NEWFOUNDLAND & LABRADOR employers' COUNCIL

NLEC'S RESPONSE TO INDUSTRIAL INQUIRY COMMISSION'S REQUEST FOR FURTHER COMMENT

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TABLE OF CONENTS

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The Newfoundland and Labrador Employers' Council (NLEC) provides further comment on the issues raised in the Industrial Inquiry Commission's first report. As an organization whose members employ more than 50% of all non-government employees in this province, we provide our input, on behalf of our entire membership, as an interested third party to the local labour dispute at Voisey's Bay. We trust that our comments will assist the Industrial Inquiry Commission in their deliberations.

PREAMBLE

This is a local dispute and as such the NLEC is of the strong opinion that recommendations of the Industrial Inquiry Commission should be focused only on local solutions to this current labour dispute and not legislative change. Any suggested recommendations for legislative change by the Commission would extend to every unionized workplace in the province who are not party to, or impacted by, the problems being experienced at Voisey's Bay. Recommended legislative change would carry significant political weight that could have long-lasting and far-reaching unintended negative consequences to our labour relations environment and the economy of this province. Legislative change is best achieved through other processes such as the current review of our Labour Relations Act through a tri-partite process involving employers, organized labour and government. Again, we urge the Commission to resist the temptation to make legislative recommendations.

It is essential that the parties to a dispute be the architects of their own solution. To do otherwise only defers the problems to future disputes. On January 28th, 2011, the Minister of Human Resources Labour and Employment, the Honourable Darin King stated publicly on VOCM radio that, "*people to understand that it's not the role of the minister to settle the strike.*"

The NLEC re-emphasizes that the recommendations the Industrial Inquiry Commission makes have the potential to impact, not only our member Vale, but the entire workforce and economy of the province. This concern has been greatly enhanced by the items for which the Commission has asked the NLEC to make further comment. Specifically, the Commission has asked us to make comment on:

1. legislating employees back to work,
2. legislating the terms of a new collective agreement, and
3. limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike.

The Commission has also asked us specifically not to make further comment on the banning of replacement workers although that appears to be, unfortunately, one of the options under discussion by the Commission.

Comments on these three items are being requested on the following premises:

"A protracted strike such as this, with
a) inflexibility shown by the parties' negotiating approaches, plus
b) replacement workers readily available to work at a remote site far from the scrutiny of the public, and
c) a small bargaining unit which can easily find financial support from the national union invites consideration of such options as legislating employees back to work, legislating the terms of a new collective agreement, banning the use of replacement workers and limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike."

The NLEC is shocked and disappointed to hear that the Commission would come to the conclusion that items a), b) and c) are significantly distinct from previous labour disputes in this province to warrant a consideration of "legislating employees back to work, legislating the terms of a collective agreement, limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike or banning the use of replacement workers."

The NLEC fails to make the connection between a), b) and c) and the leap to the radical solutions upon which the NLEC has been asked to make comment. Such solutions are marked departures from accepted solutions to private sector labour disputes and the weight of rules and laws set out in labour relations legislation in Canada and elsewhere. In particular, options a) and b) suggest that government should intervene in a service contract between private citizens and a private business and legislate those individuals to work for that private business for a particular wage. The NLEC is deeply disappointed.

However, despite our inability to see the Commission's logic in their request we do provide the following commentary on the three items for which the Industrial Inquiry Commission has asked for addition input. We also respect the Commission's request for us not to make further comment on the issue of banning replacement workers.

Issues for which the Industrial Inquiry Commission is seeking further comment

Issues 1 and 2 -- *Legislating employees back to work and legislating the terms of a collective agreement*

Because legislating employees back to work necessitates, in some shape or form, imposing some terms of settlement, issues 1 and 2 are addressed in our submission as one item. The implications of both issues are essentially the same.

Legislating employees back to work in the Voisey's Bay dispute would be an almost complete departure from private sector labour relations practices in Canada and elsewhere. Legislating public sector employees back to work happens, on occasion, but the situations faced in the public sector surrounding such back-to-work legislation differs significantly from what exists in the private sector. Back-to-work legislation in the public sector is typically based on the fact that if a given strike were to continue it would jeopardize the health, safety or security of the general public; there are typically no public health, safety or security issues in a private sector dispute. In fact, the Public Service Collective Bargaining Act was drafted specifically for the public sector recognizing the unique impact on the public. The public sector should not be used as justification for back-to-work legislation in the private sector.

There are four aspects that differentiate the public sector from the private sector when it comes to legislating employees back to work and imposing the terms of a collective agreement.

1. In the public sector, the government or a public agency is often a monopoly-provider of the good or service
2. In the public sector, the public is the owner of the good or service
3. Collective bargaining can be highly politicized (goal of re-election or political gain) in the public sector, not so in the private sector and;
4. In the public sector, government is one of the parties to the dispute (by legislation, the President of Treasury Board is the Public Sector Chief Negotiator) -- it is not a third party and therefore has direct knowledge of the limits it can accept in the imposed settlement.

While some may support such government intervention when workplace parties have difficulty reaching an agreement, the logic behind such a perspective is at best, uninformed, and at worst flawed. The short and long-term implications of legislating private sector employees back to work would be profoundly negative on both the workplace and the province.

Outside of the fact that our government should never legislate private citizens to work for a private business for a particular wage, a fundamental problem with implementing such a solution is that it leaves the core issues of the dispute unresolved with (potentially) both sides feeling discontented about the settlement. Research into the long-term success of back-to-work legislation in the public sector demonstrates that such legislation merely delays the dispute until the next round of negotiations and creates a cyclic process of contentious negotiation.

In a study conducted by the C.D. Howe Institute (June 2010), Benjamin Dachis and Robert Hebdon examined how contracts were resolved in contract negotiations, dependent on how it was settled in the previous contract. The study concluded the likelihood to use a back-to-work order was 3.41 times higher if the previous contract was settled by a back-to-work order. The results implied that back-to-work legislation negatively affected the capacity for labour and management to be accountable for developing their own solutions to problems. Back-to-work legislation also increased the probability of both parties relying on third party involvement and increased the chances of postponements to negotiations during the next round.

Legislating employees back to work and imposing the terms of a collective agreement would not have resolved the dispute in Voisey's Bay; it would have prolonged it. Certainly, the strike would have been over but the actual "dispute" would have continued -- it would just have taken a different form. And the form that it may have taken could be even more disruptive and damaging to the labour relations relationship at Voisey's Bay than had the strike been allowed to continue. Forcing an end to the strike has the potential to bottle up the resentment between the two parties until it "bursts out" in operational disruptions. Some of these operational disruptions include:

- sabotage of plant and equipment (impacting health, safety and finances);
- overtime ban;
- sit-ins;
- wildcat strikes;
- work-to-rule campaigns, and;
- absenteeism, tardiness, poor worker effort, slow production and radical interpretation of safety regulations.

The ability of the employer to operate under any, or a combination, of these conditions could severely limit production, and even bring the operation to a standstill. At least in a strike or lockout the employer is able to protect their legal and financial obligations and the long-term viability of the operation through the use of replacement workers.

Implications of legislating employees back to work and/or legislating the terms of a new collective agreement on the Economy and Labour Relations Climate of the province

If the provincial government were to take the radical step of legislating private sector employees back to work and/or legislating the terms of a new collective agreement, the implications to the labour relations climate and the economy of the province would be profoundly negative.

Private sector labour disputes would become politicized, with increased calls from the public and opposition parties for government intervention in private enterprises. Politicians would be pressured to interfere in private matters impacting the free collective bargaining process that is a principle of our economic system.

As we have already noted, the expectation that a long strike will elicit a back-to-work measure from government would make many unions and employers much less prepared to engage in serious bargaining. If employers and unions know that government will make the hard decisions for them, they will be less inclined to make those decisions themselves. Workplace parties may bargain to get what they can during the regular process then rely on government to "cut it down the middle" on what is remaining. To that end, unions may do "end runs" around management, often appealing directly to the politicians or the general public through the media when their effectiveness at the bargaining table is stifled.

The imposition of collective agreements by government could quickly become the official "end point" of the collective bargaining process in this province. The economic "weapons" employed by both sides in a strike will always do a far better job of settling an outstanding economic "disagreement" than legislation could ever manage. If settlements were legislated the winner could be the party with the more persuasive submission package, rather than the parties balancing their economic leverage against one another. This would significantly move our system of collective bargaining away from the economically efficient model of dispute/bargaining into a non-efficient model of submission and persuasion. This is well outside of our economic system.

Moving outside of the accepted practice of free collective bargaining would severely limit the business attraction and retention ability of the province. As an example, a legislated agreement for a publically traded company would, undoubtedly, be seen as negative by the market and would significantly downgrade the valuation of that company. This could result in significant economic consequences for that entity including a decreased investment grade. The fact is, government does not have a vested interest in the resolution of the dispute and is not aware of the business's goals, financial resources and commitments and operational realities. Companies will choose not to operate in this province if they do not have complete authority to assert their own interests in collective bargaining. Employers are not prepared to allow third parties to impose agreements which can have a significant impact on the financial well-being of their organization. Given the choice, and the ability to do so, they are more likely to simply move production to other provinces where they have greater control over the financial management of their organization.

As stated earlier, legislating workers back-to-work and imposing the terms of a collective agreement in the private sector is extremely rare in Canada. The only situations where the NLEC could see government even considering such action would be when public safety is at risk or the economic viability of the province, a community or a business is at risk. Even in such cases, essential service legislation may be the preferred tool.

Issue 3 -- Limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike.

The NLEC foresees situations where the existence of issue 3 above could both lengthen and shorten a strike. On the one hand, if those who are actively engaged in the strike are the most impassioned about the union's position, they could be less likely to accept compromise positions of either party to the disagreement, thereby lengthening the strike. On the other hand, those who are actively engaged in the strike may be dealing with greater economic hardship as a result of the strike and more likely to accept compromise, than those who have found employment elsewhere and are not actively engaged in the strike. It should not be assumed that employees working elsewhere are disinterested in the outcome of the strike. Without independent research into this issue, the NLEC is unwilling to commit to a position on Issue 3. It requires independent research (which the NLEC has not seen) to determine the probable impact such a decision would have on labour disputes. The NLEC does suggest, that in the absence of

research on this issue, it is most appropriate for this Industrial Inquiry Commission to "first do no harm" by avoiding any such recommendation. The NLEC therefore proposed a different solution.

Issue 3 is tied to the fact that the striking workforce from the Voisey's Bay Project Site are dispersed geographically and many of those striking workers are employed elsewhere and thus not feeling the full impact, financial or otherwise, of their decision to strike. As was stated in our original submission to the Commission, this reality presents uncertainty surrounding the direction the union leadership has chosen with regard to keeping its members on strike. A more reasonable step to address this problem, instead of recommending Issue 3, would be to put in place mechanisms to ensure union leadership accountability surrounding their decision to keep workers on strike. In the Voisey's Bay strike - none of the employer's offers were voted on by the striking workers in any way (including the most democratic method of a secret ballot) for almost 18 months into the strike. There is no way to tell if the workers would have accepted any of the offers put forward by the employer prior to the end. This does not seem reasonable or responsible given the length of time the labour dispute was on-going. Our understanding is that the Industrial Inquiry Commission did not interview striking workers to validate the Union's assertion that it had the support of the majority of its members throughout the 18 month strike. Had a secret ballot vote of the striking workers occurred on any of the employer's offers during this dispute, there is a possibility that this dispute could be over and the industrial inquiry would never have been needed. Without that mechanism in place, we will never know.

As was stated in our original submission to the Industrial Inquiry Commission, such accountability of the Union leadership is in part provided under Final Offer Vote legislative provisions in almost every jurisdiction in Canada, Newfoundland and Labrador being only one of two exceptions. Such legislation is more common than not and is not radical or anti-business like the "new" issues the Commission asked us to provide additional comment on from the Commission's first report. The NLEC is surprised that the Industrial Inquiry Commission has chosen to examine the 4 radical solutions noted previously and not the common solution of Final Offer Vote Legislation.

CONCLUSION

The labour dispute at Voisey's Bay that was the subject of this inquiry is over. Although the strike was protracted, our province's labour relations legislation was entirely successful in bringing an end to this difficult labour dispute.

Some argue that the protracted nature of the Voisey's Bay strike necessitates legislative change with more, not less, government involvement in determining the how and when future strikes should end. The NLEC strongly disagrees with such a perspective. The most responsible path is, in fact, the complete opposite. The more emotional and protracted a labour dispute becomes, the greater the need for workplace parties to be the own architects of the solutions; to do otherwise only changes the form of the dispute and / or prolongs the core issues of that dispute to the next round of negotiations.

According to the Human Resources Development Canada data, in 1976 there were 1040 work stoppages resulting in 11,544,170 days not worked. In 2009, there were 19 work stoppages resulting in 1,402,520 days not worked. Our labour relations legislation works. Employers and unions benefit from the principles of free collective bargaining and have learned to work within our legislative framework. The Industrial Inquiry Commission must resist the desire to change the "rules of the game" and put at risk the gains that have been made as a result of our past mistakes.

The NLEC is disappointed to hear that the Commission would come to the conclusion that items a), b) and c) on page 41 of the first report of the Industrial Inquiry Commission are significantly distinct from previous labour disputes to warrant a consideration of the radical solutions of "legislating employees back to work, legislating the terms of a collective agreement, limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike or banning the use of replacement workers." The NLEC fails to make the connection. Such radical proposals are marked departures from the weight of labour relations legislation in Canada and elsewhere and our economic system. We fail to understand the logic of opening the door on such radical and anti-business proposals.

We submit that the overriding goal of the Commission, to assist the parties to the Voisey's Bay labour dispute reach an agreement, has been achieved. The Commission, and the entire labour relations system of the province, has succeeded. If the Commission is unable to resist the pressure to respond with a recommendation on the four radical solutions for which we have had the opportunity to make comment, then the NLEC submits that the recommendation of the Commission should be for government not to alter the parameters of our legislation for the sake of political pressure. Instead, government must protect the legislative framework that led to the successful resolution of the Voisey's Bay strike and the many others that have come before. The ramifications of this Commission going further and recommending radical legislative change is uncertain and the potential to do harm to our labour relations environment and the economy of this province, distinct.

Therefore, we respectfully submit that the Industrial Inquiry Commission reject the four radical and anti-business proposals of legislating employees back to work, legislating the terms of a collective agreement, limiting the right of workers to accept or reject a new contract to only those who are actively engaged in a strike or banning the use of replacement workers in anyway shape or form.