
Amendments to the Canada Labour Code: Are Replacement Workers an Endangered Species?

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Recent amendments to the *Canada Labour Code* concerning the use of replacement workers during legal strikes or lockouts illustrate the ongoing process of seeking a balance between employer and trade union interests in the labour context. Prior to the adoption of these amendments, neither federal legislation nor the interpretation given to it by the Canada Labour Relations Board prohibited the use of replacement workers by employers. However, under the amended federal legislation, an employer's right to use replacement workers has been qualified. Following the recommendations issued by the Sims Task Force in its report *Seeking a Balance*, employers are now prohibited under the Code from using replacement workers during a strike or lockout where such use is for the demonstrated purpose of undermining a trade union's representational capacity rather than in pursuit of legitimate bargaining goals. The author argues that while the aim of this amendment to the Code is in line with attempting to maintain a balance between employer and employee rights, the manner in which the new provision is worded may pose a challenge to its implementation. The author therefore suggests that the amended provision be read in light of the employer's duty to bargain in good faith. Such an analysis would result in a focus on whether an employer's use of replacement workers is designed to undermine a trade union's representational capacity, triggering the prohibition on the use of replacement workers under the amended Code. This interpretation would further the labour relations objectives advanced by the Code, enabling employers who comply with the Code to continue to be able to employ replacement workers, while protecting the role of trade unions in labour relations.

Les amendements récents au *Code canadien du travail* concernant l'utilisation de travailleurs de remplacement durant une grève légale ou un lock-out illustrent le processus continu de recherche d'un équilibre entre les intérêts des employeurs et des syndicats dans le contexte des normes du travail. Avant l'adoption de ces amendements, ni la législation fédérale ni l'interprétation qui en était donnée par le Conseil canadien des relations du travail n'interdisaient l'utilisation par les employeurs de travailleurs de remplacement. Ce droit des employeurs se voit toutefois imposer des réserves par la législation telle qu'amendée. À la suite des recommandations émises par le groupe de travail Sims dans son rapport *Vers l'équilibre*, le Code interdit maintenant aux employeurs d'utiliser des travailleurs de remplacement durant une grève ou un lock-out lorsque le but établi est de miner la capacité de représentation d'un syndicat plutôt que d'atteindre des objectifs légitimes de négociation. L'auteur soutient que, bien que l'objectif de cet amendement s'inscrive dans le cadre d'un effort visant à maintenir l'équilibre entre les droits des employeurs et des employés, sa formulation est de nature à compliquer son interprétation. Il suggère, par conséquent, que la nouvelle disposition soit lue à la lumière du devoir de l'employeur de négocier de bonne foi. Une telle analyse mettrait l'accent sur l'objectif poursuivi par l'utilisation de travailleurs de remplacement afin de déterminer s'il est de miner la capacité de représentation du syndicat, déclenchant ainsi l'application de l'interdiction imposée par le Code. Cette interprétation aurait pour effet de promouvoir les objectifs poursuivis par le Code en permettant aux employeurs qui se conforment à ses dispositions de continuer à employer des travailleurs de remplacement, tout en protégeant le rôle des syndicats dans les relations de travail.

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The alternatives essentially are three. First is unilateral decision making. It reposes all power in the industrial relations field in one entity, either the employer or the state. The second is bilateral decision making. It at least precludes any one party from holding a dominating position. It, however, still eliminates an interested party: labour, management, or the public as represented by government. The third is a multilateral approach. It overcomes the deficiency of bilateral decision making and recognizes the interplay of market and institutional forces which is inevitable in a mixed enterprise economy operating within a liberal democratic political system.

The Canadian industrial relations system is multilateral. Aside from the forces of supply and demand in the labour market, it features a high degree of employer determination, trade union participation, collective bargaining, and government involvement in a variety of capacities. Our central concern is with collective bargaining and trade unionism, both of which are indispensable elements within the total system of industrial relations. Within industry, unions serve as a countervailing power to management; and within the wider socio-economic-political sphere, they function as potential agents for transformation in an increasingly pluralistic society.

Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.¹

Woods Report, 1968

Introduction

Canadian labour relations are polarized by the interests of two major actors, employers and employees: "The holders of the financial capital necessary to operate businesses seek to maximize their assets, whereas workers seek a better sharing of profits."² The development of Canadian labour relations represents the search for a balance of power between employers and employees. The right of the employer to carry on its business and the right of employees to join a trade union and to participate in its lawful activities are the bases upon which legislators, labour relations boards,

¹ Canada, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968) at 137-38 [hereinafter *Woods Report*]. The *Woods Report* constitutes an important source of our modern labour law; its recommendations prompted Parliament to adopt the *Canada Labour Code*, R.S.C. 1985, c. L-2.

² Canada, Human Resources Development, *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Minister of Public Works and Government Services, 1995) at 138 [hereinafter *Sims Report*]. The *Sims Report* also constitutes an important source of our modern labour law; its recommendations prompted Parliament to adopt the recent amendments to the *Canada Labour Code*, *ibid.* Consequently, the federal Board, formerly known as the Canada Labour Relations Board, is now known as the Canada Industrial Relations Board (see *Canada Labour Code*, *ibid.*, s. 9). For purposes of this research paper, both will be referred to as the Board.

and courts perform their balancing effort. However, providing the parties with a neutral system of collective bargaining is a difficult task. The issue of whether or not employers should be allowed to use replacement workers during labour disputes is a good example of the difficult task of balancing interests as it is a source of differences between federal and provincial jurisdictions.

Motivated by the need to modernize federal labour legislation, the federal government recently amended the *Canada Labour Code* ("Code") following the recommendations of the Sims Task Force, a study group mandated to perform a review of labour relations at the federal level. The legislative changes were aimed at, *inter alia*, the acquisition of the right to strike or lockout, the use of replacement workers, and the legal status of striking or locked-out employees.

Before the adoption of the recent amendments, federal labour legislation had been interpreted such that employers were not prohibited from using replacement workers during a strike or lockout. The new provision on replacement workers should modify the current state of the law by prohibiting the employer from using such workers for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives.

A careful analysis reveals that the Board should give meaning to the new prohibition by adopting principles similar to those relating to the duty to bargain. In considering whether or not the employer has bargained in good faith with the trade union, the Board would benefit from a legal framework for the assessment of the legitimacy of the employer's bargaining objectives. Where the trade union has demonstrated that the employer breached its duty to bargain by using replacement workers, the Board should conclude that the employer has interfered with the trade union and has therefore undermined its representational capacity. Accordingly, the Board could then prohibit the further use of replacement workers and, if required, order other suitable remedies.

I. The Status of Replacement Workers Prior to the Amendments

A. Contextual Analysis

1. Labour Relations in Canada: A Brief Overview

From a labour law perspective, the right of freedom of association, enshrined in the *Canadian Charter of Rights and Freedoms*,³ is the legacy of vigorous battles over

³ S. 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. It is important to note, however, that the Supreme Court of Canada sent a clear message to labour communities by holding that associational activities, such as the right to strike, are not protected by s. 2(d) of the *Charter*. See *Reference re: Public Service Employees Relations Act (Alberta)*, [1987] 1 S.C.R. 313,

the recognition of collective rights.⁴ The constitutionalized right to join a trade union has deep historical roots, which are intertwined with the development of English⁵ and American⁶ labour law. First seen as an illegal restraint of trade, particularly during the industrial revolution, the removal of criminal and civil liability for what was considered to be criminal conspiracy in 1871 gave legitimacy to the trade union movement in England.⁷ The next year, Canada followed in Britain's footsteps and legalized trade unions, their purposes, and the means to pursue their purposes.⁸

From its inception, Canadian labour legislation has had as its objective the resolution of industrial conflicts.⁹ Many amendments have been brought to the legislation, including the significant importation of the American framework for collective bargaining.¹⁰ The proclamation of the *Wartime Labour Relations Regulations*¹¹ proved to be "Canada's first comprehensive labour policy, embracing union organization, contract negotiation and contract administration."¹² The features included:

provision for trade union recognition by certification, on the basis of majority support of a bargaining agent with exclusive rights to represent all employees in a bargaining unit; a duty for employers and recognized unions to meet and bargain in good faith; a prohibition on specified unfair labour practices; a prohibition on strikes and lockouts during the term of a collective agreement with a related duty to resolve differences arising within the term without stoppage of work, usually by arbitration; and, the maintenance of a competent labour relations board to administer these provisions.¹³

38 D.L.R. (4th) 161; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277.

⁴ For elaboration on the history of Canadian labour law, see A.W.R. Carrothers, E.E. Palmer & W.B. Rayner, *Collective Bargaining Law in Canada*, 2d ed. (Toronto: Butterworths, 1986) at 123-25; G.W. Adams, *Canadian Labour Law*, 2d ed., looseleaf (Aurora, Ont.: Canada Law Book, 1993) at paras. 1.10-1.330. See also C. D'Aoust & F. Delorme, "The Origin of the Freedom of Association and of the Right to Strike in Canada: An Historical Perspective" (1981) 36 *Ind. Relat.* 894; D. Lavery, *Le droit du gréviste à son emploi en droit américain et canadien: perspective historique et comparée* (LL.M. Thesis, University of Ottawa 1988) [unpublished] at 178-215.

⁵ Canada relied strongly on the *Criminal Law Amendment Act, 1871* (U.K.), 34 & 35 Vict., c. 32, which refined the terms of the *Combination Act, 1825* (U.K.), 6 Geo. IV, c. 129, and on the *Trade Union Act, 1871* (U.K.), 34 & 35 Vict., c. 31, in search of solutions for its labour conflicts.

⁶ Canada was largely influenced by the *National Labor Relations Act*, c. 372, 49 Stat. 449 (1935), also referred to as the *Wagner Act*, in terms of its framework for collective bargaining.

⁷ Carrothers, Palmer & Rayner, *supra* note 4 at 16. See also Adams, *supra* note 4 at para. 1.50.

⁸ *Trade Unions Act*, S.C. 1872, c. 30; *Criminal Law Amendment Act*, S.C. 1872, c. 31. For commentary, see Adams, *supra* note 4 at para. 1.60; M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984) 16 *Ottawa L. Rev.* 267 at 278.

⁹ *Sims Report*, *supra* note 2 at 10.

¹⁰ Carrothers, Palmer & Rayner, *supra* note 4 at 47. See also Adams, *supra* note 4 at para. 1.160.

¹¹ P.C. 1003, 17 February 1944.

¹² Carrothers, Palmer & Rayner, *supra* note 4 at 50. See also Adams, *supra* note 4 at para. 1.200.

¹³ *Sims Report*, *supra* note 2 at 11.

While the federal government played a vital role in the early development of Canadian labour legislation, the Privy Council concluded in a reference to determine the federal jurisdiction over labour that it had no authority over labour relations as such;¹⁴ and that pursuant to the division of powers within the Constitution,¹⁵ exclusive provincial competence in this area is the rule.¹⁶ The federal government may exceptionally assert exclusive jurisdiction over labour relations matters if it is demonstrated that such jurisdiction is an integral part of its primary competence over some other federal subject.¹⁷ In such a case, the primary federal competence prevents the application of provincial labour legislation.¹⁸ The definition of a federal undertaking, service, or business relates to the nature of its operation,¹⁹ which in turn is determined by the normal or habitual activities of the business as those of "a going concern":

[T]he first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation ... to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.²⁰

The required relationship to a federal undertaking, service, or business for the application of the federal labour legislation is a question of degree.²¹ The nature of a business determines the labour relations jurisdiction into which the business falls. Its nature may change over time, and with it, the jurisdiction.²² Despite the fact that federal and provincial governments have mutually exclusive jurisdictions over labour relations matters, their respective laws embody the same fundamental principles.²³

¹⁴ *Toronto Electric Power Commissioners v. Snider*, [1925] 2 D.L.R. 5, A.C. 396 (P.C.).

¹⁵ Ss. 91 and 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

¹⁶ For an in-depth discussion of the federal and provincial jurisdictions over labour relations matters, see Carrothers, Palmer & Rayner, *supra* note 4 at 129ff and Adams, *supra* note 4 at paras. 3.10ff. See also *Montcalm Construction v. Québec (Minimum Wage Commission)*, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 [hereinafter *Montcalm Construction*].

¹⁷ *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529, 3 D.L.R. 721.

¹⁸ *Reference re: Minimum Wage Act (Saskatchewan)*, [1948] S.C.R. 248, 3 D.L.R. 801; *Québec (Commission du Salaire Minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145; *Letter Carriers' Union of Canada v. C.U.P.W.*, [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105.

¹⁹ *Canada (Labour Relations Board) v. Yellowknife (City of)*, [1977] 2 S.C.R. 729, 76 D.L.R. (3d) 85.

²⁰ *Northern Telecom v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 at 133, 98 D.L.R. (3d) 1. See also *U.T.U. v. Central Western Railroad*, [1990] 3 S.C.R. 1112, 76 D.L.R. (4th) 1.

²¹ *Montcalm Construction*, *supra* note 16.

²² Adams, *supra* note 4 at para. 3.125.

²³ See e.g. *Canada Labour Code*, *supra* note 1; *Labour Relations Code*, S.B.C. c. 82; *Labour Relations Act*, 1995, S.O. 1995, c. 1.; *Labour Code*, R.S.Q. c. C-27.

2. Replacement Workers across the Country: The Two Underlying Philosophies among Provincial Jurisdictions

In the area of labour law, the purpose of legislation has been to provide the parties with a neutral framework in which to resolve disputes.²⁴ In this search for legislative neutrality, one of the most sensitive issues remains whether the legislation should permit or prohibit the use of replacement workers during a strike or a lockout.²⁵ While most provinces in Canada do not preclude an employer from using the services of replacement workers during a strike or lockout,²⁶ the legislatures of British Columbia²⁷ and Quebec²⁸ have decided otherwise.²⁹

In these two provinces, the presence of replacement workers during a legal strike or lockout is perceived as shattering the balance of power between labour and management.³⁰ The provisions of the labour laws in British Columbia and Quebec take effect when the parties are involved in a legal strike or lockout.³¹ This requires the trade union or the employer to comply with all the conditions of the statute in order to be in

²⁴ See e.g. the Preamble of the *Canada Labour Code*, *supra* note 1.

²⁵ See e.g. *Sims Report*, *supra* note 2, where the members of the Task Force could not agree on the question. It is important to note that this was the only issue that registered a dissension. For a detailed review of the history of replacement workers in Canada, see A.L. Starkman, *The Use of Labour Replacement in Industrial Disputes: A British-Canadian Comparison* (Ph.D. Thesis, University of Kent at Canterbury 1993) [unpublished] at 83ff.

²⁶ For the purposes of this research paper, strikes and lockouts are treated identically, as the legal requirements and consequences are the same for both in the context of the use of replacement workers.

²⁷ See *Labour Relations Code*, *supra* note 23, s. 68. See also E.J. Harris & J.L. McConchie, "The Labour Relations Code of British Columbia: Fundamental Changes in Our Labour Laws" (1993) 51 *Advocate* 29 at 40.

²⁸ See *Labour Code*, *supra* note 23, ss. 109.1-109.4. See also L. Martineau, "L'expérience des dispositions anti-briseurs de grève selon le Code du travail (Québec)" (1980) 35 *Ind. Relat.* 555; J. Bazin, "Loi anti-briseurs de grève: où allons-nous?" (1981) 41 *R. du B.* 833; J. Bazin, "La loi anti-briseurs de grève: Où en sommes nous?" (1984) 44 *R. du B.* 600; J. Paquette, *Les dispositions anti-briseurs de grève au Québec* (Cowansville, Qc.: Yvon Blais, 1995) at 11.

²⁹ The legislature of Ontario formerly banned the use of replacement workers pursuant to ss. 73.1 and 73.2 of the *Labour Relations Act*, R.S.O. 1990, c. L.2, but with the election of the Conservative Party in 1995, the Government has enacted the *Labour Relations Act, 1995*, *supra* note 23, which repealed those two sections. See H.C. Jain & S. Muthuchidambaram, *Ontario Labour Law Reform: A History and Evaluation of Bill 40* (Kingston: Industrial Relations Centre, Queen's University, 1995); D.L. Rogers, "Ontario Labour Law Reform: Bill 7 vs. Bill 40" *Employment and Labour Law Reporter* 5:8 (November 1995) 87; B.A. Langille, "Has Ontario's Anti-Scab Law Made any Difference—Legally, Economically, or Otherwise?" (1995) 3 *C.L.E.L.J.* 461; G. Hopkinson, "Holding the Line: A Defence of Anti-Scab Laws" (1996) 4 *C.L.E.L.J.* 137. For elaboration on the provisions of British Columbia, Ontario, and Quebec, see J. Paquette, "Briseurs de grève: une analyse des règles et recours de la Colombie-Britannique, de l'Ontario et du Québec" in Barreau du Québec, Service de la formation permanente, ed., *Développements récents en droit du travail* (1995) (Cowansville, Qc.: Yvon Blais, 1995) 225 [hereinafter "Briseurs de grève"].

³⁰ See e.g. the minority opinion in the *Sims Report*, *supra* note 2 at 138ff.

³¹ See *Labour Relations Code*, *supra* note 23, s. 63(1); *Labour Code*, *supra* note 23, s. 109.1.

a legal position to call for a strike or lockout.³² The prohibition targets the work of an employee in the bargaining unit on strike or lockout.³³ In general, the employer is prevented from hiring³⁴ anyone after the beginning of collective bargaining to perform the work of a striking or locked-out employee.³⁵

Under federal and other provincial jurisdictions, the use of replacement workers is not subject to similar limits. The employer's right to use such workers is considered essential to the maintenance of a balance of power between the parties. As noted in the *Woods Report*, "the employer's economic sanction equivalent to the union's right to strike rarely is the lockout: it is his ability to take a strike."³⁶

From the employer's point of view, replacement workers are an efficient tool by which the market value of labour may be determined. A complete prohibition on the use of replacement workers would shift the balance in favour of trade unions because the parties would be forced to bargain in a "closed environment", one which would not account for the economic realities of the marketplace. Employers further argue that during work stoppages, there is no legal restriction on the employees' freedom to seek other employment, therefore, employers should similarly be permitted to use replacement workers in order to get their work done.³⁷ Most importantly, they argue that it is important for both parties to maintain the viability of a business during any work stoppage.

B. Canada Labour Relations Board Decisions

Early in the development of its jurisprudence under the Code, and at the time when the legislation was silent on the issue, the Board allowed employers to use replacement workers in the course of work stoppages. The Board's interpretation of

³² See "Briseurs de grève", *supra* note 29 at 229 (re: British Columbia) and at 238 (re: Quebec).

³³ See *Labour Relations Code*, *supra* note 23, ss. 68(1)(e) - 68(1)(f); *Labour Code*, *supra* note 23, ss. 109.1(a), 109.1(b), 109.1(g).

³⁴ One important difference between the two pieces of legislation is whether or not an employer may have recourse to volunteers to perform the work. In British Columbia, the legislation is to the effect that no employer can hire or engage a person, whether paid or not (see *Labour Relations Code*, *ibid.*, s. 68(1)). In Quebec, the legislation does not make such a specific reference as to whether the restriction applies to a person paid or not. The courts have decided that the term "hire" necessarily implies a remuneration and therefore volunteers are not considered to be replacement workers in the province of Quebec (see *Syndicat des employés professionnels et de bureau, section locale 57 (U.I.E.P.B.) C.T.C.-F.T.Q. v. Caisse populaire Saint-Charles Garnier*, [1987] R.J.Q. 979 (C.A.); D. Nadeau, "Briseurs de grève: les bénévoles à l'abri de tout soupçon!" (1987) 18 R.G.D. 693).

³⁵ See *Labour Relations Code*, *supra* note 23, s. 68(1)(a); *Labour Code*, *supra* note 23, s. 109.1(a). There are a few exceptions to this principle and one of the most important ones is the determination of essential services: see *Labour Relations Code*, *ibid.*, s. 72; *Labour Code*, *ibid.*, ss. 109.1(c), 109.2, 109.2, 111.0.1-111.0.26.

³⁶ *Woods Report*, *supra* note 1 at 176.

³⁷ P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 77-78.

permissible economic pressure tactics which employers could exercise upon trade unions during labour disputes has been relatively liberal:

Numerous cases decided by this Board and by other labour relations boards have indicated which tactics are illegal in specific collective bargaining conflict situations. It can be said, generally speaking, that the approaches which have been deemed illegal are the exception, rather than the rule. An employer can change terms and conditions of employment for all employees once the conciliation requirements of the law have been exhausted; it can pre-emptively, or in a countervailing fashion, engage in general lockout or rotating lockout activity; it can hire replacement workers; it can even go out of business. But it cannot take action that involves sanctions or discrimination against specifically identified or identifiable employees because they exercised their right to strike.³⁸

The decisions of the Board on the issue of replacement workers are not numerous and tend to focus on issues other than the legality of their use by employers.

The first decision to undertake an analysis of the status of replacement workers, *CKLW Radio Broadcasting*,³⁹ involved the filing of an application for certification by a trade union seeking to remove the bargaining agent of a unit on strike. The Board had to determine, *inter alia*, whether it should only consider the wishes of employees who were members of the bargaining unit prior to the strike, the wishes of employees working during the labour dispute and replacement workers, or both, for the purpose of the representation vote.

The Board first examined the right of the employer to carry on its business during a work stoppage within the provincial jurisdictions and noted that the only restriction applicable at the federal level related to the discipline of employees for refusing to perform the duties of a striking employee. Following the recommendation of the *Woods Report*,⁴⁰ the Code did not provide for any prohibition on the use of replacement workers. The Board then approvingly referred to a judicial review decision of the Manitoba Queen's Bench on the eligibility of replacement workers to participate in a representation vote:

From the standpoint of their economic interests, the striking employees remain a group quite distinct from workmen who have been hired to replace them. In my opinion the board has a duty to recognize this fact by treating the strikers as a unit appropriate for collective bargaining. The board would therefore only consider revoking the certification of the bargaining agent of the strikers if it formed the opinion that it no longer represented a majority of the striking employees. In forming this opinion it would not be influenced by the views of

³⁸ *C.U.P.W. and Canada Post* (1992), 90 di 29, C.L.R.B. No. 965 at 11, online: QL (CLR) [emphasis added].

³⁹ *Arthur T. Ecclestone and N.A.B.E.T. and CKLW Radio Broadcasting* (1978), 26 di 615, 2 Can. L.R.B.R. 306 [hereinafter *CKLW Radio Broadcasting 1978* cited to Can. L.R.B.R.].

⁴⁰ *Woods Report*, *supra* note 1 at 176.

workmen who had been hired to replace the strikers. If it had the power to take a vote, the board should have confined the vote to the striking employees.⁴¹

The Board also concurred with the opinion of Professor Arthurs, that striking employees and replacement workers have divergent economic interests.⁴² The Board finally came to the conclusion that only those employees who were employed on the day of the beginning of the strike and who still had an interest in the issue would be permitted to decide the representational question.

In *CJMS Radio Montréal (Québec)*,⁴³ the Board was presented with a similar scenario of raiding. The Board quoted at length its previous decision on the issue and decided that replacement workers were not employees for the purpose of determining the majority status of the bargaining unit; because of their temporary positions, replacement workers do not share any community of interest with striking employees.

The issue of replacement workers has also been studied by the Board in the context of a complaint for bad faith bargaining and failure to make every reasonable effort to enter into a collective agreement. In *General Aviation Services*,⁴⁴ the Board decided that the employer had committed an unfair labour practice when it failed to consider the trade union's proposal, which conceded to all the employer's demands as to the content of the collective agreement, with the exception that striking employees be recalled on a seniority basis to displace replacement workers. The employer's insistence on retaining persons employed during the strike was considered to be contrary to the intent of the Code. The Board reaffirmed that members of a bargaining unit maintain their employee status during a labour dispute. Replacement workers may be used in a work stoppage but they are not employees of the bargaining unit. Such workers only benefit from legislated minimums and their temporary employment is subject to the nature and outcome of the labour dispute.

In *Eastern Provincial Airways*,⁴⁵ the issue of bad faith bargaining and failure to make every reasonable effort to conclude a collective agreement was again before the Board. While the trade union would have accepted the employer's demands with regard to terms and conditions, it could not accept the employer's return to work pro-

⁴¹ *Re Manitoba Labour Board & Brandon Packers* (1960), 25 D.L.R. (2d) 531, 33 W.W.R. 58 at 63. See also G. England, "The Legal Response to Striking at the Individual Level in the Common Law Jurisdictions of Canada" (1976) 3 Dal. L.J. 440.

⁴² H. Arthurs, "The Right to Strike in Ontario and the Common Law Provinces of Canada" (Proceedings of the Fourth International Symposium on Comparative Law, 1966) [unpublished] at 192-93 (cited in *CKLW Radio Broadcasting 1978*, *supra* note 39 at 311).

⁴³ *Association des employés de CJMS and CJMS Radio Montréal (Québec)* (1978), 33 di 393, 1 Can. L.R.B.R. 426.

⁴⁴ *I.A.M.A.W., Local 2413 and General Aviation Services* (1982), 51 di 71, 3 Can. L.R.B.R. 47 [hereinafter *General Aviation Services* cited to di].

⁴⁵ *Canadian Air Line Pilots' Association and Eastern Provincial Airways* (1983), 54 di 172, 5 Can. L.R.B.R. (N.S.) 368 [hereinafter *Eastern Provincial Airways* cited to di]. The decision was reversed in part on other grounds by the Federal Court of Appeal in (1984), 65 N.R. 81, F.C.J. No. 338 and No. 355, online: QL (FCJ).

posal which contemplated a selective recall of employees who had participated in the strike out of seniority and non-recall of some other such employees, without a right to grieve, as a condition precedent to reaching a collective agreement. The Board agreed with the trade union that it could not accept the employer's return to work proposal because to have done so would have violated the duty to represent all employees in the bargaining fairly and without discrimination pursuant to section 37 of the Code.

At the outset of its analysis, the Board noted that there was no specific provision in the Code setting minimum standards for the return to work of striking or locked-out employees at the end of a labour dispute. The Board also observed that there was no prohibition regarding the use of replacement workers. However, the Board decided that, after interpreting subsection 3(2) and subparagraph 94(3)(a)(vi) of the Code,⁴⁶ "employees cannot be deprived of any term or condition of employment whatsoever because of participation in a lawful strike"⁴⁷ and that the employer's conditional proposal constituted an unfair labour practice.⁴⁸

The Board placed important limits on the right of the employer to carry on its business during a work stoppage in the decision of *Brewster Transport Company*.⁴⁹ The complaint of the trade union alleged violations by the employer of various provisions of the legislation during their collective bargaining, including the employer's offer of more favourable terms and conditions of employment to replacement workers than those proposed to the trade union at the bargaining table. As a matter of policy, the Board found that the employer's proposal constituted an unfair labour practice because it interfered with the exclusive role of the trade union.⁵⁰

The discussion in *Rogers Cable T.V. (British Columbia)*⁵¹ concerned the employer's alleged unfair labour practice of disciplining bargaining unit members for acts committed on the picket line in the course of a lawful strike. The trade union ar-

⁴⁶ Old ss. 107(2) and 184(3)(a)(vi) of the *Canada Labour Code*, *supra* note 1.

⁴⁷ *Eastern Provincial Airways*, *supra* note 45 at 211.

⁴⁸ *Ibid.* at 213. The Board's rationale was followed in *Canadian Union of Public Employees, Local 4030 and Nolisair International (Nationair Canada), Service de Personnel Sol-Air and M.Y. Air Sol Services* (1992), 89 di 94, C.L.R.B. No. 960, online: QL (CLRB), where the employer refused to sign a collective agreement and imposed additional conditions to the trade union such as the inclusion of supervisors and replacement workers in the bargaining unit after an agreement in principle had been reached.

⁴⁹ *Amalgamated Transit Union, Local 1374 and Brewster Transport Company* (1986), 66 di 1, 13 Can. L.R.B.R. (N.S.) 339 [hereinafter *Brewster Transport Company* cited to di].

⁵⁰ The Board would have imposed a remedial order on the employer for a similar offer in *Syndicat des employés de bureau de Voyageur (CNTU) and Voyageur* (1989), 77 di 14, 90 C.L.L.C. para. 16,021 (C.L.R.B.) [hereinafter *Voyageur* cited to di], had the trade union produced evidence to allow the Board to conclude that the conditions offered to the replacement workers were better than those offered to the locked out employees.

⁵¹ *I.B.E.W., Local 213 and Rogers Cable T.V. (British Columbia), Vancouver Division and Rogers Cable T.V. (British Columbia), Fraser Division* (1987), 69 di 17, 16 Can. L.R.B.R. (N.S.) 71 [hereinafter *Rogers Cable T.V. (British Columbia)* cited to di].

gued before the Board that the employer had no disciplinary power over employees once a legal work stoppage had been initiated because no rights or obligations remained from the collective agreement. The Board rejected the argument after affirming that the employment relationship between the employer and employees is of an ongoing nature, even though there is no right or obligation attached to the execution of work during strikes and lockouts:

In the overall scheme of the Code, strikes and lockouts are expected to be temporary suspensions in the employment relationship during which collective bargaining differences are ironed out. While these periods of economic sanctions last, employees have no obligation to report to work or to perform services on the employer's behalf. The employer on the other hand need not provide work to the employees, in fact, he has a legal right to call on others to perform the services necessary to keep the business operating.⁵²

The employment relationship between employers and employees is maintained throughout the labour dispute. For example, striking or locked-out employees benefit from a priority to return to work over replacement workers at the end of a conflict. Accompanying this priority, there is an obligation for striking or locked-out employees not to conduct themselves in a manner that could jeopardize their continued employment relationship with the employer. Consequently, the Board concluded that at the completion of a legal work stoppage, the employer is permitted to make use of its restored disciplinary power, provided that it is not for reasons prohibited by the Code.

The Board had to decide in *Thys and Muir* and *Canada Post*⁵³ whether or not the employer had committed an unfair labour practice by preventing two employees of a striking bargaining unit, non-members of the trade union, from working during the labour dispute. The Board concluded that the employer's hiring of certain trade union members and non-members, as well as replacement workers to perform work during the strike, did not have the effect of denying the complainants any right under the Code. While employees enjoy the right to return to work after a strike, they do not have any corresponding right to work during a strike. Nor did the employer's selective hiring have the effect of denying the complainants any right under the *Charter*. Because the freedom of association recognized by subsection 2(d) of the *Charter* does not include the right to strike, the Board found that likewise, this freedom does not include the right not to strike nor the ancillary right to work during a strike.

In *Nolisair International (Nationair Canada)*,⁵⁴ the Board faced another raiding situation where a trade union filed an application for certification seeking to represent all members of a bargaining unit and replacement workers. The Board reiterated that the general scheme of the Code precluded it from giving replacement workers an in-

⁵² *Ibid.* at 36.

⁵³ *John J.F. Thys and Terry T. Muir and Canada Post and Fred Danells and C.U.P.W.* (1989), 77 di 111, 4 Can. L.R.B.R. (2d) 291.

⁵⁴ *Union indépendante des agents de bords de Nationair and Nolisair International (Nationair Canada) and C.U.P.E. (Airline Division)* (1992), 90 di 144, 93 C.L.L.C. para. 16,018 (C.L.R.B.).

terest in the representation of members of a bargaining unit.⁵⁵ The Board also rejected the raiding trade union's argument that, pursuant to subsection 2(d) and section 15 of the *Charter*, the definition of employees ought to include replacement workers.

The most recent decision of the Board on the status of replacement workers is that of *Royal Oak Mines*.⁵⁶ This matter involved, among other issues, a raid by a trade union seeking to represent some members of the bargaining unit and replacement workers working during the lockout. Despite their temporary status, the Board recognized replacement workers as employees within the meaning of the Code and that they were therefore free to join a trade union of their choice, pursuant to subsection 8(1) of the Code and subsection 2(d) of the *Charter*. However, replacement workers are not to be included in the bargaining unit on strike or lockout because there exists no community of interest between them and striking or locked-out employees. Furthermore, the Board determined that the composition of the bargaining unit remains unchanged for the entire duration of the labour dispute by virtue of subsections 24(3) and 38(5) of the Code, and that subsequent changes to the bargaining unit are to be negotiated by the parties. In addition, replacement workers do not enjoy the right to participate in the representational issues facing the bargaining unit engaged in the strike or lockout; eligibility is limited to persons employed on the day prior to the commencement of the work stoppage.

While the Board had the necessary powers to decide some of the issues surrounding the use of replacement workers, the Board had limited ability to remedy situations where the employer would use replacement workers as a means of undermining the capacity of the trade union to represent employees.⁵⁷ Parliament sought to provide, *inter alia*, additional powers to the Board, and to modernize the Code by appointing the Sims Task Force to review the federal labour legislation.

⁵⁵ In this regard, the Board referred to *United Steelworkers of America and Bird Machine*, [1990] S.L.R.B.D. No. 40 at 24, online: QL (SLRB), a decision of the Saskatchewan Labour Relations Board, which noted:

Replacement workers are employed to advance management's interests in times of strike or lock-out. They have no immediate interest in, nor do they derive any benefit from, negotiating the conclusion of a collective bargaining agreement with the employer. This observation of the function of replacement workers is in no way pejorative, but rather a reflection of the reality that they do not share a community of interest with striking employees in attaining the fundamental goals of collective bargaining.

⁵⁶ *Giant Mines Employees' Association and Royal Oak Mines' C.A.S.A.W., Local No. 4* (1993), 92 di 1, 21 Can. L.R.B.R. (2d) 55; reconsidered in (1993), 92 di 153, 93 C.L.L.C. para. 16,063 (C.L.R.B.). On the question of bad faith bargaining and failure to make every reasonable effort to enter into a collective agreement, this matter ultimately went to the Supreme Court of Canada, see *infra* note 57.

⁵⁷ See for example *C.A.S.A.W., Local No. 4 and Royal Oak Mines* (1993), 93 di 21, 94 C.L.L.C. para. 16,026 (C.L.R.B.), aff'd (1994), 167 N.R. 234 (F.C.A.), aff'd [1996] 1 S.C.R. 369, 133 D.L.R. (4th) 129 [hereinafter *Royal Oak Mines* cited to S.C.R.], which dealt with the question of bad faith bargaining and failure to make every reasonable effort to enter into a collective agreement.

C. Labour Relations under the Federal Jurisdiction after the Sims Report

1. The Sims Task Force

Following the appointment of a Task Force to inquire into Part I of the Code⁵⁸ on June 29, 1995 by the federal Minister of Labour,⁵⁹ the legislation has undergone significant modifications which reflect changes in labour relations. The Sims Task Force was mandated to conduct a comprehensive review of the law governing collective bargaining for private sector employers and trade unions within the federal jurisdiction.⁶⁰ Their work focused mainly on the administration of the Code and labour relations processes, such as representation, collective bargaining, and rights and obligations during work stoppages. The report, entitled *Seeking a Balance*, benefited from a consensus between labour and management on many important issues, and among the members of the Task Force on all the proposed changes, the only exception being the issue of the use of replacement workers.⁶¹

The recommendations of the *Sims Report* were given serious consideration by the Government which presented Bill C-66⁶² before the House of Commons.⁶³ The Bill, which captured the essence of the recommendations of the Task Force never reached

⁵⁸ Part I (Industrial Relations) of the *Canada Labour Code*, *supra* note 1.

⁵⁹ *Sims Report*, *supra* note 2 at 247. The group was composed of Rodrigue Blouin and Paula Knopf, members, and Andrew C.L. Sims, chair.

⁶⁰ *Ibid.* at 248:

The Task Force is to identify options, and where appropriate make recommendations for legislative changes, with a view to improving collective bargaining and reducing conflict, facilitating labour-management cooperation, ensuring effective and efficient administration of the Code, and addressing the changing workplace and employment relationship.

See also section 2 of the *Canada Labour Code*, *supra* note 1, for a definition of "federal work, undertaking or business".

⁶¹ *Sims Report*, *supra* note 2 at ix-xii (Executive Summary). There is no specific definition of "replacement worker" in the legislation. However, the prohibition relating to replacement workers refers to "a person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out" (*Canada Labour Code*, *supra* note 1, s. 94(2.1)).

⁶² Bill C-66, *An Act to amend the Canada Labour Code (Part I) and the Corporations and Labour Unions Returns Act and to make consequential amendments to other Acts*, 2d Sess., 35th Parl., 1997 (died on the Order Paper when Parliament was dissolved on April 27, 1997) [hereinafter Bill C-66]. For a thorough analysis of Bill C-66, see D. Monet, "La réforme du Code canadien du travail" in Barreau du Québec, Service de la formation permanente, ed., *Développement récents en droit du travail (1997)* (Cowansville, Qc.: Yvon Blais, 1997) 1.

⁶³ *House of Commons Debates* (4 November 1996) at 6065 (1st reading Bill C-66); *House of Commons Debates* (4 March 1997) at 8625 (2d reading Bill C-66); *House of Commons Debates* (9 April 1997) at 9491 (3d reading Bill C-66).

third reading by the Senate due to an election call in the spring of 1997.⁶⁴ In its next parliamentary session, the Government remained committed to modernizing its labour law and re-introduced a similar Bill⁶⁵ before the House of Commons⁶⁶ and the Senate,⁶⁷ which finally came into force on January 1st, 1999. The new amendments have modified the rights and obligations of parties at the different stages of labour relationships, particularly during strikes and lockouts, which directly or indirectly impact on the use of replacement workers.

2. The Acquisition of the Right to Strike or Lockout

a. Legal Requirements

In our system of collective bargaining, a collective agreement entered into between an employer and a trade union—also binding upon the employees⁶⁸—is for a fixed period of time.⁶⁹ The legislation seeks to protect industrial peace by prohibiting strikes and lockouts during the term of a collective agreement.⁷⁰ Before the employer or the trade union may engage in a legal work stoppage, certain requirements must be met,⁷¹ including the notification by one party to the other of its intention to bargain in good faith to renew, revise, or enter into a new collective agreement.⁷² In the event that

⁶⁴ *Senate Debates* (10 April 1997) at 1863 (1st reading Bill C-66); *Senate Debates* (25 April 1997) at 2128 (2d reading Bill C-66).

⁶⁵ Bill C-19, *An Act to amend the Canada Labour Code (Part I) and the Corporations and Labour Unions Returns Act and to make consequential amendments to other Acts*, 1st Sess., 36th Parl., 1997 (Royal Assent on June 18, 1998; Proclamation on January 1, 1999) [hereinafter Bill C-19]. The differences between Bill C-66 and Bill C-19 are found in the changes to the wording of a few provisions, particularly those dealing with replacement workers and off-site workers. For a detailed comparison of the two bills, see J.R. Hassell, "The New Board, Replacement Workers and Strikes/Certification Issues for Non-Union Employers and More!" (Labour and Employee Relations for Federally Regulated Employers, Insight Conference, 1 December 1997) [unpublished] at 37.

⁶⁶ *House of Commons Debates* (6 November 1997) at 1619 (1st Reading Bill C-19); *House of Commons Debates* (12 March 1998) at 6821 (2d Reading Bill C-19); *House of Commons Debates* (25 May 1998) at 7178 (3d Reading Bill C-19).

⁶⁷ *Senate Debates* (26 May 1998) at 1529 (1st Reading Bill C-19); *Senate Debates* (8 June 1998) at 1680 (2d Reading Bill C-19); *Senate Debates* (18 June 1998) at 1868 (3d Reading Bill C-19).

⁶⁸ *Canada Labour Code*, *supra* note 1, s. 56.

⁶⁹ *Ibid.*, s. 67(1).

⁷⁰ *Ibid.*, s. 88.1; Bill C-19, *supra* note 65, cl. 38; Bill C-66, *supra* note 62, cl. 38 (minor difference in the wording of the provision of Bill C-66) provides an exception for collective agreements which include the possibility of revision during their term (see *Canada Labour Code*, *supra* note 1, s. 49(2)). As well, the employer may not change the work conditions of employees prior to the acquisition by one of the parties of the right to strike or lockout (see *Canada Labour Code*, *ibid.*, s. 50(b)).

⁷¹ *Canada Labour Code*, *ibid.*, s. 89(1).

⁷² *Ibid.*, s. 49(1). The period of three months immediately preceding the date of expiration of the term of the collective agreement in which a party may require the other to commence collective bargaining has been extended to four months following the coming into force of Bill C-19, *supra* note

the parties, while acting in good faith,⁷³ have failed to bargain collectively or have bargained collectively but have failed to enter into or revise a collective agreement, one of them may inform the Minister of Labour of their failure to agree,⁷⁴ forcing the latter to take action.⁷⁵ The Minister may, in the alternative, consider it advisable to take action in this regard on her own initiative.⁷⁶ The Minister may appoint a conciliation officer⁷⁷ or a conciliation commissioner,⁷⁸ require the establishment of a conciliation board,⁷⁹ or notify the parties of her intention not to take any action (through the issuance of a "no-board report").⁸⁰

With the advent of the new amendments, parties still have to go through a conciliation process⁸¹ but the new process⁸² is now limited to one stage prior to the acquisition of the right to strike or lockout. The Minister may only take one of the above actions with respect to any particular dispute involving a bargaining unit.⁸³ This approach is different from the former two-stage conciliation process where the Minister would first appoint a conciliation officer⁸⁴ and then, if required, appoint a conciliation commissioner, establish a conciliation board, or issue a "no-board" report.⁸⁵ While

65. This modification was drafted to take into account the new one-step conciliation process, see below. See also *Sims Report*, *supra* note 2 at 99.

⁷³ *Canada Labour Code*, *supra* note 1, s. 50(a). See also *Canada Labour Code*, *ibid.*, s. 996.(1); Bill C-19, *supra* note 65, cl. 45(2); Bill C-66, *supra* note 62, cl. 45(2) (power of the Board to require that a party include in or withdraw from a bargaining position specific terms or to direct a binding method of resolving those terms).

⁷⁴ *Canada Labour Code*, *ibid.*, s. 71(1).

⁷⁵ *Ibid.*, s. 72(1).

⁷⁶ *Ibid.*, s. 72(2).

⁷⁷ The duties of the conciliation officer are found at: *Canada Labour Code*, *ibid.*, ss. 73(2)(a), 73(2)(b); Bill C-19, *supra* note 65, cl. 32; Bill C-66, *supra* note 62, cl. 32.

⁷⁸ The duties of the conciliation commissioner are found at: *Canada Labour Code*, *ibid.*, s. 74(2); Bill C-19, *ibid.*, cl. 33; Bill C-66, *ibid.*, cl. 33.

⁷⁹ The duties of the conciliation board are found at: *Canada Labour Code*, *ibid.*, s. 74(2); Bill C-19, *ibid.*, cl. 33; Bill C-66, *ibid.*, cl. 33.

⁸⁰ *Canada Labour Code*, *ibid.*, s. 72(1).

⁸¹ *Ibid.*, ss. 70.1-79. The parties in dispute may agree to be bound by the recommendations of the conciliation officer or the report of the conciliation commissioner or conciliation board; the parties may also include in their collective agreement a provision to the effect that any matter arising out of collective bargaining be referred to a person or body for final and binding determination (*ibid.*, ss. 78-79; Bill C-19, *supra* note 65, cl. 33; Bill C-66, *supra* note 62, cl. 33).

⁸² *Canada Labour Code*, *ibid.*, ss. 70.1, 71, 72(3), 73(2)(b), 74-79; Bill C-19, *ibid.*, cls. 30-33; Bill C-66, *ibid.*, cls. 30-33.

⁸³ *Canada Labour Code*, *ibid.*, s. 72(3); Bill C-19, *ibid.*, cl. 31; Bill C-66, *ibid.*, cl. 31. The Minister may, however, direct the conciliation commissioner or the conciliation board to reconsider their report and clarify or amplify any part of it (see *Canada Labour Code*, *ibid.*, s. 76; Bill C-19, *ibid.*, cl. 33; Bill C-66, *ibid.*, cl. 33).

⁸⁴ Ss. 72 and 73 of the *Canada Labour Code*, *ibid.*, prior to their amendment on January 1st, 1999.

⁸⁵ Ss. 74 and 75 of the *Canada Labour Code*, *ibid.*, prior to their amendment on January 1st, 1999.

parties valued the previous conciliation process,⁸⁶ changes were required to reduce what was perceived as a time inefficient and “politically managed” process: “[T]he parties have come to believe that conciliators are delaying the release of reports in order to strategically effect the timing of industrial action in order to accom[un]odate political and public interests. The parties see this as an unwarranted manipulation of free collective bargaining.”⁸⁷

Even though conciliation between parties is now more expeditious because of the one-step process and the time limits imposed for a conciliation officer, commissioner, or board to report to the Minister,⁸⁸ what is regrettable about Bill C-19 is its failure to remove the power of appointment from the Minister.⁸⁹ The legislation did not follow the recommendation of the Sims Task Force that appointments regarding the conciliation process be made by the Federal Mediation and Conciliation Service⁹⁰ rather than by the Minister, in order to preserve ministerial neutrality.⁹¹

Once the parties have gone through conciliation, they must respect a “cooling-off” period⁹² before any work stoppage may legally take place. This period begins after the actual or deemed issuance by the Minister of a report written by the conciliation officer, commissioner, or board, or a “no-board” report.⁹³ Initially fixed at seven days by the legislator, the period of time has now increased to twenty-one days before the parties may be in a position to strike or lockout.⁹⁴ In addition, three new prerequisites to a legal strike or lockout were added through the adoption of Bill C-19: the

⁸⁶ *Sims Report*, *supra* note 2 at 109: “While they [the parties] often have little expectation that conciliation will, in itself, bring them to settlement, the conciliation process serves to bring them together, focus the areas in dispute, force each side to reexamine its position and bring accountability to each of the negotiating teams.”

⁸⁷ *Ibid.* at 112.

⁸⁸ *Canada Labour Code*, *supra* note 1, s. 75(1); Bill C-19, *supra* note 65, cl. 33; Bill C-66, *supra* note 62, cl. 33.

⁸⁹ *Canada Labour Code*, *ibid.*, s. 72(1).

⁹⁰ The role of the Federal Mediation and Conciliation Service has been officially recognized in the legislation at s. 70.1 of the *Canada Labour Code*, *ibid.*; cl. 30 of Bill C-19, *supra* note 65; cl. 30 of Bill C-66, *supra* note 62.

⁹¹ *Sims Report*, *supra* note 2 at 114-15.

⁹² Adams, *supra* note 4 at para. 2.3850:

In most of the jurisdictions, there is a “cooling-off” period which must be observed before a strike can legally occur. The time span is generally seven to fourteen days from the date on which the Minister releases either the report of the conciliation board or a statement notifying the parties that such a body will not be appointed. Sometimes other prerequisites must be fulfilled before a strike or lockout can occur. These include the taking of a strike vote or providing notice to the Minister or opposing party of the strike date. In Quebec, however, employees are free to strike ninety days after the employer has been notified of the intention to bargain.

⁹³ *Canada Labour Code*, *supra* note 1, s. 89(1)(d); Bill C-19, *supra* note 65, cl. 39; Bill C-66, *supra* note 62, cl. 39 (the “cooling-off” period would have been fourteen days under Bill C-66).

⁹⁴ *Canada Labour Code*, *ibid.*, s. 89(1)(d); Bill C-19, *ibid.*, cl. 39; Bill C-66, *ibid.*, cl. 39.

maintenance of essential services, the giving of strike or lockout notices, and the taking of strike or lockout votes.

b. Essential Services

With regard to essential services,⁹⁵ while strikes and lockouts arise between employers and trade unions, their consequences are not necessarily limited to those directly involved and may affect the general public to different degrees, ranging from minor inconvenience and economic loss to danger to public health and safety.⁹⁶ Because "federal infrastructure industries provide the major threads of our national economic and social fabric,"⁹⁷ some restrictions on the parties' right to strike or lockout were required to prevent immediate and serious dangers to the safety and health of the public.⁹⁸ Under the new framework, emphasis is put on the agreement between parties as to what services, if any, should be maintained during a work stoppage.⁹⁹ Intervention only takes place if the parties fail to agree or because of a ministerial referral.¹⁰⁰

The Board is vested with broad powers to make orders, to subsequently review these orders, and to direct the parties to undergo a binding resolution of their dispute where the maintenance of services renders the exercise of the right to strike or lockout ineffective.¹⁰¹ Once an application for the determination of essential services has been filed by one of the parties or by the Minister, the work conditions are under *status quo* until the right to strike or lockout is acquired, unless the parties agree otherwise. The employer must accordingly not alter the rates of pay, any other term or condition of employment, or any right or privilege of the employees in the bargaining unit or of the bargaining agent.¹⁰² Similarly, the employees must continue to perform their work. During the work stoppage, the employer must offer the same work conditions present

⁹⁵ For a general discussion on essential services, see J. Bernier, ed., *Strikes and Essential Services* (Quebec: Presses de l'Université Laval, 1994).

⁹⁶ *Sims Report*, *supra* note 2 at 151.

⁹⁷ *Ibid.*

⁹⁸ The *Sims Report* dismissed the possibility of imposing a complete ban on the right to strike or lockout based on any threat to health or safety because no circumstances under the Code justified such a totalitarian measure (*ibid.* at 152). It preferred to foree the parties to maintain essential services while facing a labour dispute over interest arbitration, final offer selection, or use of back-to-work legislation (*ibid.* at 159-63).

⁹⁹ *Canada Labour Code*, *supra* note 1, ss. 87.4(1) - (3); Bill C-19, *supra* note 65, cl. 37; Bill C-66, *supra* note 62, cl. 37.

¹⁰⁰ *Canada Labour Code*, *ibid.*, ss. 87.4(4)-(5); Bill C-19; *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Sims Report*, *supra* note 2 at 154.

¹⁰¹ *Canada Labour Code*, *ibid.*, ss. 87.4(6)-(8); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. The Board also has the power to issue an order requiring an employer to comply with or cease contravening with these sections.

¹⁰² *Canada Labour Code*, *ibid.*, s. 87.5(1); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Canada Labour Code*, *ibid.*, s. 99(1)(a); Bill C-19, *ibid.*, cl. 45(1); Bill C-66, *ibid.*, cl. 45(1) (power of the Board to issue an order requiring the employer to comply with or cease contravening with this subsection and to pay compensation to employees).

before the strike or lockout to the members of the bargaining unit assigned to the maintenance of services, again unless the parties agree otherwise.¹⁰³ For the purpose of preserving the parties' right to strike or lockout, an application for review of an order or a ministerial referral does not suspend the labour dispute.¹⁰⁴

c. Strike/Lockout Notices

The parties must also give strike/lockout notice of seventy-two hours prior to any action being taken, unless a legal lockout or strike has occurred.¹⁰⁵ This new technical requirement seeks to prepare the parties better for a labour dispute, particularly employers, by discouraging the unauthorized premature disruption of work and most importantly by focusing the parties on negotiations to encourage settlement before a specific deadline.¹⁰⁶ Where no strike or lockout has occurred pursuant to the notice given by one of the parties, the trade union or the employer must provide a new notice if it wishes to initiate a strike or lockout, unless the parties agree otherwise in writing.¹⁰⁷

d. Strike/Lockout Votes

With the addition of mandatory strike votes before the acquisition of the right to strike,¹⁰⁸ the *Canada Labour Code* now conforms with all provincial labour statutes which require the holding of secret ballot strike votes. The Sims Task Force observed that the decision to take strike action is of particular importance for employees and it should be treated as such:

We believe that a mandatory strike vote adds an important element to collective bargaining. Unions and the employees they represent are not disconnected from one another. Unions, as democratic organizations, customarily take their mandates from their members, particularly on crucial questions like the decision to take industrial action. A visible and proximate reaffirmation of that fact

¹⁰³ *Canada Labour Code, ibid.*, s. 87.5(2); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Canada Labour Code, ibid.*, s. 99(1)(a); Bill C-19, *ibid.*, cl. 45(1); Bill C-66, *ibid.*, cl. 45(1) (power of the Board to issue an order requiring the employer to comply with or cease contravening with this subsection and to pay compensation to employees).

¹⁰⁴ *Canada Labour Code, ibid.*, s. 87.5(3); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37.

¹⁰⁵ *Canada Labour Code, ibid.*, ss. 87.2(1)-(2); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37.

¹⁰⁶ *Sims Report, supra* note 2 at 116.

¹⁰⁷ *Canada Labour Code, supra* note 1, s. 87.2(3); Bill C-19, *supra* note 65, cl. 37; Bill C-66, *supra* note 62, cl. 37.

¹⁰⁸ The legislation also requires the holding of lockout votes where employers bargain as a group. The provision only mirrors the requirement of strike votes; the analysis provided for strike votes is applicable to lockout votes with the necessary adjustments (see *Canada Labour Code, ibid.*, ss. 87.3(2),(3),(5)-(7); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Sims Report, supra* note 2 at 106).

is healthy because it reinforces the legitimacy of the union's position in the eyes of the employer, the employees and the public at large.¹⁰⁹

Under the federal labour legislation, the holding of a strike vote must occur less than sixty days prior to the declaration of a strike.¹¹⁰ The provision reveals the legislator's concern that the strike vote be held in the context of the current state of bargaining. The strike vote represents more than just the expression of support for the trade union's position, it also conveys an implicit rejection of the employer's stance.¹¹¹ Considering the fact that strike action affects all employees working for the employer, secret ballot strike votes must include the entire workplace involved in a dispute, whether or not the employees are members of the trade union.¹¹²

While it is the bargaining agent's responsibility to direct a strike vote, an employee may challenge the validity of such a vote¹¹³ if the trade union does not comply with the statutory conditions.¹¹⁴ It is important to note that the Board may summarily dismiss such an application if it is satisfied that even if the alleged irregularities were proven, the outcome of the vote would not be different.¹¹⁵ But if the Board is to declare the vote invalid, it may order that a new vote be held pursuant to certain conditions.¹¹⁶ In addition, there is no need for a trade union to hold a strike vote if an employer has initiated a legal lockout because since the collective agreement is no longer applicable between the parties, there cannot be any limit on the trade union's immediate right to give its notice to strike in reply to such action.

¹⁰⁹ *Sims Report, ibid.* at 105. In recent years, there seems to be a tendency in the legislature to give employees more possibilities to express their wishes on matters that concern them. See e.g. s. 108.1 of the *Canada Labour Code, ibid.*, which allows the Minister to give the opportunity to employees to vote on the employer's last offer.

¹¹⁰ *Canada Labour Code, ibid.*, s. 87.3(1); Bill C-19, *supra* note 65, cl. 37; Bill C-66, *supra* note 62, cl. 37. The holding of a strike vote may be performed more than sixty days prior to the authorization of a strike by the trade union; a longer period of time may be agreed to in writing by the parties (this option would not have been available to the parties under Bill C-66).

¹¹¹ *Sims Report, supra* note 2 at 105.

¹¹² *Ibid.*

¹¹³ *Canada Labour Code, supra* note 1, s. 87.3(4); Bill C-19, *supra* note 65, cl. 37; Bill C-66, *supra* note 62, cl. 37. To avoid unnecessary delays, the employee must challenge the strike vote no later than ten days after the announcement of the results of the vote.

¹¹⁴ *Canada Labour Code, ibid.*, s. 87.3(3); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Sims Report, supra* note 2 at 105.

¹¹⁵ *Canada Labour Code, ibid.*, s. 87.3(6); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Sims Report, ibid.*

¹¹⁶ *Canada Labour Code, ibid.*, s. 87.3(7); Bill C-19, *ibid.*, cl. 37; Bill C-66, *ibid.*, cl. 37. See also *Sims Report, ibid.*

3. Replacement Workers

a. Views of the Majority

As noted above, the Sims Task Force did not achieve unanimity on the question of whether replacement workers should or should not be used in a labour dispute.¹¹⁷ However, the study group felt the need to clarify the law in this area to reduce confrontational disputes over the extent of the parties' rights.¹¹⁸ For many reasons, labour and management representation were also divided on the question.¹¹⁹ Employers on the one hand believed that they should be entitled to use replacement workers because of their reduced ability to cope with strikes, because they are unequally vulnerable to a prohibition on replacement workers, and because of the negative consequences a prohibition would have on investments. On the other hand, trade unions demanded a complete ban on the use of replacement workers due to the employees' difficulties in finding alternate work during labour disputes, the potential for violence on the picket lines, the negative impact on the duration and results of strikes, and the threat replacement workers pose to collective bargaining rights. More fundamentally, the parties expressed different views on work and work stoppages:

From an employer's perspective, the obligation to bargain is an obligation to bargain over the terms of work for their employees. They retain, in their view, the residual right to get the work done in other ways, restrained only by any commitments that they make through collective bargaining (for example, a prohibition on contracting out). Such commitments end, in any event, once a work stoppage takes place.

From the union's perspective, employees retain a permanent connection to their job until terminated. The Code maintains employees' status during a work stoppage, and protects them against retaliation for exercising their right to strike. Employees often perceive themselves as having almost a proprietary right not just to employment, but to the performance of the work. They therefore see it as an invasion of this proprietary right when someone else takes over their job.¹²⁰

The parties also had different views with respect to the purpose of work stoppages. Employers consider collective bargaining as being an instrument to determine the market value of work. Trade unions perceive strikes and lockouts as being a test of resistance between the financial ability of an employer versus that of the employees to survive a work stoppage:

Some see collective bargaining as an important market instrument. The strike or lockout tests competing views of the market value of work. The union

¹¹⁷ *Sims Report, ibid.* at 122-31 (A.C.L. Sims and P. Knopf for the majority) and at 138-50 (R. Blouin for the minority).

¹¹⁸ *Ibid.* at 122.

¹¹⁹ *Ibid.* at 122-28.

¹²⁰ *Ibid.* at 124.

maintains that the work is worth a specified price; the employer, in turn, believes it can get the work done for less. The availability of willing replacement workers and the efficiency with which they perform the work tests these assumptions. If replacement workers are unavailable or unsatisfactory, the employer is persuaded to raise its offer. If they work well, this pressures the employees, through their union, to reduce their demands to the market level.

Others see the strike as being fought on the more limited field of the financial ability of the employer to survive a shutdown versus the ability of the employees to survive without wages. Under this perception, the employer is seen as garnering an unfair advantage by maintaining a revenue stream during a shutdown. Employers argue that employees are not precluded from seeking alternative employment during a work stoppage and that to achieve balance, employers should not be prohibited from using alternate sources of labour.¹²¹

Through a consideration of the two prevailing philosophies under the provincial labour statutes, the majority preferred a middle ground solution,¹²² whereby replacement workers would only be prohibited where the employer uses such workers for the demonstrated purpose of undermining the trade union's representative capacity rather than to pursue legitimate bargaining objectives.¹²³ The majority of the Task Force felt that strikes and lockouts should be fought in terms of bargaining issues, and not in terms of the question of representation. Thus, the majority sought to preserve the basic balance of collective bargaining.¹²⁴

The prohibition applies to employers who convert economic interest disputes into representation disputes: the prohibition is directed at employers who are pursuing goals beyond the economic position they wish to achieve and who sustain labour disputes because employees are represented by a trade union.¹²⁵ Nevertheless, the majority felt strongly that in our system of collective bargaining, employers should retain the ability to use replacement workers for legitimate purposes as they may be necessary to sustain the financial viability of the workplace, particularly when employers are confronted with a harsh economic climate or unacceptable trade union demands.¹²⁶

The majority of the Task Force could not provide a clear test to determine when replacement workers are used by employers for illegitimate ends, but it suggested that "[s]uch intention can be inferred from reports of unfair labour practice complaints and

¹²¹ *Ibid.* at 124-25. See also Arthurs, *supra* note 42 at 192 (cited in *CKLW Radio Broadcasting 1978*, *supra* note 39 at 311), where Professor Arthurs notes that the "[r]esort by the employer to the labour market to keep his plant running is part of the test of economic realities which the strike is intended to be".

¹²² See *House of Commons Debates* (19 February 1998) at 4168 (debates for 2d reading Bill C-19), where the Hon. Lawrence MacAulay (Minister of Labour) led off the debate on Bill C-19 and said that "we have adopted a reasonable middle of the road approach that can be accepted as a workable compromise by both labour and management".

¹²³ *Sims Report*, *supra* note 2 at 129.

¹²⁴ *Ibid.* at 130.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

from first-hand accounts of the disputes themselves."¹²⁷ The wording of the provision¹²⁸ gave rise to heated debates in the House of Commons, in the Senate, and before the committees to which it was presented. Following the death of Bill C-66, the Minister modified the wording of the provision to better reflect the recommendation of the Sims Task Force.¹²⁹

No employer or person acting on behalf of an employer shall use, for the *demonstrated purpose* of undermining a trade union's representational capacity *rather than the pursuit of legitimate bargaining objectives*, the services of a person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out.¹³⁰

To enforce this provision, the Board has been vested with the power to require the employer to stop using, for the duration of the dispute, the services of replacement workers when an unfair labour practice has been committed.¹³¹

b. Views of the Minority

The minority of the Sims Task Force issued a separate recommendation on the question of replacement workers. It would have prohibited employers from using such

¹²⁷ *Ibid.*

¹²⁸ S. 42(2) of Bill C-66, *supra* note 62:

No employer or person acting on behalf of an employer shall use, for the purpose of undermining a trade union's representational capacity, the services of a person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out.

¹²⁹ See *House of Commons Debates* (19 February 1998) at 4168 (debates for 2d reading Bill C-19), where the Hon. Lawrence MacAulay (Minister of Labour) said:

While concerns about the clarity of the replacement worker provision in Bill C-66 were debatable, I have decided to act. Again, after consultation with the stakeholders this summer, the provision has been reworded to more accurately reflect the narrative used in the Sims task force majority recommendations.

¹³⁰ S. 94(2.1) of the *Canada Labour Code*, *supra* note 1 [emphasis added]; s. 42(2) of Bill C-19, *supra* note 65. The addition of the word "demonstrated" in the provision was not meant to increase the burden of proof (see House of Commons, Bill C-19, *An Act to amend the Canada Labour Code (Part I) and the Corporations and Labour Unions Returns Act and to make consequential amendments to other Acts* (minutes of proceedings of 24 March 1998) (Ottawa: Standing Committee on Human Resources Development and the Status of Persons with Disabilities, 1998) at 15 [hereinafter "Minutes of Proceedings"], where Mr. Mike McDermott, Senior Assistant Deputy Minister, said: "Some of them [interest groups] expressed the view that the wording of C-66 was not sufficiently clear with respect to the burden of proof. We were of the view that it was clear enough in Bill C-66 but we eventually concluded that it was possible to add this word without changing the tenor of this provision.")

¹³¹ *Canada Labour Code*, *ibid.*, s. 99(b.3); Bill C-19, *ibid.*, cl. 45(2); Bill C-66, *supra* note 62, cl. 45(2). See also Part II.A.3: Remedial Orders, below.

workers from the beginning of the bargaining process until the conclusion of a collective agreement or the decertification of the trade union.¹³² The minority would have adopted this restrictive approach because while it views strikes and lockouts as constituting valid economic pressure tactics exercised *by the parties* to promote their respective interests, in contrast, the use of replacement workers

undermines the structural elements that ensure the internal cohesion of the collective bargaining system, by introducing a foreign body into a dispute between two clearly identified parties. It upsets the economic balance of power, compromises the freedom of expression of workers engaging in a strike or lockout, shifts the original neutral ground of the dispute, and leads eventually to a perception of exploitation of the individual.¹³³

In essence, the minority was concerned with maintaining the balance of power between the parties throughout the work stoppage as it existed prior to the bargaining dispute.¹³⁴ While the minority would have prohibited the use of replacement workers, it would not have prevented employers from subcontracting work outside their premises to ensure the economic survival of the workplace as the subcontracting of work was considered by the minority to be the equivalent of alternate work for employees.¹³⁵ In addition, the minority would have made two exceptions to the proposed ban of replacement workers: the non-compliance by a trade union with its obligation respecting essential services and the maintenance or repairs necessary to keep the workplace or equipment in working order.¹³⁶

4. Legal Status of Striking or Locked-Out Employees

Along with the replacement-workers provision, the Sims Task Force felt obliged to clarify the legal status of striking or locked-out employees.¹³⁷ The new provision

¹³² *Sims Report*, *supra* note 2 at 138.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 149.

¹³⁶ *Ibid.* at 150.

¹³⁷ The dissent of Locke J. in *Canadian Pacific Railway v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654 had caused confusion with regards to the right of reinstatement of striking and locked out employees. See Adams, *supra* note 4 at para. 10.540:

All Canadian statutes provide that the employment relationship does not cease solely because an employee has ceased to work as a result of a strike or lockout. However, *in obiter*, Mr. Justice Locke of the Supreme Court of Canada, in *C.P.R. Co. v. Zambri*, expressed the view that employers were nevertheless at liberty to engage others to fill the places of strikers and were not obligated to continue the employment of striking employees at the termination of a strike if there was no work for them to do. This is also the American approach. On the other hand, the line between lawful discharge and lawful permanent replacement can be seen as a "fine" one. The policy behind requiring employees to be prepared to lose their jobs when engaging in strike activity is to convey the seriousness of strike action and its impact on both the community and the employer. But the refusal to re-employ long-standing striking employees in favour of

gives an express statutory right to striking or locked-out employees to return to work at the end of a work stoppage in preference to any person hired during the conflict.¹³⁸ Such discrimination was previously prohibited by the Code, although not in express terms.¹³⁹ The Sims Task Force also wanted to clarify that the obligation of the employer to reinstate striking or locked-out employees in the bargaining unit over replacement workers would not be tantamount to employees having a right to a collective agreement. The right to return to work upon the end of a strike or lockout does

“scab” replacements has a punitive connotation, carries with it the seeds of ugly picket-line violence and is amenable to the characterization of being “inherently destructive”. These countervailing policy considerations prompted some Canadian jurisdictions to deal specifically with the right of strikers to the return of their positions, Ontario and Quebec having the most explicit beneficial provisions for striking employees. In effect, the American “Mackay” doctrine expressed in *Zambri* has been seen in these jurisdictions as too discouraging of collective bargaining. Importantly, the Canada [Labour Relations] board, pursuant to its general unfair labour practice sections, has characterized the refusal to re-employ striking employees as an unfair labour practice even without specific statutory direction.

See also K.S. Cornwell, *Post-Strike Job Security of Strikers and Replacement Workers: A United States-Canada Comparison* (Kingston: Industrial Relations Centre, Queen’s University, 1990).

¹³⁸ *Canada Labour Code*, *supra* note 1, s. 87.6; Bill C-19, *supra* note 65, cl. 37; Bill C-66, *supra* note 62, cl. 37. See *Sims Report*, *supra* note 2 at 134. See also ss. 99(1) and (2) of the *Canada Labour Code*, *ibid.*; Bill C-19, *ibid.*, cls. 45(1)-(2); Bill C-66, *ibid.*, cls. 45(1)-(2) (power of the Board to issue an order requiring the employer to comply with or cease contravening with these sections, to reinstate employees and to pay them compensation).

¹³⁹ S. 3(2) of the *Canada Labour Code*, *ibid.*, provides:

3(2) No person ceases to be an employee within the meaning of this Part by reason only of their ceasing to work as the result of a lockout or strike or by reason only of their dismissal contrary to this Part.

Ss. 94(3)(a)(vi) and (d)(i) of the *Canada Labour Code*, *ibid.*, also provide:

94(3) No employer or person acting on behalf of an employer shall

a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

d) deny to any employee any pension rights or benefits to which the employee would be entitled but for

(i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Part ...

See e.g. *Eastern Provincial Airways*, *supra* note 45; *Union of Bank Employees (Ontario), Local 2104 and C.L.C.* and *Canadian Imperial Bank of Commerce* (1986), 65 di 1, 86 C.L.L.C. 16,023 (C.L.R.B.); *Brewster Transport Company*, *supra* note 49; *Graham Cable TV/FM and Communications, Electronic, Electrical, Technical and Salaried Workers of Canada* (1986), 67 di 1, 86 C.L.L.C. para. 16,039 (C.L.R.B.).

not mean that the parties will necessarily be in agreement with the terms and conditions of a collective agreement.¹⁴⁰

When reviewing the prohibition for filing an application for certification or decertification of a bargaining unit during the first six months of a strike or lockout without the consent of the Board, the Sims Task Force reached the conclusion that the time frame "sometimes encourages posturing during bargaining in the hope that decertification will ensue after six months of stalled negotiations."¹⁴¹ The modified subsections 24(3) and 38(5) of the Code¹⁴² address this concern by replacing the artificial time period with a general requirement for a party to obtain the consent of the Board during a work stoppage.

In accordance with the Board's approach to employees' representation votes during labour disputes, subsection 29(1.1) of the Code restricts the participation to employees in the bargaining unit on the date on which notice to bargain collectively was given.¹⁴³ This provision has the effect of excluding replacement workers from such votes because of their temporary status. The rationale behind this codification is to state clearly that permanent employees have the right to participate whether they support their trade union or return to work voluntarily during the strike or lockout.¹⁴⁴

In sum, the changes introduced by the enactment of Bill C-19 with regard to labour disputes will force employers and trade unions to fulfill more requirements before they are able to acquire the right to strike or lockout. However, the effect of these new provisions should better circumscribe the debate and encourage earlier settlements while clarifying the rights and obligations of the parties during a work stoppage.

II. The New Provision: An Analysis

A. Prohibition Relating to Replacement Workers

Prior to the introduction of subsection 94(2.1) of the Code, federal labour legislation, as well as the interpretation given to it by the Board, did not prohibit the employer from using replacement workers. The implementation of the new provision will not render the use of replacement workers illegal, but may prevent an employer from using replacement workers in the event of a breach of the Code. Simply put, the application of subsection 94(2.1) of the Code will constitute a serious interpretive

¹⁴⁰ *Sims Report*, *supra* note 2 at 134. It is interesting to note that, notwithstanding the possibility of trade union discipline, employees are not entitled to nor prohibited from continuing to work for the employer during a labour dispute (*ibid.* at 137).

¹⁴¹ *Ibid.* at 135.

¹⁴² *Canada Labour Code*, *supra* note 1, ss. 24(3), 38(5); Bill C-19, *supra* note 65, cls. 11, 20; Bill C-66, *supra* note 62, cls. 11, 20.

¹⁴³ *Canada Labour Code*, *ibid.*, s. 29(1.1); Bill C-19, *ibid.*, cl. 13; Bill C-66, *ibid.*, cl. 13.

¹⁴⁴ *Sims Report*, *supra* note 2 at 135.

challenge to the Board. The new provision sits in between the two principal philosophies respecting replacement workers by prohibiting employers from using such workers for the demonstrated purpose of undermining the trade union's representational capacity rather than the pursuit of legitimate bargaining objectives. Considering the vague language used in the new provision and the difficulty of making any analytical comparison with the existing provincial provisions, the Board will most likely refer to the work of the Sims Task Force to determine the parameters of the new prohibition.¹⁴⁵

Divergent positions between employers and trade unions are to be expected with regard to the appropriate interpretation to be given to the new provision by the Board. From the perspective of a trade union, the mere use of replacement workers undermines their representational capacity and the Board should accordingly prohibit their use because strikes and lockouts should be limited to the exercise of economic pressure tactics between parties without allowing the employer to bring third parties into the relationship. From the perspective of an employer, the prohibition on the use of replacement workers should only be exercised by the Board in special circumstances. The addition of the word "demonstrated" to the provision before its final adoption, with respect to the burden of proof, should be indicative of the high threshold a trade union must meet before the Board may prohibit the use of replacement workers. Opposing views are also to be expected with respect to what should constitute the appropriate remedial orders for the breach of subsection 94(2.1) of the Code.

Beyond the diverging perspectives between employers and trade unions, the recommendations of the *Sims Report* make it clear that subsection 94(2.1) of the Code cannot be regarded as a general prohibition on the use of replacement workers.¹⁴⁶ An employer is legally entitled to use the services of replacement workers to put economic pressure on the trade union in order to achieve its collective bargaining ends.¹⁴⁷ This is also confirmed by the adoption of subsection 29(1.1) and section 87.6 of the Code, which indirectly recognize the employer's right to use replacement workers.¹⁴⁸ Nevertheless, subsection 94(2.1) of the Code differs from the pre-existing body of

¹⁴⁵ The *Sims Report*, *ibid.*, provides a thorough analysis of all the changes performed to the labour legislation. The legislature was inspired by most of the recommendations made by the Task Force, often word for word, to adopt the new amendments. It is also common practice for the Board to refer to such reports to determine the intent of the legislature in passing certain provisions of the Code. For example, the *Woods Report*, *supra* note 1, has been examined by the Board in *N.A.B.E.T.* and *CKLW Radio Broadcasting* (1977), 23 di 51 at 57, 77 C.L.L.C. para. 16,110 (C.L.R.B.) [hereinafter *CKLW Radio Broadcasting 1977* cited to di] and by the Supreme Court of Canada in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545.

¹⁴⁶ *Sims Report*, *ibid.* at 131.

¹⁴⁷ *Ibid.* at 130.

¹⁴⁸ Ss. 29(1.1) and 87.6 of the *Canada Labour Code*, *supra* note 1; cls. 13 and 37 of Bill C-19, *supra* note 65; cls. 13 and 37 of Bill C-66, *supra* note 62, provide respectively that replacement workers are not employees of the bargaining unit and that striking or locked out employees have the right to be reinstated in the bargaining unit after a labour dispute in preference to replacement workers.

law; an employer will be prevented from further use of replacement workers in a labour dispute if its purpose is, for example, to attack the trade union's representational status.¹⁴⁹ The question then becomes, how should the Board interpret this partial prohibition?

In the author's opinion, after careful analysis of the new provision, the Board should find most of its answers by referring to the principles associated with the duty to bargain.¹⁵⁰ In order to determine whether or not the employer has respected its duty to bargain with the trade union, the Board would benefit from a legal framework for the assessment of the legitimacy of the employer's bargaining objectives. Where the trade union has demonstrated that the employer has breached its duty to bargain and has used the services of replacement workers to commit the breach, the Board should conclude that the employer has interfered with the trade union and has therefore undermined its representational capacity. The Board should then prohibit the employer from further use of replacement workers in the bargaining process in which the parties are engaged and, if required, should order other suitable remedies.

1. "The Pursuit of Legitimate Bargaining Objectives"

Before deciding on the legality of the use of replacement workers, the Board will have to give meaning to the terms "legitimate bargaining objectives". The legislation has not defined the expression nor has the Board interpreted this wording in its previous decisions. The substance of these terms should be discovered by interpreting the new provision in light of the legislative objectives of the Code. These objectives are set out in the Preamble,¹⁵¹ which the Board has often used to interpret other provisions of the Code.¹⁵² The legislative objectives seek primarily to encourage free collective bargaining and constructive settlement of disputes between employers and trade un-

¹⁴⁹ *Sims Report*, *supra* note 2 at 130.

¹⁵⁰ For a comprehensive analysis of the duty to bargain under Canadian jurisdictions, see Adams, *supra* note 4 at paras. 10.1360-10.1700. See also the *Woods Report*, *supra* note 1 at 163-64 and G.J. Clarke, *Clarke's Canada Industrial Relations Board*, looseleaf (Aurora, Ont.: Canada Law Book, 1999) at 12-1 to 12-9 for an overview of the development of the duty under the federal jurisdiction.

¹⁵¹ R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994) at 259 describes the primary function of a preamble as "the recitals constituting a preamble [that] may mention not only the facts which the legislature thought were important but also principles or policies which it sought to implement or goals to which it aspired".

¹⁵² *Ibid.* at 261, outlining the uses of preambles: "Since preambles are an integral part of an enactment, they are part of the context in which the words of the enactment must be read. As such, they may be relied on to help resolve ambiguity, determine the scope or generally understand the meaning and effect of legislative language". The Board came to a similar conclusion in *Union des Artistes (UDA), Syndicat général du cinéma et de la télévision Radio-Canada (CNTU) and C.U.P.E. and Société Radio-Canada/Canadian Broadcasting* (1982), 44 di 19, C.L.R.B. No. 383 at 239-40, online: QL (CLR.B): "The preamble to an act can thus serve or be used to limit the field of application or the scope of an act or of any of its provisions ... or, when the act includes imprecise terms, can serve, on the basis of the objectives it expresses, to clarify the meaning of these terms". See also Clarke, *supra* note 150 at 2-1ff.

ions.¹⁵³ The duty to bargain imposed on the parties is the principal means to achieve these objectives:

The purpose of collective bargaining legislation is to bring the parties to the bargaining table where they will present their proposals, articulate supporting arguments and search for common ground which can serve as the basis for a collective agreement. The duty to bargain, no matter how phrased, has been elaborated over time by labour boards to prohibit certain specific conduct, *i.e.*, misrepresentations, and at times to censure a party's entire bargaining stance where "having regard to in all the circumstances", a labour board concludes that the real object of that party is to avoid a collective agreement.¹⁵⁴

Given the objectives of our system of collective bargaining and the role of the duty to bargain, the Board would be justified in applying principles similar to those which are applied to the duty to bargain in good faith and to make every reasonable effort to enter into a collective agreement pursuant to paragraph 50(a) of the Code to determine the legitimacy of the employer's bargaining objectives under subsection 94(2.1) of the Code. Even if the terms used in these two provisions are different, the *Sims Report* seems to suggest that they share similar purposes: "No one believes that the utilization of replacement workers is a legitimate practice if its purpose is to rid the workplace of union representation or undermine the role of the union rather than to achieve an acceptable collective agreement."¹⁵⁵

The employer's use of replacement workers occurs after one of the parties has obtained the legal right to strike or lockout, a right which is acquired, pursuant to section 89 of the Code, in part as a result of unsuccessful collective bargaining. Accordingly, when faced with a complaint of an unfair labour practice, the Board should

¹⁵³ Preamble of the *Canada Labour Code*, *supra* note 1:

WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all

¹⁵⁴ Adams, *supra* note 4 at para. 10.1400.

¹⁵⁵ *Sims Report*, *supra* note 2 at 129 [emphasis added].

adopt principles similar to those which apply to the duty to bargain in order to assess the employer's bargaining objectives. This approach would be more consistent with the application of the legislation as a whole. Furthermore, the use of such principles is supported by the fact that the employer has a continuing duty to bargain from the moment the notice to bargain is given until the conclusion of a collective agreement¹⁵⁶ or, in the absence of a collective agreement, throughout a work stoppage.¹⁵⁷ The employer's bargaining objectives are the subject of continuing scrutiny and this scrutiny should be particularly intense where replacement workers have been hired.

Pursuant to paragraph 50(a) of the Code, the duty to bargain is related to the manner in which negotiations are conducted rather than to the content of the parties' proposals.¹⁵⁸ This duty is composed of two elements of equal importance, good faith and making every reasonable effort to enter into a collective agreement, both of which must be respected by the parties in the course of collective bargaining. The Supreme Court of Canada recently had the opportunity to describe the nature of the duty:

There may well be exceptions but as a general rule the duty to enter into bargaining must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is the latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an

¹⁵⁶ The Board has been following the fundamental principles enunciated in *CKLW Radio Broadcasting 1977*, *supra* note 145 at 87-89, when presented with a matter involving the duty to bargain:

This does not mean parties cannot, in the exercise of free collective bargaining, engage in hard or ruthless bargaining. ...

There is no rule in collective bargaining, like chess, that either party must move first. ...

The duty to bargaining does not cease when a work stoppage commences, although actions of the parties are appraised in that climate ...

In the absence of an indication of a change in positions a refusal to meet was not contrary to the Code.

¹⁵⁷ *General Aviation Services*, *supra* note 44 at 83.

¹⁵⁸ For an elaboration of the extent of the duty to bargain, see *De Vilbiss (Canada)*, [1976] 2 Can. L.R.B.R. 101, [1976] March O.L.R.B. Rep. 49. This interpretation has been followed in *CKLW Radio Broadcasting 1977*, *supra* note 145. In the latter case, the Board also concluded (at 58):

[G]ood faith bargaining and reasonable efforts to conclude collective agreements are required of parties, but entering a collective agreement is not necessarily the result of bargaining. Conciliation is the preferred method of settling impasses but economic sanction is the ultimate test of bargaining strength. To ensure the parties respect each other's rights and to encourage constructive bargaining and the development of good relations, the parties are required to bargain in good faith and make every reasonable effort to enter into a collective agreement.

agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.¹⁵⁹

The duty to bargain has been interpreted by the Board as fulfilling two labour relations purposes: first, the recognition of the trade union as the bargaining agent of employees and second, the fostering of rational, informed discussion.¹⁶⁰ The recognition of the trade union requires the employer to approach collective bargaining with the objective of concluding an agreement. The quality of discussion is broader in its application, covering situations where the employer engages in "hard bargaining" but does so in good faith and where the employer makes a pretense of bargaining, commonly known as "surface bargaining".¹⁶¹

While parties are allowed to act in their individual self-interest and take firm positions which may be unacceptable to the other side, the employer cannot advance through the bargaining process with the intention not to conclude a collective agreement.¹⁶² The distinction between "hard bargaining" and "surface bargaining" lies essentially on an appreciation of the facts of each case and must take into account the

For a critical analysis of the extent of the duty to bargain, see G.W. Adams, "Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation" (1991) 23 *Ottawa L. Rev.* 139.

¹⁵⁹ *Royal Oak Mines*, *supra* note 57 at 396-97.

¹⁶⁰ *CKLW Radio Broadcasting 1977*, *supra* note 145 at 85. The Board approved the interpretation given by the Ontario Labour Relations Board to the duty of good faith bargaining in *De Vilbiss (Canada)*, *supra* note 158; *Canadian Industries and United Steelworkers*, [1976] May O.L.R.B. Rep. 199. See also Adams, *supra* note 4 at para. 10.1430.

¹⁶¹ *CKLW Radio Broadcasting 1977*, *supra* note 145 at 85.

¹⁶² In *Syndicat des employés de commerce et de bureau du Comté Lapointe (C.N.T.U.), Locals 675-6, 675-7, 675-11, Syndicat des commis-comptables d'Alma, (C.N.T.U.), Locals 675-9, 675-10 and Syndicat des employés de commerce de La Baie, Local 675-8 and Royal Bank of Canada (Kénogami, Jonquière, La Baie and Alma)* (1980), 41 *di* 199, [1982] 1 *Can. L.R.B.R.* 16 at 212, the Board cited with approval the Ontario Labour Relations Board's decision in *The Daily Times and Toronto Typographical Union No. 91*, [1978] July O.L.R.B. Rep. 604, 2 *Can. L.R.B.R.* 446:

Surface bargaining is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between "surface bargaining" and hard bargaining. The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone to allow the Board to draw an inference of "surface bargaining". This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of "surface" bargaining can be made.

parties' entire relationship.¹⁶³ It is precisely the distinction between "hard bargaining" and "surface bargaining" which is an appropriate and comparable basis for an analysis of the new provision.¹⁶⁴ The *Sims Report* recognized a link between the use of replacement workers and "surface bargaining" or "bad faith bargaining":

Some argue that it is not the ability to use replacement workers itself that is objectionable so much as its frequent abuse. They point out the correlation between the use of replacement workers and efforts to undermine the trade union and destroy its bargaining agency.

This argument mirrors experience with the duty to bargain in good faith. Labour boards have moved to restrain bargaining proposals that indicate an intention to dislodge the union rather than to achieve a particular bargaining result. The distinction between this form of bad faith bargaining and hard bargaining is never easy to discern. However, such conduct is often accompanied by other conduct indicative of the same intention. While labour boards are reluctant to interfere with genuine bargaining positions, they are not, nor should they be, reluctant to intervene when bargaining positions become thinly disguised unfair labour practices aimed at undermining the union's right to represent employees.¹⁶⁵

The next step in the analysis is to determine whether or not the employer's "surface bargaining" or bad faith bargaining resulting from the use of replacement workers undermines the trade union's representational capacity.

2. "Demonstrated Purpose of Undermining the Trade Union's Representational Capacity"

While the terms "undermining the trade union's representational capacity" are not defined in the legislation, previous decisions of the Board dealing with unfair labour practices may shed light on the meaning of the new legislative terminology. The legislation gives employees the right to join the trade union of their choice and to participate in its lawful activities,¹⁶⁶ and also gives the trade union the exclusive rights and duties to represent employees.¹⁶⁷ One of the Board's functions is to ensure that these

¹⁶³ *Ibid.*

¹⁶⁴ In this regard, the well-known text of Clarke, *supra* note 150 at 14-21, reaches a similar conclusion:

The Board has already noted that the Code provisions on bargaining in good faith are not designed to assist a party which takes an unreasonable bargaining position. A similar principle would apply to any application regarding replacement workers. However surface bargaining, which demonstrates a desire not to conclude a collective agreement and violates the obligation to bargain in good faith, may provide a comparable test for the application of this new provision on replacement workers.

¹⁶⁵ *Sims Report*, *supra* note 2 at 128.

¹⁶⁶ *Canada Labour Code*, *supra* note 1, s. 8(1).

¹⁶⁷ *Ibid.*, ss. 36-37.

rights are protected and, if the employer contravenes them,¹⁶⁸ to remedy any unlawful actions through the imposition of appropriate orders.¹⁶⁹ The Board has concluded in several decisions,¹⁷⁰ that the employer's interference in the trade union undermines its representational capacity.¹⁷¹

This review of the jurisprudence reveals that the protection afforded by section 184(1)(a) [now section 94(1)(a)] against interference takes a number of forms. This protection in fact mirrors the many constantly changing forms that the right to join a union may take, this right constituting, according to the title of section 110 [now section 8] of the Code, one of the "basic freedoms." Section 184(1)(a) prohibits both deliberate and unintentional violation of this right. *The protection it affords is aimed at both actions that seek to undermine the status of the bargaining agent and those that merely have this effect. It also extends to those actions that compromise the integrity of the bargaining unit which the union represents.* Finally, this protection continues to apply both in the absence and in the presence of a collective agreement. This explains what we referred to earlier as the "omnibus" nature of the protection of section 184(1)(a). This protection does not extend—and this is confirmed by section 110—to unlawful activities ...¹⁷²

The logical inference to draw from the foregoing, in light of the new provision on replacement workers, would be that the employer's "surface bargaining" or bad faith bargaining, which is a failure by the employer to recognize the trade union as the bargaining agent of employees, interferes with the trade union and undermines its representational capacity.¹⁷³ This interpretation is in keeping with the Board's previous de-

¹⁶⁸ *Ibid.*, s. 94.

¹⁶⁹ *Ibid.*, s. 99.

¹⁷⁰ *Brewster Transport Company*, *supra* note 49 at 58; *John Brown and S.I.U. and Sedpex* (1988), 72 di 148 at 160, C.L.R.B. No. 667, online: QL (C.L.R.B.); *C.U.P.E., Broadcast Division and Canadian Broadcasting* (1994), 96 di 122 at 129 and 131, 27 Can. L.R.B.R. (2d) 110 [hereinafter *Canadian Broadcasting* cited to di]; *P.S.A.C. and Aéroports de Montréal* (1995), 97 di 116, C.L.R.B. No. 1115 at 18-20 and 29, online: QL (CLRB); *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Canadian National Railway* (1996), 100 di 50 at 56-57, C.L.R.B. No. 1154, online: QL (C.L.R.B.); *G.S.U. and Saskatchewan Wheat Pool* (1996), 101 di 127, C.L.R.B. No. 17 at 29-30, online: QL (CLRB).

¹⁷¹ For the purposes of this paper, it is assumed that the terms "trade union's representational capacity", "trade union's status", and "trade union's right of representation" are synonyms.

¹⁷² *P.S.A.C. and Canada Post* (1985), 63 di 136, C.L.R.B. No. 544 at 66-67, online: QL (CLRB) [emphasis added].

¹⁷³ Adams, *supra* note 4 at paras. 10.1500ff, noted that "[b]y reinforcing the employer's recognition of the union as the exclusive representative of the employees for which it holds bargaining rights, the duty to bargain in good faith plays a cornerstone role." For example, the Board decided in *Voyageur*, *supra* note 50 at 37, that the employer's letter sent to its employees, "which was in fact part of the bargaining process, was a thinly veiled threat that sought to undermine the bargaining agent's authority. This letter also constituted evidence of bad faith bargaining". In *Canadian Broadcasting*, *supra* note 170 at 129, the Board came to the following conclusion:

As both sections 94(1)(a) and 50 of the Code are aimed, among other things, at protecting the viability of the union and its role of exclusive bargaining agent entrenched

cisions, where it concluded that an action by the employer which violates its duty to bargain could also amount to an interference with the trade union, contrary to paragraph 94(1)(a) of the Code. For example, the Board has decided that an employer, by sending letters directly to its employees during collective bargaining, violated paragraphs 50(a) and 94(1)(a) of the Code because the communications constituted an attempt to bargain directly with the employees and were intended to malign and demean the trade union in the eyes of its members.¹⁷⁴ The Board also concluded that an employer's proposal to engage replacement workers during a strike and to offer them terms and conditions of employment superior to those already offered to the bargaining agent could result in a violation of paragraphs 50(a) and 94(1)(a) of the Code.¹⁷⁵ In another decision, the Board found that an employer's direct communications with its employees, during collective bargaining, which undermines or discredits the trade union in the eyes of its members, contravened paragraphs 50(a) and 94(1)(a) of the Code, which "are aimed, among other things, at protecting the viability of the union and its role of exclusive bargaining agent ..."¹⁷⁶

Considering the broad meaning given by the Board to the terms "undermining the trade union representational capacity", the employer's use of replacement workers to pursue illegitimate bargaining objectives should be considered by the Board as another means by which an employer may undermine the bargaining agent's right of representation, just as it is in cases where an employer attempts to bargain or communicate directly with employees, or proposes better working conditions to replacement workers than those already offered to the trade union. The employer's use of the services of replacement workers to pursue bad faith bargaining should be considered by the Board not only as contravening the duty to bargain but also as interfering with the trade union and therefore undermining its representational capacity.

This inference does not mean, however, that an employer's failure to bargain in good faith and its use of replacement workers should automatically constitute an unfair labour practice under subsection 94(2.1) of the Code. What remains are the questions of who should bear the burden of proof and what the threshold of such proof should be.

The first question is relatively simple to answer. Because subsection 94(2.1) of the Code is not an unfair labour practice subject to the reverse onus provision in subsection 98(4) of the Code, the burden should fall on the trade union to prove that replacement workers should be prohibited because of the employer's bad faith bargaining.

in section 36(1)(a) ... , an employer's direct communications with its employees, while collective bargaining is in progress, that undermines or discredits the union in the eyes of the employees effectively contravenes both sections of the Code.

¹⁷⁴ *Eastern Provincial Airways*, *supra* note 45 at 214.

¹⁷⁵ *Brewster Transport Company*, *supra* note 49 at 60. In this case, the Board concluded that the employer's proposal violated s. 94(1)(a) of the Code and noted that "[t]he principle enunciated above might equally apply in the context of a violation of subsection 148(a) [now s. 50(a)] although it was not argued as such".

¹⁷⁶ *Canadian Broadcasting*, *supra* note 170 at 129.

The second question requires more analysis because the legislator has not defined the terms “demonstrated purpose”, nor has the Board interpreted the expression. There is also no such burden of proof in existing Canadian labour legislation. With respect to the term “purpose”, a careful reading of the provision seems to indicate that the legislator has added to the legislation an unfair labour practice which requires proof of “anti-union animus”.¹⁷⁷ It is the employer’s use of replacement workers which seeks to undermine the status of the bargaining agent, and not the mere use of such workers, which would constitute an unfair labour practice.¹⁷⁸ This is also confirmed in subsection 29(1.1) and section 87.6 of the Code, which indirectly recognize the right of the employer to use replacement workers and which appear to have limited the scope of the unfair labour practice to the employer’s illegal motivation.¹⁷⁹

The interpretation of the term “demonstrated” represents a greater challenge. The addition of the word “demonstrated” through Bill C-19 has been said by the Minister to “more accurately reflect the narrative used in the Sims Task Force majority recommendations.”¹⁸⁰ It was also said at the parliamentary committees stage respecting Bill C-19 that “it was possible to add this word [“demonstrated”] without changing the tenor of this provision.”¹⁸¹ Should the addition of the word “demonstrated” change the interpretation to be given to the new provision?

Contrary to what has been said about the provision, the answer would have to be that the word “demonstrated” increases the threshold the trade union has to meet. *Black’s Law Dictionary* defines “demonstrate” as “to derive from admitted premises by steps of reasoning which admit of no doubt.”¹⁸² But for the addition of this word, the trade union would only have had to prove that the employer used replacement workers during the labour dispute and failed to bargain in good faith to establish the commission of an unfair labour practice. Following subsection 94(2.1) of the Code,

¹⁷⁷ For examples of unfair labour practices requiring proof of “anti-union *animus*”, see Adams, *supra* note 4 at para. 10.100.

¹⁷⁸ This is also the interpretation given by Monet, *supra* note 62 at 38 to the term “purpose” under Bill C-66, *supra* note 62, which is nonetheless applicable under the current legislation.

¹⁷⁹ As previously mentioned, ss. 29(1.1) and 87.6 of the *Canada Labour Code*, *supra* note 1; cls. 13 and 37 of Bill C-19, *supra* note 65; cls. 13 and 37 of Bill C-66, *ibid.*, provide respectively that replacement workers are not employees of the bargaining unit and that striking or locked out employees have the right to be reinstated in the bargaining unit after a labour dispute in preference to replacement workers.

¹⁸⁰ *House of Commons Debates* (19 February 1998) at 4168 (debates for 2d reading Bill C-19).

¹⁸¹ The addition of the word “demonstrated” in the provision was not meant to increase the burden of proof (see “Minutes of Proceedings”, *supra* note 130 at 15, specifically the explanation of Mr. Michael McDermott, Senior Assistant Deputy Minister. See House of Commons, Bill C-19, *An Act to amend the Canada Labour Code (Part I) and the Corporations and Labour Unions Returns Act and to make consequential amendments to other Acts* (minutes of proceedings of 28 April 1998) (Ottawa: Standing Committee on Human Resources Development and the Status of Persons with Disabilities, 1998) at 15, more specifically the explanation of Mr. Michael McDermott, Senior Assistant Deputy Minister).

¹⁸² *Black’s Law Dictionary*, 6th ed., s.v. “demonstrate”.

the trade union should be required to establish a link between the employer's bad faith bargaining and use of replacement workers. To prove that an unfair labour practice has been committed under the new provision, the trade union should be required to demonstrate that the employer used replacement workers to pursue illegitimate bargaining objectives and therefore undermined the trade union's representational capacity.

The preceding analysis of the prohibition relating to replacement workers leads to the following conclusions:

1. The employer who bargains in good faith and uses replacement workers should not be prohibited from further use because it does not have any "anti-union *animus*";
2. The employer who bargains in bad faith and uses replacement workers should be found in breach of paragraph 50(a) of the Code but should not be prohibited from further use because it does not necessarily have the required "anti-union *animus*";
3. The employer who bargains in bad faith by using the services of replacement workers should be prohibited from further use because it has the required "anti-union *animus*".

Because the trade union does not benefit from a reverse onus, establishing this unfair labour practice on a balance of probabilities constitutes a heavy burden, particularly when considering the difficulty of proving the employer's "anti-union *animus*" or that the employer sought to undermine the bargaining agent's status by using replacement workers. The employer's unlawful intention may be implicitly drawn from circumstantial evidence linking its bad faith bargaining and/or the commission of other unfair labour practices with its use of replacement workers. As previously mentioned, the *Sims Report* has indicated that the employer's intention to undermine the trade union's representational capacity "can be inferred from reports of unfair labour practice complaints and from first-hand accounts of the disputes themselves."¹⁸³ Therefore, the greater the number of unfair labour practices committed by the employer, the greater the possibility that the Board will infer that the employer had the required "anti-union *animus*".

The new provision represents another tool a trade union may use to have an employer's bad faith bargaining sanctioned by way of a prohibition on the further use of replacement workers, an additional remedial power granted to the administrative tribunal following the adoption of the recent amendments. Are there any other remedies the Board may impose on the employer for the breach of subsection 94(2.1) of the Code?

¹⁸³ *Sims Report*, *supra* note 2 at 130.

3. Remedial Orders

Following the recent amendments to the federal labour legislation, the Board has been given new powers to remedy the employer's illegitimate use of replacement workers. Specifically, in the event of a breach of subsection 94(2.1) of the Code, the Board is vested with the power to order the employer to comply with or cease contravening this section¹⁸⁴ and to stop using, for the duration of the dispute, the services of replacement workers.¹⁸⁵ In addition, the Board has been given the power to order an employer to do or refrain from doing anything that it is equitable to require of the employer in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfillment of those objectives.¹⁸⁶

The Board also disposes of the power to order the employer to include in or withdraw specific terms from a bargaining position. The Board may also direct a binding method of resolving those terms in the case of a contravention of the duty to bargain.¹⁸⁷ In light of the *Sims Report*, this power seems well-suited to remedy a breach of the new provision on replacement workers:

[A]s we have already indicated with respect to the illegitimate use of replacement workers, where the Board finds bargaining proposals, or the lack of them, to be a veneer for efforts to rid the worksite of the union, then we think it can, and in extreme cases, must use its remedial powers to counteract that action.¹⁸⁸

The Board may decide to impose one or many of these remedial measures on the employer in the case of a violation of subsection 94(2.1) of the Code.

Despite the prohibition on the use of replacement workers, the employer should still be allowed to contract out work during a labour dispute, as it is a right of management.¹⁸⁹ When the parties reach the stage of strike or lockout, the employer is no longer bound by the provisions of the collective agreement which may have prevented the contracting out of work. The employer should maintain its right to contract out, as it is not subject to any restriction under the Code.

¹⁸⁴ *Canada Labour Code*, *supra* note 1, s. 99(1); Bill C-19, *supra* note 65, cl. 45(1); Bill C-66, *supra* note 62, cl. 45(1).

¹⁸⁵ *Canada Labour Code*, *ibid.*, s. 99(1)(b.3); Bill C-19, *ibid.*, cl. 45(2); Bill C-66, *ibid.*, cl. 45(2). See also *Sims Report*, *supra* note 2 at 131.

¹⁸⁶ *Canada Labour Code*, *ibid.*, s. 99(2), as am. by S.C. 1991, c. 39, s. 3. See also *Sims Report*, *ibid.* at 212-13.

¹⁸⁷ *Canada Labour Code*, *ibid.*, s. 99(1)(b.1); Bill C-19, *supra* note 65, cl. 45(2); Bill C-66, *supra* note 62, cl. 45(2). See also *Sims Report*, *ibid.*

¹⁸⁸ *Sims Report*, *ibid.* at 213.

¹⁸⁹ The managerial right of contracting out is explained in Carrothers, Palmer & Rayner, *supra* note 4 at 513-20.

4. Other Approaches

The Board could adopt other approaches to the issue of replacement workers but further analysis should prove them not to be better-suited. For example, the Board could assess the validity of each bargaining objective of the employer and of the trade union. Although the initial reluctance of the Board to subject the parties' bargaining objectives to review has recently been relaxed through the decision in *Royal Oak Mines*¹⁹⁰ and through the addition of some of the new remedial powers,¹⁹¹ such an approach has been rejected in the past, because it would threaten the parties' freedom, which represents the cornerstone of our system of free collective bargaining.¹⁹²

The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, *the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith.* Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, *the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues.*¹⁹³

It could be possible for the Board to adopt an approach similar to that which has been developed in the United States, and recognize a distinction between an economic strike and unfair labour practice strike. In matters presented before the National Labor Relations Board, the nature of the strike determines the right of reinstatement of striking employees after a work stoppage. The employer may use replacement workers for any kind of strike and may also hire such workers in preference of striking employees if the strike has not been caused or prolonged by its unfair labour practices.¹⁹⁴ The adoption of such an approach by the Canada Labour Relations Board seems very improbable, given that the nature of a labour dispute has very little relevance under the Code; the right to return to work after a work stoppage is automatic

¹⁹⁰ *Supra* note 57 at 400. See also Adams, *supra* note 4 at para. 10.1575.

¹⁹¹ *Canada Labour Code*, *supra* note 1, ss. 99(1)(b.1), 99(2).

¹⁹² See e.g. *Syndicat des employés de CHNC New Carlisle (CNTU) and Radio CHNC* (1984), 55 di 61 at 75, C.L.R.B. No. 450, online: QL (C.L.R.B.) (decision involving the duty to bargain).

¹⁹³ *CKLW Radio Broadcasting 1977*, *supra* note 145 at 58-59 [emphasis added]. See also Clarke, *supra* note 150 at 12-1:

The Board assumes an unobstructive role in overseeing the parties' bargaining. The Board does not seek to be a referee between the parties, preferring instead to let the adversarial system designed by Parliament take its course. However, the Board will ensure that negotiations by both employers and unions are carried out in good faith and that the parties have as their main intent the concluding of a collective agreement.

¹⁹⁴ For a comprehensive analysis of the issue of replacement workers in the United States, see W.T. Krizner, "The Mackay Doctrine: Much More Than Mere Dicta" (1998) 49 Lab. L.J. 997.

for striking employees.¹⁹⁵ As well, the Board has only twice discussed the nature of a strike or the distinction between economic strike and unfair labour practice strike in its prior decisions and the approach has not received much favour.¹⁹⁶

The adoption of principles similar to those of the duty to bargain would appear to be a preferable approach for the Board because it would promote the legislative objectives of the Code, and would provide a framework for the assessment of the legitimacy of the employer's bargaining objectives and offer more consistency with the Code as a whole.

Conclusion

The development of Canadian labour relations illustrates the search for a balance of powers between employers and employees, which began with the legalization of the right to join a trade union and the adoption of a system of collective bargaining, and is ongoing through the modernization of labour legislation. This balancing effort performed by legislators, labour relations boards, and courts is not an easy task and the issue of whether or not employers should be allowed to use replacement workers during labour disputes still represents a source of disagreement between federal and provincial jurisdictions, and is a good example of the struggle to balance interests.

Prior to the adoption of the recent amendments, federal labour legislation did not prohibit the employer's use of replacement workers during a strike or lockout. While the objectives pursued by Parliament and the Board were the encouragement of free collective bargaining and the constructive settlement of disputes, in some labour conflicts, the employer used the services of replacement workers to rid its workplace of trade union's representation rather than to achieve bargaining objectives without being subject to effective orders by the Board. Following the recommendations of the *Sims Report*, the new provision on replacement workers was designed to rectify this aberration by prohibiting the employer from using such workers for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives.

In essence, the legislative response sought to protect the basis of our system of collective bargaining, namely the right of the employer to carry on its business and the right of employees to join a trade union and to participate in its lawful activities. Parliamentary committees consulted the interested parties on the issue, tried to reach consensus between them and pursued legitimate objectives. However, the lack of simplicity in the language used for the new provision will present a significant challenge to the Board because of the inevitable difficulties of interpretation. The wording of the new provision will certainly be centre-stage for much debate over the extent of the

¹⁹⁵ See Part I.C.4: Legal Status of Striking or Locked-Out Employees, above.

¹⁹⁶ See *I.B.E.W., Local 529 and Central Broadcasting Company (1975)*, 10 di 8, C.L.R.B. No. 48, online: QL (CLRB) and *Eastern Provincial Airways and Canadian Air Line Pilots' Association (1983)*, 51 di 209, 3 Can. L.R.B.R. (N.S.) 75.

rights and obligations of employers and trade unions, and it may take some time before a consistent approach is established and followed by the labour community.

Despite the apparent difficulties of interpretation, meaning should be given to the new provision by adopting principles similar to those that apply to the duty to bargain. In determining whether or not the employer has bargained in good faith with the trade union, the Board would benefit from a legal framework through which to assess the legitimacy of the employer's bargaining objectives. It should be concluded that the employer has interfered with the trade union, and has therefore undermined its representational capacity, only where the trade union has demonstrated that the employer failed to bargain in good faith by using the services of replacement workers. Further use of replacement workers by the employer should then be prohibited and, if required, other suitable remedies should be ordered.

If interpreted in the manner proposed, this partial prohibition on the use of replacement workers should constitute a useful tool for the fulfillment of labour relations objectives. Vested with the power to prevent further use of replacement workers during a strike or a lockout, the Board has the necessary authority to provide an appropriate remedy to a trade union for prejudice caused by an employer whose objectives are to undermine the bargaining agent. The possibility of imposing such a radical constraint on the employer's right to carry on its business should reduce the occurrence of regrettable labour disputes such as that which took place in the case of *Royal Oak Mines*, at a time when the Board had less remedial power than it does under the amended legislation. Conversely, the employer who is complying with the legislation and bargaining in good faith should retain its right to use replacement workers. The balance which has been struck in the new provision of the *Canada Labour Code* should be beneficial to employers, trade unions, and labour relations overall.
