1. THREE TYPES OF ARGUMENTS ABOUT THE ANTI-SCAB LAW

On Saturday, January 21, 1995 the front page of *The Globe and Mail* gave prominence to two stories. One headline read “Ottawa May Ban Replacing Strikers” and the other read “Warren Found Guilty in 9 Miners’ Death”. The connection between these two stories did not go unnoticed and, indeed, the coverage given to the Federal Government’s musings about amending the *Canada Labour Code* specifically referred to the 1992 explosion which killed nine miners, including three replacement workers, at the Giant Gold Mine in Yellowknife. I begin the article by referring to the connection between anti-replacement or anti-scab legislation (and I use the two terms interchangeably) and violence on picket lines, but not because I think the central legal argument for anti-scab legislation is that it reduces violence. This is not my view. Rather, it is my view that, from the point of view of *legal principle*, the events at the Giant Gold Mine are very important, but for a very different reason.

* This comment was written prior to Bill 7, introduced on October 4, 1995 by the recently elected Progressive Conservative Government, and which received Royal Assent on November 10, 1995. Bill 7 deleted the anti-scab provisions from the *Labour Relations Act*. This comment therefore addresses the situation under Bill 40.

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I draw attention to the fact that I use the words “from the point of view of legal principle”. In addressing the issue of anti-scab laws it is important to separate three types of arguments for and against such legislation: (1) arguments about basic economic and distributive justice issues, (2) arguments about other social policy concerns (such as reducing violence), and (3) arguments from legal principle. Thus there are, in my view, three different sorts of debates about the rationality, or utility, or soundness of Ontario’s decision to pass an anti-scab law. First, from the point of view of general economic and distributive justice concerns there is a legitimate debate about whether one should pass an anti-replacement worker law. The basic issue is whether one believes trade unions require more bargaining power or not. This in turn is simply an assessment of our society’s needs, in light of a host of considerations we would wish to take into account regarding a just distribution of wealth between capital and labour. Without pretending to be exhaustive, it is obvious that several of the “host of considerations” one would want to take into account are (1) the requirement that Canada be able to attract investment in order to have jobs at all, and (2) the concern over the continued “impoverishment” of the Canadian middle class in light of steadily declining real wages since the late 1970s.

When I speak of other social policy considerations, I do think of the issue of violence on picket lines which is so commonly invoked in both supporting, and arguing against, such anti-replacement worker legislation. There may be other “external” concerns, but this one is front and centre and, as in the Giant Gold Mine tragedy, obviously important.

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3 Since this comment was written, on October 4, 1995 the Government introduced Bill 7 which, inter alia, removed the anti-scab provisions brought in under Bill 40. Bill 7 received Royal Assent on November 10, 1995.

4 For some data on this phenomenon see, for example, Good Jobs Bad Jobs (Economic Council of Canada, 1990); Working Time and the Distribution of Work (Supply & Services Canada, 1994); see also John Gray, “Does Democracy Have a Future?” New York Times (January 22, 1995) (Book Review at p. 1); and “For Richer, For Poorer” (November 5-11) The Economist, at 19-21.

5 See the editorial “Lockout this Law” The Globe and Mail (Tuesday, January 24, 1995) A18.
When I turn to the third class of reasons for and against such legislation, I am talking about "legal principle". Here I mean to distinguish and set apart from the previous two categories arguments which flow from the structure, "grammar" or "logic" of Canadian collective bargaining legislation as we know it. That is, these are arguments of principle to the effect that either the anti-scab law is required by, or inconsistent with, the complex structure of law which already governs collective labour relations in this country.

There are, I think, two arguments from legal principle for and against the anti-scab law.

The best argument in favour of anti-scab laws goes as follows. Permitting employers to hire replacement workers on a permanent or "quasi-permanent" basis is a recipe for permitting employers to "contract out" of the Act, avoid their obligations regarding collective bargaining, and do an "end run" around the status of the exclusive bargaining agent with whom the statute demands that the employer deal. When I first studied labour law 20 years ago this would have struck most people as a slightly implausible argument. Its plausibility now flows from a perceived growth in a phenomenon which the Giant Gold Mine situation represents and, indeed, of which it is emblematic. That phenomenon is the phenomenon of employers hiring replacement workers, withstanding a long strike, and ultimately (and perhaps having set out with that intention) decertifying the union either on a de jure or de facto basis. From this perspective, the ability of the employer to hire replacement workers is an invitation to the employer to "exit" the statute. The perceived reality is that in Canada there are now employers ready, willing and able to employ this tactic.

This perception in Canada is informed by the perception of the state of the world in the United States. President Reagan’s wholesale replacement of the air traffic controllers is in the popular imagination (at least of union leaders) emblematic of the new employer attitude which, when combined with the ability to hire (in that country) permanent replacement workers, has led to an aggressive campaign on the part of employers to decertify unions through the use of replacement workers.6 Leaving aside any question of how general a phenomenon this is in the United States, let alone Canada, it is clear that we do have specific incidents of this phenomenon – witness the Giant Gold Mine

problem – and that at the level of “legal principle” this is indeed a problem with which those concerned with maintaining the integrity of the system must grapple.

The second argument of “legal principle” is that the introduction of anti-scab legislation alters the “balance of power” in the legislation which, it is alleged by those against anti-scab laws, is now poised at an appropriate level dictated by legal principle. The argument is, correctly, that under the Canadian system of collective bargaining what we have is still bargaining. Each side is free to withdraw at some point during negotiations in order to force the other to see the error of its ways and to come to a more sensible bargain. It is argued that, in the absence of an anti-scab law, for example under Ontario law pre-January 1st, 1993, there was an appropriate “balance of power” because each party was free to refuse to participate with the other in the enterprise of production, to seek to deploy its assets elsewhere and to seek the assistance of third parties in so doing. Thus, employers were free to hire replacement workers, but workers were free to seek employment elsewhere or to enlist the aid of third parties in other ways through boycotts, etc.

There are obvious problems with this argument, many of which are pointed out by Paul Weiler in his famous article “Striking a New Balance”. For example, there existed in Ontario and elsewhere a distinct asymmetry between the law’s attitude towards employers enlisting the support of third parties (replacement workers) and the law’s support for unions doing the same things (primary picketing, secondary picketing, consumer boycotts etc.). On this view, the balance of power argument gets turned on its head. The anti-scab law is said to be justified and required in order to achieve a balance of power (roughly equal restrictions to enlist third party support). From the point of view of those arguing against anti-replacement laws, prohibiting the use of replacement workers affects the basic strategy of bargaining in that it insulates the union from competition in the labour market. This is true. It is, of course, also true that the employer, and thus the union, is not insulated from competition in the product market.

There are, thus, two key arguments of legal principle raised respecting the anti-scab debate: that permitting replacement workers fosters decertification and that it alters the balance of power between

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7 Ibid. See also Weiler, Governing the Workplace: The Future of Labor and Employment Law (Cambridge: Harvard Univ. Press, 1990) 265-269.
the parties. In what follows I focus upon the first of these issues which is, I think, the most pressing.

Even if we assume there was in existence an appropriate balance of power, the key question which remains is whether, in light of current realities, the threat of “exit” by employers through the use of replacement workers is so compelling that it warrants a creation of a slight asymmetry that the alleged pure logic of bargaining would entail. Again, this is why the Giant Gold Mine case is so significant – it is a striking example of the conflict between these two legal principles. I do not think one can fault an analysis which says that some shift in the balance of power is required in order to ensure that some balance is maintained at all. That sounds like sound legal reasoning to me. But, of course, that depends upon a finding that the use of replacement workers was a vehicle for “union busting” in Canada. That in turn forces us to look at a host of other legal issues under Canadian labour law. If the existing rules did permit employers to use replacements to avoid the statute, then the anti-scab law will make an important legal difference. But if the existing legal regime was sufficient to prevent this tactic, then the law does not do very much, from a legal point of view.

2. HAS THE ANTI-SCAB LAW MADE ANY LEGAL DIFFERENCE?

Before turning to the central question I have identified, other issues must be noted. I start with a reminder that the significant majority of Ontario workers do not engage in collective bargaining and, as a result, all strike activity by such workers is illegal. Thus, in assessing the impact of the anti-scab legislation we should begin with the reminder that for the majority of workers in Ontario this change is an irrelevancy.  

For those within the system of collective bargaining in Ontario, what was the situation before the anti-replacement provisions were enacted? First of all, the situation was complex, and is compared with the new situation as follows:

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8 There is, of course, the interesting question of whether the change in the law will actually aid unions in their efforts to organize the hitherto unorganized. That is a question which we will have to wait for some time in order to answer in any sound empirical way.
(a) Employees in the Striking Unit

Before the new legislation, employees in the striking unit could, legally, continue to go to work; that is, cross their own union's picket line. There was a further issue of what sort of legal recourse the union could take against those who cross picket lines. Could the trade union discipline or expel its members for such action? Of course, closed shops are unusual in Ontario, but for those covered by closed shops this interesting issue remained. If a member could be disciplined, could a member bound by a closed shop provision lose his or her job? This depended upon the appropriate interpretation of what is now section 47(2) of the Act, and whether such conduct in crossing the picket line is "reasonable dissent" within the trade union. For non-members in the bargaining unit, this was not an issue.

The most overlooked and misunderstood aspect of the anti-replacement worker provision is that it is not a provision limited to replacement workers at all, but is much more than that. Not only are replacement workers prohibited from performing struck work, but so are members of the bargaining unit. In terms of either of the arguments of legal principle, cited above, (avoiding decertification via replacement and balancing the limits on appeal to third party support) this is an unnecessary and unwarranted amendment to the Act. The threat of decertification posed by replacement workers and the problem of third party support workers are addressed by prohibiting replacement workers, not by removing the rights of the members of the bargaining unit to decide for themselves whether to support a strike or not.9

(b) Employees in Non-Striking Bargaining Units of the Struck Employer at the Struck Location

It has long been the law, mistakenly in my view, that a refusal by non-striking workers to cross the picket line set up by members of a striking unit at their place of work is, in and of itself, a strike.10 This is one of the many ways the law limited the rights of unions to enlist third party support. As I understand the new legislation, this situation has not changed. However, the new provisions do extend, in section 73.1(7), a right to refuse to perform strike work. Thus, one has to go to

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9 This is linked to the "watering down" of the certification process – see Weiler, "Promises to Keep" (1983), 96 Harvard L. Rev. 1769.
work to perform one's own functions, but can refuse to perform the functions of the striking workers.

(c) **Managers at the Struck Location**

It was the case before, and also after, the amendment that managers at the struck location can perform struck work. But they too have a "right to refuse".

(d) **Other Employees of the Employer at Other Locations**

Under the old law, employees at other locations of the employer were permitted to do the struck work at their location and, in theory, could have been moved to the struck locations to perform work there. Now, under the new legislation, employees at other locations can perform struck work there, but have a right to refuse to do so. They cannot, however, be moved to a struck location.

(e) **Managers From Other Locations**

Before the amendments, employers were free to use, consolidate, or move around, managers from other locations to perform work at a struck location. Under the new amendments, the employer cannot move managers from non-struck locations. Managers from other struck locations can be consolidated and asked to perform struck work, but they too have a right to refuse.

(f) **The Relative Job Rights of Striking Workers and Replacement Workers**

Here we come to the heart of the matter. The key argument based on legal principle assumes that, under the old law, replacement workers could be used to aid in effectively decertifying a union either *de jure* or *de facto*. The meritoriousness of this assumption depends upon the answer to two questions. First, could replacement workers actually replace striking workers who wished to return to work? Second, could replacement workers vote in a decertification application? In Ontario, the answer to the first question was quite complex. First, under the old Ontario law, striking workers had an absolute right to reclaim their job within six months of the beginning of the strike. The crucial question was what happened after the six months were up.

11 The "old" s. 73.
On this question, the Ontario Labour Relations Board misinterpreted the Act in the Miniskool decision, but partially recovered in the Shaw-Almex Industries decision. The issue in Miniskool was whether it was an unfair labour practice for an employer to keep on a replacement worker in preference to a striking worker after the striker's section 73 rights had lapsed. What Ontario should have done is what the Canada Board did in the E.P.A. decision and clearly state that preferring a replacement worker to a striker is an unfair labour practice. Ontario law did not do this clearly. Thus, in my view, Ontario jurisprudence made available the argument that permitting replacement workers opens the door to employers to avoid their obligations under the Act and to unilaterally exit the bilateral collective bargaining relationship.

The law in Ontario may also have been too ambiguous on the second question of whether replacement workers are eligible to participate in decertification votes during a strike. This was the key question resolved by the Canada Labour Relations Board in connection with the Giant Gold Mine strike, in holding that replacement workers were not eligible to vote during the decertification proceeding.

If, in Ontario, it had been clearly established that replacement workers were ineligible to vote during decertification proceedings, and that it was an unfair labour practice for an employer to prefer a replacement worker to a striking worker, the legal argument in favour of the anti-scab law based on its relationship to decertification would not have been available. We would then have been left with the less compelling, albeit strong, argument based on redressing the imbalance in economic weapons during a strike. The argument in favour of anti-

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16 I do not attempt to resolve this point in detail here. My view is that Weiler is right – there was asymmetry in our law. The path Ontario has taken is the path not taken by Weiler. Weiler argued that we should address the asymmetry by removing the restrictions on unions and thus achieve a balance. Ontario's path has been to increase the restrictions on employers. See Weiler, above, note 6. But Ontario has overstepped the mark in its creation of a “statutory strike” for all members of the unit. This is not related to a balancing of third party support at all.
scab provisions, related to decertification, is clearly closed by the new anti-replacement worker legislation. The one thing the anti-scab law clearly does is prohibit an employer from hiring replacement workers to do any of the struck work at any location. There is no longer any contest over who gets to fill the job permanently, nor is there any contest about who gets to vote in a decertification proceeding. Thus, the avenue of exit which formerly was possibly provided to the employer is barred. This, is my view, is the best legal justification for the anti-scab law.

However, if Ontario law had been more clearly reflective of the Canada Board jurisprudence, then the legal argument would not work. There would be no such argument from legal principle in favour of the anti-scab law. To put this another way, the more one is of the view that Ontario and Canada Board jurisprudence were similar (and we are not really here to argue the details of this) the less the anti-scab law achieves or actually changes.

All of the action is, on this view, with the other legal argument about balancing bargaining power and the other sorts of justification of the law – either general economic and distributive justice concerns, or other public policy concerns such as violence. It is to those issues that I now turn.

3. HAS THE ANTI-SCAB LAW MADE ANY ECONOMIC DIFFERENCE?

I am not an economist, nor a social scientist trained in the complex empirical methodologies of regression analysis, etc. However, in order to answer the question just posed one is forced to try to make sense of a literature created largely by and for economists and social scientists specialized in industrial relations and sophisticated statistical techniques.

The first conclusion about which I believe there to be a consensus is that it is much too early to be able to undertake the sort of analysis required to isolate the impact of the passage of the anti-scab provisions, so as to isolate the multitude of other variables at play and control for them.

However, the general issue of the impact of restrictions upon the use of strike replacements has been much studied. For example, the previous law of Ontario, which placed certain restrictions on the use of replacements, has been studied, along with the Quebec legislation
which bans the use of replacement workers, and experts have analyzed their impact in quantifiable terms. Morley Gunderson, of the Centre for Industrial Relations at the University of Toronto, along with a number of colleagues, has undertaken an analysis of the impact of a host of legal rules, including prohibiting replacement workers, upon three key variables – (1) the incidence of strikes, (2) the duration of strikes should they occur, and (3) the impact on wage settlements. In a 1990 study,17 Gunderson and Melino concluded that “the prohibition of replacement workers increases both strike incidence and conditional duration”.18 In another context, Gunderson, Curvin and Reid19 also concluded that “our results indicate that the legislation is associated with a statistically significant and quantifiably large increase in both strike incidents and duration and hence overall strike activity”.20 Crampton, Gunderson and Tracey, in a 1994 article, also found that a replacement ban increases the real wage level.21 Some of these results have been characterized as “somewhat surprising”.22 Why?

The results on strike duration and strike incidence are surprising because, based on certain theoretical models of the “causes” of strikes, these results are not indicated. One such model, the “joint cost” model, hypothesizes that strikes will be used less when the joint costs to both parties (employers and unions) are high relative to the cost of using other mechanisms for achieving those same ends.23 Anti-scab legislation increases the cost to the employers of strikes by removing their option of carrying on production by using replacement workers, and thus should result in fewer and/or shorter strikes. Thus, the data which Gunderson and his colleagues have collected, which indicates that the result is more and longer strikes, is counter-theoretical, at least on this model. However, the data indicate higher wage settlements, i.e. that unions have greater bargaining power, because the legislation increases

18 Ibid. at 310.
20 Ibid. at 517.
21 The Effect of Collective Bargaining Legislation on Strikes and Wages, Department of Economics, University of Maryland (unpublished).
22 Gunderson, Melino & Reid, above, note 19 at 517.
23 Above, note 19 at 514.
the cost to only one party, the employer, and that party has to "bribe" the other party through an improved offer.24

On the other hand, there are theoretical perspectives from which the surprising data about strike duration and incidents is said to make sense. Models of what is called "strategic bargaining" are said to explain the phenomenon of increased strike activity in the presence of anti-replacement worker provisions. Keenan and Wilson, in an paper entitled "Strategic Bargaining Models and Interpretation of Strike Data",25 argue that "attrition, screening, and signalling models derived from strategic analysis" all predict the observed outcome that Gunderson and his colleagues have noted. In a subsequent paper, Wilson26 gives a common-sense explanation of these theoretical insights. He argues that the impact of anti-replacement worker legislation is to increase the uncertainty at the bargaining table from the union's point of view. The situation at the table is that the employer has superior information about the value of the union's services, and the union knows this. The union also knows that it will be in the employer's interest not to disclose the true value of the union's services and to attempt to win a larger share for itself. The advantage of a strike is that it imposes costs upon the employer and the idea of the strike is that it forces the employer to demonstrate convincingly that it cannot afford a higher wage. The strike, therefore, is a "kind of communication". The ability of the employer to acquire a new work force is one of the concrete ways which puts "an upper bound on the range of acceptable wages".27 The idea is that when "the union knows this bound, the problems of communication are reduced and strikes tend to be shorter".28 When this source of communication and information is removed, through the implementation of an anti-scab law, the result is longer strikes and more of them. This, then, would explain the data which Gunderson and his colleagues found "surprising". Gunderson and his colleagues, in their later work, have drawn attention to the work of Keenan and Wilson as a possible explanation for the data they discovered. The theoretical models are, however, in agreement that anti-scab laws do

24 Ibid.
26 "Negotiation with Private Information: Litigation and Strikes", The Nancy L. Schwartz Memorial Lecture, Kellog Graduate School of Management (May 1994 [unpublished]).
27 Ibid. at 15.
28 Ibid.
increase the relative bargaining power of unions, and do lead to an increase in wages. There is no theoretical model which disputes even this.

Nonetheless, apart from theoretical models, there is data which disputes this conclusion. John Budd, a distinguished commentator on these matters, has recently demonstrated that the empirical reality of the impact of various forms of anti-scab laws upon union bargaining power and bargaining results is quite mixed and difficult to assess. He concludes, "the preferred specifications imply that a ban on strike replacements significantly increases strike duration and wage change settlements, but not strike insurance or real wage levels."29 Can an explanation be found for this conclusion? I leave the detailed and internal assessment of Budd’s methodologies to those expert in the field. But there is one point which I wish to make.

All of the researchers engaged in the project of estimating the actual impact of anti-scab laws seem to have ignored one important question; that is whether the anti-scab laws actually prohibit something that otherwise would be done, in other words, whether they actually effect a change in the real world. In all of the research to which I have referred, the researchers have simply taken their data regarding strikes, strike duration, and wage settlements, and analyzed changes in the data following a change in the law. There is an assumption that the law actually directed itself to behaviour which was occurring in the real world, and that the law brought about a change in that behaviour in the real world which results in the changed data. But does this assumption hold? This turns upon the question of whether replacement workers, of the sort now prohibited, were actually used by employers before the passage of the law. It may turn out that what the law prohibits is something that was not occurring in any event. If this is the case, then all of the data and all of the theoretical speculation about it is beside the point.

However, it is quite difficult to get sound information about the use of replacement workers by struck employers prior to the passage of the Ontario legislation. The only data of which I am aware in Ontario is the study produced by the Ministry of Labour during the period of

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controversy surrounding Bill 40 and which addressed replacement of striking workers in work stoppages during 1991. That study showed that, in 1991, in Ontario, in 40 per cent of stoppages involving 62 per cent of all workers who went on strike in that year, no struck work was performed by anyone. In the 60 per cent of stoppages where struck work, or part of it, was continued during the stoppage, the breakdown of those who performed that work is as follows: in 29 per cent of those cases, only management personnel did the work of striking workers. In a further 20 per cent, management and non-union employees did the work. In only 21 per cent of those cases where some struck work was performed, were new employees used, and these work stoppages involved 6 per cent of the workers who went on strike in the year. Further, in 2 per cent of the work stoppages in which some struck work was continued, management staff, non-union staff, and employees who abandoned the strike, did the work. In the remainder of the work stoppages where struck work was done, the work was contracted out.

The net result of all this is that in only 23 per cent of the 60 per cent of the work stoppages in which some production was continued, did employees in the bargaining unit or new employees perform struck work. That is, in only 13.8 per cent of the work stoppages in Ontario in 1991 were bargaining unit employees or replacement workers used. The percentage in which outside or replacement workers were used is 12 per cent. These work stoppages involved 8 per cent of the workers who went on strike in the year. What lessons can be drawn from this? Well, perhaps it should come as no surprise that a change in public policy affecting only 13.8 per cent of strike activity, and 8 per cent of the number of workers who went on strike, should have some difficulty in establishing itself in the data as a major variable creating a major change in the overall wage settlement rates in the province. Further and more complete data would obviously be extremely desirable on this question. In the absence of such further data, I would be content to believe that Budd’s conclusion are prima facie accurate. It would, without further evidence, be surprising if statistically significant in-

Increases could be created with a legal change with such a small impact in the real world.\textsuperscript{31}

4. HAS THE ANTI-SCAB LAW MADE ANY DIFFERENCE OTHERWISE?

Here, I think one can be more definitive. In my view, the anti-scab law has made a difference – not particularly legally, and not particularly economically – but definitely rhetorically. The level of rhetoric associated with labour law reform in Ontario has escalated to new heights, and the lack of an informed basis for much of this discussion is only matched by its hysterical tone.

But our world has been changed, not merely rhetorically, but conceptually. The debate about the anti-replacement worker legislation in Ontario has, in large part, been mounted in terms of what I would refer to as “international regulatory competition”. The basis of the argument here is that Ontario cannot afford to pass “progressive” labour laws because jurisdictions with which Ontario is in competition do not have such “high” labour standards. Thus, Ontario is put at a “competitive disadvantage”. These are complex questions, but I would say the one positive contribution of the anti-scab law debate (and the general Bill 40 debate) has been to awaken us to the need for contemplation about Ontario’s labour law, not as the law of an isolated jurisdiction, but as one of the policies of a player in an increasingly economically integrated world. This is where our attention should be focused, not because the answers are easy, as many opponents of Bill 40 seem to believe, but because they are complex, important and unavoidable.\textsuperscript{32}

\textsuperscript{31} Further anecdotal evidence for this proposition is found in the data indicating low on average annual per cent wage increases in Ontario (including private sector alone) for both 1993 and 1994. See Ontario Collective Bargaining Review 1993 and December 1994 Report (Lab. Man. Services – Office of Collective Bargaining Information).

\textsuperscript{32} See Langille, for example, “‘Labour Standards in the Globalized Economy’ and The Free Trade/Fair Trade Debate” in Sengenberger & Campbell (eds.) International Labour Standards and Economic Interdependence (International Institute for Labour Studies, Geneva, 1994).