The use of replacement labour during strike action in South Africa and Canada: A legal analysis

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ABSTRACT

Like in many other countries, the use of replacement labour during protected strike action has been and continues to be one of the most controversial issues in South Africa's industrial relations system. It is often, inter alia, argued that the use of replacement labour renders a strike ineffective and may even turn collective bargaining into collective begging. On the other hand, it is often, inter alia, argued that a ban on the use of replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases.

The main objective of this study is to determine to what extent replacement labour should be allowed as a labour weapon by employers during strike action. In order to achieve this objective, this study: provides a critical analysis of the legal position and issues surrounding the replacement of lawfully striking workers in South Africa; critically analyses the position of the ILO regarding the replacement of lawfully striking workers and; determines the lessons that South Africa may learn from Canada regarding the regulation of replacement labour.

The conclusions that are drawn are that not only does the use of replacement labour lead to violent strikes but also renders strikes ineffective and turns collective bargaining into collective begging. It is argued that section 76 of the Labour Relations Act in South Africa should be amended so as to limit the use of replacement labour to strikes in sectors which can be regarded as essential or essential services.

Keywords: collective bargaining, strikes, replacement labour.

OPSOMMING

Soortgelyk aan ander lande is die gebruik van plaasvervangingsarbeid gedurende 'n beskermde staking een van die mees kontroversiële kwessies in Suid-Afrika se industriële verhoudingsisteem. Dit word dikwels, inter alia, geargumenteer dat die gebruik van plaasvervangers 'n staking oneffektief maak en kan selfs kollektiewe onderhandeling verander in kollektiewe bedelary. Die teendeel hiervan is dat, só word dit geargumenteer, 'n verbod op plaasvervangingsarbeid sal die onderhandelingsmag van die unies vergroot en dít sal lei tot aansienlik hoër loonverhogings.

Die hoofdoelwit van hierdie studie was om te bepaal tot watter mate plaasvervangingsarbeid deur werkgewers gebruik kan word as arbeidswapen gedurende 'n staking. Ten einde die doelwit te bereik, gee hierdie studie 'n kritiese analise van die wetlike posisie en kwessies rondom die vervanging van wettige stakers in Suid-Afrika; 'n kritiese analise van die posisie van die Internasionale Arbeidsorganisasie ten opsigte van die vervanging van stakende werkers; en bepaal die lesse wat Suid-Afrika by Kanada kan leer ten opsigte van die regulering van plaasvervangingsarbeid.

Die gevolgtrekkings wat gemaak word is dat die gebruik van plaasvervangingsarbeid nie slegs tot gewelddadige stakings lei nie, maar dit lei ook tot oneffektiewe stakings en veroorsaak dat kollektiewe onderhandeling in kollektiewe bedelary omskakel. Dit word geargumenteer dat afdeling 76 van die Wet op Arbeidsverhoudinge in Suid-Afrika aangepas moet word om die gebruik van plaasvervangingsarbeid te beperk tot sektore wat as noodsaaklik geag word, of dié wat noodsaaklike dienste lewer.

Sleutelwoorde: kollektiewe onderhandeling, stakings, plaasvervangingsarbeid

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LIST OF ABBREVIATIONS

1956 LRA	*Labour Relations Act* 28 of 1956
CILSA	Comparative & International Law Journal of Southern Africa
COSATU	Confederation of South African Trade Unions
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	*Labour Relations Act* 66 of 1995
NEDLAC	National Economic Development and Labour Council
NLRA	National *Labour Relations Act* of 1935
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of SA
SACWU	South Africa Chemical Workers' Union
SACCAWU	South African Commercial, Catering and Allied Workers' Union
SACTWU	South African Clothing and Textile Workers' Union
SALJ	South African Law Journal
SANDU	SA National Defence Union
SATAWU	South African Transport and Allied Workers Union
TAWUSA	Transport and Allied Workers Union of South Africa

TOWU	Transport Omnibus Workers' Union

Chapter 1 – Introduction

1.1 Problem statement

South Africa faces profound problems of poverty, unemployment and inequality.[1] In turn, these are said to directly influence actors within labour relations – management and organised labour – and shape the issues on which they engage and the way they do so.[2] Thus, the high rate of unemployment in South Africa makes it easy for employers to find a labour source when their employees participate in strike action.[3] According to statistics published by the Department of Labour, the unemployment rate was 27.7% in 2017,[4] the highest since 2005.[5]

Workers exercise collective power primarily through the mechanism of strike action.[6] On the other hand, employers may exercise power against workers during such strike action "through a range of weapons, such as the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, the exclusion of workers from the workplace (the last of these being generally called a lock-out)" and as a last resort, dismissal.[7]

In South Africa, the right of workers to strike is constitutionally enshrined. Section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) unequivocally states that every worker has the right to strike. Also, this right is given effect to in section 64 of the *Labour Relations Act* 66 of 1995 (the LRA).[8] In

1 Anstey 2013 *South African Journal of Labour Relations* 141.
2 Anstey 2013 *South African Journal of Labour Relations* 141.
3 Van der Welden and Dribbusch *Strikes Around the world 1965-2005: Case-studies of 15 Countries* 54.
4 Department of *Labour Annual Labour Market Bulletin* 2016-2017 15.
5 Department of Labour *Job opportunities and unemployment in the South African labour market 2015 – 2016* 6.
6 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.
7 See *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 66 – hereafter the *Certification* case.
8 See chapter 2 (paragraph 2.3 below), for a discussion on the inception of the LRA. The pre-LRA era and some of the events which led up to the promulgation of the LRA in 1995 are discussed in detail. For a further and more detail discussion on the inception of the LRA, see Du Toit *et al The Labour Relations Act of 1995* 9-25; Grogan *Collective Labour Law* 11-17; Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 278-301.

many countries,[9] including South Africa, the struggle for the right to strike has been a long and painful one for both trade unions and workers. Historically, in South Africa, strikes were a criminal offence and the common law did not recognise the right to strike. For example, the *Railway Regulation Act* of 1908 denied railway employees the right to strike under penalty of criminal prosecution. Also, under the *Labour Relations Act* 28 of 1956, strikes and lock-outs were illegal under certain circumstances.[10] In terms of the common law, strike action constituted a fundamental breach of contract which entitled the employer to dismiss the striking employees.[11] It is therefore not surprising that the Constitutional Court has noted that the right to strike "is both of historical and contemporaneous significance".[12]

According to Levy, an examination of the data on industrial action in South Africa over the last decade "shows an emerging pattern of great concern, reaching a point where it must be seen as a question of the utmost national importance".[13] The data shows that strike incidence declined from 1995 to 2003, and then began to increase. More worryingly, the data also shows that, from 1995 to 2012, there had been an increase in the number of strikes lasting for longer than a month.[14] This has led to the conclusion that "we can expect strikes to last longer in the future".[15] Indeed, the 2014 statistics compiled by the Department of Labour showed that there were fewer strikes compared to 2013, but that the strikes lasted for longer periods of time.[16] It is important to note that 52% of strikes in 2014 were protected while 48% were unprotected. This was the direct opposite of what occurred in 2013 when 52% of strikes were unprotected and 48% were

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9 For example, France, Germany and the United States of America *etcetera*. See Shorter and Tilly *Strikes in France 1830-1968* 21; Axley 1950 *Labour Law Journal* 441; Godfrey *et al Collective Bargaining in South Africa* 1.

10 See section 12(1) thereof.

11 See Myburgh 2004 *ILJ* 962; Grogan *Collective Labour Law* 141; *SACWU v Afrox* 1999 20 ILJ 1718 para 19.

12 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 13.

13 Levy "Strike action: will things ever be the same" 6. See also Botha and Germishuys 2017 *THRHR* 352.

14 See Department of Labour *Annual Industrial Action Report 2015* 18.

15 Levy "Strike action: will things ever be the same" 7-9.

16 See Department of Labour *Annual Industrial Action Report 2014* 3.

protected.[17] In 2015, 45% of strikes were protected while 55% were unprotected,[18] and in 2016 the number of unprotected strikes rose to 59%.[19]

Employers are turning to replacement labour[20] during industrial actions. In 2003, the use of scab labour was at 36% and rose to 45% in 2004 before another increase to 50% in 2005. In 2010 40.9% of employers reported to have used scab labour as opposed to 27.5% in 2009.[21]

A distinction is sometimes drawn between defensive and offensive lock-outs. The distinction relates to the use of replacement labour "where a lockout is in response to a strike, the employer is entitled to employ persons to continue to maintain production during the course of the protected strike".[22] Two judgments addressing pertinent issues in relation to an employer's right to lock-out and the employment of replacement labour (also known as "scab labour") during a strike have recently been handed down by the Labour Appeal Court and the Labour Court respectively.

In *PUTCO Proprietary Limited v Transport and Allied Workers Union of South Africa and others*[23] the Labour Appeal Court ruled that the employer can exclude all employees – striking and non-striking – who do not accept the employer's demand, from the workplace when it decides to institute a lock-out.[24] In coming to this conclusion, the court considered the definition and purpose of a lock-out. In *SACCAWU v Sun International*,[25] the Labour Court held that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.[26] It should be noted that this

17 See Department of Labour *Annual Industrial Action Report 2014* viii, 35.
18 See Department of Labour *Annual Industrial Action Report 2015* 11.
19 See Department of Labour *Annual Industrial Action Report 2016* 5.
20 The terms "scab labour" and "replacement labour" are used interchangeably in this study.
21 See Department of Labour *Annual Industrial Action Report 2006* 2; Department of Labour *Annual Industrial Action Report 2010* vii. It should be noted that the Annual Industrial Action Reports which have been published since 2010 (2011-2016) are silent regarding the number of employers who have used replacement labour.
22 Van Niekerk and Smit *Law @ Work* 394; see also section 76 of the LRA.
23 2015 36 ILJ 2048 (LAC). It should be noted that this case was overturned on appeal by the Constitutional Court in *TAWUSA v Putco* 2016 6 BLLR 537 (CC).
24 *Putco v TAWUSA* 2015 36 ILJ 2048 (LAC) para 64.
25 2016 1 BLLR 97 (LC).
26 At para 19.

judgment directly contradicts the Labour Court's earlier judgment in *Ntimane v Agrinet.*[27]

The two abovementioned recent judgments of the Labour Court and Labour Appeal Court place the spotlight on lock-outs and the controversial practice of using replacement labour during a strike. According to Bendix, "scab labour" has always been controversial in South Africa.[28] Trade unions have argued for a total ban on replacement labour in South Africa.[29] For example, the Confederation of South African Trade Unions (COSATU) has called for scabs to be outlawed. It argues that strikes become meaningless if the employer has the right to employ scabs, and that scabs strip workers of their democratic right to protest. It considers scabs and strike breaking labour brokers[30] as a scourge in the society which undermines orderly collective bargaining.[31]

The use of replacement labour during protected strike action was one of the "key points of contention" during consultation on the proposed Draft Labour Relations Bill of 1995.[32] One of the issues which the drafters of the Draft Labour Relations Bill of 1995 considered was the effect of a protected strike on the employer. Keeping in mind the extensive protection afforded to employees who participate in protected strike action by the Draft Bill, they reasoned that "it is through the resolution of the dispute or continued production, with the use of an alternative workforce, that the company's viability can best be maintained".[33] Therefore, the Draft Bill offered an employer facing bankruptcy three options: Resolve the dispute; employ temporary replacement labour; dismiss the striking workers on grounds of operational requirements.[34]

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27 1999 20 ILJ 809 (LC).
28 Bendix *Industrial Relations in South Africa* 613.
29 See Hepple and Leroux *Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.
30 COSATU has also called for labour brokers to be banned. See Botes 2013 *PELJ* 527. It should be noted that an in-depth discussion on labour brokers would go beyond the scope of this study, and as such will not be done.
31 COSATU 2006 https://pmg.org.za/committee-meeting/7248/.
32 Du Toit *et al The Labour Relations Act of 1995* 29.
33 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 305.
34 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 305. See also section 67(5) read with section 189A of the LRA.

The LRA prohibits replacement labour during a protected strike in only two cases: (1) To continue to maintain production where the whole or part of the employer's service has been designated as a maintenance service, or (2) to perform work of any employee who has been locked out, unless the lock-out is in response to a strike.[35]

It has been argued that permitting the use of replacement labour is one of the factors that have tilted the balance of power[36] in favour of employers in relation to collective bargaining, and that the use of replacement labour during strikes may affect the effectiveness of a strike and thus prolong it.[37] The persuasive force of a strike largely depends upon the extent to which, by withdrawing their labour, striking workers are able to interrupt the employer's business or production.[38] The use of replacement labour during a strike involves two competing interests. Employers want to be able to employ persons to maintain production during a strike or lock-out. However, from the employees' point of view the use of replacement labour deprives them of the only "weapon" that they have, namely, the ability to withhold their labour and thereby place economic pressure on the employer.[39] It therefore, *prima facie*, seems odd to entrench the right of workers to strike whilst at the same time permitting the employer to simply replace them when they exercise that right.

It should be noted that South Africa[40] is a member of the International Labour Organisation (ILO), and has ratified the two key ILO Conventions on freedom of association. The position of the ILO regarding the use of replacement labour during strike action is that "the hiring of workers to break a strike in a sector which

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35 See section 76 of the LRA; see also Hepple and Leroux *Laws Against Strikes* 34.

36 The relationship between an employer and an individual employee is "typically a relation between a bearer of power and one who is not a bearer of power". It is when employees form a collective (and are able to collectively withhold their labour during bargaining) that power is more or less equalised between an employer and its employees. See Davies and Freedland (eds) *Khan Freund's Labour and the Law* 18.

37 Ndungu 2009 *International Journal of Labour Research* 91.

38 Todd *Collective Bargaining Law* 76.

39 Du Toit *et al The Labour Relations Act of 1995* 241.

40 South Africa was one of the founding members of the ILO. However, in 1964 the ILO resolved to suspend South Africa's membership due to its apartheid policies. South Africa was re-admitted into the organisation after the demise of the apartheid regime in the early 1990's. See International Labour Office *Special Report of the Director-General on the Review of the Declaration Concerning Action Against Apartheid in South Africa* 3-4.

cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association".[41] This is so, because the ILO's Freedom of Association Committee has said so in a number of cases. For example, see 302nd Report, Case No. 1849, para 217; 327th Report, Case No. 2141, para 322; 333rd Report, Case No. 2251, para 998; 360th Report, Case No. 2770, para 372. The Committee's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions, and its jurisprudence is "an important resource" in developing the labour rights in South Africa's Constitution.[42]

Violence during strikes has become a serious concern in South Africa.[43] It has been said that the use of replacement labour increases the potential for conflict and violence.[44] According to Tenza, it "has turned out to be the root cause of violent strikes".[45]

Strike violence usually breaks out when the employer attempts to continue operating during the strike.[46] Workers, who assist the employer to maintain production during a strike, and so undermine the effect of the strike, are also colloquially referred to as "scabs".[47] There have been numerous instances where people who were scabs or considered to be scabs were either assaulted or killed. This is not a new phenomenon. Five scabs were killed during the 1987 strike by railway workers.[48]

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41 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 632.

42 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.

43 Manamela and Budeli 2013 *CILSA* 322; see also Rycroft 2015 *ILJ* 2; Benjamin 2014 *ILJ* 10; Von Holdt 2010 *Transformation* 127; Masiloane 2010 *Acta Criminologica* 31; Botha 2015 *De Jure* 344; Ngcukaitobi 2013 *ILJ* 836.

44 See McQuarrie *Industrial Relations in Canada* 257; Todd *Collective Bargaining Law* 76.

45 Tenza 2015 *Law Democracy and Development 219-222*.

46 Stewart and Townsend 1966 *University of Pennsylvania Law Review* 460.

47 Todd *Collective Bargaining Law* 76.

48 See Anstey 2013 *South African Journal of Labour Relations* 141. See also *NUMSA v GM Vincent* 1991 4 SA 304 (SCA*); S v Matshili* 1991 3 264; *National Construction Building and Allied Workers Union v Betta* 1999 20 ILJ 1617 (CCMA); *FAWU v Natioanal Co-operative Dairies* 1989 10 ILJ 490 (IC); *FAWU v Premier Foods* 2010 31 ILJ 1654 (LC). More recently, see *Mahlangu v SA Transport & Allied Workers Union* 2014 35 ILJ 1193 (GSJ).

Replacement labour's propensity to trigger violence during a strike or lock-out makes it an issue of public interest.[49] Many suggestions have been made regarding possible solutions to strike violence in South Africa. One of these is the ban on replacement labour during protected strike action. Tenza argues that section 76 of the LRA should be revisited or even repealed by the legislature.[50] Similarly, Brand also argues for a prohibition on hiring replacement labour during a protected strike, except for employers in essential services.[51]

As noted above, the use of replacement has to be viewed from both the employees' and employer's perspective. Section 22 of the Constitution guarantees the right to freedom of trade.[52] This is a right which is enjoyed by both natural and juristic persons.[53] Consequently, employers who are juristic persons have this right. Jordan argues that a total ban on replacement labour will mean that the employer is denied the right to do business. He submits that a substantial case based on public policy would have to be made on why this should be the case. For him, the mere fact that replacement labour may reduce the effectiveness of a strike is simply insufficient.[54]

It is submitted that replacement labour during a protected strike in South Africa and the issues surrounding it has not received much attention from academics. The same thing may be said about lock-outs. Therefore, the proposed research will make a meaningful contribution towards collective labour in South Africa, and in particular the interpretation of section 76 of the LRA. There is a need for empirical research and or further research with respect to industrial relations in South Africa.

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49 See Du Toit *et al The Labour Relations Act of 1995* 241.

50 Tenza 2015 *Law Democracy and Development* 219-222.

51 Brand "How the law could better regulate the right to strike in South Africa" 71. The term "essential service is defined in section 213 of the LRA as "(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Services".

52 For cases where the courts have interpreted and applied section 22 of the *Constitution*, in particular the principle of restraint of trade, see for example *South African Diamond Producers v Minister of Minister of Minerals and Energy* 2017 (6) SA 331 (CC) paras 65-69; *Fidelity Guards Holdings v Pearmain* 2001 (2) SA 853 (SE); *Knox D'arcy Ltd v Shaw* 1996 (2) SA 651 (W); *Basson v Chilwan* 1993 (3) SA 742 (A).

53 See *Contract Employment Contractors v Motor Industry Bargaining Council* 2013 3 SA 308 paras 11-21.

54 Jordaan 1997 *Law Democracy and Development* 4.

The controversy surrounding the use of replacement labour during a strike is not limited to South Africa. Much can be learned much from other industrial relations systems, and South Africa can adopt some of their best practices. By conducting a comparative analysis, the research will also determine what lessons may be learnt by South Africa with respect to replacement labour. The international position with respect to replacement labour shows stark differences.[55] The comparative analysis will be limited to Canada. However, reference to other foreign jurisdictions such as the United States of America (the USA) will be highlighted for illustration purposes if and when necessary; the vast majority of the literature on the issues surrounding replacement labour comes from North America.

The principal economic weapon available to employers in the USA is the right to hire (temporary or permanent) replacements for its striking workers. The National *Labour Relations Act* of 1935 (the NLRA) refers to the employees' right to strike but does not mention an employer's right to hire replacements for its striking workers.[56] The latter right was established almost eighty years ago by the Supreme Court in *NLRB v MacKay Radio and Telegraph Co*.[57] The court reasoned that just because workers have the right to strike to secure an advantageous bargaining position; employers do not lose their right to replace the strikers to carry on with business. This principle has come to be known as the "McKay doctrine". Like their South African counterparts, USA trade unions are vehemently opposed to the use of replacement labour during strikes.[58]

The issue of striker replacement is debated in Canada as passionately as it is in the USA. There are proponents and opponents of anti-scab legislation. Management argues that a ban on replacement labour questions the very essence of capitalism in that it threatens their right to continue business; drastically increases labour's bargaining power and subsequently jeopardises competitiveness.[59] The arguments for and against anti-scab legislation usually include (1) arguments related to economics, distributive justice and industrial

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55 Du Toit *et al Labour Relations Law* 315.
56 See Moberly 2000 *Hofstra Labor and Employment Law Journal* 171-174.
57 304 U.S.A. 333 1938.
58 See Logan 2006 *Perspectives on Work* 23-25.
59 See Vaillancourt 2000 *McGill Law Journal* 764; Spector 1992 *McGill Law Journal* 224; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 224.

democracy and (2) arguments about social policy issues (such as reducing violence).[60]

Canadian law generally assumes that the employer has the right to maintain production during a strike. However, Canadian law does not permit the permanent replacement of strikers.[61] In 1995 a task force – the Sims Task Force – was appointed to conduct a comprehensive review of the law governing collective bargaining for private sector employers and trade unions within the federal jurisdiction. The members of the task force were divided on whether the Canada *Labour Code* of 1985 (as amended) should ban the replacement of lawfully striking workers; the minority were in favour of a ban. After much debate, the Act was amended to prohibit the employer from using replacement workers "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives".[62] It should be noted that before the adoption of the amendments, federal labour law did not prohibit an employer from replacing lawfully striking workers.[63]

Apart from the Canada *Labour Code*, every province in Canada has its own statute which regulates labour relations. The use of replacement labour during a strike is only prohibited in British Columbia and Quebec. Both jurisdictions allow exemptions to the law in the case of emergencies and essential services. Ontario enacted an anti-scab law in 1993 which was later repealed in 1995.[64] Canadian law generally assumes that the employer has the right to maintain production during a strike. However, it has been said that Quebec challenges this assumption.[65] The comparative analysis on Canada will focus on British Columbia, Ontario and Quebec as they provide a good comparative perspective. The different approaches to the issue of replacement labour in Canada make Canada

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60 See Langille 1995 *Canadian Labour and Employment Law Journal* 462.
61 See Banks *et al Labor relations law in North America* 71-72.
62 See section 96(2) of the *Canada Labour Code* of 1985. See also Vaillancourt 2000 *McGill Law Journal* 770-777.
63 See Vaillancourt 2000 *McGill Law Journal* 760.
64 See McQuarrie *Industrial Relations in Canada* 257-258; Banks *et al Labor relations law in North America* 72; section 68 of British Columbia's *Labour Relations Code* of 1996; section 109 of Quebec's *Labour Code* of 1977.
65 See Spector 1992 *McGill Law Journal* 224.

the perfect country to compare South Africa with. More importantly, the legal systems in the two countries are more similar than they are different.

It should be noted that several researchers in Canada and the USA have conducted research to determine the impact of anti-scab legislation (or the lack thereof) on strike violence; incidence; duration; and collective bargaining in general.[66] The findings of this research either proves or disproves some of the arguments which have been put forward in support or against anti-scab legislation, and will therefore be considered.

In light of the above, the **primary research question** which the proposed research aims to answer is as follows: To what extent should replacement labour be allowed as a labour weapon by employers during strike action?

The secondary research question is how South Africa should regulate the replacement of striking workers in light of the section 23 constitutional rights and international best practice?

In order to answer the latter, the issues which will be addressed (include but are not limited to) the following: Why the LRA permits replacement labour; the constitutional implications for both employers and employees; the merits and demerits of replacement labour; its effects on the bargaining position of employers and workers respectively, and industrial relations as a whole *et cetera*. The proper interpretation of section 76 of the LRA will also be considered in light of the conflicting Labour Court judgments referred to above. Amongst others, the following cases where the courts have interpreted section 76 of the LRA will be critically analysed: *SACCAWU v Sun International*;[67] *Technikon SA v National Union of Tecknikon Employees of SA*;[68] *SACWTU v Coats SA*;[69] *Ntimane v Agrinet*;[70] and *Mbaru v Snacktique*.[71] Due to the interplay between the right to lock-

66 See for example, Campolieti *et al* 2014 *Industrial Relations* 394; Duffy and Johnson 2009 *Canadian Public Policy* 99; Cramton and Tracy 1998 *Journal of Labor Economics* 2; LeRoy 1995 *Berkeley Journal of Employment & Labor Law* 174; Cramton and Tracy 1999 *Labor Law Journal* 173; Langille 1995 *Canadian Labour and Employment Law Journal* 461.
67 2016 1 BLLR 97 (LC).
68 2001 22 ILJ 427 (LAC).
69 2001 22 ILJ 1413 (LC).
70 1999 20 ILJ 809 (LC).
71 1997 6 BLLR 766 (LC).

out (offensive and defensive) and replacement labour, the extent of an employer's right to lock-out its employees will also have to be considered, especially in the wake of the recent Labour Appeal Court's judgment in the *PUTCO* case.

As noted above, South Africa can learn much from other industrial relations systems, and can adopt some of their best practices. By conducting a comparative analysis with Canada, the proposed research will also determine what lessons may be learnt by South Africa with respect to replacement labour.

1.2 Research question

To what extent should replacement labour be allowed as a labour weapon by employers during strike action?

1.3 Assumptions and hypothesis

1.3.1 Assumptions

1.3.1.1 South African workers have a right to strike, and so do their counterparts in Canada.

1.3.1.2 The right to strike is vital to collective bargaining.

1.3.1.3 Scholars, labour and management hold different views regarding the replacement of lawfully striking workers. This study assumes that these different views need to be critically examined in a holistic manner.

1.3.1.4 South Africa can learn much from other industrial relations systems.

1.3.2 Hypothesis

The hiring of workers to replace lawfully striking workers constitutes a serious violation of freedom of association and the right to strike (by implication).

1.4 Objectives of the study

The main objective of this study is to determine to what extent replacement labour should be allowed as a labour weapon by employers during strike action. In order to determine the main objective, the following secondary objectives are set:

1. To critically analyse the legal position and issues surrounding the replacement of lawfully striking workers in South Africa. This task will invariably involve a close look at section 76 of the LRA and the relevant case law. As noted earlier, there are conflicting judgments regarding the interpretation of this section.

2. To critically analyse the position of the ILO regarding the replacement of lawfully striking workers. The main focus here will be on the jurisprudence of the ILO's Committee on Freedom of Association.

3. To critically analyse the approach of Canada to the replacement of lawfully striking workers. South Africa's position will be compared to that of Canada throughout this analysis. As noted earlier, the analysis of Canada will be limited to British Columbia, Ontario and Quebec.

4. To draw conclusions and make recommendations for the way forward regarding South Africa's approach to the replacement of lawfully striking workers. These recommendations will be largely determined by the lessons gleaned from the comparative perspective.

1.5 Research methodology

The study is characterised by a literature study whereby primary sources (including legislation and case law) as well as secondary sources (including law journals, books and electronic sources) were consulted. Furthermore, a legal comparative study was undertaken to compare the position in South Africa to that of Canada. Reference to other foreign jurisdictions (such as the USA) is highlighted for illustration purposes if and when necessary.

1.6 Framework of the study

Chapter 1: Introduction and problem statement.

Chapter 2: The use of replacement labour in the context of industrial relations in South Africa.

Chapter 3: Replacement labour: The ILO.

Chapter 4: Replacement labour: Canada.

Chapter 5: Conclusions and recommendations.

Chapter 2 – The use of replacement labour in the context of industrial relations in South Africa

2.1 Introduction

This chapter provides an in depth analysis of the legal position regarding the use of replacement labour during strike in South Africa. The chapter begins by providing an overview of industrial relations and collective bargaining in South Africa. Thereafter, an overview of strike law is provided. Amongst others, the following are discussed: the right to strike in terms of both the LRA and the Constitution; the limitations on the right to strike; the requirements of a protected strike; the drafting of the LRA with respect to strike law, and in particular the use of replacement labour during a strike. Importantly, the provisions of section 76 of the LRA and the relevant case law are critically analysed. It will be shown that there are conflicting judgments regarding the proper interpretation of section 76 of the LRA. Furthermore, the arguments for and against so-called anti-scab or anti-replacement[72] legislation in South Africa are also discussed. It will be argued that taken together, the arguments in support of anti-scab or anti-replacement legislation make a compelling case. Finally, conclusions are drawn.

2.2 Industrial relations and collective bargaining in South Africa

Like in many other countries, collective bargaining is widely accepted as the primary means of determining the terms and conditions of employment in South Africa.[73] Notwithstanding the doubts which have been expressed about its continued importance and influence,[74] collective bargaining is alive and well in South Africa.[75] It "remains a vibrant institution in South African law and practice".[76]

72 The terms 'anti-scab' and 'anti-replacement' are used interchangeably in this chapter.
73 Du Toit 2000 *ILJ* 1544; Botha 2015 *De Jure* 330.
74 See Du Toit 2007 *ILJ* 1405-1433; Van Niekerk and Smit *Law @ Work* 385.
75 Godfrey *et al Collective Bargaining in South Africa* 18.
76 Van Niekerk and Smit *Law @ Work* 385.

Thompson has posed the following question: "What sanctity does the law afford the institution of collective bargaining?"[77] According to him, correctly so it is submitted, "its trophy status is unquestionable".[78] Also, he goes on to add that:

> The activity of collective bargaining enjoys a special, protected status under law. It is more than a technique of wage determination. It is more than a method of dispute resolution. It is integral to a system that sets out to civilize the workplace, provide for a fair distribution between wages and profits, keep the economy vibrant and contribute to the wider democratic order.[79]

The LRA is the principal act governing labour in South Africa.[80] It provides a framework for collective bargaining and associated rights. The objectives of the LRA include giving effect and regulating the rights conferred by section 23 of the Constitution, to promote orderly collective bargaining and the effective resolution of labour disputes.[81] It has been pointed out that the Act does not have much to say about the nature of collective bargaining, how bargaining should take place and on what topics.[82] This can be explained by the voluntarist nature of the Act.[83] Due to this voluntarist nature, a situation could arise, as happened in the famous case of *NUMSA v Bader Bop*,[84] where an employer refuses to engage in collective bargaining with a trade union which represents some or all of its employees. Amongst other things, a refusal to bargain in terms of the LRA includes a refusal to recognise a trade union as a collective bargaining agent.[85] The question that arises is whether there is a legally enforceable duty to bargain. Put differently, can a court compel an employer to engage in collective bargaining?

Under the 1956 LRA, the Industrial Court in the exercise of its unfair labour practice[86] jurisdiction, although reluctant at first to intervene,[87] did eventually hold

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77 Thompson 2006 *ILJ* 704.
78 Thompson 2006 *ILJ* 704.
79 Thompson 2006 *ILJ* 704.
80 Landis and Grossett *Employment and the Law* 2.
81 See section 1 of the LRA.
82 See Van Niekerk and Smit *Law @ Work* 385.
83 See Van Niekerk and Smit *Law @ Work* 385.
84 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC). Briefly, in this case Bader Bop (the employer) manufactured leather products. The General Industrial Workers Union of SA represented the majority of the workers at the employer's workplace. On the other hand, NUMSA represented only about 26% of the workers. The employer granted NUMSA several organisational rights but refused neither to recognise its shop stewards nor to bargain with it.
85 See section 64(2) of the LRA.
86 Under the current LRA, the term 'unfair labour practice' is defined in section 186(2) of the LRA as "any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding

in a number of cases[88] that the failure to negotiate with a representative union in certain circumstances was an unfair labour practice.[89] As a result of these cases employers could be said to have a duty to bargain.[90] In *SACTWU v Maroc Carpets & Textile Mills*,[91] the Industrial Court unequivocally held that:

> Let it at once be said that, despite some earlier decisions to the contrary, it is clear that this court today unequivocally recognizes the existence of an enforceable duty upon all employers to bargain with trade unions representative of their employees, in respect of all matters concerning their relationship with those employees.[92]

Unlike its predecessor, the current LRA does not impose a duty to bargain.[93] The absence of a statutory duty to bargain has been described as "the most conspicuous omission from the Act".[94] Rather than imposing a duty to bargain, the LRA protects trade union rights and allows trade unions to enforce organisational rights.[95] It is worth noting that the drafters of the LRA did in fact consider whether the Act should impose a legally enforceable duty to bargain.[96] In rejecting the Industrial Court's approach – that there should be a legally enforceable duty to bargain – they reasoned that:

> ...the fundamental danger in the imposition of a legally enforceable duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South

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disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act". For an in-depth discussion of how the term 'unfair labour practice' was defined in the pre-LRA era, see Conradie *A critical analysis of the right to fair labour practices* 8-25.

87 Du Toit *et al The Labour Relations Act of 1995* 132.

88 For example, see *SACTWU v Maroc Carpets & Textile Mills* 1990 11 ILJ 1101 (IC) 1104 E; *Nasionale v FAWU* 1989 10 ILJ 712; *Sentraal v FAWU* 1990 11 ILJ 977 (LAC); *FAWU v Spekenham* 1988 9 ILJ 628.

89 Du Toit *et al The Labour Relations Act of 1995* 133; Todd *Collective Bargaining Law* 41; Grogan *Collective Labour Law* 102. For the definition of the term 'unfair labour practice' under the current LRA, see section 186(2) thereof.

90 Todd *Collective Bargaining Law* 41.

91 *SACTWU v Maroc Carpets & Textile Mills* 1990 11 ILJ 1101 (IC).

92 *SACTWU v Maroc Carpets & Textile Mills* 1990 11 ILJ 1101 (IC) 1104E.

93 See Landis and Grossett *Employment and the Law* 321; *NEWU v Leonard Dingler* 2011 7 BLLR 706 (LC).

94 Du Toit *et al The Labour Relations Act of 1995* 132.

95 Todd *Collective Bargaining Law* 41. Organisational rights are provided for under sections 11-22 of the LRA.

96 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 292.

> African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements. The statutory compulsion model, which does not admit even the limited flexibility of judicial intervention, fails even more dismally for the same reason.[97]

Moreover, they also added that:

> While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organizational rights for unions and by fully protecting the right to strike. These rights and the speedy and inexpensive remedies by which they are to be enforced extend significant powers to trade unions.[98]

In light of the above, it bears repeating that due to the voluntarist nature of the LRA a situation could arise where an employer refuses to engage in collective bargaining with a trade union which represents some or all of its employees. Cheadle argues that the LRA provides a safeguard against a situation where an employer would refuse to bargain at all. He argues that:

> The concern that voluntarism may allow employers to refuse to bargain at all is met to some extent by the organisational rights accorded to trade unions in Chapter III of the LRA. The LRA's approach is to provide organisational infrastructure for union organisation at the workplace and to provide a conciliation procedure to resolve interest disputes irrespective of whether the trade union is recognised.[99]

Furthermore, although section 23(5) of the Constitution guarantees the right of employers and employees to engage in collective bargaining, it does not create a legally enforceable duty to bargain. This principle was laid down in *SANDU v Minister of Defence*,[100] where the court had to determine whether there was a legally enforceable duty on the South African National Defence Force to engage in collective bargaining with the South African National Defence Union. The court noted the fact that the ILO Conventions dealing with collective bargaining "have a preference for voluntarism".[101] The court went on to point out that voluntarism does not mean employers and employees necessarily negotiate voluntarily, often they negotiate to avoid the economic pressure brought about by a strike or lock-out.[102]

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97 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 292-293.
98 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 293.
99 Cheadle 2005 *Law Democracy and Development 148*.
100 *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA).
101 *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA) para 10.
102 *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA) para 11.

Most significantly, the court held that section 23(5) of the Constitution does not impose on employees or employers a legally enforceable duty to bargain.[103]

In the exercise of its unfair labour practice jurisdiction, the Industrial Court came to realise that compulsion to bargain in itself was not enough and that good faith bargaining was essential to effectively forbid subversive bargaining conduct.[104] For example, the court held that the following conduct was indicative of bad faith in the bargaining process: making demands that are unreasonable,[105] delaying tactics,[106] imposing impossible pre-conditions on bargaining,[107] by-passing a recognised union and directly negotiating with the employees,[108] sham bargaining *et cetera*.[109]

Under the current LRA, the courts have no similar power, and the definition of "unfair labour practice" does not include bargaining tactics.[110] It has been suggested that the elimination of the unfair labour practice jurisdiction in the LRA has left relatively little scope for arbitrators or the courts to promote good faith bargaining.[111] Currently, as Levy has pointed out, one of the complicating features of collective bargaining in South Africa is the extent and nature of what can only be described as "bad faith bargaining".[112] Negotiations are characterised by unions tabling extreme demands, and then showing an unwillingness to move.[113] Consequently, this sort of (bad faith) bargaining may increase the probability of a strike and the duration of a strike should it occur.[114] However, it should be noted that there is nothing which prevents the parties engaging in collective bargaining –

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103 *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA) para 25. For a further discussion on 'the duty to bargain' in terms of the LRA and the Constitution, see Cheadle 2005 *Law Democracy and Development 148*; Molusi 2010 *Obiter* 156-166.

104 Du Toit *et al The Labour Relations Act of 1995* 136; in *Nasionale v FAWU* 1989 10 ILJ 712 (IC) at 716, the court held that "failure to bargain in good faith would create or promote labour unrest and would detrimentally affect the employer employee relationship".

105 For example, see *Sentraal v FAWU* 1990 11 ILJ 977 (LAC).

106 For example, see *MAWU v Natal Die Castings Co.* 1986 7 ILJ 520 (IC).

107 For example, see *FAWU v Sam's Foods* 1991 12 ILJ 1324 (IC).

108 For example, see *FAWU v Lanko* 1994 15 ILJ 1380 (IC); *NUM v ERGO* 1991 12 ILJ 1221 (A).

109 Du Toit *et al Labour Relations Law* 235; Du Toit *et al The Labour Relations Act of 1995* 136; Todd *Collective Bargaining Law* 48.

110 Grogan *Collective Labour Law* 119. See also the definition of 'unfair labour' practice in section 186(2) of the LRA.

111 Du Toit *et al Labour Relations Law* 235.

112 Levy "An examination of industrial action: 2013" 20.

113 Levy "An examination of industrial action: 2013" 20.

114 Levy "An examination of industrial action: 2013" 20.

management and organised labour – from making a commitment to bargain in good faith. Accordingly:

> When an employer and trade union have agreed, usually in a collective agreement referred to as a recognition agreement, to participate in collective bargaining over specific issues set out in the recognition agreement, they will usually have bound themselves to bargain with one another in good faith. Even if this is not expressly stated in the recognition agreement, it will generally be implied.[115]

A key feature of collective bargaining in South Africa which needs to be mentioned is its adversarial nature.[116] In South Africa, collective bargaining and its significance have been underlined by "the legacy of deep adversarialism between organised labour and employers".[117] It was against the backdrop of suppression, victimisation and racial discrimination that trade unions in South Africa evolved in a strongly adversarial relationship to employers and the state.[118] More recently, the collective bargaining climate has, "particularly since 2007, become increasingly adversarial".[119] As collective bargaining is by its nature inherently adversarial,[120] it is therefore not surprising that collective bargaining in South Africa is highly adversarial. This is so because:

> In collective bargaining the relationship between the employer and the employee is adversarial. Collective bargaining is competitive through and through. The task of the union is to secure as much in pay and benefits as possible. The task of the employer negotiators is to keep the pay and benefits as low as possible. In the resulting give and take bluffing and deception are the rule.[121]

South African labour legislation is based on a rigid adversarial system.[122] However, there is one exception to this statutory framework: the introduction of workplace forums in the LRA.[123] The introduction of workplace forums in the LRA has been

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115 Todd *Collective Bargaining Law* 46.

116 According to Levy, "that South African labour relations is highly adversarial, hardly deserves comment". See Levy "An examination of industrial action: 2013" 5. See also Botha and Germishuys 2017 *THRHR* 352.

117 See Du Toit 2000 *ILJ* 1544. See also Davies and Leroux 2012 *Acta Juridica* 309; Du Toit 1997 *Law Democracy and Development 41*.

118 See Du Toit 1995 *ILJ* 785.

119 See Benjamin 2014 *ILJ* 3.

120 Botha 2015 *PELJ* 1812.

121 Bowie 1985 *Journal of Business Ethics* 283. It should be noted that Bowie was describing the conventional understanding of collective bargaining.

122 See Davies and Leroux 2012 *Acta Juridica* 315.

123 See Davies and Leroux 2012 *Acta Juridica* 315. For a further and in depth discussion on workplace forums in South Africa, see; Botha 2015 *PELJ* 1812; Du Toit 2000 *ILJ* 1544; Manamela 2002 *South African Mercantile Law Journal* 728; Steadman 2004 *ILJ* 1183; Woods and Mahabir 2001 *Industrial Relations Journal* 230; Du Toit 1997 *Law Democracy and Development* 41; Olivier 1996 *ILJ* 803; Summers 1995 *ILJ* 803.

described as "the most important innovation".[124] According to the drafters of the Act, workplace forums were intended to "facilitate a shift at the workplace from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects".[125] They were supposed to supplement collective bargaining instead of undermining it.[126] Despite the noble intentions of the drafters of the LRA, workplace forums have been a spectacular failure in South Africa so far.[127] This was perhaps inevitable due to opposition from both capital and organised labour. Capital was concerned that managerial prerogative could be undermined by workplace forums.[128] For their part, trade unions feared that collective bargaining could be compromised by workplace forums.[129] Moreover, they still perceive workplace forums as a threat to their influence in the workplace and over their members.[130] Significantly, the inherently adversarial nature of industrial relations in South Africa is seen by some as one of the main reasons for the failure of workplace forums.[131] The benefits of workplace forums include, inter alia, reducing labour-management conflict. They do so by taking away the adversarial nature of this relationship from the shop floor to a central level.[132] In turn, it has also been suggested that they can reduce the number of strikes by playing a stabilising role.[133] Put differently, the state of industrial relations directly influences actors within labour relations (management and organised labour), shapes the issues over which they engage and the way they do so.[134]

What impact does the use of replacement labour have on industrial relations in South Africa? Put differently, does it reduce adversarialism or increase it? This

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124 Olivier 1996 *ILJ* 803.
125 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 310.
126 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 310.
127 See the research findings of the Sociology of Work Unit of the University of the Witwatersrand (discussed by Steadman 2004 *ILJ* 1183-1189). Briefly, amongst others, the research found the following to be primary reasons for the failure to establish workplace forums: (a) unions regard them with suspicion and are fearful that they will undermine their role; (b) *Industrial Relations* are still highly adversarial and therefore not conducive to workplace forums; (c) some companies prefer to deal with unions within the traditional collective bargaining structures *et cetera*.
128 See Davies and Leroux 2012 *Acta Juridica* 318. See also Steadman 2004 *ILJ* 1182.
129 See Davies and Leroux 2012 *Acta Juridica* 318. See also Botha 2015 *PELJ* 1829; Steadman 2004 *ILJ* 1182.
130 See Manamela 2002 *South African Mercantile Law Journal* 728.
131 See Steadman 2004 *ILJ* 1182; Davies and Leroux 2012 *Acta Juridica* 318-319.
132 Geoffrey and Mahabir 2001 *Industrial Relations Journal* 234.
133 Geoffrey and Mahabir 2001 *Industrial Relations Journal* 234.
134 Anstey 2013 *South African Journal of Labour Relations* 141.

issue is discussed later in this chapter. It is submitted that bad faith bargaining and highly adversarial labour relations are a toxic combination that can only lead to one result: industrial action. As noted above, negotiations in South Africa are characterised by unions tabling extreme demands, and then showing an unwillingness to move.[135] Past experience has shown that if unions say 'no' long enough, then management is likely to agree to their demands.[136] Unfortunately, as Brassey points out, strikes are normally the means by which deadlocks in collective bargaining are broken in South Africa.[137] The term "deadlock" simply means the parties to collective bargaining negotiations are unable to reach an agreement.[138] What normally happens is that:

> Once the parties get to the bargaining table, they motivate their extreme opening positions and demean the other sides' responses. Unions often walk out on negotiations at the end of the employer's response and declare a dispute. The unions assume that real negotiations will probably take place only once the employers are faced with an imminent or actual strike action; that the sooner the parties get to the Commission for Conciliation, Mediation and Arbitration the sooner real negotiations will start. Alternatively, they hope that the employer makes to respond by means of the minimum of concessions to keep the negotiations alive.[139]

Closely related to bad faith bargaining and highly adversarial industrial relations is the issue of strike violence.[140] Motala poses an interesting question concerning industrial action in South Africa, he asks why is it that strikes in South Africa are "not characterised by orderly picket lines with neat placards and workers singing Kumbaya, eating sandwiches and drinking tea, as they picket in a country where the right to strike is protected by the Constitution?".[141] Instead of being characterised by orderly picket lines, it has been said that South Africa has "one of the highest rates of industrial action, with its strikes amongst the most violent in the world".[142] Statistics published by the Institute of Race Relations in 2013 revealed the extent of the problem. The statistics revealed that between the years 1999 and 2012 some 181 fatalities occurred during strike violence, 313 people

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135 See Levy "An examination of industrial action: 2013" 20.
136 See Levy "An examination of industrial action: 2013" 20.
137 Brassey 2012 *ILJ* 5.
138 Todd *Collective Bargaining Law* 53.
139 See Davies and Leroux 2012 *Acta Juridica* 320.
140 See paragraph 2.6.1 below, where strike violence and the use of replacement labour are discussed.
141 Motala 2014 http://sacsis.org.za.site/artipcle/2063.
142 Odendaal 2014 http:// www.miningweekly.com/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06.

were injured while over 3000 arrests were made during that period. The reason for the particularly high number of fatalities in 1999 was attributed to the dispute between the National Union of Mine Workers, the United Workers Union of South Africa and the United Democratic Movement. The high number of fatalities in 2006 occurred during the security guard strike in which non-striking guards were attacked with some being thrown off moving trains.[143]

Much of the violence which occurs during strike action in South Africa is between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[144] Increasingly, strikes are characterised by damage to property and deaths. In this regard, as the Department of Labour has noted, the "most extreme" example is the Marikana strike action which took place in August 2014.[145] It should be recalled, as noted above, that the use of replacement labour increases the potential for conflict and violence.[146] According to Tenza, it "has turned out to be the root cause of violent strikes".[147] Many suggestions have been made regarding possible solutions to strike violence in South Africa. One of these is the ban on replacement labour during protected strike action.[148] This issue is discussed later in this chapter.

Having provided a somewhat brief overview of industrial relations and collective bargaining in South Africa, the legal framework for industrial action in South is considered next.

2.3 The legal framework: an overview

2.3.1 The pre-LRA era: a brief legal historical overview

Myburgh emphasises the fact that the creation of labour law as a distinct branch of law in South Africa has been "by state intervention in the form of legislation and

143 South African Institute of Race Relations 2013 http://irr.org.za/reports-andpublications/media/release/strike%20violence.pdf/.
144 See Levy "Strike action: will things ever be the same" 6.
145 Department of Labour *Annual Report of the Department of Labour 2016* 4.
146 See McQuarrie *Industrial Relations in Canada* 257; Todd *Collective Bargaining Law* 76.
147 Tenza 2015 *Law Democracy and Development* 219-222.
148 For example, see Tenza 2015 *Law Democracy and Development* 219-222; Brand "How the law could better regulate the right to strike in South Africa" 71.

the interpretation of that legislation by tribunals or courts".[149] As noted earlier, in many countries, including South Africa, the struggle for the right to strike has been a long and painful one for both trade unions and workers. To consider in depth the history and development of strike law in South Africa is beyond the scope of this study. Therefore, only the most important developments will be considered.

Between 1902 and 1910, two pieces of legislation were introduced which were to have a defining impact on collective bargaining and the right to strike in South Africa for the next 70 years.[150] Firstly, the *Railway Regulation Act* of 1908 not only regulated the conditions of service in this sector but was also one the first acts to place a ban on striking.[151] In return the Act established the principle of compulsory arbitration[152] between employers and railway workers whenever a dispute between the two arose.[153] Secondly, the Industrial Disputes Prevention Act[154] was introduced in 1909. The Act made provision for a board of conciliation and investigation. The board could be approached in the event of unilateral changes to conditions of employment for conciliation.[155] If there was a deadlock, no strike or lock-out could take place until the conciliation board had investigated the dispute and a month had elapsed since the publication of its report.[156] The effect of this act, as Myburgh puts it, was that "the most effective weapon of the industrial worker, the strike, was hedged about with severe restrictions".[157]

It should be noted that there were other pieces of legislation which were introduced in the early 1900s which also restricted and or prohibited strikes. For example, the *Native Labour Regulation Act* of 1911.[158] This act regulated the conditions of service of black employees. It also prohibited collective bargaining

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149 Myburgh 2004 *ILJ* 962.
150 Myburgh 2004 *ILJ* 962.
151 See Conradie *A critical analysis of the right to fair labour practices* 25; Myburgh 2004 *ILJ* 962.
152 In this context, compulsory arbitration may be defined as a form of arbitration whereby the law forces the two sides, employers and employees, to undergo. On the other hand, in voluntary arbitration, as the name suggests, the consent of both parties is required before arbitration can take place.
153 Myburgh 2004 *ILJ* 962.
154 Act 20 of 1909. According to Myburgh, the principles in this Act were based on the *Industrial Disputes and Investigation Act* passed in Canada in 1907. See Myburgh 2004 *ILJ* 962.
155 See Conradie *A critical analysis of the right to fair labour practices* 25.
156 Myburgh 2004 *ILJ* 962.
157 Myburgh 2004 *ILJ* 962.
158 Act 15 of 1911.

and strikes by black employees.[159] Despite the legislation prohibiting and or restricting strikes, thousands of black mine workers went on strike in 1913. This was followed by a strike by both black and white miners during July 1913.[160]

Historically, the "centrepiece" of collective bargaining legislation in South Africa is the *Industrial Consolidation Act* 11 of 1924.[161] It was enacted as a response to more than a decade of violent labour unrest, and it was meant to be South Africa's first comprehensive piece of labour legislation.[162] Also, it was enacted to secure the support of white labour for the system of white minority rule.[163] The act made provision for the establishment of bargaining councils. However, for more than fifty years black (but not coloured) workers who constituted the overwhelming majority of the working class were denied access to the bargaining councils by law.[164] The National Party government of the time officially introduced its apartheid policies in 1948 by enacting legislation for a racially segregated society.[165] According to Lowenberg and Kaempfer, apartheid could be described as "an exclusionary white form of socialism, or affirmative action programme for white workers".[166]

In 1956, the *Industrial Consolidation Act* 11 of 1924 was replaced by *Industrial Consolidation Act* 28 of 1956 (hereafter 1956 LRA). The new act entrenched racial segregation by targeting trade unions which had both white and coloured members: the registration of these unions was prohibited, mixed-unions already in existence were required to establish separate branches for these members and only white members could hold executive office.[167] It is against this backdrop that trade unions in South Africa are said to have evolved in a strongly adversarial relationship in relation to employers and the state.[168] Notwithstanding the

159 See Conradie *A critical analysis of the right to fair labour practices* 25.
160 See Conradie *A critical analysis of the right to fair labour practices* 25. See also Myburgh 2004 *ILJ* 963.
161 Maree 2011 *South African Journal of Labour Relations* 13.
162 Du Toit *et al The Labour Relations Act of 1995* 3.
163 Godfrey *et al Collective Bargaining in South Africa* 18.
164 Maree 2011 *South African Journal of Labour Relations* 13.
165 McGregor 2006 *Fundamina* 92; Lowenberg and Kaempfer *The Origins and Demise of South African Apartheid* 2; Deane 2005 *Fundamina* 5.
166 Lowenberg and Kaempfer *The Origins and Demise of South African Apartheid* 1.
167 Du Toit *et al The Labour Relations Act of 1995* 8.
168 Du Toit 1995 *ILJ* 785.

emergence of trade unions in the 1970s and 1980s, many employers saw them as unwelcome intruders in the affairs of employers.[169]

Trade unions have been suppressed by anti-democratic regimes[170] (Germany in the 1930s, Chile in the 1970s and South Africa in the 1970s).[171] It is probably by no accident that trade unions are and have been targeted by anti-democratic regimes. As Hepple explains:

> ...trade unions past and present have a crucial role in the fight for democracy all over the world, because they consist mainly of those with relatively few rights in society. Their particular contribution has been to extend the concept of democracy from political rights – such as the rights to vote, to speak freely, to assemble and to associate – to social and economic rights.[172]

From 1924 to 1979, employers in South Africa enjoyed the power to dismiss striking workers whether on a legal or illegal strike.[173] It was not until after the report of the Wiehahn Commission[174] in 1979 that major reforms were introduced, primarily through amendments to the 1956 LRA.[175] The Wiehahn Commission was established by the government as a response to the strikes by black workers that occurred in 1973 at or near Durban.[176]

The Wiehahn Commission recommended a number of fundamental reforms including, inter alia, that African workers be allowed to join registered trade unions.[177] Another important recommendation was the creation of the Industrial Court.[178] The Industrial Court commenced functioning in 1980[179] and it had

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169 Grogan *Collective Labour Law* 100.

170 Democratic governments too have and continue to suppress trade unions. The United Kingdom is a good example in this regard. Historically, measures that were used to achieve this included the common law of conspiracy (which prohibited trade combinations) and various statutes such as the Combination Acts of 1799 and 1800 (which declared trade unions illegal). Although trade unions are now recognised and enjoy some protections from the law, it is said that "it is virtually impossible in modern Britain to take industrial action which is lawful." See Honeyball and Bowers *Textbook on Labour Law* 388. For a discussion on the legal historical perspective of trade unions in the United Kingdom, see Orth 1981 *Journal of Legal History* 238-241; Spector 1992 *Comparative Labor Law Journal* 201-205.

171 Godfrey *et al Collective Bargaining in South Africa* 18. See also Du Toit 2007 *ILJ* 1406.

172 Hepple 1990 *ILJ* 646.

173 Myburgh 2004 *ILJ* 964.

174 The Commission was appointed in 1977 and completed its report in 1979. See Grogan *Collective Labour Law* 6.

175 Todd *Collective Bargaining Law* 1.

176 Godfrey *et al Collective Bargaining in South Africa* 18.

177 Grogan *Collective Labour Law* 5; Godfrey *et al Collective Bargaining in South Africa* 18.

178 Grogan *Collective Labour Law* 5; Godfrey *et al Collective Bargaining in South Africa* 18.

179 Grogan *Collective Labour Law* 5.

jurisdiction to resolve unfair labour practices.[180] It is an undeniable fact that the Industrial Court played a fundamental role in the development of South African labour law in general. Grogan states that:

> The advent of the unfair labour practice jurisdiction of the industrial court presaged a revolution in South African labour law. Initially, the industrial court was given a free hand to determine what constituted an unfair labour practice, and what did not. Staffed by a body of fulltime and part-time members, the industrial court set about its task with some vigour and quickly established the basic principles from which labour law was subsequently to develop. Under its unfair labour practice jurisdiction, the industrial court began eroding the foundation of practices that had long been regarded as part of the natural order in South Africa, such as discrimination on the basis of race and gender. The industrial court also laid down and developed principles of fair collective bargaining, and protected collective rights.[181]

In the 1980s, the Industrial Court, in a series of determinations, held that the dismissal of striking workers, whether or not on a legal strike, could constitute an unfair labour practice.[182] According to Myburgh, the law on strikes and lock-outs evolved during the period 1980-2000 by an interpretation of the provisions of the 1956 LRA by the courts and the exercise by the Industrial Court of its unfair labour practice jurisdiction.[183]

The early 1990's were marked by major political and legal changes in South Africa. For example, President F.W. de Klerk announced the unbanning of several organisations including the African National Congress (hereafter the ANC), the release of political prisoners (including Nelson Mandela), and the repeal of apartheid legislation.[184] Negotiations which began in 1991 between the government and the ANC eventually led to agreement on an Interim Constitution,[185] and culminated in the April 1994 elections.[186] Given the prominent role played by trade unions in bringing down apartheid, much attention was placed on labour rights in the new dispensation.[187] The following labour rights were entrenched in the Interim Constitution: the right to fair labour practices; the right to

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180 See section 17 of the 1956 LRA. See also Todd *Collective Bargaining Law* 1; Godfrey *et al Collective Bargaining in South Africa* 18; Grogan *Collective Labour Law* 5. For an in depth discussion on the concept of "unfair labour practices", see Conradie *A critical analysis of the right to fair labour practices* 72-96.
181 Grogan *Collective Labour Law* 5.
182 Myburgh 2004 *ILJ* 965.
183 Myburgh 2004 *ILJ* 965.
184 See Du Toit *et al The Labour Relations Act of 1995* 17.
185 *Constitution of the Republic of South Africa* (Interim), 1993 – hereafter the *Interim Constitution*.
186 See Du Toit *et al The Labour Relations Act of 1995* 17.
187 See Grogan *Collective Labour Law* 6.

form and join trade unions; the right to organise and bargain collectively; and the right to strike.[188] Significantly, an employer's recourse to lock-out for the purpose of collective bargaining was also protected in the Interim Constitution.[189]

Within a short space of assuming power, the new democratically elected ANC-led government announced its intentions to introduce a new labour relations statute.[190] There was a need to bring the *Labour Relations Act* into line with the Interim Constitution.[191] The Interim Constitution was therefore one of the compelling factors for reforming the Labour Relations Act.[192] A commission was appointed to produce a draft Labour Relations Bill. The draft which was produced by the commission formed the basis of the current LRA.[193]

One of the major defects of the 1956 LRA was its failure to provide any protection from dismissal from strikes.[194] The other defects of the 1956 LRA with respect to strike law were: complicated and technical pre-strike procedures; onerous ballot provisions; the criminalisation of strikes and lock-outs; the prohibition of socio-economic strikes; and the ready availability of interdicts and damages claims.[195]

In February 1995 a new body called National Economic Development and Labour Council (hereafter NEDLAC) was launched. It is a body consisting of representatives of organised labour, employers, and government.[196] All legislation relating to labour has to go to NEDLAC where the parties seek to reach consensus before it is sent to parliament.[197]

By the time negotiations commenced on the Draft Labour Relations Bill of 1995, business and labour had adopted very different positions on a number of key

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188 See section 27 of the *Interim Constitution*.
189 See section 27(5) of the *Interim Constitution*.
190 See Du Toit *et al The Labour Relations Act of 1995* 17.
191 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 281.
192 See Du Toit *et al The Labour Relations Act of 1995* 17.
193 See Grogan *Collective Labour Law* 6.
194 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 299; Du Toit *et al The Labour Relations Act of 1995* 26.
195 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 300.
196 See Grogan *Collective Labour Law* 6, 7; Du Toit *et al The Labour Relations Act of 1995* 18-19. See also the *National Economic Development and Labour Council Act* 35 of 1994.
197 Du Toit *et al The Labour Relations Act of 1995* 18-19. See also the *National Economic Development and Labour Council Act* 35 of 1994.

points.[198] As noted earlier, the use of replacement labour during protected strike action was one of the "key points of contention" during consultation on the proposed Draft Labour Relations Bill of 1995.[199] Business South Africa wanted strikes and lock-outs to be permitted once the correct procedure (including a strike ballot) had been followed. It also submitted that employers should retain their right to replace striking workers.[200] On the other hand, the trade unions were adamant that replacement labour or scab labour should not be permitted during a procedural strike.[201] It is important to note that the 1956 LRA was silent on the issue of replacement labour.[202] However, it seems as if what the law did not prohibit the law permitted.

One of the issues which the drafters of the Draft Labour Relations Bill of 1995 considered was the effect of a protected strike on the employer. Keeping in mind the extensive protection afforded to employees who participate in protected strike action by the Draft Bill, they reasoned that "it is through the resolution of the dispute or continued production, with the use of an alternative workforce, that the company's viability can best be maintained".[203] Therefore, the Draft Bill offered an employer facing bankruptcy three options: resolve the dispute; employ temporary replacement labour; dismiss the striking workers on grounds of operational requirements.[204]

The negotiations on the Draft Labour Relations Bill of 1995 were concluded on 21 July 1995. Although business and labour had reached consensus on a number of key points of contention, they had failed to reach consensus on the use of replacement labour.[205] NEDLAC referred the Draft Bill to the Cabinet. In turn the Cabinet ratified the Bill, and on 13 September 1995 the LRA was passed by

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198 The position of Business South Africa on the Draft Labour Relations Bill of 1995 was set out in a document called 'A framework for Redrafting the *Labour Relations Act* (1995)'. On the other hand, the position of organised labour was set out in a document (unpublished) called 'Proposals on the Draft Labour Relations Bill: Summary of COSATU, NACTU and FEDSAL Proposals (1 May 1995)'. See Du Toit *et al The Labour Relations Act of 1995* 28 note 134.

199 Du Toit *et al The Labour Relations Act of 1995* 29.

200 See Du Toit *et al The Labour Relations Act of 1995* 29-30.

201 See Du Toit *et al The Labour Relations Act of 1995* 29-30.

202 See Satgar 1998 *Law Democracy and Development* 49 note 8.

203 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 305.

204 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 305. These three options are discussed below in detail.

205 See Du Toit *et al The Labour Relations Act of 1995* 32.

Parliament.[206] Section 76 of the LRA – which provides for replacement labour – and the relevant case law thereto are discussed in detail below.

2.3.2 The Constitution

Historically, South Africa embraced the principle of parliamentary supremacy.[207] In turn, "the legislative process was elevated above all constitutional precepts and used as a powerful and invincible instrument in suppressing and opposing the African majority".[208]

Symbolically signed into law by President Nelson Mandela at Sharpeville on 10 December 1996, South Africa's Constitution is said to be "the product of a legal revolution unleashed by the democratic transmission from apartheid".[209] The Bill of Rights[210] in the Constitution has been hailed as "undoubtedly one the most progressive in the world",[211] and described as "an encyclopaedia of international human rights instruments".[212] It is said to contain all categories of human rights that are ordinarily included in most international human rights instruments.[213]

The extent to which labour rights have been entrenched in the South African Constitution is unique.[214] As noted above, South Africa's Constitution protects the right to strike. Section 23 thereof specifically deals with labour relations. Section 23(1) provides that everyone has the right to fair labour practices. Section 23(2) provides that every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union and; (c) to strike.[215] The significance of these provisions in the South African context was emphasised by O'Regan J in *SA National Defence Union v Minister of Defence*[216] as follows:

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206 See Du Toit *et al The Labour Relations Act of 1995* 32.
207 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 57.
208 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 57.
209 Klug *The Constitution of South Africa: A Contextual Analysis* 23.
210 See sections 7-39 of the *Constitution*.
211 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 71.
212 Nijman and Nollkaempfer *New Perspectives on the Divide Between National Law and International Law* 312.
213 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 71.
214 See Grogan *Collective Labour Law* 12.
215 These provisions should be read with section 7(3) which provides that "the rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill".
216 1999 20 ILJ 2265 (CC).

> Section 23 provides that workers have the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. These rights are important to all workers. Black workers in South Africa were denied these rights for many years. Indeed, it was only in the 1980's that rights to form and join trade unions, to bargain collectively and to strike were afforded to black workers. The inclusions of these rights in our Constitution is a clear recognition of their significance to South African workers.[217]

In considering the significance of the right to strike in the constitutional context, the Constitutional Court has stated that:

> Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock-out.[218]

2.3.3 The LRA

The LRA is the principal act governing labour.[219] It provides a framework for collective bargaining and associated rights. Unlike the 1956 LRA which was based on the view that the workplace belongs to, and is governed by, the employer – subject to a requirement that workers should be treated fairly – the LRA introduces a wholly different paradigm: it regards the worker as an "industrial citizen".[220] In form and substance, the LRA departs significantly from its predecessor.[221] However, at the same time, it retains many of the core features of the 1956 LRA and tries to incorporate many of the "better principles" developed by the Industrial Court under its unfair labour practice jurisdiction.[222]

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217 At para 20.
218 See the *Certification case* para 66.
219 Landis and Grossett *Employment and the Law* 2.
220 Jordaan 1997 *Law Democracy and Development 1*.
221 Lagrange 1995 *Survey of South African Law* 499.
222 Lagrange 1995 *Survey of South African Law* 499.

2.3.3.1 The purpose and primary objects of the Act

The LRA spells out its purpose and objects, "not in the abstract and generalised fashion typical of preambles and long titles, but in quite specific terms".[223] The purpose and primary objects of the Act are set out in section 1. These are to: advance economic development; social justice; labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are:

> (a) To give effect to and regulate the fundamental rights conferred by section 27 [now section 23] of the Constitution;
> (b) To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
> (c) To provide a framework within which employees and their trade unions, employers and employers' organisations can-
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
> (ii) formulate industrial policy; and
> (d) To promote-
> (i) orderly collective bargaining;
> (ii) collective bargaining at sectoral level;
> (iii) employee participation in decision-making in the workplace; and
> (iv) the effective resolution of labour disputes.[224] (Own underling)

From the above, it is clear that conciliation and the negotiation of settlements to industrial disputes is preferred over confrontational methods, whether in the form of industrial action or any other adversarial dispute resolution method.[225] Like its predecessor, the LRA aims to encourage collective bargaining and the settlement of disputes.[226] Although it was referring to the 1956 LRA, the views expressed by the court in *MacSteel v NUMSA*[227] are still relevant under the current dispensation where it stated that:

> Its aim is to avoid if possible, industrial strife and to maintain peace. Its operation is such that, if parties negotiate genuinely and in good faith, and their demands and offers are reasonable, settlement will be reached before disruption takes place, if not through agreement *inter partes*, then with the help of the machinery provided for in the Act.[228]

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223 Du Toit *et al The Labour Relations Act of 1995* 45. The authors explain that the LRA marks a departure from the typical approach whereby the purpose and objects of a statute have to be divined from a variety of internal and external textual aids.
224 See section 1 of the LRA. See also the preamble of the Act.
225 Lagrange 1995 *Survey of South African Law* 499.
226 Grogan *Workplace Law* 6.
227 1990 11 ILJ 995 (LAC).
228 At 1006B-E.

2.3.3.2 Scope of the Act

Barring two exceptions, the LRA applies to all employers and employees in all the sectors of the economy. The two exceptions are the South African National Defence Force and the two intelligence services, namely the National Intelligence Agency and the South African Secret Service.[229]

2.3.3.3 Interpretation of the Act

Since the proper interpretation of section 76 is critically examined below, it is important to provide an overview regarding the interpretation of the Act. As Grogan has pointed out, the unusual aspect of the LRA is that it contains a specific interpretation clause.[230] Section 3 of the Act compels any person applying the Act to interpret its provisions (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of South Africa.[231]

The interpretation clause (section 3) sanctions a purposive model of statutory interpretation as opposed to a literal approach.[232] The objects of the Act are not simply textual aids. They "must inform the interpretative process from its inception".[233] In other words, the Act must be read in the light of its objects.[234] As was noted earlier, section 23 of the Constitution specifically deals with labour relations. Therefore, the LRA must be interpreted in the light of the Constitution, especially section 23 thereof. Put differently, the interpretation clause of the LRA emphasises that the Act must be interpreted to give effect to constitutional rights.[235] Also, section 3 of the LRA emphasises the fact that South Africa's public

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229 See section 2 of the LRA. See also Du Toit *et al The Labour Relations Act of 1995* 55; Grogan *Workplace Law* 5. It is also important to note that employees of the Defence Force and the two intelligence agencies are also excluded from the ambit of the *Basic Conditions of Employment Act* of 1997 (in terms of section 3 thereof) and the *Employment Equity Act* of 1998 (in terms of section 4 thereof).

230 See Grogan *Collective Labour Law* 14.

231 See section 3 of the LRA.

232 See Lagrange 1995 *Survey of South African Law* 500; Grogan *Collective Labour Law* 15; Du Toit *et al The Labour Relations Act of 1995* 45.

233 Du Toit *et al The Labour Relations Act of 1995* 46.

234 Du Toit *et al The Labour Relations Act of 1995* 46.

235 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) paras 26-27.

international law obligations are important to the interpretation of the Act.[236] The most relevant international treaties to the interpretation of the Act are the ILO's Conventions 87 and 98.[237] As Du Toit *et al.* have noted, "it is against these two instruments principally that compliance with by the Act must be measured".[238]

2.4 Strikes and lock-outs under the LRA: an overview

Before discussing replacement labour in South Africa, it is important to provide the reader with a brief overview of the main industrial "weapons" available to workers and employers under the LRA, namely strikes and lock-outs respectively.

2.4.1 Procedural requirements for a protected strike or lock-out

The LRA protects the right of every employee to strike and recourse to lock-out for all employers.[239] However, strikes and lock-outs "are not absolute and must be exercised within the legal framework before such industrial actions are protected by law".[240] This is so because the LRA says so.[241] In terms of the LRA, a protected strike or lock-out is one which complies with the provisions of chapter four of the LRA.[242] As Gericke pointed out, the terms "legal" or "protected" are sometimes used interchangeably to refer to a strike which complies with the provisions of chapter four of the LRA.[243] Relying on Van Jaarsveld, he adds that:

> Van Jaarsveld argues that the latter term represents 'a misnomer as the consequences of the Act (protection) are confused with the Act itself'. Accordingly, it would have been more accurate to refer to a strike which complies with the Act as a legal strike, instead of referring to an aspect of the consequences of a legal strike, such as 'protection' against dismissal.[244]

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236 In *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 26, the court noted that South Africa's international obligations are important to the interpretation of the LRA.
237 Du Toit *et al The Labour Relations Act of 1995* 54.
238 Du Toit *et al The Labour Relations Act of 1995* 54.
239 In terms of section 64(1) thereof, which in part provides that "Every employee has the right to strike and every employer has recourse to lock-out...". Section 64 should be read with section 65 which deals with the limitations to the right to strike and recourse to lock-out.
240 Samuel 2013 *Journal of Contemporary Management* 245. See also Botha and Germishuys 2017 *THRHR* 358.
241 See section 64 of the LRA read with sections 65 and 67 thereof.
242 See section 67 of the LRA.
243 Gericke 2012 *THRHR* 571.
244 Gericke 2012 *THRHR* 571.

The Department of Labour's statistics show that most strikes were protected during the period 2002-2006.[245] The breakdown was as follows: 46.8% in 2002, 76.8% in 2003, 66% in 2004, 56.9% in 2005 and 60.1% in 2006.[246] Interestingly, the Department of Labour's annual report on industrial action in South Africa also highlighted the fact that there was an upward trend in the number of employers who had reported locking-out their employees. This number was six in 2002, eight in 2003, eleven in 2004, sixteen in 2005 and twenty seven in 2006.[247] The report surmised that the reason behind this development was partly due to "the fact that employers would like to prevent the intimidation of 'scab' labour and non-strikers by strikers during industrial actions, which might affect production adversely".[248]

Furthermore, the statistics published by the Department of Labour also show that most strikes were protected during the period 2007-2010. The yearly breakdown was as follows: 70.6% in 2007, 63.9 in 2008, 89.2% in 2009 and 80% in 2010.[249] In 2012, 54% of strikes were protected.[250] As was noted in the previous chapter, 52% of strikes in 2014 were protected while 48% were unprotected. This was the direct opposite of what occurred in 2013 whereby 52% of strikes were unprotected while 48% were protected.[251] More recently, among the 110 strikes which occurred in 2015 45% were protected while 55% were not.[252] In 2016, the number of unprotected strikes rose to 59%.[253] In *Technikon SA v National Union of Technikon Employees of SA*,[254] one of the issues raised was whether section 76 of the LRA permits an employer to hire replacement labour to replace striking workers during unprotected strikes only. This case is discussed in detail later in this chapter.

The requirements for protection are set out in section 64 of the LRA. Briefly, a protected strike or lock-out may commence if:

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245 See Department of Labour *Annual Industrial Action Report 2006* 2.
246 See Department of Labour *Annual Industrial Action Report 2006* 2.
247 See Department of Labour *Annual Industrial Action Report 2006* 2. In 2015, the there were 21 reported lock-outs. In this regard, see Department of Labour *Annual Industrial Action Report 2015* 1.
248 See Department of Labour *Annual Industrial Action Report 2006* 2.
249 See Department of Labour *Annual Industrial Action Report 2010* viii.
250 See Department of Labour *Annual Industrial Action Report 2013* 1.
251 See Department of Labour *Annual Industrial Action Report 2014* viii, 35.
252 See Department of Labour *Annual Industrial Action Report 2015* 11.
253 See Department of Labour *Annual Industrial Action Report 2016* 5.
254 2001 22 ILJ 427 (LAC).

a) the issue in dispute has been referred to the CCMA, and a certificate has been issued stating that the dispute remains unresolved or a period of 30 days has elapsed since the referral was made to the CCMA.[255] After that;

b) a 48 hour notice of commencement of the strike[256] or lock-out[257] has been given in writing.[258] Where the State is the employer, at least seven days of commencement of the strike or lock-out has to be given.[259]

There are some exceptions to the procedural requirements outlined above.[260] From the above, it is clear that the LRA places heavy emphasis on conciliation as the preferred means of resolving disputes.[261] The referral of a dispute to the CCMA serves two purposes. Firstly, it ensures that employees and employers do not resort to industrial action reflexively. Secondly, it compels the parties to subject themselves to conciliation with the assistance of a neutral outsider.[262]

TAWUSA v Putco,[263] a unanimous judgment delivered by the Constitutional Court in early 2016, is the most authoritative authority on the interpretation of section 64 of the LRA. Due to its importance, this case is discussed in detail below. Interestingly, the Labour Court[264] ruled in favour of the Transport and

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255 See section 64(1) of the LRA.

256 In terms of section 651(b), the notice has to be given to the employer unless:
"(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation".
For a further in depth discussion on the interpretation of section 65(1)(b) of the LRA, see Smit and Fourie 2012 *De Jure* 426-436.

257 section 64(1)(c) of the LRA provides that:
"in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lockout, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council".

258 See section 64(1)(b)-(c) of the LRA.

259 See section 64(1)(b)-(c) of the LRA. See also Botha and Germishuys 2017 *THRHR* 358-359, where they discuss the procedural requirements for protected strike action.

260 In this regard, see section 65(3) of the LRA.

261 Du Toit *et al The Labour Relations Act of 1995* 191.

262 See Grogan *Collective Labour Law* 160. See also See Botha and Germishuys 2017 *THRHR* 361-362.

263 *TAWUSA v Putco* 2016 6 BLLR 537 (CC) – hereafter *Putco 3*.

264 *TAWUSA obo members v Algoa Bus Company and Putco* 2013 34 ILJ 2949 (LC) – hereafter *Putco 1*.

Allied Workers Union of South Africa (hereafter TAWUSA); the Labour Appeal Court[265] ruled in favour of the employer Putco; and the Constitutional Court ruled in favour of TAWUSA once more.

2.4.1.1 TAWUSA v Putco

This case began in the Labour Court and involved two applications brought by TAWUSA on behalf of its members against Putco and another bus company, ALGOA Bus Company. The two applications were heard together. Putco carries on business as a passenger bus operator and provides public passenger bus services. TAWUSA represented approximately 26% of the employees at Putco while the South African Transport and Allied Workers Union (hereafter SATAWU) and the Transport Omnibus Workers' Union (hereafter TOWU) represented approximately 46% and 27% respectively.

Putco is a member of the Commuter Bus Employer's Organisation (hereafter COBEO) which is an employer's organisation member of the South African Rail Passenger Bargaining Council (hereafter SARPBAC). TAWUSA, SATAWU, and TOWU were the employees' representatives at the SARPBAC. However, TAWUSA resigned from SARPBAC sometime in August 2012. In 2013, wage negotiations at SARPBAC deadlocked and SATAWU and TOWU gave notice that they would commence with a protected strike on 17 April 2013. On 19 April 2013, Putco issued a notice of lock-out directed to TAWUSA in response to the notice to strike issued by SATAWU and TOWU. The notice of lock-out stated the intention to lock-out all affected employees. It read that:

> In response to the strike notice issued, the Company hereby gives 48 hours' notice of its intention to lock-out all employees in the bargaining unit from all of PUTCO Limited's workplaces in support of the employer wage proposals in the wage negotiations in the South African Road Passenger Bargaining Council. (Own underlining)

On the same day, TAWUSA advised the employer that its members would not strike and would report for duty as normal. TAWUSA also advised the employer that any lock-out against its members would be unlawful. Aggrieved by the notice to lock-out its members, TAWUSA approached the Labour Court on an urgent

265 *Putco v TAWUSA* 2015 36 ILJ 2048 (LAC) para 62 – hereafter *Putco 2*.

basis for an interdict. For convenience, a lock-out is defined in section 213 of the LRA as:

> ...the exclusion by the employer of employees from the employer's workplace, *for the purposes of compelling the employee to accept a demand* in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches *those employees'* contracts of employment in the course of or for the purposes of their exclusion.[266] (Own emphasis added)

The Labour Court held that a lock-out must be directed to employees with a demand. As the court explained, "logic dictates that one cannot compel somebody who does not resist or one who does not present a counter-demand".[267] In a similar vein, the court held that a lock-out must have a purpose, that is to say, when implementing a lock-out the purpose should be to compel those employees to accept a demand. This was so because, as the court reasoned, the exclusion of employees without any purpose is not lock-out as defined and is bound to be unlawful in terms of the LRA.[268]

In addition to the definition of the term "lock-out" as defined in section 213 of the LRA, the court also emphasised the fact that section 64 of the LRA – which makes provision for the right to strike for employees, recourse to lock-out for employers and the procedural requirements for protected strikes or lock-outs – refers to the word "dispute" several times. In the case of a proposed lock-out a notice must be given to a trade union which is a party to the dispute or, if there is no trade union, to the employees.[269] Based on this provision, the court held that the trade union which has to be given notice of the intended lock-out is one which is a party to the dispute. If a trade union is not a party to the dispute, so the court reasoned, it ought not to be notified of the proposed lock-out.[270]

Unhappy with the Labour Court's Judgment, Putco launched an appeal against the said judgment. Algoa Bus Company did not lodge an appeal against the Labour Court's judgment. On appeal, Putco argued that an employer party to a bargaining council should be entitled to lock-out employees who are members of a non-party

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266 See section 213 of the LRA.
267 See *Putco 1* para 12.
268 See *Putco 1* para 14.
269 See section 64(1)(c) of the LRA.
270 See *Putco 1* paras 15-16.

union because the non-party union members have a material interest in the outcome of the dispute. The lock-out, so the argument went, would promote collective bargaining at sectoral level and it would give effect to the majoritarian principle which underlies collective the bargaining dispensation in South Africa.

The Labour Appeal Court noted the fact that the constitution of SARPBAC provided that all collective agreements concluded under the auspices of SARPBAC were binding on all eligible employees in the employ of the employer's organisations and to those parties and or individuals to whom it was extended in terms of section 32 of the LRA. As a result, the court held that TAWUSA's members had an interest in the negotiations at the SARPBAC (whereby SATAWU and TOWU had rejected the employer's wage demands) and that the dispute was about a matter of mutual interest to the employer and employees.[271] Also, the court held that the definition of lock-out in the LRA does not say that it should only be directed at striking employees. Therefore, so the court reasoned, an employer can lock-out all employers (striking or non-striking) who do not accept the employer's demand. It is important to note that the court held that TAWUSA had expressly rejected the employer's wage demand.[272]

The Labour Appeal Court went on to explain that an employer may, as part of its strategy to put pressure on its employees to accept its demands, decide to lock-out all employees in order to achieve an individual or group capitulation.[273] Since the members of TAWUSA could decide to join the strike at any time without giving notice to the employer, it would be unfair, the court further held, to expect the employer not to institute a lock-out against them whilst they refuse to accept the employer's demand.[274]

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271 See *Putco 2* para 62. Moreover, the court emphasised the fact that the members of TAWUSA would reap the benefits of the wage negotiations at the SARPBAC should the majority trade unions' demands be accepted.
272 See *Putco 2* para 67.
273 See *Putco 2* para 64.
274 See *Putco 2* para 65.

In light of the above mentioned findings, the court held that Putco acted lawfully when it locked-out the members of TAWUSA.[275] The appeal was upheld and the order of the court *a quo* set aside.

The case went on appeal once more, and in a unanimous judgment (penned by Khampepe J.), the Constitutional Court framed the issue to be determined by it as follows:

> The central question in this case is whether the *Labour Relations Act* (LRA) permits an employer to exclude from its workplaces, by way of a purported lock-out, members of a trade union that were not a party to a bargaining council where a dispute arose and was subsequently referred for conciliation.[276]

Before the Constitutional Court, TAWUSA argued that section 64(1)(c) envisages locking out a party who has an interest in a dispute, or who is directly affected by it. It further contended that section 64(1) does not authorise a lock-out against a trade union and its members who are not party to the dispute that has given rise to the lock-out. It emphasised that a lock-out is defined as the exclusion from the workplace by an employer of its employees for the purpose of compelling these employees to accept a demand. Consequently, so the argument went, there can be no dispute if there is no demand. On the facts of the case, it argued that there could not have been a demand made to it as it was not a member of the bargaining council where the dispute arose. On the other hand, Putco argued that section 64(1) of the LRA provides that notice to a bargaining council is deemed as notice to all unions operating within its jurisdiction; TAWUSA was effectively a party to the dispute.

The court recalled the definition of the term "lock-out" as defined in section 213 of the LRA.[277] It noted the fact that the purpose of a lock-out in terms of section 213 is to compel employees whose trade union is party to certain negotiations to accede to an employer's demand.[278] Accordingly, the court held that, as a matter of logic, there must be a dispute between an employer and employees or their trade union before a lock-out is instituted.[279] Therefore, "any exclusion of employees from an

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275 See *Putco 2* para 70.
276 See *Putco 3* para 1.
277 See *Putco 3* para 31.
278 See *Putco 3* para 32.
279 See *Putco 3* para 32.

employer's workplace that is not preceded by a demand in respect of a disputed matter of mutual interest does not qualify as a lockout in terms of section 213 of the LRA".[280]

In the present matter, was there a demand made by Putco to TAWUSA or its members? It should be noted that in oral argument, it was contended on Putco's behalf that the lock-out notice given to TAWUSA constituted a demand. The court rejected this argument and held that the lock-out notice could not constitute a demand. This was so because, as the court held, a lock-out notice cannot constitute both a notice and a demand at the same time. The court explained that:

> A lock-out notice cannot constitute both a notice and a demand at the same time. The LRA clearly distinguishes between a notice and a demand and does not use the two interchangeably. The purpose of a lock-out notice is to inform a union and its members of an impending lock-out. In other words, recourse to a lawful lock-out must already be available. An employer is not entitled to resort to a lock-out if it has not yet made a demand to those employees who are to be excluded from the employer's workplaces.[281]

Furthermore, the court held that since TAWUSA was not a member of the Bargaining Council, no demand was made to TAWUSA nor was it in a position to accede to the demands Putco had made to the trade unions (i.e. SATAWU and TOWU) that were present at the Bargaining Council.[282] In light of the above findings, the court ultimately held that the purported lock-out of TAWUSA's members did not comply with the definition of lock-out as defined in terms of section 213 of the LRA.[283]

Apart from the finding that the purported lock-out did not comply with the definition of lock-out as defined in terms of section 213 of the LRA, the court went on to hold that it (the purported lock-out) also did not comply with the provisions of section 64 of the LRA. Briefly, the court held that the referral process (for conciliation) mandated by the LRA did not take place. The court reasoned that even though conciliation did take place at the Bargaining Council and was unsuccessful, this

280 See *Putco 3* para 32.
281 See *Putco 3* para 36.
282 See *Putco 3* para 39.
283 See *Putco 3* para 40.

process did not involve TAWUSA, because it was not a party to the Bargaining Council.[284] The appeal was upheld and the order of the court *a quo* set aside.

It is submitted that in *Putco 1*, as was also the case in *Putco 2* and *Putco 3*, the court correctly held that a lock-out as defined by the LRA must be accompanied by a demand.[285] The definition of the term lock-out in terms of the LRA makes it abundantly clear that the purpose of a lock-out is to compel employees or their trade union to accede to an employer's demand.[286] A demand must encompass more than simply requiring employees to perform their obligations in terms of their contracts of employment.[287] A lock-out must always be accompanied by an express demand: for a demand to exist the locked out employees must be informed of the actions expected of them for the lock-out to be lifted.[288] The Constitutional Court in *Putco 3* has affirmed that "the LRA requires an employer to make a perspicuous demand to employees before resorting to locking them out".[289] This case shall now serve as a clear reminder to all employers that a lock-out must be preceded by a demand to the employees who are to be excluded from the workplace.

2.4.2 The consequences of a protected strike or lock-out

As noted above, in terms of the LRA, a protected strike or lock-out is one which complies with the provisions of chapter four of the LRA.[290] Regarding protected strikes, the LRA[291] grants immunity against delictual claims by the employer and against claims for breach of contract.[292] This immunity is reinforced through a prohibition on civil proceedings against any person for participating in a protected

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284 See *Putco 3* para 47.
285 See *Putco 1* para 12; *Putco* 2 para 41; *Putco 3* para 32.
286 Grogan *Collective Labour Law* 312; Todd *Collective Labour Law* 71; Du Toit *et al The Labour Relations Act of 1995* 200-201; Van Niekerk and Smit *Law @ Work* 439; *Putco 3* para 32; *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 15.
287 Van Niekerk and Smit *Law @ Work* 439; Du Toit *et al The Labour Relations Act of 1995* 201.
288 Grogan *Collective Labour Law* 310.
289 *Putco 3* para 35.
290 See section 67 of the LRA.
291 Section 67(2) of the LRA which provides that:
A person does not commit a delict or a breach of contract by taking part in —
(*a*) a protected *strike* or a protected lockout; or
(*b*) any conduct in contemplation or in furtherance of a protected *strike* or a protected lockout.
292 See Todd *Collective Bargaining Law* 65; Van Niekerk and Smit *Law @ Work* 433; Rycroft 2012 *ILJ* 821.

strike or for participating in any conduct in contemplation or in furtherance of a protected strike.[293] The civil proceedings may include, inter alia, an interdict or damages action.[294] However, the immunity granted under section 67(2) and (6) is not unlimited. It does not apply to any act in contemplation or in furtherance of a strike if that act is an offence.[295]

Also, another consequence of a protected strike is the protection against dismissal. It has been described as "the most meaningful protection for strikes that comply with the Act"[296] and "the most valuable protection offered to employees".[297] The LRA explicitly provides that "an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike".[298] This protection is reinforced by section 187(1)(a) of the LRA which renders the dismissal of an employee for participation in a protected strike automatically unfair.[299] However, it is important to note that employees who participate in a protected strike may be fairly dismissed for a reason based on the employer's operational requirements.[300]

A reading of the judgments of the courts reveals that, in order to determine whether a dismissal was automatically unfair in terms of section 188(1)(a), there has to be an enquiry as to the true reason for dismissing the employee. This principle was expressed as follows in *SATAWU v Collett Armed Security Services*:[301]

> Imperative to the enquiry into whether section 187(1)(a) would find application is the determination of the true reason for the dismissal. To put it simply in the current matter – is it because the employees were striking or is it because they were fighting.[302]

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293 Du Toit *et al The Labour Relations Act of 1995* 213. See also section 67(6) of the LRA which provides that:
Civil legal proceedings may not be instituted against any person for-
(*a*) participating in a protected *strike* or a protected *lockout*; or
(*b*) any conduct in contemplation or in furtherance of a protected strike or a protected lockout.

294 See Du Toit *et al The Labour Relations Act of 1995* 213.

295 See section 67(8) of the LRA.

296 See Du Toit *et al The Labour Relations Act of 1995* 215.

297 Van Niekerk and Smit *Law @ Work* 434.

298 In terms of section 67(4) of the LRA.

299 See also section 5(1) of the LRA which provides that "No person may discriminate against an employee for exercising any right conferred by this Act".

300 See section 67(4) of the LRA.

301 *SATAWU v Collett Armed Security Services* 2013 ZALCJHB 239 (3 October 2013).

302 *SATAWU v Collett Armed Security Services* 2013 ZALCJHB 239 (3 October 2013) para 41.

Also, in *SACWU v Afrox*,[303] the same principle was explained in more detail as follows:

> The first step is to determine the factual causation: was the participation or support...of the protected strike a sine quo non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no...the next issue is one of legal causation, namely whether such participation or conduct was the main or dominant, or proximate, or most likely cause of the dismissal.[304]

Section 67(4) will not protect employees who commit unlawful acts during a protected strike.[305] Put differently, such employees may be fairly dismissed for a reason related to their conduct during the strike.[306] The courts have held that the right to strike does not empower strikers to behave violently nor is it a license to engage in misconduct[307] and that "violence during a strike is abhorrent and should not be countenanced".[308] Employees who commit misconduct during a strike can be dismissed.[309] Those who partake in intimidation and hostage taking may also be dismissed.[310]

Furthermore, and of greater significance for employees, employees cannot claim pay while on strike, whether the strike is protected or unprotected.[311] This principle is often referred to as "no work no pay".[312] As Todd explained, this principle simply reflects the underlying contractual arrangement between the employer and its employee(s).[313] Since the main contractual obligation of employees is to place their personal services at their employer's disposal, tender of service is a prerequisite to

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303 *SACWU v Afrox* 1999 20 ILJ 1718 (LC).
304 *SACWU v Afrox* 1999 20 ILJ 1718 (LC) para 32.
305 See Van Niekerk and Smit *Law @ Work* 433; Botha and Germishuys 2017 *THRHR* 363. See also section 67(4) read with 67(5) of the LRA.
306 See section 67(4) read with 67(5) of the LRA. See also *FAWU v Minister of Safety and Security* 1999 20 ILJ 1258 (LC) para 19, where the court held that "the exercise of that right [common law right to dismiss] may be in compliance with the Act if the employees are guilty of misconduct during the course of the strike". See also Van Eck and Kujinga 2017 *PELJ* 15.
307 See *Tsogo Sun v Future of SA Workers Union* 2012 33 ILJ 998 (LC) 1003D.
308 See *Chemical Energy Paper Printing Wood and Allied Workers Union v Metrolife* 2004 25 ILJ 231 (LC) para 45.
309 See *FAWU v Minister of Safety and Security* 1999 20 ILJ 1258 (LC) para 19. See also the Code of Good Practice: Dismissal, item 6 (1).
310 See *Mabinana v Baldwins Steel* 1999 5 BLLR 453 (LAC) para 3.
311 See section 67(3) of the LRA. See also Van Niekerk and Smit *Law @ Work* 433; Du Toit *et al The Labour Relations Act of 1995* 212; Todd *Collective Bargaining Law* 65; Grogan *Workplace Law* 53.
312 See Todd *Collective Bargaining Law* 65; Grogan *Workplace Law* 53.
313 Todd *Collective Bargaining Law* 65.

the employee's right to claim wages.[314] Put simply, if employees do not tender their service, they are not entitled to be paid.[315] This is the position under both the common law and the LRA.[316] Regarding the LRA, Du Toit *et al.* explain that:

> Since participation in a strike is deemed not to constitute a breach of contract [s 67(2)], the obligations under the employment contract subsist and, in the absence of any further qualification, an employer would be obliged to continue paying its employees during a strike. To avoid this anomaly, and maintain the common law principle of mutuality of obligations, the Act provides expressly that an employer is not obliged to remunerate an employee for services that the employee does not tender during a protected strike [s 67(3)]. The employer's obligation to remunerate is therefore suspended during a strike or lock-out.[317]

For the most part, the consequences of a protected lock-out mirror those of a protected strike. Firstly, the LRA grants an employer engaged in protected lock-out indemnity against delictual claims by employees and against claims for breach of contract.[318] This immunity is reinforced through a prohibition on civil proceedings against any person for participating in a protected lock-out or for participating in any conduct in contemplation or in furtherance of a protected lock-out.[319] However, like employees participating in a protected strike, it is important to mention that section 67(4) will not protect employers who commit unlawful acts during a protected lock-out.[320] Secondly, an employer is not obliged to remunerate the locked-out employees.[321]

From the above discussion, it is clear that the LRA protects the right to strike or lock-out. Once a strike or lock-out attains a protected status, there are several legal consequences which flow from such status. For example the "no work no pay" principle applies during a protected strike.

What does the principle of no work no pay and the others discussed above have to do with the debate on replacement labour in South Africa? In an ideal situation, one would expect industrial action – whether it be a strike by employees or a lock-out by an employer – to result in some financial stress for those concerned, that is

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314 Grogan *Workplace Law* 52.
315 See Todd *Collective Bargaining Law* 65.
316 Grogan *Workplace Law* 52.
317 Du Toit *et al The Labour Relations Act of 1995* 213-214.
318 In terms of section 67(2) of the LRA.
319 See section 67(6) of the LRA.
320 See section 67(4) read with 67(5) of the LRA.
321 See section 67(3) of the LRA.

to say, the workers do not receive any pay while they remain on strike and the employer suffers some financial loss due to the interruption or complete halt to production. In turn, this financial stress on those concerned acts as an incentive for continued bargaining with a view to reaching a compromise or settlement.[322] Whilst cautioning against pushing the analogy between warfare and strike action too far, Grogan explains that the relationship between collective bargaining and industrial action is much like the relationship between war and diplomacy.[323] As he explains, this is so because:

> It is the threat of force and the pain which its exercise might inflict on either side which generally induces governments to seek solutions to international problems by negotiation.[324]

In the South African context, one should ask where is the financial stress on employers supposed to come from in a situation where the no work no pay principle applies to employees who are on strike, whilst at the same time the law permits employers to simply replace those employees and thereby continue with production. Also, where is the incentive to continue bargaining going to come from in this situation? What about the balance of power? These issues and the other pertinent issues related to the debate on replacement labour in South Africa are discussed in detail later in this chapter.

2.5 Replacement labour in South Africa: the law and case law

As noted earlier, trade unions have argued for a total ban on replacement labour in South Africa[325] but they have clearly not yet achieved this goal since section 76 of the LRA permits the use of replacement labour during strikes. For convenience, it should be noted that the section 76 of the LRA is titled "Replacement labour" and provides that:

> (1) An employer may not take into employment any person-
> (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or

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322 See *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 17 ILJ 455 (A) 478E.
323 Grogan *Collective Labour Law* 141.
324 Grogan *Collective Labour Law* 141.
325 See Hepple and Leroux *Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.
(2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor.

An employer must therefore make an election: to either apply for designation of a maintenance service or not to apply for designation of a maintenance service. If it chooses the former option and is successful, it would secure a ban on strikes in the maintenance service – since section 65 of the LRA provides that no person may take part in a strike if that person is engaged in a maintenance service – but would also forfeit the right to replace employees who strike outside the maintenance service.[326] In terms of the LRA, a service is a maintenance service "if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery".[327] If the employer chooses the latter option, its employees will be permitted to strike (subject to the provisions of section 65 of the LRA), but it retains the right to replace them should they go on strike.[328] In general, therefore, nothing prevents an employer from taking on replacement labour during a strike except under the two exceptions in section 76 of the LRA.

So far, there have been relatively few cases where the courts have had an opportunity to closely interpret the provisions of section 76 of the LRA. As will be shown below, the principle of purposive interpretation played a critical role in how some of these cases were decided. Interestingly, there are some conflicting judgments of the Labour Court. These cases and the other cases where the courts have interpreted the provisions of section 76 of the LRA are discussed below.

2.5.1 SACTWU v Coats

This case[329] involved the interpretation of the words "to take into employment" as used in section 76 of the LRA. Briefly, in this matter the employer implemented a lock-out. The said lock-out was not in response to any strike. Some of the employees were locked-out while some were not. The employees who were not locked out continued to perform their own work as well as the work of their co-workers who were locked out. Feeling aggrieved by this state of affairs, the trade

326 See section 76(1)(a) of the LRA.
327 See section 75(1) of the LRA.
328 See section 76 of the LRA.
329 *SACTWU v Coats* 2001 22 ILJ 1413 (LC).

union SACTWU launched an urgent application to the Labour Court wherein it sought an order interdicting and restraining the employer from infringing section 76 of the LRA.

It was argued on behalf of SACTWU that the purposive approach to interpreting 76(1)(b) should be pursued: the emphasis should not be on the meaning of "take into employment" but on the words "performing the work of". The words "take into employment" should be widely interpreted to include a person who assists an employer as this would not be inconsistent with the definition of "employee". To find otherwise, so it was argued, would lead to the anomalous situation where employing an individual from outside the organisation would lead to an infringement of section 76(1)(b) and securing the assistance of an employee from within the organisation would not.

It was further argued that unless the employer was restrained, there would be an imbalance in the power-play during industrial action as the employer would not suffer from being denied the services of those who are locked out. Such an imbalance, it was argued, could not have been the intention of the legislature. Hence the purposive approach should be applied to section 76(1)(b). The court, therefore, had to determine whether the employer was contravening the provisions of section 76(1)(b) of the LRA by using its employees who were not locked out to perform their own work as well as the work of their co-workers who were locked out. Put differently, did the employer take into employment any person for the purpose of performing the work of any employee who was locked out?

Employers are permitted to employ replacement labour during a defensive lock-out – a lock-out "in response to a strike".[330] By contrast, if the employer initiates industrial action by implementing a lock-out in the absence of a strike (an offensive lock-out), then it may not employ replacement labour.[331] According to Grogan, this prohibition is aimed at balancing the scales when employers resort to lock-outs. Without it, he submits that there would be no inducement for employers to lift lock-outs, which could endure indefinitely if the employer manages to keep its business

330 See section 76(1)(b) of the LRA.
331 See section 76(1)(b) of the LRA.

running.[332] However, the LRA does seem to assume that an employer has the right to carry on with business during industrial action.[333]

Returning to *SACTWU v Coats*, the court, correctly so it is submitted, rejected the trade union's argument (outlined above). In so doing, the court held that:

> The purposive approach is applied in order to give effect to the purpose or ratio of a statute. If the purpose of the statute is evident from the language used, the words used must be given their ordinary meaning. The purposive approach is not a licence to ignore the plain meaning of the language. *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 *ILJ* 427 (LAC); [2001] 1 BLLR 58(LAC).[334]

The court added that:

> There is no ambiguity about the words 'take into employment'. They were deliberately used to exclude those who are not already in employment. If the legislature had intended the section to have the meaning that Mr Pillemer seeks to attach to the words 'take into employment' then it could simply have used the word 'employ' instead of 'take into employment'.[335]

The implication of *SACTWU v Coats* is that an employer does not contravene the provisions of section 76(1)(b) of the LRA by using its employees who are not locked out to perform their own work as well as the work of their co-workers who are locked out.[336] It is submitted that this approach is consistent with the LRA's assumption that an employer has the right to carry on with business during industrial action. However, non-striking employees and employees who have not been locked out may refuse to do the work of their co-workers who are either on strike or locked out.[337]

Although the issue was not raised in *SACTWU v Coats*, it is important to note that the words "to take into employment" as used in section 76 of the LRA includes engaging the services of a temporary employment service or an independent contractor. Section 76(2) of the LRA provides that for the purpose of the section, "take into employment" includes engaging the services of a temporary employment service or an independent contractor. [338] This provision is important as

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332 Grogan *Collective Labour Law* 315.
333 See section 76(1)(b) of the LRA read with section 187(1)(b) thereof.
334 *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 6.
335 *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 7.
336 See Grogan *Collective Labour Law* 316.
337 See section 187(1)(b) of the LRA.
338 See section 76(2) of the LRA.

it prevents employers from circumventing the provisions of section 76(1) of the LRA.[339] Without section 76(2) an employer could, say, lock-out its employees and then source replacement labour from a labour broker. The employer would then be able to argue that it did not take anyone into employment since the replacement workers are actually the employees of the labour broker. This would be so, because the contract of employment would be between the replacement workers and the labour broker. Section 198(2) of the LRA provides that:

> For the purposes of this Act, *a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary service is that person's employer*. (Emphasis added)

The notion of labour brokers as the employers of persons whose services have been procured for or provided to a client was introduced in 1983.[340] This change (the addition of sub-section (3) to section 1) was introduced by section 1(d) of the *Labour Relations Amendment Act* 2 of 1983. The new sub-section (3)(a) provided that labour brokers would be deemed the employer of the workers and that any service rendered to the client by the workers would be deemed rendered to the labour broker. Labour brokering creates what is sometimes referred to as a "triangular employment relationship".[341] In *LAD Brokers v Mandla*,[342] the court described the nature of this relationship as follows:

> …this is clearly a unique and *sui generis* tripartite relationship where the person who is provided by the temporary employment service to a client renders service, not to the temporary employment service, but to the client (although he is remunerated by the temporary employment service). It is accordingly a fiction that the person concerned renders service to the temporary employment service even when it is the employer of that person whose services are provided to the client through the temporary employment service...[343]

Interestingly, the LRA does not prohibit an employer from implementing a lock-out in response to a strike and then sourcing replacement labour (to perform the work of the locked out employees) from a labour broker. Also, with or without a lock-out, the employer would be able to source replacement labour (to perform the work of striking employees) from a labour broker should its employees go on strike. Put

339 Du Toit *et al The Labour Relations Act of 1995* 242.
340 Theron 2005 *ILJ* 625.
341 Gericke 2010 *Obiter* 105.
342 *LAD Brokers v Mandla* 2001 22 ILJ 1813 (LAC).
343 *LAD Brokers v Mandla* 2001 22 ILJ 1813 (LAC) 1818.

differently, nothing prevents an employer from sourcing replacement labour from a labour broker (subject to the prohibitions in section 76(1) of the LRA).

In the United Kingdom (hereafter the U.K.), particularly since 2015, the issue of whether or not labour brokers (known as employment agencies in the U.K.) should be permitted to supply replacement labour is a highly contentious issue. Section 7 of The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (hereafter the Employment Agency Regulations) prohibits employment agencies from supplying replacement labour to perform "the duties normally performed by a worker who is taking part in a strike or other industrial action".[344] However, in 2015 the government (through the Trade Union Bill of 2015) proposed amending section 7 of the Employment Agency Regulations. The proposed amendment was to repeal section 7 of the Employment Agency Regulations, thereby permitting employment agencies to supply replacement labour during strikes.

Unsurprisingly, trade unions in the U.K. are vehemently opposed to the proposed change to section 7 of the Employment Agency Regulations. Unite the Union, which is the largest trade union in the U.K., described the proposed repeal of the said section 7 as "unnecessary, inflammatory, disproportionate and discriminatory of trade unions".[345] Unite the Union also said:

> Removing Regulation 7 of itself and in context will cause immense industrial frustration and untold industrial damage. If agency staff, many of whom will in future be considered for employment in the workplace, break a strike, perhaps rendering it meaningless, the resultant industrial unrest this will cause and the splits in the workforce will be enormous.
>
> There will also be civil and social unrest. The reality is that agency workers live amongst the communities where employers are based...Strike breaking causes civil unrest within the communities where both agency and permanent workers live.[346]

In South Africa, COSATU has had long-running campaigns to ban labour brokering. It (COSATU) views labour brokering as being equivalent to trading in human beings, and as a practice which allows the 'real employer' (the client) to

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344 See section 7 of *The Conduct of Employment Agencies and Employment Businesses Regulations* 2003 (U.K.).

345 Unite the Union 2015 http://www.unitetheunion.org/uploaded/documents/BISHiringagencystaff11-23978.pdf.

346 Unite the Union 2015 http://www.unitetheunion.org/uploaded/documents/BISHiringagencystaff11-23978.pdf.

avoid employment responsibilities and labour laws whilst at the same time the labour broker unduly gets a fee from the client for doing nothing.[347] In a memorandum on labour brokering, COSATU has stated that "apart from undermining collective bargaining rights, labour brokers also provide scab labour and therefore serve as strike breakers!".[348] Therefore, it might be safe for one to assume that COSATU is not pleased with the fact that (subject to the prohibitions in section 76(1) of the LRA) the LRA does not prohibit employers from sourcing replacement labour from a labour broker. It may be argued that permitting employers to source replacement labour from labour brokers causes immense frustration for workers who exercise their right to strike and are then replaced. Consequently, it may also be argued that this situation may increase the likelihood of strike violence.

2.5.2 SACTWU v Stuttafords

As noted earlier, section 76 of the LRA prohibits the employment of temporary replacement labour "for the purpose of performing the work of an employee who is locked out, unless the lock-out is in response to a strike". This prohibition applies only if the temporary employees are engaged to perform the work of the locked out employees. Where for, example, the locked out employees are production workers, nothing prevents the employer from engaging additional security guards to maintain safety and security. The question should be asked who is a 'temporary employee'. Section 198(A)(1) does not define the term. Rather, it defines a 'temporary service' as work for a client by an employee –

a) For a period not exceeding three months;
b) As a substitute for an employee of the client who is temporarily absent; or
c) In a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).[349]

Amongst others, the question that arose in *SACTWU v Stuttafords*[350] was whether the employer was contravening the provisions of section 76 of the LRA when it hired casual employees, whom it had employed regularly, to perform the work of

347 COSATU 2012 http://www.cosatu.org.za/show.php?ID=5917.
348 COSATU 2012 http://www.cosatu.org.za/show.php?ID=5917.
349 See section 198(A)(1) of the LRA.
350 1999 20 ILJ 2692 (LC).

its locked out full-time employees. Briefly, wage negotiations broke down between the employer and the trade union SACTWU. On 17 August 1998 the employer gave notice in terms of section 64(1)(c) of the LRA to lock-out SACTWU's members, and on 20 August instituted a lock-out. SACTWU brought an application in the Labour Court for an order declaring the lock-out unprotected and awarding compensation to its members on the grounds that the notice required by section 64(1)(c) was defective; and that the employer had used temporary replacement labour to perform the work of locked out employees in contravention of section 76.

It was common cause that the employer had utilised the services of temporary employees and students during the lock-out. What was disputed was whether the temporary employees and students had performed the work of the locked out employees.[351] It was argued on behalf of the employer that section 76 of the LRA should be read in such a manner that it does not prohibit an employer from employing temporary employees during a lock-out. The basis of this argument was that:

> The definition of 'employee' in s 213 of the LRA is such that it is wide enough to encompass a temporary employee and the word 'employment' utilized in s 76 has a corresponding meaning;
>
> Interpreting the relevant provisions of s 76 liberally would be in accordance with the intention of the Act and enhance the protection and status of persons who do not qualify as employees in the common law;
>
> The phrase, '[a]n employer may not take into employment any person' used in s 76(1) should be given a similar interpretation so as not to preclude the respondent from utilizing temporary employees with whom it has this long-standing relationship.[352]

Fundamentally, the employer was arguing that the temporary employees (whom it had employed regularly) were actually its employees and that it did not contravene the provisions of section 76(1)(b) of the LRA by using its employees who were not locked out to perform their own work as well as the work of their co-workers who were locked out. To counter the employer's argument, it was argued on behalf of SACTWU that although there was a long-standing relationship between the employer and its temporary employees (some of whom had worked for the employer over a period of years) this did not detract from the fact that a new

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351 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 39.
352 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 43.

contract of employment was entered into each time the temporary employee was called upon to work.[353]

The court accepted that the law recognises that there is an ongoing relationship between a casual employee and an employer despite the termination of the employment contract. However, it rejected the employer's submissions, and in so doing reasoned that:

> ...a liberal interpretation of this provision [section 76 of the LRA] does not accord with the purpose of the LRA set out in chapter 1. That a purposive interpretation is necessary is clear from the provisions of chapter 1 and the jurisprudence developed by the Labour Courts.[354] (References omitted)

Also, the court held that:

> To interpret s 76 in the manner contended for will, in my view, affect that power-play and effect a shift in the power relations between employers and employees. More specifically, it would lead to a weakening of the position of labour in the context of a protected strike or a procedural offensive lock-out. For this reason I do not consider the interpretation contended for by Mr Cassim [the employer's counsel] to be correct. I prefer the purposive approach which interprets s 76 in such a manner so as to give effect to the primary objects of the LRA and particularly, to promote orderly collective bargaining.
>
> I conclude, therefore, that the employment of temporary employees whom the respondent had previously employed for the purpose of performing work of any employee locked out, constitutes a contravention of s 76(1)(b) of the LRA.[355]

On the facts of the case, the court concluded that the employer had contravened the provisions of section 76 by employing temporary employees to perform the work of locked out (permanent) employees. Regarding the students, the court found that there was insufficient evidence that they performed the work of locked out employees.[356]

It is important to note that there was also an allegation that the employer had contravened the provisions of section 76 by utilising security personnel to perform the work of locked out employees. The security personnel were employed by security companies which were independent contractors. Therefore, the court had to determine whether under these circumstances the employer had taken the security personnel 'into employment'. It will be recalled that section 76 of the LRA

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353 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 46.
354 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 50-52.
355 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 50-52.
356 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 58-63.

prohibits the employment of temporary replacement labour "for the purpose of performing the work of an employee who is locked out, unless the lock-out is in response to a strike". Importantly, section 76(2) of the LRA provides that for the purpose of the section, "take into employment" includes engaging the services of an independent contractor. In interpreting these provisions, the court held that:

> ...the legislature intended to encompass in the prohibition not only the case of an employer physically employing a person to perform the work of locked out employees but also the case of an employer utilizing the services of a person not otherwise employed by it, to assist in the performance of the work of employees who have been locked out.[357]

On appeal, the Labour Appeal Court[358] was not concerned with whether the employer contravened the provisions of section 76 of the LRA when it hired casual employees, whom it had employed regularly, to perform the work of its locked out full-time employees. Rather, the court focused on the awarding of compensation to SACTWU's members by the court *a quo*. The court *a quo* had concluded that the lock-out in question was protected; that the employer had contravened the section 76 of the LRA; and had consequently awarded SACTWU's members compensation in terms of section 68 of the LRA. Therefore, the Labour Appeal Court had to determine whether the court *a quo* had jurisdiction to entertain the claim for compensation (in terms of section 68 of the LRA) in the case of a contravention of section 76 of the LRA.

The Labour Appeal Court held that the court *a quo* did not have jurisdiction under section 68(1)(b) or even section 158 of the LRA to entertain a claim for compensation for losses attributable to a protected lock-out.[359] In coming to this conclusion the court reasoned that:

> In inflicting economic harm on its adversary, a party to collective bargaining is not limited to a strike or lock-out. In addition to a strike or lock-out, such a party is entitled to resort to conduct in contemplation or in furtherance of a strike or lock-out. Provided such conduct does not constitute a criminal offence, such conduct is protected and the party responsible for it is also protected. (See s 67(2), (3), (4), (5), (6), (8) and (9)). This means that such conduct cannot provide a course of action nor can the party have civil proceedings instituted against it for such conduct.[360]

Furthermore, the court added that:

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357 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 73.
358 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC).
359 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) paras 31, 39.
360 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 27.

> The Labour Court does not have jurisdiction under s 68(1)(b) to entertain a claim for compensation for loss attributable to a protected lock-out. Section 68(1)(b) confers exclusive jurisdiction on the Labour Court to award 'just and equitable compensation for any loss attributable to the strike or lock-out'. The reference to a lock-out in s 68(1)(b) is a reference to an unprotected lock-out.[361]

Another issue that was indirectly raised on appeal in *SACTWU v Stuttafords* was whether contravention of section 76 of the LRA renders an otherwise protected lock-out unprotected. In terms of the pre-trial minute, the Labour Court had to decide whether the employer had contravened section 76 of the LRA, and if so, whether it should forfeit the protection afforded a lock-out in terms of the LRA. Unfortunately, as the Labour Appeal Court noted,[362] the Labour Court failed to address this issue in its judgment. In the Labour Appeal Court it was argued on behalf of SACTWU that contravention of section 76 of the LRA renders an otherwise protected lock-out unprotected. However, this argument was later abandoned by SACTWU's counsel. The court, correctly so it is submitted, accepted the fact that employment of temporary replacement labour in contravention of section 76(1)(b) of the LRA by an employer in the course of a protected lock-out did not affect the legality of such a lock-out.[363] This is so, it is submitted, because there is simply no provision in the LRA which provides otherwise.

2.5.3 Technikon v National Union of Technikon Employees of South Africa

This case[364] is probably the most important case when it comes to the interpretation of section 76 of the LRA: it is one of a handful of cases where the Labour Appeal Court has interpreted the provisions of section 76 in detail. The case began in the Labour Court. On appeal, the judgment of the Labour Court was overturned.

In this matter the employer and the National Union of Technikon Employees of South Africa (hereafter NUTESA) reached a deadlock in their annual wage negotiations. Conciliation failed and a certificate was issued in terms of s 64(1)(a)(i) of the LRA. On 8 March 2000 NUTESA issued a strike notice to the

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361 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 31.
362 See *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 40.
363 See *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 20.
364 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC).

employer, and on the same day the employer issued a lock-out notice which was headed "Notice of defensive lock-out". In part the lock-out notice provided that:

> We hereby give you notice of our intention to embark on a lock-out of your union's members from the time following the commencement of such strike as referred to above and in response thereto as envisaged in ss *64 (1)(c)* and *76(1)(b)* of the *Labour Relations Act* 1995 (the Act). Such lock-out shall continue until such time as the unions accept the Technikon management's last wage offer dated 13 January 2000.

NUTESA's attorneys responded to the said lock-out notice by a letter dated 10 March 2000. In that letter they suggested that the lock-out notice was defective because it contended that the lock-out was a defensive lock-out and yet it referred to section 64(1)(c) – which, they maintained applied to offensive lock-outs only. Also, they argued that, as the respondent's strike was a protected one, the appellant could not institute a lock-out in terms of section 64(3)(d) nor could the employer employ temporary replacement labour in terms of section 76(b) of the LRA. They sought an undertaking from the employer that it would not proceed with its intended lock-out. The employer refused to comply with the said request. Thereafter, NUTESA launched an urgent application to the Labour Court to interdict the lock-out and the employment of temporary replacement labour.

The Labour Court made certain findings or observations which informed its judgment. These were that:

a) Whether a lock-out is offensive or defensive is characterised by the primary purpose for which it is instituted. The court reasoned that if the primary purpose is to compel the trade union and employees to meet the employer's demand it is offensive;[365]
b) The primary purpose of a defensive lock-out is to protect the employer's rights to property, person and economic activity;[366]
c) A lock-out is defensive if the strike is not protected. However, the court also stated that a lock-out in response to a protected strike may also be defensive;[367]
d) The right to employ replacement labour in terms of section 76(1)(b) of the LRA cannot be available in an offensive lock-out;[368]

365 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 1.
366 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 2.
367 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 4.

e) A purposive approach should be pursued in interpreting section 76(1)(b) of the LRA. Such an approach, so the court reasoned, would result in the recourse to replacement labour being invoked only when the lock-out is defensive.[369]

In light of the above, and on the facts of the case, the court held that the lock-out in question was in fact an offensive lock-out and not a defensive one as the employer had alleged. The court reasoned that the primary purpose of the lock-out was not to protect the employer's rights to property, person and economic activity.[370] Bizarrely, the court also held that the lock-out was not in response to a strike[371] – this finding is crucial in determining whether or not an employer may engage replacement labour in terms of section 76(1)(b) of the LRA. Consequently, the court held that the employer was not entitled to employ replacement labour in terms of section 76(1)(b) of the LRA.

Unsurprisingly, the employer launched an appeal to the Labour Appeal Court against the judgment of the Labour Court. In the Labour Appeal Court it was argued on behalf of the employer that, in order to determine whether the employer had the right to institute a lock-out, it was not necessary to characterise the lock-out as either offensive or defensive. This characterisation was only necessary in determining whether the employer was entitled to employ replacement labour, it was argued. On the other hand, NUTESA maintained that the lock-out which the employer had sought to institute was offensive, and that the LRA does not permit the employment of replacement labour during an offensive lock-out. The court pointed out the fact that the LRA does not refer to either offensive or defensive lock-outs. It stated that:

> The Act does not anywhere refer to the terms: defensive lock-out and offensive lock-out. However, it does refer in s 76(1)(b) to a lockout that is 'in response to a strike' and in s 64(3)(d) to a lock-out as a response to a strike that does not comply with the Act. These terms are used frequently in labour law parlance. However, care must be taken

368 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 12.
369 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 16.
370 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 24.
371 *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 31. The court stated that: "The benefit for the respondent in saying that the lock-out is in response to the strike is that it hoped then to qualify in terms of s 76(1)(b) to employ replacement labour. Although the respondent says that the lock-out was in response to the strike, after all the facts are considered it would appear that this is merely an assertion unsubstantiated by the facts".

> to ensure that pre-occupation with whether a lock-out is an offensive or a defensive lock-out does not have the effect that the focus is removed from where it should rightly be, namely, in the Act. In other words the true enquiry, which is whether the conduct complained of is permissible in terms of the Act, should never be lost sight of. I think that the court *a quo* may have fallen into this error.[372]

However, subject to one qualification, the court did acknowledge that categorising a lock-out as offensive or defensive is necessary for the determination of the question whether the employer was entitled to employ temporary replacement labour. The court explained that the qualification is that since the Act (in sections 64(3)(d) and 76(1)(b)) refers to a lock-out in response to a strike, it may be advisable to use that terminology.[373]

Relying on purposive interpretation, it was further argued on behalf of NUTESA that sections 64(3)(d) and 76(1)(b) should be read together to mean that: a defensive lock-out is only available to an employer if it is faced with an unprotected strike. It was submitted that if the word "strike" in section 76(1)(b) included a protected strike, that "would render the workers' right to strike nugatory and would reduce collective bargaining to collective begging".[374] In rejecting these arguments, correctly so it is submitted, the court held that:

> The submission by Mr Hennig that we should resort to purposive interpretation in reading s 76(1)(b) has no basis. The mere fact that the ordinary meaning of a word in a statute does not suit one's case is no justification then to seek to avoid the ordinary meaning of that word. That provides no justifiable basis to invoke purposive interpretation. Mr Hennig was not able to point out any ambiguity in s 67(1)(b) [76(1)(b)] nor was he able to suggest any absurdity that would result if the word 'strike' was read as meaning any strike **-** protected or unprotected.[375]

Also, the court (per Zondo J.P. as he then was) added that:

> It seems warranted that I should repeat what I said two years ago in the Labour Court about purposive interpretation. In *Transportation Motor Spares v National Union of Metalworkers of SA & others* (1999)20 *ILJ* 690 (LC) at 699B I said: 'While purposive interpretation has much to its credit, nevertheless, it must be adopted in appropriate cases. Purposive interpretation is no licence to ignore the language used in the

372 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 27.
373 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 28.
374 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 34.
375 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 40.

> statute which is the subject of interpretation.' There is, accordingly, no justification for reading into s *76(1)(b)* a word which is not there.[376]

The court went on to conclude that the lock-out in question was protected and that it was in response to the strike called by NUTESA. Regarding the latter, the court stated that was "clear as daylight" that the lock-out was in response to the strike called by NUTESA – which meant that the employer was entitled to employ temporary replacement labour in terms of section 76(1)(b) of the LRA.

The above case is a good example where a trade union, relying on purposive interpretation, sought to convince the court to interpret an employer's right to employ temporary replacement labour in terms of section 76(1)(b) of the LRA narrowly. Perhaps, on a broader level, it demonstrates the frustration which trade unions face regarding section 76 of the LRA. It should be recalled that during the drafting of the LRA trade unions were adamant that replacement labour or scab labour should not be permitted during a procedural strike.[377] Even so, the language used in the Act cannot simply be ignored. If the legislature had intended that employers should only be permitted to employ temporary replacement labour in response to an unprotected strike, it would have said so in section 76(1)(b).

2.5.4 SACCAWU v Sun International

SACCAWU v Sun international[378] is one of the more recent cases which were concerned with the interpretation of section 76 of the LRA. It should be recalled that section 76(1)(b) prohibits an employer from taking into employment any person for the purpose of performing the work of an employee who has been locked out, unless the lock-out is in response to a strike. The focus in this case is on the words "in response to a strike" as used in section 76.

The trade union SACCAWU embarked on a limited duration protected strike and issued a notice in terms of section 64 of the LRA on 21 September 2015. The notice informed Sun International (hereafter the employer) that the strike would

376 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 41. See also *SACTWU v Coats* 2001 22 ILJ 1413 (LC) paras 6-7.
377 See Du Toit *et al The Labour Relations Act of 1995* 29-30.
378 *SACCAWU v Sun International* 2016 1 BLLR 97 (LC) – hereafter the *Sun International case*.

start on 25 September 2015. The dispute involved demands for wage increases, minimum working hours and a housing subsidy.

On 22 September 2015, three days before the strike was set to commence, the employer issued a notice the heading of which read as follows: "Notification of the commencement of a lock-out in terms of section 64(1)(c) read with section 76(1)(b) Labour Relations Act, 66 of 1995, as amended (the LRA)". The lock-out was set to commence on 25 September 2015.

Feeling aggrieved by the said notice, SACCAWU approached the Labour Court on an urgent basis where it sought a declaratory and interdictory order couched as follows:

> Declaring that the Respondent's unlimited duration lock-out is not meant to counteract the effect of the strike action by the Applicant's members and is, therefore, not in response thereto as envisaged by the latter part of the provisions of s 76(1)(b) of the Labour Relations Act, No 66 of 1995 as amended; and
>
> Interdicting and restraining the Respondent forthwith from taking into its employment any person for the purpose of performing the work of any employee who is locked out by virtue of a lock-out issued by the Respondent on 22 September 2015.[379]

The court identified the issue to be determined as whether in terms of section 76(1)(b) of the LRA an employer may continue to use replacement labour after a strike has ended.[380] Although the trade union conceded that the lock-out in question was protected, it argued that an employer's right to use replacement labour must be in response to a strike and that once a strike has ended, section 76(1)(b) of the LRA no longer applies. On the other hand, the employer argued that, taking into account the interpretation clause contained in the LRA, it is entitled to use replacement labour in a context in which the employer reacts to a strike by means of a protected lock-out, even after the end of such strike. It would be anomalous, so the argument went, that an employer is entitled to meet a union's attack by way of a counter-attack (in the form of a lock-out), but with its right to an effective counter-attack being limited by a factor of the attacker's choosing – the duration of the hostilities.

379 See the *Sun International case* para 1.
380 See *Sun International case* para 5.

The employer relied on an earlier judgment by the Labour Court in *Ntimane v Agrinet*[381] where the court had held that the right to employ replacement labour accrues at the stage a defensive lock-out is implemented and endures until the lock-out ceases.[382] Put differently, the court in *Ntimane* held that if an employer implements a defensive lock-out (a lock-out in response to a strike) it does not lose the right to employ replacement labour should its employees decide to terminate their strike. For its part, SACCAWU relied on yet another earlier judgment of the Labour Court in *National Union of Technikon Employees v Technikon*[383] where the court had stated (obiter) that "*if the strike ends so must the employment of replacement labour*".[384]

In light of the above conflicting judgments, the court had to decide whether to follow *Ntimane.* For the reasons outlined below and discussed in more detail later, the court decided not to follow *Ntimane*. The court considered the meaning of the words "in response to a strike" as used in section 76(1)(b) of the LRA. Relying on a number of authorities including the certification judgment[385] (where the constitutional court rejected the proposition that the right of employers to lock-out is the necessary equivalent of the right of workers to strike), and the ILO's committee of experts (where it had stated – in reference to the Right to Organise and Collective Bargaining Convention (No. 98) of 1949 – that workers who participate in a lawful strike should be able to work once the strike has ended), the court held that the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased.[386]

Employers are permitted to employ replacement labour during a defensive lock-out – a lock-out "in response to a strike".[387] By contrast, if the employer initiates industrial action by implementing a lock-out in the absence of a strike (an offensive

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381 *Ntimane v Agrinet* 1999 20 ILJ 809 (LC) – hereafter *Ntimane*.
382 See *Ntimane* para 17.
383 2000 21 ILJ 1645 (LC).
384 See *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 9. It should be noted that this judgment was overturned by the Labour Appeal Court on appeal in *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC).
385 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
386 See *Sun International case* paras 13-19.
387 See section 76(1)(b) of the LRA.

lock-out), then it may not employ replacement labour.[388] According to Grogan, this prohibition is aimed at balancing the scales when employers resort to lock-outs. Without it, he submits that there would be no inducement for employers to lift lock-outs, which could endure indefinitely if the employer manages to keep its business running.[389] In *Technikon SA v National Union of Technikon Employees*,[390] the Labour Appeal Court explained the rationale behind section 76(b) of the LRA as follows:

> The rationale behind s *76(1)(b)* is that if an employer decides to institute a lock-out as the aggressor in the fight between itself and employees or a union, it may not employ temporary replacement labour. That is to discourage the resort by employers to lock-outs. The rationale is to try and let employers resort to lock-outs only in those circumstances where they will be prepared to do without replacement labour (i.e. when they are the aggressors) or where they are forced to in self-defence in the sense that the lock-out is 'in response to' a strike by the union and the employees - in other words, where the union and the employees are the aggressors.[391]

Also, the court added that:

> The policy [rationale behind section 76(1)(b) of the LRA] is one that also says to unions and employees: do not lightly resort to a strike when a dispute has arisen because, in the absence of a strike, the employer may not employ replacement labour even if it institutes a lock-out but, if you strike, the employer will be able to employ replacement labour - with or without a lock-out. The sum total of all this is that the policy is to encourage parties to disputes to try to reach agreement on their disputes and a strike or lock-out should be the last resort when all reasonable attempts to reach agreement have failed.[392]

Returning to the *Sun International* matter, it is obvious that this case turned on the interpretation of the words "in response to a strike" as used in section 76(1)(b) of the LRA. The question should be asked, do these words mean that the right to employ replacement labour accrues at the stage a defensive lock-out is implemented and endures until the lock-out ceases, as was held in *Ntimane*; or, do they mean that the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased, as was held in *Sun International?*

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388 See section 76(1)(b) of the LRA.
389 Grogan *Collective Labour Law* 315.
390 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC).
391 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 40.
392 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 43.

The facts in both cases are strikingly similar. Briefly, in *Ntimane* there was a dispute between the trade union SACCAWU and the employer regarding wage negotiations. The employees engaged in a protected lock-out, and the employer responded by instituting a lock-out. The lock-out was in response to the strike. The trade union informed the employer that it did not accept the employer's demands but it was calling off the strike. In turn, the employer informed the trade union that the lock-out would continue until such a time as its offer had been accepted by the union's members.

The starting point in determining the true meaning of the words "in response to a strike" as used in section 76(1)(b) of the LRA is the LRA itself. As Grogan has pointed out, the unusual aspect of the LRA is that it contains a specific interpretation clause.[393] Section 3 of the Act compels any person applying the Act to interpret its provisions (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of South Africa.[394]

In *Sun International*, it seems as if it was common cause that the lock-out which was implemented by the employer on 25 September 2015 was in response to a strike by its employees which commenced on the same day.[395] Also, it seems that it was common cause that the termination of the said strike did not affect the legality of the lock-out; it remained a protected lock-out and the employer was not required to comply with the procedural requirements set out in section 64 of the LRA all over again.[396] Put differently, the lock-out (even after the strike had been terminated) was the unbroken continuation of the action which the employer had embarked upon on 25 September 2015.[397] As the court put it in *Ntimane*, "a chameleon remains a chameleon even after it has changed its hue".[398]

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393 See Grogan *Collective Labour Law* 14.
394 See section 3 of the LRA.
395 In part, the lock-out notice provided that "the lockout will commence after members of SACCAWU have embarked on their strike".
396 See *Sun International case* para 5.
397 In part, the lock-out notice provided that "the lockout will continue until such time as Sun International's aforesaid offer has been accepted...".
398 See *Ntimane* para 10.

If one were to follow the court's reasoning in *Sun International* (set out above) it would mean that the employer's lock-out remained the same protected lock-out for the purposes of section 64 of the LRA but at the same time changed (when the employees terminated their strike) into an offensive lock-out for the purposes of section 76(1)(b) of the LRA – which meant that the employer was no longer permitted to employ replacement labour. This cannot be correct since the employer only instituted one lock-out in response to the strike by its employees.

Moreover, section 76(1)(b) of the LRA does not provide that the exception therein is rendered inapplicable when the strike in response to which the lock-out was initiated, terminates.[399] In *Sun International* the court applied purposive interpretation to reach the conclusion that the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased. Although the LRA endorses purposive statutory interpretation, purposive interpretation is no license to ignore the clear language used in the Act and should be adopted in appropriate cases.[400]

In light of the above, it is submitted that the court in *Ntimane* was correct in its interpretation of section 76(1)(b) of the LRA. Grogan states that "if a lock-out commences as a 'defensive' lock-out (i.e. in response to a strike) and the workers subsequently abandon their strike, the right to employ replacement labour continues".[401] Furthermore, as the court held in *Ntimane*, the employer's right to continue using replacement labour is counterbalanced by the right to picket.[402] Section 69 of the LRA affords members of a trade union the right to picket in support of a protected strike or in opposition to any lock-out. The right to picket is

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399 See *Ntimane* para 16.

400 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 41. See also *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 6, where it was held that "the purposive approach is applied in order to give effect to the purpose or ratio of a statute. If the purpose of the statute is evident from the language used, the words used must be given their ordinary meaning. The purposive approach is not a licence to ignore the plain meaning of the language".

401 Grogan *Workplace Law* 488. See also Todd *Collective Labour Law* 77 where the author states that "If a lock-out is implemented in response to a strike, then replacement labour is permitted. This remains so even if the strike (in response to which the lock-out was implemented) has come to an end".

402 See *Ntimane* para 18. However, contrast with *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 12 (it should be noted that this judgment was overturned by the Labour Appeal Court on appeal).

reinforced by the fundamental rights to freedom of expression[403] and freedom of assembly[404] as guaranteed by the Constitution.[405] The position of the LRA is in line with the ILO. According to the ILO, taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful.[406] It is submitted that the "other workers" includes replacement workers. Importantly, in the South African context, there is a Code of Good Practice on Picketing.[407] Item 3 thereof provides that:

> The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of this support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not do business with the employer. (Emphasis added)

In the *Sun International* matter, there was therefore nothing which would have prevented the employees from firmly but peacefully picketing to dissuade replacement labour from working. It should be noted that there are some authors who have suggested that the legislature should permit employers to hire replacement labour during employer initiated lock-outs or offensive lockouts as they are sometimes called – something which is currently prohibited by section 76 of the LRA. The LRA does not preclude an employer who has locked out its workers from dismissing them for operational requirements.[408] Accordingly, Todd and Damant argue that the prohibition on replacement labour in employer initiated lock-outs "serves to make some avoidable dismissals unavoidable".[409] They reason that:

> ...the prohibition on the use of replacement labour in employer initiated lockouts has the effect that an employer may find itself more quickly at the point where it is operationally and commercially justifiable on rational grounds to jettison the existing recalcitrant workforce and go to the cost and effort of replacing it and training a new workforce, rather than continuing to hold out with the existing workforce at the point of impasse.[410]

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403 See section 16 of the *Constitution*.
404 See section 18 of the *Constitution*.
405 Van Niekerk and Smit *Law @ Work* 436.
406 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 648-651.
407 GN 765 in GG 18887, dated 15 May 1998.
408 Grogan *Workplace Law* 490.
409 Todd and Damant 2004 *ILJ* 919.
410 Todd and Damant 2004 *ILJ* 919.

Also, they add that:

> It would be more sensible, in our view, for the legislature to permit the use of replacement labour in employer initiated lock-outs. This would make it more difficult for employers to argue that they have reached the point of dismissal before they have exhausted attempts at resolving the issue through industrial action.[411]

Simply put, Thompson has also suggested that the legislature should permit employers to hire replacement labour during employer initiated lock-outs. While conceding that "the phenomenon of scab labour admittedly attracts its own special opprobrium",[412] he argues that the significance of employment security may warrant such a change.[413] The basis of the suggestion to permit replacement labour during employer initiated lock-outs seems to be the idea that from the employees' perspective it may be better to be replaced temporarily than being dismissed permanently.

A counter-argument to this suggestion (that the legislature should permit employers to hire replacement labour during employer initiated lock-outs) is that the prohibition on replacement labour during employer initiated lock-outs is aimed at balancing the scales when employers resort to lock-outs. Without it, there would be no inducement for employers to lift lock-outs, which could endure indefinitely if the employer manages to keep its business running.[414] Furthermore, as the Labour Appeal Court pointed out in *Technikon SA v National Union of Technikon Employees of SA*, the rationale behind section 76(1)(b) of the LRA – which prohibits replace labour during employer initiated lock-outs – is to discourage the resort by employers to lock-outs; this is achieved by permitting employers to resort to lock-outs only in circumstances where they are prepared to do without replacement labour.[415] Moreover, section 76(1)(b) of the LRA is designed to protect labour in the power-play situation of an offensive lock-out. Without it, the position of labour would be severely weakened.[416]

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411 Todd and Damant 2004 *ILJ* 921.
412 Thompson 2006 *ILJ* 730.
413 Thompson 2006 *ILJ* 730.
414 Grogan *Collective Labour Law* 315.
415 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 40.
416 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 50. See also *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 12, where the court stated that "Furthermore, s 76(1)(b) cannot be available in an offensive lock-out if there is to be

Returning to the *Sun International case*, Sun International was not happy with the Labour Court's judgment and launched an appeal against the said judgment. The judgment[417] of the Labour Appeal Court was delivered on 3 May 2017. The court (per Davis JA) framed the issue before it as follows:

> The substance of the appeal before this Court concerns one crisp question, namely the interpretation of s76 (1)(b) of the *Labour Relations Act* 66 of 1995 ('LRA'). Section 76 (1) (b) of the LRA provides:
>
> [a]n employer may not take into employment any person for the purposes of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.[418]

From the above discussion, it will be recalled that the trade union SACCAWU embarked on a limited duration protected strike and issued a notice in terms of Section 64 of the LRA on 21 September 2015. The notice informed Sun International that the strike would start on 25 September 2015. On 22 September 2015, three days before the strike was set to commence, the employer issued a notice the heading of which read as follows: "Notification of the commencement of a lockout in terms of section 64(1)(c) read with section 76(1)(b) Labour Relations Act, 66 of 1995, as amended (the LRA)". The lock-out was set to commence on 25 September 2015. It will also be recalled that feeling aggrieved by the said notice, SACCAWU approached the Labour Court on an urgent basis where it sought certain declaratory and interdictory orders.

When the appeal was heard, it was common cause that the parties had concluded a wage settlement agreement on 7 October 2015.[419] As the Labour Appeal Court put it, it was "common cause that the dispute which gave rise to both the strike and the lock-out had been resolved".[420] Consequently, the respondent (SACCAWU) raised a point *in limine* regarding the appeal against the judgment of the Labour Court. It argued that the appeal was moot since the dispute between the parties

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substantive parity in collective bargaining. It would have untenable results if it were allowed. An employer could then make any demand, lock-out its workforce and employ replacement labour. It is conceivable that an employer may prefer to run its operations under such conditions. The employees will be disproportionately disadvantaged".

417 *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC).
418 *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC) para 2.
419 *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC) para 8.
420 *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC) para 8.

had been resolved.[421] On the other hand, the appellant (Sun International) argued that the appeal had not become moot. It argued that there was a continuing dispute about whether it was entitled to use replacement labour in the circumstances of this case i.e. where the trade union had ended its strike. In the event that the court was to conclude that the appeal was moot, it argued that the court should nonetheless exercise its discretion to entertain the appeal, because (1) the appeal raised a discrete legal issue, being the interpretation of section 76 (1)(b) of the LRA and that this issue was of importance to the labour community at large; and (2) it was important for the Labour Appeal Court to resolve the conflict between the court *a quo's* judgment and *Ntimane.*[422]

It will be recalled that the court *a quo* held that the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased.[423] However, the same court (Labour Court) in *Ntimane* had held that the right to employ replacement labour accrues at the stage a defensive lock-out is implemented and endures until the lock-out ceases.[424] Thus, the court in *Ntimane* held that if an employer implements a defensive lock-out (a lock-out in response to a strike) it does not lose the right to employ replacement labour should its employees decide to terminate their strike.

Given the above mentioned submissions for the respondent and the appellant respectively, the Labour Appeal Court concluded that the appeal was moot. The appeal was dismissed based on this point.[425] For the purpose of this study, it is not necessary to provide an in-depth analysis of whether the appeal was moot or not. Rather, the important point which has to be emphasised is that the Labour Appeal Court declined to consider the merits of the appeal. If it had considered the merits of the appeal, the Labour Appeal Court would have provided an authoritative interpretation of section 76(1)(b) of the LRA, thereby resolving the conflict between the judgments of the Labour Court mentioned above, namely *Ntimane* and the *Sun International case*.

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421 *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC) para 8.
422 *Ntimane v Agrinet* 1999 20 ILJ 809 (LC).
423 See *Sun International* case paras 13-19.
424 See *Ntimane* para 17.
425 See *Sun International case* paras 15-22.

Nevertheless, it is clear that under the current dispensation the LRA does not permit the employment of replacement labour during offensive lock-outs. However, it is also evident (as shown above) that there are some negative implications for employees under the current system.

Having discussed the law and case law on replacement labour in South Africa, the possible arguments for (and against) anti-scab legislation are considered next.

2.6 Possible arguments for anti-scab legislation in South Africa

2.6.1 The use of replacement labour causes violence

That violence during strikes has become a serious concern in South Africa hardly needs comment. Instead of being characterised by orderly picket lines, South Africa has "one of the highest rates of industrial action, with its strikes amongst the most violent in the world".[426] As far back as 1995, the drafters of the LRA recognised that under the 1956 LRA there was an unacceptably high incidence of unnecessary and unprocedural strikes, often characterised by violence.[427] As will be shown below and as has been suggested,[428] the current provisions of the LRA have not prevented widespread violence during protected and unprotected strikes. Many suggestions have been made regarding possible solutions to strike violence in South Africa: the re-introduction of strike ballots,[429] educating trade unions and their members, removing the protected status of a strike if it turns violent,[430] and the creation of specialised police units.[431]

Another suggestion which has been made regarding possible solutions to strike violence in South Africa is the ban on replacement labour during protected strike action. This suggestion is the focus of this discussion. As noted earlier, strike violence usually breaks out when the employer attempts to continue operating

426 Odendaal 2014 http:// www.miningweekly.com/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06.
427 Explanatory Memorandum to the Labour Relations Bill, published in 1995 16 ILJ 278 at 284.
428 Ngcukaitobi 2013 *ILJ* 846.
429 Brand "How the law could better regulate the right to strike in South Africa" 68. See also Tenza 2015 *Law Democracy and Development* 212.
430 See Levy "Strike action: will things ever be the same" 19.
431 Brand "How the law could better regulate the right to strike in South Africa" 71.

during the strike.[432] Much of the violence which occurs during strike action in South Africa is between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[433] Strikers perceive the use of replacement labour by an employer as undermining their action and this breeds anger.[434] Accordingly, this "seems to be the root cause of the friction between replacement workers and strikers".[435] Given the negative attitude which trade unions in South Africa have towards labour brokers, it is submitted that the anger of the striking workers may be exacerbated if the replacement workers are sourced from a labour broker. Instead of "responsible trade unionism",[436] trade unions incite and support strike violence or simply step back and allow it to happen.[437] As far back as the early 1900s Jack London proclaimed that terrorism, that is violence, is an eminently successful policy of labour unions. According to him, this terrorism was only justifiable if it was "directed at the scab, placing him in such fear for life and limb as to drive him out of the contest".[438]

There have been numerous instances where people who were scabs or considered to be scabs were either assaulted or killed. This is not a new phenomenon. In the 1980's strikes were often accompanied by violence: striking workers were beaten, arrested and shot by the police. Scab labourers were intimidated, assaulted and sometimes murdered by striking workers.[439] For example, in *FAWU v Natioanal Co-operative Dairies*[440] the employer had attempted to hire casual labourers (replacement labour) in an attempt to maintain production during a strike. Groups of striking employees assaulted the replacement labourers with pieces of wood, pipes, crate hooks and sticks. In the

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432 Stewart and Townsend 1966 *University of Pennsylvania Law Review* 460.
433 See Levy "Strike action: will things ever be the same" 6.
434 Tenza 2015 *Law Democracy and Development* 220.
435 Tenza 2015 *Law Democracy and Development* 220.
436 For a discussion on the concept of "responsible trade unionism", see Botha 2015 *De Jure* 334.
437 See Levy "Strike action: will things ever be the same" 18. See also Von Holdt 2010 *Transformation* 147, where he states that "At the COSATU 10th congress, held in 2009, the secretariat report criticised the use of violence and the trashing of streets in strikes, arguing that this delegitimised the strike weapon in the eyes of the public. Many of the affiliate leaders were clearly uncomfortable with this view, and argued that provocative and brutal police action and the use of scab labour to undermine strikes drove workers to use such tactics". (Emphasis added)
438 London *War of the Classes* 112.
439 Von Holdt 2010 *Transformation* 127.
440 *FAWU v Natioanal Co-operative Dairies* 1989 10 ILJ 490 (IC).

ensuing violence, the replacement labourers were forced to run for their lives.[441] The high level of strike violence in the 1980's was ascribed to the conditions under which trade unions organised and engaged in collective bargaining under the apartheid era.[442] It was hoped that this situation would change after the post-apartheid era. However, this has not happened.[443]

According to Von Holdt, workers are disposed to use violence in strikes, because they believe it is intrinsic to the strike and because it has proven its effectiveness.[444] The 2007 strike by nurses in the public sector was accompanied by high levels of violence. In a study conducted by Von Holdt, a shop steward was quoted as saying:

> Since I was born, I have seen all strikes are violent. There are no such strikes as peaceful strikes. Some workers do not join a strike because of fear. We must develop a mechanism for all these workers to participate. By force they must join the strike. Otherwise anybody would do their own thing...If you don't use force, problems won't be resolved speedily. This puts pressure on the management or government to act. Violence sends a message to the whole country, those responsible will quickly realise they must resolve things. So the violence assists to wake up the entire country, that the innocent will suffer.[445]

Strikes are usually accompanied by pickets.[446] As noted earlier, South African law permits employees to peacefully picket to dissuade replacement labour from working.[447] In practical terms, this means that striking workers would be on the picket line trying to prevent the replacement labourers from working. It is submitted that the use of replacement labour may heighten the risk of violence on a picket line if the employer uses replacement labour during a strike.[448] This is so because:

> Picketing has long been recognised as very crucial in the conduct of industrial action. Where a claim by a trade union is rejected by an employer, the unions' call for strike can only be meaningful if it stops the employer from continuing his business. The strike will not be effective if the employer is able to recruit non-union labour ('blacklegs') [this term is used to refer to replacement labour or scab labour in the U.K.] or makes do with those who may not want to join the strike ('scab') to continue in business. This makes the factory gate to become the focal point of the strike. Picketing is thus clearly the physical means employed by employees either to intensify

441 *FAWU v Natioanal Co-operative Dairies* 1989 10 ILJ 490 (IC) 492.
442 Von Holdt 2010 *Transformation* 127.
443 Von Holdt 2010 *Transformation* 127.
444 Von Holdt 2010 *Transformation* 141.
445 Von Holdt 2010 *Transformation* 141.
446 Tenza 2015 *Law Democracy and Development* 220. See also section 69 of the LRA (which regulates picketing); Code of Good Practice on Picketing.
447 See Item 3 of the Code of Good Practice on Picketing.
448 See also Tenza 2015 *Law Democracy and Development* 219.

> the economic pressure mounted on the employer or to ensure that the concerted stoppage of work is not undermined.[449] (Emphasis added)

Unfortunately, the violence which normally erupts between striking workers and replacement labour is not limited to the workplace or the picket line: sometimes replacement labourers are attacked on their way to and from the workplace. The facts in the more recent case of *Mahlangu v SA Transport & Allied Workers Union*[450] provide a good example. In this matter, the plaintiff obtained employment as a replacement worker during a 2006 nation-wide strike by SATAWU. She was basically kidnapped on her way to work by striking employees who then forced her to accompany them to Johannesburg. She was later bundled onto a train, where she was stripped naked and assaulted. Finally, she was then thrown from the moving train.[451]

The above mentioned case makes it clear that replacement labour's propensity to trigger violence during a strike or lock-out makes it a public interest issue.[452] Among the suggestions which have been made regarding possible solutions to strike violence in South Africa is the ban on replacement labour during protected strike action. Tenza argues that section 76 of the LRA should be revisited or even repealed by the legislature.[453] Similarly, Brand also argues for a prohibition on hiring replacement labour during a protected strike, except for employers in essential services.[454] Would a prohibition on replacement labour during protected strike action end strike violence in South Africa? It probably would not end all the strike violence in South Africa: there may still be some violence between striking and non-striking employees with or without replacement labour. However, a ban may go a long way in addressing the problem of strike violence if the use of replacement labour is indeed "the root cause of violent strikes".[455]

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449 Okene 2008 *University of Botswana Law Journal* 121.
450 *Mahlangu v SA Transport & Allied Workers Union* 2014 35 ILJ 1193 (GSJ).
451 *Mahlangu v SA Transport & Allied Workers Union* 2014 35 ILJ 1193 (GSJ) paras 11-19.
452 See Du Toit *et al The Labour Relations Act of 1995* 241.
453 Tenza 2015 *Law Democracy and Development* 219-222.
454 Brand "How the law could better regulate the right to strike in South Africa" 71.
455 Tenza 2015 *Law Democracy and Development* 219-222.

2.6.2 The use of replacement labour renders a strike ineffective

It has been argued that the use of replacement labour renders a strike ineffective.[456] Some have gone as far as suggesting that the use of replacement labour changes collective bargaining into collective begging.[457] As noted earlier, COSATU has called for scabs to be outlawed. It argues that strikes become meaningless if the employer has the right to employ scabs, and that scabs strip workers of their democratic right to protest. It considers scabs and strike breaking labour brokers as a scourge in the society undermining orderly collective bargaining.[458] The now former General Secretary of COSATU, Zwelinzima Vavi, has been quoted as saying:

> There remain some gaps in the law on the right to strike, which we must raise today. One is the use of replacement labour, which employers have a virtually unfettered right to employ. This amounts to an infringement of the right to strike and, in our context of very high levels of unemployment, is a root cause of violence in strikes.[459]

In order to fully understand the argument that the use of replacement labour renders a strike ineffective, it is necessary to explain the role of strikes in collective bargaining. Collective bargaining is an adversarial process which takes place when one or more employers engage with one or more employee collectives in an attempt to reach an agreement on issues of mutual concern.[460] Collective bargaining is widely accepted as the primary means of determining the terms and conditions of employment in South Africa.[461] Davies and Freedland aptly describe the purpose of collective bargaining as follows:

> By bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc., should not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and that jobs should be reasonably secure.[462]

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456 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.
457 Tenza 2016 *Obiter* 116.
458 COSATU 2006 https://pmg.org.za/committee-meeting/7248/.
459 See Calitz 2016 *South African Mercantile Law Journal* 439.
460 Grogan *Workplace Law* 320. See also *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board* 2014 35 ILJ 1885 (CC) paras 142-143.
461 Du Toit 2000 *ILJ* 1544; Botha 2015 *De Jure* 330.
462 Davies and Freedland *Khan Freund's Labour and the Law* 69.

In the context of the workplace, freedom of association "entails the right of workers to form and join trade unions of their choice and to participate in these unions' lawful activities".[463] The LRA gives broad protection to the right to freedom of association.[464] Once a trade union is formed, organised workers in the form of a trade union meet the employer on a more equal footing than an individual worker would – they are able to confront the employer with collective power.[465] Workers confront the employer with collective power by withholding their labour. Put differently, it is through industrial action – primarily through a strike – that workers are able to assert bargaining power.[466] The term "strike" is not defined in the Constitution but in the LRA. It is defined in section 213 of the LRA as:

> The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect any matter of mutual interest between employer and employee...[467]

Employees use a strike (whatever form it may take) for the purpose of coercing the employer to accede to their demands. An employer may agree to a compromise to avoid the negative consequences associated with the stoppage of production.[468] Strikes are a corollary to collective bargaining and the right to collective bargaining is incomplete without the pressure of a strike.[469] By their very nature, strikes are disruptive and impose a "punitive cost" on both the employer and the striking employees.[470] Therefore, the LRA converts strikes into "a proper trial of strength, the outcome of which is determined by whether the employer can do without the employee's labour longer than the employees can do without their wages".[471]

In light of the above, one would then expect that strikes which are conducted under the auspices of the LRA should result in some financial stress on those concerned, that is to say, the workers do not receive any pay while they remain on strike and the employer suffers some financial loss due to the interruption or

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463 McGregor *et al Labour Law Rules* 163.
464 See sections 4 and 5 of the LRA. See also section 23(2)(a) of the *Constitution*.
465 Banjo 2009 *South African Journal of Labour Relations* 121.
466 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.
467 See section 213 of the LRA.
468 Van der Walt *et al Labour Law in Context* 203.
469 *NUM v G Vincent Metal Sections* 1993 14 ILJ 1818, 1324-1325.
470 *SATAWU v Moloto* 2012 33 ILJ 2549 (CC) para 33.
471 Grogan *Collective Labour Law* 10. See also Tenza 2016 *Obiter* 116.

complete halt to production. In South Africa, where is the financial stress on employers supposed to come from in a situation where the no work no pay principle applies to employees who are on strike whilst at the same time the law permits employers to simply replace those employees and thereby continue with production? Clearly, a strike is rendered ineffective whereby the employer is able to use replacement labour and thereby maintain production. This is so because the persuasive force of a strike largely depends upon the extent to which, by withdrawing their labour, striking workers are able to interrupt the employer's business or production.[472] If:

> ...the disruption is small and can be easily managed, there is little prospect that the strike will persuade the employer to accede to the workers' demands. If production can be maintained either by existing workers who choose not to participate in the strike *or by temporary workers, much of the force will be removed*.[473] (Emphasis added)

The use of replacement labour during a strike involves two competing interests. Employers want to be able to employ persons to maintain production during a strike. However, from the employees' point of view the use of replacement labour deprives them of the only "weapon" that they have, namely, the ability to withhold their labour and thereby place economic pressure on the employer.[474] In order to address these competing interests, the LRA affords members of a trade union to picket in support of a protected strike or in opposition to any lock-out,[475] and the Code of Good Practice on Picketing[476] provides that employees may picket to dissuade replacement labour from working.[477] Therefore, as Jordaan has done, it may be argued that the right to picket counters the argument that the use of replacement labour renders a strike ineffective.[478] Clearly, a strike will be effective if the striking workers are able to prevent replacement labour from working. However, as stated earlier, the use of replacement labour may heighten the risk of violence on a picket line if the employer uses replacement labour during a strike. Strikers perceive the use of replacement labour by an employer as undermining

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472 Todd *Collective Bargaining Law* 76.
473 Todd *Collective Bargaining Law* 76.
474 Du Toit *et al The Labour Relations Act of 1995* 241.
475 See section 69 of the LRA.
476 GN 765 in GG 18887, dated 15 May 1998.
477 See Item 3 thereof.
478 Jordaan 1997 *Law Democracy and Development* 4.

their action and this breeds anger.[479] Much of the violence which occurs during strike action in South Africa is between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[480] It can therefore be argued that picketing addresses one problem (ensuring that a strike is not rendered ineffective by preventing replacement labour from working) but also creates another (strike violence).

2.6.3 The use of replacement labour results in longer strikes

A strike results in some financial stress for those concerned, that is to say, the workers do not receive any pay while they remain on strike and the employer suffers some financial loss due to the interruption or complete halt to production. In turn, this financial stress acts as an incentive for continued bargaining with a view to reaching a compromise or settlement.[481] Obviously, the economic pressure caused by a strike will be reduced or even eliminated if the employer uses replacement labour to maintain production during a strike.

One of the most common arguments which proponents of anti-scab legislation usually make is that the use of replacement leads to longer strikes. The rationale behind this argument is that by using replacement labour during a strike (thereby maintaining production) an employer is not placed under much economic pressure to settle the dispute and is thus able to hold out for longer. Interestingly, in the South African context, the Department of Labour has suggested that the use of replacement labour leads to longer strikes. In its 2010 Annual Report on Industrial Action, it stated that:

> The number of work stoppages that lasted 41 and more days increased from 1.4% in 2009 to 3.4% in 2010...This might partly be attributed to the use of replacement labour. The use of replacement labour is expected to increase the length of strikes.[482] (Emphasis added)

It is true that strikes are lasting for longer periods in South Africa. In 2014 the longest strike in South Africa's history (post 1994) took place in the mining

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479 Tenza 2015 *Law Democracy and Development* 220.
480 See Levy "Strike action: will things ever be the same" 6.
481 See *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 17 ILJ 455 (A) 478E. See also Grogan *Collective Labour Law* 10; Gerick 2012*THRHR* 567.
482 See Department of Labour *Annual Industrial Action Report 2010* 33.

industry. The strike lasted for four months.[483] In the following year, members of the National Union of Mineworkers in the coal industry embarked on a strike which lasted for three and a half months.[484] In the same year, that is to say 2015, 5.1% of strikes lasted for 40 days or longer.[485] From 1995 to 2012, the average length of strikes was 8.32 days.[486] However, in the same period there was an increase in the number of strikes lasting for longer than a month. This has led to the conclusion that "we can expect strikes to last longer in the future".[487] The 2014 statistics compiled by the Department of Labour showed that there were fewer strikes compared to 2013, but that it lasted longer.[488]

In light of the above, the critical question is whether the use of replacement leads to strikes lasting for longer periods in South Africa as the Department of Labour has suggested. On a theoretical level, it is easy to accept that by using replacement labour during a strike an employer is not placed under much economic pressure to settle the dispute and is thus able to hold out for longer. In such a scenario, the strike may last for a longer period (provided that the striking workers are also prepared to go without pay during the strike). As evidenced by the longest strike in South Africa's history, workers are sometimes prepared to maintain a strike for months. However, it should be pointed out that Department of Labour's suggestion – that the use of replacement leads to strikes lasting for longer periods – is not based on empirical evidence. The Department of Labour simply does not provide any evidence to support its hypothesis. On a broader level, it seems as far as can be gathered, that there is no empirical research which has been conducted in South Africa to ascertain the effects of using replacement labour. Moreover, the very fact that strikes are lasting for longer periods in South Africa may be used to support the continued use of replacement labour by employers during strikes. It may be argued that the longer a strike lasts, the higher

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483 Tenza 2016 *Obiter* 115.
484 See Department of Labour *Annual Industrial Action Report 2015* 18.
485 See Department of Labour *Annual Industrial Action Report 2015* 18. In 2016, this figure rose slightly to 5.4%. See Department of Labour *Annual Report of the Department of Labour 2016* 12.
486 Levy "Strike action: will things ever be the same" 7-9.
487 Levy "Strike action: will things ever be the same" 7-9.
488 See Department of Labour *Annual Industrial Action Report 2014* 3. In 2015, there were 110 recorded strikes. This figure rose to 122 in 2016. See Department of Labour *Annual Report of the Department of Labour 2016* 1.

the chances that the employer will suffer irreparable economic harm. Therefore, it can be argued that permitting employers to use replacement labour during strikes (as the LRA does) is the best way that the company's viability can best be maintained.[489]

Although it seems as if empirical research has not yet been conducted in South Africa to ascertain the effects of using replacement labour, such research has been conducted in other countries such as the USA and Canada. Amongst other things, this research looked at whether the use of replacement labour leads to longer strikes. Some studies concluded that the use of replacement labour does increase the duration of strikes while other studies have concluded that it does not. This research and its findings are discussed later in Chapter 4.

2.6.4 The balance of power argument

Another argument which is often made in support of anti-scab legislation is that the use of replacement labour (unfairly) tilts the balance of power in favour of employers.[490] According to Ndungu, the balance of power has gradually shifted in favour of employers since the reforms which were initiated in the mid-1990s in South Africa's collective bargaining system.[491] Amongst others, he identifies the use of scab labour as one of the key reasons for this shift.[492]

A good point of departure is the inequality in the bargaining power between employer and employee. This is "typically a relation between a bearer of power and one who is not a bearer of power".[493] Employers hold power by the very fact that employees need jobs: employees usually need their jobs more than an employer needs the services of a particular employee.[494] It is when employees form a collective that power is more or less equalised between an employer and its

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489 For an explanation as to why the LRA permits the use of replacement labour during strikes, see Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 305.

490 See Singh and Harish 2001 *Industrial Relations Journal* 23; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 148; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310; Langille 1995 *Canadian Labour and Employment Law Journal* 46.

491 Ndungu 2009 *International Journal of Labour Research* 90.

492 Ndungu 2009 *International Journal of Labour Research* 91.

493 Davies and Freedland (eds) *Khan Freund's Labour and the Law* 18.

494 Bendix *The Basics of Labour Relations* 15, Grogan *Collective Labour Law* 102.

employees.[495] As stated by the Constitutional Court, "workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers".[496] Power or the perception of power is important in collective bargaining. As Bendix explains:

> Power, or the perception of power, not only forms the basis for the bargaining relationship, but is also present throughout the bargaining process. When planning for collective bargaining, each party assesses its power position as opposed to the position of the other party. On this basis each party decides whether to make concessions or hold its ground.[497]

Collective bargaining is a "see-saw" whereby the worker's bargaining power goes down as the employer's goes up.[498] Collective bargaining legislation does not dictate the degree of economic power each party wields. It aspires to "provide a framework whereby each party is able to bring whatever actual economic power it has to bear on the other".[499] Workers assert bargaining power in collective bargaining through industrial action, that is to say, a strike.[500] As noted earlier, the LRA converts strikes into "a proper trial of strength, the outcome of which is determined by whether the employer can do without the employee's labour longer than the employees can do without their wages".[501] However, the use of replacement labour during a strike (which the LRA permits) may render a strike ineffective,[502] and may even change collective bargaining into collective begging,[503] as some have argued. If it is indeed correct that power or the perception of power affects the decision whether to make concessions in collective bargaining, it is interesting to note that the Department of Labour has stated that:

> Employers with greater bargaining power might see the use of replacement labour as a more effective tool and want to use it both more often and for longer. The more use of 'scab labour' is expected to be significant enough to extract more concessions from employees.[504]

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495 Bendix *The Basics of Labour Relations* 137.
496 See the *Certification case* para 66.
497 Bendix *The Basics of Labour Relations* 137.
498 Brassey 2013 *ILJ* 826.
499 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 152. See also the preamble of the LRA and section1(c) and (d) thereof.
500 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 13.
501 Grogan *Collective Labour Law* 10. See also Tenza 2016 *Obiter* 116.
502 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112; Creamer 1998 *ILJ* 20; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 157.
503 Tenza 2016 *Obiter* 116.
504 See Department of Labour *Annual Industrial Action Report* 2010 33.

Ironically, those who are opposed to anti-scab legislation usually argue, among other things, that a ban on replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases.[505] However, even the opponents of anti-scab legislation cannot deny that collective bargaining was instituted to promote equality of power between employers and employees.[506] According to Hopkinson, who is a strong advocate for a ban on replacement labour, the idea that a ban on replacement labour upsets the balance of power created by collective bargaining legislation in favour of trade unions is fundamentally flawed. He argues that it is flawed for the very reason that collective bargaining legislation without a prohibition against hiring temporary replacement labour "does not bring about the much-vaunted balance of power assumed by these critics".[507] In fact, he argues the use of replacement labour maintains the imbalance which exists at common law.[508]

In the South African context, it is submitted that even if a ban on replacement labour were to be introduced, the (overall) balance of power in collective bargaining would still favour employers. This would be so, it is submitted, for one essential reason: the LRA permits employers do dismiss striking employees for operational requirements. Put differently, the use of replacement labour is only but one of the reasons why the balance of power has gradually shifted in favour of employers since the reforms which were initiated in the mid-1990s in South Africa's collective bargaining system.[509]

The argument that the use of replacement labour upset the balance of power created by collective bargaining legislation in favour of employers is best summed up by Hopkinson as follows:

> ...collective bargaining was provided to give workers a 'cartel in the supply of labour' in order to rectify the imbalance of bargaining power between labour and capital. Second, the 'balance of power' principle assumes that both sides have the means for inflicting economic hardship on the other for failure to reach an agreement. Third, the strike is the only effective economic weapon of labour. With these basic premises in

505 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310.
506 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151.
507 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.
508 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.
509 For a discussion on the other reasons why the balance of power has gradually shifted in favour of employers, see Ndungu 2009 *International Journal of Labour Research* 90-91.

> mind, a strong case exists that the employer's ability to hire temporary strike replacements undermines the essential purpose and structure of collective bargaining legislation, turning the putative economic pressure of the strikers' withdrawal of labour into a sterile ritual.[510]

He goes on to add that:

> ...the employer's ability to hire replacement workers ensures that the costs of not reaching an agreement are suffered by only one side. During the strike, the strikers must go without their pay; however, the employer who hires replacement workers suffers no comparable diminution in revenue as a result of the impasse...this unequal distribution of the ability to inflict serious economic harm produces a corresponding asymmetry in the pressure to compromise or capitulate.[511]

2.6.5 Section 76 of the LRA is unconstitutional?

Probably the most radical criticism of replacement labour in South Africa is that section 76 of the LRA – which regulates the use of replacement labour – maybe unconstitutional. It is not the only section of the LRA which is vulnerable to constitutional attack. For example, section 26 of the LRA – which provides for closed shop agreements – is also vulnerable to constitutional attack on the grounds that it violates the right to freedom of association in terms of sections 18 and 23 of the Constitution.[512] Creamer, in his article[513] argues that section 76 of the LRA could be vulnerable to constitutional challenge.[514]

The LRA was enacted to give effect to section 23 of the Constitution,[515] and must be interpreted in compliance with the Constitution.[516] It is important to note that unlike the Interim Constitution,[517] the (final) Constitution of South Africa protects the right to strike, but excludes the right to lock-out. In addressing this issue directly, the Constitutional Court in the *Certification case* rejected the argument that "it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included".[518]

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510 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.
511 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 156.
512 Du Toit *et al The Labour Relations Act of 1995* 76.
513 Titled "The meaning and implications of the inclusion in the *Constitution* of a right to strike and the exclusion of a lock-out right: towards asymmetrical parity in the regulation of industrial action".
514 Creamer 1998 *ILJ* 20.
515 Section 1(a) of the LRA.
516 Section 3 of the LRA.
517 See section 27(5) of the *Interim Constitution* which provided that "Employers' recourse to lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1)".
518 *Certification case* para 66.

According to Creamer, this approach – the Constitution's protection of the right to strike and its silence on the lock-out – heralds a new approach to the regulation of industrial action in South Africa, based on the "asymmetrical parity conception".[519] In turn, he argues that legislation which regulates industrial action (such as the LRA) must be scrutinised to determine whether workers are given a sufficient advantage in collective bargaining and industrial action in order to correct the structural advantages enjoyed by employers.[520] Regarding whether section 76 of the LRA is unconstitutional, Creamer argues that:

> [The] scenario...where the LRA provides that employers engaged in defensive lock-outs may employ replacement labour, places a serious limitation on the rights to strike and collective bargaining as it is possible in terms of this provision, and in the absence of any collective agreement, that every time workers engage in procedural strike action employers can, after giving 48 hours' notice, lock out their workers and employ replacements in their place. This erodes the power of workers in the collective bargaining process as it puts the employer in a position where it can avoid the costs associated with, and essential to the impact of, strike action by using replacement labour to keep its operation up and running.[521] (Emphasis added)

Importantly, he goes on to add that:

> For such a limitation to be held to amount to an unconstitutional breach of the right to strike, it would have to be shown that the limitation is not 'reasonable and justifiable'. In the context of an attempt to create greater substantive parity, the fact that the essential content of the rights to strike and collective bargaining are negated by the LRA's provision allowing for the hiring of replacement labour at 48 hours' notice, this provision could be vulnerable to constitutional challenge.[522] (Emphasis added)

In addition to Creamer's arguments (outlined above), it is submitted that section 76 of the LRA may also be also vulnerable to constitutional attack based on another reason. It may be argued that the hiring of workers to replace lawfully striking workers constitutes a serious violation of freedom of association and the right to strike (by implication). This argument is explored in detail in the next chapters. As noted earlier, the focus of chapter 3 is on the Committee on Freedom of Association's jurisprudence regarding the use of replacement labour during strikes. The Committee's decisions are an authoritative development of the principles of freedom of association contained in the ILO Conventions, and its jurisprudence is

519 Creamer 1998 *ILJ* 17.
520 Creamer 1998 *ILJ* 17.
521 Creamer 1998 *ILJ* 19-20.
522 Creamer 1998 *ILJ* 19-20.

"an important resource" in developing the labour rights in South Africa's Constitution.[523]

2.7 Conclusions

Like in many other countries, collective bargaining is widely accepted as the primary means of determining the terms and conditions of employment in South Africa.[524] Collective bargaining in South Africa is characterised by what can only be described as "bad faith bargaining",[525] and has become increasingly adversarial. [526] More worryingly, is the problem of strike violence which, was shown, usually occurs between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[527]

The purpose of this chapter was to provide a critical analysis of the use of replacement labour in the context of industrial relations in South Africa. Therefore, central to this objective, was an analysis of the law and case law regarding the use of replacement labour in South Africa. For convenience, it will be recalled that section 76 of the LRA is titled "Replacement labour" and provides that:

> (1) An employer may not take into employment any person-
> (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or
> (b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.
> (2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor.

Having conducted a critical analysis of the law (section 76 of the LRA) and case law regarding the use of replacement labour in South Africa, the following conclusions can be drawn:

a) An employer is prohibited from hiring replacement labour to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service;[528]

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523 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.
524 Du Toit 2000 *ILJ* 1544; Botha 2015 *De Jure* 330.
525 Levy "An examination of industrial action: 2013" 20.
526 See Benjamin 2014 *ILJ* 3.
527 See Levy "Strike action: will things ever be the same" 6.
528 See section 76(1)(a) of the LRA.

b) An employer does not contravene the provisions of section 76(1)(b) of the LRA by using its employees who are not locked out to perform their own work as well as the work of their co-workers who are locked out;[529]

c) Subject to the prohibitions in section 76(1) of the LRA, the LRA does not prohibit employers from sourcing replacement labour from a labour broker;[530]

d) The employment of temporary or casual employees (notwithstanding any long-term relationship with the employer) for the purpose of performing the work of any employees who have been locked out constitutes a contravention of section 76 of the LRA;[531]

e) The employment of temporary replacement labour in contravention of section 76(1)(b) of the LRA by an employer in the course of a protected lock-out does not affect the legality of such a lock-out;[532]

f) Employers may employ temporary replacement labour in response to either protected or unprotected strikes;[533]

g) In light of some conflicting judgments, there is some uncertainty whether the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased;[534]

h) Employees may peacefully picket to dissuade replacement labour from working.[535]

The case law which was discussed clearly shows that trade unions, relying on the principle of purposive interpretation, have sought to convince the courts to interpret an employer's right to employ temporary replacement labour in terms of section 76(1)(b) of the LRA narrowly. For example, in *Technikon SA v National*

529 *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 7.
530 See section 76 of the LRA.
531 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 50-52.
532 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 20.
533 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) paras 40-41.
534 See *SACCAWU v Sun International* 2016 1 BLLR 97 (LC) paras 13-19. However, contrast with *Ntimane v Agrinet* 1999 20 ILJ 809 (LC) para 16. See also the Labour Appeal Court's judgment in *Sun International v SACCAWU* 2017 8 BLLR 776 (LAC) paras 15-22. It should be emphasised that the Labour Appeal Court declined to determine the merits of the appeal in this case. If it had done so, it would have resolved the conflict between *SACCAWU v Sun International* and *Ntimane v Agrinet.*
535 See Item 3 of the Code of Good Practice on Picketing.

Union of Technikon Employees of SA,[536] the trade union argued that the phrase 'in response to a strike' as used in section 76(1)(b) of the LRA should be interpreted as referring to unprotected strikes only. The Labour Appeal Court, correctly so it is submitted, rejected this argument.[537]

Scab labour has always been controversial in South Africa,[538] and trade unions have argued for a total ban on replacement labour.[539] Therefore, an important aspect of this chapter was to consider the possible arguments which can be made in support of anti-replacement labour legislation. The arguments that were considered were that the use of replacement causes violence; renders a strike ineffective; leads to longer strikes; unfairly tilts the balance of power in favour of employers; and section 76 of the LRA may be vulnerable to constitutional attack. Taken together, these arguments make a compelling case in favour of anti-replacement labour legislation. However, a complicating factor is the lack of empirical research in South Africa regarding the effects of the use of replacement labour. Such research has been conducted in other countries such as the USA and Canada. This research and its findings are considered later in chapter 4 as it may provide invaluable insights for South Africa. Prior to that, the focus of the next chapter (chapter 3) is on the Committee on Freedom of Association's jurisprudence regarding the use of replacement labour during strikes.

536 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC).
537 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) paras 34-39.
538 Bendix *Industrial Relations in South Africa* 613.
539 See Hepple and Leroux *Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.

Chapter 3 – Replacement labour and the International Labour Organisation

3.1 Introduction

This chapter focuses on the position of the ILO regarding the replacement of strikers, and in particular the position of its supervisory body, namely the Committee of Freedom of Association (hereafter the CFA).[540] From the start, it should be emphasised that there is no express provision regarding the use of replacement labour in any of the ILO's instruments.

In order to achieve the above mentioned goal, the chapter begins by providing an overview of the origins and structure of the ILO. Thereafter, an overview of the functions and role of the ILO in international labour is provided. It will be shown that the ILO continues to play an important role in the promulgation and promotion of international labour standards. Since a critical analysis of the CFA's jurisprudence regarding the replacement of strikers will be conducted, an overview of the ILO's monitoring bodies will be provided before considering the said jurisprudence.

Why is the CFA's jurisprudence important? It is important because it serves as a point of reference in many countries and hence may have an impact on shaping the legal structure in such countries.[541] Even South Africa's Constitutional Court has held that the CFA's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions.[542]

It will be argued that, notwithstanding the fact that there is no concrete provision regarding the use of replacement labour in any of the ILO's instruments, the CFA (as well as the ILO's committee of experts),[543] has taken a clear position regarding the replacement of strikers. At this juncture, it is important to note that the cases

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540 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.

541 Weiss 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 10.

542 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.

543 The Committee of Experts on the Application of Conventions and Recommendations – hereafter the Committee of Experts.

which have been determined by the CFA involved either permanent or temporary replacement of strikers. Throughout this chapter, reference to the legal practice in some countries will be done for illustration purposes if and when necessary. Finally, conclusions will be drawn.

3.1.1 The origins and structure of the ILO

The ILO was established in terms of the Treaty of Versailles, signed in 1919.[544] The Treaty of Versailles also established the League of Nations, and all members of the League of Nations became founder members of the ILO.[545] The primary purpose of the ILO was to provide for the international regulation of labour matters.[546] Put differently, the ILO was (and continues to be) the primary organisation charged with promoting international labour rights.[547] Amongst others, these rights include: freedom of association, freedom of expression and the right to collective bargaining.[548] When the United Nations (the UN) replaced the League of Nations after the Second World War, the ILO became the UN's first specialised agency.[549] Like with its predecessor, members of the UN automatically became members of the ILO.[550]

The ILO has three main bodies: the International Labour Conference, governing body, and the International Labour Office. The International Labour Conference is the highest policy-making body of the ILO. Its annual meetings, held in Geneva, are attended by national delegation of member states.[551] The core function of the International Labour Conference is to adopt new labour standards.[552] The

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544 Van Niekerk and Smit *Law @ Work* 21; Du Toit *et al The Labour Relations Act of 1995* 51. For an in depth discussion regarding the historical context of the origins of the ILO, see Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 3-10.

545 Van Niekerk and Smit *Law @ Work* 21.

546 Du Toit *et al The Labour Relations Act of 1995* 51.

547 O'Neil 2011 *Labor & Employment Law Forum* 204.

548 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 7.

549 Van Niekerk and Smit *Law @ Work* 21.

550 O'Neil 2011 *Labor & Employment Law Forum* 204. See also Article 1 of the *Constitution of the International Labour Organisation*, 1919 (hereafter the *ILO's Constitution*).

551 The delegations from member states comprise of two government delegates and two other delegates representing employers and workers respectively. See Article 3(1) of the *ILO's Constitution*.

552 Van Niekerk and Smit *Law @ Work* 22.

governing body consists of fifty-six persons,[553] and is the executive arm of the ILO.[554] Amongst other things, the governing body manages the budget of the ILO and makes decisions on policy issues. The International Labour Office performs the day-to-day work necessary to give effect to the ILO's mandate.[555] Amongst others, its functions include assisting governments with the framing of laws and regulations.[556]

A key feature of the ILO since its inception has been its tripartite nature – the representatives of workers' and employers' organisations participate in the work and governance of the ILO.[557] This feature distinguishes the ILO from other intergovernmental organisations.[558] Rogers *et al.* explain the concept of "tripartism" within the context of the ILO as follows:

> The ILO is the only international intergovernmental institution in which governments do not have the exclusive voting power in setting standards and policies. Employers and workers have an equal voice with governments in its decision making processes. This concept, known as 'tripartism', is based on article 3 of the ILO Constitution, which with great simplicity states that: 'The … General Conference … shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members'.[559]

3.1.2 The Functions and role of the ILO

According to Du Toit *et al.*, the most important function performed by the ILO since its inception has been its standard-setting activities.[560] The most important standards are the Conventions which are adopted by the International Labour

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553 See Article 7(1) of the *ILO's Constitution*.
554 Van Niekerk and Smit *Law @ Work* 23.
555 Van Niekerk and Smit *Law @ Work* 23.
556 See Article 10 of the *ILO's Constitution*.
557 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 12; Du Toit *et al The Labour Relations Act of 1995* 50. See also, for example, Article 3(1) of the *ILO's Constitution* which provides for the participation of employers' and workers' representatives within the International Labour Conference.
558 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 12.
559 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 12.
560 Du Toit *et al The Labour Relations Act of 1995* 51.

Conference.[561] These standards, as Rogers *et al.* have explained, lay down action to be taken, or principles to be respected by governments and others.[562]

Since 1919 when the ILO was established, the International Labour Conference has adopted a large number of conventions and recommendations[563] relating to matters such as freedom of association and the elimination of discrimination *etcetera*.[564] It is interesting to note that when the ILO was first established, the British proposed that only conventions should be adopted – these conventions would be binding once ratified in accordance with international law.[565] On the other hand, the SA proposed that instruments adopted should be merely recommendations.[566] Recommendations, as the name implies, are not binding on member states of the ILO.[567] After some negotiations, an agreement was eventually reached to allow the adoption of both conventions and recommendations.[568]

There are eight conventions which are considered by the governing body as "fundamental to the rights of human beings at work".[569] These "core conventions" (as they are sometimes referred to) are:

- Freedom of Association and Protection of the Right to Organise Convention;[570]
- Right to Organise and Collective Bargaining Convention;[571]
- Forced Labour Convention;[572]

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561 Van Niekerk and Smit *Law @ Work* 23.
562 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 19.
563 According to Van Niekerk and Smit, by June 2014, 189 Conventions and 203 Recommendations had been adopted. See Van Niekerk and Smit *Law @ Work* 23.
564 For example, amongst others, the following: abolition of forced labour and equal remuneration. See Du Toit *et al The Labour Relations Act of 1995* 51.
565 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 19.
566 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 19.
567 Van Niekerk and Smit *Law @ Work* 23.
568 Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 19.
569 ILO *The International Labour Organization's Fundamental Conventions* 7, 8. See also Coxson 1999 *Dickson Journal of International Law* 470,471; Van Niekerk and Smit *Law @ Work* 24.
570 1948 (No. 87) – hereafter the *Freedom of Association Convention*.
571 1949 (No. 98).
572 1930 (No. 29).

- Abolition of Forced Labour Convention;[573]
- Minimum Age Convention;[574]
- Worst Forms of Child Labour Convention;[575]
- Equal Remuneration Convention;[576]
- Discrimination (Employment and Occupation) Convention.[577]

In 1998, the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work (hereafter the 1998 ILO Declaration). The Declaration declares that all members of the ILO, irrespective of whether they have ratified the relevant conventions, have an obligation to promote and to realise four core labour standards: freedom of association, freedom from forced labour, freedom from child labour, and non-discrimination in respect of employment.[578] The 1998 ILO Declaration is not without controversy. It has been described by some as being potentially the most "effective mechanism to promote international labour standards".[579] It has also been argued that the Declaration "re-establishes the ILO as the pre-eminent international body for the promulgation, supervision and promotion of international labour standards".[580] However, for critics such as Alston, the 1998 ILO Declaration has shifted the focus on rights and replaced it with a focus on "more generally formulated principles".[581] In turn, he argues that the emphasis on "soft promotional techniques" may over time lead to "a gradual downgrading of the ILO's traditional 'enforcement' mechanisms".[582]

However, the somewhat brief overview of the ILO (above) shows that the ILO has played and continues to play an important role in the promulgation and promotion of international labour standards. As noted above, the most important function

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573 1957 (No. 105).
574 1973 (No. 138).
575 1999 (No. 182).
576 1951 (No. 100).
577 1958 (No. 111).
578 See Article 2 of the 1998 ILO Declaration.
579 Coxson 1999 *Dickson Journal of International Law* 504. See also Alston 2004 *The European Journal of International Law* 459, where he states that "Others have suggested that some observers view the Declaration as a defining point, or '*Constitution*al moment', in the life of the ILO. The Declaration's principles are said by some authors to have attained an elevated status in international law as "fundamental international norms', and by another to have attained *jus cogens* status" (references omitted).
580 Coxson 1999 *Dickson Journal of International Law* 504.
581 Alston 2004 *The European Journal of International Law* 458.
582 Alston 2004 *The European Journal of International Law* 458.

performed by the ILO since its inception has been its standard-setting activities,[583] and the most important standards are the conventions which have been adopted by the International Labour Conference.

3.1.3 The ILO's monitoring bodies: the Fact-finding Commission and the CFA

The standards set out in the ILO's instruments are more fully supplemented by the decisions of the ILO's supervisory and investigatory bodies: the Fact-Finding and Conciliation Commission on Freedom of Association (hereafter the Fact-Finding Commission) and the CFA.[584] The rationale behind the establishment of these two bodies has been explained as follows:

> In addition to this standard-setting function of the ILO, which in itself shows how vital freedom of association is for the Organization, it should be emphasized that, pursuant to negotiations and agreements between the governing body of the ILO and the United Nations Economic and Social Council, a special procedure was established in 1950-51 for the protection of freedom of association, supplementing the general procedures for the supervision of the application of ILO standards, under the responsibility of two bodies: the Fact-Finding and Conciliation Commission on Freedom of Association and the Freedom of Association Committee of the governing body of the ILO. Under this special procedure, governments or organizations of workers and of employers can submit complaints concerning violations of trade union rights by States (irrespective of whether they are Members of the ILO, or Members of the United Nations without being Members of the ILO). The procedure can be applied even when the Conventions on freedom of association and collective bargaining have not been ratified.[585]

Established in 1950, the Fact-Finding Commission is composed of independent persons and its function is to examine complaints concerning alleged infringement of trade union rights.[586] Complaints may be referred to it by the governing body.[587] As the name suggests, the Fact-Finding Commission is essentially a fact-finding body. It has dealt with only six complaints to date.[588]

Where the country concerned has not ratified the ILO's Conventions on freedom of association, the Fact-Finding Commission may only intervene if such country gives

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583 Du Toit *et al The Labour Relations Act of 1995* 51.
584 Du Toit *et al The Labour Relations Act of 1995* 51.
585 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.
586 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.
587 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.
588 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.

its consent.[589] A good example is the complaint against the government of South Africa which was made by COSATU in the late 1980's. The complaint involved allegations that proposed amendments to the 1956 LRA (later enacted as the Labour Relations Amendment Act, 1988) infringed certain principles of freedom of association.[590] South Africa was not a member of the ILO – it had ceased to be a member of the ILO in 1966 but remained a member of the United Nations – or a party to the ILO's Conventions relevant to freedom of association. Therefore, South Africa's consent for the complaint against it to be referred to the Fact-Finding Commission was sought in 1988 and later obtained in 1991.[591] Thereafter, a panel of three members of the Fact-Finding Commission was appointed to examine the complaint against the government of South Africa alleging infringement of trade union rights. After conducting its fact-finding mission, the resulting report[592] of the Fact-Finding Commission highlighted some of the fundamental principles regarding the nature of the commission's reports. The report noted that:

> ...the reports of the Fact-Finding and Conciliation Commission do not constitute judgements calling for decision by the governing body, but are an account of the inquiry carried out by the commission regarding freedom of association, of which the governing body is invited to take note.[593]

The focus of this chapter is not on the Fact-Finding Commission, and as such it shall not be discussed any further. Rather, the focus of this chapter is on the CFA and in particular its jurisprudence on replacement labour.

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589 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.

590 See *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* 1 (available at http://www.ilo.int/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm).

591 See *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* 1-2 (available at http://www.ilo.int/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm).

592 *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* (available at http://www.ilo.int/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm).

593 *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa* 1-2 (available at http://www.ilo.int/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm).

The CFA was established by a resolution of the governing body in 1951.[594] It is a tripartite body consisting of three representatives from government, three worker representatives and three employer representatives (nine in total).[595] The CFA was established to examine allegations/complaints concerning alleged violations of freedom of association submitted by a worker's organisation or an employers' organisation or even a member state of the ILO.[596] Put differently, the mandate of the CFA is to determine "whether any given legislation or practice complies with the principles of freedom of association and collective bargaining" laid down in the relevant ILO Conventions.[597]

Where national laws in a given state violate the principles of freedom of association, the CFA may offer the ILO's technical assistance to bring the non-compliant laws into compliance with the principles of freedom of association and collective bargaining.[598] Also, the CFA may recommend to the governing body: (a) that it should draw the attention of the member state concerned to the problems that have been identified and invite it to take appropriate measures to resolve them; (b) that a case does not require any further examination; or (c) that the case be referred to the Fact-Finding Commission of the ILO.[599] It is important to note that the CFA may examine complaints irrespective of whether or not the country concerned has ratified the relevant ILO conventions on freedom of association.[600]

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594 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2. See also Van Niekerk and Smit *Law @ Work* 27.

595 Van Niekerk and Smit *Law @ Work* 27.

596 Van Niekerk and Smit *Law @ Work* 27. See also Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 21 where it is stated that "In 1951, the ILO added an entirely original complaints mechanism, which authorized employers or workers organizations to submit complaints alleging violations of the basic principle of freedom of association contained in the *Constitution*, even when the relevant Conventions had not been ratified by the member State concerned. The Governing Body Committee on Freedom of Association, which considers these complaints, thus evolved into a full-blown complaints mechanism itself".

597 ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 6.

598 ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 6.

599 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.

600 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 8.

Unlike the Fact-Finding Commission which has only examined six complaints to date, the CFA has examined close to 3000 cases since its inception in 1951.[601] In turn, this has enabled the CFA to "build up a body of principles on freedom of association and collective bargaining",[602] based on relevant ILO instruments. As Weiss noted, the impact of the ILO's monitoring bodies (such as the CFA) should not be underestimated.[603] He explains that even if the binding nature of the CFA's case law may be problematic, it may be argued that "in many jurisdictions it serves as a point of reference and hence may have an impact on shaping the legal structure in many countries".[604] For example, as was noted in the previous chapter, South Africa's Constitutional Court has held that the CFA's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions, and its jurisprudence is "an important resource" in developing the labour rights in South Africa's Constitution.[605] The ILO has described the significance and or impact of the CFA's jurisprudence as follows:

> It should be emphasized that the experience acquired through the examination of more than 2 500 cases in its over 50 years of existence has enabled the Committee on Freedom of Association to build up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant conventions, recommendations and resolutions. This body of principles has been created by a specialized and impartial international body of high renown, which adopts a tripartite perspective and whose work is based on real situations, namely concrete, varied and frequently very serious and complex allegations of violations of trade union rights throughout the world; it has therefore acquired recognized authority at both the international and national levels, where it is increasingly being used for the development of national legislation, as well as in the various bodies responsible for the application of law relating to freedom of association, for the resolution of major collective disputes and in publications on jurisprudence.[606]

It should be emphasised that Fact-Finding Commission and the CFA were created for the effective protection of trade union rights. It is submitted that freedom of association and the right to strike are fundamental trade union rights. In the discussion that will follow hereunder regarding the CFA's jurisprudence on replacement labour, these two rights will form a core element of such discussion.

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601 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.
602 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.
603 Weiss 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 10.
604 Weiss 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 10.
605 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.
606 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.

Therefore, it is necessary to provide some contextual background regarding the ILO's approach to both rights.[607]

3.1.4 The ILO, freedom of association and the right to strike

3.1.4.1 Freedom of association

A good point of departure is the ILO's Constitution itself. Article 1 thereof (which established the ILO) proclaims that the ILO was established for the promotion of the objects set forth in preamble to the ILO's Constitution. Among the objects set forth in the preamble is the recognition of the principle of freedom of association.[608] In 1944, the Declaration of Philadelphia – which forms part of the ILO's Constitution – reaffirmed that freedom of expression and freedom of association are "essential to sustained progress" and further emphasised that this was one of the "fundamental principles on which the organisation is based".[609] As far as the ILO is concerned, freedom of association is a basic human right which opens the door to other fundamental labour rights.[610]

Although freedom of association is considered a fundamental human right in most countries today, this wasn't always the case. For example, in France it is said that the Le Chapelier Law of 1791 (a law passed during the second phase of the French Revolution) and other criminal laws made it impossible for workers to act collectively against their employer.[611] Around the 1830s, the law forbade any

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607 An in-depth discussion on the ILO's approach to freedom of association and the right to strike is beyond the scope of this study. Therefore, only a brief overview on the ILO's approach to freedom of association and the right to strike will be provided. In particular, an overview of the principles developed by the ILO's supervisory bodies such as the CFA.

608 See the preamble to the of the ILO's *Constitution* which in part provides that "And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the recognition of...the principle of freedom of association". (Emphasis added)

609 See the *Declaration of Philadelphia*, (1944). See also ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 16.

610 The ILO's Committee of Experts has stated that freedom of association is "a basic human right with universal scope enabling the enjoyment of other rights, a process with substantive content, and opens the door to participatory actions against forced labour, the protection of children from abuses and responsive measures based on non-discrimination and equality beneficial to all. Freedom of association is at the heart of democracy from the grassroots to the higher echelons of power". See *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 17.

611 Shorter and Tilly *Strikes in France 1830-1968* 22.

collective action by workers.[612] Trade unions and strikes were illegal.[613] In the United Kingdom, as early as the late 1700s, the government has periodically enacted legislation meant to restrict the trade union movement.[614] Currently, Britain does not have a constitution in the formal sense but has one in the "substantive sense".[615] Unfortunately, it is still "virtually impossible in modern Britain to take industrial action which is lawful".[616] This is so, because although strikers are afforded some immunity, employers may sue their employees for damages caused by industrial action.[617]

Notwithstanding the emergence of trade unions in the late 1880s and early 1900s around the world, many employers saw them as unwelcome intruders in the affairs of employers.[618] As Axley points out, American employers considered collective representatives as being "agitators" and "troublemakers".[619] He further points out that those employers used several tactics such as offering employees certain benefits in order to suppress the influence of trade unions.[620] Although trade unions have been suppressed by anti-democratic regimes (for example, Germany in the 1930s) they managed to survive and have played a crucial role in the fight for democracy.[621] It is probably by no accident that trade unions are and have been targeted by anti-democratic regimes.[622] As Hepple explains, "their contribution has been to extend the concept of democracy from political rights – such as the rights to vote, to speak freely, to assemble and to associate – to social and economic rights".[623] For example, in South Africa, trade unions played an important role in the defeat of the apartheid regime.[624]

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612 Shorter and Tilly *Strikes in France 1830-1968* 1.
613 Shorter and Tilly *Strikes in France 1830-1968* 21.
614 See Hodge 1993 *Denning Law Journal* 96-113, where he outlines the most important legal developments in Britain from the late 1700s to the early 1990s.
615 Hogwood and Roberts *European Politics Today* 187.
616 Honeyball and Bowers *Textbook on Labour Law* 388.
617 Honeyball and Bowers *Textbook on Labour Law* 388.
618 Grogan *Collective Labour Law* 100.
619 Axley 1950 *Labour Law Journal* 441.
620 Axley 1950 *Labour Law Journal* 441.
621 Godfrey *et al Collective Bargaining in South Africa* 1.
622 Godfrey *et al Collective Bargaining in South Africa* 18.
623 Hepple 1990 *ILJ* 646.
624 Du Toit 1995 *ILJ* 785.

In light of the above, it is not surprising that the ILO has placed such an emphasis on freedom of association. Given its tripartite nature, the respect and protection of freedom of association is fundamental and unavoidable for the ILO.[625] Therefore, due to its significance, the ILO has adopted several conventions and recommendations on this subject.[626] For example, the Freedom of Association Convention, which is one of the core conventions of the ILO.[627] Article 2 thereof provides that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation".[628] It should be noted that there are other international and or regional non-ILO instruments which also protect the right to freedom of association.[629] The ILO's committee of experts recognises the fact that freedom of association is vital for both workers and employers. It has noted that:

> Freedom of association and collective bargaining, which are now set out in most of the constitutions of member States, are of vital importance for the social partners, as they enable them to establish rules in the field of working conditions, including wages, to pursue more general claims and to reconcile their respective interests with a view to ensuring lasting economic and social development. In the committee's opinion, strong and independent workers' organizations are essential to compensate the legal and economic inferiority of workers. Furthermore, employers' organizations are particularly important for the protection of interests of small enterprises.[630]

As noted earlier, the standards set out in the ILO's instruments - such as the Freedom of Association Convention – are more fully supplemented by the decisions of the ILO's supervisory and investigatory bodies, and some of the key principles regarding freedom of association which have been laid down by these bodies include:

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625 Gernigon *et al ILO Principles Concerning the Right to Strike* 3.
626 Gernigon *et al ILO Principles Concerning the Right to Strike* 3.
627 ILO *The International Labour Organization's Fundamental Conventions* 7-8. See also Coxson 1999 *Dickson Journal of International Law* 470,471; Van Niekerk and Smit *Law @ Work* 24.
628 See Article 2 of the *Freedom of Association Convention*.
629 For example, see the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (2003), Article 26; the *International Covenant on Civil and Political Rights* (1976), Article 22; the *International Covenant on Economic, Social and Cultural Rights* (1976), Article 8; the *European Charter on Human Rights* (1950), Article 11; the *African Charter on Human and People's Rights* (1981), Article 10; and the *Charter of Fundamental Social Rights in SADC* (2003), Article 4.
630 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 17-18.

a) Freedom of association should be guaranteed without discrimination of any kind, particularly with regard to occupation, sex, race, *etc*. This right applies to workers in both the public and private sectors.[631] With the possible exception of the armed forces and the police,[632] freedom of association applies to workers in both the public and private sectors including agricultural workers, domestic workers, migrant workers and workers in the informal economy, *etcetera*.[633]

b) The formalities prescribed legislation should not be of such a nature as to impair the establishment of trade unions.[634] It has been emphasised that any law which make the right to associate subject to authorisation (the so-called requirement of previous authorisation) granted by the government "purely in its discretion is incompatible with the principle of freedom of association".[635]

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631 ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 205; ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 209; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 19.

632 It should be noted that Article 9 of the *Freedom of Association Convention* provides that "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations". See also *SANDU v Minister of Defence* 1999 20 ILJ 2265 (CC) para 26, where South Africa's *Constitution*al Court said the following regarding Article 9 of the *Freedom of Association Convention*: "It is clear from these provisions, therefore, that the convention does include 'armed forces and the police' within its scope, but that the extent to which the provisions of the convention shall be held to apply to such services is a matter for national law and is not governed directly by the convention. This approach has also been adopted in the Convention on the Right to Organize and Collective Bargaining 98 of 1949,'7 which South Africa also ratified in 1995. The ILO therefore considers members of the armed forces and the police to be workers for the purposes of these conventions, but consider that their position is special, to the extent that it leaves it open to members states to determine the extent to which the provision of the conventions should apply to members of the armed forces and the police".

633 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 19.

634 ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 248.

635 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 273. See also ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 30, where the ILO's Committee of Experts stated that: "In the view of the Committee, regulations providing for formalities are not in themselves incompatible with the Convention, provided that they do not in practice impose a requirement of 'previous authorization', in violation of Article 2, or give the authorities discretionary power to refuse the establishment of an organization; nor must they constitute such an obstacle that they amount in practice to a pure and simple prohibition".

c) Recalling that Article 2 of the Freedom of Association Convention protects the right of workers to join organisations of their "own choosing", it has been emphasised that this implies the possibility of forming trade unions independent of those which already exist and of any political party.[636] Whilst the proliferation of competing trade unions may not be desirable, the right of workers to join organisations of their own choosing implies that trade union diversity or pluralism should always be possible.[637] The pluralist approach is an approach to industrial relations which has been adopted in most industrialised countries, as it is in South Africa.[638] The term pluralist basically refers to granting recognition to more than one trade union provided that they are sufficiently representative.[639] The ILO has emphasised that while a minimum membership requirement is not incompatible with the Freedom of Association Convention, the number should be fixed in a reasonable manner so that the establishment of trade unions is not hindered.[640]

d) Workers do not form and or join trade unions merely for the sake of doing so. Once a trade union is formed, organised workers in the form of a trade union meet the employer on a more equal footing than an individual worker would – they are able to confront the employer with collective power.[641] Workers confront the employer with collective power by withholding their labour. Put differently, it is through industrial action – primarily through a

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636 ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 273.

637 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 34. See also *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 31, where South Africa's *Constitution*al Court said the following in relation to Article 2 of the *Freedom of Association Convention* and pluralism: "Both committees [the Committee of Experts and the CFA] have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organize members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time".

638 Bendix *Industrial Relations in South Africa* 25. For a further and in-depth discussion on pluralism and majoritarianism, see Kruger and Tshoose 2013 *PELJ* 285.

639 Du Toit *et al Labour Relations Law* 231. For a South African perspective, see section 21(8A) – (8C) of the LRA.

640 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 287.

641 Banjo 2009 *South African Journal of Labour Relations* 121.

strike – that workers are able to assert bargaining power.[642] Strikes are a corollary to collective bargaining and the right to collective bargaining is incomplete without the pressure of a strike.[643] As it has been said, collective bargaining without the right to strike would be "collective begging".[644] Therefore, notwithstanding the fact that the Freedom of Association Convention does not expressly mention the right to strike, the ILO recognises the fact that not only does the Freedom of Association Convention protect the right to associate but the right to strike as well.[645]

3.1.4.2 The right to strike

The ILO regards the right to strike as a fundamental right of workers and of their organisations.[646] It is therefore not surprising that the CFA has always recognised the right to strike by workers and their organisations "as a legitimate means of defending their economic and social interests".[647]

As noted above, the Freedom of Association Convention does not expressly mention the right to strike.[648] However, when read together, several of its articles may be interpreted as implying such a right. Article 3 recognises the right of workers' organisations to organise their activities and to formulate their programmes. In turn, Article 10 defines the term 'organisation', as used in the convention, as any "organisation of workers or of employers for furthering and

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642 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.

643 *NUM v G Vincent Metal Sections* 1993 14 ILJ 1818 (IC) 1324, 1325.

644 Weiss 2004-2005 *Comparative Labour Law and Policy Journal* 185.

645 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 179; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-48. See also Gernigon *et al ILO Principles Concerning the Right to Strike* 8-10; O'Neil 2011 *Labor & Employment Law Forum* 207; Servais 2010 *Canadian Labor and Employment Law Journal* 150; *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 32; Manamela and Budeli 2013 *CILSA* 315.

646 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 131, 520.

647 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 521.

648 It should be noted that there are several international and regional instruments which do expressly protect the right to strike. For example, see the *International Covenant on Economic, Social and Cultural Rights* (1976), Article 8; the *European Charter on Human Rights* (1950), Article 28; the *Charter of the Organisation of American States,* Article 45(c); the *Arab Charter on Human Rights*, Article 35(c). It should also be noted that there are some ILO instruments which do refer to the right to strike. For example, see the *Abolition of Forced Labour Convention*, 1957 (No. 105) and the *Voluntary Conciliation and Arbitration Recommendation*, 1951 (No. 92).

defending the interests of workers or of employers". Therefore, the committee of experts has reasoned that:

> The words 'activities and ... programmes' [as used in Article 3] in this context acquire their full meaning only when read together with Article 10, which states that in this convention the term 'organization' means any organization 'for furthering and defending the interests of workers or of employers'. The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions.[649]

Importantly, the committee of experts went on to add that:

> Under Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' *organizations.* In the view of the committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3.[650] (Emphasis added)

It is important to note that the position of the ILO's supervisory bodies in favour of the recognition of the right to strike has, however, been criticised by the Employers' Group in the Committee on the Application of Standards of the International Labour Conference. Basically, it has argued that the right to strike has no legal basis in the Freedom of Association Convention.[651] On the other

649 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 148.

650 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 149. See also ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-48; Gernigon *et al ILO Principles Concerning the Right to Strike* 8-10; O'Neil 2011 *Labor & Employment Law Forum* 207; Servais 2010 *Canadian Labor and Employment Law Journal* 150; *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 32; Manamela and Budeli 2013 *CILSA* 315.

651 The position of the Employers' Group in the Committee on the Application of Standards of the International Labour Conference on this matter is that "The Employers' group in the Conference Committee considers that neither the preparatory work for Convention No. 87, nor an interpretation based on the Vienna Convention on the Law of Treaties, offers a basis for developing, starting from the Convention, principles regulating in detail the right to strike. According to the Employer members, the right to strike has no legal basis in the freedom of association Conventions. In their view, Convention No. 87 at most contains a general right to strike, which nonetheless cannot be regulated in detail under the Convention. They consider that when the Committee of Experts expresses its views in detail on strike policies, especially on essential services, it applies a 'one-size-fits-all' approach that fails to recognize differences in economic or industrial development and current economic circumstances. They add that the approach of the Committee of Experts undermines tripartism and ask it to reconsider its interpretation of the matter". See ILO *General Survey on the fundamental Conventions*

hand, and unsurprisingly, the worker members of the committee hold the opposite view: they have argued that although the right to strike is not expressly mentioned in the convention, this does not "prevent its existence being recognised, particularly on the basis of several international instruments".[652] In their view, the right to strike is an "indispensable corollary of the right to organize protected by Convention No. 87 and by the principles enunciated in the ILO Constitution".[653]

Be that as it may, the committee of experts has taken the position that the absence of a concrete provision regarding the right to strike is not decisive as the Freedom of Association Convention must be interpreted in the light of its objects and purpose.[654] In other words, purposive interpretation must be applied when interpreting the convention as opposed to literal interpretation.[655] In order to ensure that this right is recognised and practised, the ILO's supervisory bodies (particularly the CFA) have developed, amongst others,[656] the following key principles:

a) Given that the right to strike is one of the essential means available to workers and their unions for the protection of their economic and social interests,[657] the right to strike constitutes a fundamental right for workers and their unions.[658]

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concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008 46-47.

652 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-47.

653 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-47.

654 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 48.

655 The purposive approach to statutory interpretation has been described as follows: "A purposive methodology looks beyond the manifested intention...The interpreter must endeavour to infer the design or purpose which lies behind legislation. In order to do this the interpreter should make use of an unqualified contextual approach which allows an unconditional examination of all internal and external sources". See Du Toit *et al The Labour Relations Act of 1995* 46.

656 For all the principles which have been developed by the supervisory bodies, see ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 520-676.

657 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 474; ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 521; See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46.

658 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 473;

As such, the right to strike must be enjoyed by workers, trade unions, federations and confederations.[659] The ILO has also emphasised that whilst national laws may lay down prerequisites which have to be fulfilled in order to render a strike lawful,[660] any law which prohibits the federations and confederations from calling a strike in inconsistent with the Freedom of Association Convention.[661]

b) Notwithstanding its fundamental nature, the right to strike is not absolute. It may be restricted or even prohibited in exceptional circumstances.[662] In general, the ILO accepts that the right to strike may be restricted or even prohibited in the public service[663] or in essential services.[664] Moreover, the ILO has also emphasised that the right to strike may be restricted or even

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ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 520.

659 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 49.

660 The ILO has also emphasised that such procedural pre-strike requirements should be reasonable and should not be so complicated as to make it practically impossible for trade unions to call a lawful strike. In this regard, see ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 547-548. For the full list of pre-strike requirements (such as pre-strike ballots) which are permissible, see paras 547-569. See also ILO *Digest of decisions of the Committee on Freedom of Association* (1996) paras 498-514; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 58-60.

661 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 525.

662 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 49-51; ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 570.

663 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 52, where it is stated that "Taking into account the importance of ensuring the continuity of the functions of the three branches of the State (the legislative, executive and judicial authorities) and of essential services, the Committee of Experts and the Committee on Freedom of Association consider that States may restrict or prohibit the right to strike of public servants 'exercising authority in the name of the State'".

664 The Committee of Experts has noted that "it considers that essential services, for the purposes of restricting or prohibiting the right to strike, are only those 'the interruption of which would endanger the life, personal safety or health of the whole of part of the population'. This concept is not absolute in its nature in so far as a non-essential service may become essential if the strike exceeds a certain duration or extent, or as a function of the special characteristics of a country (for example, an island State)". See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 53. See also ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 585, for the full list of services which the ILO considers to be or may be essential. Amongst others, these include electricity services, the hospital sector, water supply services, the police and armed forces, fire-fighting services *etcetera*.

prohibited "in the event of an acute national emergency and for a limited period of time".[665]

c) The objective of a strike by workers and their unions must be to defend their economic and social interests. Therefore, strikes which are purely political in nature do not fall within the scope of freedom of association. [666] Although the committee of experts has recognised that it is often difficult in practice to distinguish between the political and occupational aspects of a strike,[667] it has taken the position that trade unions should be able to have recourse to protest strikes, especially where such action is aimed at criticising a government's economic and social policies.[668]

d) In order to protect workers and or trade unions from victimisation, the ILO has made it clear that the legitimate exercise of the right to strike may not result in sanctions of any sort.[669]

From the above, it is clear that, notwithstanding the absence of a concrete provision regarding the right to strike in the ILO's instruments, such as the Freedom of Association Convention, the ILO's supervisory bodies have developed some key principles in relation to this right. As will be shown immediately

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665 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 570.

666 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention* (1994) para 474; ILO *Digest of decisions of the Committee on Freedom of Association* (1996) para 481; ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 528.

667 ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention* (1994) para 165. For a further and detailed discussion on political strikes, see Cassim 2008 *ILJ* 2349-2385.

668 See ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention* (1994) para 166, where the Committee stated that "In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living". See also ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 529.

669 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 658; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 50.

hereunder, the CFA has, notwithstanding the absence of a concrete provision regarding the replacement labour in the ILO's instruments, taken a clear position regarding the employment of replacement labour during a lawful strike.

Having shown the importance of freedom of association for the ILO, and having shown the relationship between the right to associate and the right to strike, the jurisprudence of the CFA regarding the use of replacement labour in considered next.

3.2 The CFA on replacement labour: the case law

The international position with respect to replacement labour shows stark differences.[670] Some countries permit the use of replacement labour during protected strikes while others do not. Amongst others, the countries which prohibit the replacement of lawfully striking workers include, among others, Portugal,[671] Italy,[672] France,[673] Lithuania,[674] Slovenia,[675] Slovakia,[676] Mexico,[677] New Zealand,[678]and Namibia.[679] On the other hand, countries which do permit the use of replacement labour during protected strikes include, among others, South Africa,[680] the USA,[681] the United Kingdom,[682] Ireland,[683] Sweden,[684] Japan,[685] and Germany.[686]

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670 Du Toit *et al Labour Relations Law* 241.
671 Du Toit *et al Labour Relations Law* 241; Warneck *Strike Rules in the EU27 – A Comparative Overview* 58.
672 In Italy striking workers may not be replaced by other workers recruited from outside the enterprise. Even temporary replacement is not permitted. See Warneck *Strike Rules in the EU27 – A Comparative Overview* 43.
673 Calitz 2016 *South African Mercantile Law Journal* 449.
674 However, it should be noted that there is an exception to the ban on replacing striking workers in Lithuania – when maintenance services are not guaranteed. See Warneck *Strike Rules in the EU27 – A Comparative Overview* 47.
675 Warneck *Strike Rules in the EU27 – A Comparative Overview* 67.
676 Warneck *Strike Rules in the EU27 – A Comparative Overview* 64.
677 Banks *et al Labor Relations in North America* 140.
678 See section 97 of New Zealand's *Employment Relations Act* 2000.
679 See section 76(3)(b) of Namibia's *Labour Act* 11 of 2007 which provides that an employer must not "hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee".
680 See chapter 2 above.
681 Banks *et al Labor Relations in North America* 204; *NLRB v MacKay Radio and Telegraph Co* 304 U.S.A. 333 1938.
682 Florkowski *Managing Global Legal Systems* 156; Rycroft 1993 *ILJ* 291, where it is said "there are no restrictions [in the U.K.] on the employer's right to hire permanent replacements".
683 Florkowski *Managing Global Legal Systems* 156.
684 Florkowski *Managing Global Legal Systems* 156.

Although there is no provision regarding the use of replacement labour in any of the ILO's instruments, the CFA has considered a number of cases[687] wherein the issue of replacement labour during lawful strikes was raised. In their book, Du Toit *et al.* state that "the Committee on Freedom of Association, while condemning the permanent replacement of strikers, takes up no explicit position on temporary replacement".[688] By the end of this chapter, it will be shown that the accuracy of this statement may be questionable.

At this juncture, it should be noted that Article 8 of the Freedom of Association Convention provides that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention". The question of what the implications of this provision in relation to the use of replacement labour are will be addressed below. An overview of the facts and the conclusions of the CFA in each case will be provided, and thereafter the cases will be discussed collectively.

3.2.1 Case No. 1543 (United States)

3.2.1.1 A brief legal background on replacement labour in the United States

In order to better understand this case, it is necessary to start off by providing a brief legal background on replacement labour in the USA. A good starting point is a few examples of what happens occasionally when workers decide to exercise their right to strike in the USA. In 2005, after months of negotiations with management, workers at a textile manufacturing company (National Wire Fabric) located in the State of Arkansas decided to exercise their right to strike. Management responded to the strike by hiring replacement workers. Thus, the company was able to maintain production using replacement workers for almost

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685 See Schmidt and Ellis 2010 *Industrial International and Comparative law Review* 14, where the authors state that "In Japan, employers have the 'freedom to conduct operations' during dispute acts, which grants a limited right to replace striking workers. The Japanese Supreme Court is often quoted on the matter as saying 'even during a strike...an employer is not required to suspend the operation of its business, and can take measures that are necessary to continue its operations in response to the workers' dispute acts that seek to obstruct those operations.' However, while this principle permits employers to hire replacements, they may only do so temporarily...".

686 Calitz 2016 *South African Mercantile Law Journal* 448-449.

687 All of the cases discussed below are available online at the ILO's website (http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20060:0::NO:::).

688 See Du Toit *et al The Labour Relations Act of 1995* 241.

two years.[689] Almost a quarter of a century before the National Wire Fabric strike, one of the most infamous incidents occurred; an incident which some have argued made the replacement of strikers more socially acceptable.[690] In 1981, more than twelve thousand members of the Professional Air Traffic Controllers Organisation (PATCO) went on strike. When they refused to go back to work as ordered by President Ronald Reagan, they were discharged and permanently replaced.[691] Years later, McCartin would describe the PATCO incident as "an event which many in organised labour would prefer to forget".[692]

The practice of replacing strikers in the USA is a long-established practice. The National *Labour Relations Act* of 1935 (hereafter the NLRA), which is the core federal labour legislation in the USA,[693] protects the right of workers to organise[694] and to strike.[695] However, the NLRA does not mention an employer's right to hire replacements for its striking workers.[696] The latter right was established almost eighty years ago by the Supreme Court in *NLRB v MacKay Radio and Telegraph Co*.[697] In its famous dictum, which is commonly referred to as the "Mackay doctrine", the Supreme Court held that:

> Although Section 13 [of the NLRA] provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' *it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them*.[698] (Emphasis added)

From the above dictum, it is clear that the court assumed that an employer who is faced with a strike is implicitly entitled to protect and to keep its business operating. It should be noted that long before *Mackay* had been decided, and as

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689 Human Rights Watch *A Strange Case*: *Violations of Workers' Freedom of Association in the United States by European Multinational Corporations* 107-109.
690 Gregor and Balders 2000 *Temple International and Comparative Journal* 45.
691 McCartin 2006 *Perspectives on Work* 17.
692 McCartin 2006 *Perspectives on Work* 17.
693 Goldman and Corrada *Labor Law in the USA* 29.
694 Section 7 of the NLRA reads in part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing...".
695 See section 13 of the NLRA provides that "Nothing in the Act shall be construed so as to interfere or otherwise impede the right to strike".
696 See Moberly 2000 *Hofstra Labor and Employment Law Journal* 171-174.
697 304 U.S.A. 333 1938.
698 *NLRB v MacKay Radio and Telegraph Co*. 304 U.S.A. 333 1938 at 345-346.

early as the 1800s, American law already recognised the employer's right to maintain operations during a strike.[699] What *Mackay* did was to authoritatively lay down the principle that in order to do so, that is to protect and to keep its business operating, an employer is permitted to hire workers either on a temporary basis or permanent basis to replace the strikers[700] – indeed a powerful employer counter-weapon to a strike.

3.2.1.2 The allegations before the CFA

In 1990, the American Federation of Labour and Congress of Industrial Organizations (hereafter the AFL-CIO) submitted a complaint of various trade union rights violations against the USA government. It should be noted that the USA had not the ratified either the Freedom of Association Convention or the Right to Organise and Collective Bargaining Convention.[701] Although the USA law permits an employer to hire workers either on a temporary basis or permanent basis to replace strikers, this case was focused on the latter.

The complainant alleged that USA labour law and jurisprudence allow for the (permanent) replacement of workers engaging in lawful strikes, which gives rise to violations of freedom of association, and of the rights to organise and collective bargaining. It was further alleged that while USA labour law prohibited the dismissal of workers who engage in a lawful strike, there was no practical difference between dismissing such workers and replacing them permanently.[702] There was evidence which showed that some employers would start recruiting and even training replacement workers prior to a strike.[703] In some instances employers would begin advertising in newspapers prior to the expiration of collective agreements; whilst ensuring that their employees were aware of this effort.[704] Accordingly, the complainant alleged that:

> This [the practice of employers replacing strikers] has caused a serious imbalance in industrial relations by placing the weight of the law on one side of the bargaining table; it has increased conflicts between labour and management and among workers, has

699 LeRoy 1995 *Berkeley Journal of Employment & Labor Law* 175.
700 Goldman and Corrada *Labor Law in the USA* 29.
701 No. 98 of 1949.
702 Report 278, Case No. 1543 (United States) para 64.
703 Report 278, Case No. 1543 (United States) para 66.
704 Report 278, Case No. 1543 (United States) para 66.

> undermined the negotiation of collective bargaining agreements and, in many cases, has led to the destruction of trade unions with the consequent loss of worker representation and rights.[705]

Also, the complainant alleged that:

> The legal possibility for employers permanently to replace economic strikers undermines freedom of association and collective bargaining at every stage of the process. It often thwarts the process of self-organisation, denies workers the protection of a first collective bargaining agreement, provides an incentive for employers to destroy long and stable industrial relations and results in loss of employment and representation for workers.[706]

The USA government replied to AFL-CIO's allegations by defending the practice of employers replacing strikers. Firstly, the government argued that the practice was a long-time component of USA labour law, which seeks to balance the rights and interests of both workers and employers in collective bargaining. Relying on the decision of the Supreme Court in *Mackay*, the government argued that as a balance to the right to strike – a right which is protected in terms of the NLRA – employers have the legal right to maintain operations during a strike, including the right to hire replacements.[707]

Secondly, the government argued that even if economic strikers are replaced, they retain their status as employees under United States law, and are therefore they are entitled to preferential reinstatement (when vacancies become available). It pointed to the fact that the Supreme Court in *NLRB v. Fleetwood Trailer Co.* had clarified the responsibilities of employers regarding the reinstatement of such workers. It summed up the principles laid down in this case as follows:

> An employer who fails to reinstate such strikers at the conclusion of a strike is guilty of an unfair labour practice unless it can show 'legitimate and substantial business justifications', such as curtailed production or the fact that strikers' jobs are occupied by replacement workers. Upon an unconditional offer to return to work, the employer must offer a job to an economic striker when a job for which the striker is qualified becomes available – for example, when a replacement worker leaves or when full production is resumed. This right of reinstatement extends not only to the job the striker held before the strike, but to any other jobs for which he may be qualified. An employer is thereby prevented from refusing to reinstate an economic striker by claiming that the particular job he previously held no longer exists. The employer must also reinstate all qualified economic strikers before hiring any new workers. Only if an economic striker refuses the employer's offer of an equal or substantially equivalent

705 Report 278, Case No. 1543 (United States) para 65.
706 Report 278, Case No. 1543 (United States) para 69.
707 Report 278, Case No. 1543 (United States) paras 71-72.

> position, or if he obtains regular and substantially equivalent employment elsewhere, is his reinstatement right extinguished.[708]

Thirdly, the government rejected the argument that employers replace strikers in order to weaken or to destroy trade unions completely. It pointed to the fact that both the replacement workers and the replaced strikers are considered to be represented by the trade union; unless such workers vote the union out (a decertification election) or the employer can demonstrate that the union is no longer supported by a majority of the employees.[709] Furthermore, it dismissed the assertion that the decision of the Supreme Court in *Mackay* had had a chilling effect on the ability of trade unions' to strike and on their bargaining power.[710]

In conclusion, and based on the reasons outlined above, the USA government maintained that "the freedom of association of workers in the United States has not been abridged". It also added that the policy of allowing employers to replace

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708 Report 278, Case No. 1543 (United States) para 76. In the following paragraph, the government also added that "In *NLRB v. Erie Resistor Corp.,* the Supreme Court further protected economic strikers' employment rights by limiting the power of employers to give special seniority privileges to replacement workers. The Court ruled that it is an unfair labour practice under the NLRA for an employer to give 'super seniority to replacement workers or employees who return to work during a strike. In addition, the employer may not offer to strike replacements terms of employment better than its final offer to the strikers. Moreover, a striker's seniority cannot be adversely affected by his engaging in a strike. Upon reinstatement, an economic striker will be in a preferred position relative to less senior replacements as to seniority-sensitive wages, benefits, and terms and conditions of employment".

709 The government argued that "...under United States law, even if an employer has replaced its striking employees, the trade union continues to represent all bargaining unit employees. Both the replacements and the strikers are considered to be represented by the union, unless the employees vote the union out through an NLRB-supervised decertification election or the employer can demonstrate objective evidence that the union is no longer supported by a majority of the employees. For a period of one year from the commencement of the strike, replaced strikers have a statutory right to vote in any such decertification election. In 1990, the Supreme Court strengthened the rights of trade unions in situations where employers have hired permanent replacement workers. In *NLRB v. Curtin Matheson Scientific, Inc.*, an employer hired replacement workers during a strike and then attempted to withdraw recognition of the union, on the assumption that the replacement workers, who then made up a majority of the workforce, opposed the union. However, the Supreme Court ruled that an employer cannot assume that the replacement workers as such oppose the union; therefore, to withdraw recognition on that basis is an unfair labour practice". See Report 278, Case No. 1543 (United States) para 78.

710 The government argued that "That judgement was issued in 1938, and trade unions and strike activity flourished for decades following that ruling. In fact, trade unions thrived until their growth began to slow down in the 1970s. The gradual decline in trade union membership since then is attributable to many factors including, most importantly, a shift in the United States economy from an industrial to a more service-oriented base, global competition, a changing workforce and, according to some analysts, a less favourable public view of unions". See Report 278, Case No. 1543 (United States) para 80.

strikers, far from infringing trade union rights, has "proven to be balanced fairly and in the public interest".[711]

3.2.1.3 The committee's conclusions and recommendations

The CFA identified the issue to be determined by it as whether USA labour law and jurisprudence (*Mackay* and other related decisions) were in conformity with the principles of freedom of association.[712] It concluded that although the courts in the USA – in cases such as *NLRB v. Fleetwood Trailer Co.* – had clarified and enlarged the reinstatement rights of striking workers, such workers were entitled to reinstatement "only if and when vacancies occur, such as when replacements choose to leave".[713] In turn, so the CFA concluded this meant that an employer may legally replace striking workers permanently.[714] This also implies, so the committee went on to explain, that "a worker who has legally exercised his statutory right to strike, while never formally discharged by the employer, may be permanently out of his or her job".[715] Finally, the committee concluded that:

> The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. *The committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally*. The committee considers that, *if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights*.[716] (Emphasis added)

In light of the foregoing conclusion, the CFA invited the governing body of the ILO to approve the following recommendation:

> The committee invites the government [of the United States] to take into account that, if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights.[717]

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711 Report 278, Case No. 1543 (United States) para 85.
712 Report 278, Case No. 1543 (United States) para 89.
713 Report 278, Case No. 1543 (United States) para 90.
714 Report 278, Case No. 1543 (United States) para 91.
715 Report 278, Case No. 1543 (United States) para 91.
716 Report 278, Case No. 1543 (United States) para 92.
717 Report 278, Case No. 1543 (United States) para 93.

3.2.2 Case No. 2141 (Chile)

3.2.2.1 The allegations before the CFA

This case dealt directly with the hiring of workers to replace strikers. It should be noted that Chile has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.[718]

The Trade Union International of Workers of the Energy, Metal, Chemistry, Oil and Related Industries (hereafter UIS-TEMQPIA), alleged that by using certain provisions in Chile's *Labour Code*, the Bianchi Bicycle Factory S.A. (hereafter FABISA or the employer) had hired workers to replace its striking employees at its factory. The strike had begun on 30 April 2001 and its purpose was to obtain a wage increase. The complainant further alleged that three days after the strike had begun when its members were peacefully picketing at the entrance of the factory, a bus which was carrying (amongst others) strike-breakers was driven into them resulting in one death and several injuries.[719]

The government's response to the above allegations revealed more relevant facts about the strike in question. The government alleged that 90% of FABISA's workers had voted in favour of the strike, and as soon as the strike began the employer hired replacements for the strikers. It further alleged that since the replacements were hired in accordance with the country's *Labour Code* (section 381 thereof), there could be no legal objection to the employer's conduct.[720] Amongst other things, the government pointed out that one fatality and several injuries occurred whilst the strikers were attempting to prevent replacement workers who had been brought in by bus from entering FABISA's premises.[721]

3.2.2.2 The committee's conclusions and recommendations

Regarding the government's allegation that since the replacements were hired in accordance with the country's *Labour Code* (section 381 thereof), there could be no legal objection to the employer's conduct, the CFA concluded that once a

718 No. 98 of 1949.
719 Report 327, Case No. 2141 (Chile) paras 315-316.
720 Report 327, Case No. 2141 (Chile) para 317.
721 Report 327, Case No. 2141 (Chile) para 318.

deadlock had been reached between FABISA and UIS-TEMQPIA the workers called a strike. In turn, as the CFA further concluded, the employer hired workers to fill the posts of the strikers as soon as the strike began. Importantly, the CFA acknowledged the fact that FABISA had acted in accordance with Chile's *Labour Code*.[722] In order to illustrate the last point, the CFA quoted section 381 of Chile's *Labour Code* as follows:

> It is forbidden to replace strikers under the last offer provided at least, in the manner and delays provided for in article 372(3): (a)... (b)... (c) a replacement indemnity with a value equal to four motivation premiums for each replacement worker. The total amount of this indemnity will be paid, in equal parts, to striking workers, within five days from the end of the strike. In this case, the employer may, from the first day of the strike, hire the workers it deems necessary to fulfil the duties of strikers. Moreover, the workers may, in this case, choose to go back to their post on the 15th day after the beginning of the strike. Should the employer not complete an offer in line with the conditions provided for in subparagraph 1 and in the circumstances therein indicated, it may hire the workers it deems necessary from the 15th day of the strike, provided it gives the indemnity mentioned in subparagraph 1(c). However, the employers may hire the workers it deems necessary to fulfil the duties of strikers, from the 15th day of the strike...[723] (Emphasis added)

To sum up, section 381 of Chile's *Labour Code* permits employers to temporarily replace striking workers but makes it expensive for them to do so. Therefore, in light of this section, the CFA held that:

> In this respect, the committee recalls that 'the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association' [see Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 570].[724]

Moreover, the CFA also observed that the ILO's committee of experts has made observations to the same effect on this issue with respect to Chile.[725] Based on the above conclusion – that hiring workers to break a strike constitutes a serious violation of freedom of association – and the fact that Chile's *Labour Code* permits employers to replace striking workers, the CFA requested the government of Chile to take the necessary steps to amend section 381 of its *Labour Code*

722 Report 327, Case No. 2141 (Chile) para 322.
723 Report 327, Case No. 2141 (Chile) para 322.
724 Report 327, Case No. 2141 (Chile) para 322.
725 Report 327, Case No. 2141 (Chile) para 322.

accordingly.[726] In light of the foregoing conclusions, the CFA invited the governing body of the ILO to approve the following recommendation:

> The committee requests the government to take the necessary steps to amend sections 380 and 381 of the *Labour Code* allowing the replacement of workers engaged in a strike in services that are not essential in the strict sense of the term (i.e. services whose interruption may endanger the life, personal safety or health of the whole or part of the population).[727]

At this point, it should be emphasised that unlike the case against the United States[728] which was discussed earlier, wherein the issue was the permanent replacement of strikers, the case *in casu* was concerned with legal provisions which permitted employers to temporarily replace striking workers. This point is important and shall be elaborated upon later in this chapter.

3.2.3 Case No. 2770 (Chile)

This case dealt directly with the hiring of workers to replace strikers. Again, it should be noted that Chile has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.

3.2.3.1 The allegations before the CFA

The World Federation of Trade Unions (hereafter WFTU) alleged that Chilean legislation contains a number or regulations that are contrary to the ILO's conventions and principles of freedom of association. In this case, the WFTU objected specifically to section 381 of the Chilean *Labour Code*, which provides that the replacement of strikers is prohibited, except in certain specified circumstances.[729] According to the WFTU, the aforementioned legislation permits

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726 The Committee requested the Government to "to take the necessary steps to amend sections 380 and 381 of the *Labour Code* which allow the replacement of workers engaged in a strike in services that are not essential in the strict sense of the term (i.e. services whose interruption may endanger the life, personal safety or health of the whole or part of the population)". See Report 327, Case No. 2141 (Chile) para 322.

727 Report 327, Case No. 2141 (Chile) para 326.

728 Report 278, Case No. 1543 (United States)

729 As was noted earlier, section 381 of the Chilean *Labour Code* provides that "It is forbidden to replace strikers under the last offer provided at least, in the manner and delays provided for in article 372(3): (a)... (b)... (c) a replacement indemnity with a value equal to four motivation premiums for each replacement worker. The total amount of this indemnity will be paid, in equal parts, to striking workers, within five days from the end of the strike. In this case, the employer may, from the first day of the strike, hire the workers it deems necessary to fulfil the duties of strikers. Moreover, the workers may, in this case, choose to go back to their post on the 15th day after the beginning of the strike. Should the employer not complete an offer in line

employers to hire strike-breakers from the 1st day or from the 15th day of a strike, but that in practice strike-breakers start working from the 1st day of a strike.[730]

In this particular case, the WFTU alleged that the workers of Cerámica Espejo Ltd submitted a petition regarding a wage increase in January 2010 and the company refused to negotiate, asserting that it did not recognise the trade union. In these circumstances, so the WFTU maintained, the workers were left with no practical option but to resort to strike action. Furthermore, the WFTU alleged that once the strike had begun, the company hired strike-breakers and redeployed other workers to replace the strikers.[731]

The government's response to the aforementioned allegations was that section 381 makes it very clear "the general rule is that the replacement of striking workers is prohibited, which is perfectly in line with the provisions of ILO conventions no.'s 87, 98 and 135".[732] Whilst conceding the fact that there were exceptions to the general prohibition on the hiring of replacement workers for strikers, the Chilean government maintained that:

> ...the legislator has envisaged these exceptions exclusively for situations explicitly and specifically provided for in law, and whose application entails a considerable financial burden for the employer, which discourages it from exercising this prerogative, particularly when it is exercised from the first day of the strike.[733]

Moreover, and in light of the above, the Chilean government maintained that the employer in question (Cerámica Espejo Ltd.) was legally entitled to hire replacements for strikers from the 15th day of the beginning of the strike in accordance with section 381 of the *Labour Code*.[734] Finally, Chilean government

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with the conditions provided for in subparagraph 1 and in the circumstances therein indicated, it may hire the workers it deems necessary from the 15th day of the strike, provided it gives the indemnity mentioned in subparagraph 1(c). However, the employers may hire the workers it deems necessary to fulfil the duties of strikers, from the 15th day of the strike..." (Emphasis added). See Report 327, Case No. 2141 (Chile) para 322 where the CFA quoted section 381 in this manner.

730 Report 360, Case No. 2770 (Chile) paras 348-349.
731 Report 360, Case No. 2770 (Chile) para 350.
732 Report 360, Case No. 2770 (Chile) para 354.
733 Report 360, Case No. 2770 (Chile) para 356.
734 Report 360, Case No. 2770 (Chile) para 358.

denied that it had violated any of the ILO's conventions on freedom of association, including the Freedom of Association Convention.[735]

3.2.3.2 The committee's conclusions and recommendations

The committee noted that section 381 of the Chilean *Labour Code* does provide that the replacement of strikers is prohibited, but notwithstanding this, replacement workers may be hired in certain specified circumstances.[736] Further, the committee noted that the application of these exceptions "entails a considerable burden for the employer, which discourages it from exercising this prerogative, particularly when it is exercised from the first day of the strike".[737] Nonetheless, the committee recalled that on numerous occasions – for example in the case against the United States[738] – it has emphasised that "if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights".[739] Importantly, the committee went on to hold that:

> *...the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association, and that the employment of persons to perform duties which have been suspended as a result of a labour dispute can, if the strike is lawful, be justified only by the need to ensure the operation of services or industries whose suspension would lead to an acute crisis*.[740] (Emphasis added)

In light of the foregoing conclusion, the CFA requested the government of Chile to amend section 381 of the *Labour Code* so that the hiring of replacement workers to replace strikers will only be possible in the event of strikes in essential sectors or services, and "in the event of minimum services not being maintained, or in the

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735 It maintained that it had "fully complied with the provisions and principles enshrined in those instruments, recognizing and promoting freedom of association, a fundamental guarantee provided for in paragraph 16, article 19, of the Chilean *Constitution*. In particular, with regard to Convention No. 87, the right of the workers to form and join the trade union organization in question was respected at all times and the public authorities refrained from any intervention that might restrict this right". See Report 360, Case No. 2770 (Chile) para 361.

736 Report 360, Case No. 2770 (Chile) para 370.

737 Report 360, Case No. 2770 (Chile) para 370.

738 See Report 278, Case No. 1543 (United States) para 92.

739 Report 360, Case No. 2770 (Chile) para 371.

740 Report 360, Case No. 2770 (Chile) para 372.

event of an acute crisis".[741] Finally, the CFA invited the governing body of the ILO to approve a recommendation which was similarly worded.[742]

3.2.4 Case No. 1899 (Argentina)

This case dealt directly with the hiring of workers to replace strikers in the education sector. It should be noted that Argentina has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.[743]

3.2.4.1 The allegations before the CFA

The complainant was the Union of Education Workers of Río Negro (hereafter UNTER), and it objected to Resolution No. 203/96, issued in February 1996 by the Río Negro Provincial Education Council, which concerned the recruitment of teachers to replace striking employees.[744] In part, the aforementioned resolution provided that:

> Considering the possibility of direct action being taken by decision of teaching staff, *and whereas the continuity of educational services must be ensured; a political decision has been taken to recruit persons wishing to provide teaching services to replace those who may take part in the direct action*; there are a large number of persons with professional and equivalent qualifications who are able to take on teaching hours and/or grades; in order to fill posts which would otherwise be unattended it is necessary to recruit persons voluntarily expressing the wish to work in the education sector...[745] (Emphasis added)

The Argentinean government's response to the abovementioned allegations was to defend the action taken by the Río Negro Provincial Education Council. It argued that Resolution No. 203/96 did not violate either the constitutional right to strike or any of the ILO's conventions on freedom of association.[746] Also, it argued that Resolution No. 203/96 was intended to guarantee the constitutional right to education in the event of strike action by teachers for an unspecified or prolonged

741 Report 360, Case No. 2770 (Chile) para 372.
742 The Committee invited the Governing Body to approve the following recommendation: "The Committee requests the Government to take steps to amend section 381 of the *Labour Code*, so that the hiring of workers to replace strikers will only be possible in the event of strikes in essential services in the strict sense of the term, in the event of minimum services not being maintained, or in the event of an acute crisis and to ensure that these amendments are effectively implemented". See Report 360, Case No. 2770 (Chile) para 376.
743 No. 98 of 1949.
744 Report 307, Case No. 1899 (Argentina) para 71.
745 Report 307, Case No. 1899 (Argentina) para 72.
746 Report 307, Case No. 1899 (Argentina) para 76.

period.[747] Moreover, the Argentinean government pointed out that the teachers who went on strike were not removed from their posts, but were merely replaced while on strike until they went back to work.[748] Put differently, the Argentinean government was arguing that the teachers were not replaced permanently but temporarily i.e. they were entitled to go back to work once the strike had ended.

3.2.4.2 The committee's conclusions and recommendations

The committee noted that Argentinean law provides for the possibility of imposing a minimum service in the event of a strike in the education sector, and that this was in conformity with the ILO's principles of freedom of association.[749] However, given that Resolution No. 203/96 provided for the recruitment of teachers to replace striking staff, the CFA once again concluded that:

> ...the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association.[750]

In light of the foregoing conclusion, the committee requested the Argentinean government to "take the necessary steps to repeal Resolution No. 203/96 issued by the Education Council of Río Negro province".[751] Finally, the CFA invited the governing body of the ILO to approve a recommendation which was similarly worded.[752]

Again, it should be emphasised that unlike the case against the United States[753] which was discussed earlier, wherein the issue was the permanent replacement of strikers, the case *in casu* was concerned with legal provisions which permitted employers to temporarily replace striking workers. This point is important and will be elaborated upon later in this chapter.

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747 Report 307, Case No. 1899 (Argentina) para 77.
748 Report 307, Case No. 1899 (Argentina) para 77.
749 Report 307, Case No. 1899 (Argentina) para 81.
750 Report 307, Case No. 1899 (Argentina) para 81.
751 Report 307, Case No. 1899 (Argentina) para 81.
752 The Committee invited the Governing Body to approve the following recommendation: "The Committee requests the Government to take the necessary steps to repeal resolution No. 203/96, issued by the Education Council...allowing workers to be hired during a teacher's strike". See Report 307, Case No. 1899 (Argentina) para 87.
753 Report 278, Case No. 1543 (United States)

3.2.5 Case No. 1849 (Belarus)

3.2.5.1 The allegations before the CFA

In this case, the hiring of workers to replace strikers was not the central issue, but one of many. It should be noted that Belarus has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.[754]

This case was concerned with a complaint by the International Confederation of Free Trade Unions (hereafter the ICFTU) wherein it alleged several violations of freedom of association and trade union rights by the government of Belarus. The ICFTU alleged that Minsk Metro workers enjoyed the right to strike until the government of Belarus issued an order in March 1995 containing a detailed list of enterprises and industries where, according to the Order, strikes "endanger the life and health of persons".[755] This list included the transport services.[756]

On 17 August 1995, notwithstanding the said Order, Minsk Metro workers (including train drivers) went on strike. On 21 August 1995, substitute drivers were hired to drive the trains, and the police made sure that the replacement workers were able to carry out their duties.[757]

In its response, the government of Belarus emphasised that, amongst other things, the action it had taken was necessary and appropriate given the significance of the transport industry.[758] Importantly, the government did not deny the factual allegations made by the complainant.[759]

3.2.5.2 The committee's conclusions and recommendations

The committee acknowledged that strikes may be restricted or even prohibited under certain specific circumstances, that is to say, in "essential services in the strict sense of the term, i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population".[760] The

754 No. 98 of 1949.
755 Report 302, Case No. 1849 (Belarus) para 165.
756 Report 302, Case No. 1849 (Belarus) para 165.
757 Report 302, Case No. 1849 (Belarus) para 217.
758 Report 302, Case No. 1849 (Belarus) paras 187-189.
759 Report 302, Case No. 1849 (Belarus) para 190.
760 Report 302, Case No. 1849 (Belarus) para 203.

question was asked if the transport industry is an essential service or industry. The committee concluded that it was not.[761]

The committee deplored the fact that during the strike in Minsk, various actions were taken by the authorities targeting participating unions and their members, in violation of freedom of association principles. In particular, as the CFA pointed out, public authorities engaged in strike-breaking activities.[762] Given that on 21 August 1995 substitute drivers were hired to drive trains, the CFA recalled that:

> ...the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association.[763]

In light of the foregoing conclusion, the CFA requested the government of Belarus to "refrain in the future from using substitute workers to break a strike".[764] Finally, the CFA invited the governing body of the ILO to approve a recommendation which was similarly worded.[765]

3.2.6 Case No. 2251 (Russia)

In this case, the hiring of workers to replace strikers was not the central issue, but one of many. It should be noted that Russia has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.[766]

3.2.6.1 The allegations before the CFA

The complainant, the Russian Labour Confederation (hereafter RLC), alleged a large number of workers' and trade union rights violations against the Russian government. In particular, the RLC objected to several sections in Russia's *Labour Code*, which, it alleged, violated the principles of freedom of association, the right to strike and the right to bargain collectively.[767]

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761 It concluded that "the Committee has...always considered that transport does not generally fall within the category of essential services". See Report 302, Case No. 1849 (Belarus) para 203.
762 Report 302, Case No. 1849 (Belarus) para 208.
763 Report 302, Case No. 1849 (Belarus) para 217.
764 Report 302, Case No. 1849 (Belarus) para 217.
765 See Report 302, Case No. 1849 (Belarus) para 217.
766 No. 98 of 1949.
767 Report 333, case No. 2251 (Russia) para 943.

Amongst the slew of complaints made by the RLC was the fact that Russian labour legislation does not contain any provision regarding the employment of workers to replace lawful strikers.[768] In practice, so the RLC argued, employers often abuse this loophole by hiring replacement workers, and "strikes turn out to be ineffective and have no real impact on the employer".[769] It should be noted that in its reply, the Russian government did not specifically address the issue of replacement labour.[770]

3.2.6.2 The committee's conclusions and recommendations

The committee noted the RLC's concerns over strike replacements, to which employers, "incited by the absence of provision in the *Labour Code* banning such a practice, often have recourse".[771] Showing its displeasure, the CFA once again held that "the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association".[772] Therefore, the CFA requested the Russian government to ensure that this principle is respected.[773] Also, the CFA invited the governing body of the ILO to approve a recommendation which was similarly worded.[774]

3.2.7 Case No.1954 (Côte d'Ivoire)

3.2.7.1 The allegations before the CFA

In this case, the confederation Digenté alleged several violations of freedom of association and trade union rights by the government of Côte d'Ivoire. It should be noted that Côte d'Ivoire has ratified both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention.[775]

The confederation Digenté explained that the workers of a company called CARENA went on strike on 5 March 1997 in support of a wage increase demand.

768 Report 333, case No. 2251 (Russia) para 962.
769 Report 333, case No. 2251 (Russia) para 962.
770 For the government's reply to the allegations levelled against it, see Report 333, case No. 2251 (Russia) paras 963-969.
771 Report 333, case No. 2251 (Russia) para 998.
772 Report 333, case No. 2251 (Russia) para 998.
773 Report 333, case No. 2251 (Russia) para 998.
774 Report 333, case No. 2251 (Russia) para 1001.
775 No. 98 of 1949.

The workers were discontented by the wage discrimination they had suffered since the 1950's and wanted to be treated equal to their European colleagues.[776]

On 10 March 1997 the employer implemented a lock-out. On 24 March, workers who were picketing outside the enterprise were driven away by the police, it being CARENA's intention to bring in workers to replace the strikers.[777] In a surprise move, so the confederation Digenté further alleged, the workers from the subcontracting company refused to replace the strikers as an act of solidarity. Instead, they appealed to both management and the striking workers to resolve their dispute through negotiations.[778]

In its response to the above mentioned allegations, whilst not addressing the issue of replacement labour directly, the Ivorian government argued that the involvement of the police in the strike was necessary given that a previous so-called peaceful strike involving confederation Digenté had resulted in acts of violence against non-string workers.[779]

3.2.7.2 The committee's conclusions and recommendations

Amongst other things, the CFA noted the fact that an attempt to resolve the dispute between confederation Digenté and CARENA through conciliation had ended in failure due to the fact that the employer (CARENA) had resumed business operations using replacement workers.[780] Recalling the fundamental nature of the right to strike for workers which is an "intrinsic corollary" to the right to associate protected by the Freedom of Association Convention, the CFA reiterated its position that:

> ...the hiring of workers to break a strike and requiring workers to go back to work, except for such cases where the strike risks causing a situation in which the life, health or personal safety of populations might be endangered, are contrary to the principles of freedom of association.[781]

776 Report 311, case No. 1954 (Côte d'Ivoire) para 371.
777 Report 311, case No. 1954 (Côte d'Ivoire) para 380.
778 Report 311, case No. 1954 (Côte d'Ivoire) para 380.
779 Report 311, case No. 1954 (Côte d'Ivoire) para 386.
780 Report 311, case No. 1954 (Côte d'Ivoire) para 386.
781 Report 311, case No. 1954 (Côte d'Ivoire) para 386.

3.2.8 Case No. 1865 (Korea)

Amongst other things, this case dealt directly with the hiring of workers to replace strikers. Unlike the other cases discussed above, it should be noted that the Republic of Korea has ratified neither the Freedom of Association Convention nor the Right to Organise and Collective Bargaining Convention.[782]

3.2.8.1 The allegations before the CFA

In this case, the International Confederation of Free Trade Unions (hereafter the ICFTU) alleged violations of trade union rights by the Korean government. In particular, the ICFTU objected to recent changes made to the country's labour legislation, which, it argued further undermined freedom of association instead of bringing the legislation into compliance with international labour standards.[783] Amongst others, the ICFTU objected to the fact that under the changes employers were permitted to hire workers from outside the enterprise to replace strikers.[784]

The Korean government's response to the abovementioned allegations was to defend the changes to the country's labour laws. Instead of undermining freedom of association as the ICFTU alleged, the government argued that the revised labour laws were "a considerable step forward towards respecting ILO standards, at the same time reflecting the Republic of Korea's economic needs and its socio-political particularities".[785] However, the Korean government acknowledged the fact that there had been strong demands for the government to reconsider certain aspects of the new legislation, and that the National Assembly was going to reopen debates over the said legislation.[786] Therefore, the Korean government requested the CFA to adjourn the case in the meantime.[787]

3.2.8.2 The committee's conclusions and recommendations

Notwithstanding the government's request for an adjournment, the committee decided to proceed with the case and examine the impugned legislation. The

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782 No. 98 of 1949.
783 Report 306, Case No. 1865 (Korea) para 305.
784 Report 306, Case No. 1865 (Korea) para 306.
785 Report 306, Case No. 1865 (Korea) para 318.
786 Report 306, Case No. 1865 (Korea) para 319.
787 Report 306, Case No. 1865 (Korea) para 319.

committee observed that under the new changes, employers were permitted to hire workers from outside the enterprise to replace strikers. It noted that significant business loss was expected to be caused by industrial action in this case.[788] Furthermore, the committee noted the fact that it had dealt with other cases wherein the issue of replacement labour was raised, and it reiterated its position on the matter.[789] The committee added that:

> Moreover, national legislation pertaining to trade union rights, and in this case the right to strike, should be in conformity with freedom of association principles. The Committee notes that the legislation contains a certain number of guarantees since the hiring takes place during a specified period, with the permission of the Labour Relations Commission. *The Committee stresses, nevertheless, that this provision is only acceptable from the standpoint of freedom of association if it applies to essential services in the strict sense of the term*.[790] (Emphasis added)

In light of the foregoing conclusions, the CFA requested the Korean government to "limit the hiring of workers from outside the business to replace strikers to essential services".[791]

3.3 The CFA's jurisprudence: a discussion

3.3.1 On permanent replacement labour

Although USA law permits an employer to hire workers either on a temporary or permanent basis to replace strikers,[792] the case against the United States focused on the latter. An interesting fact about this case is that the NLRA – which is the core federal labour legislation in the USA – does not mention an employer's right to hire replacements for its striking workers,[793] and it was actually the Supreme Court which laid down the famous or infamous (depending on one's point of view) *Mackay* doctrine. It has undoubtedly turned out to be one of the most controversial issues in industrial relations and has been so for more than 80 years.[794] It should

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788 Report 306, Case No. 1865 (Korea) para 335.
789 The Committee once again held that "the hiring of workers to break a strike and requiring workers to go back to work, except for such cases where the strike risks causing a situation in which the life, health or personal safety of populations might be endangered, are contrary to the principles of freedom of association". In this regard, see Report 306, Case No. 1865 (Korea) para 336.
790 Report 306, Case No. 1865 (Korea) para 336.
791 Not just essential services, but essential services "in the strict sense of the term". See Report 306, Case No. 1865 (Korea) para 346.
792 See Goldman and Corrada *Labor Law in the USA* 29.
793 See Moberly 2000 *Hofstra Labor and Employment Law Journal* 171-174.
794 Logan 2006 *Perspectives on Work* 23-25.

be recalled that the court in *Mackay* held that an employer that is faced with a strike has a right to protect and continue its business by hiring workers to fill the places left by the strikers, and that it may do so temporarily or permanently.[795]

In practice, this means that American law permits an employer to refuse to reinstate a worker while that worker's job is occupied by a replacement hired while the worker was on strike.[796] However, given that American law distinguishes between economic strikes and unfair labour practice strikes, the rule is different if workers engage in an unfair labour practice strike.[797] An economic strike is "a collective work stoppage directed not against an unfair labour practice, but to support collective agreement claims concerning general work conditions".[798] Such strikes may also involve a demand regarding the recognition of a union.[799] On the other hand, an unfair labour practice strike is "a collective work stoppage in order to protest against the conduct of the employer that is upheld by the National Labour Relations Board (hereafter the NLRB) to be an unfair labour practice prohibited by the NLRA".[800] In the latter scenario, provided that the NLRB finds that an employer was in fact guilty of an unfair labour practice, a worker is entitled to reinstatement even if he or she had been replaced by another worker during the strike.[801]

Before the CFA, the complainant's case was that USA labour law and jurisprudence allow for the (permanent) replacement of workers engaging in lawful strikes, which gives rise to violations of freedom of association, and of the rights to organise and collective bargaining.[802] On the other hand, the government's defence revolved around the argument that USA law seeks to balance the rights and interests of both workers and employers in collective bargaining.[803]

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795 Goldman and Corrada *Labor Law in the USA* 29.
796 Goldman and Corrada *Labor Law in the USA* 29.
797 Goldman and Corrada *Labor Law in the USA* 29.
798 Gregor and Balders 2000 *Temple International and Comparative Journal* 42-43.
799 Gregor and Balders 2000 *Temple International and Comparative Journal* 42-43.
800 Gregor and Balders 2000 *Temple International and Comparative Journal* 42-43.
801 Goldman and Corrada *Labor Law in the USA* 29.
802 See Report 278, Case No. 1543 (United States) para 64.
803 See Report 278, Case No. 1543 (United States) paras 71-72.

The law can and does influence the relative bargaining power of labour and management.[804] It was indicated in the previous chapter that the use of replacement labour during a strike may render a strike ineffective,[805] and may even change collective bargaining into collective begging as some have argued.[806] One may ask, what then is bargaining power? According to Schmidt and Ellis, bargaining power may be defined as "the ability to induce an opponent to accept one's agreement on one's terms".[807] In economic terms, as they further explain, a party's bargaining power "depends on that party's ability to impose costs on the other side for failure to reach an agreement while minimizing the party's own costs of disagreement".[808] In this "see-saw" whereby the labour's bargaining power goes down as the employer's goes up,[809] the law can raise labour's bargaining power relative to management's by *inter alia* prohibiting the replacement of strikers.[810] Permitting employers to replace striking workers will have the opposite effect. This effect may be magnified significantly if the law permits the permanent replacement of strikers. Importantly, the ILO has made it clear that the legitimate exercise of the right to strike may not result in sanctions of any sort.[811]

In the case against the United States, the CFA in its conclusions, rightly so it is submitted, emphasised the fundamental nature of the right to strike for workers and focused on the fact that when workers exercise their right to strike in the USA they face a real risk of losing their jobs i.e. the risk of being permanently replaced. As Goldman and Corrada have explained, such workers face not one but three risks:

> First, they risk whether their ability to go without the financial returns of their jobs will be greater than the employer's ability to get along without their work. Secondly, they risk that the economic harm the strike inflicts on the employer will permanently

804 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
805 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112; Creamer 1998 *ILJ* 20; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 157.
806 Tenza 2016 *Obiter* 116.
807 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 3.
808 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
809 Brassey 2013 *ILJ* 826.
810 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
811 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 658; ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 50.

> damage the employer's prospects of operating at an improved level of worker benefits. Thirdly, they risk that their jobs will be occupied by others when the conflict ends.[812]

For convenience, it will be recalled that the CFA concluded that "if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike...".[813] There are at least two significant aspects to this conclusion. Firstly, the deliberate use of the words "if a strike is otherwise legal" implies that the CFA does not object to the replacement of strikers if the strike itself is not legal or protected as it is referred to in some countries. Secondly, the use of the words "labour drawn from outside the undertaking" implies that the CFA does not object to the use of non-striking workers to assist in maintaining production by performing the work of the strikers. However, the CFA does object to discrimination in favour of non-strikers, for example, whereby such workers are given bonuses.[814] Importantly, the CFA has condemned laws which provide for the closure of an enterprise in the event of a strike – such laws are "an infringement of the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise".[815] Therefore, it is submitted that it cannot be argued that the CFA does not take into consideration the interests of employers during a strike.

From the above, it is clear that the CFA has condemned the permanent replacement of strikers who are engaged in a lawful strike. As the CFA has held, such a practice entails derogation from the right to strike[816] – a right which is "an indispensable corollary of the right to organize protected by Convention No. 87 and by the principles enunciated in the ILO Constitution".[817] It is a practice which gives employers an enormous advantage over trade unions by virtually neutralising the strike weapon,[818] and may even reduce collective bargaining to collective begging. It seems contradictory that the law would protect the right to strike (as section 13 of the NLRA does in the USA) whilst permitting a practice

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812 Goldman and Corrada *Labor Law in the USA* 406.
813 Report 278, Case No. 1543 (United States) para 92.
814 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 675.
815 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 676.
816 See Report 278, Case No. 1543 (United States) para 92.
817 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-47.
818 O'Neil 2011 *Labor & Employment Law Forum* 215.

which renders the strike weapon almost meaningless. To illustrate this paradox, an American law professor has been quoted as saying:

> Every year when I teach my students about the rules relating to the strike weapon in Labour Law, I always explain the practical significance of engaging in protected activity. I point out to them that the practical significance is that the employee is immunized from employer self help instituted against [workers] in the form of discipline or discharge for engaging in the conduct in question. But then I tell them that despite the fact that workers cannot be discharged or disciplined for engaging in a strike, they can be permanently displaced. Either this produces nervous laughter or expression of puzzlement - and well it should![819]

The USA is one of the few developed countries in the world which permits the permanent replacement of lawful strikers.[820] The UK is another such country.[821] Briefly, it is interesting to note that, in legal terms, the position of strikers in the UK is even worse than that of their counterparts in the USA[822] Not only are employers permitted to permanently replace strikers in the UK, but unlike in the USA, employees who strike may lose their status as employees.[823] Whilst it has been said that "it is virtually impossible in modern Britain to take industrial action which is lawful",[824] some commentators in the wake of the judgment of the European Court of Human Rights in *Enerji Yapi-Yol Sen v Turkey*,[825] a judgment in which the court held that Article 11 of the European Charter of Human Rights included protection of the right to strike, have argued that British workers do in fact now have a "right to strike".[826] As late as 2016, the ILO's committee of experts criticised plans by the UK government to expand the right of employers to hire replacements for strikers.[827] Interestingly, the said criticism was not directed at permanent replacement labour, but replacement labour in general, which it is submitted includes temporary replacement labour. What the committee said and the CFA's jurisprudence regarding cases which involved the temporary replacement of strikers is discussed below.

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819 See Gregor and Balders 2000 *Temple International and Comparative Journal* 46, where they quote William B. Gould, a Professor at Stanford Law School.
820 Holley *et al The Labor Relations Process* 401.
821 See Rycroft 1993 *ILJ* 291, where it is said "there are no restrictions [in the U.K.] on the employer's right to hire permanent replacements".
822 Spector 1992 *McGill Law Journal* 201.
823 Spector 1992 *McGill Law Journal* 208.
824 Honeyball and Bowers *Textbook on Labour Law* 388.
825 Application No 68959/01, judgment dated 21 April 2009.
826 Ewing and Hendy 2010 *ILJ* (UK) 13; Dukes 2011 *ILJ* (UK) 303.
827 ILO *Application of International Labour Standards 2016 (I)* 153-154.

3.3.2 On temporary replacement labour

A good point of departure is the cases against Chile. Since there were two cases determined by the CFA involving Chile, the first of these cases (case No. 2141)[828] will hereafter be referred to as *Chile 1* and the second case (case No. 2770)[829] as *Chile 2*. In *Chile 1*, it will be recalled that, amongst other things, the Chilean government's defence was that the employer in question (FABISA) had acted in accordance with the country's labour legislation (section 381 of the *Labour Code*) when it hired workers to replace its striking employees.[830] The said section 381 permits employers to hire replacement workers either on the first day of the strike or from the 15th day after the beginning of the strike. If an employer chooses the former option, it is required to pay a replacement indemnity to its striking employees. Importantly, the section further provides that in this scenario the striking workers may choose to return to their posts from the 15th day after the beginning of the strike.[831]

From the above, it is clear that *Chile 1* dealt with a situation whereby the law permits the temporary replacement of strikers. Moreover, the issue of permanent replacement was never raised. Whilst the CFA did concede that section 381 of Chile's *Labour Code* permits employers to temporarily replace striking workers, but makes it expensive for them to do so, it nonetheless concluded that "the hiring of workers to break a strike in a sector which cannot be regarded as an essential

828 Report 327, Case No. 2141 (Chile).
829 Report 360, Case No. 2770 (Chile).
830 See Report 327, Case No. 2141 (Chile) para 317.
831 In part, section 381 provides that "It is forbidden to replace strikers under the last offer provided at least, in the manner and delays provided for in article 372(3): (a)... (b)... (c) a replacement indemnity with a value equal to four motivation premiums for each replacement worker. The total amount of this indemnity will be paid, in equal parts, to striking workers, within five days from the end of the strike. In this case, the employer may, from the first day of the strike, hire the workers it deems necessary to fulfil the duties of strikers. Moreover, the workers may, in this case, choose to go back to their post on the 15th day after the beginning of the strike. Should the employer not complete an offer in line with the conditions provided for in subparagraph 1 and in the circumstances therein indicated, it may hire the workers it deems necessary from the 15th day of the strike, provided it gives the indemnity mentioned in subparagraph 1(c). However, the employers may hire the workers it deems necessary to fulfil the duties of strikers, from the 15th day of the strike...". See *Chile 1* para 322 where the CFA quoted section 381 of Chile's *Labour Code*.

sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association".[832]

There are several important things which should be noted about the above dictum. Firstly, it is worded differently from the CFA's conclusion in the case against the United States – wherein it condemned the replacement of strikers for "an indeterminate period" as entailing derogation from the right to strike.[833] It is submitted that the words "for an indeterminate period" as used by the CFA means permanently. There is no reference in *Chile 1* to the words "for an indeterminate period". Instead, and secondly, in *Chile 1* (unlike in the case against the United States) the CFA links essential services to the hiring of workers to replace strikers. It does so by condemning the hiring of workers to break a strike in "a sector which cannot be regarded as an essential sector in the strict sense of the term" as constituting "a serious violation of freedom of association".[834] The services which are considered to be essential by the ILO include the hospital sector, electricity services, the police and armed forces, the fire-fighting services, prison services and air-traffic control.[835] It will be recalled that in *Chile 1* the employer in question (FABISA) was a company which manufactured bicycles – certainly not an essential service. In the case against Belarus, it will be recalled that government had issued an order in March 1995 which contained a detailed list of enterprises and industries where, according to the order, strikes "endanger the life and health of persons". This list included the transport services.[836] It should be asked if the transport industry is an essential service or industry. The committee concluded that it was not.[837]

Lastly, another important factor which should be noted about *Chile 1* (and *Chile 2*) is the fact that the CFA requested the Chilean government to take the necessary steps to amend section 381 of its *Labour Code* in line with the principle that the hiring of workers to replace strikers should be limited to essential services and or

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832 See *Chile 1* para 326.
833 See Report 278, Case No. 1543 (United States) para 92.
834 See *Chile 1* para 322.
835 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 585.
836 Report 302, Case No. 1849 (Belarus) para 165.
837 It concluded that "the Committee has...always considered that transport does not generally fall within the category of essential services". See Report 302, Case No. 1849 (Belarus) para 203.

sectors.[838] Instead of simply condemning the replacement of strikers, the CFA took the bold step of requiring the government to repeal and or amend legislation which it found to be inconsistent with the principle that the replacement of lawful strikers should be limited to essential services or sectors.

The case against Argentina also dealt with legal provisions which permitted employers to temporarily replace striking workers. As part of its defence the Argentinean government pointed out that the teachers who went on strike were not removed from their posts, but were merely replaced while on strike until they went back to work.[839] Put differently, the Argentinean government was arguing that the teachers were not replaced permanently but temporarily i.e. they were entitled to go back to work once the strike had ended. Once again, the CFA was not convinced by this argument and pretty much repeated its conclusion in *Chile 1* and *Chile 2.*[840] Also, the CFA reiterated its position again in the cases against Russia,[841] Côte d'Ivoire[842] and Korea.[843]

To support the CFA's position on the issue of replacement labour, it may be argued that permitting employers to replace lawfully striking workers (both temporarily and permanently) is inconsistent with certain provisions of the Freedom of Association Convention.[844] Article 3 thereof protects the right of workers' organisations to "organise their administration and activities and to formulate their programmes".[845] As noted earlier, these words when read together with Article 10[846] have been interpreted by the ILO's supervisory bodies as

838 The Committee requested the Government to "to take the necessary steps to amend sections 380 and 381 of the *Labour Code* which allow the replacement of workers engaged in a strike in services that are not essential in the strict sense of the term (i.e. services whose interruption may endanger the life, personal safety or health of the whole or part of the population)". See Report 327, Case No. 2141 (Chile) para 322.
839 Report 307, Case No. 1899 (Argentina) para 77.
840 Report 307, Case No. 1899 (Argentina) para 81.
841 See Report 333, case No. 2251 (Russia) para 998.
842 See Report 311, case No. 1954 (Côte d'Ivoire) para 386.
843 See Report 306, Case No. 1865 (Korea) para 336.
844 See Servais 2010 *Canadian Labor and Employment Law Journal* 158 (quoted above).
845 See Article 3 of the *Freedom of Association Convention*.
846 Article 10 of the *Freedom of Association Convention* provides that "In this Convention the term organisation means any organisation of workers...for furthering and defending the interests of workers...".

including strike action.[847] Importantly, Article 8 of the said convention provides that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention".[848] Therefore, it is submitted that the words "guarantees" (when read together with Articles 3 and 10) includes the right to strike. In support of this argument, Servais argues that:

> The CFA has concluded that the hiring of workers for the purpose of neutralizing a strike in a sector which cannot be regarded as essential in the sense explained above constitutes a serious violation of trade union rights. In my view, Convention 87 [the *Freedom of Association Convention*] may be interpreted as requiring states to prevent the hiring of strike breakers, whether in the public or the private sector, for either temporary or indefinite replacement of strikers.[849] (Emphasis added)

Although it may have seemed somewhat repetitive, the cases discussed above clearly show that the CFA has condemned not just the permanent replacement of strikers but the replacement of lawful strikers in general. To emphasise this point, it will be recalled, that as late as 2016 the ILO's committee of experts criticised plans by the UK government to expand the right of employers to hire replacements for strikers.[850] The committee noted that:

> The committee further observes the concerns raised by the TUC in relation to the proposal to revoke the regulation in the Conduct of Employment Agencies and Employment Businesses Regulations 2003 which prohibited the provision of agency workers to replace strikers. The committee requests the government to review this proposal with the social partners concerned bearing in mind its general consideration that the use of striker replacements should be limited to industrial action in essential services.[851](Emphasis added)

Importantly, the committee previously stated that:

> ...in some countries with the common-law system strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace strikers with new recruits. In other countries, when a strike takes place employers may dismiss strikers or replace them temporarily or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the

847 See ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 148, 149.
848 See Article 8 of the *Freedom of Association Convention.*
849 Servais 2010 *Canadian Labor and Employment Law Journal* 158.
850 ILO *Application of International Labour Standards 2016 (I)* 153-154.
851 ILO *Application of International Labour Standards 2016 (I)* 153-154.

> Committee's view, legislation should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content.[852] (Emphasis added)

Therefore, in light of the above, it is submitted the committee of experts' criticism of the UK government's plans was not directed at permanent replacement labour, but replacement labour in general – which it is submitted includes temporary replacement labour. Has the CFA itself ever explicitly condemned the temporary replacement of strikers? The CFA has done so. In the General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, the CFA observed that:

> *The committee considers that provisions allowing employers to dismiss strikers or replace them temporarily or for an indeterminate period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute.*[853] (Emphasis added)

It should be noted that there are some countries and or jurisdictions which do conform to the principle that the replacement of strikers should be limited to essential services. Some good examples are Mexico[854] and certain provinces in Canada (British Columbia and Quebec).[855] The next chapter will focus on Canada's approach to replacement labour.

3.4 Conclusions

The purpose of this chapter was to consider the position of the ILO regarding the replacement of strikers, and in particular the position of its supervisory body, namely the CFA. It was shown that the ILO continues to be the primary organisation charged with promoting international labour rights,[856] and that the most important function performed by the ILO since its inception has been its standard-setting activities.[857] Due to the significance of freedom of association for

852 See ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 139.

853 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 61.

854 Banks *et al Labor Relations in North America* 140; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 224.

855 See McQuarrie *Industrial Relations in Canada* 257-258; Banks *et al Labor relations law in North America* 72; section 68 of British Columbia's *Labour Relations Code* of 1996; section 109 of Quebec's *Labour Code* of 1977.

856 O'Neil 2011 *Labor & Employment Law Forum* 204.

857 Du Toit *et al The Labour Relations Act of 1995* 51.

the ILO, it has adopted several conventions and recommendations on this subject.[858] It was also shown that closely related to the right to associate is the right to strike. The ILO regards the right to strike as constituting a fundamental right of workers and as an essential aspect of trade union rights.[859] In turn, the CFA has always recognised the right to strike by workers and their organisations "as a legitimate means of defending their economic and social interests".[860]

While the ILO's instruments (such as conventions) are important in laying down principles to be respected by governments, such instruments are fully supplemented by the decisions of the ILO's supervisory bodies. The most important of these bodies, for the purpose of this research, is the CFA. The CFA's mandate is to examine complaints concerning alleged violations of freedom of association, and since its inception in 1951 has examined thousands of cases. This fact is important. As Weiss suggests, the CFA's case law "serves as a point of reference and hence may have an impact on shaping the legal structure in many countries".[861] Similarly, the ILO too itself has asserted that the CFA's jurisprudence has acquired recognised authority at both the international and national levels.[862] For example, even South Africa's Constitutional Court held that the CFA's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions.[863]

The CFA has examined a number of cases involving the replacement of strikers, and it has done so notwithstanding the fact that there is actually no ILO instrument which regulates the said practice. Keeping in mind the fundamental nature of freedom of association and the right to strike for workers, the important principles which may be gleaned from the CFA's jurisprudence are the following:

a) The CFA does not object to the replacement of strikers if the strike itself is not legal or protected as it is referred to in some countries. This conclusion

858 Gernigon *et al ILO Principles Concerning the Right to Strike* 3.
859 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 131, 520.
860 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 521.
861 Weiss 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 10.
862 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.
863 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.

is based on the CFA's own conclusion in the case against the United States where it said that "*if a strike is otherwise legal*, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike..."[864]

b) The CFA does not object to the use of non-striking workers to assist in maintaining production by performing the work of the strikers. However, the CFA does object to discrimination in favour of non-strikers, for example, whereby such workers are given bonuses.[865]

c) The CFA has condemned the permanent replacement of strikers who are engaged in a lawful strike. As the CFA has held, such a practice entails derogation from the right to strike.[866]

d) The CFA has linked essential services to the hiring of workers to replace strikers, and has done so by condemning the hiring of workers to break a strike in "a sector which cannot be regarded as an essential sector in the strict sense of the term" as constituting "a serious violation of freedom of association".[867] Consequently, even legislation which provides for the temporary replacement of strikers has been condemned by the CFA, provided that such legislation permits employers in a non-essential service or sector to replace lawful strikers. The facts in *Chile 1* and *Chile 2* yield the best example in this regard.

e) The CFA has taken the bold step of requiring governments to repeal and or amend legislation which was found to be inconsistent with the principle that the replacement of lawful strikers should be limited to essential services or sectors. The case against Argentina is a good example in this regard: the committee requested the Argentinean government to "take the necessary

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864 Report 278, Case No. 1543 (United States) para 92.
865 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 675.
866 See Report 278, Case No. 1543 (United States) para 92.
867 See *Chile 1* para 322.

steps to repeal Resolution No. 203/96 issued by the Education Council of Río Negro province",[868] and this recommendation was complied with.[869]

When read together, the above principles make it clear that as far as the CFA is concerned, the replacement of lawful strikers may only be justified in or limited to essential services or sectors. In summary, it is submitted that the CFA has condemned the replacement (both permanent and temporary) of lawful strikers in a sector which cannot be regarded as an essential sector in the strict sense of the term.

As was argued earlier, whilst conceding the fact that there is no ILO instrument which explicitly refers to replacement labour, the CFA's point of view on this issue may be supported by certain provisions of the Freedom of Association Convention when read together. That is to say, it may be argued that permitting employers to replace lawfully striking workers (both temporarily and permanently) is inconsistent with certain provisions of the Freedom of Association Convention when read together. In fact, as was noted earlier, Servais goes a step further by arguing that Article 8 of the Freedom of Association Convention may be interpreted as requiring states to "prevent the hiring of strike breakers, whether in the public or the private sector, for either temporary or indefinite replacement of strikers".[870]

Be that as it may, the vital point which should be emphasised is the fact that the CFA has condemned the replacement (both permanent and temporary) of lawful strikers in "a sector which cannot be regarded as an essential sector in the strict sense of the term", and that the committee of experts has also taken a similar position.

There are some countries and or jurisdictions which do conform to the principle that the replacement of strikers should be limited to essential services. Put differently, these countries and or jurisdictions have a general prohibition regarding the replacement of lawful strikers, and the only recognised exception is essential

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868 Report 307, Case No. 1899 (Argentina) para 81.

869 See a document titled "Effect given to the recommendations of the Committee and the Governing Body – Report No. 308". This document is available on the ILO's website (http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20060:0::NO:::).

870 Servais 2010 *Canadian Labor and Employment Law Journal* 158.

services. This approach is consistent with the CFA's jurisprudence on the matter. Some good examples are Mexico and certain provinces in Canada (British Columbia and Quebec).[871] Given the significant amount of research and literature on the issue of replacement labour in Canada, the next chapter will focus on Canada's approach to replacement labour. In so doing, whilst keeping the CFA's jurisprudence in mind, South Africa's position regarding replacement labour will be compared to that of Canada. Reference to other foreign jurisdictions will be highlighted for illustration purposes if and when necessary.

871 See McQuarrie *Industrial Relations in Canada* 257-258; Banks *et al Labor relations law in North America* 72; section 68 of British Columbia's *Labour Relations Code* of 1996; section 109 of Quebec's *Labour Code* of 1977.

Chapter 4 – Replacement labour in Canada: a comparative perspective

4.1 Introduction

The controversy surrounding the use of replacement labour during a strike is not limited to South Africa. Much can be learned from other industrial relations systems, and South Africa can adopt some of their best practices. Therefore, the focus of this chapter is a comparative analysis between South Africa and Canada.

The issue of striker replacement is debated in Canada as passionately as it is in South Africa: there are proponents and opponents of so-called anti-scab or replacement legislation. On one hand, trade unions and labour advocates argue in favour of laws banning or restricting the use of replacement labour to protect the potency of strikes, to reduce strike activity and to reduce strike related violence. They also argue that the use of replacement workers leads to longer strikes.[872] On the other hand, employers and employers' organisations argue that restricting or prohibiting the use of replacement labour during labour disputes leads to increased bargaining power for unions; a shift in the balance of power; and increased strike activity, including drawn-out strikes.[873]

Canadian law generally assumes that the employer has the right to maintain production during a strike. However, Canadian law does not permit the permanent replacement of strikers.[874] The Canada *Labour Code*, which is the law that regulates labour relations for employees in federally regulated industries, only prohibits the employer from using replacement workers "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives".[875] Apart from the Canada *Labour Code,* every province in Canada has its own statute which regulates labour relations.[876] The province of Ontario enacted an anti-scab law in 1993 which was later

872 Singh *et al* 2005 *Labour Studies Journal* 61-62.
873 Singh *et al* 2005 *Labour Studies Journal* 61- 62.
874 See Banks *et al Labor relations law in North America* 71-72.
875 See section 96(2) of the *Canada Labour Code* of 1985. See also Vaillancourt 2000 *McGill Law Journal* 770-777.
876 Banks *et al Labor relations law in North America* 37.

repealed in 1995.[877] Currently, the use of replacement labour during a strike is only prohibited in British Columbia and Quebec. Both jurisdictions allow exemptions to the law in the case of emergencies and essential services.[878]

The comparative analysis on Canada will focus on British Columbia, Quebec, Ontario and the Canada *Labour Code* as they provide a good comparative perspective. The different approaches to the issue of replacement labour in Canada make Canada the perfect country to compare South Africa with. More importantly, the legal systems in the two countries are more similar than they are different.

Whilst keeping the CFA's jurisprudence in mind,[879] the purpose of this chapter is to critically analyse the approach of Canada to the replacement of lawfully striking workers. More importantly, a legal comparative study will also be undertaken to compare the position in Canada on this issue to that of South Africa. Regarding Canada, to delineate the study, only British Columbia, Quebec, Ontario and the Canada *Labour Code* will be considered.

In order to achieve the abovementioned goals, firstly, the chapter begins by briefly outlining the relevant legal framework in Canada. Secondly, given that the purpose of this chapter is to critically analyse the approach of Canada to the replacement of lawfully striking workers, the right to strike in Canada will be considered – in particular, the jurisprudence of the Supreme Court of Canada. Thirdly, the relevant legal provisions in British Columbia, Quebec, Ontario and the Canada *Labour Code* will be considered in order to determine how the replacement of lawfully striking workers is regulated. Fourthly, several researchers in Canada have conducted research to determine the impact of anti-scab legislation (or the lack thereof) on strike violence; incidence; duration; and collective bargaining in general. The findings of this research either proves or disproves some of the

877 See McQuarrie *Industrial Relations in Canada* 257-258; Banks *et al Labor relations law in North America* 72; section 68 of British Columbia's *Labour Relations Code* of 1996; section 109 of Quebec's *Labour Code* of 1977.

878 See Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

879 From the previous chapter, it will be recalled that the CFA has condemned even legislation which provides for the temporary replacement of strikers, provided that such legislation permits employers in a non-essential service/sector to replace lawful strikers.

arguments which have been put forward in support or against anti-scab legislation, and will therefore be considered. Throughout this chapter, a comparative analysis will be undertaken to compare the position in Canada regarding the replacement of striking workers (replacement labour) to that of South Africa. Lastly, conclusions will be drawn.

4.2 The legal framework in Canada: an overview

4.2.1 A brief historical perspective

As in South Africa, the rights and freedoms which trade unions enjoy today were hard earned. As Fudge explains, the achievement of rights at work in Canada "has been the outcome of complex, protracted struggles between different social groups".[880] There are 11 provinces in Canada, and they all have their own statutes which deal with labour law. Due to space constraints, this study will not look at each province's labour laws; instead the focus will be to trace the development of labour relations at a federal or national level.

The Canadian labour movement can be traced as far back as the 18th and early 19th century: employees began to associate by forming unions in order to better their working conditions as early as 1794.[881] Under the master and servant regime (1800-1877), strikes, which inevitably entail some sort of collective action, were illegal.[882] Associating for the purpose of setting wages and or performing organisational activities were generally considered unlawful.[883] Workers did not have a 'right' to strike and employers were free to terminate a striking worker's employment contract. To make things even worse, there was no legal duty on the employer to rehire a striking worker at the conclusion of the strike.[884]

Towards the mid-1800s, Canadian workers began to affiliate with their counterparts in the USA, and trade union activity began to accelerate in the 1880s as "public opinion began to shift in support of the struggles of the average working

880 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 335.
881 Saunders *Industrial Relations in Canada* 1.
882 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 340.
883 Saunders *Industrial Relations in Canada* 2.
884 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 341.

man against the abuses of industrialisation".[885] In the 1870s, the Canadian federal government began to address the plight of workers and trade unions by enacting the *Trade Union Act* of 1872.[886] This statute permitted workers to associate in order to bargain for better wages and working conditions.[887] Also, and importantly, the statute provided that such workers could not be prosecuted for criminal conspiracy simply because they were members of a trade union.[888]

In the same year, a similar law, the *Criminal Law Amendment Act* of 1872, was enacted. It legalised strikes,[889] and importantly, the statute also provided that workers could not be prosecuted for "actions taken for the purposes of trade combination".[890] Given the sometimes violent nature of strikes, for example, violence directed at non-striking workers and or replacement labour, the latter statute criminalised violence or intimidation during strikes.[891] Taken together, the effect of the aforementioned statutes was to "provide a legal foundation for the freedom to strike".[892] The period from the 1870s to the early 1900s, described as "liberal voluntarism",[893] has been summed up as follows:

> While workers enjoyed a wide freedom to strike under liberal voluntarism, it must also be emphasized that there was no claim right to strike that entailed an obligation on employers to treat striking workers as employees whose contracts were merely suspended and who were therefore entitled to have their jobs back when the strike ended. Workers who went on strike put their jobs on the line, although in many circumstances they may reasonably have anticipated that they would be able to resume their employment, either because the strike would be successful or because, even if they did not accomplish their objectives with the strike, their employers would re-hire most of them as a matter of practical necessity.[894]

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885 Saunders *Industrial Relations in Canada* 2-3.
886 Ndumo *The Duty to Bargain and Collective Bargaining in South Africa, Lesotho and Canada: Comparative Perspectives* 26. See also Saunders *Industrial Relations in Canada* 25, where he explains that this statute "is regarded as Canada's first piece of labour relations legislation".
887 Saunders *Industrial Relations in Canada* 3.
888 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 342.
889 Ndumo *The Duty to Bargain and Collective Bargaining in South Africa, Lesotho and Canada: Comparative Perspectives* 26.
890 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 341.
891 Saunders *Industrial Relations in Canada* 3.
892 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 341.
893 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 341-343.
894 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 343.

The early 1900s to the early 1930s was a turbulent period for trade unions and labour relations in general; there were violent strikes[895] and strikes were restricted during World War I.[896] From the previous chapter, it will be recalled that it was around this period that labour radicals such as Jack London were proclaiming that terrorism, that is violence, is an eminently successful policy of labour unions. According to him, this terrorism was only justifiable if it was "directed at the scab, placing him in such fear for life and limb as to drive him out of the contest".[897]

The fortunes of workers and trade unions in Canada took a turn for the better in 1935 with the enactment of the NLRA (also commonly known as the Wagner Act) in the USA.[898] From the previous chapter, it will be recalled that the NLRA is the core federal labour legislation in the USA which protects the right of workers to organise[899] and to strike.[900] It should be noted that the current labour laws in Canada were strongly influenced by the NLRA in the USA.[901] However, it is important to emphasise that unlike in the USA, the law in Canada does not permit the permanent replacement of strikers.[902]

Returning to the historical perspective, in the 1950s, the various provinces in Canada began enacting labour relations legislation tailored to meet the particular needs of their respective jurisdictions.[903] In this regard, Ontario, Quebec and British Columbia "assumed leadership roles in Canadian labour relations policy".[904] The

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895 Saunders *Industrial Relations in Canada* 6.

896 As Fudge explains, the federal government "called for a ban on strikes and lockouts for the war's duration, but in exchange, it also offered support for collective bargaining, including the right to organise without employer interference". See Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 347.

897 London *War of the Classes* 112. See also chapter 2 above, and in particular, the discussion on strike violence.

898 Saunders *Industrial Relations in Canada* 8.

899 Section 7 of the NLRA reads in part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing...".

900 See section 13 of the NLRA which provides that "Nothing in the Act shall be construed so as to interfere or otherwise impede the right to strike".

901 As Fudge explains, "As is well known, the key legal innovation that marked the change from industrial voluntarism to industrial pluralism was the adoption of the Wagner Act [NLRA] model of collective bargaining...by the enactment of legislation along similar lines in all Canadian jurisdictions". See Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 348. See also Saunders *Industrial Relations in Canada* 26-28.

902 See Banks *et al Labor relations law in North America* 71-72.

903 Saunders *Industrial Relations in Canada* 27.

904 Saunders *Industrial Relations in Canada* 27-28.

period 1943 to the present, described as "industrial pluralism", is best summed up by Fudge as follows:

> Industrial pluralism's basic framework for regulating strikes, which...is to match restrictions on the freedom to strike with duties on the employers or on the state, is woven into a scheme of collective bargaining which contains compromises that reflect the state's efforts to craft an industrial relations policy suitable for an industrial capitalist Keynesian welfare state.[905]

Having provided a brief legal historical perspective on the labour relations policy in Canada, an overview of the current legal framework is provided next. Before doing so, it is important to emphasise that unlike in the USA, the law in Canada does not permit the permanent replacement of strikers.[906]

4.2.2 The current legal framework: an overview

As noted above, the legal comparative study in this chapter will compare the position in Canada to that of South Africa regarding the replacement of lawfully striking workers. Regarding Canada, to delineate the study, only British Columbia, Quebec, Ontario and the Canada *Labour Code* will be considered. However, in doing so, the relevant constitutional provisions will also be considered.

4.2.2.1 The Canadian Constitution (and the Charter)

In Canada, the constitution is called the *Constitution Act* of 1982 (hereafter the Canadian Constitution). In terms of the "property and civil rights" power under section 92(13),[907] the Canadian Constitution grants each Canadian province exclusive jurisdiction over labour policies.[908] As Banks *et al.* explain:

> Provincial authority to regulate labour matters is derived from the power of the provinces to legislate on “property and civil rights” and on “local works and undertakings” provided in Section 92 of the Constitution. Labour rights are seen as regulating the civil right of freedom of contract, thereby falling within provincial jurisdiction. The provinces enjoy nearly complete sovereignty in labour law matters within their jurisdiction, constrained only by constitutional and criminal law considerations (criminal law is within federal jurisdiction).[909]

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905 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 351.
906 See Banks *et al Labor relations law in North America* 71-72.
907 See the *Consolidated Constitution Acts* 1876 to 1982.
908 Banks *et al Labor Relations in North America* 32; Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
909 Banks *et al Labor Relations in North America* 33.

The federal government only has authority over labour relations in specified industries, and in relation to its own employees.[910] Put differently, the Canadian (federal) parliament, through legislation it enacts, regulates labour relations for federal government employees and for employees in specified important activities[911] identified in section 91 of the Canadian Constitution.[912]

The Canadian Constitution contains the Canadian Charter of Rights and Freedoms (hereafter the Charter).[913] As the name suggests, the Charter protects fundamental human rights and freedoms.[914] Unlike the South African Constitution which protects the three core labour rights (the right to associate, the right to engage in collective bargaining and the right to strike),[915] the Charter merely provides that everyone has the freedom of association. Section 2 thereof is titled *Fundamental Freedoms*, and provides that:

> 2. Everyone has the following fundamental freedoms:
>
> a. Freedom of conscience and religion;
> b. Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c. Freedom of peaceful assembly; and
> d. Freedom of association.

4.2.2.2 At the federal level: the Canada *Labour Code*

As noted above, the federal government has authority over labour relations in specified industries, and in relation to its own employees.[916] Put differently, the Canadian (federal) parliament, through legislation it enacts, regulates labour relations for federal government employees and for employees in specified important activities[917] identified in section 91 of the Canadian Constitution.[918] Canadian labour legislation, unlike South Africa, is not regulated solely at the national level. The legislation that was enacted by the Canadian (federal)

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910 Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
911 Such as banks, broadcasting, postal services, airports, telecommunications *etcetera*. For the full list, see section 91 of the *Canadian Constitution*.
912 Banks *et al Labor Relations in North America* 32.
913 *Canadian Charter of Rights and Freedoms*, 1982.
914 It could be said that *Charter* is the equivalent of the Bill of Rights in South Africa's *Constitution*.
915 See section 23 of the (South African) *Constitution*.
916 Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
917 Such as banks, broadcasting, postal services, airports, telecommunications *etcetera*. For the full list, see section 91 of the *Canadian Constitution*.
918 Banks *et al Labor Relations in North America* 32.

parliament is the Canada *Labour Code*. Part I thereof, which regulates industrial relations, applies to federal employees[919] and crown corporations.[920] Unlike South Africa's LRA which proclaims that "every employee has the right to strike",[921] the Canada *Labour Code* merely provides that every employee is free to join the trade union of their choice and to participate in its lawful activities.[922] However, this does not mean that Canadian federal employees do not have the right to strike. The Canada *Labour Code* regulates strikes, thus implying that such employees have this right.[923] In terms of the Canada *Labour Code,* a strike is defined as follows:

> Strike includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.[924]

The Canada *Labour Code* sets out the procedures that must be followed before strike action can be taken.[925] For example, and unlike the LRA in South Africa, a pre-strike ballot must be held before strike action can be taken.[926] A trade union that authorises a strike which does not satisfy the procedural requirements set out in the Act is guilty of an offence – the punishment is a fine not exceeding one thousand dollars for each day the strike lasts.[927] Importantly for the purpose of this study, the Canada *Labour Code* provides that employees are entitled to reinstatement after a strike ends.[928] More importantly, the Canada *Labour Code* only prohibits the employer from using replacement workers "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives".[929] The regulation of replacement labour by the Canada *Labour Code* is discussed in detail later in this chapter.

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919 See section 4 of the *Canada Labour Code*.
920 See section 5 of the *Canada Labour Code*. Crown Corporations are corporations established to perform any function on behalf of the government of Canada.
921 In terms of section 64 of the LRA.
922 See section 8(1) of the *Canada Labour Code.*
923 Singh and Harish 2001 *Industrial Relations Journal* 29-30.
924 See the definitions section (section 3) of the *Canada Labour Code*.
925 Setting out all of the procedural requirements would go beyond the scope of this study. Therefore only a few examples will be outlined.
926 See section 87.3(1) of the *Canada Labour Code*.
927 See section 100(3) of the *Canada Labour Code*.
928 See section 87.6 of the *Canada Labour Code*.
929 See section 96(2.1) of the *Canada Labour Code* of 1985. See also Vaillancourt 2000 *McGill Law Journal* 770-777.

4.2.2.3 At the provincial level: Quebec, British Columbia, Ontario

It should be noted that about 90% of the workforce in Canada is covered by provincial labour laws.[930] Therefore, approximately 10% of the workforce in Canada is covered by federal labour legislation, that is to say, the Canada *Labour Code.*[931] As was noted earlier*,* in terms of the "property and civil rights" power under section 92(13),[932] the Canadian Constitution grants each province exclusive jurisdiction over labour policies.[933] This provision (section 92(13) of the Canadian Constitution) has frustrated attempts by the Canadian (federal) government to regulate labour relations on a national scale. As Banks *et al.* explain:

> Early attempts by the federal government to regulate labour relations on a national scale were frustrated by this constitutional division of powers underpinning the Canadian federation. In a landmark case in 1925, the Judicial Committee of the Privy Council in the United Kingdom (Canada's highest court of appeal at that time) held that provincial legislatures possessed primary legislative authority over labour relations. This case remains the legal basis for the Canadian courts' restrictive interpretation of federal labour law jurisdiction.[934]

Although there are some important differences, British Columbia's *Labour Relations Code* of 1996 (hereafter the B.C. *Labour Relations Code*), Quebec's *Labour Code* of 1977 (hereafter the Quebec *Labour Code*) and Ontario's *Labour Relations Act* of 1995 (hereafter the Ontario Labour Relations Act*)* contain certain important common features, whether specific or general. Like the Canada *Labour Code*, and unlike South Africa's LRA which proclaims that "every employee has the right to strike",[935] these statutes (the B.C. *Labour Relations Code*, the Quebec *Labour Code*, and the Ontario Labour Relations Act) merely provide that "every employee is free to join the trade union of their choice and to participate in its lawful activities".[936] However, like the Canada *Labour Code,* these statutes regulate strikes, thus implying that the employees they cover have the right to strike. As Singh and Harish have explained:

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930 Banks *et al Labor relations law in North America* 33.
931 Singh and Harish 2001 *Industrial Relations Journal 29.*
932 See the *Consolidated Constitution Acts* 1876 to 1982.
933 Banks *et al Labor Relations in North America* 32; Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
934 Banks *et al Labor Relations in North America* 33.
935 In terms of section 64 of the LRA.
936 See section 5 of the Ontario *Labour Relations Act*; section 4 of the B.C. *Labour Relations Code*; and section 3 of the *Quebec Labour Code*. It should be noted that the Quebec's *Labour Code* is worded slightly differently.

> The right to strike is not guaranteed in any Canadian jurisdiction, even though all have provisions similar to the federal Canada *Labour Code* section 8(i) which stipulates that "every employee is free to join the trade union of his choice and to participate in its activities." However, as Arthurs and colleagues (1993) note, statutes in all jurisdictions [including Quebec, British Columbia and Ontario] regulate strikes, thus implying that employees have this right.[937]

All three statutes set out the procedures that must be followed before strike action can be taken.[938] For example, all three statutes provide that strikes are forbidden during the period of a collective agreement.[939] Langille neatly sums up the basic requirements for a lawful strike in Canada as follows:

> Labour relations statutes in Canada ban all mid-contract strikes. A strike is permitted only if it is "timely" **-** i.e., if it undertaken by a group of workers who have selected a union to represent them in a way recognized by the law (usually by certification after establishing majority support), and who have then gone on to bargain in good faith, endure a conciliation process, give notice to strike, approve the strike in a compulsory ballot, and wait until a statutory cooling-off period has expired **-** thereby finally reaching the time when it is legal for them to exercise the right to strike (and simultaneously, for the employer to exercise the right to lock out). Strikes are thus only permitted in order to obtain a collective agreement. Once an agreement is signed, strikes are forbidden during its term (which under the statute must be at least one year).[940]

Importantly, all three labour statutes (in Ontario, Quebec and British Columbia) regulate the replacement of striking workers. The B.C. *Labour Relations Code* and the Quebec *Labour Code* both have a general prohibition regarding the replacement of lawful strikers, and the only recognised exception is essential services.[941] On the other hand, the Ontario *Labour Relations Act* permits the replacement of lawful strikers in general – it only prohibits the hiring of professional strike breakers.[942] The relevant provisions in all three provinces which regulate the replacement of striking workers are discussed in detail later in this chapter. It will be argued that Quebec and British Columbia's approach to the regulation of the replacement of striking workers is consistent with the CFA's jurisprudence on the matter.

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937 Singh and Harish 2001 *Industrial Relations Journal* 29-30.

938 Setting out all of the procedural requirements would go beyond the scope of this study. Therefore only a few examples will be outlined.

939 See section 79 of the Ontario *Labour Relations Act*; section 57 of the B.C. *Labour Relations Code*; and section 107 of the *Quebec Labour Code*.

940 Langille 2009-2010 *Canadian Labour and Employment Law Journal* 358 note 9.

941 See section 68 of the B.C. *Labour Relations Code* and section 109 of Quebec's *Labour Code*.

942 See section 78(1) of the Ontario Labour Relations Act.

4.3 The right to strike in Canada

In the previous two chapters it was shown that the Bill of Rights[943] in South Africa's Constitution has been hailed as "undoubtedly one the most progressive in the world",[944] and described as "an encyclopaedia of international human rights instruments".[945] Section 23 thereof specifically deals with labour relations. Section 23(1) provides that everyone has the right to fair labour practices. Section 23(2) provides that every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union and; (c) to strike.[946] It was also shown that the ILO regards the right to strike as constituting a fundamental right of workers and as an essential aspect of trade union rights,[947] and that the CFA has always recognised the right to strike by workers and their organisations "as a legitimate means of defending their economic and social interests".[948]

In light of the above, and given that the purpose of this chapter is to critically analyse the approach of Canada to the replacement of lawfully striking workers, the right to strike in Canada will now be considered – in particular, the jurisprudence of the Supreme Court of Canada. It has already been shown that the Canada *Labour Code,* the B.C. *Labour Relations Code*, the Quebec *Labour Code*, and the Ontario *Labour Relations Act* merely provide that "every employee is free to join the trade union of their choice and to participate in its lawful activities"[949]; they do not expressly provide that every worker has the right to strike.[950] Importantly, it has also been shown that unlike the South African Constitution

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943 See sections 7-39 of the *Constitution*.
944 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 71.
945 Nijman and Nollkaempfer *New Perspectives on the Divide Between National Law and International Law* 312.
946 These provisions should be read with section 7(3) which provides that "the rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill".
947 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 131, 520.
948 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 521.
949 See section 5 of the Ontario *Labour Relations Act*; section 4 of the B.C. *Labour Relations Code*; and section 3 of the *Quebec Labour Code*. It should be noted that the Quebec's *Labour Code* is worded slightly differently.
950 However, it should be recalled that since all three statutes regulate strikes, this implies that the employees they cover have the right to strike. See Singh and Harish 2001 *Industrial Relations Journal* 29, 30.

which protects the three core labour rights (the right to associate, the right to engage in collective bargaining and the right to strike), the Canadian Charter of Rights and Freedoms merely provides that everyone has the freedom of association. Section 2 thereof is titled *Fundamental Freedoms*, and provides that:

> 2. Everyone has the following fundamental freedoms:
>
> a. Freedom of conscience and religion;
> b. Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c. Freedom of peaceful assembly; and
> d. Freedom of association.

Does section 2(d) of the Charter protect the right to strike? As will be shown below, although reluctant to do so in a number of earlier cases, the Supreme Court of Canada has interpreted section 2(d) of the Charter (outlined above) as protecting (1) the right to collective bargaining; and more recently, (2) the right to strike.

4.3.1 The labour trilogy

The phrase 'the labour trilogy' is often used to refer to three cases decided by the Supreme Court of Canada in the late 1980's, wherein it had to decide whether section 2(d) of the Charter protects the right to collective bargaining and/or the right to strike. These three cases are *Reference re Public Service Employee Relations Act (Alberta)*,[951] *Public Services Alliance of Canada v Canada*[952] and *RWDSU v Saskatchewan.*[953]

In *Alberta Reference,* the case involved the interpretation of section 2(d) of the Charter in the labour relations context. The court had to determine whether certain legislation enacted in Alberta which prohibited strikes, was inconsistent with section 2(d) of the charter. The impugned legislation provided for compulsory arbitration for the resolution of disputes and prohibited strikes and lock-outs. In the *Public Service Alliance* case, the court had to determine whether another piece of

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951 *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313 (hereafter *Alberta Reference case*).
952 *Public Services Alliance of Canada v Canada* [1987] 1 S.C.R. 424 (hereafter *Public Service Alliance case).*
953 *RWDSU v Saskatchewan* [1987] 1S.C.R. 460 (hereafter *RWDSU case*).

legislation was inconsistent with section 2(d) of the Charter. In the *RWDSU* case, more or less the same issues were raised.

All three cases were decided in 1987, and it seems as if the judgment in the *Alberta Reference* case was delivered first. The court was divided. The minority judgment (per Dickson C.J.) held that section 2(d) of the Charter protects collective activity, including collective bargaining and the right to strike. After considering a vast number of authorities, including the position of the ILO's supervisory and investigatory bodies (such as the CFA) regarding their interpretation of the Freedom of Association Convention and the right to strike,[954] Dickson C.J. (dissenting) held that:

> Under our system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter.[955]

On the other hand, the majority concluded that section 2(d) of the Charter does not protect the right to collective bargaining or the right to strike.[956] Concurring with the majority, whilst emphasising the fact that the importance of strike action in Canada was beyond question, McIntyre J ultimately concluded that:

> Specific reference to the right to strike appears in the constitutions of France...further, in Japan...the rights of trade unions are specifically guaranteed. The framers of the Constitution [*Canadian Constitution*] must be presumed to have been aware of these constitutional provisions. The omission of similar provisions in the Charter, taken with the fact that the overwhelming preoccupation of the Charter is with individual, political, and democratic rights...speaks strongly against any implication of a right to strike. Accordingly, if s. 2(d) is read in the context of the whole Charter, it cannot, in my opinion, support an interpretation of freedom of association which could include a right to strike.[957]

Since the judgment in the *Alberta Reference* case was delivered first, the reasoning in this case was applied to the other two cases, namely the *Public Service Alliance* case and the *RWDSU* case. Therefore, in both the *Public Service Alliance* and the *RWDSU* case the court concluded that section 2(d) of the Charter does not protect the right to collective bargaining or the right to strike.[958]

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954 *Alberta Reference case* 354-356.
955 *Alberta Reference case* 390.
956 *Alberta Reference case* 390.
957 *Alberta Reference case* 413.
958 See *Public Service Alliance case* 453; *RWDSU case* 484.

Unsurprisingly, given the different opinions of the justices of the Supreme Court, the labour trilogy was controversial. Arthurs describes it as "a series of cases in which the court famously or (in) infamously refused to read the right to strike and other labour rights into the recently-adopted Charter of Rights and Freedoms".[959] Similarly, Cameron criticised the labour trilogy for going against the grain of Charter decision-making at the time.[960] Using rather strong language, he describes the majority judgments and the judges who concurred in them as "irresponsible".[961]

After some lower courts had held that the right to collective bargaining and the right to strike were protected by the Charter, many had expected the Supreme Court of Canada to follow suit.[962] But, as shown above, it did not. The implications of the labour trilogy on Canadian labour law were significant. As Harmer opined:

> These cases therefore have very serious implications for Canadian labour law, as they effectively remove a fundamentally important activity from Charter protection. It is my belief that the ability of employees to voice important concerns and grievances through strike action when they determine that it is necessary to do so is a fundamental element of democracy in a capitalist system of production such as our own.[963]

Importantly, he went on to add that:

> *Unions, by their collective nature, give power and voice to many workers who cannot make themselves heard as individuals, either by employers, politicians or society in general. Strikes, when engaged in by large enough numbers of workers, ensure that such voices are taken seriously*. Collective labour action, including the ability to strike, is therefore, I believe, vital to the rights of Canadian working people and as such is worthy of constitutional protection under the Charter.[964] (Emphasis added)

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959 Arthurs 2015-2016 *Canadian Labour and Employment Law Journal* 327.

960 Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 299.

961 He argues that "Of the six judges who participated in the Trilogy, a majority of four agreed that s. 2(d) did not protect collective bargaining or a right to strike. The Court was unable to present majority reasons; LeDain J's plurality opinion in the Alberta Reference was signed by half the members of the panel and a third of the Court's nine members. That opinion lacked authority because it attracted only three votes, but also because of another, more damaging reason. Although it took the Court almost two years to decide the Trilogy, LeDain J.'s opinion dismissed watershed Charter claims in four expedient paragraphs. Considering the importance of these cases, it is not too harsh to describe the plurality opinion, and the judges who concurred in it, as irresponsible". See Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 300.

962 Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 300. Indeed, Dickson C.J. in his dissenting opinion in the *Alberta Reference case* did acknowledge that the lower courts in Canada were divided regarding whether or not the Charter protects the right to collective bargaining and the right to strike. In this regard, see *Alberta Reference case* 338-340.

963 Harmer 1989 *Toronto, Faculty of Law Review* 422.

964 Harmer 1989 *Toronto, Faculty of Law Review* 422.

In summary, after the labour trilogy it was accepted that the Charter did not protect either the right to collective bargaining or the right to strike – the highest court in Canada had spoken. However, the scope of section 2(d) of the Charter remained ambiguous.[965] As Cameron explains, in case after case, in the years that followed, the Supreme Court of Canada "failed to resolve what freedom of association meant, and whether the entitlement was individual or collective in nature".[966]

The 'denouncement' of the labour trilogy began in *Dunmore v Ontario*[967] wherein Bastarache J., writing for the majority, "undermined the basis of the Trilogy and made it unsustainable in the long run".[968] The next important case wherein the Supreme Court of Canada had to consider the meaning and scope of section 2(d) of the Charter is considered next.

4.3.2 B.C. Health Services case

Twenty years after the labour trilogy, the Supreme Court of Canada was once again faced with the task of determining the meaning and scope of section 2(d) of the Charter in *Health Services and Support v British Columbia* case.[969] Briefly, the province of British Columbia enacted health and social services legislation,[970] and the said legislation affected the terms of employment of health care workers. The relevant trade unions were not adequately consulted before the said legislation became law. Therefore, the court had to determine whether freedom of association, as guaranteed in section 2(d) of the Charter, includes the right to collective bargaining. It is interesting to note that the British Columbia Court of Appeal had also not been willing to recognise the right to collective bargaining

965 Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 302.
966 Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 302.
967 *Dunmore v Ontario* [2001] 3 S.C.R. 1016.
968 As Cameron explains, in *Dunmore v Ontario* the court (per Bastarache J writing for the majority) maintained that it "could recognise and protect certain collective activities without undermining the Court's decisions excluding collective bargaining and the right to strike from s. 2(d) of the Charter". See Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 302. See also *Dunmore v Ontario* [2001] 3 S.C.R. 1016 para 17.
969 *Health Services and support v British Columbia* [2007] 2 R.C.S. 391 (hereafter *B.C. Health Services case*).
970 *Health and Social Services Delivery Improvement Act* of 2002.

under section 2(d) of the Charter. However, it had noted that the Supreme Court had opened the door "to the recognition of such a right".[971]

In the *B.C. Health Services* case, overturning twenty years of precedent, the Supreme Court of Canada held that the reasoning evoked in its previous decisions regarding the meaning and scope of section 2(d) of the Charter could no longer stand.[972] Writing for the majority, McLachlin C.J. and LeBel J. held that:

> Our conclusion that s. 2(*d*) of the Charter protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other Charter rights, freedoms and values.[973]

After a comprehensive review of its jurisprudence regarding whether section 2(d) protects the right to collective bargaining, the court came to the conclusion that the reasons provided by the majorities in those cases did not survive scrutiny. In particular, the court emphasised the fact that the rationale for excluding collective activities for section 2(d)'s protection had been overtaken by *Dunmore v Ontario.*[974] It should be recalled that, before *Dunmore v Ontario,* the court had consistently emphasised the fact section 2(d) of the Charter protects individual freedoms and rights and not collective freedoms and rights.[975]

What then is the meaning and/or scope of the constitutional right to collective bargaining? The Supreme Court of Canada answered this question in *B.C. Health Services* case as follows:

> ...the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the

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971 In this regard, the British Columbia Court of Appeal relied on the Supreme Court of Canada's decision in *Dunmore v Ontario*. See *B.C. Health Services case* paras 13, 17.

972 *B.C. Health Services case* para 20.

973 *B.C. Health Services case* para 20

974 *B.C. Health Services case* para 36.

975 For example, see McIntyre J's concurring judgement in *Alberta Reference case* (quoted in part above). McIntyre J had emphasised the fact that section 2(d) of the *Charter* focuses on individual freedoms/rights and not collective ones. See *Alberta Reference case* 413.

> protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to...employers collectively and to engage in discussions in an attempt to achieve workplace-related goals.[976]

Although the *B.C. Health Services* case was not concerned with whether section 2(d) of the Charter protects the right to strike,[977] the question that it raised was the following: if section 2(d) of the Charter protects the right to collective bargaining, does it also protect the right to strike? Logically, if the Supreme Court could overturn twenty years of precedent which said that section 2(d) of the Charter does not protect the right to collective bargaining, it could come to the same conclusion regarding whether 2(d) of the Charter protects the right to strike.

From the previous chapter, it was argued that workers do not form and or join trade unions merely for the sake of doing so. Once a trade union is formed, organised workers in the form of a trade union meet the employer on a more equal footing than an individual worker would – they are able to confront the employer with collective power.[978] It was also argued that workers confront the employer with collective power by withholding their labour. Put differently, it is through industrial action – primarily through a strike – that workers are able to assert bargaining power.[979] Furthermore, it was also argued that strikes are a corollary to collective bargaining and the right to collective bargaining is incomplete without the pressure of a strike.[980] As it has been said, collective bargaining without the right to strike would be "collective begging".[981] In Canada, after the Supreme Court's judgment in the *B.C. Health Services case,* some commentators were already arguing that the *B.C. Health Services case* would make it difficult for the Supreme Court of Canada to avoid finding (in a future case) that section 2(d) of the Charter also protects the right to strike as well.[982] Almost ten years after the *B.C. Health Services case,* the Supreme Court of Canada was directly called upon to address this issue in another case. This case is discussed next.

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976 *B.C. Health Services case* para 89.
977 This point was emphasised by the court. See *B.C. Health Services case* para 19.
978 Banjo 2009 *South African Journal of Labour Relations* 121.
979 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.
980 *NUM v G Vincent Metal Sections* 1993 14 ILJ 1818 (IC) 1324-1325.
981 Weiss 2004-2005 *Comparative Labour Law and Policy Journal* 185.
982 For example, see Cameron 2009-2010 *Canadian Labour and Employment Law Journal* 307.

4.3.3 Saskatchewan Federation of Labour v Saskatchewan

Since the labour trilogy in 1987, the Supreme Court of Canada had consistently held that that the Charter did not protect either the right to collective bargaining or the right to strike. Twenty years later, the Supreme Court, in the *B.C. Health Services case*, held that section 2(d) of the Charter protects the right to collective bargaining. In 2015, the court, in *Saskatchewan Federation of Labour v Saskatchewan*,[983] now had to decide whether section 2(d) of the Charter also protects the right to strike.

Briefly, in 2007, the province of Saskatchewan introduced legislation which prohibited designated essential services employees (public sector employees) from striking.[984] The Saskatchewan Federation of Labour challenged the constitutionality of the said legislation. The trial judge concluded that "the right to strike is a fundamental freedom protected by s. 2(d) of the Charter".[985] However, the Saskatchewan Court of Appeal held that "while the Court's [Supreme Court of Canada] freedom of association jurisprudence has evolved in recent years, it has not shifted far enough, or clearly enough, to warrant a ruling by this Court that the right to strike is protected by s. 2(d) of the Charter".[986] Unsatisfied with this judgement, the Saskatchewan Federation of Labour appealed to the Supreme Court of Canada.

In the *Saskatchewan Federation of Labour case*, given the conflicting judgments of the lower courts, the Supreme Court had to decide if section 2(d) of the Charter protects the right to strike. Yet again, like in the labour trilogy where the majority had held that the Charter did not protect the right to strike, the court was divided. In the *Saskatchewan Federation of Labour case,* five judges (the majority) concluded that section 2(d) of the Charter does protect the right to strike[987] while two judges (the minority) concluded that it does not. The judgment of the majority was delivered by Abella J.

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983 *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 R.C.S. 245 (hereafter *Saskatchewan Federation of Labour case*).
984 The legislation became law in 2008 (the *Public Service Essential Services Act* of 2008).
985 As quoted in *Saskatchewan Federation of Labour case* para 18.
986 As quoted in *Saskatchewan Federation of Labour case* para 23.
987 *Saskatchewan Federation of Labour case* para 34.

Abella J. held that the views of the trial judge (that section 2(d) of the Charter does protect the right to strike) are "supported by the history of strike activity in Canada and globally".[988] After tracing the development of the law regarding strikes in Canada, she concluded that the strike is "an indispensable part of the Canadian industrial relations system".[989] It will be recalled that from the above discussion on the legal historical perspective regarding strikes in Canada, strikes were legalised in Canada as far back as the 1870's.[990] Abella J. also held that Canada's international obligations mandate protecting the right to strike is "part of meaningful collective bargaining".[991] Like South Africa's Constitutional Court in *NUMSA v Bader Bop*,[992] Abella J. held that the decisions of the CFA – which has concluded that the Freedom of Association Convention protects the right to strike[993] – have considerable persuasive weight.[994]

In light of the above, Abella J. concluded that section 2(d) of the Charter does protect the right to strike.[995] She had begun her judgment by saying that the right to strike is not "merely derivative of collective bargaining, it is an indispensable component of that right",[996] and she had also said that "it seems to me to be the time to give this conclusion constitutional benediction".[997] In so doing, the Supreme Court of Canada overruled almost thirty years of precedent. However, as was noted earlier, the court was divided in the *Saskatchewan Federation of Labour case*. Rothstein J. and Wagner J. did not agree that section 2(d) of the Charter should be interpreted as protecting the right to strike. Based on a number of reasons, including that the court should not depart from precedent in this case,

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988 *Saskatchewan Federation of Labour case* para 34.
989 Abella J added that "...it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals". See *Saskatchewan Federation of Labour case* para 46.
990 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 341.Saunders *Industrial Relations in Canada 3*. See also 4.2.1 above.
991 *Saskatchewan Federation of Labour case* para 62.
992 It will be recalled that the Constitutional Court held that the CFA' decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions and its jurisprudence is "an important resource" in developing the labour rights in South Africa's *Constitution*. See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.
993 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 523.
994 *Saskatchewan Federation of Labour case* para 69.
995 See *Saskatchewan Federation of Labour case* paras 3, 24 and 75.
996 *Saskatchewan Federation of Labour case* para 3.
997 *Saskatchewan Federation of Labour case* para 3.

they (dissenting) held that the Charter does not protect the right to strike.[998] To hold otherwise, so they argued, would upset the "complex balance" struck by legislatures between the interests of employers and employees.[999] In any event, so they further argued, the courts must show deference in the field of labour relations. Put differently, the courts should not usurp the powers of the legislature and the executive by creating a constitutional right to strike.[1000]

Be that as it may, as the will of the majority prevails, the Supreme Court of Canada has held that section 2(d) of the Charter does protect the right to strike. The year 2015 (the year when the *Saskatchewan Federation of Labour case* judgment was delivered) was significant in the history of Canadian labour law.[1001] Unsurprisingly, as Herst has noted, unions were thrilled with the Supreme Court's decision, which they claimed to be "a huge victory for labour rights".[1002]

It is interesting to note that between 1982 and 1992, the Supreme Court of Canada heard 16 cases involving the Charter and labour issues: employers won 11 of those cases.[1003] However, between 1992 and 2015, the court heard 18 cases involving the Charter and labour issues: unions won 12, and employers only 6.[1004] In so doing, as Arthurs has noted, the Supreme Court has "affirmed and expanded – and yes, even created – rights for working people".[1005]

Also, it is interesting to note that the Supreme Court's decision in the *Saskatchewan Federation of Labour case* is not without controversy. Whilst some

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998 *Saskatchewan Federation of Labour case* para 104.

999 *Saskatchewan Federation of Labour case* para 107. At para 57, Abella J's response to this arguement was that "In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying".

1000 *Saskatchewan Federation of Labour case* paras 114-115. See also Paquette 2016 *Canadian Labour and Employment Law Journal* 427, where he disagrees with Rothstein J and Wagner J. He argues that "The characterisation of labour relations as reflecting complex socioeconomic policy choices does not make it unique. In no other area with similar complexity has it been held that the courts should take a 'reserved' or 'hands off' approach in determining the rights of individuals affected by legislative choices. It follows, then, that such an approach should not hold sway in the field of labour relations, either. If such an approach were to be adopted, it would artificially diminish the vital role of judges, and silence the dialogue that has had such a central place in Canadian society".

1001 Paquette 2016 *Canadian Labour and Employment Law Journal* 414.

1002 Herst 2017 *Appeal: Review of Current Law and Law Reform* 35.

1003 Arthurs 2015-2016 *Canadian Labour and Employment Law Journal* 328.

1004 Arthurs 2015-2016 *Canadian Labour and Employment Law Journal* 328.

1005 Arthurs 2015-2016 *Canadian Labour and Employment Law Journal* 328.

have hailed it as a huge victory for labour rights, this enthusiasm, however, is far from unanimous. Amongst other reasons, critics point out the court's lack of respect for precedent,[1006] which, it has been argued, has introduced great uncertainty into Canadian labour relations.[1007]

Indeed, in the years to come, as Paquette colourfully puts it, "many gallons of virtual ink will likely be spilled" discussing the *Saskatchewan Federation of Labour case.*[1008] For the purpose of this study, the important points that should be emphasised regarding strikes in Canada, as the Supreme Court has done, are that: (1) strikes are an indispensable part of industrial relations;[1009] (2) strikes are essential in the process of collective bargaining;[1010] and (3) the right to strike is protected by section 2(d) of the Charter.[1011]

Whilst the achievement of the constitutional right to collective bargaining and the right to strike in Canada has required the intervention of the Supreme Court, in South Africa, such intervention is unnecessary given the guarantees in section 23 of the Constitution.[1012]

Having identified and discussed the above-mentioned key principles regarding strikes in Canada, the relevant legal provisions in British Columbia, Quebec, Ontario and the Canada *Labour Code* will be critically analysed in order to determine how the replacement of lawfully striking workers is regulated.

4.4 The regulation of replacement labour in Canada

This part provides a critical analysis of the law regarding the regulation of replacement labour in Canada. Apart from the (federal) Canada *Labour Code,* every province (all eleven provinces) in Canada has its own statute which

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1006 Herst 2017 *Appeal: Review of Current Law and Law Reform* 35.
1007 Olaguera 2016 *Appeal: Review of Current Law and Law Reform* 119.
1008 Paquette 2016 *Canadian Labour and Employment Law Journal* 414.
1009 *Saskatchewan Federation of Labour case* para 46.
1010 That is to say, the ability of employees to collectively withdraw their labour in the event of a deadlock during bargaining with their employer. This ability to strike is considered to be essential to meaningful collective bargaining in Canada. See *Saskatchewan Federation of Labour case* paras 46-51.
1011 *Saskatchewan Federation of Labour case* paras 3, 24 and 75.
1012 Section 23 guarantees the right to freedom of association; collective bargaining and to strike. See chapter 2 above, and in particular paragraph 2.3.2, where the provisions of section 23 of South Africa's *Constitution* are discussed.

regulates labour relations.[1013] Given space constraints, and the need to delineate the study, on one hand, only two jurisdictions which permit the use of replacement labour during a lawful strike will be considered: the federal level (Canada *Labour Code)* and Ontario (Ontario's Labour Relations Act*).* On the other hand, only two jurisdictions which do not permit the use of such labour will be considered: British Columbia (B.C. *Labour Relations Code*) and Quebec (Quebec's *Labour Code*).

4.4.1 The (federal) Canada Labour Code

4.4.1.1 Section 94(2.1) of the Canada *Labour Code*

The federal government has authority over labour relations in specified industries, and in relation to its own employees.[1014] Part I of the Canada *Labour Code* regulates industrial relations, and it applies to federal employees[1015] and crown corporations.[1016] It sets out the procedures that must be followed before strike action can be taken.[1017] Importantly, it also provides that employees are entitled to reinstatement after a strike ends.[1018]

The replacement of lawfully striking workers is regulated by section 94(2.1), and it provides that:

> *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.* (Emphasis added)

A simple reading of the above-quoted provision makes it clear that the replacement of lawfully striking workers is permitted, and that the only exception to this rule is when an employer hires replacement labour "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives". What does the term "for the demonstrated purpose of undermining the trade union's representational capacity"

1013 Banks *et al Labor relations law in North America* 37.
1014 Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
1015 See section 4 of the *Canada Labour Code*.
1016 See section 5 of the *Canada Labour Code*. Crown Corporations are corporations established to perform any function on behalf of the government of Canada.
1017 Setting out all of the procedural requirements would go beyond the scope of this study. Therefore only a few examples will be outlined.
1018 See section 87.6 of the *Canada Labour Code*.

mean? In order to better understand section 96(2.1) of the Canada *Labour Code,* it is necessary to provide some historical context regarding the drafting of the Canada *Labour Code* itself.

4.4.1.2 The Sims Task Force

Collective bargaining is a see-saw whereby the worker's bargaining power goes down as the employer's goes up.[1019] Collective bargaining legislation does not dictate the degree of economic power each party wields. It aspires to "provide a framework whereby each party is able to bring whatever actual economic power it has to bear on the other".[1020] As in other countries, the development of labour relations in Canada "represents the search for a balance of power between employers and employees".[1021]

In 1995, motivated by the need to modernise federal labour legislation, the Canadian government appointed a task force – the Sims Task Force – to conduct a comprehensive review of the law governing collective bargaining for private sector employers and trade unions within the federal jurisdiction.[1022] The Sims Task Force produced a report titled *Seeking a balance: Canada Labour Code, Part I, Review* (hereafter the *Sims Report*). Part I of the Canada *Labour Code* as it is today was heavily influenced by the recommendations of the Sims Task Force.[1023] The Task Force summarised its mandate as follows:

> The Task Force was established by the Minister of Labour on June 29, 1995, to conduct a comprehensive review of Part I of the *Canada Labour Code*. Its mandate was to identify options and, where appropriate, *to make recommendations for legislative change, 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. The recommendations were to be made in the context of the present Code which recognizes freedom of association and free collective bargaining as the bases of effective industrial relations.* The Task Force was instructed to consult with labour and management groups whose members were subject to the Code and to submit a final report to the Minister of Labour by December 15, 1995.[1024] (Emphasis added)

1019 Brassey 2013 *ILJ* 826.
1020 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 152. See also the preamble of the LRA and section1(c) and (d) thereof.
1021 Vaillancourt 2000 *McGill Law Journal* 759.
1022 Vaillancourt 2000 *McGill Law Journal* 760.
1023 Vaillancourt 2000 *McGill Law Journal* 760 note 2.
1024 The *Sims Report* 1.

Amongst others, the key issues for consideration for the Sims Task Force were the rights and obligations of employers and workers during and after a strike or lockout.[1025] It is interesting to note that Sims Task Force was appointed around the same time that a commission was appointed in South Africa to produce a draft Labour Relations Bill – the draft which formed the basis of the current LRA.[1026] From the discussion in chapter 2 of this study, it will be recalled that by the time negotiations commenced on the Draft Labour Relations Bill of 1995 in South Africa, business and labour had adopted very different positions on a number of key points.[1027] The use of replacement labour during protected strike action was one of the "key points of contention" during consultation on the proposed Draft Labour Relations Bill.[1028] Business South Africa wanted strikes and lock-outs to be permitted once the correct procedure (including a strike ballot) had been followed. It also submitted that employers should retain their right to replace striking workers.[1029] On the other hand, the trade unions were adamant that replacement labour or scab labour should not be permitted during a procedural strike.[1030]

In Canada, as in South Africa, the use of replacement labour during lawful strike action was one of the key points of contention for the Sims Task Force. As Vaillancourt has noted, the *Sims Report* 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".[1031] Unsurprisingly, as the Sims Task Force noted, in the submissions that it received, labour was "virtually unanimous" in favouring a prohibition of replacement labour during a strike; as the task force noted, a so called "anti-scab law".[1032] Also unsurprisingly, employers were equally unanimous

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1025 The *Sims Report* 2.
1026 See Grogan *Collective Labour Law* 6.
1027 The position of Business South Africa on the Draft Labour Relations Bill of 1995 was set out in a document called 'A framework for Redrafting the *Labour Relations Act* (1995)'. On the other hand, the position of organised labour was set out in a document (unpublished) called 'Proposals on the Draft Labour Relations Bill: Summary of COSATU, NACTU and FEDSAL Proposals (1 May 1995)'. See Du Toit *et al The Labour Relations Act of 1995* 28 note 134.
1028 Du Toit *et al The Labour Relations Act of 1995* 29.
1029 See Du Toit *et al The Labour Relations Act of 1995* 29-30.
1030 See Du Toit *et al The Labour Relations Act of 1995* 29-30.
1031 Vaillancourt 2000 *McGill Law Journal* 770.
1032 The *Sims Report* 115.

in their opposition to such a proposal.[1033] The task force considered the various arguments which were put forward both in support and in opposition to an anti-scab law. These included the impact of the use of replacement labour on strike violence; investment; the balance of power; strike duration; etc.[1034] The majority of the task force was not convinced by the arguments put forward in support of an anti-scab law. They preferred a middle ground, that is to say, that the use of replacement labour should only be prohibited where an employer uses such labour "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives".[1035] Thus, they made the following recommendations:

> *There should be no general prohibition on the use of replacement workers*. Where the use of replacement workers in a dispute is demonstrated to be for the purpose of undermining the union's representative capacity rather than the pursuit of legitimate bargaining objectives, this should be declared an unfair labour practice. In the event of a finding of such an unfair labour practice, the Board should be given the specific remedial power to prohibit the further use of replacement workers in the dispute.[1036] (Emphasis added)

Rodrigue Blouin, the only dissenting voice within the Sims Task Force did not agree with the other members. He argued that the general principles underlying Canada's system of collective bargaining "dictate the presence of replacement workers during a legal strike or lockout and is illegitimate".[1037] He argued that their use must therefore be declared illegal.[1038] The gist of his opposition to the use of replacement workers during a lawful strike was that:

> 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.[1039]

In essence, Rodrigue Blouin was concerned with maintaining the balance of power between employers and employees which he believed the use of replacement

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1033 The *Sims Report* 115.
1034 The *Sims Report* 117-119.
1035 Vaillancourt 2000 *McGill Law Journal* 778.
1036 The Sims Report 130. Reference to the term 'the Board' referred to the Canada Relations Board which is now called the Canada *Industrial Relations* Board. See also Vaillancourt 2000 *McGill Law Journal* 759.
1037 The *Sims Report* 136,137.
1038 The *Sims Report* 136,137.
1039 The *Sims Report* 137. See also Vaillancourt 2000 *McGill Law Journal* 780.

workers upsets.[1040] However, he proposed two exceptions to the ban on replacement workers during a lawful strike: (1) where a trade union fails to maintain an essential service, if there is such a service; and (2) for the maintenance of equipment at the workplace.[1041]

In the end, the recommendation that was made by the majority of the Sims Task Force – that the use of replacement labour should be permitted subject to some exceptions – prevailed.[1042] Thus, section 94(2.1) of the Canada *Labour Code* as it is known today reflects this viewpoint. It should be noted that before the adoption of the section 94(2.1), federal labour law in Canada did not prohibit an employer from replacing lawfully striking workers.[1043]

4.4.1.3 Interpreting section 94(2.1) of the Canada *Labour Code*

While the wording may vary slightly, all labour relations statutes in the various jurisdictions in Canada prohibit certain employer conduct which is considered to be unfair. For example, they all prohibit interference with workers' exercise of labour rights.[1044] As was noted in the previous chapters, notwithstanding the emergence of trade unions in the late 1880s and early 1900s around the world, many employers saw them as unwelcome intruders in the affairs of employers.[1045] Thus, employers used several tactics[1046] meant to either weaken or destroy trade unions in the workplace.

The abovementioned statutes also establish a tribunal – a Labour Relations Board – which is tasked with hearing and determining alleged breaches of the relevant labour relations statute.[1047] As Banks *et al.* have noted, in general, these boards "prohibit employers from acting, even in part, on the basis of antiunion motives, regardless of the presence of valid business justifications for their actions".[1048] Importantly, it should be emphasised that section 94(2.1) falls under the part of the

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1040 Vaillancourt 2000 *McGill Law Journal* 780.
1041 The *Sims Report* 145. See also Vaillancourt 2000 *McGill Law Journal* 781.
1042 Vaillancourt 2000 *McGill Law Journal* 779.
1043 See Vaillancourt 2000 *McGill Law Journal* 760.
1044 Banks *et al Labor relations law in North America* 74.
1045 Grogan *Collective Labour Law* 100.
1046 For example, employers offered their employees certain benefits in order to suppress the influence of trade unions. See Axley 1950 *Labour Law Journal* 441.
1047 Banks *et al Labor relations law in North America* 80-81.
1048 Banks *et al Labor relations law in North America* 77.

Canada *Labour Code* which deals with unfair practices.[1049] For convenience, it will be recalled that section 94(2.1) of the Canada *Labour Code* regulates replacement labour, and provides that:

> 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. (Emphasis added)

One should ask what the meaning of the above underlined phrases is. Firstly, the phrase "for the demonstrated purpose of undermining a trade union's representational capacity" is not defined in the Canada *Labour Code.*[1050] However, as has been suggested, decisions of the Canada Industrial Relations Board[1051] may shed some light on this issue.[1052] The Board has concluded that:

> 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*.[1053] (Emphasis added)

The inference to be drawn from the foregoing is that "for the demonstrated purpose of undermining a trade union's representational capacity" refers to the employer's use of replacement workers in order to undermine a trade union's representativeness or to pursue illegitimate bargaining objectives (bad faith bargaining). The employer's motives for using replacement workers during a strike would therefore be a key consideration in determining whether or not there has been a violation of section 94(2.1). Therefore, in terms of section 94(2.1) of the Canada *Labour Code*, an employer may (lawfully) use replacement workers during

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1049 See section 94 of the *Canada Labour Code*.
1050 Vaillancourt 2000 *McGill Law Journal* 788.
1051 See section 9 of the *Canada Labour Code* which establishes the Canada *Industrial Relations* Board – the board which is tasked with hearing and determining alleged breaches of the *Canada Labour Code.*
1052 Vaillancourt 2000 *McGill Law Journal* 788.
1053 Vaillancourt 2000 *McGill Law Journal* 790.

a strike unless it can be shown that the employer hired such workers in order to undermine a trade union's representational capacity. The wording of the section seems to imply that the same principle will apply where an employer has implemented a lock-out. This, in turn, raises the question of who should demonstrate that the employer hired replacement workers in order to undermine a trade union's representational capacity. Clearly, section 94(2.1) places the burden of proof on a trade union which alleges a breach of the section.[1054] Where a trade union is able to discharge this onus of proof, the Canada Industrial Relations Board is empowered to order an employer to cease contravening section 94(2.1).[1055]

Based on the above discussion, it is clear that the Canada *Labour Code* attempts to balance the interests of both employers and employees; it protects an employer's right to carry on business during a strike by permitting employers to hire replacement workers (unless it can be shown that the employer hired such workers in order to undermine a trade union's representational capacity), and it protects trade unions against unfair anti-union conduct (unfairly undermining their representational capacity). However, as Savage and Butovsky have pointed out, this provision has been ineffective because it has allowed employers "to carry on business as usual with the help of scab labour as long as they kept up the façade of bargaining with the union".[1056] It is also clear that the wording of section 94(2.1) may cause some interpretation difficulties.[1057]

The similarities and the differences between section 94(2.1) of the Canada *Labour Code* and section 76 of the LRA[1058] in South Africa are evident. They both protect an employer's right to carry on business during a lawful or protected strike, and, subject to limited exceptions, this includes the right to hire replacement labour. Under both statutes, the employees who were replaced are entitled to return to work once the strike ends. Put differently, both statutes permit temporary replacement labour but not permanent replacement labour.

1054 Vaillancourt 2000 *McGill Law Journal* 790.
1055 See section 99(1) of the *Canada Labour Code*.
1056 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 19.
1057 Vaillancourt 2000 *McGill Law Journal* 796.
1058 See chapter 2 above (paragraph 2.5), where the provisions of section 76 of the LRA are critically analysed.

The major difference between the two statutes is the exception to the general rule that an employer may use replacement labour during a lawful or protected strike. While the Canada *Labour Code* prohibits the use of such labour where it can be shown that the employer hired such workers in order to undermine a trade union's representational capacity,[1059] the LRA prohibits the use of such labour during an offensive lock-out.[1060] Despite these varying approaches, it can be argued that the end result is the same: the use of replacement labour renders a strike ineffective,[1061] and may even change collective bargaining into collective begging.[1062]

4.4.2 Ontario's Labour Relations Act

Ontario is probably the most interesting Canadian jurisdiction when it comes to the regulation of replacement labour during a strike: a ban on the use of replacement labour was introduced in 1993 but then later repealed only two years later in 1995.[1063] As Logan has observed, Ontario has seen "greater upheaval in its law and jurisprudence" on replacement labour than most other provinces.[1064] Currently, in Ontario, similar to the Canada *Labour Code,* the law does not prohibit an employer from hiring replacement workers during a lawful strike. Before considering the law in its current format, it may be helpful to briefly review the state of the law on replacement labour in Ontario before 1993, and between 1993 and 1995. It will be shown that the question of how to regulate replacement labour has been and continues to be one of the most controversial issues in Ontario's industrial relations system.

4.4.2.1 Prior 1993: the years of uncertainty

Before 1970, the right of striking workers to displace replacement workers at the end of a strike was "precarious at best".[1065] However, in 1970 the Labour Relations Act, which was in force at the time, was amended to provide for a reinstatement

1059 See section 92(2.1) of the *Canada Labour Code.*
1060 See section 76(2) of the LRA.
1061 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.
1062 Tenza 2016 *Obiter* 116.
1063 Langille 1995 *Canadian Labour and Employment Law Journal* 462 note 3; Tucker 2005 *Comparative Labour Law and Policy Journal* 121
1064 Logan 2002 *Industrial Relations* 150.
1065 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 140.

right for striking workers.[1066] Striking workers therefore, had a right to return to work at the end of a strike, and thereby displace replacement workers who had been hired to replace them. This right, however, had to be exercised within six months from the beginning of the strike.[1067] If exercised within the aforementioned time period, the right entitled striking workers "to displace replacement workers absolutely".[1068] As the Ontario Labour Relations Board held in *U.S.W.A. v Fotomat Canada*:[1069]

> For the first six months of any strike, striking employees have a right to their former jobs on making an unconditional application to this effect with their employer. The only qualifications are where the work is no longer being performed or the employer has ceased operations. The employer cannot refuse the application because another employee is performing the striking employee's job and there are no other vacancies. *The striking employee must be returned to his former job even if this results in the layoff, transfer or termination of employment of the replacement employee.*[1070] (Own emphasis added)

A critical issue that was not addressed in the amended Act was what happened if a striking worker did not exercise his or her right within the six month period?[1071] The law was ambiguous, and may have encouraged striking workers to abandon a strike before the six month deadline.[1072] Another contentious issue during this period was whether replacement workers could participate in a decertification vote to oust a representative trade union.[1073] According to Hopkinson, replacement workers were entitled to participate in such votes.[1074] However, as Langille has argued, the answer to this question was more complex.[1075] Thankfully, from the workers' perspective at least, from the 1980's labour boards across Canada (including Ontario's) "began to protect the rights of striking workers by giving them

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1066 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 140; Logan 2002 *Industrial Relations* 150.
1067 Langille 1995 *Canadian Labour and Employment Law Journal* 468; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 141.
1068 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 141.
1069 *U.S.W.A. v Fotomat Canada* [1980] O.L.R.B. Rep. 1397 (see Hopkinson 1996 *Canadian Labour and Employment Law Journal* 141).
1070 *U.S.W.A. v Fotomat Canada* [1980] O.L.R.B. Rep. 1397 at 1430 (as quoted by Hopkinson 1996 *Canadian Labour and Employment Law Journal* 141).
1071 Langille 1995 *Canadian Labour and Employment Law Journal* 468.
1072 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 142.
1073 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 142, 143; Langille 1995 *Canadian Labour and Employment Law Journal* 468.
1074 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 142-143.
1075 Langille 1995 *Canadian Labour and Employment Law Journal* 468.

priority over replacement workers at the end of strikes".[1076] This was done by prohibiting employers from hiring permanent replacement workers and or providing striking workers with clear reinstatement rights.[1077] So far, it is evident that employers were permitted to hire replacement workers in Ontario prior 1993.

4.4.2.2 1993-1995: Bill 40 and the ban on replacement labour

As early as 1990, the government of Ontario had declared its intention to amend the Labour Relations Act[1078] – the industrial relations statute in force in Ontario at the time. After a lengthy consultation process, Bill 40 (titled *Bill 40, an Act to amend certain Acts Concerning Collective Bargaining and Employment in Ontario*) was tabled before the (provincial) Ontario legislature in 1992.[1079] Amongst other things, Bill 40 introduced restrictions regarding the use of replacement labour during lawful strikes and lock-outs. During a lawful strike, the Bill prohibited an employer from using in any of its operations: replacement workers; its employees who ordinarily work at another of the employer's place of operations; volunteers; and contractors or other persons supplied by contractors.[1080] Unsurprisingly, this was the most controversial part of Bill 40, because during the consultation phase labour was virtually unanimous in favouring a prohibition of replacement labour during lawful strikes, and employers were equally unanimous in their opposition to such a proposal.[1081] The employers' opposition to the Bill and the tactics which they were prepared to use in an attempt to defeat it have been aptly described by Jordan as follows:

> Numerous business groups, however, were adamantly opposed to the legislation, believing that it granted unions a potent and deleterious economic weapon. Consequently, these groups waged vigorous propaganda campaigns against the amendments. The Motor Vehicle Manufacturers Association argued that the ban on replacement workers would cripple the industry, costing upwards of C$10,000,000. The Coalition to Keep Ontario Working, another pro-business lobby, spent C$700,000 on advertisements, alleging that the proposed changes in the law, if enacted, would cost Ontario 295,000 jobs and drive away investors. The business alliance Project Economic Growth ('PEG'), comprised of such major corporations as IBM, General

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1076 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 142-143.
1077 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 144.
1078 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 138.
1079 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 138; Tucker 2005 *Comparative Labour Law and Policy Journal* 121.
1080 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 144.
1081 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 144.

> Motors, and Sears, initiated a C$1,000,000 campaign in an attempt to defeat the proposals.[1082]

Notwithstanding the opposition to it by employers' organisations,[1083] Bill 40 received its Royal Assent in November 1992, and came into force in January 1993.[1084] In so doing, Ontario became the third province in Canada (after Quebec and British Columbia) to introduce a general ban on the use of replacement labour during a lawful strike.[1085] It is important to note that the Bill did provide some exceptions to the general ban; employers in essential services were permitted to use replacement workers.[1086] The governing party at the time in Ontario, the NDP Party, justified the introduction of the ban as a way of promoting industrial peace and or reducing conflict. As Hopkinson explains:

> The former NDP government presented the replacement worker prohibition as an integral part of its effort to resolve 'the current inequities in the system' and make labour disputes less confrontational. In that government's view, the reduction of conflict and confrontation would, in turn, promote the increased cooperation and partnership between employers and employees required to respond to the exigencies of the new workplaces and workforce engendered by an increasingly competitive, globalised economy.[1087]

Whilst labour probably saw the change in the law as a major victory, employers were not pleased to say the least:

> The anti-scab prohibitions were seen to be an indefensible interference with the employer's right to resist union bargaining demands and to continue its operations. As such, the anti-scab provisions represented for many employers a blatant restructuring of the balance of power in industrial relations in favour of unions.[1088]

Labour's victory would turn out to be short-lived. In 1995, a new political party came into power in Ontario, and it revisited the question of whether there should be a legal ban on the use of replacement labour during lawful strikes. Without any consultation or public hearings,[1089] on November 10 1995, Bill 40 was repealed

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1082 Jordan 1995 *Fordham International law Journal* 2069-2070.
1083 Tucker 2005 *Comparative Labour Law and Policy Journal* 121.
1084 Langille 1995 *Canadian Labour and Employment Law Journal* 462.
1085 Banks *et al Labor relations law in North America* 72; Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 42.
1086 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 43, 44.
1087 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 138.
1088 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 138-139.
1089 Tucker 2005 *Comparative Labour Law and Policy Journal* 121.

along with the anti-scab provisions it had introduced.[1090] Therefore, post-1995 to date, employers in Ontario are not prohibited from replacing lawfully striking workers. When Bill 40 was repealed, the main justification put forward for doing so was that anti-scab legislation upsets the balance of power during collective bargaining in favour of trade unions. In response to this argument, Hopkinson argues that:

> The repeal of the anti-scab provisions has, as expected, been justified in terms of reasserting the balance of power in labour relations thrown off by the NDP government. I have argued that such an argument is fallacious. It misrepresents the various sides of the labour relations power equation, by overestimating the coercive power of labour and by failing to recognise the unarticulated prerogatives accorded to capital, which are unjustifiable in terms of the normative structure established by schemes of collective bargaining. Anti-scab legislation can be seen as throwing off the balance of power between labour and capital only if the actual power of capital is not weighed.[1091]

He goes on to add that:

> I have argued that the absence of anti-scab laws in traditional collective bargaining regimes provides capital with a distinct advantage in terms of bargaining power. I have not done so naively. I am not convinced that collective bargaining law was ever intended to provide anything approximating equal bargaining power.[1092]

4.4.2.3 Post-1995: the current dispensation

As noted above, post-1995 (to date) employers in Ontario are not prohibited from replacing lawfully striking workers. Section 78(1) is the relevant section of the Ontario *Labour Relations Act* and it provides that:

> No person, employer, employers' organization or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or *retain the services of a professional strike breaker and no person shall act as a professional strike breaker*.[1093] (Emphasis added)

From the above, it is evident that section 78(1) does not expressly provide that employers may hire replacement workers during a strike. Rather, the section only prohibits the hiring of a professional strike breaker and acting as a professional strike breaker. The question to raise is what is the definition of a professional strike breaker? Section 78(2) defines the term as follows:

1090 Langille 1995 *Canadian Labour and Employment Law Journal* 462 note 3; Tucker 2005 *Comparative Labour Law and Policy Journal* 121.

1091 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 146.

1092 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 146. For a different point of view, see Langille 1995 *Canadian Labour and Employment Law Journal* 462-474.

1093 See section 78(1) of the *Ontario Labour Relations Act*.

> ...'professional strike breaker' means a person who is not involved in a dispute whose primary object, in the Board's opinion, is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out...[1094]

Therefore, a professional strike breaker is a person who is not involved in a dispute (probably supplied by a temporary employment agency) and whose primary objective is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under the Ontario Labour Relations Act. The use of the term 'professional' probably implies a person who habitually works on a temporary basis as a replacement worker, and not just an ordinary replacement worker, but a professional whose purpose is to break a strike (hence the use of the term "strike breaker"). From the employer's perspective, this means that it may not avail itself of "the services of firms which maintain a labour pool explicitly for temporary use by struck employers".[1095] Importantly, the Ontario Labour Relations Board is given the task of determining whether a replacement worker's primary objective is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under the Ontario *Labour Relations Act*.

Professional strike breakers have been used in North America as far back as the early 1900's.[1096] For example, during a strike by meat packers in Chicago (in the USA) in 1904, employers hired professional strike breakers; professionals at the trade and always on the move to the next place where needed.[1097] Another more recent example is the strike at the Los Angeles Herald Examiner newspaper. When its employees went on strike, management responded by hiring hundreds of professional strike breakers. The strike breakers were described in some media publications as "criminals" and "mercenaries".[1098] In Canada, a strike in Ontario in 1963 where professional strike breakers were used, resulted in three deaths and several casualties.[1099] As Cardwell suggests, the fact that employers had hired

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1094 See section 78(2) of the *Ontario Labour Relations Act*.
1095 Spector 1992 *McGill Law Journal* 214.
1096 Tuttle 1966 *Labour History* 193. See also Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 17, where she states that "Professional strikebreaking in North America dates back to the nineteenth century".
1097 Tuttle 1966 *Labour History* 193.
1098 Brennan 2005 *Critical Studies in Media Communications* 69.
1099 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 18.

professional strike breakers as opposed to ordinary replacement workers may actually have increased the likelihood of violence during strikes:

> The very hiring of strike breakers itself was often the cause of violence particularly when replacements were professional strike breakers with little or no technical job skills who simply wished to prolong the strike for their own financial benefit.[1100] (References omitted)

Another issue regarding professional strike breakers is that they need industrial conflict in order to earn a living; it is "in their best interest to perpetuate conflict between labour and management".[1101] They purposely prolong strikes because the longer the duration of a strike, the more money they stand to make.[1102] As in Ontario, the province of Manitoba in Canada also prohibits the hiring of professional strike breakers during a strike.[1103]

From a comparative perspective, it is evident that the Ontario *Labour Relations Act* and the LRA in South Africa[1104] both permit the use of replacement labour during a strike, even though they do not expressly say so. Also, under both statutes, the replaced employees are entitled to return to work once the strike ends.[1105] However, it is also evident that they differ regarding the limitations on the use of such labour. The LRA does not permit the use of replacement labour during an offensive lock-out, and the Ontario *Labour Relations Act* does not permit the use of professional strike breakers.

So far, two jurisdictions within Canada which permit the use of replacement labour during a lawful strike have been discussed. It has been shown that, like in South Africa,[1106] the use of such labour during a lawful strike is controversial. Keeping this

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1100 She continues to explain that "There are many historical examples of violence occurring in situations where management uses the services of professional strikebreakers. A legendary example in North America labour history transpired at Andrew Carnegie's Steel Company in 1892 in Homestead, Pennsylvania. Three hundred professional strikebreakers were hired to break the strike which resulted in dissolution of the union, eighty-three wounded and thirty-five dead" (references omitted). See Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 17-18.

1101 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 19.

1102 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 19.

1103 See Manitoba's *Labour Relations Act* of 1988 (as amended), section 14 thereof.

1104 See chapter two above.

1105 See section 80(1) of the *Ontario Labour Relations Act*; section 76 of the LRA.

1106 See chapter two above.

in mind, the two jurisdictions (Quebec and British Columbia) which prohibit the use of replacement labour during a lawful strike are discussed next.[1107]

Before doing so, it is interesting to note that, post-1995, there have been several bills (unsuccessfully) put before Ontario's legislature meant to amend the Ontario *Labour Relations Act* with respect to the regulation of replacement workers during strikes. For example, Bill 86 (titled *Labour Relations Amendment Act (Replacement Workers), 2008*) and Bill 45 (titled *Labour Relations Amendment Act (Replacement Workers), 2010*) proposed amending the Ontario *Labour Relations Act* by re-introducing a ban (which was in place between 1993 and 1995) on the use of replacement workers during a strike or lock-out. However, the bills did provide for some exceptions: employers were permitted to use specified replacement workers in order to prevent danger to life, health or safety (essential services); destruction or deterioration of machinery; and environmental damage. It is submitted that this approach would have been consistent with the CFA's jurisprudence which says the use of replacement workers during strikes should be limited to essential services.[1108]

4.4.3 Quebec's Labour Code and British Columbia's Labour Relations Code

4.4.3.1 The origins of anti-replacement labour legislation in Quebec and British Columbia

As noted earlier, the early 1900s to the early 1930s was a turbulent period for trade unions and labour relations in general in Canada – there were violent strikes[1109] and strikes were restricted during World War I.[1110] However, the fortunes of workers and trade unions in Canada took a turn for the better from the 1930's. In the 1950s, various provinces in Canada began enacting labour relations legislation which was tailored to meet the particular needs of their respective

1107 Since the law in both provinces is similar, they shall be discussed simultaneously.
1108 See chapter 3 above.
1109 Saunders *Industrial Relations in Canada 6*.
1110 Strikes were restricted in industries which were concerned with or involved in war production. See Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 347.

jurisdictions.[1111] In this regard, Ontario, Quebec and British Columbia "assumed leadership roles in Canadian labour relations policy".[1112]

While federal and provincial labour laws initially made no reference to replacement workers, the policy debate on this issue had "turned decisively against employers in most provinces by the early 1970's".[1113] In the post-World War II decades, there was considerable legal uncertainty regarding the regulation of replacement labour at both federal and provincial levels.[1114] However, it should be noted that the use of replacement labour during strikes had significantly diminished in the 1940's and 1950's as most employers abandoned their "more overt and provocative anti-union tactics".[1115]

In the post-World War II decades, employers and unions clashed over the issue of state regulation of their respective economic weapons.[1116] As Logan explains:

> If labour laws were to limit the right to strike*, unionists argued, they should also proscribe the use of replacement workers.* Indeed, labour leaders 'expected' that 'a government which believes in collective bargaining' would enact legislation 'forbidding an employer from attempting to open his plant by the hiring of strike-breakers'.[1117] (Emphasis added)

In Canada, the first legislative ban on the use of replacement workers during a lawful strike came in the form of a provincial anti-scab law in the province of Quebec.[1118] As a result of some violent strikes in 1975, Quebec introduced a legislative ban on the use of replacement workers during lawful strikes in 1977.[1119] Bill 45 (or the anti-scab law as it is commonly known) was intended to reduce picket line violence and to prevent otherwise peaceful strikes from turning into violent ones.[1120] Indeed, Quebec had a long history of strike violence.[1121]

1111 Saunders *Industrial Relations in Canada* 27.
1112 Saunders *Industrial Relations in Canada* 27-28.
1113 Logan 2002 *Industrial Relations* 147.
1114 Logan 2002 *Industrial Relations* 147.
1115 Logan 2002 *Industrial Relations* 148.
1116 Logan 2002 *Industrial Relations* 146.
1117 Logan 2002 *Industrial Relations* 147.
1118 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16.
1119 The law came into effect in February 1978. See Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 48; Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16.
1120 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 48.

Currently, Quebec is the most unionised province in Canada, and trade unions have had a long and close relationship with successive provincial governments therein.[1122] In fact, trade unions played a key role in propelling the *Parti Québécois* (a political party in Quebec – hereafter the PQ) to power in Quebec. After it was elected, the PQ returned the favour by implementing a number of labour reforms which included a ban on the use of replacement workers in 1977.[1123] Labour rights tend to be protected to a greater extent where there is a strong relationship between governing political parties and trade unions. This is not unusual. From the previous chapters,[1124] it will be recalled that given the prominent role played by trade unions in bringing down apartheid in South Africa, much attention was placed by the ANC-led government on protecting labour rights in South Africa post-1994.[1125]

As the province of Ontario was contemplating introducing a ban on the use of replacement workers during lawful strikes in 1992,[1126] the province of British Columbia too began reviewing its industrial relations policy. By then, Quebec's ban on the use of replacement workers during lawful strikes had already been in place for around fifteen years. In 1992, the (provincial) government of British Columbia established a committee of special advisors to review the province's industrial relations policy.[1127] Also, a subcommittee was established to recommend changes to the province's *Industrial Relations Act* – the industrial relations statute in force at the time.[1128] The subcommittee produced a report titled *Recommendations for Labour Law Reform*.[1129] Importantly, the report included a Draft *Labour Relations Code* (Bill 84).[1130] Bill 84 was passed by the (provincial) legislature in 1992.[1131]

1121 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 59; Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16.
1122 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16.
1123 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16-17.
1124 See chapter two above, in particular paragraph 2.3.1 thereof.
1125 See Grogan *Collective Labour Law* 6.
1126 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 138; Tucker 2005 *Comparative Labour Law and Policy Journal* 121.
1127 Harris and McConchie1993 *The Advocate* 29.
1128 Harris and McConchie1993 *The Advocate* 29.
1129 Harris and McConchie1993 *The Advocate* 29.
1130 Harris and McConchie1993 *The Advocate* 29.
1131 The name of the statute changed from *Industrial Relations Act* to the *Industrial Relations Code* (as it is known today). See Harris and McConchie1993 *The Advocate* 29.

For the purpose of this study, the most significant change introduced by Bill 84 was a ban on the use of replacement workers during lawful strikes. As Harris and McConchie have pointed out, this was the most controversial change introduced by Bill 84.[1132] The issue of replacement workers had also been controversial within the subcommittee who had produced the report.[1133] Of the three members of the subcommittee; one was not in favour of an anti-scab clause while the other two members in favour of such a clause could not agree on the form an anti-scab clause should take.[1134] It is important to note that under the *Industrial Relations Act* (which was replaced by Bill 84 in 1992) employers were only prohibited from hiring professional strike breakers during a lawful strike.[1135] Reducing picket line violence was the justification put forward for changing the law, that is to say, introducing the ban on the use of replacement workers during lawful strikes.[1136]

It should be emphasised that in 1992, British Columbia became the second province in Canada (after Quebec) to introduce a ban on the use of replacement workers during lawful strikes. Ontario became the third province in Canada (after Quebec and British Columbia) to introduce a similar ban in 1993.[1137] However, as was explained above, in 1995 Ontario repealed the anti-replacement worker provisions it had introduced in 1993.[1138] It is interesting to note that other Canadian provinces too have seriously contemplated introducing a ban on the use of replacement workers during lawful strikes. In 1994, the provincial governments in New Brunswick and Nova Scotia indicated that they were contemplating the introduction of 'blanket anti-replacement legislation'.[1139] However, following concerted and vigorous campaigns by employers against such proposals, both provincial governments were forced to back down.[1140]

1132 Harris and McConchie1993 *The Advocate* 38, 39.
1133 Harris and McConchie1993 *The Advocate* 38, 39.
1134 Harris and McConchie1993 *The Advocate* 38, 39.
1135 Harris and McConchie1993 *The Advocate* 39.
1136 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 45, 46.
1137 Banks *et al Labor relations law in North America* 72; Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law 42.*
1138 Langille 1995 *Canadian Labour and Employment Law Journal* 462 note 3; Tucker 2005 *Comparative Labour Law and Policy Journal* 121.
1139 Logan 2002 *Industrial Relations* 151.
1140 Logan 2002 *Industrial Relations* 151.

Having set out how the anti-replacement labour legislation in Quebec and British Columbia came to be, the provisions which regulate the use of such labour in each province are critically analysed next.

4.4.3.2 The anti-replacement provisions under British Columbia's *Labour Relations Code* and Quebec's *Labour Code*

Like all other labour relations statutes in Canada, the B.C. *Labour Relations Code* and Quebec's *Labour Code* contain certain important common features, whether specific or general. Most (if not all) of these statutes provide that every employee is free to join the trade union of their choice and to participate in its lawful activities.[1141] Although they do not expressly say that employees have the right to strike, these statutes regulate strikes, thus implying that the employees they cover have the right to strike.[1142] Whilst most jurisdictions in Canada do not prohibit the use of replacement labour during strikes or lock-outs, Quebec and British Columbia have decided otherwise.[1143] At this juncture, it is important to note, as Vaillancourt has pointed out, that in Quebec and British Columbia "the presence of replacement workers during a legal strike or lockout is perceived as shattering the balance of power between labour and management".[1144]

In Quebec, section 109.1 of the *Labour Code* regulates the replacement of striking workers. It provides that:

> For the duration of a strike declared in accordance with this Code or a lock-out, every employer is prohibited from:
>
> (a) Utilizing the services of a person to discharge the duties of an employee who is a member of the bargaining unit then on strike or locked out when such person was hired between the day the negotiation stage begins and the end of the strike or lock-out;
>
> (b) Utilizing, in the establishment where the strike or lock-out has been declared, the services of a person employed by another employer or the services of another contractor to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out;

1141 See section 5 of the Ontario *Labour Relations Act*; section 4 of the B.C. *Labour Relations Code*; and section 3 of the *Quebec Labour Code*. It should be noted that the Quebec's *Labour Code* is worded slightly differently.

1142 Singh and Harish 2001 *Industrial Relations Journal* 29-30. In South Africa, the right of every employee to strike is expressly laid down in section 64 of the LRA.

1143 Vaillancourt 2000 *McGill Law Journal* 763.

1144 Vaillancourt 2000 *McGill Law Journal* 763.

(c) Utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee who is a member of the bargaining unit then on strike or locked out...;

(d) Utilizing, in another of his establishments, the services of an employee who is a member of the bargaining unit then on strike or locked out;

(e) Utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee he employs in another establishment;

(f) Utilizing, in an establishment where a strike or a lock-out has been declared, the services of a person other than an employee he employs in another establishment, except where the employees of the latter establishment are members of the bargaining unit on strike or locked out;

(g) Utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee he employs in the establishment to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out.[1145]

(Emphasis added)

The aforementioned section 109.1 (quoted above) is clearly aimed at prohibiting the replacement of striking workers and workers who have been locked out. Although it is written in a somewhat difficult way to understand, there are several important points which should be noted. Firstly, the prohibition applies for the duration of a strike or lock-out which complies with Quebec's *Labour Code.* Put differently, the application of section 109.1 becomes effective once the prerequisites for a lawful strike or lock-out are met.[1146] Secondly, it prohibits the use of a person to do the work of an employee who is on strike or locked out when such a person is hired between the start and end of the strike or lock-out.[1147] Thirdly, the prohibition also applies where the replacement worker is supplied by a temporary employment service or is an independent contractor.[1148] Therefore, like section 76 of the LRA in South Africa,[1149] Quebec's *Labour Code* prevents employers from circumventing the prohibition by utilising the services of persons not otherwise employed by them (persons supplied by a temporary employment

1145 See section 109.1 of Quebec's *Labour Code*.
1146 Singh and Harish 2001 *Industrial Relations Journal* 30.
1147 See section 109.1(a) of Quebec's *Labour Code*.
1148 See section 109.1(b) of Quebec's *Labour Code.*
1149 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) para 73, where the court in interpreting section 76 of the LRA and the limitations it imposes on hiring replacement workers during a strike held that "...the legislature intended to encompass in the prohibition not only the case of an employer physically employing a person to perform the work of locked out employees but also the case of an employer utilizing the services of a person not otherwise employed by it, to assist in the performance of the work of employees who have been locked out".

service or independent contractors) to perform the work of an employee who is on strike or has been locked out. Fourthly, an employer is prohibited from using, in its place of operations where there is a strike or lock-out, its employees from another location.[1150] Lastly, and importantly, Quebec's *Labour Code* allows for an exemption to the prohibition on replacement labour during a strike or lock-out in the case of emergencies and or services deemed essential.[1151]

In British Columbia, the B.C. *Labour Relations Code* too bans the use of replacement workers during a lawful strike or lock-out. Section 68(1), titled *Replacement Workers*, provides that:

> (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not;
> (a) Who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins;
> (b) Who ordinarily works at another of the employer's places of operations;
> (c) Who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins; or
> (d) Who is employed, engaged or supplied to the employer by another person, to perform;
> (e) The work of an employee in the bargaining unit that is on strike or locked out; or
> (f) The work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.[1152] (Emphasis added)

Given that Quebec's *Labour Code* served as a model for the B.C. *Labour Relations Code,*[1153] unsurprisingly, it is therefore evident that the two statutes regulate replacement labour similarly; both statutes ban the use of replacement labour during a strike or lock-out. Although worded slightly differently, most of the prohibitions under Quebec's *Labour Code* also apply under the B.C. *Labour Relations Code*.[1154] They both permit managerial staff to work as replacements,[1155] and importantly, both statutes allow for an exemption to the prohibition on

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1150 Singh and Harish 2001 *Industrial Relations Journal* 30. See also section 109.1(e) of Quebec's *Labour Code.*

1151 See section 109.3 of Quebec's *Labour Code.* See also, Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

1152 See section 68(1) of the *B.C. Labour Relations Code*.

1153 Harris and McConchie1993 *The Advocate* 40.

1154 Harris and McConchie1993 *The Advocate* 40.

1155 Banks *et al Labor Relations in North America* 72; Singh and Harish 2001 *Industrial Relations Journal* 30; Harris and McConchie1993 *The Advocate* 39, 40.

replacement labour during a strike or lock-out in the case of emergencies and or services deemed essential.[1156]

There are, however, some important differences between the two statutes which should be noted. Although Quebec's *Labour Code* has a blanket prohibition on the use of bargaining-unit members during a strike, the B.C. *Labour Relations Code* allows employers to use non-bargaining unit employees and consenting strikers.[1157] This is the most significant difference between the two statutes. Also, whereas Quebec's *Labour Code* prohibits struck work to be done at other facilities, this is permissible under the B.C*. Labour Relations Code.*[1158] Moreover, while the B.C. *Labour Relations Code* expressly forbids the use of the services of a "person paid or not" to perform the work of an employee who is on strike or locked out, Quebec's *Labour Code* makes no such specific reference. The term "person paid or not" (as used in the B.C. *Labour Relations Code*) includes volunteers.[1159] Therefore, while volunteers may not be used as replacement 'workers' in terms of the B.C. *Labour Relations Code*, the same does not apply under Quebec's *Labour Code.* Put differently, unlike in British Columbia, volunteers are not considered to be replacement 'workers' in Quebec.[1160]

In light of the above discussion, it is submitted that Quebec and British Columbia's approach to the regulation of replacement labour during strikes is consistent with the CFA's jurisprudence. Quebec's *Labour Code* and the B.C. *Labour Relations Code* both allow for an exemption to the prohibition on replacement labour during a strike in the case of emergencies and or services deemed essential. It will be

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1156 Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

1157 See section 68(2) of the *B.C. Labour Relations Code* which provides that "An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person". See also Banks *et al Labor Relations in North America* 72; Harris and McConchie1993 *The Advocate* 40; Singh and Harish 2001 *Industrial Relations Journal* 30.

1158 Singh and Harish 2001 *Industrial Relations Journal* 30.

1159 Vaillancourt 2000 *McGill Law Journal* 764 (note 34).

1160 Vaillancourt 2000 *McGill Law Journal* 764 (note 34).

recalled that, in case after case, the CFA has concluded that the replacement of strikers should be limited to essential services.[1161]

Like Quebec and British Columbia, there are some countries and or jurisdictions which do conform to the principle that the replacement of strikers should be limited to essential services. For example, Mexico's 1917 Constitution was the first one in the world to entrench the right to strike.[1162] The Federal Labour Law (known as *Ley de Trabajo*)[1163] prohibits both permanent and temporary replacement of lawfully striking workers.[1164] This prohibition has been in place since 1931.[1165] However, the only exception is in essential services whereby employers may use temporary replacement workers during a strike.[1166] This approach is consistent with the ILO's Committee on CFA's jurisprudence.

Outside North America, there are also some other countries which do conform to the principle that the replacement of strikers should be limited to essential services. For example, New Zealand's Employment Relations Act[1167] permits employers to use their own employees (persons already employed by the employer when a strike or lock-out commences) to perform the work of an employee who is on strike or locked out.[1168] When it comes to persons who would be described as 'proper replacement workers', the *Employment Relations Act* limits the use of such workers to emergencies or services which may be deemed essential. Section 97(4) thereof provides that:

> An employer may employ or engage another person to perform the work of a striking or locked out employee if —
> (a) There are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and
> (b) The person is employed or engaged to perform the work only to the extent necessary for reasons of safety or health.[1169]

1161 See chapter 3 above and in particular the discussion on the CFA's jurisprudence.
1162 Banks *et al Labor relations law in North America* 131.
1163 The *Federal labour Law* (*Ley de Trabajo*) of 1931 (as amended).
1164 Banks *et al Labor relations law in North America* 140.
1165 Singh and Harish 2001 *Industrial Relations Journal* 33, 34.
1166 Singh and Harish 2001 *Industrial Relations Journal* 34; Banks *et al Labor relations law in North America* 140. See also Article 447 of Mexico's *Federal labour Law* (*Ley de Trabajo*).
1167 *Employment Relations Act* 24 of 2000.
1168 See section 97(3) of the *Employment Relations Act* 24 of 2000.
1169 See section 97(4) of the *Employment Relations Act* 24 of 2000.

It might be safe for one to assume that, in the abovementioned countries, like in South Africa and Canada, the issue of replacement labour is also debated passionately. In chapter 2 of this study, the possible arguments which can be made in support of anti-replacement labour legislation in South Africa were discussed. The arguments that were considered were that the use of replacement causes violence; renders a strike ineffective; leads to longer strikes; and unfairly tilts the balance of power in favour of employers. It was argued that, taken together, these arguments make a compelling case in favour of anti-replacement labour legislation in South Africa. However, a complicating factor is the lack of empirical research in South Africa regarding the effects of the use of replacement labour. It should be mentioned that several researchers have conducted research to determine the impact of anti-replacement labour legislation or the lack thereof, in Canada, as well as the impact it has on strike violence; incidence; duration; and collective bargaining in general, *etc*. Some of this research and its findings are discussed next.

4.5 The empirical research on the effects of anti-replacement labour legislation or the lack thereof

In South Africa and Canada, the use of replacement labour during lawful strikes is controversial. Labour and workers' rights advocates have argued for a ban on replacement labour during lawful strikes in both countries. However, employers and free market advocates generally oppose such legislation.[1170] Singh *et al.* have summed up the usual arguments made in favour of a ban as follows:

> In summary, trade unions and labour rights advocates argue for laws banning the use of replacement workers to protect the potency of the strike weapon, to reduce strike activity and prevent violence. Furthermore, supporters of organised labour contend that the use of replacements leads to longer strikes, among other effects.[1171]

Regarding the opponents of a ban, they state that:

> Employers and 'free trade' advocates, on the other hand, contend that limiting or prohibiting the use of replacement workers leads to increased bargaining power for unions and increased strike activity. Business organisations argue that any restriction

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1170 Regarding South Africa, see Hepple and *Leroux Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613. Regarding Canada, see Duffy and Johnson 2009 *Canadian Public Policy* 100 where they state that "Labour organisations press for the adoption of anti-scab legislation in all Canadian jurisdictions".

1171 Singh *et al* 2005 *Labour Studies Journal* 61.

> on the use of replacement workers would give unions an unfair bargaining advantage, shift the balance of power, and lead to increased strike activity, including longer strikes.[1172]

Given the space constraints in this study, the empirical research which is discussed below focuses on the impact of anti-replacement legislation (or the lack thereof) on strike violence; strike incidence; strike duration; and the balance of power. The findings of this research either proves or disproves some of the above mentioned arguments which have been put forward in support or against such legislation.

4.5.1 Strike violence

From chapter 2 of this study, it will be recalled that one the suggestions which has been made regarding possible solutions to strike violence in South Africa is the ban on replacement labour during protected strike action. It was noted that much of the violence which occurs during strike action in South Africa is between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[1173] Strikers perceive the use of replacement labour by an employer as undermining their action and this breeds anger.[1174] Accordingly, this appears to be the key factor leading to conflict between replacement workers and strikers.[1175] Indeed, the research conducted by Von Holdt in South Africa shows that workers are disposed to use violence in strikes because they believe it is intrinsic to the strike and because it has proven its effectiveness.[1176] Therefore, some commentators have argued that section 76 of the LRA in South Africa should be revisited or even repealed by the legislature.[1177]

Keeping in mind that proponents of anti-replacement legislation usually argue that a ban would reduce strike related violence, one might ask if research conducted in Canada show that the use of replacement workers during a strike causes violence or increases the likelihood of violence. Wallace and Grant conducted a study in order to determine why strikes turn violent. They used data from Ontario for the

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1172 Singh *et al* 2005 *Labour Studies Journal* 61-62.
1173 See Levy "Strike action: will things ever be the same" 6.
1174 Tenza 2015 *Law Democracy and Development* 220.
1175 Tenza 2015 *Law Democracy and Development* 220.
1176 Von Holdt 2010 *Transformation* 141.
1177 Tenza 2015 *Law Democracy and Development* 219-222; Brand "How the law could better regulate the right to strike in South Africa" 71.

period 1958 to 1967. They argued that strike violence is related to "the strategies utilised by striking workers and the counter-strategies used by employers".[1178] The strategy most likely to cause violence, so they surmised, is an attempt to keep the enterprise running (which may include using replacement workers).[1179]

Indeed, the results of Wallace and Grant's research confirmed their hypothesis (quoted above).[1180] Other researchers have also come to the same conclusion, that is to say, they have found that the use of replacement workers during a strike causes violence or increases the likelihood of violence. For example, Singh and Harish have summed up the results of the research conducted by Alexandrowicz as follows:

> In a study which addressed this issue, Alexandrowicz collected data, through survey questionnaires sent to union executives, on strikes that took place in Ontario during 1988 in which violence occurred. After analysing the usable responses, *he concluded that 'the employer's use of replacement workers proved to have the strongest positive impact on picket-line violence'.* The author suggested two reasons why such a practice may have led to more violence, 'first, the daily crossing of the picket line by replacement workers will increase the chance of violent confrontations. Second, this employer tactic will have a strong impact on the individual psychological states of the strikers, frustrating and predisposing them towards violence'. *He concluded that, 'this study underlies the need for anti-strikebreaker legislation by showing that the employer's use of outside replacement workers will often lead to picket-line violence'.*[1181] (Own emphasis added)

More recently, the use of replacement workers during strikes has caused violence or increased the likelihood of violence in Canada. In 2002, several strikes in Quebec during which replacement workers were used resulted in violence. In these instances, the employers involved were exempt from the province's anti-replacement labour legislation.[1182] Proponents of anti-replacement legislation usually argue that a ban would reduce strike related violence. It will be recalled

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1178 Wallace and Grant 1991 *American Journal of Sociology* 1117.

1179 They concluded that "Employers may adopt strategies that provoke violence. The employer tactic most likely to provoke a violent response is the attempt to keep the enterprise running at a partial or a normal level during the strike. Aside from the obvious symbolic meaning of this action, keeping the enterprise running may lead directly or indirectly to violence. Trying to maintain plant operations may involve non-striking workers' crossing picket lines or the hiring of outside replacements for strikers. In either case, violent confrontations with strikers determined to keep the plant shut down are likely. Often, employers utilize police to escort non-strikers across picket lines. The very presence of police is likely to aggravate a heated situation and lead to violence. Thus, we expect that, to the degree that employers seek to maintain the full operation of the plant, violence will be likely". See Wallace and Grant 1991 *American Journal of Sociology* 1131.

1180 Wallace and Grant 1991 *American Journal of Sociology* 1147.

1181 Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 315.

1182 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 17-18.

that reducing picket line violence was the justification put forward for introducing the ban on the use of replacement workers during lawful strikes in Quebec.[1183] According to England, the introduction of the ban resulted in "a reduction in the duration of strikes in the province as well as the disappearance of picket-line violence caused by 'scab' labour".[1184]

In light of the above, the results of research conducted in Canada seems to support the argument that banning the use of replacement labour during strikes will reduce strike related violence. Even Cardwell, who does not support the idea of banning the use of the replacement labour, admits: "It is not difficult to imagine that legislation prohibiting replacement workers will likely decrease strike violence".[1185] It should be noted that as far as can be gathered, there is no empirical research which contradicts the findings of the research referred to above.

In chapter 2 of this study, the question was asked if a prohibition on replacement labour during protected strike action will end strike violence in South Africa. It was argued that it probably would not end all the strike violence in South Africa since there may still be some violence between striking and non-striking employees with or without replacement labour. It is submitted that the same argument also applies to Canada.[1186]

4.5.2 Strike incidence and duration

As noted above, whilst supporters of anti-replacement legislation often argue that such legislation would reduce strike activity and also lead to shorter strikes should they occur, the opponents of anti-replacement legislation claim the opposite; they argue that any restriction on the use of replacement labour would increase the number and duration of strikes.

1183 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 45-46.

1184 England 1990 *International and Comparative Law Quarterly* 564.

1185 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 63.

1186 According to Cardwell, prohibiting the use of replacement workers in Canada during strikes would decrease strike violence but not eliminate it. See Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 63.

In Canada, there have been a number of studies which have shown that banning the use of replacement labour during strikes actually increases the number of strikes.[1187] An example is a study conducted by Cramton and Tracy showing that banning the use of replacement labour indeed increases the number of strikes. Their study looked at data from 1967 to 1993.[1188] In a more recent study, looking at data covering the period 1978 to 2003, Duffy and Johnson came to the same conclusion.[1189] They summed up the findings of the most significant previous research as follows:

> Evidence on the probability of a strike occurring is presented by Gunderson, Kevin, and Reid (1989), Budd (1996), and Cramton, Gunderson, and Tracy (1999)...The period of time differs from study to study: Gunderson *et al* use data from 1971 to 1985, Budd uses data from 1966 to 1985, and Cramton *et al* use data from 1967 to 1993...All the studies show that the presence of ATR [anti-temporary replacement worker legislation] increases the probability of a work stoppage occurring.[1190]

It has been argued that the use of replacement labour renders a strike ineffective,[1191] and some have gone as far as suggesting that the use of replacement labour changes collective bargaining into collective begging.[1192] This is so because the persuasive force of a strike largely depends upon the extent to which, by withdrawing their labour, striking workers are able to interrupt the employer's business or production. A strike will not be effective if production can be maintained by using replacement labour.[1193] Therefore, logically, a strike will be more effective when replacement labour is prohibited. Perhaps, this is the reason why anti-replacement legislation has been found to increase strike incidence as trade unions may be more likely to resort to strike action when they know that it will be effective.

However, as Campolieti *et al.* found in a study which looked at data covering the period 1978 to 2008, the impact of anti-replacement labour legislation on strike

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1187 Duffy and Johnson 2009 *Canadian Public Policy* 101; Cramton and Tracy 1999 *Labour Law Journal* 174-177; Gunderson and Melino 1990 *Journal of Labour Economics* 300-310.

1188 It should be noted that in the period (1967-1993) covered by this study, the ban on replacement labour had only been in place in British Columbia and Ontario for short periods of time. Therefore, as Cramton and Tracy themselves point out; their study relied heavily on data from Quebec where the ban had been in place since 1977. See Cramton and Tracy 1999 *Labour Law Journal* 174-177.

1189 Duffy and Johnson 2009 *Canadian Public Policy* 101.

1190 Duffy and Johnson 2009 *Canadian Public Policy* 101.

1191 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.

1192 Tenza 2016 *Obiter* 116.

1193 Todd *Collective Bargaining Law* 76.

incidence is uncertain.[1194] In a similar vein, as some commentators have argued, it can be tricky (given the number of other variables) to establish the causality between a ban on replacement labour and strike incidence:

> ...the relationship between anti-scab legislation and work stoppages is not so straightforward...After a steep decline in the number of strikes and lockouts in Quebec following the implementation of an anti-scab law, the number of work stoppages climbed to 4 million in 1981. From 1990 to 2005 the numbers of days lost to strikes was well under 1 million per year. In 2006 only 156,000 worker/days were lost to strikes. This overall decline can largely be explained through insecurity due to neo-liberal restructuring and a general decline in union militancy, particularly in the private sector. The same uneven pattern is apparent in Ontario and British Columbia. *This suggests that there are many factors that influence the number of work stoppages and that anti-scab legislation, on its own, cannot account for large changes in the number of strikes or lockouts. Even sophisticated regression analyses of the impact of labour legislation on the length and frequency of strikes cannot include the full range of variables affecting these outcomes nor establish causality*...[1195] (Emphasis added)

Regarding strike duration, proponents of anti-replacement labour legislation usually argue that the use of replacement labour leads to prolonged strikes.[1196] The rationale behind this argument is that by using replacement labour during a strike (thereby maintaining production) an employer is not placed under much economic pressure to settle the dispute and is thus able to hold out for longer. In the South African context, it will be recalled that the Department of Labour has suggested that the use of replacement labour leads to longer strikes. In its 2010 Annual Report on Industrial Action, it stated that:

> The number of work stoppages that lasted 41 and more days increased from 1.4% in 2009 to 3.4% in 2010...<u>This might partly be attributed to the use of replacement labour. The use of replacement labour is expected to increase the length of strikes.</u>[1197] (Emphasis added)

In Canada, there are some studies which have shown that banning the use of replacement labour during strikes increases the duration of strikes. The research conducted by Cramton and Tracy (referred to above) came to this conclusion.[1198] In an earlier study, looking at data covering the period 1967 to 1985, Gunderson and

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1194 Campolieti *et al* 2014 *Industrial Relations* 405.

1195 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 18, 19. See also Singh and Harish 2001 *Industrial Relations Journal* 44, where they state that the results of research looking at the link between anti-replacement labour legislation and increased strike activity is "ambiguous".

1196 See Singh *et al* 2005 *Labour Studies Journal* 61-62.

1197 See Department of Labour *Annual Industrial Action Report 2010* 33.

1198 See Cramton and Tracy 1999 *Labour Law Journal* 174-177.

Melino came to the same conclusion.[1199] They did, however, add that "this does not imply that prohibition of replacement workers is an erroneous policy. The longer strikes without the threat of replacement workers may be more orderly and less socially disruptive".[1200]

However, it is important to note that some studies conducted in Canada have shown that a ban on the use of replacement labour actually decreases the duration of strikes. A study by Singh and Harish, which looked at data covering the period 1991 to 1997, found that "the use of strike replacements is associated with longer strikes".[1201] This conclusion can be interpreted as meaning that if a ban on the use of strike replacements was in place, the duration of strikes would decrease. Regarding the reason why the use of replacement workers leads to longer strikes, Singh and Harish opined that "it appears that the use of strike replacements decreases the cost of the strike to be borne by employers, thus decreasing their willingness to compromise in settling the dispute in a short time".[1202] Similarly, a study by Singh *et al.* also concluded that the use of replacement workers leads to longer strikes.[1203] From a comparative perspective, the aforementioned research supports the assertion made by the Department of Labour in South Africa that the use of replacement labour leads to longer strikes.[1204]

The study by Duffy and Johnson (referred to above) came to the conclusion that anti-replacement labour legislation (which prohibits the use of strike replacements) decreases the duration of strikes. As they put it, "anti-scab legislation increases the number of work stoppages and decreases their length".[1205] As will be recalled from the above discussion, this study considered data covering the period 1978 to

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1199 It should be noted that their study relied almost exclusively on data from Quebec where the ban on replacement labour had been in place since 1978. See Gunderson and Melino 1990 *Journal of Labour Economics* 309. For a more recent study, see Campolieti *et al* 2014 *Industrial Relations* 421.

1200 See Gunderson and Melino 1990 *Journal of Labour Economics* 310.

1201 Singh and Harish 1999 *Labour Law Journal* 181.

1202 Singh and Harish 1999 *Labour Law Journal* 182.

1203 Singh *et al* 2005 *Labour Studies Journal* 77, 81. For an earlier study, see Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 74.

1204 See Department of Labour *Annual Industrial Action Report 2010* 33.

1205 Duffy and Johnson 2009 *Canadian Public Policy* 101.

2003.[1206] Again, like strike incidence, it is important to emphasise that it can be tricky (given the number of other variables) to establish the causality between a ban on replacement labour and the duration of strikes.[1207]

In summary, the above discussion shows that different studies have come to different conclusions regarding the impact of anti-replacement legislation (or the lack thereof) on strike incidence and duration.

4.5.3 The balance of power

Another argument which is often made in support of anti-replacement legislation is that the use of replacement labour (unfairly) tilts the balance of power in favour of employers.[1208] In South Africa, according to Ndungu, the balance of power has gradually shifted in favour of employers since the reforms which were initiated in the mid-1990s in South Africa's collective bargaining system.[1209] Amongst other things, he identifies the use of scab labour as one of the key reasons for this shift.[1210] Ironically, those who are opposed to anti-replacement legislation usually argue, inter-alia, that a ban on replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases.[1211] These arguments (both in support of and against anti-replacement legislation) are applicable to South Africa and Canada alike.

The law can and does influence the relative bargaining power of labour and management.[1212] It will be recalled, as was shown in the previous chapters, that the use of replacement labour during a strike may render a strike ineffective,[1213] and may even change collective bargaining into collective begging as some have

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1206 Duffy and Johnson 2009 *Canadian Public Policy* 101.
1207 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 18-19.
1208 See Singh and Harish 2001 *Industrial Relations Journal* 23; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 148; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310; Langille 1995 *Canadian Labour and Employment Law Journal* 46.
1209 Ndungu 2009 *International Journal of Labour Research* 90.
1210 Ndungu 2009 *International Journal of Labour Research* 91.
1211 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310.
1212 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
1213 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112; Creamer 1998 *ILJ* 20; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 157.

argued.[1214] What then is bargaining power? According to Schmidt and Ellis, bargaining power may be defined as the ability to induce an opponent to accept one's agreement on one's terms.[1215] In economic terms, as they further explain, a party's bargaining power "depends on that party's ability to impose costs on the other side for failure to reach an agreement while minimizing the party's own costs of disagreement".[1216] In this see-saw whereby the labour's bargaining power goes down as the employer's goes up,[1217] the law can raise labour's bargaining power relative to management's by inter-alia prohibiting the replacement of strikers.[1218] Evidently, permitting employers to replace striking workers will have the opposite effect.

To determine what impact (if any) anti-replacement legislation has on the balance of power; researchers in Canada have focused on whether the presence of such legislation results in significantly higher wage increases. Cramton and Tracy's study, which looked at data from 1967 to 1993, showed that anti-replacement legislation was associated with real wage increases.[1219] This, so they opined, was due to enhanced bargaining power of unions when employers are prohibited from using replacement labour during strikes.[1220] Therefore, the results of Cramton and Tracy's study seem to support the argument often made by employers that a ban on the use of replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases. However, as Cardwell has pointed out, "power is a very elusive concept that is difficult to measure empirically".[1221] In turn, as Cardwell has pointed out, "the balance of power in collective bargaining becomes tenuous and complex".[1222]

1214 Tenza 2016 *Obiter* 116.
1215 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 3.
1216 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
1217 Brassey 2013 *ILJ* 826.
1218 Schmidt and Ellis 2010 *Industrial International and Comparative Law Review* 2.
1219 Cramton and Tracy 1999 *Labour Law Journal* 174-177.
1220 Again, it should be noted that in the period (1967-1993) covered by this study, the ban on replacement labour had only been in place in British Columbia and Ontario for short periods of time. Therefore, as Cramton and Tracy themselves point out; their study relied heavily on data from Quebec where the ban had been in place since 1977. See Cramton and Tracy 1999 *Labour Law Journal* 174-177.
1221 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 50.
1222 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 50.

According to Hopkinson, who is a strong advocate for a ban on replacement labour, the idea that a ban on replacement labour upsets the balance of power created by collective bargaining legislation in favour of trade unions is fundamentally flawed. He argues that it is flawed for the very reason that collective bargaining legislation without a prohibition against hiring temporary replacement labour "does not bring about the much-vaunted balance of power assumed by these critics".[1223] In fact, he argues the use of replacement labour maintains the imbalance which exists at common law.[1224]

Be that as it may, it should be noted that some studies conducted in Canada have actually concluded that a ban on replacement labour does not increase the bargaining power of unions nor result in significantly higher wage increases. As Singh and Harish explain:

> This issue was investigated by Budd and Pritchett in an analysis of 2042 collective bargaining agreements in Canadian manufacturing between 1966 and 1985. Using changes in wages as an indicator of shifts in bargaining power, with statistical controls for other wage determinants, the authors concluded that, '*there is no evidence to support the contention that the presence of legislation affecting the use of strike replacements significantly alters relative bargaining power and the wage determination process*'... *As such, the only evidence on this issue suggests that legislation prohibiting replacement workers does not distort the balance of power between labour and management.*[1225] (Own emphasis added)

In a study which looked at data covering the period 1978 to 2008, Campolieti *et al.* actually found that bans on replacement workers decreased wages by about 1.8%.[1226] If a ban on replacement labour increases the bargaining power of unions and results in significantly higher wage increases, one might have expected that there would have been an increase in wage settlements in Quebec after it enacted anti-replacement labour legislation. However, as some commentators have

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1223 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.

1224 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.

1225 Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310. See also Singh and Harish 2001 *Industrial Relations Journal* 42; Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20 where they note that "Budd (1996) looked at wage settlements in manufacturing from 1965-1985 and found that anti-scab laws had no effect".

1226 They reason that "...labour relations legislation, such as bans on replacement workers, could influence investment and employment decisions of firms. An implication of these changes in labour policies' effects on investment flows and employment is that the bargaining power of firms could have increased and this could put downward pressure on wage settlements". See Campolieti *et al* 2014 *Industrial Relations* 418-419.

pointed out, there was actually a 1% to 2% decline in wage settlements in Quebec after the enactment of the said legislation.[1227]

The aforementioned studies seem to contradict each other. Given their findings, the research on the effects of anti-replacement labour legislation on wage settlements is clearly inconclusive.[1228]

4.6 Conclusions

The purpose of this chapter was to critically analyse the approach of Canada to the replacement of lawfully striking workers. In so doing, a legal comparative study was also undertaken to compare the position in Canada on this issue to that of South Africa. It was argued that the different approaches to the issue of replacement labour in Canada make Canada the perfect country to compare South Africa with.

In order to achieve the abovementioned goals, the chapter began by briefly outlining the relevant legal framework in Canada. Like in South Africa, it was shown that the rights and freedoms which trade unions enjoy today were hard earned.[1229] Also, the purpose of this chapter was to critically analyse the approach of Canada to the replacement of lawfully striking workers. Thus, the right to strike in Canada was considered, particularly the jurisprudence of the Supreme Court of Canada. Although reluctant to do so in a number of earlier cases, it was shown that the Supreme Court of Canada has interpreted section 2(d) of the Charter as protecting (1) the right to collective bargaining; and more recently, (2) the right to strike.[1230]

The relevant legal provisions which regulate the replacement of striking workers in Canada were considered. To delineate the study, only the (federal) Canada *Labour Code*, the Ontario Labour Relations Act, Quebec's *Labour Code* and the B.C. *Labour Relations Code* were considered. Thus, two jurisdictions permitting replacement workers and two which do not were considered.

1227 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20.
1228 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20.
1229 Fudge 2009-2010 *Canadian Labour and Employment Law Journal* 335.
1230 See *Saskatchewan Federation of Labour case* paras 3, 24 and 75.

The (federal) Canada *Labour Code* permits the replacement of lawfully striking workers, and the only exception to this rule is when an employer hires replacement labour "for the demonstrated purpose of undermining the trade union's representational capacity rather than to pursue legitimate bargaining objectives".[1231] The term "for the demonstrated purpose of undermining a trade union's representational capacity" refers to the employer's use of replacement workers in order to pursue illegitimate bargaining objectives (bad faith bargaining).[1232]

Ontario is probably the most interesting Canadian jurisdiction when it comes to the regulation of replacement labour during a strike: a ban on the use of replacement labour was introduced in 1993 but then repealed only two years later in 1995. Currently, in Ontario, like the Canada *Labour Code,* the Ontario *Labour Relations Act* does not prohibit an employer from hiring replacement workers during a lawful strike. Section 78(1) thereof does not expressly provide that employers may hire replacement workers during a strike. Rather, the section only prohibits the hiring of a professional strike breaker, and acting as a professional strike breaker.[1233]

Currently, the use of replacement labour during a strike is only prohibited in Quebec and British Columbia. In both provinces, the presence of replacement workers during a legal strike or lock-out is perceived as "shattering the balance of power between labour and management".[1234] Although worded slightly differently, most of the prohibitions under the Quebec *Labour Code* also apply under the B.C. *Labour Relations Code*.[1235] However, some important differences between the two statutes were noted. Although Quebec's *Labour Code* has a blanket prohibition on the use of bargaining-unit members during a strike, the B.C. *Labour Relations Code* allows employers to use non-bargaining unit employees and consenting strikers.[1236] This is the most significant difference between the two statutes

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1231 See 94(2.1) of the *Canada Labour Code.*
1232 Vaillancourt 2000 *McGill Law Journal* 790.
1233 See section 78(1) of the *Ontario Labour Relations Act*.
1234 Vaillancourt 2000 *McGill Law Journal* 763.
1235 Harris and McConchie1993 *The Advocate* 40.
1236 See section 68(2) of the *B.C. Labour Relations Code* which provides that "An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person". See also Banks *et al Labor*

identified. Also, whereas the Quebec *Labour Code* prohibits struck work to be done at other facilities, this is permissible under the B.C. *Labour Relations Code.*[1237] Importantly, it was also shown that both statutes allow for an exemption to the prohibition on replacement labour during a strike or lock-out in the case of emergencies and or services deemed essential.[1238]

From a comparative perspective, the Canada *Labour Code* and section 76 of the LRA in South Africa both protect an employer's right to carry on business during a lawful or protected strike, and, subject to limited exceptions, this includes the right to hire replacement labour. While the Canada *Labour Code* prohibits the use of such labour where it can be shown that the employer hired such workers in order to undermine a trade union's representational capacity,[1239] the LRA prohibits the use of such labour during an offensive lock-out.[1240] Similarly, the Ontario *Labour Relations Act* and section 76 of the LRA in South Africa both protect an employer's right to carry on business during a lawful or protected strike, and, subject to limited exceptions, this includes the right to hire replacement labour. While the Ontario *Labour Relations Act* prohibits the hiring of a professional strike breaker and acting as a professional strike breaker,[1241] the LRA prohibits the use of replacement labour during an offensive lock-out.[1242] Despite these varying approaches of the Canada *Labour Code*, the Ontario *Labour Relations Act* and section 76 of the LRA in South Africa, it is submitted that the end result is the same: the use of replacement labour renders a strike ineffective,[1243] and may even change collective bargaining into collective begging.[1244]

Relations in North America 72; Harris and McConchie1993 *The Advocate* 40; Singh and Harish 2001 *Industrial Relations Journal* 30.

1237 Singh and Harish 2001 *Industrial Relations Journal* 30.

1238 See section 68 of the *B.C. Relations Code* of 1996; section 109 of the *Quebec Labour Code* of 1977. See also McQuarrie *Industrial Relations in Canada 257*-258; Banks *et al Labor relations law in North America* 72; Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

1239 See section 92(2.1) of the *Canada Labour Code.*

1240 See section 76(2) of the LRA.

1241 See section 78(1) of the *Ontario Labour Relations Act*.

1242 See section 76(2) of the LRA.

1243 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.

1244 Tenza 2016 *Obiter* 116.

When compared to South Africa, Quebec and British Columbia have clearly taken a different approach regarding the regulation of replacement labour: they prohibit the use of such labour and the only exception to this rule is in relation to emergencies and or services deemed essential. It is submitted that Quebec and British Columbia's approach to the regulation of replacement labour during strikes is consistent with the CFA's jurisprudence.

The issue of striker replacement is debated in Canada as passionately as it is in the South Africa: there are proponents and opponents of anti-scab legislation. Basically, trade unions and labour advocates argue for laws banning or restricting the use of replacement labour to protect the potency of strikes, to reduce strike activity and to reduce strike related violence. They also argue that the use of replacement workers leads to longer strikes.[1245] On the other hand, employers and employers' organisations argue that restricting or prohibiting the use of replacement labour during labour disputes leads to increased bargaining power for unions; a shift in the balance of power; and increased strike activity, including longer strikes.[1246]

Given these conflicting claims, one of the objectives of this chapter was to consider the research which has been conducted in Canada to determine the impact of anti-scab legislation (or the lack thereof) on strike violence; incidence; duration; and the balance of power in collective bargaining. The findings of this research either proves or disproves some of the arguments which have been put forward in support or against anti-scab legislation.

Regarding violence, results of research conducted in Canada seems to support the argument that a banning the use of replacement labour during strikes would reduce strike related violence.[1247] Regarding strike activity or incidence, while some studies have found that that banning the use of replacement labour during strikes

1245 Singh *et al* 2005 *Labour Studies Journal* 61-62.
1246 Singh *et al* 2005 *Labour Studies Journal* 61-62.
1247 For example, see Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 63*;* Wallace and Grant 1991 *American Journal of Sociology* 1131; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 315.

actually increases the number of strikes,[1248] some studies have found that the impact of anti-replacement labour legislation on strike incidence is undetermined.[1249]

Again, regarding strike duration, while some studies have found that banning the use of replacement labour increases the duration of strikes,[1250] some studies have found that the use of replacement labour during strikes actually increases the duration of strikes.[1251] As Singh and Harish have opined, "it appears that the use of strike replacements decreases the cost of the strike to be borne by employers, thus decreasing their willingness to compromise in settling the dispute in a short time".[1252] Similarly, studies which have looked at the impact of anti-scab legislation (or the lack thereof) on balance of power in collective bargaining seem to contradict each other.[1253] This research focused on whether the presence of such legislation results in significantly higher wage increases; the results of this research are clearly inconclusive.[1254]

1248 For example, see Gunderson and Melino 1990 *Journal of Labour Economics* 300-310; Cramton and Tracy 1999 *Labour Law Journal* 174-177; Duffy and Johnson 2009 *Canadian Public Policy* 101.

1249 Campolieti *et al* 2014 *Industrial Relations* 405.

1250 See Cramton and Tracy 1999 *Labour Law Journal* 174-177.

1251 Singh *et al* 2005 *Labour Studies Journal* 77, 81. For an earlier study, see Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 74.

1252 Singh and Harish 1999 *Labour Law Journal* 182.

1253 For research which showed that banning replacement workers leads to higher wage settlements, see Cramton and Tracy 1999 *Labour Law Journal* 174-177. For research which came to a different conclusion, see Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310; Singh and Harish 2001 *Industrial Relations Journal* 42; Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20 where they note that "Budd (1996) looked at wage settlements in manufacturing from 1965-1985 and found that anti-scab laws had no effect".

1254 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20.

Chapter 5 – Conclusions and recommendations

5.1 Introduction

Similar as in many other countries, the right of workers to strike is constitutionally enshrined in South Africa. Section 23 of the Constitution unequivocally states that every worker has this right. Also, this right is given effect to in section 64 of the LRA. Workers exercise collective power primarily through the mechanism of strike action. On the other hand, employers may exercise power against workers during such strike action through a range of weapons such as, *inter alia*, the employment of alternative or replacement labour.[1255] As the number of strikes which last longer than a month has steadily increased during the past decade,[1256] so has the number of employers who use replacement labour during protected strikes.[1257]

The use of replacement labour during protected strike action has been controversial in South Africa from the inception of the LRA: it was one of the main factors leading to disputation during consultation on the proposed Draft Labour Relations Bill of 1995.[1258] Trade unions have argued for a total ban on replacement labour.[1259] For example, COSATU has called for scabs to be outlawed. It argues that strikes become meaningless if the employer has the right to employ scabs, and that scabs strip workers of their democratic right to protest. It considers scabs and strike breaking labour brokers as a scourge in society which undermines orderly collective bargaining.[1260] Similarly, some commentators have argued that section 76 of the LRA should be revisited or even repealed by the legislature.[1261] In a similar vein, some have argued for a prohibition on hiring replacement labour

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1255 See the *Certification case* para 66. See also chapter 2 above (paragraph 2.3.2), where this case is discussed.

1256 See Department of Labour *Annual Industrial Action Report 2015* 18; Levy "Strike action: will things ever be the same" 7-9; Department of Labour *Annual Industrial Action Report 2014* 3.

1257 As was noted in chapter 1, terms "scab labour" and "replacement labour" are used interchangeably in this study. See chapter 1 above (paragraph 1.1), where the statistics on the use of replacement labour by employers are outlined.

1258 Du Toit *et al The Labour Relations Act of 1995* 29.

1259 See Hepple and *Leroux Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.

1260 COSATU 2006 https://pmg.org.za/committee-meeting/7248/. See chapter 2 above (paragraph 2.6.2), where COSATU's position on the use of replacement labour is discussed in detail.

1261 See Tenza 2015 *Law Democracy and Development* 219-222.

during protected strikes, except for employers in essential services.[1262] However, there are some who hold the opposite view.[1263]

Currently, section 76 of the LRA prohibits replacement labour during a protected strike in only two cases: (1) to continue to maintain production where the whole or part of the employer's service has been designated as a maintenance service, or (2) to perform work of any employee who has been locked out, unless the lock-out is in response to a strike.[1264] In *SACCAWU v Sun International*,[1265] the Labour Court held that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased.[1266] This judgment directly contradicts the Labour Court's earlier judgment in *Ntimane v Agrinet.*[1267]

The controversy surrounding the use of replacement labour during a strike is not limited to South Africa. Indeed, the international position with respect to replacement labour shows stark differences.[1268] Some countries (such as South Africa) permit the use of replacement labour during protected strikes while others do not.[1269] South Africa is a member of the ILO, and has ratified the two key ILO conventions on freedom of association. The CFA has, notwithstanding the absence of a concrete provision regarding the replacement labour in the ILO's instruments, taken a clear position regarding the employment of replacement labour during a lawful strike. It has concluded that "the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict

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1262 Brand "How the law could better regulate the right to strike in South Africa" 71.
1263 For example, Jordan argues that a total ban on replacement labour in South Africa will mean that the employer is denied the right to do business. He submits that a substantial case based on public policy would have to be made out why this should be the case. For him, the mere fact that replacement labour may reduce the effectiveness of a strike is simply insufficient. See Jordaan 1997 *Law Democracy and Development* 4.
1264 See section 76 of the LRA. See also Hepple and *Leroux Laws Against Strikes* 34.
1265 2016 1 BLLR 97 (LC).
1266 At para 19.
1267 1999 20 ILJ 809 (LC).
1268 Du Toit *et al Labour Relations Law 241*.
1269 For example, see section 76(3)(b) of Namibia's *Labour Act* 11 of 2007 which provides that an employer must not "hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee".

sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association".[1270]

It was argued that much can be learned from other industrial relations systems, and that South Africa can adopt some of their best practices. Like in South Africa, the use of replacement labour is also controversial in Canada. There are proponents and opponents of anti-scab legislation.[1271] Unlike in South Africa, several researchers in Canada have conducted research to determine the impact of anti-scab legislation (or the lack thereof). Therefore, one of the main objectives of this study was to conduct a comparative analysis between South Africa and Canada regarding the regulation of replacement labour. In so doing, this research aimed to determine what lessons may be learnt by South Africa with respect to replacement labour.

It is against this backdrop that this study aimed to answer the following question: to what extent should replacement labour be allowed as a labour weapon by employers during strike action? The secondary research question was how South Africa should regulate the replacement of striking workers in light of the section 23 constitutional rights and international best practice. In order to determine the main objective set out above, the following secondary objectives were set:

1. To critically analyse the legal position and issues surrounding the replacement of lawfully striking workers in South Africa. This task invariably involved a close look at section 76 of the LRA and the relevant case law. There are conflicting judgments regarding the interpretation of this section.

2. To critically analyse the position of the ILO regarding the replacement of lawfully striking workers. The main focus here was on the jurisprudence of the ILO's Committee on Freedom of Association.

3. To critically analyse the approach of Canada to the replacement of lawfully striking workers. South Africa's position was compared to that of Canada

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1270 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 632.

1271 See Singh *et al* 2005 *Labour Studies Journal* 61-62.

throughout this analysis. The analysis of Canada was limited to the federal Canada *Labour Code*, British Columbia, Ontario and Quebec.

4. To draw conclusions and make recommendations for the way forward regarding South Africa's approach to the replacement of lawfully striking workers. These recommendations will be largely determined by the lessons gleaned from the comparative perspective.

It is submitted that the abovementioned objectives were achieved in the preceding chapters of this study. This chapter draws final conclusions and makes recommendations for the way forward.

5.2 Final analysis: the use of replacement labour in the context of industrial relations in South Africa

The main objective of chapter 2 of this study was to provide an in-depth analysis of the legal position regarding the use of replacement labour during strike action in South Africa. The chapter began by providing an overview of industrial relations and collective bargaining in South Africa. The purpose of this discussion was to provide some contextual background before providing an in-depth analysis of section 76 of the LRA and the relevant case law.

It was shown that collective bargaining is widely accepted as the primary means of determining the terms and conditions of employment in South Africa.[1272] Although section 23(5) of the Constitution guarantees the right of employers and employees to engage in collective bargaining, it does not create a legally enforceable duty to bargain.[1273]

Unfortunately, a key feature of collective bargaining in South Africa, as was highlighted, is its adversarial nature.[1274] In South Africa, collective bargaining and its significance have been underlined by "the legacy of deep adversarialism

1272 Du Toit 2000 *ILJ* 1544; Botha 2015 *De Jure* 330.
1273 See *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA) para 10.
1274 According to Levy, "that South African labour relations is highly adversarial, hardly deserves comment". See Levy "An examination of industrial action: 2013" 5.

between organised labour and employers".[1275] It was against the backdrop of suppression, victimisation and racial discrimination that trade unions in South Africa evolved in a strongly adversarial relationship in relation to employers and the state.[1276] More recently, the collective bargaining climate has, "particularly since 2007, become increasingly adversarial".[1277] Collective bargaining in South Africa is not only characterised by its adversarial nature but also by what can only be described as bad faith bargaining.[1278] It was argued that bad faith bargaining and highly adversarial labour relations are a toxic combination that can only lead to one result: industrial action. In South Africa, negotiations are characterised by unions tabling extreme demands, and then showing an unwillingness to move.[1279] Past experience has shown that if unions say 'no' long enough, then management is likely to agree to their demands.[1280] Consequently, this sort of (bad faith) bargaining may increase the probability of a strike and the length of a strike should it occur.[1281] Unfortunately, as Brassey points out, strikes are normally the means by which deadlocks in collective bargaining are broken in South Africa.[1282]

More worryingly, it was shown that closely related to bad faith bargaining and highly adversarial industrial relations is the issue of strike violence. Instead of being characterised by orderly picket lines, it has been said that South Africa has one of the highest rates of industrial action, with its strikes amongst the most violent in the world.[1283] Undeniably, the accuracy of this statement is debatable.[1284] Be that as it may, it is clear that much of the violence which occurs during strike

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1275 See Du Toit 2000 *ILJ* 1544. See also Davies and Leroux 2012 *Acta Juridica* 309; Du Toit 1997 *Law Democracy and Development* 41.

1276 See Du Toit 1995 *ILJ* 785.

1277 See Benjamin 2014 *ILJ* 3.

1278 Levy "An examination of industrial action: 2013" 20.

1279 Levy "An examination of industrial action: 2013" 20.

1280 See Levy "An examination of industrial action: 2013" 20.

1281 Levy "An examination of industrial action: 2013" 20.

1282 Brassey 2012 *ILJ* 5.

1283 Odendaal 2014 http:// www.miningweekly.com/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06.

1284 Regarding whether South Africa is the strike capital of the world, Levy has noted that "in an editorial piece published in Business Day (6 November 2013), Stephen Friedman disputed the assertion that South Africa was the 'strike capital of the world', and argued that in fact collective bargaining in South Africa was particularly efficient, and that those who took the view that the economy was being held ransom by the labour movement were introducing a 'moral panic'. His position was informed by an unpublished study from the University of Cape Town. Brand, basing his arguments on data from the IMF, the OECD and the Department of Labour, disputed the position and argued that South Africa was indeed the strike capital of the world". See Levy "An examination of industrial action: 2013" 6.

action in South Africa is between strikers and non-strikers, and is usually aimed at preventing the employer from continuing with production.[1285] In this regard, as the Department of Labour has noted, the most extreme example is the Marikana strike action which took place in August 2014.[1286] Instead of "responsible trade unionism",[1287] trade unions incite and support strike violence or simply step back and allow it to happen.[1288]

It was shown that the use of replacement labour increases the potential for conflict and violence.[1289] According to Tenza, it "has turned out to be the root cause of violent strikes".[1290] Many suggestions have been made regarding possible solutions to strike violence in South Africa. One of these is the ban on replacement labour during protected strike action.[1291] This issue is discussed later in this chapter.

Chapter 2 of this study also considered the pre-LRA era, that is to say, the era before the current LRA was enacted in 1995. Currently, the LRA protects the right of every employee to strike and recourse to lock-out for all employers,[1292] and the extent to which labour rights have been entrenched in the South African Constitution is unique.[1293] South Africa's Constitution protects the right to strike. Section 23 thereof specifically deals with labour relations. Section 23(1) provides that everyone has the right to fair labour practices. Section 23(2) provides that

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1285 See Levy "Strike action: will things ever be the same" 6.
1286 Department of Labour *Annual Report of the Department of Labour 2016* 4.
1287 For a discussion on the concept of "responsible trade unionism", see Botha 2015 De Jure 334.
1288 See Levy "Strike action: will things ever be the same" 18. See also Von Holdt 2010 *Transformation* 147, where he states that "At the COSATU 10th congress, held in 2009, the secretariat report criticised the use of violence and the trashing of streets in strikes, arguing that this delegitimised the strike weapon in the eyes of the public. Many of the affiliate leaders were clearly uncomfortable with this view, and argued that provocative and brutal police action and the use of scab labour to undermine strikes drove workers to use such tactics". (Emphasis added)
1289 See McQuarrie *Industrial Relations in Canada* 257; Todd *Collective Bargaining Law* 76.
1290 Tenza 2015 *Law Democracy and Development* 219-222.
1291 For example, see Tenza 2015 *Law Democracy and Development* 219-222; Brand "How the law could better regulate the right to strike in South Africa" 71.
1292 In terms of section 64(1) thereof, which in part provides that "Every employee has the right to strike and every employer has recourse to lock-out...". Section 64 should be read with section 65 which deals with the limitations to the right to strike and recourse to lock-out.
1293 See Grogan *Collective Labour Law* 12.

every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union and; (c) to strike.[1294]

However, it was shown that in many countries,[1295] including South Africa, the struggle for the right to strike has been a long and painful one for both trade unions and workers. Historically, in South Africa, strikes were a criminal offence and the common law did not recognise the right to strike. For example, the *Railway Regulation Act* of 1908 denied railway employees the right to strike under penalty of criminal prosecution. There were other pieces of legislation which were introduced in the early 1900s which also restricted and/or prohibited strikes, for example, the *Native Labour Regulation Act* of 1911.[1296] This act regulated the conditions of service of black employees. It also prohibited collective bargaining and strikes by black employees.[1297] Also, under the 1956 LRA, strikes and lock-outs were illegal under certain circumstances.[1298] In terms of the common law, strike action constituted a fundamental breach of contract which entitled the employer to dismiss the striking employees.[1299] It is therefore not surprising that the Constitutional Court has noted that the right to strike "is both of historical and contemporaneous significance".[1300]

In the 1980s, the Industrial Court, in a series of determinations, held that the dismissal of striking workers, whether or not on a legal strike, could constitute an unfair labour practice.[1301] The law on strikes and lock-outs evolved during the period 1980-2000 by an interpretation of the provisions of the 1956 LRA by the courts and the exercise by the Industrial Court of its unfair labour practice jurisdiction.[1302]

1294 These provisions should be read with section 7(3) which provides that "the rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill".

1295 For example, France, Germany and the United States of America *etcetera*. See Shorter and Tilly *Strikes in France 1830-1968* 21; Axley 1950 *Labour Law Journal* 441; Godfrey *et al Collective Bargaining in South Africa* 1.

1296 Act 15 of 1911.

1297 See Conradie *A critical analysis of the right to fair labour practices* 25.

1298 See section 12(1) thereof.

1299 See Myburgh 2004 *ILJ* 962; Grogan *Collective Labour Law* 141; *SACWU v Afrox* 1999 20 ILJ 1718 para 19.

1300 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 13.

1301 Myburgh 2004 *ILJ* 965.

1302 Myburgh 2004 *ILJ* 965.

It was shown that the early 1990's were marked by major political and legal changes in South Africa. Negotiations which began in 1991 between the government and the ANC eventually led to agreement on an Interim Constitution. The following labour rights were entrenched in the Interim Constitution: the right to fair labour practices; the right to form and join trade unions; the right to organise and bargain collectively; and the right to strike.[1303] Significantly, an employer's recourse to lock-out for the purpose of collective bargaining was also protected by the Interim Constitution.[1304] By the time negotiations commenced on the Draft Labour Relations Bill of 1995, business and labour had adopted very different positions on a number of key points.[1305] The use of replacement labour during protected strike action was one of the "key points of contention" during consultation on the proposed Draft Labour Relations Bill of 1995.[1306] Business South Africa wanted strikes and lock-outs to be permitted once the correct procedure (including a strike ballot) had been followed. It also submitted that employers should retain their right to replace striking workers.[1307] On the other hand, the trade unions were adamant that replacement labour or scab labour should not be permitted during a procedural strike.[1308] Importantly, it was noted that the 1956 LRA was silent on the issue of replacement labour.[1309] It seems as if what the law did not prohibit the law permitted.

It was against this backdrop (outlined above) that chapter 2 of this study aimed to provide an in-depth analysis of section 76 of the LRA and the relevant case law.

5.2.1 Section 76 of the LRA: the law and the case law

For convenience, it will be recalled that the section 76 of the LRA is titled *Replacement labour* and provides that:

1303 See section 27 of the *Interim Constitution*.
1304 See section 27(5) of the *Interim Constitution*.
1305 The position of Business South Africa on the Draft Labour Relations Bill of 1995 was set out in a document called 'A framework for Redrafting the *Labour Relations Act* (1995)'. On the other hand, the position of organised labour was set out in a document (unpublished) called 'Proposals on the Draft Labour Relations Bill: Summary of COSATU, NACTU and FEDSAL Proposals (1 May 1995)'. See Du Toit *et al The Labour Relations Act of 1995* 28 note 134.
1306 Du Toit *et al The Labour Relations Act of 1995* 29.
1307 See Du Toit *et al The Labour Relations Act of 1995* 29-30.
1308 See Du Toit *et al The Labour Relations Act of 1995* 29-30.
1309 See Satgar 1998 *Law Democracy and Development* 49 note 8.

> (1) An employer may not take into employment any person-
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> (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or
>
> (b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

Although the LRA protects the right of every employee to strike and recourse to lock-out for all employers,[1310] strikes and lock-outs "are not absolute and must be exercised within the legal framework before such industrial actions are protected by law".[1311] This is so because the LRA says so.[1312] The requirements for protection are set out in section 64 of the LRA. A lock-out must always be accompanied by an express demand: for a demand to exist the locked out employees must be informed of the actions expected of them for the lock-out to be lifted.[1313] The Constitutional Court in *Putco 3* has affirmed that "the LRA requires an employer to make a perspicuous demand to employees before resorting to locking them out".[1314] It is submitted that this case will now serve as a clear reminder to all employers that a lock-out must be preceded by a demand to the employees who are to be excluded from the workplace.

Returning to section 76 of the LRA and the use of replacement labour, trade unions have argued for a total ban on replacement labour in South Africa[1315] but they have clearly not yet achieved this goal since section 76 of the LRA permits the use of replacement labour during strikes. In light of the provisions of section 76(1)(a) of the LRA, an employer must make an election: (1) to either apply for designation of a maintenance service or (2) not to apply for designation of a maintenance service. If it chooses option 1 and is successful, it would secure a ban on strikes in the maintenance service – since section 65 of the LRA provides that no person may take part in a strike if that person is engaged in a maintenance service – but would also forfeit the right to replace employees who strike outside

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1310 In terms of section 64(1) thereof, which in part provides that "Every employee has the right to strike and every employer has recourse to lock-out..." Section 64 should be read with section 65 which deals with the limitations to the right to strike and recourse to lock-out.
1311 Samuel 2013 *Journal of Contemporary Management* 245.
1312 See section 64 of the LRA read with sections 65 and 67 thereof.
1313 Grogan *Collective Labour Law* 310.
1314 *Putco 3* para 35.
1315 See Hepple and *Leroux Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.

the maintenance service.[1316] If the employer chooses the latter option (2), its employees will be permitted to strike (subject to the provisions of section 65 of the LRA), but it retains the right to replace them should they go on strike.[1317] In general, therefore, nothing prevents an employer from taking on replacement labour during a strike except under the two exceptions in section 76 of the LRA. The controversy surrounding section 76 of the LRA begins when the courts have to interpret the words used therein, for example, the phrase 'to take into employment' as used in section 76(1) of the LRA. The principle of purposive interpretation played a critical role in how some of these cases were decided.

SACTWU v Coats[1318] involved the interpretation of the words 'to take into employment' as used in section 76 of the LRA. In this case the court had to determine whether the employer was contravening the provisions of section 76(1)(b) of the LRA by using its employees who were not locked out to perform their own work as well as the work of their co-workers who were locked out. Put differently, the question that the court had to determine was, did the employer take into employment any person for the purpose of performing the work of any employee who was locked out? It was argued on behalf of SACTWU that the purposive approach to interpreting 76(1)(b) should be pursued: the emphasis should not be on the meaning of 'take into employment', but on the words 'performing the work of'. The words 'take into employment' should be widely interpreted to include a person who assists an employer as this would not be inconsistent with the definition of 'employee'.

The court, correctly so it is submitted, rejected the trade union's argument.[1319] The implication of *SACTWU v Coats* is that an employer does not contravene the provisions of section 76(1)(b) of the LRA by using its employees who are not locked out to perform their own work as well as the work of their co-workers who are locked out.[1320] It is further submitted that this approach is consistent with the CFA's jurisprudence on the use of replacement labour during lawful or protected

1316 See section 76(1)(a) of the LRA.
1317 See section 76 of the LRA.
1318 *SACTWU v Coats* 2001 22 ILJ 1413 (LC).
1319 *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 7.
1320 See Grogan *Collective Labour Law* 316.

strikes. This is to say, the CFA does not object to the use of non-striking workers to assist in maintaining production by performing the work of the strikers.[1321]

Although the issue was not raised in *SACTWU v Coats*, it is important to note that the words 'to take into employment' as used in section 76 of the LRA includes engaging the services of a temporary employment service or an independent contractor. Section 76(2) of the LRA provides that for the purpose of the section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor.[1322] This provision is important as it prevents employers from circumventing the provisions of section 76(1) of the LRA.[1323] Without section 76(2) an employer could, lock-out its employees and then source replacement labour from a labour broker. The employer would then be able to argue that it did not take anyone into employment since the replacement workers are actually the employees of the labour broker.

Interestingly, the LRA does not prohibit an employer from implementing a lock-out in response to a strike and then sourcing replacement labour (to perform the work of the locked out employees) from a labour broker. Also, with or without a lock-out, the employer would be able to source replacement labour (to perform the work of striking employees) from a labour broker should its employees go on strike. Put differently, (subject to the prohibitions in section 76(1) of the LRA) nothing prevents an employer from sourcing replacement labour from a labour broker. Given the negative attitude of South African trade unions towards labour brokers, it is submitted that the anger of the striking workers may be exacerbated if the replacement workers are sourced from a labour broker.

Whilst on the subject of what the phrase 'to take into employment' means as used in section 76 of the LRA, the case of *SACTWU v Stuttafords*[1324] deserves a mention. In this case the employer argued that the temporary employees (whom it

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1321 For example see Report 278, Case No. 1543 (United States) para 92, where the CFA concluded that "The Committee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights".

1322 See section 76(2) of the LRA.

1323 Du Toit *et al The Labour Relations Act of 1995* 242.

1324 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC).

had employed regularly) were actually its own employees. The employer argued that it did not contravene the provisions of section 76(1)(b) of the LRA by using its (temporary) employees who were not locked out to perform their own work as well as the work of their co-workers who were locked out. On the facts of the case, the court concluded that the employer had contravened the provisions of section 76 by using temporary employees to perform the work of locked out (permanent) employees.[1325] When this case went on appeal,[1326] an issue that was indirectly raised on appeal was whether contravention of section 76 of the LRA renders an otherwise protected lock-out unprotected. The Labour Appeal Court, correctly so it is submitted, accepted the fact that employment of temporary replacement labour in contravention of section 76(1)(b) of the LRA by an employer in the course of a protected lock-out did not affect the legality of such a lock-out.[1327] It is submitted that this is so because there is simply no provision in the LRA which provides otherwise.

The most important case discussed in chapter 2 of this study was *Technikon v National Union of Technikon Employees of South Africa*.[1328] It is one of a handful of cases where the Labour Appeal Court has interpreted the provisions of section 76 in detail. In this matter, the court emphasised the fact that the LRA does not refer to either offensive or defensive lock-outs. It conceded that the terms are often used in labour law parlance.[1329] Subject to one qualification, the court also acknowledged that categorising a lock-out as offensive or defensive is necessary for the determination of the question whether the employer was entitled to employ temporary replacement labour. Relying on purposive interpretation, it was argued

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1325 See *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 50-52, where the court held that "To interpret s 76 in the manner contended for will, in my view, affect that power-play and effect a shift in the power relations between employers and employees. More specifically, it would lead to a weakening of the position of labour in the context of a protected strike or a procedural offensive lock-out. For this reason I do not consider the interpretation contended for by Mr Cassim [the employer's counsel] to be correct. I prefer the purposive approach which interprets s 76 in such a manner so as to give effect to the primary objects of the LRA and particularly, to promote orderly collective bargaining. I conclude, therefore, that the employment of temporary employees whom the respondent had previously employed for the purpose of performing work of any employee locked out, constitutes a contravention of s 76(1)(b) of the LRA".

1326 See *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC).

1327 See *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 20.

1328 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC).

1329 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 27.

on behalf of NUTESA that sections 64(3)(d) and 76(1)(b) should be read together to mean that a defensive lock-out is only available to an employer if it is faced with an unprotected strike.[1330] In rejecting this argument, the court (per Zondo J.P. as he was then) held that:

> It seems warranted that I should repeat what I said two year ago in the Labour Court about purposive interpretation. In *Transportation Motor Spares v National Union of Metalworkers of SA & others* (1999)20 *ILJ* 690 (LC) at 699B I said: 'While purposive interpretation has much to its credit, nevertheless, it must be adopted in appropriate cases. *Purposive interpretation is no licence to ignore the language used in the statute which is the subject of interpretation.' There is, accordingly, no justification for reading into s 76(1)(b) a word which is not there*.[1331] (Emphasis added)

This case is also important because the Labour Appeal Court authoritatively explained the rationale behind section 76 of the LRA. It explained it as follows:

> The policy [rationale behind section 76(1)(b) of the LRA] is one that also says to unions and employees: Do not lightly resort to a strike when a dispute has arisen because, in the absence of a strike, the employer may not employ replacement labour even if it institutes a lock-out but, if you strike, the employer will be able to employ replacement labour - with or without a lock-out. The sum total of all this is that the policy is to encourage parties to disputes to try to reach agreement on their disputes and a strike or lock-out should be the last resort when all reasonable attempts to reach agreement have failed.[1332]

It is submitted that the above case is a good example where a trade union, relying on purposive interpretation, sought to convince the court to interpret an employer's right to employ temporary replacement labour in terms of section 76(1)(b) of the LRA narrowly. *SACTWU v Coats*[1333] is another good example. Perhaps, on a broader level, these cases demonstrate the frustration which trade unions face regarding section 76 of the LRA. It should be recalled that during the drafting of the LRA trade unions were adamant that replacement labour or scab labour should not be permitted during a procedural strike.[1334] Even so, the language used in the Act cannot simply be ignored.[1335] If the legislature had intended that

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1330 See *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 39.

1331 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 41. See also *SACTWU v Coats* 2001 22 ILJ 1413 (LC) paras 6-7.

1332 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 43.

1333 *SACTWU v Coats* 2001 22 ILJ 1413 (LC).

1334 See Du Toit *et al The Labour Relations Act of 1995* 29-30.

1335 See *SACTWU v Coats* 2001 22 ILJ 1413 (LC) paras 6-7, where the court held that "The purposive approach is applied in order to give effect to the purpose or ratio of a statute. If the purpose of the statute is evident from the language used, the words used must be given their

employers should only be permitted to employ temporary replacement labour in response to an unprotected strike, it would have said so in section 76(1)(b) of the LRA. If it so decides, it is parliament which should amend legislation and not the courts.

The last case that was considered in chapter 2 of this study was the *Sun International case*.[1336] It will be recalled that the main issue in this case was whether in terms of section 76(1)(b) of the LRA an employer may continue to use replacement labour after a strike has ended.[1337] The court held that the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased.[1338] This judgment was in conflict with the Labour Court's earlier judgment in *Ntimane*[1339] where the court had held that the right to employ replacement labour accrues at the stage a defensive lock-out is implemented and endures until the lock-out ceases.[1340] Put differently, the court in *Ntimane* held that if an employer implements a defensive lock-out (a lock-out in response to a strike) it does not lose the right to employ replacement labour should its employees decide to terminate their strike.

When the *Sun International case* went on appeal, the Labour Appeal Court concluded that the appeal was moot, and the appeal was dismissed based on this point.[1341] The Labour Appeal Court declined to consider the merits of the appeal. It is submitted that if it had considered the merits of the appeal, the Labour Appeal Court would have provided an authoritative interpretation of section 76(1)(b) of the LRA thereby resolving the conflict between the judgments of the Labour Court mentioned above, namely *Ntimane* and the *Sun International case*. Ultimately, this means that the conflict between these two judgments of the Labour Court has not been resolved.

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ordinary meaning. The purposive approach is not a licence to ignore the plain meaning of the language".

1336 *Sun International case – SACCAWU v Sun International* 2016 1 BLLR 97 (LC).
1337 See *Sun International case* para 5.
1338 See *Sun International case* paras 13-19.
1339 *Ntimane – Ntimane v Agrinet* 1999 20 ILJ 809 (LC).
1340 See *Ntimane* paras 10-16.
1341 See *Sun International case* paras 15-22.

Be that as it may, it is submitted that the court in *Ntimane* was correct in its interpretation of section 76(1)(b) of the LRA. This conclusion is fortified by the fact that section 76(1)(b) of the LRA does not provide that the exception therein is rendered inapplicable when the strike in response to which the lock-out was initiated terminates.[1342] Furthermore, as the court held in *Ntimane*, that the employer's right to continue using replacement labour is counterbalanced by the right to picket.[1343] Section 69 of the LRA affords members of a trade union the right to picket in support of a protected strike or in opposition to any lock-out. The right to picket is reinforced by the fundamental rights to freedom of expression[1344] and freedom of assembly[1345] as guaranteed by the Constitution.[1346] According to the ILO, taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful.[1347] In South Africa, item 3 of the Code of Good Practice on Picketing[1348] makes it abundantly clear that one of the purposes of a picket may be to "dissuade replacement labour from working". However, it is submitted that this scenario may lead to more problems, because the use of replacement labour may heighten the risk of violence on a picket line if the employer uses replacement labour during a strike.[1349]

In light of the above discussion, the following final conclusions are drawn about the law and the relevant case law regarding the use of replacement labour in South Africa:

a) An employer is prohibited from hiring replacement labour to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service;[1350]

1342 See *Ntimane* para 16.
1343 See *Ntimane* para 18. However, contrast with *National Union of Technikon Employees v Technikon* 2000 21 ILJ 1645 (LC) para 12 (it should be noted that this judgment was overturned by the Labour Appeal Court on appeal).
1344 See section 16 of the *Constitution*.
1345 See section 18 of the *Constitution*.
1346 Van Niekerk and Smit *Law @ Work* 436.
1347 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 648-651.
1348 GN 765 in GG 18887, dated 15 May 1998.
1349 See also Tenza 2015 *Law Democracy and Development* 219.
1350 See section 76(1)(a) of the LRA.

b) An employer does not contravene the provisions of section 76(1)(b) of the LRA by using its employees who are not locked out to perform their own work as well as the work of their co-workers who are locked out;[1351]

c) Subject to the prohibitions in section 76(1) of the LRA, the LRA does not prohibit employers from sourcing replacement labour from a labour broker;[1352]

a) The employment of temporary or casual employees (notwithstanding any long-term relationship with the employer) for the purpose of performing the work of any employees who have been locked out constitutes a contravention of section 76 of the LRA;[1353]

b) The employment of temporary replacement labour in contravention of section 76(1)(b) of the LRA by an employer in the course of a protected lock-out does not affect the legality of such a lock-out;[1354]

c) Employers may employ temporary replacement labour in response to either protected or unprotected strikes;[1355]

d) In light of some conflicting judgments, there is some uncertainty whether the statutory right of an employer to use replacement labour is restricted to the period during which a protected strike pertains and not after it has ceased;[1356]

e) Employees may peacefully picket to dissuade replacement labour from working.[1357]

The above conclusions show that the restrictions which are placed on the use of replacement labour are minimal. The important point which should be emphasised is that in South Africa the moment employees go on strike, an employer is permitted to hire replacement workers (with or without a lock-out) to replace them.

1351 *SACTWU v Coats* 2001 22 ILJ 1413 (LC) para 7.
1352 See section 76 of the LRA.
1353 *SACTWU v Stuttafords* 1999 20 ILJ 2692 (LC) paras 50-52.
1354 *Stuttafords v SACTWU* 2001 22 ILJ 414 (LAC) para 20.
1355 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) paras 40-41.
1356 See *Sun International case* paras 13-19. However, contrast with *Ntimane* para 16. See also the Labour Court's judgment in the *Sun International case* paras 15-22. It should be emphasised that the Labour Appeal Court declined to determine the merits of the appeal in this case. If it had done so, it would have resolved the conflict between *Sun International* and *Ntimane.*
1357 See Item 3 of the Code of Good Practice on Picketing.

In 2003, the use of scab labour stood at 36% and rose to 45% in 2004 before another increase to 50% in 2005. In 2010 40.9% of employers reported to have used scab labour as opposed to 27.5% in 2009.[1358] If these statistics published by the Department of Labour are anything to go by, the number of employers who use replacement labour during strikes can only be expected to rise in the coming years.

Some commentators have suggested that the legislature should permit employers to hire replacement labour during employer initiated lock-outs.[1359] Apart from the fact that trade unions would probably be vehemently opposed to such a change, this suggestion (that the legislature should permit employers to hire replacement labour during employer initiated lock-outs) ignores the fact that the prohibition on replacement labour during employer initiated lock-outs is aimed at balancing the scales when employers resort to lock-outs. Without it, there would be no inducement for employers to lift lock-outs, which could endure indefinitely if the employer manages to keep its business running.[1360] Furthermore, as the Labour Appeal Court pointed out in *Technikon v National Union of Technikon Employees of South Africa*, the rationale behind section 76(1)(b) of the LRA – which prohibits replacement labour during employer initiated lock-outs – is to discourage the resort by employers to lock-outs. This is achieved by permitting employers to resort to lock-outs only in circumstances where they are prepared to do without replacement labour.[1361] It is therefore submitted that employers should not be permitted to hire replacement labour during employer initiated lock-outs.

1358 See Department of Labour *Annual Industrial Action Report 2006* 2; Department of Labour *Annual Industrial Action Report 2010* vii. It should be noted that the Annual Industrial Action Reports which have been published since 2010 (2011-2016) are silent regarding the number of employers who have used replacement labour

1359 For example, see Todd and Damant 2004 *ILJ* 921, where they argue that "...the prohibition on the use of replacement labour in employer initiated lockouts has the effect that an employer may find itself more quickly at the point where it is operationally and commercially justifiable on rational grounds to jettison the existing recalcitrant workforce and go to the cost and effort of replacing it and training a new workforce, rather than continuing to hold out with the existing workforce at the point of impasse". For a similar argument, see also Thompson 2006 *ILJ* 730.

1360 Grogan *Collective Labour Law* 315.

1361 *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) para 40.

Given the controversial nature of replacement labour in South Africa, one of the objectives in chapter 2 of this study was to consider the possible arguments and counter-arguments in favour of banning the use of replacement labour during protected strikes.

5.3.1 The possible arguments for anti-scab legislation in South Africa

Replacement labour or so-called scab labour has always been controversial in South Africa,[1362] and trade unions have argued for a total ban on replacement labour.[1363] Therefore, an important aspect of chapter 2 was to consider possible arguments which can be made in support of anti-replacement labour legislation. The arguments considered were that the use of replacement causes violence; renders a strike ineffective; leads to longer strikes; unfairly tilts the balance of power in favour of employers; and section 76 of the LRA may be vulnerable to constitutional attack.

Regarding the argument that the use of replacement labour causes strike violence, the drafters of the LRA recognised that under the 1956 LRA there was an unacceptably high incidence of unnecessary and unprocedural strikes, often characterised by violence.[1364] Unfortunately, the current provisions of the LRA have not prevented widespread violence during protected and unprotected strikes. [1365] Violent strikes are contrary to the LRA's objective of advancing labour peace.[1366] It is undeniable that strike violence usually breaks out when the employer attempts to continue operating during the strike,[1367] and that much of the violence which occurs during strike action in South Africa is between strikers and non-strikers.[1368] Strikers perceive the use of replacement labour by an employer as undermining their action and this breeds anger.[1369] According to Tenza, this "seems to be the root cause of the friction between replacement workers and strikers".[1370] It will be

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1362 Bendix *Industrial Relations in South Africa* 613.
1363 See Hepple and *Leroux Laws Against Strikes* 34; Todd *Collective Bargaining Law* 76; Bendix *Industrial Relations in South Africa* 613.
1364 Explanatory Memorandum to the Labour Relations Bill, published in 1995 16 ILJ 278 at 284.
1365 Ngcukaitobi 2013 *ILJ* 846.
1366 See section 1 of the LRA where the LRA's objectives are set out.
1367 Stewart and Townsend 1966 *University of Pennsylvania Law Review* 460.
1368 See Levy "Strike action: will things ever be the same" 6.
1369 Tenza 2015 *Law Democracy and Development* 220.
1370 Tenza 2015 *Law Democracy and Development* 220.

recalled that as far back as the early 1900s Jack London proclaimed that terrorism, that is violence, is an eminently successful policy of labour unions. According to him, this terrorism was only justifiable if it was "directed at the scab, placing him in such fear for life and limb as to drive him out of the contest".[1371] It was shown that there have been a number of instances in South Africa where scabs or people considered to be scabs were either assaulted or killed. As will be shown later in this chapter, empirical research conducted in Canada shows that the use of replacement workers causes or increases the probability of strike-related violence.[1372] As far as can be gathered, there is no empirical research conducted in either Canada or South Africa which has come to a different conclusion. In South Africa, replacement labour's propensity to trigger violence during a strike or lock-out is not even controversial.

Many suggestions have been made regarding possible solutions to strike violence in South Africa. One of these is the ban on replacement labour during protected strike action. According to Tenza, the use of replacement labour "has turned out to be the root cause of violent strikes".[1373] Accordingly, he argues that section 76 of the LRA should be revisited or even repealed by the legislature.[1374] Similarly, Brand also argues for a prohibition on hiring replacement labour during a protected strike.[1375] Would a prohibition on replacement labour during protected strike action end strike violence in South Africa? It probably would not end all the strike violence in South Africa: there may still be some violence between striking and non-striking employees with or without replacement labour. However, a ban may go a long way in addressing the problem of strike violence if the use of replacement labour is indeed the root cause of violent strikes.[1376]

The second argument that was considered in favour of a prohibition on replacement labour in South Africa was whether the use of such labour renders a strike ineffective. It has been argued that the use of replacement labour renders a

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1371 London *War of the Classes* 112.
1372 For example, see Wallace and Grant 1991 *American Journal of Sociology* 1131; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 315; Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 63.
1373 Tenza 2015 *Law Democracy and Development* 219-222.
1374 Tenza 2015 *Law Democracy and Development* 219-222.
1375 Brand "How the law could better regulate the right to strike in South Africa" 71.
1376 Tenza 2015 *Law Democracy and Development* 219-222.

strike ineffective,[1377] and some have gone as far as suggesting that the use of replacement labour changes collective bargaining into collective begging.[1378] This issue must be considered in light of the fact that the rights and freedoms which workers and trade unions enjoy today were hard earned. In the post-apartheid era, the extent to which labour rights have been entrenched in the South African Constitution is unique.[1379] It bears repeating that section 23 of the Constitution deals with labour relations. Section 23(1) provides that everyone has the right to fair labour practices. Section 23(2) provides that every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.[1380] The significance of these provisions in the South African context was emphasised by O'Regan J. in *SA National Defence Union v Minister of Defence*[1381] as follows:

> Section 23 provides that workers have the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. These rights are important to all workers. Black workers in South Africa were denied these rights for many years. Indeed, it was only in the 1980's that rights to form and join trade unions, to bargain collectively and to strike were afforded to black workers. The inclusion of these rights in our Constitution is a clear recognition of their significance to South African workers.[1382]

It is through industrial action – primarily through a strike – that workers are able to assert bargaining power.[1383] Strikes are a corollary to collective bargaining and the right to collective bargaining is incomplete without the pressure of a strike.[1384] In South Africa, in theory at least, the LRA converts strikes into "a proper trial of strength, the outcome of which is determined by whether the employer can do without the employee's labour longer than the employees can do without their wages".[1385] Therefore, the question which has to be asked is the following: where is the financial stress on employers supposed to come from in a situation where the no work no pay principle applies to employees who are on strike whilst at the

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1377 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.
1378 Tenza 2016 *Obiter* 116.
1379 See Grogan *Collective Labour Law* 12.
1380 These provisions should be read with section 7(3) which provides that "the rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill".
1381 1999 20 ILJ 2265 (CC).
1382 At para 20.
1383 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.
1384 *NUM v G Vincent Metal Sections* 1993 14 ILJ 1818, 1324-1325.
1385 Grogan *Collective Labour Law* 10. See also Tenza 2016 *Obiter* 116.

same time the law permits employers to simply replace those employees and thereby continue with production? Clearly, a strike is rendered ineffective whereby the employer is able to use replacement labour and thereby maintain production. This is so because the persuasive force of a strike largely depends upon the extent to which, by withdrawing their labour, striking workers are able to interrupt the employer's business or production.[1386]

It therefore, *prima facie*, seems odd to entrench the right of workers to strike whilst at the same time permitting the employer to simply replace them when they exercise that right. The following remarks by Calitz are apposite:

> Although South Africa's LRA does make provision for the use of replacement labour in limited circumstances, *it is still surprising that a pro-labour government and moreover a country in which the right to strike is protected in the constitution allows for the use of replacement labour. The lack of a prohibition on replacement labour is even more surprising if the emphasis that the Constitutional Court has placed on the importance of the right to strike to level the playing field for labour is taken into account*.[1387] (Emphasis added)

On the flip side, it should be recalled that the LRA affords members of a trade union the right to picket in support of a protected strike or in opposition to any lock-out,[1388] and the Code of Good Practice on Picketing[1389] provides that employees may picket to dissuade replacement labour from working.[1390] Therefore, as Jordaan has done, it may be argued that the right to picket counters the argument that the use of replacement labour renders a strike ineffective.[1391] It is submitted that picketing may address one problem (ensuring that a strike is not rendered ineffective by preventing replacement labour from working) but may also create another, namely strike violence. Okene has noted that:

> Picketing has long been recognised as very crucial in the conduct of industrial action. Where a claim by a trade union is rejected by an employer, the unions' call for strike can only be meaningful if it stops the employer from continuing his business. The strike will not be effective if the employer is able to recruit non-union labour ('blacklegs') [this term is used to refer to replacement labour or scab labour in the U.K.] or makes do with those who may not want to join the strike ('scab') to continue in business. <u>This makes the factory gate to become the focal point of the strike. Picketing is thus clearly the physical means employed by employees either to intensify</u>

1386 Todd *Collective Bargaining Law* 76.
1387 Calitz 2016 *South African Mercantile Law Journal* 459.
1388 See section 69 of the LRA.
1389 GN 765 in GG 18887, dated 15 May 1998.
1390 See Item 3 thereof.
1391 Jordaan 1997 *Law Democracy and Development* 4.

the economic pressure mounted on the employer or to ensure that the concerted stoppage of work is not undermined".[1392] (Emphasis added)

Supporters of anti-replacement legislation often argue that such legislation would reduce strike activity and also lead to shorter strikes should they occur. On the other hand, the opponents of anti-replacement legislation claim the opposite; they argue that any restriction on the use of replacement labour would increase the number and duration of strikes. [1393] Interestingly, in the South African context, the Department of Labour has suggested that the use of replacement labour leads to longer strikes.[1394]

Therefore, the third argument that was considered in favour of a prohibition on replacement labour in South Africa was whether the use of such labour leads to longer strikes. One of the most common arguments which proponents of anti-scab legislation usually make is that the use of replacement leads to longer strikes. The rationale behind this argument is that by using replacement labour during a strike (thereby maintaining production) an employer is not placed under much economic pressure to settle the dispute and is thus able to hold out for longer. It is true that strikes are lasting for longer periods in South Africa. In 2014 the longest strike in South Africa's history (post 1994) took place in the mining industry. The strike lasted for four months.[1395] In 2015, 5.1% of strikes lasted for 40 days or longer.[1396] This figure increased to 5.6% in 2016.[1397]

In light of the above, the critical question that was posed was whether the use of replacement labour leads to strikes lasting for longer periods in South Africa as the Department of Labour has suggested. It was argued that on a theoretical level, it is easy to accept that by using replacement labour during a strike an employer is not placed under much economic pressure to settle the dispute and is thus able to hold out for longer. However, the important point that was emphasised was the fact that the Department of Labour simply does not provide any evidence to support its hypothesis (quoted above) that the use of replacement labour is

1392 See Okene 2008 *University of Botswana Law Journal* 121
1393 Singh *et al* 2005 *Labour Studies Journal* 61-62.
1394 See Department of Labour *Annual Industrial Action Report 2010* 33.
1395 Tenza 2016 *Obiter* 115.
1396 See Department of Labour *Annual Industrial Action Report 2015* 18.
1397 In the same year, 9.2% of strikes lasted for 21-30 days. See Department of Labour *Annual Industrial Action Report 2016* 12.

expected to increase the length of strikes. As far as can be gathered, there is no empirical research which has been conducted in South Africa to ascertain the effects of using replacement labour. In particular, as far as can be gathered, there is no empirical research which has been conducted in South Africa to determine the effect (if any) that the use of replacement labour has on the length of strikes. As will be explained later in this chapter, there are some studies which have been conducted in Canada which have shown that banning the use of replacement labour during strikes increases the duration of strikes. However, there are also some studies conducted in Canada which have shown that a ban on the use of replacement labour actually decreases the duration of strikes.

Another argument which is often made in support of anti-scab legislation is that the use of replacement labour (unfairly) tilts the balance of power in favour of employers.[1398] Therefore, the fourth argument that was considered in favour of a prohibition on replacement labour in South Africa was whether the use of replacement labour (unfairly) tilts the balance of power in favour of employers. According to Ndungu, it does.[1399] Again, it bears repeating that the Department of Labour has stated that:

> Employers with greater bargaining power might see the use of replacement labour as a more effective tool and want to use it both more often and for longer. *The more use of 'scab labour' is expected to be significant enough to extract more concessions from employees*.[1400] (Emphasis added)

Those who are opposed to anti-scab legislation usually argue, among other things, that a ban on replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases.[1401] It was shown that the idea that a ban on replacement labour upsets the balance of power created by collective bargaining legislation in favour of trade unions is fundamentally flawed.[1402] In fact, it was shown that the use of replacement labour

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1398 See Singh and Harish 2001 *Industrial Relations Journal* 23; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 148; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310; Langille 1995 *Canadian Labour and Employment Law Journal* 46.

1399 Ndungu 2009 *International Journal of Labour Research* 90.

1400 See Department of Labour *Annual Industrial Action Report 2010* 33.

1401 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310.

1402 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.

maintains the imbalance which exists at common law.[1403] It is submitted that the use of replacement labour (unfairly) tilts the balance of power in favour of employers. This argument is best summed up by Hopkinson.[1404]

The last argument that was considered in favour of a prohibition on replacement labour in South Africa was that section 76 of the LRA – which regulates the use of replacement labour – may be unconstitutional. It is important to emphasise that, to date, the said section has not been declared unconstitutional by any court of law in South Africa. However, according to Creamer, the Constitution's protection of the right to strike and its silence on the lock-out heralds a new approach to the regulation of industrial action in South Africa, based on the 'asymmetrical parity' conception.[1405] In turn, he argues that legislation which regulates industrial action (such as the LRA) must be scrutinised to determine whether workers are given a sufficient advantage in collective bargaining and industrial action in order to correct the structural advantages enjoyed by employers.[1406] As has been argued above, the use of replacement labour (which is permitted by section 76 of the LRA) renders a strike ineffective and unfairly tilts the balance of power in favour of employers. It is submitted that section 76 of the LRA may also be vulnerable to constitutional attack based on another reason. It may be argued that the hiring of workers to replace lawfully striking workers constitutes a serious violation of freedom of association and the right to strike (by implication). Whether section 76 of the LRA is unconstitutional can only be determined by a court of law. This is an issue which requires further and in-depth research.

1403 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.

1404 See Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152, where he argues that ".... collective bargaining was provided to give workers a 'cartel in the supply of labour' in order to rectify the imbalance of bargaining power between labour and capital. Second, the 'balance of power' principle assumes that both sides have the means for inflicting economic hardship on the other for failure to reach an agreement. Third, the strike is the only effective economic weapon of labour. With these basic premises in mind, a strong case exists that the employer's ability to hire temporary strike replacements undermines the essential purpose and structure of collective bargaining legislation, turning the putative economic pressure of the strikers' withdrawal of labour into a sterile ritual". (Emphasis added) At 156, he adds that "...the employer's ability to hire replacement workers ensures that the costs of not reaching an agreement are suffered by only one side. During the strike, the strikers must go without their pay; however, *the employer who hires replacement workers suffers no comparable diminution in revenue as a result of the impasse...this unequal distribution of the ability to inflict serious economic harm produces a corresponding asymmetry in the pressure to compromise or capitulate*".

1405 Creamer 1998 *ILJ* 17.

1406 Creamer 1998 *ILJ* 17.

It is submitted that taken together, the arguments (outlined above) in favour of a prohibition on replacement labour in South Africa make a compelling case in favour of anti-replacement labour legislation in South Africa. The most compelling are that the use of replacement labour: (1) causes strike violence; (2) renders a strike ineffective; (3) unfairly tilts the balance of power in favour of employers. A complicating factor is the lack of empirical research in South Africa regarding the effects of the use of replacement labour. What would anti-replacement labour legislation in South Africa look like? In this regard, some recommendations are made later in this chapter.

5.4 Final analysis: replacement labour and the ILO

The focus of chapter 3 was on the position of the ILO regarding the replacement of strikers, and in particular the position of its supervisory body, namely the CFA.[1407] From the start, it was emphasised that there is no express provision regarding the use of replacement labour in any of the ILO's instruments.

The CFA was established to examine allegations and complaints concerning alleged violations of freedom of association submitted by a worker's organisation or an employer's organisation, or even a member state of the ILO.[1408] Why is the CFA's jurisprudence important? It is important because it serves as a point of reference in many countries and hence may have an impact on shaping the legal structure in such countries.[1409] It has examined close to 3000 cases since its inception in 1951,[1410] and this has enabled the CFA to "build up a body of

1407 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 2.

1408 Van Niekerk and Smit *Law @ Work* 27. See also Rogers *et al The International Labour Organization and the Quest for Social Justice, 1919-2009* 21 where it is stated that "In 1951, the ILO added an entirely original complaints mechanism, which authorized employers or workers organizations to submit complaints alleging violations of the basic principle of freedom of association contained in the *Constitution*, even when the relevant Conventions had not been ratified by the member State concerned. The Governing Body Committee on Freedom of Association, which considers these complaints, thus evolved into a full-blown complaints mechanism itself".

1409 Weiss 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 10.

1410 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.

principles on freedom of association and collective bargaining"[1411] based on relevant ILO instruments. Even South Africa's Constitutional Court has held that the CFA's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions.[1412]

The CFA has always recognised the right to strike by workers and their organisations "as a legitimate means of defending their economic and social interests".[1413] The Freedom of Association Convention does not expressly mention the right to strike.[1414] However, it was argued that when read together, several of its articles may be interpreted as implying such a right. Article 3 recognises the right of workers' organisations to organise their activities and to formulate their programmes. In turn, Article 10 defines the term 'organisation', as used in the convention, as any "organisation of workers or of employers for furthering and defending the interests of workers or of employers".[1415]

Notwithstanding the absence of a concrete provision regarding the right to strike in the ILO's instruments such as Freedom of Association Convention, the ILO's supervisory bodies have developed some key principles in relation to this right. For

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1411 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 3.

1412 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.

1413 ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 521.

1414 It should be noted that there are several international and regional instruments which do expressly protect the right to strike. For example, see the *International Covenant on Economic, Social and Cultural Rights* (1976), Article 8; the *European Charter on Human Rights* (1950), Article 28; the *Charter of the Organisation of American States,* Article 45(c); the *Arab Charter on Human Rights*, Article 35(c). It should also be noted that there are some ILO instruments which do refer to the right to strike. For example, see the *Abolition of Forced Labour Convention*, 1957 (No. 105) and the *Voluntary Conciliation and Arbitration Recommendation*, 1951 (No. 92).

1415 The ILO's Committee of Experts has stated that "Under Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' organizations. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3". (Emphasis added) See ILO *General Survey of the Rights on the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention (1994)* para 149. See also ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 46-48; Gernigon *et al ILO Principles Concerning the Right to Strike* 8-10; O'Neil 2011 *Labor & Employment Law Forum* 207; Servais 2010 *Canadian Labor and Employment Law Journal* 150; *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 32; Manamela and Budeli 2013 *CILSA* 315.

example, notwithstanding its fundamental nature, the ILO's supervisory bodies have concluded that the right to strike is not absolute. It may be restricted or even prohibited in exceptional circumstances.[1416] In general, the ILO accepts that the right to strike may be restricted or even prohibited in the public service[1417] or in essential services.[1418]

Similarly, it is submitted that the CFA has, notwithstanding the absence of a concrete provision regarding the replacement labour in the ILO's instruments, taken a clear position regarding the employment of replacement labour during a lawful strike. Several of the cases considered by the CFA over the years involving the replacement of strikers were discussed in chapter 3 of this study, and a similar exercise is not necessary in this chapter. The important principles which may be gleaned from the CFA's jurisprudence are the following:

a) The CFA does not object to the replacement of strikers if the strike itself is not legal or protected as it is referred to in some countries. This conclusion is based on the CFA's own conclusion in the case against the United States where it said that "*if a strike is otherwise legal*, the use of labour drawn from

1416 ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 49-51; ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 570.

1417 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 52, where it is stated that "Taking into account the importance of ensuring the continuity of the functions of the three branches of the State (the legislative, executive and judicial authorities) and of essential services, the Committee of Experts and the Committee on Freedom of Association consider that States may restrict or prohibit the right to strike of public servants 'exercising authority in the name of the State'".

1418 The Committee of Experts has noted that "it considers that essential services, for the purposes of restricting or prohibiting the right to strike, are only those 'the interruption of which would endanger the life, personal safety or health of the whole of part of the population'. This concept is not absolute in its nature in so far as a non-essential service may become essential if the strike exceeds a certain duration or extent, or as a function of the special characteristics of a country (for example, an island State)". See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 53. See also ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 585, for the full list of services which the ILO considers to be or may be essential. Amongst others, these include electricity services, the hospital sector, water supply services, the police and armed forces, fire-fighting services *etcetera*.

outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike..."[1419]

b) The CFA does not object to the use of non-striking workers to assist in maintaining production by performing the work of the strikers. However, the CFA does object to discrimination in favour of non-strikers, for example, whereby such workers are given bonuses.[1420]

c) The CFA has condemned the permanent replacement of strikers who are engaged in a lawful strike. As the CFA has held, such a practice entails derogation from the right to strike.[1421]

d) The CFA has linked essential services to the hiring of workers to replace strikers, and has done so by condemning the hiring of workers to break a strike in "a sector which cannot be regarded as an essential sector in the strict sense of the term" as constituting "a serious violation of freedom of association".[1422] The result of this is that the CFA has condemned even legislation which provides for the temporary replacement of strikers;[1423] provided that such legislation permits employers in a non-essential service or sector to replace lawful strikers. The facts in *Chile 1* and *Chile 2* provide the best example in this regard.

e) The CFA has taken the bold step of requiring governments to repeal and or amend legislation which was found to be inconsistent with the principle that the replacement of lawful strikers should be limited to essential services or sectors. The case against Argentina is a good example in this regard: the committee requested the Argentinean government to "take the necessary

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1419 Report 278, Case No. 1543 (United States) para 92.
1420 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 675.
1421 See Report 278, Case No. 1543 (United States) para 92.
1422 See *Chile 1* para 322.
1423 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 61, where the CFA noted that "The Committee considers that provisions allowing employers to dismiss strikers or replace them temporarily or for an indeterminate period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute".

steps to repeal Resolution No. 203/96 issued by the Education Council of Río Negro province",[1424] and this recommendation was complied with.[1425]

It was argued that when read together, the above principles make it clear that as far as the CFA is concerned, the replacement of lawful strikers may only be justified in or limited to essential services or sectors. The CFA has condemned the replacement (both permanent and temporary) of lawful strikers in a sector which cannot be regarded as an essential sector in the strict sense of the term. It is important to emphasise the fact that the ILO's committee of experts has also adopted a similar approach. As recent as 2016 the committee criticised plans by the UK government to expand the right of employers to hire replacements for strikers.[1426] It noted that:

> The committee further observes the concerns raised by the TUC in relation to the proposal to revoke the regulation in the Conduct of Employment Agencies and Employment Businesses Regulations 2003 which prohibited the provision of agency workers to replace strikers. The committee requests the government to review this proposal with the social partners concerned bearing in mind its general consideration that the use of striker replacements should be limited to industrial action in essential services.[1427] (Emphasis added)

It is submitted that the CFA's position on the issue of replacement labour is supported by certain provisions of the Freedom of Association Convention when read together. That is to say, it may be argued that permitting employers to replace lawfully striking workers (both temporarily and permanently) is inconsistent with certain provisions of the Freedom of Association Convention when read together. In fact, as was noted in chapter 3 of this study, Servais goes a step further by arguing that Article 8 of the Freedom of Association Convention may be interpreted as requiring states to prohibit the hiring of replacement workers (either temporarily or indefinitely) during lawful strikes. Correctly so it is submitted, he says:

> The CFA has concluded that the hiring of workers for the purpose of neutralizing a strike in a sector which cannot be regarded as essential in the sense explained above constitutes a serious violation of trade union rights. In my view, Convention 87 [the

1424 Report 307, Case No. 1899 (Argentina) para 81.
1425 See a document titled "Effect given to the recommendations of the Committee and the Governing Body – Report No. 308". This document is available on the ILO's website (http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20060:0::NO:::).
1426 ILO *Application of International Labour Standards 2016 (I)* 153-154.
1427 ILO *Application of International Labour Standards 2016 (I)* 153-154.

> Freedom of Association Convention] may be interpreted as requiring states to prevent the hiring of strike breakers, whether in the public or the private sector, for either temporary or indefinite replacement of strikers.[1428] (Emphasis added)

Workers do not form and/or join trade unions merely for the sake of doing so. Once a trade union is formed, organised workers in the form of a trade union meet the employer on a more equal footing than an individual worker would – they are able to confront the employer with collective power.[1429] It is submitted that workers confront the employer with collective power by withholding their labour. Put differently, it is through industrial action – primarily through a strike – that workers are able to assert bargaining power.[1430]

In light of the above discussion on the CFA's jurisprudence, the conclusion to be drawn is that section 76 of the LRA in South Africa constitutes a serious violation of freedom of association (and by implication the right to strike)[1431] in as much as it permits the use of replacement labour in sectors which cannot be regarded as essential sectors in the strict sense of the term. It bears repeating that South Africa's Constitutional Court has held that the CFA's decisions are an authoritative development of the principles of freedom of association contained in ILO Conventions.[1432]

It was noted that there are some countries and/or jurisdictions which do conform to the principle that the replacement of strikers should be limited to essential services. Expressed differently, these countries and/or jurisdictions have a general prohibition regarding the replacement of lawful strikers, and the only recognised exception is essential services. It is submitted that this approach is consistent with

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1428 Servais 2010 *Canadian Labor and Employment Law Journal* 158.
1429 Banjo 2009 *South African Journal of Labour Relations* 121.
1430 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 33.
1431 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 61, where the CFA noted that "The Committee considers that provisions allowing employers to dismiss strikers or replace them temporarily or for an indeterminate period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute".
1432 See *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 30.

the CFA's jurisprudence on the matter. Some good examples are Mexico, New Zealand and certain provinces in Canada (British Columbia and Quebec).[1433]

5.5 Final analysis: replacement labour in Canada and the comparative analysis

Given the significant amount of research and literature on the issue of replacement labour in Canada, chapter 4 of this study focused on Canada's approach to the use of replacement labour during lawful strikes. In so doing, whilst keeping the CFA's jurisprudence in mind, South Africa's position regarding replacement labour was compared to that of Canada.

First of all chapter 4 briefly outlined the relevant legal framework in Canada. Interestingly, the Canadian Constitution*,* in terms of the property and civil rights power under section 92(13),[1434] grants each Canadian province exclusive jurisdiction over labour policies.[1435] The federal government only has authority over labour relations in specified industries, and in relation to its own employees.[1436] Unlike in South Africa, Canadian labour legislation is not regulated solely at national level. Also, unlike the South African Constitution which protects the three core labour rights (the right to associate, the right to engage in collective bargaining and the right to strike),[1437] the Canadian Constitution*,* through the Canadian Charter of Rights and Freedoms*,* merely provides that everyone has the right to freedom of association.[1438] Moreover, unlike South Africa's LRA which proclaims that every employee has the right to strike,[1439] Canadian labour legislation (both at the federal and provincial level) merely provides that every employee is free to join the trade union of their choice and to participate in its

1433 See McQuarrie *Industrial Relations in Canada* 257-258; Banks *et al Labor relations law in North America* 72; section 68 of the B.C. *Labour Relations Code*; section 109 of Quebec's *Labour Code*.
1434 See the *Consolidated Constitution Acts* 1876 to 1982.
1435 Banks *et al Labor Relations in North America* 32; Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
1436 Thompson and Slinn 2013 *Comparative Labour Law and Policy Law Journal* 395.
1437 See section 23 of the *Constitution*.
1438 See section 2 of the *Charter*.
1439 In terms of section 64 of the LRA.

lawful activities.[1440] These statutes regulate strikes, thus implying that the employees they cover have the right to strike.[1441]

In a move which was welcomed by many, the Supreme Court of Canada has authoritatively interpreted section 2(d) of the Charter as protecting (1) the right to collective bargaining; and more recently, (2) the right to strike. In the *Saskatchewan Federation of Labour case,* the court (per Abella J. writing for the majority) stated that the right to strike is not "merely derivative of collective bargaining, it is an indispensable component of that right".[1442]

The focus of chapter 4 was on Canada's approach to the use of replacement labour during lawful strikes. Some jurisdictions in Canada permit the use of such labour while others do not. This is the crux which made Canada such an interesting country to compare South Africa to. On one hand, two jurisdictions which permit the use of replacement labour during a lawful strike in Canada were considered: the federal level (Canada *Labour Code*) and Ontario (Ontario's Labour Relations Act). On the other hand, two jurisdictions which do not permit the use of such labour were considered: British Columbia (B.C. *Labour Relations Code*) and Quebec (Quebec's *Labour Code*).

Like section 76 of the LRA in South Africa, section 94(2.1) of the Canada *Labour Code* does permit the use of replacement labour during strikes. The major difference between the two statutes is the exception to the general rule that an employer may use replacement labour during a lawful or protected strike. Whilst the former prohibits the use of such labour during an offensive lock-out,[1443] the latter only prohibits the use of such labour where it can be shown that the employer hired such workers in order to undermine a trade union's representational capacity.[1444] Despite these varying approaches, it can be argued that the end result is the same: the use of replacement labour renders a strike

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1440 See section 8(1) of the *Canada Labour Code*; section 5 of the Ontario *Labour Relations Act*; section 4 of the B.C. *Labour Relations Code*; and section 3 of Quebec's *Labour Code*. It should be noted that the Quebec's *Labour Code* is worded slightly differently.

1441 Singh and Harish 2001 *Industrial Relations Journal* 29, 30.

1442 *Saskatchewan Federation of Labour case* para 3.

1443 See section 76(2) of the LRA.

1444 See section 92(2.1) of the *Canada Labour Code.*

ineffective,[1445] and may even change collective bargaining into collective begging as some commentators have suggested.[1446] The following remarks of Rodrigue Blouin, the only dissenting voice within the Sims Task Force,[1447] bear repeating:

> 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.[1448]

It was argued in chapter 4 of this study that Ontario is probably the most interesting Canadian jurisdiction when it comes to the regulation of replacement labour during a strike. Indeed, Ontario has seen "greater upheaval in its law and jurisprudence" on replacement labour than most other provinces.[1449] A ban on the use of replacement labour was introduced in 1993, but repealed only two years later in 1995. Post-1995, there have been several Bills put (unsuccessfully) before Ontario's legislature meant to amend the Ontario *Labour Relations Act* with respect to the regulation of replacement workers during strikes. Two examples are, Bill 86 (titled *Labour Relations Amendment Act (Replacement Workers), 2008*) and Bill 45 (titled *Labour Relations Amendment Act (Replacement Workers*), 2010). These bills proposed amending the Ontario *Labour Relations Act* by re-introducing the ban which was in place between 1993 and 1995 on the use of replacement workers during a strike or lock-out. However, these Bills did provide for some exceptions: employers would have been permitted to use "specified replacement workers" in order to prevent danger to life, health or safety (essential services); destruction or deterioration of machinery; and environmental damage. It is submitted that this approach would have been consistent with the CFA's

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1445 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112.
1446 Tenza 2016 *Obiter* 116.
1447 It will be recalled that the Sims Task Force was appointed by the Canadian government in 1995 to conduct a comprehensive review of the law regulating collective bargaining for private sector employees and trade unions within the federal jurisdiction. See Vaillancourt 2000 *McGill Law Journal* 760. It will also be recalled that the majority of the members of the Task Force recommended that, subject to some very minimal limitations, the use of replacement labour during lawful strikes should be permitted by the *Canada Labour Code*. As it is today, section 94(2.1) of the *Canada Labour Code* (which regulates the use of replacement labour) reflects this viewpoint.
1448 The *Sims Report* 137. See also Vaillancourt 2000 *McGill Law Journal* 780.
1449 Logan 2002 *Industrial Relations* 150.

jurisprudence which says making use of replacement workers during strikes should be limited to essential services.[1450]

Currently, in Ontario, similar to the Canada *Labour Code*, the Ontario *Labour Relations Act* does not prohibit an employer from hiring replacement workers during a lawful strike. Section 78(1) thereof does not expressly provide that employers may hire replacement workers during a strike. Rather, the section only prohibits the hiring of a "professional strike breaker", and acting as a "professional strike breaker".[1451]

A few things should be noted about professional strike breakers. The term does not exist in South Africa's LRA; the LRA does not even refer to 'professional replacement workers'. In general, a professional strike breaker may be defined as a person who habitually works as a replacement worker. This refers to someone who is not just an ordinary replacement worker, but a professional whose purpose is to break a strike (hence the use of the term 'strike breaker').[1452] As the North American experience demonstrates, the use of professional strike breakers may lead to many negative consequences. It was shown in chapter 4 of this study that professional strike breakers have been used in North America as far back as the early 1900's,[1453] and that the use of such persons, as opposed to ordinary replacement workers, may exponentially increase the likelihood of violence.[1454] Another problem with professional strike breakers is that they need industrial conflict in order to earn a living, that is to say it is "in their best interest to perpetuate conflict between labour and management".[1455] They purposely prolong strikes because the longer the duration of a strike, the better their income.[1456]

1450 See chapter 3 above.
1451 See section 78(1) of the *Ontario Labour Relations Act*.
1452 Section 78(2) of the Ontario *Labor Relations Act* defines the term as "a person who is not involved in a dispute whose primary object...is to interfere with, obstruct, prevent, restraint or disrupt the exercise of any right under this Act in anticipation of, or during a lawful strike or lock-out".
1453 Tuttle 1966 *Labour History* 193. See also Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 17, where she states that "Professional strikebreaking in North America dates back to the nineteenth century".
1454 See Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 17-18.
1455 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 19.
1456 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 19.

Assuming without deciding that professional strike breakers do exist in South Africa, this is an issue which may need to be addressed in the LRA. Following the example set in the Ontario Labour Relations Act, the use of such persons should be prohibited in the LRA. It is interesting to note that in Canada, similar to Ontario, the province of Manitoba also prohibits the hiring of professional strike breakers during a strike.[1457]

Currently in Canada, the use of replacement labour during a strike is only prohibited in British Columbia and Quebec. In 1977, the first legislative ban in Canada on the use of replacement workers during a lawful strike came in the form a provincial anti-scab law in the province of Quebec,[1458] and in 1992 British Columbia became the second province in Canada (after Quebec) to introduce a ban on the use of replacement workers during lawful strikes. In both provinces, "the presence of replacement workers during a legal strike or lockout is perceived as shattering the balance of power between labour and management".[1459]

Given that Quebec's *Labour Code* served as a model for the B.C. *Labour Relations Code*,[1460] it is unsurprising that the two statutes regulate replacement labour similarly – both statutes ban the use of replacement labour during a strike or lock-out. Although worded slightly differently, most of the prohibitions under Quebec's *Labour Code* also apply under the B.C. *Labour Relations Code.*[1461] They both permit managerial staff to work as replacements,[1462] and allow for an exemption to the prohibition on replacement labour during a strike or lock-out in the case of emergencies and or services deemed essential.[1463] There are, however, some important differences between the two statutes which should be noted. Although Quebec's *Labour Code* has a blanket prohibition on the use of bargaining-unit members during a strike, the B.C. *Labour Relations Code* allows

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1457 See Manitoba's *Labour Relations Act* of 1988 (as amended), section 14 thereof.
1458 Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 16.
1459 Vaillancourt 2000 *McGill Law Journal* 763.
1460 Harris and McConchie1993 *The Advocate* 40.
1461 Harris and McConchie1993 *The Advocate* 40.
1462 Banks *et al Labor Relations in North America* 72; Singh and Harish 2001 *Industrial Relations Journal* 30; Harris and McConchie1993 *The Advocate* 39-40.
1463 Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

employers to use non-bargaining unit employees and consenting strikers.[1464] This is the most significant difference between the two statutes.

It is submitted that Quebec and British Columbia's approach to the regulation of replacement labour during strikes is consistent with the CFA's jurisprudence. Quebec's *Labour Code* and the B.C. *Labour Relations Code* both allow for an exemption to the prohibition on replacement labour during a strike in the case of emergencies and or services deemed essential.[1465] It will be recalled that, in case after case, the CFA has concluded that the replacement of strikers should be limited to essential services.[1466] As was noted earlier in this chapter, it may be argued section 76 of the LRA in South Africa constitutes a serious violation of freedom of association (and by implication the right to strike)[1467] in as much as it permits the use of replacement labour in sectors which cannot be regarded as essential sectors in the strict sense of the term.

Like Quebec and British Columbia, there are some countries which do conform to the principle that the replacement of strikers should be limited to essential services. Some good examples are Mexico (since 1931)[1468] and New Zealand. Regarding the latter, in terms of section 97(4) of the Employment Relations Act,[1469] the use of replacement workers during strikes is limited to emergencies or services

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1464 See section 68(2) of the *B.C. Labour Relations Code* which provides that "An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person". See also Banks *et al Labor Relations in North America* 72; Harris and McConchie1993 *The Advocate* 40; Singh and Harish 2001 *Industrial Relations Journal* 30.

1465 See section 68 of the *B.C. Relations Code* of 1996; section 109 of the *Quebec Labour Code* of 1977. See also McQuarrie *Industrial Relations in Canada 257*-258; Banks *et al Labor relations law in North America* 72; Singh and Harish 2001 *Industrial Relations Journal* 30; Vaillancourt 2000 *McGill Law Journal* 764 (note 35); Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 299.

1466 See chapter 3 above and in particular the discussion on the CFA's jurisprudence.

1467 See ILO *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* 61, where the CFA noted that "The Committee considers that provisions allowing employers to dismiss strikers or replace them temporarily or for an indeterminate period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute".

1468 Singh and Harish 2001 *Industrial Relations Journal* 33, 34; Banks *et al Labor relations law in North America* 140. See also Article 447 of the *Federal labour Law* (*Ley de Trabajo*).

1469 *Employment Relations Act* 24 of 2000.

which may be deemed essential.[1470] Similarly, although the use of replacement labour is prohibited in Portugal, an exception is made for meeting indispensable social needs and the maintenance of equipment.[1471]

In Namibia, the use of replacement labour is prohibited but it is not clear from the relevant statute whether there are any exceptions to this prohibition.[1472] In Europe, the following countries prohibit the use of replacement labour: Portugal,[1473] Italy,[1474] Lithuania,[1475] Slovenia,[1476] and Slovakia.[1477] It is interesting to note that other Canadian provinces too have seriously contemplated introducing a ban on the use of replacement workers during lawful strikes. In 1994, the provincial governments in New Brunswick and Nova Scotia indicated that they were contemplating the introduction of "blanket anti-replacement legislation".[1478] However, following concerted and vigorous campaigns by employers against such proposals, both provincial governments were forced to back down.[1479]

Probably, one of the most important parts of chapter 4 of this study was the discussion regarding the empirical research which has been conducted in Canada to determine the impact of anti-replacement labour legislation (or the lack thereof) on strike violence; incidence; duration; and collective bargaining in general *etc*. In chapter 2 of this study, the possible arguments which can be made in support of anti-replacement labour legislation in South Africa were discussed. These were that the use of replacement causes violence; renders a strike ineffective; leads to

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1470 Section 97(4) provides that "An employer may employ or engage another person to perform the work of a striking or locked out employee if — (a) there are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and (b) the person is employed or engaged to perform the work only to the extent necessary for reasons of safety or health".

1471 Calitz 2016 *South African Mercantile Law Journal* 449.

1472 See section 76(3)(b) of Namibia's *Labour Act* 11 of 2007, which provides that an employer must not "hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee".

1473 Du Toit *et al Labour Relations Law 241*; Warneck *Strike Rules in the EU27 – A Comparative Overview* 58.

1474 In Italy striking workers may not be replaced by other workers recruited from outside the enterprise. Even temporary replacement is not permitted. See Warneck *Strike Rules in the EU27 – A Comparative Overview* 43.

1475 However, it should be noted that there is an exception to the ban on replacing striking workers in Lithuania – when maintenance services are not guaranteed. See Warneck *Strike Rules in the EU27 – A Comparative Overview* 47.

1476 Warneck *Strike Rules in the EU27 – A Comparative Overview* 67.

1477 Warneck *Strike Rules in the EU27 – A Comparative Overview* 64.

1478 Logan 2002 *Industrial Relations* 151.

1479 Logan 2002 *Industrial Relations* 151.

longer strikes; unfairly tilts the balance of power in favour of employers. The findings of the empirical research conducted in Canada are quite important, because they prove or disprove these arguments.[1480]

Regarding strike violence, empirical research in Canada has consistently found that the use of replacement workers during a strike causes violence or increases the likelihood of violence.[1481] As far as can be gathered, there is no empirical research which has been conducted in Canada that has come to a different conclusion.

Regarding strike incidence, the results are less clear.[1482] On one hand, a number of studies have shown that banning the use of replacement labour during strikes actually increases the number of strikes.[1483] Logically, a strike will be more effective where replacement labour is prohibited. Perhaps, this is the reason why anti-replacement legislation has been found to increase strike incidence as trade unions may be more likely to resort to strike action when they know that it will be effective. On the other hand, as Campolieti *et al.* found in their study, a study which looked at data covering the period from 1978 to 2008, the impact of anti-replacement labour legislation on strike incidence is uncertain.[1484]

From the South African perspective, what is undisputable is that (1) the use of replacement labour has been permitted (officially) since 1995 with the enactment of the LRA, and (2) there has been an upward trend in strike incidence since the enactment of the LRA in 1995.[1485] Initially, there was a downward trend between 1995 and 2003.[1486] However, there was a sharp increase in the number of strikes during the period 2009 to 2015.[1487] There were 51 strikes in 2009, 74 in 2010, 67 in

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1480 See chapter 4 above (paragraph 4.5), where the research is critically analysed.
1481 See Wallace and Grant 1991 *American Journal of Sociology* 1131; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 315; England 1990 *International and Comparative Law Quarterly* 564; Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 63.
1482 See chapter 4 above (paragraph 4.5.2), where the research is critically analysed.
1483 For example, see Gunderson and Melino 1990 *Journal of Labour Economics* 300-310; Cramton and Tracy 1999 *Labour Law Journal* 174-177; Duffy and Johnson 2009 *Canadian Public Policy* 101.
1484 Campolieti *et al* 2014 *Industrial Relations* 405.
1485 Levy "An examination of industrial action: 2013" 7.
1486 Levy "An examination of industrial action: 2013" 7.
1487 Department of Labour *Annual Industrial Action Report 2013* 3.

2011, 99 in 2012, 114 in 2013, 88 in 2014, 110 in 2015, and 122 in 2016.[1488] The opponents of anti-replacement legislation often argue that any restriction on the use of replacement labour would increase the number of strikes, and proponents of anti-replacement legislation claim the opposite.[1489] The South African data clearly supports the assertions made by the latter group.

Regarding strike duration, the results of empirical research conducted in Canada are also less clear.[1490] There are some studies which have shown that banning the use of replacement labour during strikes increases the duration of strikes.[1491] However, some studies conducted in Canada have shown that the use of replacement labour (where there is no ban) actually increases the duration of strikes.[1492]

From a comparative perspective, the aforementioned research supports the assertion made by the Department of Labour in South Africa that the use of replacement labour leads to longer strikes.[1493] A word of caution: it should be pointed out that Department of Labour's suggestion – that the use of replacement leads to prolonged strikes – is not based on empirical evidence or research. The Department of Labour does not provide any evidence to support its hypothesis. As Levy explains:

> The Department of Labour does publish figures on industrial action...However, the document [usually titled 'Annual Industrial Action Report'] provides little analysis of strike action. Whilst the report does contain data from the Department's own records in respect strike action, as well as a section on the overall work of the CCMA, *it draws conclusions which do not appear to be supported by any factual argument or data*.[1494] (Emphasis added)

Regarding the effect of replacement labour on the balance of power, the results of empirical research conducted in Canada are inconclusive. This is probably so because "power is a very elusive concept that is difficult to measure

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1488 Department of Labour *Annual Industrial Action Report 2015* 7*;* Department of Labour *Annual Industrial Action Report 2016* 1.
1489 See Singh *et al* 2005 *Labour Studies Journal* 61, 62.
1490 See chapter 4 above (paragraph 4.5.2), where the research is critically analysed.
1491 See Cramton and Tracy 1999 *Labour Law Journal* 174-177.
1492 Singh and Harish 1999 *Labour Law Journal* 181; Singh *et al* 2005 *Labour Studies Journal* 77, 81. For an earlier study, see Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 74.
1493 See Department of Labour *Annual Industrial Action Report 2010* 33.
1494 Levy "An examination of industrial action: 2013" 7.

empirically".[1495] In turn "the balance of power in collective bargaining becomes tenuous and complex".[1496] To determine what impact (if any) anti-replacement legislation has on the balance of power; researchers in Canada have focused on whether the presence of such legislation results in significantly higher wage increases. Some studies have found that a ban on the use of replacement labour leads to higher wage increases,[1497] while others have found that a ban on replacement labour does not increase the bargaining power of unions nor result in significantly higher wage increases.[1498]

It is submitted the idea that a ban on replacement labour upsets the balance of power created by collective bargaining legislation in favour of trade unions is fundamentally flawed. A good point of departure is the inequality in the bargaining power between employer and employee. This is "typically a relation between a bearer of power and one who is not a bearer of power".[1499] It is when employees form a collective that power is more or less equalised between an employer and its employees.[1500] How do workers assert bargaining power in collective bargaining? Workers assert bargaining power in collective bargaining through industrial action, that is to say, a strike.[1501] Those who are opposed to anti-scab legislation usually argue, among other things, that a ban on replacement labour would increase the bargaining power of unions and that this would result in significantly higher wage increases.[1502] According to Hopkinson, this argument is flawed for the very reason that collective bargaining legislation without a prohibition against hiring replacement labour "does not bring about the much-vaunted balance of power assumed by these critics".[1503] In fact, he argues that the use of replacement labour

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1495 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 50.
1496 Cardwell *Replacement Worker Legislation: A longitudinal Analysis of Quebec's Anti-scab Law* 50.
1497 Cramton and Tracy 1999 *Labour Law Journal* 174-177.
1498 Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310. See also Singh and Harish 2001 *Industrial Relations Journal* 42; Savage and Butovsky 2009 *Just Labour: A Canadian Journal of Work and Society* 20 where they note that "Budd (1996) looked at wage settlements in manufacturing from 1965-1985 and found that anti-scab laws had no effect".
1499 Davies and Freedland (eds) *Khan Freund's Labour and the Law* 18.
1500 Bendix *The Basics of Labour Relations* 137.
1501 *NUMSA v Bader Bop* 2003 ILJ 24 305 (CC) para 13.
1502 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151; Singh and Harish 1997 *Canadian Labour and Employment Law Journal* 310.
1503 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.

maintains the imbalance which exists at common law.[1504] To this, one can add that the use of replacement labour renders a strike ineffective[1505] and may even change collective bargaining into collective begging.[1506]

In light of the Canadian empirical research discussed above, it is submitted that the possible arguments which were made in chapter 2 of this study in favour of anti-replacement labour legislation in South Africa still make a compelling case. These were that the use of replacement causes violence; renders a strike ineffective; leads to longer strikes; and unfairly tilts the balance of power in favour of employers.

5.6 Unique contribution of the study

The use of replacement labour during a protected strike in South Africa has not received much attention from academics.[1507] As far as can be gathered, this study represents the most comprehensive analysis of this topic in South Africa to date. Therefore, this research will make a meaningful contribution towards collective labour in South Africa, and in particular the interpretation of section 76 of the LRA. This study provides new insight into the matter of replacement labour by conducting an in-depth comparative analysis between South Africa and Canada regarding the regulation of replacement labour.

5.7 Recommendations for the way forward

In light of all of the above, the following recommendations are made:

1) Section 76 of the LRA should be amended.

It will be recalled that section 76 of the LRA currently provides that:

> (1) An employer may not take into employment any person-

1504 Hopkinson 1996 *Canadian Labour and Employment Law Journal* 151-152.
1505 Tenza 2015 *Law Democracy and Development* 222. See also Tenza 2016 *Obiter* 112; Creamer 1998 *ILJ* 20; Hopkinson 1996 *Canadian Labour and Employment Law Journal* 157.
1506 Tenza 2016 *Obiter* 116.
1507 It should, however, be noted that the a few articles on this topic have been published in the wake of the Labour Court's 2016 judgment in *SACCAWU v Sun International* 2016 BLLR 97 (LC). See for example, Calitz 2016 *South African Mercantile Law Journal* 439.

(a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

It is submitted that it should be amended so as to limit the use of replacement labour to strikes in sectors which can be regarded as essential or essential services. Put differently, there should be a ban on the use of replacement labour during protected strikes;[1508] the only exception being strikes in essential services. It is submitted that section 76 of the LRA should be amended to read as follows:

76. Replacement Labour

(1) An employer may not take into employment[1509] any person -

(a) to continue or maintain production during a protected strike[1510] or;

(b) for the purpose of performing the work of any employee who is locked out.[1511]

(2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service, an independent contractor or volunteers.[1512]

(3) Notwithstanding subsection 1(a), an employer who is engaged in an essential service may hire replacement labour during a protected strike.[1513]

1508 For a similar viewpoint, see Calitz 2016 *South African Mercantile Law Journal* 459; Tenza 2015 *Law Democracy and Development* 219-222; Brand "How the law could better regulate the right to strike in South Africa" 71. It should be noted that these commentators are primarily concerned with ending strike violence.

1509 In terms of the proposed section 76, employers would be permitted to use non-striking employees to maintain production during a strike. It will be recalled that the CFA has condemned laws which provide for the closure of an enterprise in the event of a strike – such laws are "an infringement of the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise". See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 676. See also *SACTWU v Coats* 2001 22 ILJ 1413 (LC), discussed in chapter 2 (paragraph 2.5.1), where the issue was the meaning of the words "to take into employment" as used in section 76 of the LRA.

1510 In terms of the proposed section 76, all employers would be permitted to hire replacement labour during an unprotected strike (should they decide not to interdict the unprotected strike or dismiss the employees who are engaged in unprotected action).

1511 In terms of the proposed section 76, the words "unless the lock-out is in response to a strike" would be omitted and/or deleted.

1512 In terms of the proposed section 76, volunteers would be added to the list of persons whom the employer may not use to maintain production during a protected strike.

1513 The proposed subsection (3) would bring South African law in line with the CFA's jurisprudence which is that the use of replacement labour should be limited to essential services. See the cases discussed in chapter 3 above (paragraph 3.2). It should be recalled that the ILO's Committee of Experts has also expressed the view that "...the use of striker

The question that comes to mind is how the above proposed section would work given that employees engaged in essential services in South Africa are prohibited from striking in terms of section 65(d) of the LRA. This section merely reflects the general rule and must be read with section 72 of the LRA. In terms of section 72, employees engaged in a service which has been designated as essential may strike provided that a collective agreement has been concluded which makes provision for the maintenance of a "minimum service". If such an agreement is concluded, the workers performing minimum services are deprived of the right to strike.[1514] In *Eskom v National Union of Mineworkers*,[1515] the rationale behind section 72 was explained as follows by the Supreme Court of Appeal:

> ...it is acknowledged both in this country and internationally that not all the workers employed in an industry declared to be an essential service need to be precluded from striking for that service to continue to operate at an acceptable level. *This has given rise to the concept of a 'minimum service' which is intended to allow certain workers in an industry designated as an essential service to strike while at the same time maintaining a level of production or services at which the life, personal safety or health of the whole or part of the population will not be endangered.* Recognizing this the legislature, presumably in a bid to prevent the declaration of an industry as an essential service from impinging unnecessarily on the right to strike, provided in s 72 of the LRA that...[1516] (Emphasis added)

Notwithstanding the above recommendation, employers in services which have not been designated as essential would retain their right to use non-striking employees to perform their own work as well as the work of their co-workers who are on strike, managerial and supervisory personnel. As was noted in chapter 3 of this study, the CFA does not object to the use of non-striking workers to assist in maintaining production by performing the work of strikers. However, the CFA does object to discrimination in favour of non-strikers, for example, whereby such

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replacements should be limited to industrial action in essential services". ILO *Application of International Labour Standards 2016 (I)* 153-154.

1514 Grogan *Workplace Law* 448. See also section 72(1)(a) of the LRA.

1515 *Eskom v National Union of Mineworkers* 2011 32 ILJ 2904 (SCA).

1516 *Eskom v National Union of Mineworkers* 2011 32 ILJ 2904 (SCA). See also *Explanatory Memorandum to the Labour Relations Bill* (published in 1995 16 ILJ 278) at 284, where the drafters of the LRA explained that "Provision is made, however, for registered trade unions and employers to include within their collective agreements provisions on the maintenance of a minimum service within an essential service. These agreements have to be ratified by the essential services committee because the interests at stake are not simply those of the employer and the trade union but also the public at large. If the collective agreement is ratified, then a strike or a lock-out can take place in an essential service provided the minimum service is maintained".

workers are given bonuses.[1517] Importantly, the CFA has condemned laws which provide for the closure of an enterprise in the event of a strike; such laws are "an infringement of the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise".[1518] Should the employer use replacement labour, the striking workers would be able to counter with a picket. As the ILO has emphasised, taking part in picketing and firmly, but peacefully inciting other workers to keep away from their workplace, cannot be considered unlawful.[1519] Also, employers in services which have not been designated as essential would still be able to shift production to a non-struck workplace for the duration of a strike,[1520] increase production in anticipation of a strike and restock following the strike.[1521] These are just some of the measures which employers often utilise to offset or minimise the impact of a strike. As a last resort, where the continued viability of a commercial enterprise is under threat, the striking workers could still be dismissed on the grounds of operational requirements.[1522]

2) There should be a comprehensive approach to ending strike violence in South Africa

It is submitted that there should be a comprehensive approach to ending strike violence in South Africa. An approach which addresses both the underlying causes of strike violence and the violence itself. This may inter alia include the re-introduction of strike ballots,[1523] educating trade unions and their members, removing the protected status of a strike if it turns violent,[1524] the creation of specialised police units,[1525] and prohibiting the use of replacement labour during protected strikes.[1526]

1517 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 675.
1518 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* para 676.
1519 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 648-651.
1520 Rycroft 1993 *ILJ* 289.
1521 Department of Labour *Annual Industrial Action Report 2010* 36.
1522 See section 67(4) of the LRA. See also *SACWU v Afrox* 1999 20 ILJ 1718 (LC) paras 29-30.
1523 Brand "How the law could better regulate the right to strike in South Africa" 68. See also Tenza 2015 *Law Democracy and Development* 212.
1524 See Levy "Strike action: will things ever be the same" 19.
1525 Brand "How the law could better regulate the right to strike in South Africa" 71.
1526 Tenza 2015 *Law Democracy and Development* 219-222.

Addressing the root-causes of strike violence

Masiloane proposes that employees should be educated before and during strike action and that the unions should support this.[1527] This proposal is sound and cannot be faulted. Also, the Democratic Alliance had proposed something similar in a draft bill that it prepared (the Labour Relations Amendment Bill 2014). The purpose of the bill was to curtail strike violence.[1528] Carlson goes a step further and argues that not only should the unions educate their members, but they should also take action against its members who perpetrate violence.[1529] It is unfortunate that trade unions often incite and support strike violence or simply step back and allow it to happen.[1530] Educating workers and their unions on non-violent industrial action can only benefit them and the employers. In particular, workers must be taught that if an employer hires replacement labour during a strike, they (the workers) may picket and firmly, but peacefully incite other workers to keep away from the workplace.[1531]

Many of the problems which South Africa is facing (such as the high rates of strikes and strike violence) can be traced back to the increasingly adversarial nature of industrial relations.[1532] It was against the backdrop of suppression, victimisation and racial discrimination that trade unions in South Africa evolved in a strongly adversarial relationship in relation to employers and the state.[1533] More

1527 Masiloane 2012 *Acta Criminologica* 39.
1528 Democratic Alliance 2015 http://www.da.org.za/2015/01/num-must-come-support-da-strike-violence-bill/.
1529 Carlson 1990 *Capital University Law Review* 221.
1530 See Levy "Strike action: will things ever be the same" 18. See also Von Holdt 2010 *Transformation* 147, where he states that "At the COSATU 10th congress, held in 2009, the secretariat report criticised the use of violence and the trashing of streets in strikes, arguing that this delegitimised the strike weapon in the eyes of the public. Many of the affiliate leaders were clearly uncomfortable with this view, and argued that provocative and brutal police action and the use of scab labour to undermine strikes drove workers to use such tactics". (Emphasis added)
1531 See ILO *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* paras 648-651; item 3 of the Code of Good Practice on Picketing.
1532 According to Levy, "that South African labour relations is highly adversarial, hardly deserves comment". See Levy "An examination of industrial action: 2013" 5.
1533 See Du Toit 1995 *ILJ* 785.

recently, the collective bargaining climate has, "particularly since 2007, become increasingly adversarial".[1534]

According to the drafters of the LRA, workplace forums were intended to "facilitate a shift at the workplace from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects".[1535] They were supposed to supplement collective bargaining instead of undermining it.[1536] Despite the noble intentions of the drafters of the LRA, workplace forums have been a spectacular failure in South Africa so far.[1537] Many commentators attribute this failure to the way in which the provisions of Chapter V of the LRA are drafted. Firstly, they criticise the high threshold (100 employees or more) which is set (by section 80(1) of the LRA) for a workplace forum to be established.[1538] Secondly, they criticise the enormous power which trade unions are given (by section 80(1) of the LRA) regarding the establishment of such forums; workplace forums can only exist if trade unions want them to exist.[1539]

The establishment of workplace forums can have a direct impact on the use of replacement labour. The benefits of workplace forums include, inter alia, reducing labour-management conflict. They do so by taking away the adversarial nature of this relationship from the shop floor to a central level.[1540] In turn, it has also been suggested that they can reduce the number of strikes by playing a stabilising role.[1541] Obviously, where there is no strike, there is no need for replacement labour. Given these potential benefits, workplace forums should be given the chance to exist. They will exist if the hurdles placed by the LRA are removed. It is

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1534 See Benjamin 2014 *ILJ* 3.
1535 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 310.
1536 See Explanatory Memorandum to the Labour Relations Bill (1995 16 *ILJ* 278) 310.
1537 See the research findings of the Sociology of Work Unit of the University of the Witwatersrand (discussed by Steadman 2004 *ILJ* 1183-1189). Briefly, amongst others, the research found the following to be primary reasons for the failure to establish workplace forums: (a) unions regard them with suspicion and are fearful that they will undermine their role; (b) Industrial *Relations* are still highly adversarial and therefore not conducive to workplace forums; (c) some companies prefer to deal with unions within the traditional collective bargaining structures *etcetera*.
1538 See Manamela 2002 *South African Mercantile Law Journal* 730; Du Toit 1995 *ILJ* 797; Olivier 1996 *ILJ* 809.
1539 See Du Toit 2000 *ILJ* 1457; Manamela 2002 *South African Mercantile Law Journal* 730; Olivier 1996 *ILJ* 809.
1540 Geoffrey and Mahabir 2001 *Industrial Relations Journal* 234.
1541 Geoffrey and Mahabir 2001 *Industrial Relations Journal* 234.

therefore recommended that the threshold which must be satisfied for a forum to be established should be reduced, from 100 to 10. This would be achieved by amending section 80(1) of the LRA. Secondly, the enormous power given to trade unions should be curtailed or eliminated altogether. The decision of whether or not to establish a forum should be left to the workers themselves. This would be achieved by amending section 80(2) of the LRA accordingly.

Regarding pre-strike ballots, John Brand has proposed that strike ballots could be effective in reducing strike violence.[1542] The idea behind a ballot is to gauge whether the majority of the members in a trade union are in support of a strike.[1543] Under the 1956 LRA strike ballots were mandatory before a strike could be called.[1544] There is no similar provision in the current LRA. The Labour Relations Amendment Bill of 2012 did contain a clause that would have restored the status quo under the 1956 LRA. However, the clause was later deleted.[1545] It is submitted that strike ballots should be re-introduced in the LRA. Although strike ballots were not successful under the 1956 LRA in deterring or eliminating strike violence,[1546] Tenza, correctly so it is submitted, argues that:

> ...the aim of a ballot by members before a strike takes place is to prevent industrial action that has little or no support. Violence is likely to occur during industrial action that enjoys little support.[1547]

The re-introduction of pre-strike ballots is not without its critics. As Ngcucaitobi points out, the change was intended to prevent industrial action with only minority support, as "violence or intimidation are more likely to occur under these

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1542 Brand "How the law could better regulate the right to strike in South Africa" 71. See also Tenza 2015 *Law Democracy and Development* 212.

1543 Rycroft 2015 *ILJ* 7.

1544 In terms of section 65(2)(b) of the 1956 LRA.

1545 Rycroft 2015 *ILJ* 1.

1546 The reasons why strike ballots were unsuccessful in deterring or eliminating strike violence under the 1956 LRA have been summed up as follows: "The question that arises is what impact the inclusion of a ballot requirement will have on industrial relations if it was once tried and failed. It could be argued, however, that the reason for the failure of the ballot requirement to deter unions from engaging in violent strikes can be attributed to the fact that under the 1956 legislation, strike action was inseparable from political violence. As such, the ballot requirement under the old *Labour Relations Act* failed to serve its purpose, that is, to democratise the right to participate in a strike and to give members of the union an opportunity to have a say in the decision to go on strike...Now that political violence has diminished, the article argues that the reintroduction of a ballot requirement in our labour legislation may play a positive role in addressing the issue of strike related violence". See Tenza 2015 *Law Democracy and Development* 213-215.

1547 Tenza 2015 *Law Democracy and Development* 214-215.

circumstances".[1548] He criticises the then proposed amendment to the LRA (re-introduction of a pre-strike ballot) as a requirement that would have added an additional administration hurdle to the attainment of protected strike action, and concludes by adding that the re-introduction of a mandatory strike ballot would not be effective in combating strike violence.[1549] Furthermore, as Benjamin points out, there is no empirical evidence correlating the level of strike related violence with the level of worker support for a demand.[1550]

Addressing actual strike violence

It has been suggested that the Labour Court should be given the power to grant relief to persons whose rights are violated during industrial action and that it should also be given the power to suspend the protection of industrial action for limited periods of time.[1551] In a similar vein, Levy has also called for a "provision for the withdrawal of the protected nature of strikes where behaviour clearly exceeds acceptable and reasonable limits".[1552] This is surely a controversial proposition which in all likelihood would be vehemently opposed by the trade unions.

In *Tsogo Sun v Future of SA Workers Union*,[1553] striking employees had committed several acts of violence and misconduct including throwing bricks at the police. Expressing his displeasure regarding this conduct, Van Niekerk J. said:

> ...When tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.[1554]

Rycroft submits that this sentence opens the door to argue that a strike "marred by misconduct" loses its protected status. He further points out that should the court remove the protected status; the protection from dismissal would also fall away. However, he does concede that there is no provision in the LRA which expressly

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1548 Ngcukaitobi 2013 *ILJ* 844.
1549 Ngcukaitobi 2013 *ILJ* 850.
1550 Benjamin 2014 35 *ILJ* 11.
1551 Brand "How the law could better regulate the right to strike in South Africa" 71.
1552 See Levy "Strike action: will things ever be the same" 19.
1553 2012 33 ILJ 998 (LC).
1554 *Tsogo Sun v Future of SA Workers Union* 2012 ILJ 998 (LC) 1004A. More recently, see *National Union of Food Beverage Wines Spirits and Allied Workers Union v Universal Product Network* 2016 37 ILJ 476 (LC) paras 38-39. See also Fergus 2016 *ILJ* 1537, where she discusses how and in what circumstances courts may intervene during violent strikes.

provides for a strike to lose its protected status, although this may be implicit in the powers of the Labour Court in terms of section 158(1)(a)(iv).[1555] A criticism of removing the protected status of a strike when it turns violent is that it would amount to collective punishment, that is to say, even the strikers who are peaceful would lose the protection against dismissal. Secondly (as Rycroft himself concedes) it would be difficult to determine how much violence there has to be before the Labour Court could remove the protected status.[1556] This could lead to inconsistent judgments.

Be that as it may, as the law currently stands, it is submitted that the LRA provides an adequate remedy for acts of violence during strike action.[1557] The Labour Court can and has granted orders which interdict and/or restrain workers from committing any acts of violence in the course of a protected strike.[1558] Secondly, it is submitted that it should be left to the legislature to decide whether or not violent strikes can and/or should lose their protected status.[1559] If it so decided, the legislature may amend the LRA accordingly so as to empower the Labour Court to determine such matters.

Closely related to strike violence is the issue of whether strikes are required to be functional to collective bargaining to be lawful. Put differently, this issue may be formulated as follows: whether strikes (for example, violent strikes) can be interdicted or lose their protected status if they cease to be or are not functional to collective bargaining. Rycroft has argued that the Labour Court should suspend[1560] strikes that are violent and thus not functional to collective bargaining.[1561] This view is shared by Botha and Germishuys.[1562] In light of the purpose and objectives of the LRA,[1563] they have argued that:

1555 Rycroft 2012 *ILJ* 826. See also Fergus 2016 *ILJ* 1537.
1556 Rycroft 2012 *ILJ* 826.
1557 See section 158(1)(a) read with section 67(8) of the LRA.
1558 For example, see *Bidvest Food Services v NUMSA* 2015 36 ILJ 1292 (LC).
1559 As has been argued "whether it [is] was appropriate for the judiciary to find that strikes may lose their protection — or at least stand to be suspended — when the legislature has explicitly elected not to include such a provision in the law is uncertain. To maintain the opposite separation of powers between the legislature and judiciary, a more principled justification for judicial intervention in the legislative process was surely necessary." See Fergus 2016 *ILJ* 1548-1549. See also Van Eck and Kujinga 2017 *PELJ* 19.
1560 That is, to remove the protected status of a strike.
1561 Rycroft 2012 *ILJ* 826.

> It is submitted that strike action in compliance with the LRA, its purpose and objectives, cannot give effect to its own function without at the same time promoting effective collective bargaining. It is on this basis that a protected strike that gives effect to the purpose of both the LRA and the Constitution by definition is functional to collective bargaining. The converse is true about strike action which neither advances the purpose nor fulfils the primary objects of the LRA. Such strikes cannot be said to be functional to either the purpose or the objects of the LRA. The aim of a strike is to persuade the employer through the peaceful withholding of their labour, to agree to workers' demands. The economic pressure put on the employer as a result of the strike is sufficient and functional to collective bargaining.[1564]

Whilst the argument by Botha and Germishuys (outlined above) is sound,[1565] it is worth noting that there are some authors who argue there is no legal basis for the idea that only strikes which are functional to collective bargaining are lawful.[1566] Functionality is said to have its roots in section 27(4) of the Interim Constitution which provided that "Workers shall have the right to strike for the purpose of collective bargaining".[1567] However, the words "for the purpose of collective bargaining" were not included in section 23 of the current Constitution or 'final Constitution'.[1568] Section 23(c) simply provides that every worker has the right to strike. Moreover, the LRA sets out the requirements for protected or 'lawful' strike action. In terms of the LRA, functionality is not one of these requirements.[1569] According to Van Eck and Kujinga:

> Our...analysis has made it clear that there is no constitutional or legislative authority that instructs that a strike must be 'functional to collective bargaining' in order to be lawful. In our view, as long as the original demand deals with a matter which is not prohibited by the LRA, such as disputes of right which are eligible to be arbitrated or

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1562 The authors argue that "the courts should have greater powers to allow for intervention where there is disregard for the rule of law, and where strikes become violent or otherwise dysfunctional to collective bargaining". See Botha and Germishuys 2017 *THRHR* 552.

1563 See section 1 of the LRA.

1564 See Botha and Germishuys 2017 *THRHR* 550.

1565 For example, see *National Union of Food Beverage Wines Spirits and Allied Workers Union v Universal Product Network* 2016 37 ILJ 476 (LC) paras 29-39. This is a view shared by some academics. For example, see Rycroft 2012 *ILJ* 826; Levy 2010 *ILJ* 831-832.

1566 Functionality is said to have its roots in section 27(4) of the *Interim Constitution* which provided that "Workers shall have the right to strike for the purpose of collective bargaining".

1567 See Rycroft 2012 *ILJ* 826. He says that "the right to strike is specifically stated 'for the purpose of collective bargaining'. This has for some time been expressed in the phrase 'functional to collective bargaining', linking industrial action to a legitimate purpose".

1568 Fergus argues that "the phrase 'for the purposes of collective bargaining' was removed from the interim *Constitution* and it does not appear in the final *Constitution*. Even it had been retained its purpose was not to prohibit strikes which (according to a court) were 'dysfunctional'. Rather, it was intended to confine strikes to matters which fell within the parameters of the employment (or labour) relationship". See Fergus 2016 *ILJ* 1539.

1569 Fergus 2016 *ILJ* 1537. However, it has been argued that functionality is an implicit limitation and/or requirement for protected strikes. See Rycroft 2012 *ILJ* 822.

> adjudicated, all strikes about matters about mutual interest are by their very nature functional to collective bargaining.[1570]

Be that as it may, there seems to be consensus that the "menace" of violent strikes cannot be ignored.[1571] Moreover, with the Marikana massacre of 2012 still a vivid memory for South Africans, it has also been suggested that a Specialised Industrial Action Protection Unit should be formed within the South African Police Service in order to protect people from criminal conduct during strikes.[1572] Presumably these specialised units would be trained on how to manage large crowds of people. However, as Benjamin points out, the police are reluctant to intervene in strike situations, even when these escalate into violence.[1573] Stewart and Townsend also make a similar point.[1574] In a similar vein, the police were heavily criticised in *National Union of Food Beverage Wines Spirits and Allied Workers Union v Universal Product Network*[1575] for their reluctance to intervene, uphold law and order when strikes turn violent. As Van Niekerk J. put it:

> What is more concerning is that those institutions whose function it is to uphold order (in most instances, the South African Police Services) appear content to remain spectators of wanton acts of violence, intimidation and sabotage, adopting the view that they will intervene if and only if the court order is granted. Why this court should be called upon routinely to authorise and direct the SAPS to execute its statutory functions in relation to strike -related violence is incomprehensible.[1576]

Masiloane submits, correctly so, that democracy cannot neglect law and order. However, he makes it clear that the "traditional method of policing" (which adopts a strict law enforcement approach) has the potential to exacerbate a situation that could well be contained by passive law enforcement.[1577] For example, the Marikana Commission of Enquiry concluded that some of the tactics that were used by the police ignited and caused the violent confrontation between the strikers and the police.[1578] Therefore, provided that its members are adequately

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1570 Van Eck and Kujinga 2017 *PELJ* 19. For a contrary view, see Rycroft 2012 *ILJ* 826; Botha and Germishuys 2017 *THRHR* 552; Levy 2010 ILJ 831

1571 See Fergus 2016 *ILJ* 1538; Rycroft 2012 *ILJ* 826; Botha and Germishuys 2017 *THRHR* 531.

1572 Brand "How the law could better regulate the right to strike in South Africa" 71.

1573 Benjamin 2014 35 *ILJ* 11.

1574 Stewart and Townsend 1966 *University of Pennsylvania Law Review* 465.

1575 *National Union of Food Beverage Wines Spirits and Allied Workers Union v Universal Product Network* 2016 37 ILJ 476 (LC).

1576 *National Union of Food Beverage Wines Spirits and Allied Workers Union v Universal Product Network* 2016 37 ILJ 476 (LC) para 37.

1577 Masiloane 2012 *Acta Criminologica* 38.

1578 See Marikana Commission of Enquiry Report at page 557. The report is available online at https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf.

trained, the proposal that a Specialised Industrial Action Protection Unit should be formed within the South African Police Service in order to protect people from criminal conduct during strikes seems sound.

Individually, the above proposals would probably not achieve the desired goal of ending strike related violence in South Africa. For example, unless workers are educated about peaceful industrial action, the re-introduction of strike ballots would not achieve much. There is, therefore, a need for a comprehensive approach to tackling the problem of strike violence. In the spirit of responsible trade unionism,[1579] trade unions must take the leading role in addressing this problem.

5.8 Recommendations for further research

The purpose of this study was to determine to what extent replacement labour should be allowed as a labour weapon by employers during strike action. The secondary research question was how South Africa should regulate the replacement of striking workers in light of the section 23 constitutional rights and international best practice. It was shown that several researchers in Canada and the USA have conducted empirical research to determine the impact of anti-scab legislation (or the lack thereof) on strike violence; incidence; duration; and collective bargaining in general. However, it was also shown that, as far as can be gathered, similar research has not been conducted in South Africa. It is therefore recommended that further (empirical) research should be conducted in South Africa to determine the impact the use of replacement labour has on:

a) Strike violence;

b) Strike incidence;

c) Strike duration;

d) Collective bargaining, that is to say, the balance of power.

1579 For a discussion on the concept of "responsible trade unionism", see Botha 2015 *De Jure* 334.

Regarding (d) above, to determine what impact (if any) the use of replacement labour has on the balance of power; the question would be whether the use of such labour results in significantly higher or lower wage increases.

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