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Technological Strikebreaking: A Case Study of Quebec's Anti-Scab Legislation

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Résumé de l'article

Le droit de grève a reçu une protection constitutionnelle au Canada en 2015. Dans certaines juridictions où le droit de grève est explicitement protégé dans la constitution, l'interdiction du recours aux briseurs de grève est reconnue comme découlant de ce droit constitutionnel. Seules deux provinces canadiennes interdisent le recours aux travailleurs de remplacement durant une grève ou un lockout. Au Québec, cette interdiction s'applique au sein de l'établissement de l'employeur. Le concept mal défini d'établissement a été interprété par des tribunaux et des arbitres comme se limitant au lieu physique de production, sans égard pour les avancées technologiques qui permettent aux travailleurs d'oeuvrer à distance. Cet article examine comment une telle interpretation restrictive facilite une forme de recours aux briseurs de grève qui avait été identifié par la cour constitutionnelle espagnole, à savoir les briseurs de grève technologiques (esquirolaje technologico), soit le recours à la technologie pour contourner les restrictions prévues à la loi même lorsqu'il ne s'agit pas de technologie généralement utilisée. L'impact de la technologie est examiné au moyen de deux études de cas: les lockouts successifs au *Journal de Québec* et au *Journal de Montréal*. Durant ces lockouts, les publications ont continué de façon ininterrompues grâce à des collaborateurs externes qui fournissaient du matériel électroniquement. En utilisant le modèle de Kochan et Katz, cet article examine comment les briseurs de grève technologiques ont modifié l'équilibre de pouvoir, ont affecté le niveau stratégique de négociation et ont eu des impacts considérables sur l'issu du lockout. Enfin, même si les lockouts ont mené à des appels de réforme législatives en 2011, de telles réforme ne sont pas nécessaires pour que les dispositions antibriseurs de grève rencontrent leur objectif initial, à savoir la réduction de la durée des conflits de travail.

Technological Strikebreaking: A Case Study of Quebec's Anti-Scab Legislation

Andrea Talarico

Abstract

Quebec's anti-strikebreaking provisions allow a form of strikebreaking known as technological strikebreaking. Quebec's *Labour Code* prevents the use of replacement workers during a strike or a lockout at the employer's establishment. The concept of *establishment*, though ill-defined, has been interpreted by the courts as being limited to a physical location of production, an interpretation that ignores technological reality. The inherent limits of this interpretation are examined through two newspaper lockouts where easily accessible technology allowed publication to continue uninterrupted and, thus, fundamentally altered the balance of bargaining power. Though the lockouts led to a call for legislative reform in 2011, legislative change is not necessary to align existing provisions with the goal of shortening labour disputes.

Keywords: replacement workers, technological strikebreaking, lockout, right to strike

Introduction

In 1977, the province of Quebec became one of the first jurisdictions in North America to prohibit the use of replacement workers at an employer's establishment during a strike or a lockout. This type of restriction is referred to as replacement worker provisions, strikebreaking provisions, or, colloquially, anti-scab legislation. In the few jurisdictions where such legislation exists,

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the general aim is to decrease picket-line violence and shorten labour disputes. This paper focuses on the anti-strikebreaking provisions in section 109.1 of Quebec's *Labour Code*, which prohibit the use of replacement workers at an employer's establishment for the duration of a strike or a lockout (Labour Code: 109(1)).

In Canada, the right to strike has been constitutionally protected since 2015 (*Saskatchewan Federation of Labour*, 2015: par. 3). This protection derives from the constitutionally protected freedom of association (*Canadian Charter of Rights and Freedoms*: s. 2(d)). Unlike Canada, several European countries explicitly recognize a right to strike in their constitutional documents, including Spain (*Constituciòn de 1978*: art. 28(2)) and Italy (*Costituzione della Repubblica Italiana*: art. 40). In Spain, the Constitutional Court has ruled that the prohibition of strikebreaking is part of the constitutional right to strike.

In recent years, Italian and Spanish literature has explored the effects of technology on strikes, particularly technological strikebreaking (*crumiraggio technologico* or *esquirolaje technologico*). According to Negri and Vercellone, technological change and the move to a knowledge-based economy have destabilized the distinctions of the capital-labour relationship (Negri and Vercellone, 2007: 50). One example is technological strikebreaking. Little has been written on the topic in North America, probably because anti-strikebreaking legislation is relatively absent in this part of the world.

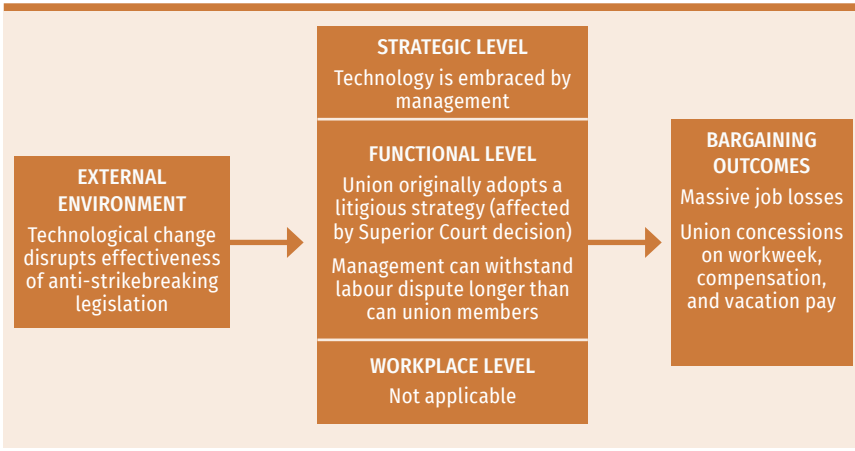
Quebec's anti-strikebreaking provisions have facilitated technological strikebreaking through an outdated interpretation that ignores the realities of production. Using Katz, Kochan and Colvil's three-tier model of collective bargaining (see Figure 1 below), this paper examines the effects of such strikebreaking in Quebec through a case study of two labour disputes. In both cases, technological strikebreaking affected the external environment by fundamentally altering the balance of bargaining power, as well as the strategic and functional levels of the bargaining process itself. These outcomes, in turn, had catastrophic impacts on the bargaining outcomes.

FIGURE 1

The Three-Tier Model of Collective Bargaining (Katz, Kochan and Colvil, 2017)

FIGURE 2

The Effects of Technological Strikebreaking on the Lockout at the *Journal de Montréal*



The selected cases are the lockouts at the *Journal de Québec* and the *Journal de Montréal* between 2007 and 2011. The two lockouts are examined by using primary sources (newspaper articles, first-person accounts, parliamentary committee debates, and financial statements) to contextualize the legal decisions that arose from them. They were selected because they were two of the longest labour disputes in Canadian history (the lockout at the *Journal de Montréal* being the longest one in Canada's media) and because they led to a call for legislative reform.

Ultimately, despite the disruptive effects of technological strikebreaking in Quebec, legislative reform is not necessary to align the relevant sections of the *Labour Code* with the legislator's intention to accelerate the resolution of industrial disputes.

Technological Strikebreaking in Context

Quebec is one of two jurisdictions in Canada that prohibit the use of replacement workers during a strike or a lockout. This prohibition forms an integral part of the external environment of the collective bargaining process. Quebec's anti-strikebreaking provisions suffer, however, from an outdated legal interpretation, thus facilitating a phenomenon known as technological strikebreaking. This section will present the general effects and purpose of the anti-strikebreaking provisions, the disruption to such provisions by technological strikebreaking, and the characteristics of Quebec's legislation that allow such strikebreaking to occur.

Traditionally, industrial action has succeeded by inflicting economic costs on the employer, who would then prefer to settle the dispute through bargaining (Tucker, 2013: 18). By prohibiting the use of replacement workers, legislation forces the employer to bear the cost of a strike or a lockout. Detractors of replacement worker legislation have largely viewed it as excessive government interference in labour relations and as leading to regulatory disadvantages, whereas supporters have argued that anti-scab legislation is necessary for the promotion of peaceful labour relations (Logan, 2002: 155). There is little indication that bans on the use of replacement workers affect strike frequency (Budd, 1996). A study conducted between 1985 and 1989 has shown, however, that strikes last longer when an employer uses replacement workers (Schnell and Gramm, 1994). Canadian data indicate that anti-strikebreaking legislation decreases strike length significantly (Duffy and Johnson, 2009). A more recent study from South Africa concludes that the use of replacement workers correlates with increased strike violence (Tenza, 2016).

Labour relations are particularly sensitive to the impacts of new technology (Pérez Rey, 2013). The Internet has provided the employer with tools to circumvent union action (Rota, 2018). Automation affords employers a certain protection against strike action (Pérez Rey, 2013). One example is the use of technology to avoid the effects of bans on replacement workers, a phenomenon known as *esquirolaje tecnologico* in Spain.

Technological strikebreaking (*esquirolagje tecnologico* in Spain or *crummiraggio technologico* in Italy) can be defined as the use of pre-existing technology to limit the effects of a strike, including those cases where such technology is not normally used by the employer (Rota, 2018). In Spain, *esquirolaje tecnologico* has attracted a lot of attention in the telecommunications sector (Rota, 2018) because the Spanish Constitutional Court has recognized that the use of technology to mitigate the effects of a strike (including its use to continue services) is not a violation of the general prohibition against using replacement workers (Aguilar Del Castillo, 2018). Some argue that technological strikebreaking is essentially the use of tools at the employer's disposal to protect the right to conduct business (Rota, 2018). Others argue that the Spanish Constitutional Court's interpretation of strikebreaking is a denial of the right to strike (Aguilar Del Castillo, 2018).

There has been little study of the use of technology as a way of neutralizing strike activity in Europe (Rota 2018) and even less in North America, probably owing to the relative rarity of anti-strikebreaking legislation. Such legislation in Quebec has shown a focus on the employer's establishment, a concept that is challenging to define and which has been interpreted so restrictively as to ignore technological change and allow technological strikebreaking.

In 1977, Quebec amended its *Labour Code* to add a prohibition against the use of replacement workers at the employer's establishment during a strike or a

lockout ("An Act to Amend the Labour Code", 1977). In the committee debates, Labour Minister Pierre-Marc Johnson argued that replacement workers make a strike meaningless, as their presence allows an employer to avoid paying the economic cost of a strike ("An Act to Amend the Labour Code", 1977: 16). According to him, the purpose of the legislation was to de-escalate labour disputes by maintaining a real balance of power during a strike ("An Act to Amend the Labour Code", 1977: 18).

In Quebec, replacement workers are prohibited at the employer's establishment during a strike or a lockout. The interpretation of "employer's establishment" and the effects of this interpretation will be the focus of this paper. An article published in 1980 reported certain difficulties in enforcement of the new provisions (then article 97a of the *Labour Code*), two years after enactment into law, namely the lack of definitions (unlike similar provisions in the B.C. *Labour Relations Code*) (Martineau, 1980: 556). In 1981, the government of Quebec commissioned a study on the effects of the anti-strikebreaking provisions. Published in March 1982, the study highlighted a possible problem with the undefined concept of *establishment*, namely how it should apply to subsidiaries of the same company (Centre de recherche et de statistiques sur le marché de travail, 1982).

Though over two-hundred and fifty decisions have been handed down by administrative tribunals and courts in Quebec specifically on anti-strikebreaking provisions, relatively few of them have analyzed the concept of *establishment*. An initial decision on this concept focused on managers replacing workers at Télébec (*Syndicat des travailleurs en communication du Canada*, DTE 85T-951). In 1985, a strike was declared and a complaint filed with the Labour Board. The Board had to examine the case of managers from one office replacing workers in another city. Were they brought in from another establishment in violation of the *Labour Code*? According to the Board, the managers were employed in several of the employer's establishments; in any given week, they could spend between 20 and 50% of their time in a city other than the one they were based in. Though the Board did not define *establishment*, it did give it a broad interpretation that encompassed all the locations where the managers generally worked (*Syndicat des travailleurs en communication du Canada*, DTE 85T-951). We should keep this interpretation in mind when we consider a similar approach, focused on the location of regular work, which the Labour Board took in a controversial 2008 decision. One year later, the Board redefined *establishment* to include only the physical location where activities were carried out (*Syndicat des travailleurs en communication du Canada*, DTE 86T-37). This definition has prevailed in rulings since 1986.

This focus on the employer's physical establishment has made Quebec's anti-strikebreaking provisions particularly susceptible to technological strikebreaking. In the cases of the *Journal de Québec* and the *Journal de*

Montréal, the provisions were interpreted in a way that ignored how technology enables journalists to work remotely. That interpretation has made those provisions all but meaningless, thereby fundamentally altering the legislative environment and the balance of bargaining power.

Overview of the Lockouts at the *Journal de Québec* and the *Journal de Montréal*

Between 2007 and 2011, two newspapers revealed the inherent limits of Quebec's anti-strikebreaking provisions. The *Journal de Québec* and the *Journal de Montréal* were daily newspapers then owned by Sun Media, a subsidiary of the media conglomerate Québécor. Québécor had other subsidiaries: television channels, cable services, music stores, bookstores, and one sports team. Its president, Pierre-Karl Péladeau, was the son of Pierre Péladeau, the founder of the *Journal de Québec* and the *Journal de Montréal*. Since the 1960s, both newspapers had enjoyed relatively peaceful labour relations. This situation changed in 2007. Both newspapers continued their daily operations uninterrupted for a total of four years while their employees were locked out, thanks to web-based communications and a series of external contributors who worked remotely to replace the locked-out journalists.

Lockout at the *Journal de Québec*

On April 22, 2007, security guards erected a perimeter around the *Journal de Québec* buildings. Pinned to the gate was a lockout notice by Sun Media (Piat-Sauvé, 2009). The day after the start of the lockout, the newspaper contacted Keystone, an agency providing photography services. Keystone started providing the *Journal de Québec* with pictures the next day (*Syndicat canadien de la fonction publique*, 2008: par. 38).

In May 2007, Canoë, a website owned by Québécor advertised positions for journalists (*Syndicat canadien de la fonction publique*, 2008: par. 97). The same month, Pierre-Karl Péladeau suggested the creation of a new agency called Agence Nomade to replace existing services provided by Canadian Press, which he considered too expensive *(Syndicat canadien de la fonction publique*, 2008: par. 116). Agence Nomade was created in August 2007 to provide content exclusively to Québécor (*Syndicat canadien de la fonction publique*, 2008: par. 122), while sharing its journalists with Canoë (*Syndicat canadien de la fonction publique*, 2008: par. 134). During the dispute, to keep costs down, the editors decided they would mostly use content from Canoë for the *Journal de Québec*. Additional content was obtained from *ad hoc* contributors (*Syndicat canadien de la fonction publique*, 2008: par. 92), while articles were also penned by non-unionized managers and by various

well-known columnists who regularly contributed opinion pieces and who, mostly, continued to do so for the duration of the lockout.

Before the lockout was declared, journalists had begun talking about setting up an alternative newspaper. Two days after the start of the dispute, locked-out employees began handing out copies of *MédiaMatin Québec*, a 24-page tabloid produced in response to the lockout (Piat-Sauvé, 2009). The employer immediately sought an injunction to stop publication, but the Superior Court merely prohibited the locked-out journalists from using confidential information obtained during their employment (Corporation Sun Media, 2007[1]). In November 2007, two photographers from Keystone Press Agency applied for a provisional injunction against locked-out employees who had publicly accused them of being scabs and had published their picture in *MédiaMatin* (Benjamin, 2007: A15). The injunction was not granted (Leclair, 2007).

A year into the dispute, Québécor remained firm in calling the union's position irrational and lamented the state of the printed press throughout the world. A union representative responded by pointing out that the newspaper had earned profits of $25 million the previous year (Meunier, 2008: D2). Fourteen months after the start of the dispute, at the annual general meeting of Québécor Media, Pierre Karl Péladeau announced a 20.5% increase in profits, while lamenting the extravagant costs of outdated collective bargaining agreements at the *Journal de Québec*. To this he added that Québécor would stop at nothing to ensure the survival of Quebec's newsrooms (Mercure, 2008: D5).

The dispute at the *Journal de Québec* ended on August 18, 2008. For those sixteen months, with publication continuing normally, complaints had been filed under section 109.1 of the *Labour Code* on October 10, 2007, on November 8, 2007, and on November 29, 2007. Hearings took place over eleven days, between January 14 and June 2, 2008. Surprisingly, the decision was handed down only in December 2008, nearly four months after the dispute had ended (*Syndicat canadien de la fonction publique*, 2008 QCCRT 534).

The Board's decision, penned by administrative judge Myriam Bédard, was a marked departure from the state of jurisprudence until then. The employer argued that they did not use the services of journalists during the lockout but merely used the product of services rendered to and by other companies (*Syndicat canadien de la fonction publique*, 2008: par. 2-8). According to the Board, the system in place was designed so that the employer could solicit content from other sources. Even though the newspaper did not solicit content directly, it did so through an intermediary. In short, the newspaper

1. A request to appeal was denied: *Corporation Sun Media c. Syndicat canadien de la fonction publique, SCFP-Québec*, 2007 QCCA 1186 (CanLII).

merely added one step to circumvent enforcement of the *Labour Code*. Consequently, the employer used the services of other companies to do the work normally done by the locked-out journalists. As for the concept of *establishment*, the journalists argued that the establishment of the newspaper must be considered to be the territory where the journalists normally did their work (*Syndicat canadien de la fonction publique*, 2008: par. 263-267). Reiterating that the *Labour Code* does not define "establishment," the Board decided that the only way to identify the establishment of the *Journal de Québec* would be to compare the locations where work was done before and after the lockout (*Syndicat canadien de la fonction publique*, 2008: par. 277). As the journalists worked on the territory of Quebec City, the employer could not say that work was being done "elsewhere." The work now requested by the *Journal de Québec* was done at the same location as the work previously done by the locked-out journalists. Therefore, the *Journal de Québec* was using the services of people employed by other employers to do work normally done by the locked-out workers at the employer's establishment, thus violating section 109.1 of the *Labour Code* (*Syndicat canadien de la fonction publique*, 2008: par. 299-300).

As the dispute at the *Journal de Québec* ended, another one was about to begin. The lockout at the *Journal de Québec* (and eventually the Superior Court of Quebec's review of the 2008 Labour Board decision cited above) would form part of the external environment affecting the bargaining process at the *Journal de Montréal*.

Lockout at the *Journal de Montréal*

On October 2, 2008, Pierre Loyer, the Director of Human Resources at the *Journal de Montréal*, asked Raynald Leblanc, the President of the local union, to delay the start of the collective bargaining process. The union suspected a delaying tactic to prepare for a lockout: the newspaper was buying time to hire more managers who (being non-unionized) could continue the operations during a labour dispute (Guilbert and Larose, 2015: 75). Negotiations began on October 28, 2008. On January 6, 2009 Québécor incorporated QMI, a new "internal" news agency (Registraire des entreprises, Quebec). On January 7, Québécor applied for a judicial review of the Labour Board's decision in the *Journal de Québec* case (*Journal de Québec*).

On January 24, 2009, the two hundred and fifty-three employees of the *Journal de Montréal* found out, via a phone call tree, that they had been locked out. They met on a cold winter morning in the union offices next door to the *Journal de Montréal*. There they wondered how the newspaper would ever continue publication with only a handful of managers to do the work of the 253 locked-out employees (Guilbert and Larose, 2015: 75).

To receive strike pay, the secretarial and administrative staff were assigned eight hours of picketing, two days per week. Journalists also had to picket, but their weekly hours were reduced in exchange for the time they spent contributing to *RueFrontenac.com*, an online publication produced by the locked-out journalists (Guilbert and Larose, 2015: 81-82). The website was launched on January 25, 2009. The choice of an electronic platform was deliberate, as Québécor accused the union of ignoring new technology (Les deux premiers jours du lockout, 2009).

As with the *Journal de Québec*, most of the regular columnists from the *Journal de Montréal* continued to write during the lockout. Marc Cassivi at Montreal's *La Presse*, called this behaviour a selfish gesture full of contempt for the common good (Cassivi, 2009). On February 1, 2009, union leader Leblanc was a guest on *Tout le monde en parle*, a prime-time current events talk show in Quebec. Another guest was Richard Martineau, a columnist at the *Journal de Montréal* (Tout le monde en parle, 2009). Martineau was asked to respond to Cassivi's article. He said he felt he was being asked to have the worst of both worlds: he did not benefit from union protection but was supposed to show solidarity by giving up a job he loved. When Leblanc was asked about strikebreakers, he simply answered that strikebreaking had already begun (Tout le monde en parle, 2009).

On April 15, 2009, the union sought a provisional injunction to stop the *Journal de Montréal* from using the services of other people employed by Québécor. The hearing took place on April 24 and the decision was handed down the same day (*Syndicat des travailleurs de l'information du Journal de Montréal*, 2009). In addition to filing affidavits, the union pointed to about 30 articles that had been published in the *Journal de Montréal* between January 28 and February 21, 2009, and which were mostly identified as being produced by QMI (*Syndicat des travailleurs de l'information du Journal de Montréal*, 2009: par. 5). For the Labour Board, the journalists at QMI provided content but were not directly employed to replace the employees of the *Journal de Montréal* (*Syndicat des travailleurs de l'information du Journal de Montréal*, 2009: par. 12). Consequently, no provisional injunction was granted. A request for a permanent injunction was rejected on the same grounds. The union sought a judicial review of these decisions, but Quebec's Superior Court judged the decisions to be reasonable and no review was granted (*Syndicat des travailleurs de l'information du Journal de Montréal*, 2010).[2]

In the summer of 2009, a grievance was filed before a labour arbitrator to challenge the use of QMI to supply the newspaper with content during the lockout. The grievance was ruled unfounded because, according to the

2. The Court of Appeal denied the request to appeal this decision. See: *Syndicat des travailleurs de l'information du Journal de Montréal (CSN)* c. *Journal de Montréal*, 2010 QCCA 1714.

arbitrator, the collective agreement ceased to have effect when the lockout was declared (*Le Journal de Montréal*, 2009).

On September 11, 2009 the Superior Court judicially reviewed the Labour Board's decision in the 2008 *Journal de Québec* case. According to the Court, the evidence showed that no work was done at the *Journal de Québec*'s offices (*Journal de Québec*, 2009: par. 21-22). According to the Court, the Labour Board had gone beyond the legislator's intention by redefining the term "establishment" in section 109.1 of the *Labour Code* (*Journal de Québec*, 2009: par. 40-41). Consequently, the Board's decision was deemed unreasonable and overturned by the Superior Court. Thus, Québécor acted legally during the lockout at the *Journal de Québec* and continued using the same tactics at the *Journal de Montréal*.

As the lockout dragged on for another year, protesters would fill school buses each Wednesday and protest in front of businesses still advertising in the *Journal de Montréal* or in front of the Québécor headquarters (Guilbert and Larose, 2015: 86). In December 2010, ten thousand people took to the streets of Montreal in a solidarity rally organized by the Confédération des Syndicats Nationaux, one of Quebec's largest trade union federations (Sprague, 2011: 13). On January 24, 2011, a benefit concert was held at the Metropolis in Montreal to mark the two-year anniversary of the labour dispute and to raise funds for the locked-out workers (Canadian Press, 2011).

In February 2011, a tentative agreement was reached, and on February 26 the locked-out employees spent ten hours going over each provision of an 80-page collective agreement. The agreement called for major union concessions, while the company withdrew a demand to prohibit the fired employees from working for competing news outlets and proposed a $20 million severance and re-training package. According to the union secretary, the entire agreement was a downgrade from pre-existing agreements (Karedeglija, 2011).

The lockouts at the *Journal de Québec* and the *Journal de Montréal* were particularly long, especially when compared to the average duration of lockouts in the province. In 2011, the average lockout in Quebec lasted 53.8 days (lower than the Canadian average of 71.1 days) (Government of Canada, 2020). The capacity to continue production at both newspapers led to an erosion of the unions' bargaining power and an increase in the duration of workplace conflict. Other journalists could continue supplying content despite the lockout, as long as they remained outside the newspaper offices. Such a setup was no challenge, given the current state of technology. The balance of power had shifted entirely in Québécor's favour. Thus, with the anti-strike-breaking provisions in the *Labour Code* no longer serving their purpose, a call for reform was made in late 2010.

Effects of Technological Strikebreaking at the *Journal de Montréal*

We will now return to the three-tier model of collective bargaining to examine how the ineffectiveness of Quebec's anti-strikebreaking provisions affected the external environment and the bargaining process at the *Journal de Montréal* both strategically and functionally. Finally, the bargaining outcomes will be examined.

Once the Superior Court of Quebec had reviewed the Labour Board's decision in the *Journal de Québec* case (allowing the use of journalists to supply the newspaper with content), the legislative environment was no longer the same. As the *Journal de Montréal* began negotiations, the balance of bargaining power had fundamentally altered.

Bargaining power depends on the capacity to inflict or endure economic or social sanctions (Dion, 1986). In "The Pure Theory of Bargaining," Mabry argued that obtaining concessions at the bargaining table was contingent upon the capacity to reward or punish the other party (Mabry, 1965). In the case of the *Journal de Montréal*, because journalists could work outside the newspaper offices while unionized workers remained locked-out, only one party at the bargaining table would suffer financially. Indeed, Québécor's financial statements (as well as the management discussion and analysis) for the last year of the lockout revealed a profitable business whose net income from news media increased from 2010 to 2011 (Québécor Inc, 2011 and 2010: 9); furthermore, the company was able to develop its Internet presence in response to external competition (Québécor Inc, 2012:8). Thus, the balance of bargaining power shifted in Québécor's favour throughout the bargaining process at the *Journal de Montréal*.

The possibility of technological strikebreaking appears to have influenced Québécor's strategy even before the dispute began at the *Journal de Montréal*, as shown by Québécor's move toward media convergence (use of material provided by other Québécor entities) (*Syndicat canadien de la fonction publique*, 2008) and by the creation of an internal news agency (QMI). Perhaps owing to the Labour Board's decision in the *Journal de Québec* case (which had not then been judicially reviewed), the *Journal de Montréal*'s union did not factor technological strikebreaking into its strategic assessment. When the journalists first learned about the lockout, they initially wondered how the newspaper would continue its operations (Guilbert and Larose, 2015: 75). After the start of the dispute, the union chose to adopt a litigious strategy (again, likely based on the 2008 Labour Board decision), which ultimately proved unsuccessful. The union president stated that the battle was lost in 2009, when the labour arbitrator rejected the union's grievance and when the Superior Court reviewed the *Journal de Québec* case (Guilbert and Larose, 2015: 101).

At the functional level of bargaining, an impasse was soon reached, the eventual outcome being a lockout. Both sides appeared to have firm positions. Management representatives stated outright that the *Journal de Montréal*'s existing bargaining agreement was outdated and that it was time for the pendulum to swing the other way (Guilbert and Larose, 2015: 13-14), while the union issued a press release stating that they would not give up their working conditions while the *Journal de Montréal* continued to earn $50 million in profits annually (Les deux premiers jours du lockout, 2009). Ultimately, Québécor could withstand the labour dispute much longer than could the union because news material continued to be supplied by journalists working remotely.

For the union, the outcome of the bargaining process was severe. "The impact of the labour dispute had taken its toll on most employees. Family breakups, psychological stress and financial hardships were some of the examples used by union members to explain why they were left no choice but to concede defeat in accepting the company's offer," wrote *The Globe and Mail* (Séguin, 2011). "We lost everything," said Pascal Filotto, the union secretary (Sprague, 2011). Of the 253 employees, only 62 would remain on staff. "Workweek, compensation, vacation pay, pretty much everything… there's not a single thing that wasn't downgraded from what we had before," said Filotto (Karedeglija, 2011).

Calls for Reform: Were They Necessary?

The protests during the lockout at the *Journal de Montréal* led to calls for legislative reform, which ultimately led to an initiative to reform Quebec's *Labour Code* (4.1). Yet technological change required no legislative response to align the provisions of the *Labour Code* with the legislator's intent (4.2).

The 2011 Initiative to Reform the *Labour Code*

On September 20, 2010, Guy Leclair, a member of Quebec's National Assembly, presented a petition that over twenty-one thousand people had signed and which asked for the National Assembly to take all means necessary to encourage a quick resolution of the labour dispute at the *Journal de Montréal*, including naming a mediator or adopting legislation to improve the balance of bargaining power (Petition filed at the Assemblée Nationale du Québec, 2010). On October 22, 2010, the National Assembly unanimously adopted a motion to "modernize" the *Labour Code*, particularly the *Code*'s anti-strike-breaking provisions, to better reflect economic and technological changes (Assemblée Nationale du Québec, Order of initiative, 2011).

On December 8, 2010, the Committee on Labour and the Economy adopted an initiative to reform the replacement worker provisions and decided to hold special consultations to hear representations from the unions, from the employer's representatives, and from experts (Assemblée Nationale du Québec, Order of initiative, 2011). The consultations took place on February 1 and 2, 2011 (Assemblée Nationale du Québec, Journal des débats, February 1, 2011). In his opening remarks, François Ouimet, the Committee's president, reminded those present of the purpose of the replacement worker provisions, namely to strike a balance between the two parties to avoid violence during labour disputes and to shorten such disputes. He mentioned changes to methods of production, adding that it was time to reflect on whether the anti-strikebreaking provisions were still adapted to the realities of the world of work (Assemblée Nationale du Québec, Journal des débats, February 1, 2011, 10:00).

Raynald Leblanc, the *Journal de Montréal* union's representative, openly stated that the union wished to demonstrate that the anti-strikebreaking provisions in the *Labour Code* were outdated, particularly when it came to the concept of *establishment*. According to Leblanc, it was clear that the *Code* allowed an employer to continue operations unimpeded while locking out the employees. To demonstrate this legal loophole, the union decided to create a printed version of the online newspaper, *Ruefrontenac.com*, out of a hotel room in Quebec City to be distributed the next day at the legislature, while leaving vacant their Montreal premises (their "establishment"). This example, according to Leblanc, demonstrated the absurdity of the notion of a brick-and-mortar "establishment" in the newspaper industry (Assemblée Nationale du Québec, Journal des débats, February 1, 2011, 10:20).

Québécor president Pierre Karl Péladeau began his testimony by lamenting the legislature's involvement in a labour dispute at a private business. He added that if a reform were necessary, the legislature would do well to reconsider the entirety of the *Labour Code* to see how it benefits or penalizes Quebec's businesses. Péladeau refused to comment on the concept of *establishment*, preferring to leave that debate to "experts" (Assemblée Nationale du Québec, Journal des débats, February 1, 2011, 11:21).

When Professor Gilles Trudeau addressed the Committee, he took the time to specify that he was acting not as Dean of the Faculty of Law at the Université de Montréal but in his own name, as an expert on labour law. For Trudeau, the need for reform extended beyond replacement worker provisions and the dispute at the *Journal de Montréal*. He felt that the dispute showed the obsolescence of the *Labour Code* in Quebec's changing socioeconomic situation. In 1977, worker replacement provisions had been adopted to "crystalize" a balance of power judged to be conducive to reaching a negotiated agreement. In 2011, the balance of power had significantly shifted. Whereas in 1977

the concept of *establishment* was clear-cut (and here Trudeau pointed out exceptions recognized in 1977, namely transport), in 2011 it no longer made sense (Assemblée Nationale du Québec, Journal des débats, February 1, 2011, 10:52).

In its final report of November 2011, the Committee recommended amendments to the *Labour Code* to reflect the changes in the concept of *establishment*. Referring to the 2009 Labour Board decision in the *Journal de Québec* case (since overturned) and the testimonies to the Committee, the Committee members stated that the balance of power between the bargaining parties was becoming considerably unequal, particularly in the communications sector. The members of the legislature further stated that Quebec's anti-strikebreaking provisions should be adapted to changing technology and the changing economy in order to maintain a balance of power, a fundamental goal for the legislator. If such adaptation is not done by the courts, the Committee was clear that legislative action would be required (Assemblée nationale du Québec, Order of initiative, 2011, 14). Ultimately, no changes were made, and section 109.1 of the *Labour Code* has remained unchanged.

Is Legislative Change Necessary?

Though both disputes brought about a proposed amendment to the *Labour Code*, legislative change is not necessary to bring Quebec's 1977 provisions into the twenty-first century. On December 3, 2010 a private member's bill was tabled in the National Assembly by Guy Leclair. Bill 399 sought to amend the *Labour Code*'s replacement worker provisions to add restrictions on the use of replacement labour outside the employer's establishment (Bill 399, 2010). Bill 399 died on the Order Paper. Nonetheless, it is worth examining as a possible solution to the issues raised by section 109.1 of the *Labour Code*. The proposed amendment would have prohibited any replacement work done within or outside the establishment by either private persons or moral persons. One wonders, however, whether legislative change is necessary.

Section 41 of Quebec's *Interpretation Act* reads as follows:

> Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights or for the remedying of some injustice or the securing of some benefit.
>
> Such statute shall receive such fair, large and liberal construction as will enable the attainment of its object and the carrying out of its provisions, according to the true intent, meaning and spirit.

Thus, there is already legislation that would enable the courts to broaden the interpretation of *establishment* in the *Labour Code* in a manner consistent with the legislator's true intention, with the meaning and spirit of the *Code*,

with the recognition of rights (namely the right to strike), and with the remedying of an injustice. Without repeating what has already been said, any interpretation of *establishment* should consider the balance of bargaining power and the need to create sufficient economic pressure to accelerate the resolution of the dispute. Therefore, a restrictive interpretation cannot be justified under the *Interpretation Act*. Referring back to the Labour Board's 2008 decision, only an interpretation centred on the work actually done by the striking or locked-out employees would lead to sufficient economic pressure (without such pressure being disproportionate) to ensure rapid dispute resolution. For this reason, *establishment* in the *Labour Code* should be interpreted as the place where the striking or locked-out employees normally do most of their work. This interpretation would affect the economic behaviour of the parties, thus fulfilling the legislator's original intention in 1977.

Conclusion

Quebec's labour legislation proved ineffective in dealing with the use of replacement workers at the *Journal de Québec* and the *Journal de Montréal*, an indication of how labour law has ignored the new economic realities, especially the significant changes in production as we move toward a knowledge-based economy.

From 1977 (when the *Labour Code* was amended) to 2007 (the beginning of the lockout at the *Journal de Québec*), Quebec's economy went from industrial to post-industrial while, as discussed previously, the interpretation of the *Labour Code*'s provisions remained unchanged. In 1977, Quebec was already on the cusp of economic change, with the onset of a decline in manufacturing. The decline would only accelerate over the ensuing decades. The Institut de la statistique du Québec noted a clear tertiarization of the economy between 1976 and the turn of the millennium (Institut de la statistique du Québec, 2004: 61-62). The manufacturing sector was already stagnating by the 1970s (Manzagol, 1983: 238) and declining from 1979 onwards (Manzagol, 1983: 237-238). The decline from the 1970s onward is also shown by the decreasing investment in machinery; investment in machinery plummeted from 74% of Quebec's GDP in 1972 to 43% in 1997 (Migué, 1998: 25). During the 1980s, both data processing and consulting engineering began to occupy a more important place within Quebec's economy (Durand, 2016: 207). During the recession of the early 1990s (1990-1992), manufacturing jobs fell by a further 11.3% (Institut de la statistique du Québec, 2004:62). The late 1990s saw an expansion fueled by telecommunications, aeronautics, and technology, whereas traditional manufacturing decreased again significantly (Institut de la statistique du Québec, 2004: 62). To continue interpreting Quebec's legislation in a manner focused on industrial production was nothing short of anachronistic.

The idea that technology can disrupt labour relations is not new. However, the recent rise of the knowledge economy has profoundly disrupted central distinctions of labour law, notably by eroding the one between "working time" and "non-working time" and the one between "in the workplace" and "outside the workplace" (Negri and Vercellone, 2008). The mass relocation of workers to their homes during the COVID-19 pandemic further illustrates how the modern workplace often has little in common with locations of industrial production.

As Quebec's economy shifted, the interpretation of replacement worker provisions in the *Labour Code* remained stagnant, thus enabling technological strikebreaking. From 2007 to 2011, the result was two of the longest lockouts in Canadian history. Despite not having any journalists, the *Journal de Québec* and the *Journal de Montréal* continued to publish without interruption by using everyday technology. The balance of bargaining power was fundamentally altered and the bargaining outcomes, particularly at the *Journal de Montréal*, were dramatic.

Though little has been written about technological strikebreaking in North America, the labour disputes at both newspapers are illustrative. As the economy continues to shift, particularly as workers relocate to their homes for production, further attention must be paid to the effects of technological change on collective labour rights.

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SUMMARY

The right to strike has been constitutionally protected in Canada since 2015. In other jurisdictions where the right to strike is explicitly recognized in the constitution, protection against strikebreaking is recognized as part of that right. Only two Canadian provinces restrict the use of replacement workers during a strike or a lockout. Quebec's *Labour Code* has provisions that prohibit the use of replacement workers at the employer's establishment. Quebec arbitrators, courts, and boards have interpreted this ill-defined concept as a strictly physical location of production, while ignoring technological advances that make remote work possible. This paper examines how the restrictive interpretation of *establishment* allows a form of strikebreaking that the Spanish Constitutional Court has described as "technological strikebreaking" (*esquirolaje technologico*), while also allowing the use of technology already at the employer's disposal to circumvent restrictions on replacement workers even when such technology is not routinely used. The impact of technology on strikebreaking is examined through two case studies: the successive lockouts at the *Journal de Québec* and the *Journal de Montréal*. In both cases, external contributors provided the newspapers with content electronically, thus allowing uninterrupted publication. Using Katz, Kochan and Colvil's three-tier model of collective bargaining, this paper looks at how technological strikebreaking disrupts not only the balance of bargaining power but also bargaining strategy, and how, in the case of the *Journal de Montréal*, it led to devastating bargaining outcomes. Though the lockouts led to a call for legislative reform in 2011, legislative change is not necessary to align existing provisions with the goal of shortening labour disputes.

RÉSUMÉ

Le droit de grève a reçu une protection constitutionnelle au Canada en 2015. Dans certaines juridictions où le droit de grève est explicitement protégé dans la constitution, l'interdiction du recours aux briseurs de grève est reconnue comme découlant de ce droit constitutionnel. Seules deux provinces canadiennes interdisent le recours aux travailleurs de remplacement durant une grève ou un lockout. Au

Québec, cette interdiction s'applique au sein de l'établissement de l'employeur. Le concept mal défini d'établissement a été interprété par des tribunaux et des arbitres comme se limitant au lieu physique de production, sans égard pour les avancées technologiques qui permettent aux travailleurs d'œuvrer à distance. Cet article examine comment une telle interpretation restrictive facilite une forme de recours aux briseurs de grève qui avait été identifié par la cour constitutionnelle espagnole, à savoir les briseurs de grève technologiques (esquirolaje technologico), soit le recours à la technologie pour contourner les restrictions prévues à la loi même lorsqu'il ne s'agit pas de technologie généralement utilisée. L'impact de la technologie est examiné au moyen de deux études de cas: les lockouts successifs au *Journal de Québec* et au *Journal de Montréal*. Durant ces lockouts, les publications ont continué de façon ininterrompues grâce à des collaborateurs externes qui fournissaient du matériel électroniquement. En utilisant le modèle de Kochan et Katz, cet article examine comment les briseurs de grève technologiques ont modifié l'équilibre de pouvoir, ont affecté le niveau stratégique de négociation et ont eu des impacts considérables sur l'issu du lockout. Enfin, même si les lockouts ont mené à des appels de réforme législatives en 2011, de telles réforme ne sont pas nécessaires pour que les dispositions antibriseurs de grève rencontrent leur objectif initial, à savoir la réduction de la durée des conflits de travail.