RESOURCE CENTRE

Bills C-257 and C-236: A Complete Prohibition on Replacement Workers?
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Employment and Labour Law

There are two bills currently pending before Parliament which propose to amend the *Canada Labour Code* (the "Code"). The intent of each of these substantially similar Private Members' Bills is to prohibit the use of replacement workers (so-called "scabs") by federally regulated employers. The success of either of these bills will have significant long and short term ramifications for both federally *and provincially* regulated employers.

BACKGROUND

A. Legislative History

On May 1, 2006, the NDP submitted Bill C-236 to the House of Commons, and then three days later, on May 4, 2006, the Bloc Québécois submitted Bill C-257. Parliamentary debate on Bill C-257 has commenced while Bill C-236 has not progressed beyond first reading.

Both the NDP and the Bloc have tabled similar bills in the past and supported one another's efforts to create a total prohibition on replacement workers in the federal jurisdiction. Past and present efforts to ban replacement workers are premised on the belief that the presence of replacement workers leads to longer strikes and more picket line violence.

Prior to Bills C-257 and C-236, the most recent attempt to ban replacement workers was Bill C-263. Bill C-263 was defeated by just 12 votes in April of 2005. However, unlike previous attempts to prohibit replacement workers federally, each of the current bills has been brought forward in the context of a minority government.

The Liberal Party does not have a consensus position on the replacement worker issue. In the previous Parliament, 32 Liberal MPs voted in favour of adopting Bill C-263 and prohibiting replacement workers. Only Cabinet Ministers were required to vote against Bill C-263. That being the case, a number of Liberal MPs, even former Cabinet Ministers, may vote in favour of Bills C-257 and C-236. While the Conservatives do not support these bills, their minority status makes it impossible for them to decide the outcome of this legislation. Thus, there is a risk that the Code will be amended to provide a total prohibition on the use of replacement workers during a labour dispute.

Bill C-257 has progressed in the House. Should it be defeated, debate on Bill C-236 will continue. The staggered submission of the bills will provide supporters of a prohibition on replacement workers with a second opportunity to achieve their objective in the numerically favourable climate of a minority government.

B. Replacement Workers Under the *Canada Labour Code*

In 1999, Parliament amended the Code as it related to the use of replacement workers during a strike or lockout. Prior to the changes to the Code, employers' use of replacement workers was not limited in the federal jurisdiction either by statute or through the jurisprudence developed by the former Canada Labour Relations Board. However, the 1999 amendments qualified the right of an employer to use replacement workers. The amended language is now found at s. 94(2.1) of the Code.

The catalyst for the amendments to the Code was a report issued by the Sims Task Force, entitled *Seeking a Balance*. Under the current provisions of the Code, employers continue to be permitted to use replacement workers during a strike or lockout. However, employers are prohibited from using replacement workers during a strike or lockout where replacement workers are used for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining goals.

The present wording of the Code functions to protect trade unions' representational rights while simultaneously permitting employers who act in compliance with the Code to use replacement workers.

C. Experience Under the Current Provisions of the Code

In 2005-2006, 97% of all collective bargaining agreements under federal jurisdiction were signed without a work stoppage. Moreover, since the 1999 amendments only 18 complaints have been submitted to the Canada Industrial Relations Board related to the "replacement worker" provisions of the Code. Thirteen of these complaints were withdrawn, three were rejected and two are currently under consideration. Given the current wording of s. 94(2.1), it appears that a fair balance has been struck.

BILLS C-257 AND C-236 SHOULD BE OF CONCERN TO EMPLOYERS

I. Out-of-Step Industrial Relations Policy

At present, Quebec and British Columbia are the only two jurisdictions in North America that have adopted complete prohibitions on the use of replacement workers. If either Bill C-257 or Bill C-236 is adopted, the federal jurisdiction will become the third. Adoption of a prohibition on replacement workers at the federal level could create significant momentum for similar amendments to be made in the other provinces.

II. Asymmetrical Industrial Relations Policy

Balance is a key pillar of Canadian industrial relations. The employer's right to lock out its employees is offset by the employees' right to strike. Prohibiting a company from hiring staff to replace strikers, even though strikers are free to work elsewhere, introduces asymmetry to the rights and obligations of the parties to a labour dispute.

A. Increase in Union Bargaining Power

In the absence of the *potential* for replacement workers to be used, employers' bargaining positions will be weakened. The result of a prohibition will be to force employers lacking the ability to withstand union demands to capitulate in order to avoid work stoppages. Employers unable to continue their operations will be compelled to seek quick settlements rather than settlements which serve the long-term viability of the enterprise.

Large, multinational companies are better positioned to survive a shutdown brought on by a ban on replacement workers as they can transfer work out of the country. However, the prospect of a shutdown acts as a disincentive to maintaining current operations and also to future investment.

An integral element of both Bill C-257 and Bill C-236 is a prohibition on employers' ability to employ bargaining unit members who are on strike or locked out. This provision operates to prevent employers from allowing employees to cross their own union's picket line. In effect, Bills C-257 and C-236 will legislate solidarity. Individual workers will be unable to express dissatisfaction with their own union's actions by choosing to return to work. As a consequence, under either bill a union may be able to present its collective bargaining demands to the employer based upon an artificially inflated level of membership support and as a result, work stoppages may be unnecessarily prolonged.

B. Impact on the Supply Chain

The Code governs the collective bargaining relationship of some 1,000,000 employees engaged in federal jurisdiction industries, which include interprovincial transportation (air, land and water), broadcasting, banking, longshoring and grain handling, and private sector employees in Nunavut, the Yukon and the Northwest Territories. The consequence for employers in these industries is that a prohibition on the use of replacement workers will certainly augment the direct pressure which a union may exert during collective bargaining. However, in order to appreciate the true magnitude of the proposed amendments to the Code, the ramifications of a work stoppage (which employers would be prohibited from using replacement workers to mitigate) must be considered from the perspective of those who *rely* on the products or services of federally regulated employers.

This is particularly so as many employers are now integrated into a lean production system and thus increasingly vulnerable to a work stoppage at another firm which is part of the production web. This increased vulnerability flows from the dictates of modern lean production methodologies which prevent firms from stockpiling significant inventories of parts or materials to allow them to continue operations during a strike at a supplier firm. Also, federally regulated providers of transportation services are an integral part of many production webs. As such, employers who rely on the services of these firms will also be vulnerable to the consequences of the proposed amendments to the Code.

It must be emphasized that the impact of a prohibition on replacement workers will not be confined to employers directly regulated by the Code. It is certain that the customers and suppliers of federally regulated employers, although possibly regulated by provincial legislation, will be impacted by a prohibition on the use of replacement workers. Federally regulated employers must be mindful of the fact

that over the long term, customers whose operations are threatened or repeatedly impacted by a work stoppage at a supplier or service provider may look to more reliable alternatives, if that is even possible.

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Ogilvy Renault LLP or any member of the firm on the points of law discussed.

For further information on how the proposed amendments could impact your business or for information on how you can effectively express your views on the proposed amendments, please contact one of the following lawyers:

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