SUBMISSIONS OF THE CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS REGARDING BILL C-257

INTRODUCTION

The Canadian Association of Counsel to Employers – or CACE – is an Association comprised of over 200 practicing Canadian lawyers, who devote the majority of their practices to the representation of management in labour and employment matters. CACE's members act for most of the major employers in the country, including many of the businesses which are subject to federal jurisdiction and the *Canada Labour Code* ("*Code*"). CACE's members have a wealth of experience in collective bargaining and labour relations. We are filing these submissions, and repeatedly sought but unfortunately were not granted standing to appear before the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, because we firmly believe that it would be a serious mistake for Parliament to adopt Bill C-257. Based on our members' experience as practitioners in both the federal sector and three provincial jurisdictions where similar legislation was or is in force, we believe that Bill C-257 will have negative consequences on labour relations in the federal jurisdiction and may adversely impact the Canadian economy in general.

As is more fully discussed, below, the empirical evidence demonstrates that replacement worker bans, like that proposed in Bill C-257, do not decrease the number or length of work stoppages. To the contrary, one study even concludes that these sorts of provisions actually increase both the duration and frequency of labour disruptions. Moreover, there is no evidence to show that replacement worker bans have any impact on picket line violence. Thus, Bill C-257 will not achieve the goals that its supporters claim it will advance.

Far from improving labour relations, Bill C-257 will likely cause significant harm to labour relations, negatively impact employers' costs of operations and likely harm the Canadian economy in general. In this regard, many of the businesses that are subject to the *Code* form the backbone of the Canadian economy: the airlines, railways, marine shippers, most trucking companies, many aspects of the nuclear industry, the banks, the postal service, many courier companies, operators of grain and feed mills and the telecommunications industry are all governed by the *Code*. These undertakings provide vital services to Canadian businesses and the general public. Any significant increase in costs associated with the operation of federal undertakings will impact everyone in the country. It has been demonstrated that provisions like Bill C-257 artificially drive up the cost of labour settlements. Thus, in addition to being ineffective to achieve its purported goals, the replacement worker ban in Bill C-257 may have adverse consequences on Canada's continued prosperity.

Furthermore, the adoption of Bill C-257 will upset the careful balance between management and labour that has been enshrined in Part I of the *Code*. Without exception, significant changes to labour legislation at the federal level in the past have always been introduced following a thorough and responsible examination and study by the government, often under the auspices of expert commissions or task forces that were able to achieve broad consensus between

management and labour on the content of amendments.[1] Indeed, it was just such a process that occurred in 1999 when the *Code* was last amended to adopt virtually all of the recommendations made by the majority of the Sims Task Force in its report, aptly entitled, "Seeking a Balance".[2] Notably, the Sims Task Force rejected the notion of a replacement worker ban like Bill C-257, after thorough study and debate on the issue.

We submit that for Parliament to now rush headlong to adopt Bill C-257, without any study or even a proper debate on the issue, would be a serious mistake with far-reaching consequences. We thus urge the Committee to take this opportunity to stop the progress of Bill C-257.

OVERVIEW OF THE *CODE'S* CURRENT PROVISIONS AND OTHER NORTH AMERICAN LABOUR RELATIONS REGIMES

The *Code* currently contains significant protections for trade unions in regard to replacement workers. First, and most importantly, the *Code* prohibits employers from hiring permanent workers in preference to striking or locked-out employees. Section 87.6 of the *Code* (which was adopted in 1999 to codify pre-existing case law of the Canada Labour Relations Board[3]) requires an employer to reinstate bargaining unit members following a strike or lockout in preference to replacement workers. Second, sub-section 94(2.1) of the *Code* prohibits employers from using replacement workers "for the demonstrated purpose of undermining a trade union's representational capacity rather than the legitimate pursuit of bargaining objectives". This provision affords unions greater protections than under the labour legislation in most Canadian provincial jurisdictions or any American jurisdiction.[4] It is noteworthy that following the introduction of sub-section 94(2.1) of the Code in 1999, no trade union has advanced a case to hearing before the Canada Industrial Relations Board, claiming that an employer had used replacement workers in violation of this sub-section.

The proposed amendments to the *Code* contained in Bill C-257, with one exception, are found nowhere else in North America. The one exception is the Province of Quebec, which contains similar provisions in sections 109.1 to 110.1 of the *Labour Code*.[5] The only other jurisdiction with a somewhat similar provision is British Columbia. The B.C. legislation, however, differs significantly from Bill C-257 in that striking or locked-out employees are free to choose to cross a picket line. Under Bill C-257, workers would have this freedom of choice removed from them, as the Bill seeks to prohibit employers from allowing striking or locked-out workers to elect to work during a labour dispute. If Parliament were to adopt Bill C-257, the *Code* would be

---

1 See e.g. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: The Queen's Printer, 1969) [*Woods Task Force*]; Canada, Human Resources Development Canada, *Seeking a Balance: Canada Labour Code, Part I, Review*, (Ottawa: Minister of Public Works and Government Services, 1995) [*Sims Task Force*].

2 *Sims Task Force, ibid.*

3 See, for example, *Brewster Transport Co.* (1986) 66 di 1; *Eastern Provincial Airways Ltd.* (1983) 54 di 172, revd. in part on other grounds [1984] 1 F.C. 732 (C.A.).

4 Only Quebec and British Columbia have provisions in their labour legislation that prohibits the use of temporary replacement workers. No American jurisdiction poses any ban on the use of replacement workers during a labour dispute.

5 *Labour Code*, R.S.Q. c. C-27.

completely out of step with legislation in every other North American jurisdiction, except Quebec.

WHY ARGUMENTS IN FAVOUR OF BILL C-257 CARRY NO WEIGHT

Trade unions suggest that strikes and lockouts will be shorter and the number of strikes and lockouts will drop if Bill C-257 is adopted. As Paul Forder from the Canadian Auto Workers Union stated in his testimony before the Committee: "Our view is that the evidence is clear. When replacement workers and strike breakers are used during strikes and lockouts, labour disputes last longer."[6] Similarly, Mme Claudette Carbonneau of the Centrale des syndicats nationaux stated in her testimony before the committee that "the statistics overwhelmingly show that replacement worker legislation makes labour relations more civilized and reduces the number and length of disputes."[7] An examination of the statistics, however, shows that there is no evidence that replacement worker legislation decreases the number or length of work stoppages.

A comparison of data from Quebec (which adopted its ban on replacement workers in 1977), British Columbia (which adopted its ban on replacement workers in 1992), Ontario (which had a ban on replacement workers from 1993 to 1995) and the federal jurisdiction (which has no ban on the use of temporary replacement workers) demonstrates the ineffectiveness of provisions like Bill C-257 in reducing the number of work stoppages. The table below compares these numbers.

	Federal	Ontario	Quebec	British Columbia
Number of work stoppages in 1976	46	230	282	72
Number of work stoppages per 10 000 employees in 1976	0.97	0.7	1.5	0.7
Number of work stoppages 2005	4	58	76	7
Number of work stoppages per 10 000 employees in 2005	0.05	0.12	0.25	0.04

Source: Human Resources and Social Development Canada, "Key Observations Regarding the Effect of Replacement Worker Legislation on Workers" (2006) at 2.

---

6 House of Commons, Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, Minutes of Proceedings, 39th Parl., 1st sess. Meeting No. 44 (5 December 2006).

7 House of Commons, Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, Minutes of Proceedings, 39th Parl., 1st sess. Meeting No. 47 (7 December 2006).

While this table shows what seems at first to be a dramatic drop in the number of work stoppages in Quebec after the adoption of the ban on replacement workers, the historical context for these numbers needs to be considered. The starting point for this table is 1976, a year that saw large scale labour disruptions as the country moved into a recession: on October 14, 1976, over 1 million workers joined in a national day of protest against the Trudeau government's wage and price controls. Given this starting point, it is not surprising that there were fewer work stoppages in 2005 while the country as a whole enjoyed a strong economy. Indeed, this dramatic drop in work stoppages can be seen in Ontario where the ban was adopted and then removed, and the federal jurisdiction where there has never been a ban. While the incidence of work stoppages in British Columbia fell in 2005, this is likewise attributable to the province's current robust economy. What is important to take away from this table is that, despite the adoption of a ban on replacement workers in 1977, Quebec still has more work stoppages than Ontario or the federal jurisdiction. Quebec also has the highest ratio of work stoppages – more than twice Ontario's ratio, both before and after the introduction of the ban. The ban on replacement workers has not done anything to change Quebec's status as a hotspot for labour disruptions.

Likewise, there is no evidence that replacement worker bans result in shorter work stoppages. The table below compares the length of work stoppages in the private sector in the federal, Ontario, Quebec and British Columbia jurisdictions.

	Federal	**Ontario**	**Quebec**	**British Columbia**
1975	24.8	31.2	37.8	34.2
1976	22.4	30.0	35.0	30.6
1977	53.1	23.5	38.1	16.3
Average	**33.4**	**28.2**	**37.0**	**27.0**
1990	59.6	39.8	42.4	36.6
1991	36.8	42.2	37.2	43.3
1992	71.3	37.0	40.8	51.9
Average	**55.9**	**39.7**	**40.1**	**43.9**
2003	51.0	38.2	46.3	34.5
2004	46.5	30.1	57.0	36.7
2005	34.3	46.0	36.4	15.4
Average	**43.9**	**38.1**	**46.6**	**28.9**

Source: Human Resources and Social Development Canada, "Key Observations Regarding the Effect of Replacement Worker Legislation on Workers" (2006) at 3.

Despite Quebec's legislation, the average length of a work stoppage in that province has risen from an average of 37 days in the period from 1975 - 1977 to 47 days in the period from 2003 - 2005. The current average duration of work stoppages in Quebec is the highest of all four jurisdictions examined.[8] Clearly, replacement worker bans do not achieve their objectives of reducing the duration or frequency of strikes.

In the most comprehensive study done to date, Cramton, Gunderson and Tracy found that the average duration of a strike is 86 days when replacement workers are banned and only 54 days when replacement workers are permitted. The same study also concludes that a ban on replacement workers increases the probability of a strike occurring from 15 percent to 27 percent.[9] Thus, independent academic experts have determined that replacement worker bans are actually harmful to sound labour relations.

Unions also advance the argument that a reduction in picket line violence will occur if there is a ban on replacement workers. However, there are no reliable statistics respecting violent conduct on Canadian picket lines. While there have certainly been some high-profile labour disputes where violence has occurred, in our members' experience, the vast majority of picket lines are quite peaceful. Where picket line violence does occur, it is just as likely to be directed at employees who are entitled under legislation like Bill C-257 to cross picket lines (managers, supervisors or excluded employees) as at newly-hired temporary replacement workers or bargaining unit members who elect to cross the picket line. There is absolutely no evidence that the replacement worker bans in British Columbia or Quebec reduced picket line violence.

Furthermore, picket line violence is already subject to sanctions under criminal and tort law. Granting trade unions more power in collective bargaining through a ban on temporary replacement workers in order to reduce illegal picket line violence would be tantamount to rewarding criminal and tortious conduct. From a public policy perspective, we submit it would be unsound and improper to fashion labour laws in this manner.

BILL C-257 SHOULD NOT BE ADOPTED BECAUSE THE CAREFUL STUDY OF THE SIMS TASK FORCE DETERMINED SUCH A PROVISION WAS UNWARRANTED

The most compelling argument against adopting a prohibition on temporary replacement workers is that such a change to the *Code* was already rejected after a far more thorough study of the issue. The Sims Task Force fully considered this issue in 1995 and concluded that the balance of power between employers and trade unions required that federally-regulated employers be permitted to use temporary replacements during a strike or lockout. The Sims Task Force was an expert panel that engaged in an extensive tri-partite consultation process. The Task Force had the benefit of full submissions on this issue.[10] The majority determined that employers should be permitted to engage temporary replacement workers during a legal strike or lockout so long as the demonstrated purpose of doing so is not to undermine the trade union's representational

---

8 It should also be noted that the federal average has been driven artificially high due to a small number of lengthy work stoppages.

9 Peter Cramton, Morley Gunderson & Joseph Tracy, "Impacts of Strike Replacement Bans in Canada" (1999) 50 Lab. L.J. 173.

10 Consultations were conducted on the trade union side with the CLC, CSN, FTQ and on the employer side with FETCO, WGEA and the CBA.

capacity rather than to pursue legitimate bargaining objectives. The Woods Task Force on labour relations likewise held that a ban on the use of replacement workers was a necessary countervailing right to the right to strike:

> [T]he employer's economical sanction equivalent to the union's right to strike rarely is a lockout: it is his ability to take a strike. ...However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of the strike and to use other employees and replacements to perform work normally done by strikers. Together with the lockout, these possibilities constitute the employer's *quid pro quo* for the workers' right to strike; this is as it should be, in our view.[11]
>
> (Emphasis added)

In considering the place of temporary replacement workers in the labour relations balance, it is important to note that trade unions typically compensate bargaining unit members through strike pay (often with contributions from other trade unions) and striking workers are entitled to seek alternative employment.[12] In addition, trade unions are able to engage in expressive activities such as picketing or calls for consumer boycotts, to exert further economic pressure on the employer. A balance is achieved on the employer side partly through the right to lockout but mostly through mechanisms by which the employer can attempt to sustain its operations and place economic pressure on the trade union and bargaining unit members. These mechanisms include assigning bargaining unit work to managers and supervisors, permitting bargaining unit members to return to work, temporarily contracting out work to third parties and hiring temporary replacement workers.

The principal goal of the Sims Task Force was to achieve a labour relations balance within the *Code* through a tripartite consultative process. Bill C-257 is the antithesis of the consultative, tripartite approach adopted by the Sims Task Force: it is a highly politicized attempt to skew the labour relations balance in favour of trade unions. The Bill would leave intact the features of the labour relations system that favour trade unions and workers – the ability to strike, the ability to pay strike pay, the ability to seek alternative employment, the ability to picket and engage in other expressive activities – while severely limiting the ability of employers to counter trade union tactics.

If Bill C-257 were passed, the tradition of the depoliticized labour law reform at the federal level would be shattered. Experience at the provincial level suggests that the politicization of labour law is ultimately counterproductive, since it leads inevitably to instability and a "swinging pendulum", as labour law shifts to mirror the ideological positions of the government of the

---

11 *Woods Task Force*, *supra* note 1 at para. 607.

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

day.[13] This is precisely what has occurred in Ontario, and, to a certain extent, British Columbia, where successive governments of different political stripes have made sweeping amendments to labour legislation. This pendulum-swinging is counter-productive to healthy labour relations, fuels economic uncertainty and creates litigation between labour and management.

ECONOMIC ARGUMENTS FAVOURING TEMPORARY REPLACEMENT WORKERS

There are a number of economic arguments supporting the ability of employers to use temporary replacement workers during a work stoppage.

First, as noted in the study by Cramton, Gunderson and Tracy, there is evidence that bans on the use of replacement workers actually increases both the number of work stoppages and the length of these work stoppages.[14] If one of the goals of labour law is to promote industrial stability, then allowing employers to use temporary replacements is justified.

Second, there is evidence to support the conclusion that a ban on replacement workers (and the associated imbalance in bargaining power) results in higher costs to employers in the form of more and longer strikes and higher wage settlements.[15] There is also evidence to support the conclusion that these increased costs have an adverse impact on employment levels. In one 2000 study, it was found that the ban on temporary replacement workers in Quebec, British Columbia and Ontario led to,

> ...a lower provincial employment-to-population ratio ... and a drastically lower bargaining unit employment growth rate. Both estimated relationships are statistically significant at conventional levels of significance controlling for other potential determinants of employment.[16]

Third, a work stoppage could be economically devastating for many employers, particularly if they operate in a highly competitive environment where customers can readily switch their business to competitors. By utilizing temporary replacement workers to provide even limited services during a work stoppage, an employer may be able to preserve parts of its business and the associated jobs of bargaining unit members. This has obvious economic benefits for the employer, workers and the trade union.

Fourth, it has been argued that employers' use of temporary replacement workers performs the function of a "test of economic realities" on the demands of a striking trade union.[17] If an employer can easily attract temporary replacement workers, this indicates that the trade union's

---

13 Paul C. Weiler, "The Process of Reforming Labour Law in British Columbia" in J.M. Weiler & P.J. Gall, eds., *The Labour Code of British Columbia in the 1980s* (Vancouver: Carswell, 1984); Tim Armstrong, "Contemporary Collective Bargaining: How Well is it Working?" (Paper presented at the Larry Sifton Memorial Lecture, March 6, 2003), online: Centre for Industrial Relations and Human Resources <www.chass.utoronto.ca/cir/library/electronicarchives/seftonlectures/SeftonLecture21st_2002-03_Armstrong.pdf.>.

14 *Crompton, et al.* "Impacts of Strike Replacement Bans in Canada"; *supra*, note 9, at 176.

15 *Ibid*, at 177-78.

16 Budd, *supra* note 4 at 243.

17 H.W. Arthurs, "The Right to Strike in Ontario and the Common Law Provinces of Canada" *Proceedings of the Fourth International Symposium on Comparative Law, 1966* at 192; Luc Vaillancourt, "Amendments to the *Canada Labour Code*: Are Replacement Workers an Endangered Species?" (2000) 45 McGill L. J. 757 at 777-778.

demands may be excessive and that it should pursue a compromise. If the employer has difficulty attracting temporary replacements, then it is the employer who should consider a compromise. In both instances, market forces determine the price for labour. A ban on replacement workers introduces an artificial element for those workers who can be readily replaced. Thus, employers of such workers may well end up paying an artificial premium for their services if there is a ban on using replacement workers in the event of a labour dispute.

Fifth, a ban on temporary replacement workers may well encourage employers to establish workplaces outside the jurisdiction so that some operations can be maintained in the event of a strike or lockout. This is precisely what occurred after Quebec and Ontario introduced their bans on replacement workers; a myriad of employers established operations across the border in the United States and in other provinces to avoid a complete shutdown of their operations in the event of a strike or lockout. Good paying unionized jobs were lost in these jurisdictions. Since the *Code* extends across Canada, the adoption of Bill C-257 might result in several federally-regulated employers establishing operations in the United States or elsewhere overseas. It has been our members' experience that once businesses move out of a jurisdiction, they rarely return.

THE UNIQUE NATURE OF THE FEDERAL SECTOR

As noted, the federal sector is unique because many federally-regulated companies constitute the national social and economic infrastructure. For this reason, there has historically been little tolerance for work stoppages in the federal sector, and back-to-work legislation has been common. When the *Code* was amended in 1999 in response to the recommendations of the Sims Task Force, one of the goals was to diminish the federal government's role in labour disputes. For this reason, the *Code* included new provisions on the maintenance of essential services during a work stoppage (section 87.4), to ensure that federal employers continue services that are essential to prevent "an immediate and serious danger to the safety or health of the public". Federal employers, however, continue to have the right to use temporary replacement workers to provide services that are not "essential" within the meaning of section 87.4 of the *Code*, but may nonetheless be essential to the Canadian economy and social fabric. There has not been back-to-work legislation in the federal sector since the *Code* was amended following the Sims Task Force's Report.

If the use of temporary replacement workers were prohibited under the *Code*, then it probably will not be possible for employers to maintain services during a work stoppage beyond those considered "essential" under section 87.4. This means that services which are crucial to the economy could be halted, like mail delivery by Canada Post, flights by Air Canada, and operation of the railways, to name but a few examples. The country would likely require renewed political intervention in labour relations in the form of back-to-work legislation to ensure that Canadian society can function. This would run counter to the goal of restricting political intervention in labour disputes in the federal sector.

CONCLUSIONS

For these reasons we urge the Committee to recommend that the House of Commons not proceed further with this Bill. With respect, we firmly believe that Bill C-257 is ill-conceived, and finds its genesis in political motivations that are contrary to the best interests of the country. Legislation of this magnitude should not be passed hastily, without any real opportunity for

consultation or study. Bill C-257 is a politically-motivated intervention in the federal labour relations system that will undermine the *Code's* careful balancing of rights between management and labour, will create more labour disruptions and will likely have a detrimental impact on the Canadian economy. For this reason we urge you to stop the progress of Bill C-257.

Respectfully submitted this 5th day of February 2007.

Peter Thorup
President

Mary Gleason
Legislative and Law Reform Director