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Proposed Ban on Replacement Workers in the Federal Jurisdiction: A Concern for Employers in All Jurisdictions

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Background

Many employers rely on replacement workers to maintain operations during strikes or lockouts. The right of all federal jurisdiction employers to operate during a strike or lockout is under serious threat from two Private Members Bills presently before Parliament. If enacted, Bills C-257 and C-295 would amend the *Canada Labour Code ('the Code')* by banning the use of replacement workers during a strike or lockout.

Unionized and non-unionized employers alike should be concerned about these Bills. Unionized employers need to be concerned because the Bills will dramatically affect their ability to operate during a strike or lockout. This will diminish their bargaining power, and therefore collective bargaining outcomes.

Non-unionized federal *and* provincial jurisdiction employers should be concerned because a federal jurisdiction employer in their supply chain may be unionized. The entire supply chain would therefore be disrupted during a strike or lockout. Furthermore, federal jurisdiction unionized employers in the supply chain may seek to pass along their higher wage costs to the non-union or provincial jurisdiction purchaser of their goods or services.

Bill C-257 and Bill C-295

Bill C-257, sponsored by the Bloc Québecois, has passed Second Reading in the House and been referred to the Standing Committee on Human Resources Social Development and Status of Persons with Disabilities. At Second Reading on October 25, 2006 the Bill was passed by a vote of 167 to 101. Bill C-295, sponsored by the NDP is presently at Second Reading.

Both Bills contain sweeping restrictions for employers. If enacted, employers in the federal jurisdiction would be:

1. prohibited from hiring new replacement employees or contract workers to do the bargaining unit work of striking or locked out employees;

2. prohibited from redeploying non-bargaining unit employees, possibly including managers, to do bargaining unit work of striking or locked out employees; and

3. prohibited from allowing striking bargaining unit employees from crossing the picket line and returning to do any work.

The objective of the legislation is to effectively deny employers the right to carry on business during a strike or lockout. These Bills represent legislated union solidarity by denying striking bargaining unit employees the right to cross the picket line and return to work to make a living.

Replacement Worker Bans: A Brief Legislative History

The Code presently provides for limited restrictions on the use of replacement workers. Today, it is an unfair labour practice to use replacement workers for the demonstrated purpose of undermining a union's representational capacity. In other words, the Code prohibits the use of replacement workers for the purpose of busting the union. This limited and measured restriction on the use of replacement workers was enacted as part of sweeping and balanced reforms to the Code in 1999. The 1999 reforms were a product of extensive tripartite consultations between labour, employers and government. To date, the Canada Industrial Relations Board ('CIRB') has not had to decide a single case alleging actual improper use of replacement workers.

Through several private members bills, labour has attempted to impose a ban on replacement workers in the federal jurisdiction since the 1999 reforms. To date, Parliament has consistently refused to enact such a ban. During the previous Liberal regime, two Bills were brought forward and defeated. The first by 18 votes, and the most recent Bill was defeated by only 12 votes. 32 Liberal MPs voted in favour of the ban on replacement workers during the latest attempt, including the current Labour Critic, Denis Coderre.

The Conservatives, with 125 seats in the House do not support the Bills. Despite this 'position', 20 Conservative MP's voted in favour of Bill C-257 at Second Reading. The Bills are supported by the Bloc, with 50 seats, and the NDP, with 29 seats. The Liberals, with 101 seats, do not have a consensus position. The Conservative's minority status makes it impossible for them to decide the outcome of these Bills. It is imperative that employers make their MP aware of their strong objection to these Bills in very short order.

Reasons for Voting Against These Bills

1. The tripartite consultative process for reforming federal labour law is at stake. There is a long history, dating back to the 1970's, of reforming federal labour law through the tripartite consultative processes. These Bills are a dangerous departure from this tradition. Passage of either of either of these Bills would destroy the faith and trust that labour, employers and government have built through the consultative process. Passage would disrupt the fragile balance needed in labour management relations. One party, in this case labour, should not be allowed to dictate the outcome of what is probably the most contentious issue in labour law.

2. Laws should only be changed to address problems. Canada does not have a problem with the use of replacement workers. If we did, unions would have filed unfair labour practice complaints with the CIRB, and the CIRB would have rendered decisions. The fact is the limited restriction on the use of replacement workers has been in place for almost 7 years and the CIRB has not issued a single decision on the subject where replacement workers were actually used. There simply is no problem for these Bills to address, so they should not be enacted.

3. Strike/lockout evidence does not support a ban. Advocates for the ban on replacement workers allege that replacement worker bans reduce the impact of strike and lockout activity, benefiting workers and the economy. Data compiled by the Labour Program at HRSDC in an October 24, 2006 report titled, 'Key Observations Regarding the Effect of Replacement Worker Legislation on Workers' does not support their contentions. British Columbia and Québec are the only provinces that ban the use of replacement workers. Québec continues to have appreciably more strikes and lockouts than Ontario, a province without a ban on replacement workers. There is no evidence that banning replacement workers decreases the duration of strikes or lockouts. There is no evidence that banning replacement workers results in fewer days of work lost. During the period of 2003 to 2005, Québec lost one and a half times the number of working days lost in Ontario. Finally, although not addressed in the HRSDC report, there is no evidence to support the contention that banning replacement workers reduces picket line violence. Replacement worker bans do not benefit workers or the economy.

4. Federal jurisdiction employers are the backbone of Canada's economic infrastructure and must be permitted to operate. Prior to the 1999 amendments to the Code, the federal government enacted emergency back to work legislation on 31 occasions. Since the 1999 amendments, there has not been a single instance where the federal government was forced to legislate an end to a strike or a lockout. Enacting either of these bills will be a step backwards. For example, the government will not allow the economic disruption and the inconvenience to the Canadian public caused by the shut down of key infrastructure industries found in the federal jurisdiction. Government will be back in the business of emergency back to work legislation.

Employers in all Canadian jurisdictions must be heard on this issue. We have a fair and balanced Code. Organized labour should not be allowed to unilaterally change it to their advantage.

Our firm is assisting a number of organizations in their advocacy efforts concerning Bill C-257 and we would be pleased to provide you with similar assistance or further information. A copy of Bill C-257 and C-295 as well as the report compiled by the Labour Program at HRSDC titled, 'Key Observations Regarding the Effect of Replacement Worker Legislation on Workers' (October 24, 2006) may be obtained by contacting Steven Williams at 613-940-2737 or swilliams@ehlaw.ca.