

Federally Regulated Employers - Transportation and Communication(FETCO)
-- Employeurs des Transports et Communications de Régie Fédérale(ETCOF)
- welcomes the opportunity to appear before the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities (HUMA) as part of the review of Bill C-257.

FETCO consists of a number of major employers and employer groups in the transportation and communications sectors coming under federal labour law.

FETCO members employ about two-thirds of the unionized workforce under federal jurisdiction. FETCO's interests relate to public policy issues at the federal level affecting employer-employee relations. These include collective bargaining, safety and health, labour standards, pension legislation, human rights, pay equity, employment equity and privacy.

FETCO is the major employer organization in Canada at the federal level dealing with human resource/human rights/employee relations matters.

The FETCO member organizations are:

Air Canada
Archer Daniels Midland
B.C. Maritime Employers Association
Bell Canada
Canada Post Corporation
Canadian Airports Council
Canadian Association of Broadcasters
Canadian Broadcasting Corporation
Canadian National Railways
Canadian Pacific Railway
Canadian Trucking Alliance
Iron Ore Company of Canada
Maritime Employers Association
NAV Canada
Purolator
SaskTel
Telus
Western Grain Elevator Association
VIA Rail Canada

Part I of the Canada Labour Code governs the collective bargaining

relationship of some 850,000 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 impact of Bill C-257 would be to amend Part I of the Canada Labour Code to prohibit replacement workers in the event of a strike or lockout as follows:

Bill C-257 in a nutshell

- someone hired after the collective bargaining process commences,
- someone employed by another employer or the services of a contractor,
- an employee in the bargaining unit on strike or locked out either in a bargaining unit position or elsewhere,
- any other employee (i.e., those employees not in the bargaining unit on strike or locked out)

cannot be used during a work stoppage. However,

- managers, superintendents, foremen and labour relations personnel and directors can be used and
- the employer can take such measures as necessary to avoid damage or destruction to the employer's property.

The impact of this would be that in the event of a work stoppage under Part I of the Code employers would have great difficulty in providing service to the public. In fact, in many instances this could mean a complete shutdown of operations at great inconvenience to the public and businesses relying on the services of federal employers.

Available data indicate that such legislation does not reduce strikes or strike lengths or violence. These have not been problems under federal jurisdiction. Bill C-257 is trying to impose a solution to a problem in Quebec 30 years ago that doesn't exist in the federal sector today. The major problem federally over the last several decades was government intervention into the collective bargaining process which was necessitated by the essential nature of federal industries. The amendments to the Code effective in 1999 has resolved the issue of Parliamentary intervention.

There are eleven jurisdictions in Canada and in the 29 years since the

implementation of the "Quebec Model" British Columbia is the only Canadian jurisdiction that has adopted and maintained a similar approach. These two provinces are out of step with the rest of the country.

Balance is a pillar of Canadian industrial relations. The employer's right to lock-out is off-set by 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 in a labour dispute.

Background: the current Part I of the Canada Labour Code came into being on January 01, 1999 after years of work through a legislative review process initiated by the then Minister of Labour, which included a Task Force headed by Andrew Sims, a former chair of the Alberta Labour Relations Board. There was a consultative process, which included some consensus meetings involving the CLC, CSN, FTQ and employer groups - FETCO, WGEA and the CBA. Employers and the unions did reach consensus on several changes to the Code, primarily dealing with the now Canada Industrial Relations Board and the conciliation process.

From the start of the process the Sims Task Force attempted to create a balance between the interests of employers with those of the workers. Mr. Sims had seen what had happened in Ontario with radical changes to the Ontario Labour Relations Act being repealed by the next government in power. He made it clear he wanted to avoid that. The title of the report, dated January 31, 1996, in fact was "Seeking a Balance". He wanted therefore to ensure that his report reflected the interest of all parties (thus the word "balance"), not just those of one stakeholder as had happened in Ontario.

The Task Force did not reach unanimity on the "replacement worker" issue but the majority report recommended a provision that would give employers flexibility to meet their operating responsibilities, but would prevent them from using replacement workers to undermine a union's legitimate bargaining objectives. The minority report recommended a prohibition on replacement workers. After the report had been released

and with the intervention of the office of the Minister of Labour the Code was amended based on the majority view of the Task Force. This provision, very much so, sought a balance between the parties' interests.

In summary, the current version of Part I, effective January 01, 1999, was developed through a process that attempted to address the interests of all stakeholders, not those of just one stakeholder at the expense of all others. However, that is exactly what Bill C-257 would do. It would give the unions exactly what they want in perhaps the most contentious issue in all labour law without even an examination being made as to the overall consequences of such a change.

When the *Code* was amended in response to the recommendations of the Sims Task Force, one of the principal goals was to diminish the federal government's role in labour disputes. For this reason, the *Code* includes new provisions on the maintenance of services during a work stoppage (section 87.4), where there is an immediate and serious danger to the safety or health of the public. Another example of the essential nature of the federal sector is Section 87.7 that obligates, in the event of a work stoppage, all parties to:

“provide the services they normally provide to ensure the tie-up, let-go and loading of grain vessels at licensed terminals and transfer elevators, and the movement of the grain vessels in and out of a port” (87.7(1))

As well, federal employers continue to have the right to use temporary replacement workers to provide services that are not “essential” in the sense of sections 87.4 and 87.7, but are essential to the Canadian economy and social fabric.

Situation prior to the Sims Task Force: In the post war period the reality is that there were many labour disputes in the federal sector causing considerable inconvenience to Canadians and disruption to the Canadian economy. Many people will remember them: Canada Post, Port of Montreal, Port of Vancouver, and the railways. In the 20-year period before the establishment of the Sims task force Parliament was forced to legislate an end

to federal work stoppages on 17 occasions.

The Sims recommendations have done what the government wanted them to do. Since the 1999 amendments to Part I of the Code there has been no need to pass emergency back-to-work legislation. They have allowed employers to operate during a work stoppage but not in a way that would clearly undermine the union's ability to represent its members - the kind of action that can result in violence.

Since 1999 there have been work stoppages involving a number of federal operations - examples are Videotron, CPR, CN, Telus, CBC, Aliant, all providing an essential service but none requiring Parliamentary action. One of these work stoppages occurred at a major federally regulated transportation company. The business was struck by employees comprising about 2% of the total workforce but essential to the operation. All other unions had settled but this union wanted more. If Bill C-257 had been in effect this organization could not have operated resulting in a huge disruption to Canadian business. A shutdown of any length would almost certainly have needed Parliamentary intervention.

In 2005-2006, 97% of all collective agreements under federal jurisdiction were signed without a work stoppage. This is a clear indicator of the effectiveness of the current *Code*.

The Nature of Federal Jurisdiction: The federal labour jurisdiction is unique. The industries are federally regulated because they are of importance to Canada as a whole. Unlike their provincially-regulated counterparts, federal undertakings provide services that constitute the backbone of the Canadian economy and infrastructure. Most federal employers are not goods producers or manufacturers; they are service providers to all Canadians and bear the responsibility of ensuring that goods, services, capital and people flow freely across the country and across borders.

Federally regulated employers frequently operate out of a large number of sites across Canada and even operating under existing laws covering work

stoppages does impact on the services the employer can provide. With C-257 what could be maintained would often be quite minimal.

The vast majority of federally regulated employers have a mature and sophisticated labour/management relationship where strikes/lockouts are relatively infrequent. Nothing in this long history of these relationships indicates a need for change. In fact the maturity of these relationships is reflected in the general quality and quantity of the wage, benefit, pension terms and conditions of employment.

The last resort any employer entertains is a strike. It is usually tied to a fundamental change that the business requires to maintain its competitiveness either in the Canadian market place or internationally. The "after effects" of a strike are also well understood by these mature businesses. If one wants to risk our ability to negotiate important competitive change, then adding this restriction on our ability to operate will weaken these various sectors. At a time where the Canadian government (as well as the previous one) is making comments about our lack of competitiveness, the timing is extremely poor.

In very few, if any, of the large employers under provincial jurisdiction would a work stoppage have the deleterious impact on the economy that a strike or lockout would involve companies under federal jurisdiction.

Whenever there is a work stoppage causing a shutdown of operations involving a federal sector employer, two outcomes can virtually be assured. First, the work stoppage causes considerable national economic disruption since the shutdown of a federal employer - an airline, trucking company, pipeline, broadcaster, postal service, etc. - has wide-ranging consequences on persons and businesses in Canada, which depend on the uninterrupted provision of such services. In contrast with provincial employers, the struck federal employer is often the only entity that provides the services with no alternative replacement available. This leads to the second outcome: Parliament passes back-to-work legislation shortly after the commencement of the work stoppage. The reason for this is obvious: the disruption of such services cannot be tolerated for any prolonged period. There is simply too much at stake.

Implementation of Bill C-257 would reintroduce the “narcotic effect” to collective bargaining in the federal sector that was effectively eliminated with the 1999 changes. This is the situation where collective bargaining breaks down when the parties realize that back-to-work legislation is pending and that Parliament will “let them off the hook” in having to make the hard decisions needed to effect a settlement. Passage of this bill would once again allow the parties to shirk their responsibilities.

Legislative Development at the Federal Level:

The Preamble to Part I that spells out the purpose of the Code includes reference to “cooperative efforts to develop good relations and constructive collective bargaining practices”. This principle clearly does not contemplate unilateral changes to the Code to benefit only one party as we see in Bill C-257.

The tripartite process for developing labour legislation and regulations goes back to the late 1970s. It is now well established that tripartitism is the mechanism to develop public policy in Ottawa when it comes to labour issues. In fact this consultative approach developed by the labour relations stakeholders is now used elsewhere in government.

Over the years this approach has developed countless changes to Parts I, II and III of the Canada Labour Code and the regulations emanating from them. To give some recent examples:

- As Part I was being debated in the House of Commons a tripartite committee from the CLC, FETCO, the Canadian Bankers Association and the Labour Program jointly developed changes to Part II of the Code (safety and health), which later was passed by Parliament.
- Regulations covering violence in the workplace and ergonomics were developed by tripartite committees.
- The review of Part III of the Code (labour standards) headed by Harry Arthurs and which recently reported to the Minister of Labour

expanded on the Sims process by appointing four "stakeholder representatives" to assist in the development of the report.

The huge value of the tripartite approach developed over the last quarter century is that it ensures workable legislation acceptable to *all* stakeholders. It avoids pitting one group against another.

Impact of C-257

If the use of temporary replacement workers were prohibited under the *Code*, then it may not be possible for employers to maintain services during a work stoppage beyond those contemplated under section 87.4. This means that services could be halted that are crucial to the economy, such as general mail delivery by Canada Post, flights by Air Canada, etc. Renewed political intervention in labour relations (in the form of back-to-work legislation) would often be the result. This would run counter to the goal of restricting and even eliminating political intervention in labour disputes in the federal sector.

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, it must be emphasized that the impact of a prohibition on replacement workers will not be confined to employers directly regulated by the *Code*. Customers and suppliers of federally regulated employers, although likely 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.

As many industries now work on a "just-in-time" model, employers often cannot build up inventories to allow them to weather a strike. The result is that a work stoppage at one facility can stop work at a number of other unrelated employers. This deprives employees of work and society of the fruits of production.

The impact on the labour movement as a whole, from a ban on replacement

workers, will be to encourage business owners to manage their operations in such a way that reduces the dependence on unionized staff as much as possible. This will be achieved by relying on fewer permanent workers or moving production to another jurisdiction.

Smaller companies are poorly positioned to weather the economic pressures brought on by a shutdown. The result is that a smaller company will be forced to capitulate to trade union demands in order to avoid a strike it knows it cannot withstand. In the absence of the ability to continue operations smaller companies will be compelled to seek a quick settlement rather than a settlement that serves the long-term viability of the company.

Up against these unfavourable conditions, the logical reaction of a small business owner will be to manage his company in a way that reduces his dependence on unionized staff as much as possible. For example, a company could rely more on subcontracts, could hire fewer permanent workers, or could increase its production capacity by opening a new plant, often outside the province where it operates, rather than expanding the existing plant.

Large, multi-national companies are better positioned to survive a shutdown brought on by a ban on replacement workers. However, the prospect of a shutdown acts as a disincentive to maintaining current operations and also future investment.

A work stoppage could be economically devastating for a company, particularly if it operates 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.

In summary, the impact of Bill C-257 could be extensive - more work stoppages; political intervention into collective bargaining process and serious disruption to the public and thousands of businesses that rely on the federal sector.

Claims made by the Bill's supporters

Claim: violence on the picket line will be reduced if there is a prohibition on replacement workers.

In fact picket line violence is rare in Canada. The reality is that it can be caused by the use of replacement workers but it can be caused by other factors too - the workplace culture which might be highly adversarial; the nature of any company demands (e.g. outsourcing) that could threaten workers' jobs; the ability of the union to control the picket line and ensure that employees do not act illegally, e.g. sabotage company equipment. There is no one single cause of picket line violence.

The prevention of "picket-line violence" is a cornerstone of Bill C-257 supporters' arguments; however, the vast majority of picket lines are non-violent. Where picket line violence occurs, it is just as likely to be directed at employees who are entitled to cross the picket line (*i.e.* managers, supervisors, and other excluded employees) as at newly hired temporary replacement workers or bargaining unit members who elect to cross the picket line. There is no evidence that the Quebec ban on replacement workers contributed to diminishing picket line violence. In any event, violence on picket lines should be deterred, punished and remedied through established legal procedures.

Claim: prohibition of replacement workers reduces the length of strikes.

Those involved in the debate over replacement workers have been quick to produce statistics to demonstrate the veracity of their point-of-view. By selecting an appropriate measure and carefully chosen time period confusing and contradictory conclusions have been reached. Fortunately, HRSDC - as the agency responsible for enforcement of the Code and therefore impartial - has helped greatly in this debate by producing a report, "Key Observations Regarding the Effect of Replacement Worker Legislation on Workers" dated October 24, 2006. They looked at private

sector data from 1975 to the present.

They come to a number of conclusions:

- There is no evidence that replacement worker legislation reduces the number of work stoppages. For example, in 2005, Quebec had more work stoppages to that of Ontario and of the federal jurisdiction on a comparable basis.
- There is no evidence that replacement workers legislation results in shorter duration of work stoppages. For example, the average duration of work stoppages in Quebec was 47 days compared to 38 in Ontario, on average, over the 2003-2005 period.
- There is no evidence that replacement worker legislation has reduced the average duration of work stoppages. For example, despite Quebec's legislation, the average work stoppage in that province has risen from 37 days, on average, in 1975-1977 to about 47 days, on average, during 2003-2005.
- There is no evidence that replacement worker legislation reduces the number of work days lost. For example, Quebec lost one-and-a-half times more working days than Ontario, on a comparable basis, over the 2003-2005 period.
- There is no evidence that replacement worker legislation has any effect on wage outcomes.

The minority opinion on replacement workers in the Sims report also recognized this:

"I submit that, in the final analysis, no definite conclusion can be drawn concerning the impact of replacements on the frequency and duration of disputes" (Sims, p147)

There is therefore no merit in the argument that passage of Bill C-257 will necessarily reduce time lost due to labour disputes. In fact, the reality is that the main impact of Bill C-257 will be to reduce the inability of federally regulated firms from operating in the event of a work stoppage with serious economic impact.

Claim: prohibition of replacement workers restores balance of power

You do not provide balanced law by isolated amendments to a statute that benefit one party at the expense of other stakeholders, without examining the implications of the amendments on other parts of the law, and without examining any potential harmful impacts on the public. But this is exactly what Bill C-257 is doing. It is the antitheses of how we should approach amendments to the law, the opposite of the approach taken by the government when they appointed Andrew Sims to review Part I of the Code.

There is nothing balanced about Bill C-257. In fact it is heavily skewed to favour organized labour's interests.

Bill C-257 prohibits employees on strike (who are obviously not "replacement" workers) from doing their own job if they wish to exercise their freedom of expression and continue to work. This is not balance. It's an effort to thwart the employer from running his operation.

Even the minority position on replacement workers in the Sims report was more reasonable than this bill. It stated that employers "cannot be prevented from subcontracting work" (Sims, p 149) during a work stoppage, on the basis that this was equivalent to the right of employees to seek alternative employment during a strike or lockout. Hence, even the minority position recognized that the labour relations balance of power required that both employers and workers be granted comparable rights to sustain themselves during a work stoppage. However, this action would be prohibited by Bill C-257.

The minority position also recommended that an exception to the use of replacement workers would be "where the union does not fulfill its obligation to maintain essential services", (Sims, p 150) of which there are many falling under federal jurisdiction. This is similar in intent to Section 111.17 of the Quebec Labour Code where the *Conseil des services essentiels*

« ...if it considers that the conflict is or is likely to be prejudicial to a service to which the public is entitled or that the essential services provided for in a list or agreement are not rendered during a strike, may, after giving the parties the opportunity to submit their views, make an order to ensure that a service to which the public is entitled is available, or require compliance

with the law, a collective agreement or an agreement or list on essential services. »

A similar provision (Section 72) exists in the BC Labour Relations Code.

Nothing like that exists in Bill C-257.

There is nothing balanced at all about Bill C-257. It doesn't even meet the criteria set out in the minority position of the Sims Report. In reality it is an effort to swing the pendulum far in favour of the bargaining agent.

Even so the minority position stands in stark contrast to the majority position of the Sims Task Force, which concluded that the balance of power between employers and trade unions requires that employers be entitled to make broader arrangements to have bargaining unit work performed during a strike or lockout. This includes using temporary replacement workers. Maintaining the balance of power is, in fact, the most compelling argument favouring the use of temporary replacements and other mechanisms for having work performed during a strike or lockout.

How to review the Canada Labour Code

Complex legislation such as the Canada Labour Code should only be amended after careful review and involvement of all interested parties and/or a review by an independent task force. Examples of these are the Sims task force and the task force headed by Dean HD Woods in the late 1960s. Other amendments introduced by the government were only done after consultation with the parties.

There are major implications by just looking at the replacement worker issue without examining other provisions impacted by it.

- the workload of the Canada Industrial Relations Board given the increased number of disputes going to it under the new provision.
- the implications on the "Maintenance of Activities" provisions which would be used far more often with the new provision.
- the effect of the 60-day conciliation procedure, specifically designed to work with the 1999 amendments.
- the effect on the rules governing strikes and lockouts enacted in 1999.

- the lack of a "safety value" essential worker provision as found in the Quebec and BC labour laws.

If one wants to examine the replacement worker issue the only legitimate way to undertake it is in the context of an overall review of the Code.

Conclusions The stakeholders in the federal labour sector long ago developed a process to amend labour legislation in Canada. It has worked well and especially so since the 1999 amendments to Canada Labour Code, developed after an exhaustive and cooperative process.

We talk about free collective bargaining. Of course it is not "free" at all. It is heavily regulated. But, to the greatest extent possible, the parties should be allowed the greatest flexibility in crafting out their bargain - even in federal jurisdiction where there are many essential services. The way to ensure that works best is to provide fair and impartial labour legislation - as we have now.

Efforts now are being made to undermine this by attempting to pass an amendment to the Code that would benefit one stakeholder to the detriment of others. This bill would undermine three decades of consultation; swing the balance of power to unions; increase the likelihood of work stoppages; increase the likelihood of Parliamentary intervention. It is done in isolation of any examination of the implications for other provisions of the Code. This is a very retrograde way of amending a complex law like Part I of the Code and probably dooms the consultative process for the future.

This bill will not reduce picket line violence or cut down the length of work stoppages. It will however prevent essential industries from operating, disrupt the Canadian economy and inconvenience the public. And it will bring the spectre of Parliament once again having to legislate an end to strikes and lockouts.

We have a fair labour code. Don't change it just to benefit one party.

