Prohibiting Replacement Workers in Federally Regulated Industries and Improving the Maintenance of Activities Process Under the Canada Labour Code

PSAC submission to public consultations

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The Public Service Alliance of Canada (PSAC) represents nearly 230,000 workers in every province and territory in Canada and in locations around the world. Our members work for federal government departments and agencies, Crown Corporations, universities, casinos, community services agencies, Indigenous communities, airports, and the security sector among others. PSAC is headquartered in Ottawa with 23 regional offices across Canada. PSAC currently has 174 bargaining units under the Canada Labour Code, which include airports, ports, hamlets in the North, and national units such as Canada Post and NAV Canada.

This submission addresses PSAC's positions relating to the discussion papers on **Prohibiting replacement workers in federally regulated sectors** and **Improving the maintenance of activities process under the Canada Labour Code** circulated by the Labour Program as part of the public consultation process on legislative changes in November 2022 through January 2023.

We emphasize, as discussed in the final roundtable held on 11 January 2023:

- Robust and progressive legislation to prohibit the use of replacement workers under the Canada Labour Code is long overdue.
- Initiatives must include adequate resourcing of the Canada Industrial Relations Board to enact ongoing and new requirements.
- All initiatives must be compliant with the Charter, which protects the rights of workers under Section 2(b), freedom of expression and Section 2(d) freedom of association, which includes the right to withdraw labour in the course of bargaining.
- Anti-scab provisions should also be extended to all workers in the federal public sector

We reiterate the Government of Canada must lead by example. As one of the most active contracting agents, the Government of Canada has incentivized or required the use of replacement workers by contractors with which it does business, which must be ended.

At a minimum, future government contracts cannot include language that promotes or requires the use of replacement workers by its contractors, regardless of whether the work of those contractors falls under the Canada Labour Code or under provincial or territorial legislation. Preferably, the government will reverse course on this matter and demonstrate its commitment

to a true ban on replacement workers by prohibiting its contractors from using replacement workers in the case of a strike or lockout.

Responses to Consultation Questions Concerning Amendment of the *Canada Labour Code* (Part I) to Prohibit the Use of Replacement Workers

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1. **What are your views on the current, limited ban on replacement workers under Part I of the Code?**

   The limited ban established by s.94(2.1) has been wholly ineffective at preventing the use of replacement workers in general, and in the limited circumstances to which the provision applies. In the absence of a comprehensive ban on the use of replacement workers, this provision would be improved by the introduction of a reverse-onus, achieved by amending s.98(4) to include s.94(2.1) within its scope, so that respondents to complaints which allege violation of s.94(2.1) will bear the burden of proof in those matters.

2. **Do you believe that the use of replacement workers is a problem in federally regulated sectors?**

   The use of replacement workers is indeed a problem in federally regulated sectors, as the use of replacement workers tends to increase the length and volatility of every strike or lockout, regardless of sector or jurisdiction. This union has experienced dangerous volatility and risks of violence as a result of an employer's decision to use replacement workers.

3. **What are the benefits of using replacement workers in federally regulated sectors?**

   There are no actual benefits to employers, employees or unions that flow from the use of replacement workers. Some employers may perceive themselves as benefiting from their use of replacement workers, but those benefits are fleeting at best and illusory at worst, and they are realized at the expense of great damage to and a long-term poisoning of the relationships between an employer and its employees, an employer and the union representing its employees, and employees themselves.

   This toxification manifests as heightened distrust and diminished collaboration in resolving various forms of labour relations issues, making costly litigation far more likely than mutually beneficial, constructive and cooperative dispute resolution.

4. What are the downsides of using replacement workers in federally regulated sectors?

The use of replacement workers by an employer results in a poisoning and long-term toxification of relationships between an employer and its employees, an employer and the union representing its employees, and employees themselves. The causing of such forms of long-term harm in the pursuit of short-term collective bargaining goals runs entirely contrary to the goals of the legislation as set out in its preamble.

The use of replacement workers typically increases the length of labour disputes by introducing distortions and imbalances into the process of collective bargaining at its most sensitive and challenging moment.
Where the duration of a labour dispute is prolonged by the use of replacement workers, any harms or inconveniences that may be associated with the occurrence of that labour dispute are themselves exacerbated. If a dispute causes harm or inconvenience, whether to the parties, to the public, or to other stakeholders (e.g., clients), the prolonging of that dispute exacerbates those harms and inconveniences.

The use of replacement workers increases not only the duration of disputes, but also the acrimony and tensions associated with a given labour dispute, on the part of all affected persons. These effects associated with the use of replacement workers in turn invite greater volatility and inevitably increase the risk of instances of verbal abuse, property damage, and ultimately, even violence (by persons directly associated with the parties, or by members of the broader public who are sympathetic to a particular party.)

History has shown that the use of replacement workers can result in tragic instances of violence, injury and death. In saying this, we take care to note that this union does not condone or excuse the conduct of those who engage in abuse or violence under any circumstances, but we acknowledge that their occurrence is a foreseeable potential sequela of the use of replacement workers by an employer.

5. How would a prohibition on replacement workers affect your sector?

Collective bargaining would proceed in a more stable and orderly manner, and strikes and lockouts would be diminished in frequency, duration and volatility.

Labour relations between parties would be improved in a manner consistent with the Code's purpose as expressed in its Preamble.

The poisoning of relationships between employers and employees, between employers and unions, and between employees themselves, which are caused by the use of replacement workers, would be eliminated.

6. **Should people have the right to refuse to do the work of employees who are on strike or locked out, even if the ban on replacement workers does not apply to them?**

   Yes. The existing prohibition established by s.94(3)(c) should be expanded to encompass all persons who may be asked to perform the work of struck or locked out employees, regardless of who employs them and regardless of who may ask or direct those persons to perform such work. For example, if an employer is in the midst of a labour dispute and it seeks to expand the scope of work performed by a contractor or the employees of a contractor, by having them perform work of the bargaining unit that is the subject of a labour dispute, those contractors and their employees must be provided a right to decline to perform that hot work, and protection against reprisals for the exercise of that right.

   This issue may also be considered to have significant *Charter* implications, insofar as a statutory scheme that does not prohibit an employer from compelling its employees to invite upon themselves the social stigma attaching to "scab" status, is one that may not survive *Charter* scrutiny.

7. **Should unionized employees be prohibited from working for the employer if their bargaining unit is on strike or locked out?**

   Yes, subject to the maintenance of activities requirements of the *Code.*

   With respect to circumstances of a strike, unions are democratic, majoritarian organizations. Additionally, in the context of labour relations under the *Code,* it is simply a fact that if a union is on lawful strike, that is because a majority of voters have expressed the will to strike in a lawfully conducted, secret ballot vote.

   To permit dissenting employees to perform work for the employer is to invite all of the damaging effects that flow from the use of any replacement worker by an employer. The fact that a dissenting employee may *wish* to cross their own union's picket line and work during a strike (regardless of their reasons) does not alter in any way the damaging consequences of their doing so. They should therefore not be permitted to do so.

It should also be noted that labour disputes eventually end, and when they do, striking employees and employees who choose to cross their own picket line must continue to work together. The continuing relationship and continuing workplace contact between those two groups of employees becomes inevitably fraught and frequently conflictual. Striking employees typically feel betrayed by co-workers who chose to cross their own picket line. Similarly, they believe they have been harmed by those employees' actions, through their prolonging of the strike.

With respect to circumstances of a lock-out, for all of the same reasons outlined above, no employees in the locked out bargaining unit should be permitted to perform work of that bargaining unit while the labour dispute continues.

We feel bound to observe that this discussion question is somewhat paradoxical in its suggestion that there could be circumstances in which an employer may simultaneously lock its employees out, while also allowing its employees to work. We cannot envisage any such hypothetical circumstance that would not, almost as a certainty, run an employer afoul of the *Code*'s unfair labour practice prohibitions.

Once a strike or lockout has commenced, no work of the affected bargaining unit should be performed except as required by the *Code's* maintenance of activities provisions, or provisions that may be introduced for the purpose of preventing the destruction of or serious damage to an employer's machinery, equipment or premises, or serious damage to the natural environment. To be clear, however, PSAC has grave doubts that provisions of this latter nature are required.

8. **There is no universal definition of a replacement worker. Which types of workers do you think a prohibition on replacement workers should apply to?**

A prohibition should be applicable to all natural persons, regardless of location, so as to clearly prohibit the performance of the work by persons who are located off-site or offshore. The prohibition must extend beyond the physical workplace or establishment of the employer, and should also anticipate and preclude frustration of the prohibition through the use of emerging or future technologies such as robotics and artificial intelligence.

9. **What types of workers should be allowed to do the work of striking or locked out employees, if any?**

None, except in accordance with the maintenance of activities provisions of the *Code*, or in accordance with any provisions that may be introduced, and which provide for the prevention of destruction or serious damage to an employer's machinery, equipment or premises, or serious damage to the natural environment. Again, however, we emphasize that we are not persuaded that these latter measures are required.

10. **Do you think there should be any exceptions to a prohibition on replacement workers? Should an employer be allowed to use replacement workers in very specific situations (for example, to prevent destruction or damage to property)?**

We have grave doubts about the necessity of this exception given the existence of the Maintenance of Activities and 72-hour strike notice provisions already contained in the Code.

If a decision is made to move in the direction of including this exception, we believe it is critical that where such circumstances are invoked, a mechanism should be in place to ensure that a representative of the union is entitled to be present for purposes of verification and monitoring, in order to prevent abuse of the exception.

There is likely to be considerable merit in introducing a mechanism, similar to that now in place for maintenance of activities requirements, that would allow collective bargaining parties to attempt first to negotiate the fine details of which property and circumstances will trigger the exception, the thresholds at which such work's performance will be permissible, the identification of those persons who will be permitted to perform that work, and the monitoring of the performance of that work for purposes of verification and ensuring compliance. Where parties cannot reach agreement, the Board should be empowered to issue orders.

It is also this union's view that if a decision is taken to include this exception in the new prohibition, it will be important to re-visit the necessity of continuing to include the 72-hour strike notice requirement presently established by section 87.2 of the *Code*. That notice requirement was sought and obtained by employers during the *Code* review process undertaken in the mid-1990s, with its key stated purpose being that of allowing employers to engage in an orderly shut-down of operations in the event of a labour dispute (see: *Seeking a Balance*, pp. 116-117.) That orderly shut-down of operations is the means by which employers have to date ensured that their property, goods, equipment and premises are not damaged during a labour dispute.

It appears to this union that if the exception to the prohibition now under consideration is included in amendments to the *Code*, the underlying purpose of the 72 hour strike notice requirement now present in the *Code* will be substantially satisfied by that exception. This would therefore render the 72-hour notice requirement to be redundant and excessive. We note that under many major pieces of collective bargaining legislation, no strike notice requirement is present (e.g., the *Federal Public Sector Labour Relations Act*, Ontario's *Labour Relations Act, 1995,* or indeed, Québec's *Labour Code* (which contains prohibitions against the use of replacement workers and a similar exception to that now under discussion).)

11. What do you think is the most effective way to make sure that employers respect a ban on replacement workers? How should it be enforced?

We believe that a reverse onus should be applicable in complaint proceedings where violation of the ban is alleged.

The ban should be crafted so as to prohibit both the act of performing struck or locked out work, and any acts or omissions that cause struck or locked out work to be performed. Not only employers and persons acting on behalf of employers should be subject to the prohibition and face grave consequences in the event of violation, but so too should all persons who themselves perform struck or locked out work.

Authorities and resources providing for rapid, immediate investigation by a third-party neutral (at any time of day or night) must be in place, along with expedited litigation processes that swiftly inquire into allegations of contravention. Litigation concerning alleged contraventions of the ban should proceed with equal or greater swiftness as that now in place as a matter of practice in matters concerning allegations of unlawful strikes or lockouts.

In cases where violation is found to have occurred, orders to pay damages to affected employees should be issued, and those damages should be in amounts sufficiently large to serve as an effective deterrent to contravention.

Further, in cases where violation is found to have occurred, orders in the nature of injunctive relief should be issued, and those and any other orders issued should be required to be immediately filed by the Board in the Federal Court, pursuant to s.23 of the *Code*.

12. What do you think the impact of a prohibition on replacement workers would be:

1. **on work stoppages?**

   Work stoppages will be fewer, shorter in duration, less volatile, and less dangerous.

2. **on labour relations?**

   Labour relations will be improved by the introduction of balance and the elimination of the potential attraction of the negative consequences that predictably arise from the use of replacement workers.

3. **on the economy?**

   The economy will benefit from a diminishment in the number of labour disputes and thus also in their attendant disruptions.

13. Are there any other impacts not discussed in this paper that should be examined?

The introduction of this provision will have positive, far-reaching effects throughout Canada by demonstrating leadership to those jurisdictions in Canada where a ban on the use of replacement workers does not presently exist, or where a ban is in place but inadequate in its present form. Federal legislation establishing a prohibition against the use of replacement workers will in this manner, over time, provide benefits to the economy of Canada as a whole, and help create better functioning systems of labour relations across all Canadian jurisdictions.

Position on Maintenance of Activities provisions under the Canada Labour Code

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PSAC currently has 174 bargaining units under the Canada Labour Code, which include airports, ports, Hamlets in the North, and larger units like Canada Post and NAV Canada. As the bargaining agent, PSAC typically includes a reminder of MOAA timelines in our notice to bargain.

Section 87.4 of the Canada Labour Code (the Code) requires that either party notify the other should they deem necessary a Maintenance of Activities Agreement (MOAA). They must notify the other party within 15 days of the notice to bargain. Unfortunately, these timelines are often not respected, and exceptions are made for employers who file their MOAA proposals months or even years following the notice to bargain. PSAC wishes to underline that **these timelines must be more strictly enforced by the CIRB.**

Once an employers' MOAA proposals are received, three outcomes are possible:

1. The parties reach an agreement without Board intervention.
2. The parties do not reach an agreement and the Board intervenes.
3. The parties do not reach an agreement and the Board does not intervene as the parties have reached a tentative agreement or an arbitral award.

The first and third outcomes are of little concern to the PSAC. We have reached numerous MOAAs without Board intervention (#1), and our goal is to reach satisfactory collective agreements for our members (#3).

However, we wish to address the second outcome, the process around it, and the impact this has on our members' right to strike.

Once impasse is reached with employers, a notice of dispute is filed. Fifteen days following the notice of dispute, the Board determines any question with respect to the maintenance of activities. This can be in the form of a decision; however, the Board can also recommend to the parties a mediation process as a dispute resolution method. Though this mediation process is voluntary, the Board has influence to determine the dispute resolution mechanism. It is PSAC's experience that the Board is encouraging parties to engage in mediation where Board decisions are the appropriate resolution mechanism.

Mediation as a Dispute Resolution Mechanism for Essential Services

In several recent cases, the Canada Industrial Relations Board (CIRB) has proposed mediation to resolve differences on the MOAA. Although mediation has many advantages as a dispute resolution mechanism in collective bargaining, it is problematic for essential services.

When mediation is used to resolve disputes in collective bargaining, the mediator often provides creative solutions that can bring the parties closer to an agreement. For example, they may offer more days of paid leave in exchange for a slight reduction in a salary adjustment. They may suggest mandatory anti-oppression training due to outstanding grievances. A mediator could recommend a market adjustment where classification issues have plagued employees. These are examples of ways a mediator can encourage both parties to come closer to a collective agreement and resolve disputes.

In the case of essential services, the range of creative solutions is greatly reduced due to two factors:

1. Both parties, and the Board, are constrained by the legal requirement to prevent an immediate and serious danger to the safety or health of the public in the case of a strike. There must be an agreement on precisely what is needed to prevent such, and the onus is on both parties, as well as the CIRB, to ensure that is in place prior to any legal strike action.

This limits the range of solutions a mediator can provide because there is very little to exchange. Either a service is legally required to prevent any immediate and serious danger to the safety or health of the public, or it is not. Unlike in collective bargaining, there is very little room for creativity when deciding for example, how many nurses or paramedics are needed in a remote community.

2. The right to strike is protected by the Canadian Charter of Rights and Freedoms (the Charter) and therefore anything that may impede or limit that right risks a violation of the Charter.

The second piece is crucial to the PSAC's ability to fairly represent its membership. If an employer proposes non-essential positions or services be deemed essential, it can weaken the threat of a strike, unless the Board intervenes in a timely manner. For example, in a small bargaining unit (e.g., 25 members), if the employer proposes 20 positions as essential and we only agree with ten, that leaves five people to walk a picket line thus greatly diminishing their collective power.

Mediation can further delay the process to arrive to an MOAA and therefore, a timely Board decision is often the best resolution mechanism. At this point, we also must consider the mobilization involved for members to exercise their right to strike.

Mobilization and the Right to Strike

The efforts taken by members to mobilize their coworkers with the aim of getting a fair collective agreement cannot be understated. Members do a considerable amount of work to raise awareness of the key issues in collective bargaining and to engage their coworkers in issues. Once a notice of dispute is filed, pressure ramps up not only at the bargaining table, but also for key organizers who work diligently to ensure their membership is informed, engaged and active.

When members are given the opportunity to vote for or against strike action, they consider numerous factors: their political views, their family and support systems, their financial situation and the relationship they have with their employer. The decision to strike is never one that is taken lightly.

Therefore, anything that weakens the threat of a strike or delays strike action, threatens the integrity of the collective bargaining process and must be taken very seriously. Delays in achieving an MOAA, by any party, must be taken seriously as they threaten to violate the Charter right to strike. If the establishment of an MOAA is delayed due to a lengthy mediation process, there is very little recourse for unions to ensure an effective strike action can take place at the time collectively chosen by its membership.

Recommendations

- Enforce timelines in the *Code* prescribed for MOAA submissions.
- Use mediation very judiciously as a dispute resolution mechanism for essential services.
- Develop educational resources for employers and unions on MOAA process.

Responses to Consultation Questions Concerning Amendment of the Canada Labour Code (Part I) on Maintenance of Activities:

General

1. **In your opinion, is the current maintenance of activities process working? Why or why not?**

   Most MOA matters are resolved by agreement of the parties, but in cases where CIRB determination is required, the system would benefit from the provision of greater resources to the CIRB, in order to enable it to determine MOA disputes in a more expeditious manner that doesn't come at the expense of generating delays in the determination of other important labour relations matters.

2. **What sectors are most affected by the current maintenance of activities process?**

   MOA matters largely impact the broader public and para-public sectors: airports, northern territorial municipalities, northern territorial hospitals.
   Nuclear facilities and northern mines and dams would also be amongst sectors where the MOA issue of greatest real significance, given the risk to the public that may flow from a failure to comply with Code obligations.

3. **What are some ways that the Government could improve the current maintenance of activities process?**

   Through the allocation of greater levels of resources and possibly through a re-allocation of existing resources:

   - Appointing more Vice-Chairs.
   - Formation of two-Member (one union-side, one employer-side) panels for MOA in order to eliminate the necessity of assigning Vice-Chairs to MOA matters except in cases where a two-Member panel is deadlocked, where a Vice-Chair would then decide between the two positions in an expedited manner.
   - Delegating certain decision-making authority to Board staff such as Industrial Relations Officers or Regional Directors.
   - Re-visiting the issue of the determination of "appropriate bargaining units" by the CIRB in various proceedings where that issue arises. At present, determination of those issues in certain types of cases frequently involves lengthy hearing processes, involving many dates over a period of many

months, followed by lengthy waits for written reasons after the conclusion of hearings. The CIRB resources expended on those matters could be better directed towards the timely determination of MOA matters. In addition, expediting the process of bargaining unit appropriateness determination would enhance access to collective bargaining for workers, reduce delays in collective bargaining that are invited by the lengthy hearing and decision processes, all of which would substantially advance the fulfilment of the purposes of the Code as set out in its preamble.

Issue 1 – Third party verification

4. **Should the Government require employers and unions to submit their maintenance of activities agreement to the CIRB or another third party for review?**
    - **If so, how should this review happen? Should there be a time limit?**
    - **If not, why not?**

No, this is a solution in search of a problem. In the absence of evidence suggesting that employers and unions are failing to meet the requirements of the Code, there is no need to introduce third-party oversight. Adding an additional step to the process will at best create further delay in the resolution or determination of MOA issues, and at worst, depending on the authorities granted to a third-party oversight body, it will disincentivize good-faith negotiation by parties and encourage parties to use the oversight process as something in the nature of a litigation forum. There is already a litigation forum in place: the CIRB, and the focus should be on timely and effective intervention within that process. Should there be a need for better data on the use of MOAAs, the Government could ask that parties submit information about whether a MOAA was used after the bargaining process is completed and a collective agreement in place.

5. **Should all employers and unions be required to have verified maintenance of activities agreements before they can start a strike or lockout? Why or why not?**
    - **If not, are there certain industries where this should be required?**

See reply to question 4. In the absence of evidence that there is a compliance problem, there is no need for such a process. This is a proposed solution in search of a non-existent problem.

6. **How long should a verified maintenance of activities agreement be valid?**

There should not be a verification process. An MOAA should be valid for the same length of time that a MOA order is valid.

We submit that both agreements and orders should be valid, subject to any amendment processes, until a collective agreement is reached by the parties and the right to strike, or lockout is thus no longer available. The process should be re-visited in each successive round of collective bargaining.

Issue 2 – Processing times

7. **In your opinion, are long processing times for maintenance of activities questions a problem?**

Yes, they are a very serious problem that are impeding our members' right to strike in multiple cases. We hope to see more proactive measures to reduce processing times, and to also provide education and resources on the process, to all parties, to facilitate better compliance.

8. **How could the Government shorten the time it takes to get a decision on maintenance of activities questions?**

Please see suggestions set out in reply to question 3.

9. **Should the Government create a new body dedicated to resolving maintenance of activities issues? For instance, the new body could be division of the CIRB with dedicated resources. It could focus on:**
    - **Certifying maintenance of activities agreements**
    - **Resolving disputes about which activities need to continue during a strike or lockout, as quickly as possible**

This is one way to expedite the MOA determination process, but there is no need to "certify" MOAAs. Such a body's role should be confined to determination of referrals in cases where parties have been unable to reach agreement.

10. **What impacts, positive or negative, do you think a new maintenance of activities body could have?**

If the body engages in "certifying" MOAAs, it will do damage by generating delay and disincentivizing good faith negotiation (see reply to questions 4 and 5 above)

If the body engages only in determining MOA matters where parties have been unable to reach agreement, it will have positive impact by expediting the process and timeline for parties to reach lawful strike or lockout position. Rounds of collective bargaining will thus conclude more quickly.

11. How can the Government make sure that the new body can reach decisions quickly?

Oral hearings should only take place in exceptional circumstances and decisions should be made quickly on the basis of written submissions. If necessary, in order to obtain a greater level of comfort with and confidence in such a process, the Government could require written evidence to be provided in affidavit form, rather than merely by letter.

Issue 3 – Minister of Labour's involvement

12. Is the Minister of Labour's role in the maintenance of activities an issue?

The potential for Ministers to engage inappropriately via s87.4(5) is certainly present. It would be best to completely remove a political actor like the Minister from the process. Labour relations or genuine public safety considerations should be the overriding determinants. The Board is staffed with persons having expertise in industrial relations and administration of the Code. If there is to be an oversight function, that function should be carried out by the Board.

13. What role should the Minister of Labour have in the maintenance of activities process?

None, for the reasons set out in response to question 12.