Anti-strike breaking: Bill C-58 is forging ahead!

November 29, 2023

On Oct. 19, 2022, Employment and Social Development Canada (ESDC) announced the government's commitment to "introduce legislation to prohibit the use of replacement workers" during a strike or lockout by the end of 2023. We published an article on the subject shortly after this announcement.

A few days later, on Oct. 27, 2022, the member of the New Democratic Party (NDP) also introduced in the House of Commons Bill C-302 - An *Act to amend the Canada Labour Code (replacement workers)*, which died on the order paper.

Finally, on Nov. 9, 2023, the Honourable Seamus O'Regan, newly appointed Minister of Labour and Seniors (the Minister), introduced Bill C-58 - An *Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012*. Bill C-58 has moved to the second reading stage at the House of Commons on Nov. 22, 2023.

Bill C-58 has provoked opposite reactions in the labour community. As expected, Canadian unions are welcoming the bill, while the *Conseil du patronat du Québec* sees it as inordinate proposals that will harm Canadian businesses and citizens (*French only*).

Description of Bill C-58

Bill C-58 contains robust measures to prevent the use of replacement workers by federally regulated employers.

The Bill removes the current requirement set out in the *Canada Labour Code* to demonstrate intent to undermine a union's representational capacity before being able to prohibit the use of replacement workers during a legal strike or lockout.

Specifically, during legal strikes or lockouts, the Bill provides for the prohibition for any employer (or person acting on behalf of an employer) to use the services of the following persons for all or part of the duties of an employee who is in a bargaining unit:

> ***(a)*** *any employee or any person who performs management functions or who is employed in a confidential capacity in matters related to industrial relations, if that*

employee or person is hired after the day on which notice to bargain collectively is given;

(b) *any contractor other than a dependent contractor or any employee of another employer.*[1]

Bill C-58 further prohibits using the services of employees in a bargaining unit that is on strike or locked out during a legal work stoppage, for all or part of the duties of an employee in the bargaining unit.

Finally, the Bill also differs from the Québec legislation by not limiting its prohibitions to the notion of an "establishment." It thus appears that the new prohibitions also cover the use of teleworkers. In Québec, the issue is currently being debated before the Court of Appeal, following the Superior Court's decision in February 2023 holding that the concept of establishment in the *Labour Code* cannot be expanded to include the services of a person who is teleworking.

Exceptions

Bill C-58 nevertheless contemplates some exceptions.

For instance, a contractor hired by the employer *before* the day on which notice to bargain collectively was given may continue to perform the work for which they were hired in order to perform the same or substantially similar duties as those of an employee in the bargaining unit, during the strike or lockout, provided that they do so "in the same manner, to the same extent and in the same circumstances as they did before the notice was given."[2]

The Bill also provides that the services of a person mentioned above (and of the employees of the bargaining unit) may be used if they are necessary to deal with a situation that presents or could reasonably be expected to present a:

(i) *threat to the life, health or safety of any person;*

(ii) *threat of destruction of, or serious damage to, the employer's property or premises; or*

(iii) *threat of serious environmental damage affecting the employer's property or premises.*[3]

The Bill specifies that an employer, or anyone acting on its behalf, may rely on these exceptions only for conservation purposes "and not for the purpose of continuing the supply of services, operation of facilities or production of goods."[4]

Fines

Bill C-58 provides that the use of replacement workers will be a summary conviction offence, with serious fines of up to $100,000 "for each day during which the offence is committed or continued."[5]

In addition, the government may issue regulations establishing an administrative monetary penalties scheme for the purpose of promoting compliance with the above-mentioned provisions.

Coming into force

The Bill stipulates that the prohibitions with respect to the use of replacement workers will come into force within 18 months of the Bill receiving Royal Assent.

Other related amendments

It should also be noted that Bill C-58 includes amendments aiming at encouraging timely decisions by the Canada Industrial Relations Board (the CIRB) on complaints alleging violation of anti-strike-breaking provisions. The time limits imposed on the CIRB in this regard will be set by regulations. In the absence of such, the Board will be required to issue its decisions as soon as possible.

The Bill also amends certain provisions relating to the maintenance of activities process in the event of a strike or lockout, in order to encourage employers and unions to reach an earlier agreement respecting these matters. These same provisions also limit the power of the Minister to make referrals to the CIRB for determinations of the services to be maintained in the event of a strike or lockout. With this Bill, the Minister will only be able to make a referral to the CIRB to determine the ability of an agreement reached by the parties to meet the requirements of the maintenance of activities legislation. In this respect, one should bear in mind that the only services that can be maintained during legal strikes or lockouts are those required to prevent imminent and serious risks to public health or safety.

Bill C-58: Main takeaways

With the introduction of this Bill, the federal government is following in the footsteps of Québec and British Columbia, the only two provinces in Canada with anti-strike-breaker provisions.

However, we must not lose sight of the fact that at so early a stage, the Bill was only presented for a first reading and will be subject to more debate later on at the House of Commons and the Senate. Further, with the 18-month period to anticipate between the Bill's assent and its coming into force,[6] we remain a long way from an enforceable legal text.

Regardless, the Bill as tabled clearly demonstrates the government's intention to limit employers' use of third-party strike-breakers in the event of strikes and lockouts. Given the alliance with the NDP, which means that the Bill is supported by a majority group in the House, employers should expect that the legislation that will ultimately be adopted will be similar to the current Bill. Such legislation will certainly bring about a major change in the dynamics of labour relations in the federal private sector in Canada.

Contact us

For assistance with collective bargaining or any other matter, please contact our Labour and Employment Law Group at BLG, as we continue to monitor the progress of this Bill and the evolution of labour relations dynamics.

Footnotes

[1] Bill C-58, s. 9(2).

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] Bill C-58, s. 12.

[6] Bill C-58, s. 18.

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