



Bill C-257

A Grave Threat to the Economic Security of Canadians

A brief presented by the Conseil du patronat du Québec
in reference to Bill C-257, an Act to amend the
Canada Labour Code (replacement workers)

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PRESENTATION

The Conseil du patronat du Québec (CPQ) is a not-for-profit association that consolidates most of the employer and sector-based associations present in Québec as well as over 300 of the largest. It therefore represents the employers of the vast majority of the Québec labour force.

It is through its intervention that the business sector makes itself heard by society, governments and various bodies and makes the general public aware of the needs of Québec businesses, in order to enable them to fulfil their primary mission: to create the prosperity needed to improve the standard of living of all Québécois.

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The Conseil du patronat du Québec (CPQ) thanks the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities for the opportunity to express the business community's perspective on the aforementioned Bill.

INTRODUCTION

In the best interest of Canadians, their families, their communities, and the prosperity of their country, the CPQ calls for the unequivocal rejection of Bill C-257.

In light of the fact that this Bill will completely upset the fragile balance of power that now exists among employers, employees and trade unions in the most significant sectors of our economy – rail and air transport, telecommunications and banking, to name a few – we encourage Members of the House of Commons, and particularly the Liberal Party of Canada, to vigorously oppose this Bill **because it represents a grave threat to the economic security of Canadians.**

The purpose of the Bill is to prohibit employers under the Canada Labour Code from hiring replacement workers to perform the tasks of striking or locked-out employees. The Bloc Québécois has made a proposal that mimics legislation already on the books in Quebec, even though the ramifications of that legislation have proven clearly injurious to Quebec's economy and its ability to create jobs.

In the current economic environment, any change to the Code should aim to enhance the competitive edge of Canadian companies. The proposed amendments, however, assure the precise opposite. They make our labour legislation, which already handcuffs employers, still more cumbersome to them. These amendments can only severely inhibit foreign investment, at a time when we should be doing everything we can to attract companies to Canada.

Anti-strikebreaking ("anti-scab") measures in Quebec have effectively granted the unions disproportionate and unjust powers. The legislation has disadvantaged both employers and the very workers it was meant to help. Should Ottawa choose to imitate Quebec in this regard, the damage will be twofold: first, to the established balance of labour relations across the country, and additionally to the competitive posture of Canada in the world. By adopting such labour legislation, our country will inflict upon itself an unflattering and unhelpful image. We will be seen by foreign businesses and investors as excessively restrictive and pro-union.

In the pages that follow, we present in detail the reasons why the measures proposed in Bill C-257 must be rejected.

I— BALANCED LABOUR RELATIONS: A PLEDGE OF PROSPERITY FOR CANADIANS

The prohibition against the hiring of replacement workers during a strike, combined with the right of striking workers to look for other work, creates an imbalance of power in favour of the trade unionists and undercuts the effectiveness of negotiations between the parties. As the following excerpt from the Woods Report observes, the employer's option of continuing his business and preserving his productivity during a strike acts as a balance to the workers' right to invoke the pressure tactic of a walk-out:

"However, it is important to note that the employer's capacity to take a strike depends largely on his right to stockpile goods in advance of a 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."¹

The Code regulates employers principally in the sectors of banking, interprovincial and international transport, air transport, as well as broadcasting and telecommunications. These employers, who count some 700,000 workers in their ranks,² risk being suddenly prevented from freely and fully carrying out their businesses in the event of a work stoppage. Similarly, the Canadian public could suddenly be held hostage by being deprived of services which, in many cases, it cannot do without.

The CPQ insists strongly upon the recognition of this point: that the ban against recourse to replacement workers unjustly deprives employers of their fundamental right to continue running their businesses. The CPQ vigorously opposed, and continues to oppose, the anti-strikebreaking legislation adopted by Quebec's National Assembly in 1977. We went so far as to question the legitimacy and legality of the legislation in court.³ We have always emphatically deplored the negative effects on the climate of labour relations in Quebec of the supposed benefits of this legislation's provisions.⁴

The balance of negotiating power is in fact distorted by such provisions. While striking employees have the right to find work elsewhere, the companies that are subject to anti-strikebreaking legislation must, almost without exception, close their doors. While the current Code equitably serves the interests of both employers and employees faced with a labour conflict, it makes no sense to support a proposed law such as Bill C-257.

II- THE EFFECTIVENESS OF THE CODE: WHY FIX SOMETHING THAT ISN'T BROKEN?

Canada is facing numerous unprecedented challenges. Among them are the need to adopt new technologies, respond to the rise of Asian economies, deal with climate change, and attain a secure energy supply. Why then, we at the CPQ wonder, would our Members of Parliament choose to devote their time to the renovation of a structure that is not in any way defective or outdated? *The federal labour code requires no repair.* We can only express astonishment at the spectacle of our elected representatives willfully removing their focus from the problems that truly matter for the future of Canadians.

Instead of helping lead the way to reforms necessary for the prosperity of our country, we at the CPQ find ourselves engaged in a rearguard battle to prevent our legislators from turning a satisfactory situation into

an almost certain debacle. This turn of events is just plain sad, and we wish to put our reproach unmistakably on the record.

Defending the interests of our members, whose success is the principal key to the prosperity of our society, the CPQ has always intervened to critique and prevent the adoption of anti-strikebreaking legislation. We consider ourselves an indispensable watchdog in reference to the balance of labour relations, at a time when governments are tempted to give in to the lobbies of the trade unions that are always seeking greater powers.

In 1995, the CPQ contributed significantly to the thinking of a special committee mandated to conduct an independent study and propose changes to federal labour legislation. This special committee, chaired by Mr. Andrew Sims, Q.C., published a report in February 1996 entitled *Seeking Balance*. In 1999, as a result of this report, several important changes were made to Part I of the Code.

Among these changes is an amendment to the effect that recourse to replacement workers during a legal work stoppage or lock-out is not subject to a general prohibition. Article 94(2.1), which enunciates this principle, furthermore foresees that the hiring of such workers can constitute improper practice only if it is carried out with the aim of undermining the union rather than with furthering the legitimate objectives of the negotiation. In such a case, the Canada Industrial Relations Board (CIRB) could order the employer to cease hiring replacement workers for the duration of the dispute.⁵ The relevant article 94(2.1) reads as follows:

94 (2.1) No employer or person acting on behalf of an employer shall use, for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining objectives, the services of a person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out.

Since its adoption in 1999, the CIRB has received a total of eighteen complaints germane to article 94(2.1) of the Code. Thirteen of them were withdrawn, three have been rejected, and two are still being analyzed. Given that the article is only seven years old, why seek to change it so soon? Would it not be wiser to let time judge its effectiveness? Why the urgency to proceed with such significant amendments as those proposed in Bill C-257? Is it a concession to a trade union lobby that is growing more and more powerful?

Furthermore, one of the decisions rendered by the CIRB in a case that questioned article 94(2.1) of the Code provides a reminder of why this measure was adopted⁶:

Prior to the amendments to the Code in 1999, the Code contained no express prohibition against the use of replacement workers by an employer during a legal workstoppage. [...]

The new provision in the Code espouses two principles. The first is that an employer has a legal right to utilize such workers during a lawful work stoppage to put economic pressure on the trade unions to achieve its bargaining objectives. This principle is counterbalanced by other related provisions in the Code, namely, that replacement

workers are not considered to be members of the bargaining unit and are thus excluded from representation votes (section 29(1.1)), and that striking or locked out employees are to be reinstated ahead of any replacement workers at the conclusion of a work stoppage (section 87.6).

The second principle is that an employer cannot use replacement workers for improper and illegal purposes, such as to rid the workplace of union representation, as opposed to pursuing a particular economic goal or bargaining objective. Thus, the employer's use of replacement workers must not be used to undermine the union's representational capacity. (Our emphasis.)

The employees' rights to strike and to return to their jobs are thus clearly protected, consistent with the objectives of the Code. The provision also prohibits any punishment of, or imposition of penalty upon, those employees who refuse to do the work of striking or locked-out fellow employees.⁷

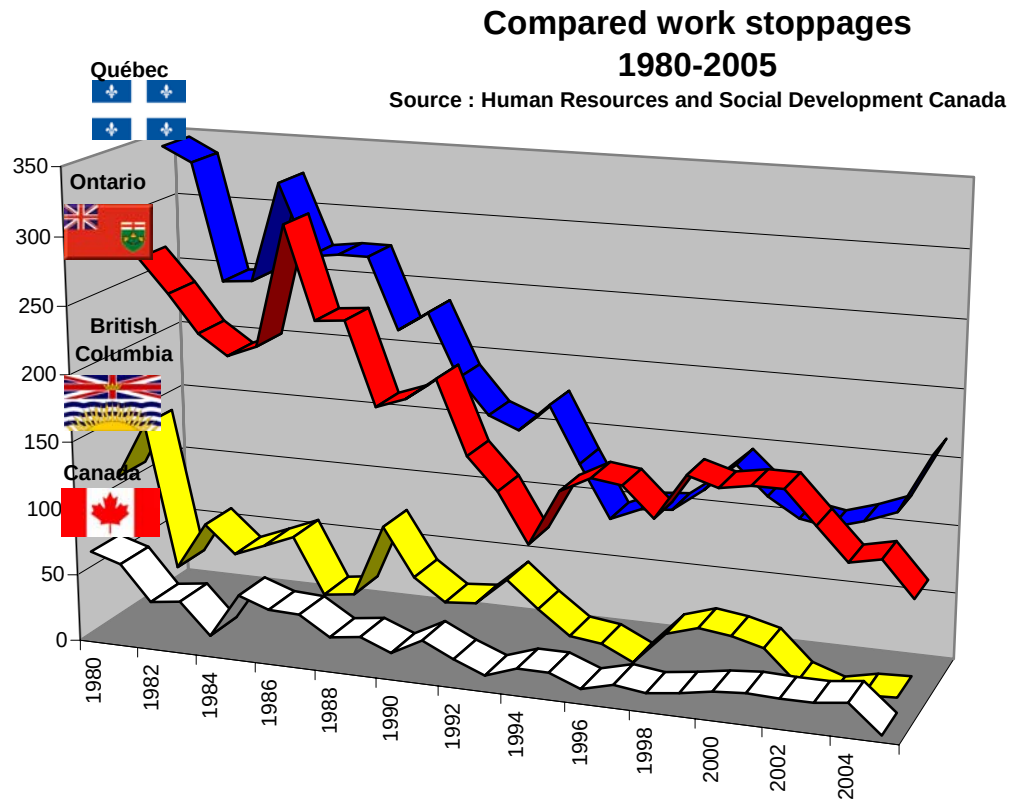
Concluding this point, we should remember that Canadian collective bargaining traditionally favours unfettered negotiations between unions and companies on working conditions. It also includes tools of leverage that have been accepted by the parties, namely the strike and the lock-out. The trade unions possess an absolute right to resort to the strike, and the CPQ does not challenge that entitlement in the least. However, the recognition of the right to strike does not extend so far as to allow for the elimination of the employer's right to continue the operation of his business during a strike. We will return later to the financial consequences that such a breach of the employer's rights entails.

III- A PROPOSED LAW THAT WILL DO NOTHING TO DETER OR SHORTEN LABOUR DISPUTES

It should be pointed out that in the debate concerning Bill C-257, the burden of proof rests with the parties who favour its adoption. It is their responsibility to prove, with numbers and facts, that the Bill will deliver the promised benefits. They will find it impossible to do so, however. When we examine the similar legislation that has been in force in Quebec for thirty years, we find that it has done nothing to reduce the number of labour disputes, their intensity or their duration. As to the benefits that were expected from that legislation in terms of economic development – none ever materialized. In fact, all serious indications lead us to believe the reverse, namely that such a law only undercuts prosperity and triggers the loss of thousands of jobs.

The amendments to the Code proposed by Bill C-257 do not guarantee a reduction in the number or duration of work stoppages. Recent experience bears this out.⁸ Over the last thirty years, the number of labour conflicts has been reduced to roughly the same degree in all Canadian jurisdictions, whether or not there is a prohibition against hiring replacement workers.

The following graphic illustrates:



Clearly, no evidence supports the inference that anti-strikebreaking legislation would reduce either the scale or frequency of labour disputes. The province of Quebec, which outlaws recourse to replacement workers, regularly claims first place among the provinces when it comes to the highest number of work stoppages in Canada. Moreover, in Quebec, the number of work stoppages increased significantly between 2004 and 2005, while in Ontario, a province that does not ban recourse to replacement workers and which has an economy much stronger than Quebec's, the number of stoppages went down. The duration in person-days of work stoppages also shot up in Quebec, particularly between 2004 and 2005, while it went down slightly in Ontario during the same period.

Some analysts have noted that the average number of strikes in Canadian jurisdictions has risen over the last three years.⁹ This trend appears to be reversing in 2006 according to the facts available to us at the time of writing (September, 2006). It is interesting to point out in addition that between 2003 and 2005, the trade unions were responsible for initiating approximately 84% of work stoppages.¹⁰

Other experts who have examined the matter of strike frequency have observed that measures outlawing recourse to replacement workers have had the effect, in general, of increasing the probability of strikes by between 15 and 27%¹¹, which would be explained in part by the impact on salaries:

*"This may be one of the factors explaining why strikes last longer and occur more often in the presence of anti-scab laws. Unions, whose power is strengthened by such laws, are prepared to endure longer disputes in the hope of being compensated by higher wages. Higher wage gains for unionized employees may seem advantageous on the face of it. However, if they are not accompanied by equivalent increases in productivity, the company's profitability may come under threat. In addition, with labour becoming relatively costly, companies will tend to hire fewer workers. In the end, none of these consequences works to the long-term advantage of labour as a whole, whether unionized or not."*¹²

The facts then do not support the notion that banning recourse to replacement workers lessens the duration of work stoppages and delivers an advantage to workers. Quite the contrary. The case which argues that anti-strikebreaking legislation bears some sort of influence upon the climate of labour relations has not been made. Moreover, in 2005-2006, 97% of collective bargaining agreements involving companies under federal jurisdiction were successfully negotiated without any stoppage of work.

IV- DISASTROUS EFFECTS ON THE ECONOMY: DO WE NEED THIS?

Bill C-257 emulates legislation that has been in place in Quebec since 1977. The Quebec law bans the hiring of replacement workers during a strike¹³, yet allows striking workers to take jobs elsewhere during the dispute. This asymmetric situation vis-à-vis rights and obligations during a labour dispute clearly disadvantages employers.

Following the example of its Quebec model, Bill C-257 allows for the possibility of employers calling upon the services of their non-striking personnel during a strike or lock-out. However, business reality today is such that companies do not have sufficient management staff to fill the gap. As a result, the basic services of strike-targeted companies cannot be fully offered, their clientele soon patronize other suppliers for products or services, and some revenues are lost forever. If the government prevents a company from functioning during a strike, it is, for all intents and purposes, causing it irreparable harm – especially so in a market environment of intense competition.

The hospitality industry in Quebec provides a good case in point, because the services offered by hotels cannot be put off to a later date or assumed by management staff. In Montreal, a number of paralyzing strikes made possible by the Quebec law have forced employers to grant salary increases well beyond the norm for markets that are similar in size. These concessions harm the hotels' profitability and naturally tend to discourage new investments (along with the creation of new jobs) in the sector. Quite a few employers under federal jurisdiction will undergo the identical experience if Bill C-257 becomes law. For others, a work stoppage will effectively interrupt the supply chain to client companies whose profitability will, in turn, be damaged.

If large companies, foremost among them the multi-nationals, must submit to a law banning recourse to replacement workers, they could well respond to the economic pressure of a strike by, for instance, transferring production to another location or out-of-country site, or even by closing the targeted branch. For these companies, it makes no sense to locate themselves in jurisdictions where labour relations

constitute a potential obstacle to their productivity. *The adoption of Bill C-257 will ensure that fewer jobs are created.* For the smallest of businesses, this Bill could impel the adoption of corporate strategies that reduce companies' dependence on permanent staff. For example, strike-fearing companies may choose to do more business with sub-contractors. Then there is the matter of unionized companies being vulnerable in the marketplace to non-unionized competitors; the playing field for such companies is, clearly, imbalanced. No matter how we look at it, the implementation of Bill C-257 will inhibit investments and put a brake on job creation in Canada.

We submit additionally that Bill C-257 can represent a dangerous weapon in the hands of less scrupulous trade unions that might offer their services to competing companies. Some of our members, subject to Quebec's legislation, have mentioned to us that before the launch of a strike, some of their unionized employees tried to harm the ability of management to step in as replacement labour, going so far as to sabotage and vandalize the workplace in order to complicate and augment the task of management.

It should be noted that the hiring of replacement workers is never an easy or routine solution for an employer at the outset of a strike. Such a step entails significant risks and constraints. Replacement workers must first be recruited. Then they must be trained and sometimes housed. These steps incur considerable costs for the employer. In other cases, because of the specialized nature of certain jobs, the employer might not have any workers at all to call upon as replacements. In the 1990s, recourse to replacement workers by companies under federal jurisdiction took place in only 25% of strikes.¹⁴ It is clearly not a solution that is applied automatically in the event of a strike. Calling upon replacement workers can result in serious damage to the reputation of a company and on its long term relations with its employees and the community. Such factors play a large role in discouraging many companies from bringing in replacement workers, or at least causes them to reflect deeply on the potential consequences before doing so.

V- ANTI-STRIKEBREAKING LEGISLATION AS A SUPPOSED REMEDY TO CONFRONTATIONS: ANOTHER MYTH TO DEMOLISH

The supporters of anti-strikebreaking legislation have long held that such a ban actually prevents acts of violence. They refer to events that occur when replacement workers try to cross picket lines manned by employees on strike or lock-out. Whether or not tensions exist, the threat of violence should never influence legislators. Violence is not a consequence of companies resorting to replacement workers, but rather of the behaviour of individuals who are acting on their own account and with full knowledge of the motive and ramifications of their actions. It is completely absurd that employers can be prevented from ensuring the productivity of their companies on the premise that some angry strikers might act reprehensibly – while public security would take no action in response.

This whole issue prompts a good question: why do we not outrightly condemn such violent behaviour, instead of depriving one of the parties in the dispute of the ability to continue running his business? Experience has shown that the resort to violence during labour conflicts happens not only in the case of replacement workers, but for many different reasons. Let's not forget that the Code states clearly that strikers have the right to return to their jobs. Union members therefore should not fear the loss of

employment, and the trade union should not feel threatened by replacement workers that cross picket lines – so long of course as the union maintains the support of its members.

VI - BILL C-257 ALSO THREATENS THE MAINTENANCE OF ESSENTIAL SERVICES

The CPQ categorically upholds the view that this proposed law represents a serious threat to the economic infrastructure of the country.

Any interruption of services provided by the companies that fall under the jurisdiction of the Canadian Labour Code can enormously affect the public interest. Consisting of the transport, communications and banking sectors, these companies comprise the heart of the Canadian economy. They assure access to critical goods and services, and conduct our international exchange of capital. No work stoppage under provincial legislation can carry consequences similar to the potential damage that can be caused by work stoppages within companies that fall under the aegis of the Canadian Labour Code. In preventing replacement workers from doing the work targeted during a strike, Bill C-257 compromises the possibilities of maintaining essential services.

Before adopting such a proposed law, it would be appropriate to analyze the effectiveness of the method now used under the Code to assure the maintenance of certain services in the event of a strike. The analysis should be made in the context of the proposal that henceforth any recourse to replacement workers will be prohibited. Bill C-257 does permit the use of management personnel, but the number of managers available to do the required work may simply not be sufficient to assure the protection of the public interest during a labour dispute. Additionally, many vital services are performed by specialized employees who cannot be replaced easily. Any change to the Code should be made only after a profound study of these very grave potential consequences, and only after consultations with all involved parties. We therefore find it surprising that the hearings called by the committee charged with examining Bill C-257 took place so quickly after second reading, and that the list of invited contributors to the debate is so short.

We note further that the adoption of Bill C-257 will increase the number of cases to be heard by the CIRB. Among other effects, this will have an impact on the application of the Code's current regulations on the maintenance of certain business activities,¹⁵ as well as on obligations pertaining to strikes and lock-outs.¹⁶

Notwithstanding the fact that we consider the principle recommended in Bill C-257 to be wholly unacceptable, this is not a matter to be executed in haste. We believe it would have been appropriate at the very least to examine the impact of its measures on the totality of the Code and on the conduct of labour relations.

CONCLUSION

To prohibit employers from hiring replacement workers is the equivalent of giving trade unions the abusive power to completely paralyze the nerve centres of the Canadian economy to their own profit and to the detriment of the public, whose prosperity depends upon the reliability of our economic infrastructure, namely the sectors of air and rail transport, communications, and financial services.

To prohibit employers from hiring replacement workers is to trade a well-functioning federal labour Code that attracts complaints from nobody for a delusional Code copied from a Quebec experience that has not only served up thirty years of non-existent benefits, but has acted as a powerful killer of economic development in a province where the rate of per capita wealth stays rooted comparatively deep in the country's cellar.

To prohibit employers from hiring replacement workers is to unleash a toxic precedent that will encourage the other provinces in Canada – which today put reasonable limits on the power of trade unions within companies where they are active – to follow the same model, and to do so irreversibly.

Whatever the reasons might be to justify the eventual adoption of these measures, the CPQ adamantly opposes Bill C-257. This Bill will undermine the delicate balance of labour relations that has proven indispensable at the federal level. It recalls the 1999 breakdown in consensus that necessitated many years of work to bring the involved parties back together.

Our large industries require flexibility to create wealth. Playing prominent roles at the heart of Canada's economy, they purchase products and services from thousands of SMEs. A slowdown among these huge creators of jobs will have a major adverse impact on the activities of countless smaller companies. A prohibition as extreme as the one contemplated in Bill C-257 – a ban against replacement workers – would interfere significantly with the normal functioning of our economy and would, in addition, diminish the attraction of Canada as a favourable investment destination.

Imagine the consequences of a work stoppage in telecommunications if it should close the pipes of digital transmission. Imagine too if the banks could not perform financial transactions on the national and international levels. The confidence of external markets in our economy and companies would be shaken profoundly.

Moreover, workers themselves would be adversely affected by the proposed changes to the legislation. The best protection for the worker on strike remains the possibility of reclaiming his job. This assurance, however, cannot be given, should his employer be unable to conduct business during a strike. It is worth noting as well that Bill C-257 effectively mocks the right of this worker to earn his living, once his bargaining unit goes on strike and prevents his employer from calling upon him.

The Canadian Labour Code as currently written aims to balance and reconcile disparate interests in regard to labour conflicts; it does not seek to promote the interests of one group to the detriment of another. The amendments in Bill C-257 will, if adopted, create an imbalance between opposing interests, and surely weaken the competitive position of Canada in the global economy.

For all these reasons, the CPQ demands the immediate withdrawal of the Bill.

NOTES

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- ¹ Canadian Industrial Relations: The Report of the Task Force on Industrial Relations, December 1968, paragraph 607.
- ² *Human Resources and Social Development Canada*, www.rhdrc.gc.ca
- ³ The CPQ alleged in particular a breach of the right to property implicitly protected by the Canadian Charter of Rights and Freedoms.
- ⁴ When the Attorney General of Quebec challenged the CPQ's stake in the matter, the CPQ took the case to the Supreme Court which confirmed its stake, albeit twelve years later. In light of the extent of time that has passed since the adoption of these measures in Quebec (1978), it has been decided to defer all challenges.
- ⁵ Article 99 b) 3 of the Code.
- ⁶ Union of Telecommunications Workers and TELUS Communications Inc. [2004] CIRB no. 271.
- ⁷ Article 94 (3) c) of the Code.
- ⁸ Chronological Perspective on Work Stoppages (work stoppages involving one or more workers), Human Resources and Social Development Canada. Labour Branch, Workplace Information Directorate.
- ⁹ Ernest B. Akyeampong, "Des arrêts de travail accrus", in *L'emploi et le revenu en perspective*, Vol. 7, no. 8, August 2006 (75-001-XIF). This study published by Statistics Canada showed that the number of work stoppages due to strikes and lock-outs decreased, going from an annual average of 754 in the 1980s to 394 in the 1990s, and down to 319 in the years since 2000. This study indicates, however, that most recently work stoppages have increased on average, rising to 261 in 2005, as opposed to 221 in 2003.
- ¹⁰ Op. cit. note 9.
- ¹¹ Peter Cramton, Morley Gunderson and Joseph Tracy, "Impacts of Strike Replacement Bans in Canada," *Labor Law Journal*, 50(3), September, 1999, pp. 173 – 180, cited by Norma Koshaya, "The Perverse Effects of Anti-Scab Measures," *Montreal Economic Institute*, January 2005.
- ¹² Norma Kozhaya, op. cit. note 11.
- ¹³ Articles 109.1 to 109.3 of the Labour Code of Quebec.
- ¹⁴ Andrew C.L. Sims (President), *Seeking a Balance: Revision of Part One of the Canada Labour Code*, Hull, Ministry of Public Works and Government Services Canada, 1996.
- ¹⁵ Article 87(1) and the following articles of the Code.
- ¹⁶ Article 87.1 and the following articles of the Code.