

Submission to the Federal Labour Program Consultation on Prohibiting Replacement Workers

January, 2023



Introduction

The Manitoba Federation of Labour is Manitoba's central labour body, representing the interests of over 30 affiliated unions and over 125,000 unionized workers in the province. Unions affiliated to the MFL represent federally and provincially-regulated workers, and Manitobans who work in the public and private sectors, including: manufacturing, government offices, retail stores, hospitals, schools, natural resources, tourism, agriculture and many others.

The MFL is glad to take part in this consultation process and we fully support a federal ban on the use of replacement workers during strikes and lockouts. Such a ban is long past due at the federal level. Preventing employers from hiring replacement workers during labour disputes would enable a fairer balance of power between employers and workers during contract negotiations and labour disputes. The decision to go out on strike is never one that is made lightly by workers, and being out on picket line because of a strike or a lockout means workers lose income and other face other hardships. As long as the hiring of replacement workers is allowed to take place, employers are able to ensure they do not face similar types of income loss.

The utilization of replacement workers also heightens tension between employers and the unionized workforce, and gives the employer an unfair upper hand in contract negotiations. A federal ban on replacement workers would moderate this by limiting the ability of employers to undermine the effectiveness of a strike by using, or threatening to use, replacement workers. It would also prevent employers from the deeply callous and unfair practice of locking employees out, and then bringing in replacement workers to undermine a collective bargaining unit and force workers to accept the employer's offer.

A ban on replacement workers would create incentives for employers to bargain in good faith, to work towards avoiding labour disputes in the first place, and ensure its regular employees are respected and treated fairly. In addition to providing a more level playing field between workers and employers during labour disputes, a ban on the use of replacement workers will lead to shorter labour disputes, safer workplaces, reduce tension in contract negotiations and on picket lines, and facilitate a less toxic workplace when workers return to work.

Background

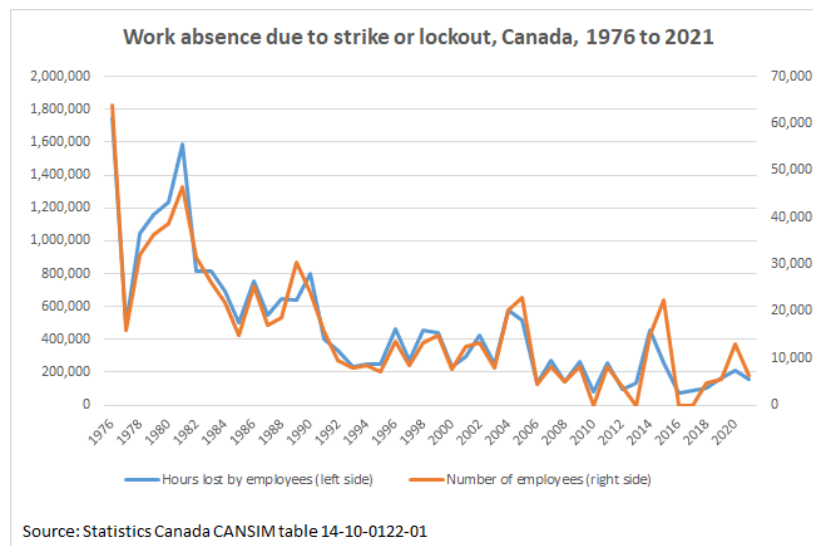
The right to strike is constitutionally protected in Canada, recently affirmed as a Charter right by the Supreme Court of Canada in 2015.¹ Unlike other countries, such as the United States, workers in Canada have the right to go back to their jobs when a strike or

¹ *Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC*

lockout ends. This means that employers cannot permanently replace workers just because they went on strike or were locked out.

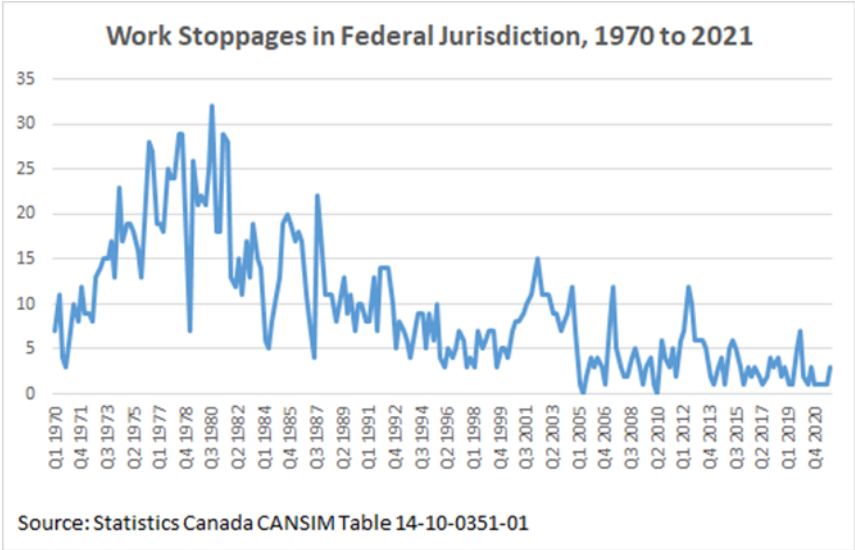
Currently, the Canada Labour Code allows employers to hire replacement workers to perform the work of union members who are on strike or locked out, so long as the replacement workers are not used to undermine the “representational capacity” of the union, a point that is notoriously difficult to prove. The Code does not impose fines on employers for hiring replacement workers. The Canada Labour Code applies to approximately 22,000 employers and about 985,000 workers.²

In the federal jurisdiction, the vast majority (95%) of collective bargaining processes to renew collective agreements are completed successfully without any work stoppage.³ As well, the frequency of strikes and lockouts in Canada have declined markedly from the numbers reached 50 years ago. Indeed, across Canada there are approximately 150 strikes and lockouts each year, and the level of work absences due to strikes and lockouts is at historically-low levels.



² Prohibiting replacement workers in federally regulated industries – Discussion paper

³ Peter Annis, Work Stoppages in the Federal Private Sector: Innovative Solutions, report produced for the Minister of Labour, Government of Canada, September 2008.



With respect to the average duration of work stoppages, there has been a slow decline since the 1980s (Table 1). The average duration of stoppages today is higher than in the 1970s; but this is in part due to the fact that since the 1970s, a portion of work stoppages are much longer than the longest stoppages seen in that decade. Indeed, the pattern that characterized the 1970s, with more frequent strikes and lockouts of a relatively short average duration, has given way to a trend toward fewer stoppages each year that are either very short or quite long. This is consistent with labour’s concern that in a minority of disputes, the presence of replacement workers contributes to prolonging and embittering wage stoppages, with attendant economic inefficiencies and losses.

Table 1 Work Stoppages in the Federal Private Sector by Decade

	Average Annual			
	Number of Work Stoppages	Duration of Work Stoppages in Days		
		Average	Minimum	Maximum
1970s	10.1	22.67	9.3	45.8
1980s	11.0	32.26	8.6	47.3
1990s	6.0	30.54	7.8	63.0
2000s	5.5	31.55	2.0	64.0
2010s	3.7	29.65	1.0	65.0

Source: Statistics Canada CANSIM table Table: 14-10-0351-01.
 Work stoppage data cover strikes and lockouts that amount to 10 or more person-days not worked

According to the federal labour department, from January 1, 2012 to August 1, 2022, estimates show that employers used other workers and managers to do some or all of the work of striking or locked out employees in about 42% of all strikes and lockouts in

federally regulated workplaces.⁴ This shows a rise in the use of replacement workers when compared with the 1995 Sims Task Force reviewing Part I of the Canada Labour Code, which estimated that between 1991 and 1994, external replacement workers were hired in about 25% of 48 work stoppages in federally regulated workplaces, suggesting an increase in the use of replacement workers in strikes and lockouts. Bans on replacement workers currently exist in two provinces: British Columbia (since 1993) and Quebec (since 1977). Beyond our borders, bans on replacement workers are quite common. According to the International Labour Organization, “in many countries, the replacement of striking workers is prohibited or, in any event restricted” (ILO 2015). The United Kingdom, Spain, France, Portugal, Greece, South Africa, South Korea, Argentina, Mexico, Chile, Czechia, and many other countries have restrictions or bans on employers’ ability to use replacement workers.⁵

These restrictions range from a general prohibition on hiring replacement workers during lawful strikes to outlawing replacement workers except under very specific circumstances. In an international context, a federal ban on replacement workers would be very much in line with Canada’s ratification of ILO conventions recognizing the right to collective bargaining and to strike, as well as our Constitutional guarantees provided to collective bargaining, freedom of association, and unions’ expressive activity.

Creating a Fairer Collective Bargaining Process

Collective bargaining is a tried and tested process that allows workers and employers to reach fair deals that make sense for both sides when the process is fair. It is up to government to ensure that workers and employers are negotiating on a fair playing field. Right now, employers can easily tip the scales against unionized workers during the course of a labour dispute by hiring replacement workers, and we believe this unfair advantage should be ended under federal law. A ban on replacement workers would lead to better outcomes overall because it would force both sides in a labour dispute to the table sooner and end strikes and lockouts more quickly.

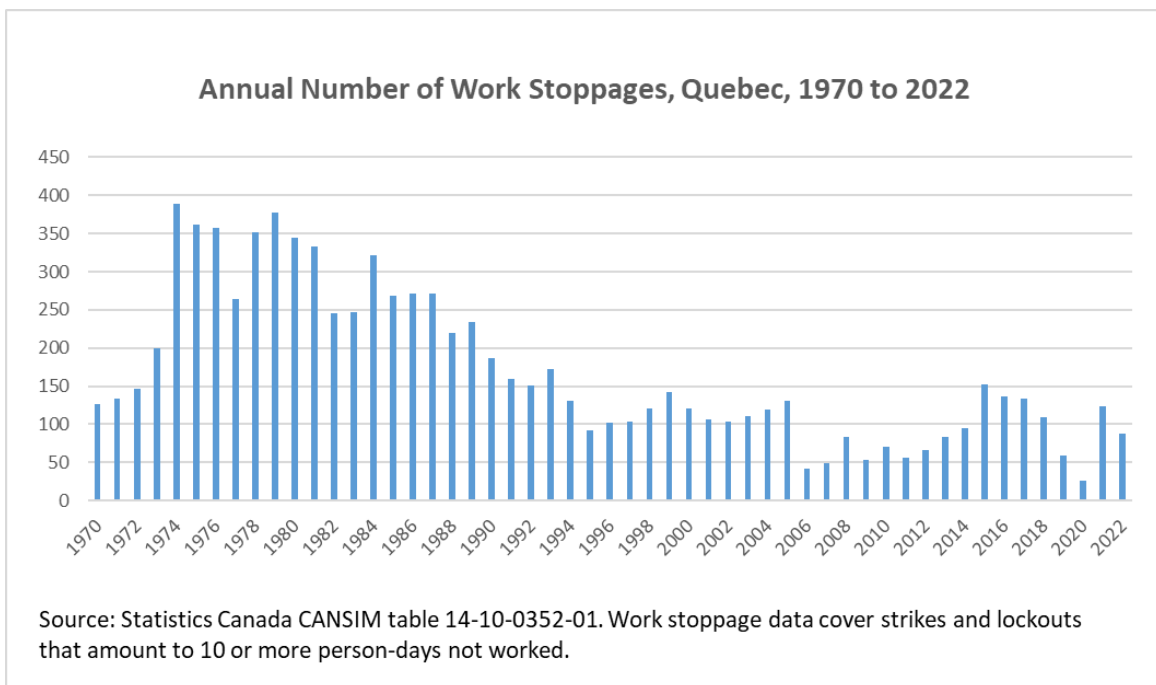
The decision made by workers to go on strike is not one that is made lightly. Striking raises the stakes of the conflict, along with the potential costs and risks for workers. Because of this, workers typically view the withdrawal of their labour as a last resort once all other avenues for reaching a settlement have been exhausted. In a dispute resulting in a work stoppage, the decision to try to inflict economic pressure (and how much pressure) is always carefully weighed against the financial constraints and competitive pressures on the employer. Unions and workers have no influence over an employers’ decision to lock out employees.

⁴ Prohibiting replacement workers in federally regulated industries – Discussion paper

⁵ International Labour Organization, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015)

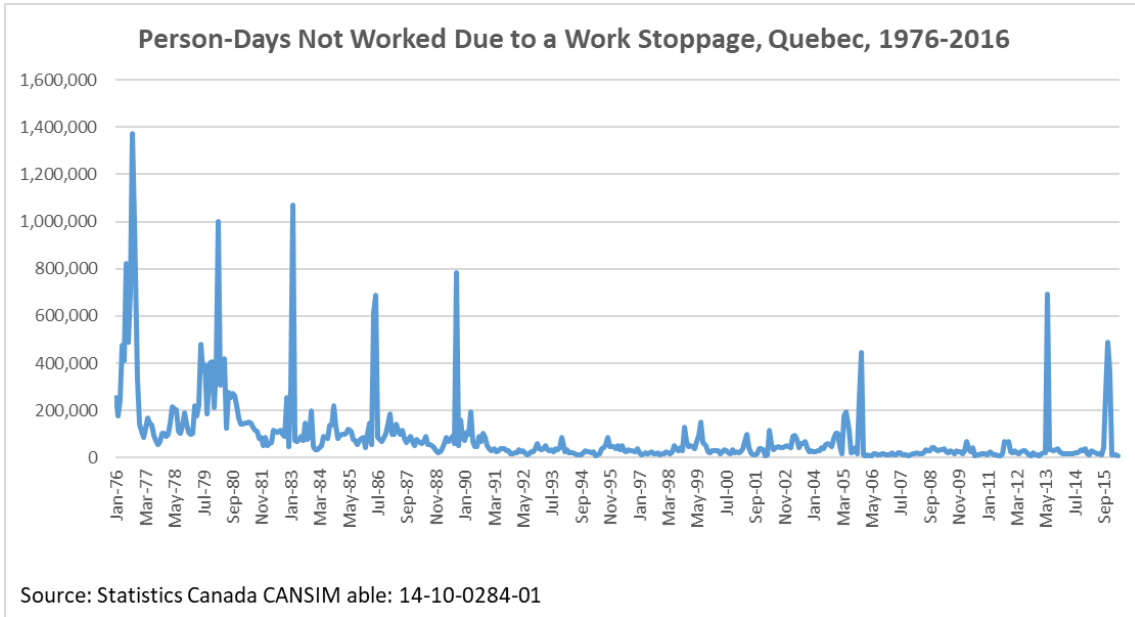
A study of labour dispute data from 1978 to 2003 examined the impacts of replacement workers bans on the frequency and duration of work stoppages and found that the while incidence of work stoppages tended to increase in the first two years after legislation to ban replacement workers was introduced, there was a significant and substantial reduction in the length of the work stoppages overall.⁶ As noted, the number of strikes overall has been trending downward for decades. But longer, more intractable labour disputes are often fueled by the use of replacement workers, hired by employers to prolong force workers’ hands in the case of a lockout, or to try and negate the use of a strike as a bargaining chip by workers. Analysis by Unifor of its own members’ experiences with the use of replacement workers during strikes and lockouts shows a strong correlation between the use of replacement workers and longer labour disputes.⁷

The pattern of stoppages following the introduction of bans on replacement workers also provides no reason to believe that strikes are going to rise significantly or for a lasting period of time. The frequency of work stoppages had been rising in Quebec in the 1970s leading up to its introduction of a ban on replacement workers in 1977. The province then saw the frequency of strikes began to fall in the 1980s, and that number has remained at relatively low levels since then, much like other jurisdictions in Canada (both those with and without replacement worker bans).

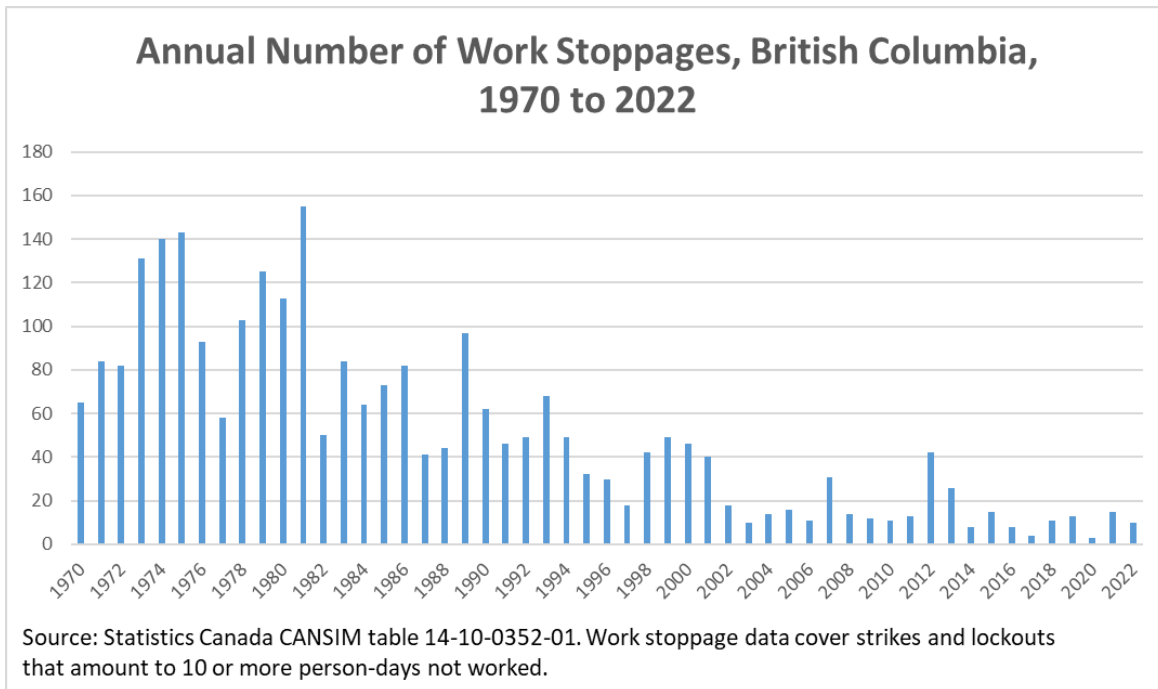


⁶ Duffy, P., and Johnson, S. (2009). ‘The Impact of Anti-Temporary Replacement Legislation on Work Stoppages: Empirical Evidence from Canada.’ *Canadian Public Policy*, 35(1): Pgs 99–120.

⁷ Fairness on the line: The case for anti-scab legislation in Canada (May 2021): Page 4.



This long-term trend is also evident in British Columbia, which shows the same pattern of elevated strikes and lockouts in the 1970s, followed by decline in the 1980s and a low frequency of stoppages thereafter (BC introduced its replacement worker ban in 1993).



As noted above, while the use of replacement workers in federally-regulated workplaces has increased since the 1990s, federal employers do not resort to using replacement workers in a majority of strikes or lockouts. Since most employers involved in federally-regulated labour disputes do not utilize replacement workers, most employers will not be affected by a general ban on the temporary use of replacement workers. The problem concerns a minority of strikes and lockouts where employers bring in replacement workers, enflaming the dispute, escalating tensions, and deepening resentments.

There is a clear public-interest justification for a ban on replacement workers. When a company uses them, they turn routine, typically short-lived stoppages into drawn-out, tension-filled conflicts. Workers stand to lose their jobs, their homes, and sometimes their unions; disputes can become dug-in and embittered. Banning replacement workers limit the unnecessary impacts on economic potential, workplace morale, community cohesion, and individual lives. It makes sense for the well-being of everyone concerned.

The purpose of labour law is to address the fundamentally unequal power relationship between employers and workers. As the Supreme Court of Canada wrote about the notion of ‘balance’ between employers and unions:

In essentially attributing equivalence between the power of employees and employers, this reasoning...turns labour relations on its head, and *ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying.*⁸

This is also the unequal power relation that the ban on replacement workers seeks to address. And it is especially the case in the federally regulated private-sector, which consists of industries that are mostly dominated by large, powerful, global corporations.

In a strike or lockout, the company’s production, income and competitive position may be put at risk. But workers put everything on the line: their income, their jobs, their house and car, their benefits and their future. While companies can build inventories, and rely on loans and accumulated financial assets during a stoppage, workers typically don’t have significant savings to rely on. There is no equivalence between the sacrifices workers make in a strike or lockout, and what the employer experiences. Employers’ recourse to use replacement workers further aggravates this imbalance.

We know that this government is concerned with reducing inequality and strengthening the economic security of working Canadians. Making the collective bargaining process fairer, and removing inherent power imbalances between employers and workers in the process, is one of the most effective ways governments can help to achieve these goals. By bringing workers’ collective power to the bargaining table, unions are able to

⁸ *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC

win better wages and benefits for working people—reducing income inequality as a result.⁹

The widening power imbalance between corporations and unions that caused wages to lag far behind productivity growth, meaning owners in the top 1% have received more and more of the wealth produced. Stronger unions are necessary to restore shared prosperity in Canada, and a ban on replacement workers at the federal level would enhance the bargaining power of federally-regulated workers and their unions and allow for fairer distributions of income.

We encourage your government to move quickly to ban the temporary use of replacement workers in federally-regulated workplaces. As we have seen a growing use of replacement workers by employers in labour disputes at the federal level, now is the time to introduce a meaningful ban, backed up with strong enforcement mechanisms.

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⁹ Brennan, J. “The Creation of a Shared Prosperity in Canada: Unions, Corporations and Countervailing Power.” Canadian Centre for Policy Alternatives: p. 10

Work Cited:

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Fairness on the line: The case for anti-scab legislation in Canada (May 2021), Unifor

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International Labour Organization, *Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised) (Geneva, 23–25 February 2015)*.

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, [2015] 1 S.C.R. 245