Canadian Association of Counsel to Employers
association canadienne des avocats d'employeurs

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BY E-MAIL & BY HAND

Ottawa, May 30, 2008

Mr. Peter Annis
165 Hôtel-de-Ville Street
Place du Portage
Phase II, 11th Floor
Gatineau QC K1A 0J2

Dear Mr. Annis:

Re: Submissions - Work Stoppages Study

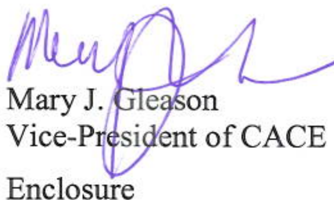
Please find enclosed the submissions of the Canadian Association of Counsel to Employers ("CACE") with respect to your study. In making these submissions, we have reviewed and considered your draft discussion paper.

If possible, CACE representatives would very much appreciate the opportunity to make a formal presentation to you and to participate in the roundtable sessions. Our President, Gavin Hume, would be available to make a presentation in Vancouver. I would be available to do the same in Ottawa, and another of our members of the Board of Directors would be available in Montreal.

Please let me know whether or not you would like to hear from us.

I hope you will find the enclosed useful in your deliberations on these matters.

Yours very truly,



Mary J. Gleason
Vice-President of CACE

Enclosure

Appendix "3"

The CIRB Appointment Process: A Report to the Chairperson of the Board from the CIRB Client Consultation Committee.

At its second meeting, held in Ottawa on June 7, 2005, the Committee paid particular attention to a possible process for identifying qualified candidates for nomination as members of the Board and to appropriate roles for the Board Chair and representatives of the federal jurisdiction labour relations community in such a process. Related issues such as the residency requirement for full-time Board members and the timeliness of appointments and renewal appointments, were also considered.

Committee members reviewed certain established and recently adopted recruitment processes for other federal tribunals, which emphasize the identification of well qualified, experienced candidates for nomination, by the responsible Minister, for appointment by the Governor in Council.

For the reasons detailed below, Committee members concluded that there is a need to establish procedures and criteria enabling the Chair of the Board, after consultation with representatives of the federal jurisdiction labour-management relations community, to identify lists of well qualified candidates from which the Minister of Labour can choose nominees for appointment to the Board by the Governor-in-Council.

Current Situation.

There are no set procedures for identifying nominees for appointments to the CIRB other than the initial announcement of vacancies in the *Canada Gazette.* Assessment of applicants who do respond to the announcements or who otherwise become aware of vacancies, is a centrally-run process. Selection panels for the smaller tribunals usually include representatives from the Prime Minister's Office, the responsible Minister's office, the Privy Council Office and sometimes, but not always, the Chair of the tribunal.

Part I of the Canada Labour Code requires that the Chairperson and Vice-Chairpersons must have experience and expertise in industrial relations. No specific criteria are spelled out under this general requirement and, as far as is ascertainable, none have been formally or informally adopted in the past. That is not to say that qualified candidates have not been appointed to the CIRB or to the predecessor Canada Labour Relations Board. There have been occasions, however, when the degree of relevant experience and expertise in industrial relations, possessed by some appointees, has not been readily apparent to seasoned practitioners.

Part I also requires that representative members of the Board be appointed on the recommendation of the Minister of Labour after consultation by the Minister with the organizations representative of employees and employers that the Minister considers appropriate. This requirement has been observed for the most part but there have been one or possibly two occasions when the major union and employer organizations active

in the federal jurisdiction were not consulted prior to the appointment of representative members.

The relevant provisions in Part I reflect recommendations in *Seeking A Balance,* the Report of the Task Force for the Review of Part I (the Sims Report), which was submitted to the Minister of Labour on January 31, 1996. The Report subsequently served as the basis for a number of legislative amendments which came into force on January 1, 1999. Several of the Sims recommendations, including those related to Board appointments, reflected in turn the conclusions of the labour-management consensus group established by the Task Force to assist with its mandate.

More specifically, Sims recommended that all candidates for appointments to the Board must have extensive and recognized experience and respect in labour relations, and that equity, language, regional and sectoral balance should also be considered in making appointments from among experienced candidates. Appointments should be made by the Governor in Council on the recommendation of the Minister of Labour, but only after the Minister of Labour has reviewed potential appointees with the Advisory Committee on Labour Relations and with the Chair of the Board.

The Advisory Committee on Labour Relations was the subject of a separate recommendation which aimed to provide the Minister, the Board and the Federal Mediation and Conciliation Service with a sounding board on labour relations policy and administration comprised of experienced practitioners familiar with Part I of the Code. The recommendation was not pursued.

Processes for Other Federal Tribunals.

The Committee reviewed initiatives taken by the federal government recently to increase the transparency of appointment processes in certain administrative tribunals by adopting procedures and criteria that ensure the identification of highly qualified candidates from among whom the responsible Minister can recommend nominees for appointment. The Veterans Appeal Board and the Immigration and Refugee Board are two such bodies and particular attention was paid to the procedures adopted by the latter Board. The statutory requirements for appointments to the Public Service Labour Relations Board were also reviewed.

The Immigration and Refugee Board (IRB) employs some 200 Order-in-Council appointees, the largest number in any federal tribunal. In March, 2004, the Minister of Citizenship and Immigration announced a new, merit-based selection process for prospective nominees to the Board as "front line" adjudicators. The specific procedures involve: a preliminary screening of applications and a written test for applicants to ensure that basic education, experience and knowledge criteria are met; further assessment against the merit-based criteria by an expert advisory panel; interviews of screened in candidates by the Chairperson's Selection Board; and, reference checks. Highly qualified candidates identified as a result of these procedures are recommended to the Minister for appointment. While no specific ratios are included in the criteria, it is understood that the

number of recommendations made is generally in the order of two times the vacancies to be filled.

The Public Service Labour Relations Act (PSLRA) contains specific provision for the appointment of members of the Public Service Labour Relations Board (PSLRB). The provision is actually a continuation of similar wording in the former Public Service Staff Relations Act (PSSRA) with respect the former Public Service Staff Relations Board (PSSRB). The provision stipulates that whenever the Governor in Council intends to appoint a member, other than the Chair or a Vice-Chair, the appointment shall be made from among eligible persons whose names are included in a list prepared by the Chairperson after consultation with the employer and the bargaining agents. The list shall include the names of those recommended by the employer and the bargaining agents but shall also include the names of others whom the Chair considers suitable for appointment. To the extent possible appointments from those recommended by the employer and bargaining agents will be in equal numbers but, once appointed, such persons are required to be impartial adjudicators.

Considerations for the CIRB.

All members of the CIRB act as "front line" adjudicators deciding issues and differences that arise between employers and bargaining agents or, with respect to the duty of fair representation, between individuals and labour organizations. This is particularly the case for the Chair and Vice-Chairs who may frequently be called upon to sit alone.

Success of third party interventions in labour matters depends significantly on the acceptability and credibility of the third party, whether it concerns mediation, arbitration or, as in this case, quasi-judicial adjudication. Acceptability and credibility depend, in turn, on recognition of the intervenor's expertise, knowledge and experience, as well as on less quantifiable but equally important competence factors such as labour relations common sense. Practitioners, whether they are from labour or management, are well placed to evaluate and advise on what constitutes meeting these requirements.

Since many of the amendments to Part I of the Code were base on the Sims Report recommendations, expectations were raised that there would be a somewhat formalized advisory role for labour and management in the identification of candidates for nomination to the Board. While this has for the most part been the case with respect to representational members, involvement with respect to the appointment of Vice-Chairs has been *ad hoc* if at all. A formal role for labour and management representatives can only enhance the acceptability and credibility of Board adjudicators and strengthen justification of the strong privative clause and judicial deference to their decisions.

The Code amendments also clarified and strengthened the management role of the Chair as the Board's chief executive officer, again with the expectation that such would include involvement in the appointment and re-appointment process. It would appear that the experience in this respect has also been *ad hoc*. Formalizing a role for the Chair would be in line with the approaches at the IRB and the PSLRB.

A Process for the CIRB.

The collective experience of Committee members confirms that labour boards work best, acquit their legislative responsibilities most efficiently and maintain credibility when the communities they serve have had input to their composition. The Ontario Labour Relations Board under George Adams' chairmanship and the early Canada Labour Relations Board under Marc Lapointe were cited as examples of well functioning and well regarded boards. In both cases the Board Chair played a significant role, in conjunction with labour and management, in the identification of nominees for appointment. The process was informal, understood rather than spelled out. However, the world has changed since the 1970's, the community and the issues are more complex and a more formalized process is recommended.

The Committee recognizes that final decisions with respect to Board appointments must rest with the government and that the Minister of Labour is responsible for nominating candidates for formal appointment by the Governor in Council. It believes that a process involving both the Board Chair and the federal jurisdiction labour-management community will assist the Minister in identifying experienced and competent candidates for appointment.

In reviewing a process suited to the needs of the CIRB, the Committee found that the IRB model, devised for a large organization, is too structured and mechanical. The model does, however, assure a role for the Board Chairperson and for the expert community in the identification of candidates whose qualifications meet specific experience and knowledge criteria. The PSLRB model, adapted to include the identification of Vice-Chairs as well as members, is more manageable and appropriate for the CIRB. The following specific procedures are recommended:

- Elaboration of criteria respecting the levels of educational and practical experience consistent with expertise in industrial relations.

- When appointments are needed to fill Board vacancies, the Chair of the Board will provide the Minister with a list of persons possessing the required experience and expertise from which the Minister will make recommendations to the Governor in Council. The list may include candidates for renewal appointments.

- CIRB Chair to consult federal labour and management representatives with respect to persons to be included in the list, recognizing that representational member vacancies should be filled by persons recommended by employer and trade union organizations active in the federal jurisdiction.

- Identification of the appropriate means of consultation with labour and management, possibly the CIRB Client Consultation Committee which would

allow input from the major labour (CLC and CNTU) and federal employer (FETCO) organizations as well as the specialized labour bar.

Residency Requirement for Full -Time Members.

Part I of the Code requires that full-time members of the CIRB must reside in the National Capital Region or within the distance from the NCR that is determined by the Governor in Council. The discretionary flexibility to fix a distance beyond the NCR has been exercised very modestly. Labour and management representatives in Western Canada are particularly critical of the residency requirement, which they find discourages interest among qualified candidates from the west who are reluctant to relocate for relatively short-term appointments.

Regional appointments of part-time representative members have been made from the outset. Recently, there have been regional appointments of part-time Vice-Presidents. Such appointments are not subject to the residency requirement and go some way to addressing the imbalance in regional representation. However, technology exists that would allow the Board to function effectively and efficiently without the need for all full-time members to be centralized in the NCR. There are potential travel, relocation and other cost savings to be made if some full-time members are permitted to reside in their home locations. Rapidity of response would also be served when expedited hearings are required.

The Committee would support either amendment to Part I with respect to the residency requirement or more generous use of the discretion, which already resides with the Governor in Council. However, it was also noted that removal or relaxation of the residency requirement would need to be managed such that collegiality and consistency would not be jeopardized. Periodic in-person Board meetings and the occasional assignment of a regional appointee to a case in another location, could ensure that the CIRB does not become "balkanized."

Renewal Appointments.

Chair and Vice-Chair appointments are for terms up to five years and representative member appointments are for up to three years. All members of the Board may be re-appointed to additional terms. Lack of notice with respect to renewal of appointments has been a perennial problem, with some re-appointments not being made until after expiration of the original term.

Delays in informing members of their prospects for re-appointment are unfair to the individual and inconsistent with accepted human resource practices. In addition, serious implications for CIRB case management result from the practice of former members remaining seized to complete assigned cases following expiry of their terms. In some cases, former members have taken considerable caseloads with them. *Per diem* costs are incurred and delays encountered particularly when the former member takes up other

employment activities. It is understood that *mandamus* applications have resulted in some cases.

The relevant Sims recommendation called for the government to advise members at least six months before the end of their terms whether it intended to renew their appointments. The Committee supports adequate notice being given to Board members with respect to renewal of appointments. The precise length of such notice should be consistent with fair human resource practices and allow the Board Chair sufficient time to manage caseload assignment such that departing members do not carry a large number of unfinished cases. The Committee recommends that Board appointments should automatically be extended for a period of three months if notice of intention to renew or not to renew has not been given three months before the scheduled expiry date.

The Committee also recommends that the Chair of the Board should play a major role in recommending renewal appointments. This is consistent with his duties as chief executive officer of the Board and would also be consistent with the initial appointments process recommended above.

A last related point in this area concerns the filling of vacancies on a timely basis. It would appear that at times it has been difficult to assign tripartite panels to cases due to the shortage of representative members appointed to the Board. This in turn has likely resulted in more cases being assigned to single member panels than would normally have been expected given the representative structure of the Board. Appointments to fill vacancies should be timely and their announcement in anticipation of the appointment date is recommended.

APPENDIX "1"

Work Stoppages in Canada[1]

Period	Number beginning during period	Total Number	Workers Involved	Person-days not worked
Canada Total (All Industries)				
2007	182	207	66,883	1,791,362
2006	126	151	42,314	791,413
2005	228	260	199,007	4,149,930
2004	260	297	259,731	3,209,318
2003	221	266	81,184	1,736,162
2002	251	294	168,002	3,033,430
2001	324	381	221,145	2,198,850
2000	321	379	143,795	1,656,790
1999	358	413	160,149	2,442,580
TOTAL	**2271**	**2648**	**1,342,210**	**21,009,835**

Quebec (All Industries)				
2007	43	50	9,101	191,288
2006	35	42	5,319	143,235
2005	114	130	114,814	1,451,840
2004	94	119	20,739	592,858
2003	95	110	23,487	681,442
2002	91	103	22,898	532,450
2001	89	107	38,819	426,250
2000	97	121	25,108	307,750
1999	112	142	27,084	692,340
TOTAL	**770**	**924**	**287,369**	**5,019,453**

Canadian Labour Code - Part 1				
2007	17	18	8,245	125,600
2006	6	6	542	33,350
2005	5	5	19,556	1,448,700
2004	16	19	19,101	615,920
2003	12	20	6,429	244,960
2002	15	22	8,029	569,490
2001	15	20	3,312	103,900
2000	19	21	9,107	121,800
1999	12	14	21,753	444,340
TOTAL	**117**	**145**	**96,074**	**3,708,060**

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[1] Statistics are from the HRSDC website at http://www110.hrdc-drhc.gc.ca/millieudetravail_workplace/chrono/index.cfm?doc=english

Work Stoppages in Canada

1999-2007	Total	Quebec	Percentage
Number Beginning During Period	2,271	770	33.91
Total Number	2,648	924	34.89
Workers Involved	1,342,210	287,369	21.41
Person-days not worked	21,009,835	5,019,453	23.89

1999-2007	Total	Canadian Labour Code - Part 1	Percentage
Number Beginning During Period	2,271	117	5.15
Total Number	2,648	145	5.48
Workers Involved	1,342,210	96,074	7.16
Person-days not worked	21,009,835	3,708,060	17.65

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APPENDIX "2"

POSITION PAPER OF THE CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS REGARDING BILL C-415

INTRODUCTION

On March 22, 2007, Mario Silva, a Liberal Member of Parliament, tabled Bill C-415, "*An Act to amend the Canada Labour Code (replacement workers)*". Bill C-415 is virtually identical to Bill C-257, which was a private members Bill tabled by a Member of the Block Quebecois that did not pass 3rd Reading in the House of Commons and was negatived at the Report stage on March 21, 2007. Indeed, the only difference between Bill C-415 and C-257 is that C-415 seeks to amend section 87.4 of the *Canada Labour Code*. Section 87.4 is the "maintenance of activities" provision in the *Code*, which requires the continuation of "the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public" in the event of a strike or lock-out. Bill C-415 seeks to insert the word "essential" into section 87.4 of the *Code* in describing such services. The rest of the Bill's text is identical, word-for-word, to Bill C-257 which was defeated in the House of Commons on March 27, 2001. Bill C-415, like it predecessor, would prevent federally-regulated employers from using any individual, other than a manager, to perform work done by members of the bargaining unit. Under the proposed Bill, employers would be prevented from assigning such work to non-managerial employees, subcontractors or even from allowing bargaining unit members to choose to cross a picket line.

The Canadian Association of Counsel to Employers ("CACE") vehemently opposes Bill C-415. CACE is an Association comprised of over 400 practicing Canadian lawyers who devote the majority of their practices to the representation of management in labour and employment matters. CACE's members act for most of the major employers in the country, including many of the businesses which are subject to federal jurisdiction and the *Code*. CACE's members have a wealth of experience in collective bargaining and labour relations. Our members firmly believe that it would be a serious mistake for Parliament to adopt Bill C-415. Based on our members' experience as practitioners in both the federal sector and three provincial jurisdictions where similar legislation was or is in force, we believe that Bill C-415 — like its virtually identical predecessor, Bill C-257 — will have negative consequences on labour relations in the federal jurisdiction and may adversely impact the Canadian economy in general. We have drafted the submissions on a pro-bono basis because we strongly believe that adopting Bill C-415 would be a grave mistake.

As we discuss more fully below, Bill C-415 will not achieve the goals that its supporters claim it will advance. The empirical evidence demonstrates that replacement worker bans, like that proposed in Bill C-415, do not decrease the number or length of work stoppages. To the contrary, one study even concludes that these sorts of provisions actually increase both the duration and frequency of labour disruptions. There is also no evidence to support the claim that replacement worker bans have any impact on picket line violence.

In fact, far from improving labour relations, Bill C-415 will likely cause significant harm to labour relations, increase the cost of employer operations, and, perhaps most importantly, harm the Canadian economy as a whole. It has been demonstrated that provisions like Bill C-415 artificially drive up the cost of labour settlements, and, notably, many of the businesses that are subject to the *Code* form the backbone of the Canadian economy: the airlines, postal service, banks, railways, marine shippers, operators of grain and feed mills, most trucking companies, many courier companies, many aspects of the nuclear industry, and the telecommunications industry are all governed by the *Code*. These undertakings provide vital services to Canadian businesses and the general public, and any significant increase in costs associated with the operation of federal undertakings will impact everyone in the country.

Furthermore, the adoption of Bill C-415 will upset the subtle balance between management and labour that has been enshrined in Part I of the *Code*. Without exception, significant changes to labour legislation at the federal level in the past have always been introduced following a thorough and responsible examination and study by the government, often under the auspices of expert commissions or task forces that were able to achieve broad consensus between management and labour on the content of amendments.[1] Indeed, it was just such a process that occurred in 1999 when the *Code* was last amended to adopt virtually all of the recommendations made by the majority of the Sims Task Force in its report, aptly entitled, "Seeking a Balance".[2] Notably, the Sims Task Force rejected the notion of a replacement worker ban like Bill C-415 after rigorous study and thorough debate.

OVERVIEW OF THE *CODE'S* CURRENT PROVISIONS AND OTHER NORTH AMERICAN LABOUR RELATIONS REGIMES

The *Code* currently contains significant protections for trade unions in regard to replacement workers. First, and most importantly, the *Code* prohibits employers from hiring permanent workers in preference to striking or locked-out employees. Section 87.6 of the *Code* (which was adopted in 1999 to codify pre-existing case law of the Canada Labour Relations Board[3]) requires an employer to reinstate bargaining unit members following a strike or lockout in preference to replacement workers. Second, sub-section 94(2.1) of the *Code* prohibits employers from using replacement workers "for the demonstrated purpose of undermining a trade union's representational capacity rather than the legitimate

1 See e.g. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: The Queen's Printer, 1969) [*Woods Task Force*]; Canada, Human Resources Development Canada, *Seeking a Balance: Canada Labour Code, Part I, Review*, (Ottawa: Minister of Public Works and Government Services, 1995) [*Sims Task Force*].

2 *Sims Task Force*, *ibid.*

3 See, for example, *Brewster Transport Co.* (1986) 66 di 1; *Eastern Provincial Airways Ltd.* (1983) 54 di 172, revd. in part on other grounds [1984] 1 F.C. 732 (C.A.).

pursuit of bargaining objectives". This provision affords unions greater protections than under the labour legislation in most Canadian provincial jurisdictions or any American jurisdiction.[4] It is noteworthy that employers have evidently heeded this provision: over eight years after subsection 94(2.1) was introduced, there have been few claims of violation of this sub-section.

The proposed amendments to the *Code* contained in Bill C-415, with one exception, are found nowhere else in North America. The one exception is the Province of Quebec, which contains similar provisions in sections 109.1 to 110.1 of the *Labour Code*.[5] The only other jurisdiction with a somewhat similar provision is British Columbia. The B.C. legislation, however, differs significantly from Bill C-415 in that striking or locked-out employees are free to choose to cross a picket line. Under Bill C-415, workers would not have this freedom of choice, as the Bill seeks to prohibit employers from allowing striking or locked-out workers to elect to work during a labour dispute. If Parliament were to adopt Bill C-415, the *Code* would be completely out of step with legislation in every other North American jurisdiction, except Quebec.

WHY ARGUMENTS IN FAVOUR OF BILL C-415 CARRY NO WEIGHT

Trade unions suggest that strikes and lockouts will be shorter and the number of strikes and lockouts will drop if legislation banning replacement workers is adopted. As Paul Forder from the Canadian Auto Workers Union recently stated in his testimony before the House of Commons, Standing Committee on Human Resources, Social Development, and the Status of Persons with Disabilities: "Our view is that the evidence is clear. When replacement workers and strike breakers are used during strikes and lockouts, labour disputes last longer."[6] Similarly, Mme Claudette Carbonneau of the Centrale des syndicats nationaux stated in her testimony before the Committee that "the statistics overwhelmingly show that replacement worker legislation makes labour relations more civilized and reduces the number and length of disputes."[7] An examination of the statistics, however, shows that there is no evidence that replacement worker legislation decreases the number or length of work stoppages.

A comparison of data from Quebec (which adopted its ban on replacement workers in 1977), British Columbia (which adopted its ban on replacement workers in 1992), Ontario (which had a ban on replacement workers from 1993 to 1995) and the federal jurisdiction (which has no ban on the use of temporary replacement workers) demonstrates the ineffectiveness of provisions like Bill C-415 in reducing the number of work stoppages. The table below compares these numbers.

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[4] Only Quebec and British Columbia have provisions in their labour legislation that prohibits the use of temporary replacement workers. No American jurisdiction poses any ban on the use of replacement workers during a labour dispute.

[5] *Labour Code*, R.S.Q. c. C-27.

[6] House of Commons, Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, Minutes of Proceedings, 39th Parl., 1st sess. Meeting No. 44 (5 December 2006).

[7] House of Commons, Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, Minutes of Proceedings, 39th Parl., 1st sess. Meeting No. 47 (7 December 2006).

	Federal	Ontario	Quebec	British Columb ia
Number of work stoppages in 1976	46	230	282	72
Number of work stoppages per 10 000 employees in 1976	0.97	0.7	1.5	0.7
Number of work stoppages 2005	4	58	76	7
Number of work stoppages per 10 000 employees in 2005	0.05	0.12	0.25	0.04

Source: Human Resources and Social Development Canada, "Key Observations Regarding the Effect of Replacement Worker Legislation on Workers" (2006) at 2.

Although this table shows what seems at first to be a dramatic drop in the number of work stoppages in Quebec after the adoption of the ban on replacement workers, the historical context for these numbers needs to be considered. The starting point for this table is 1976, a year that saw large scale labour disruptions as the country moved into a recession: on October 14, 1976, over 1 million workers joined in a national day of protest against the Trudeau government's wage and price controls. Given this starting point, it is not surprising that there were fewer work stoppages in 2005 while the country as a whole enjoyed a strong economy. Indeed, this dramatic drop in work stoppages can be seen in Ontario where the ban was adopted much later and then removed, and in the federal jurisdiction where there has never been a ban. While the incidence of work stoppages in British Columbia fell in 2005, this is likewise attributable to the province's current robust economy. What is important to take away from this table is that, despite the adoption of a ban on replacement workers in 1977, Quebec still has more work stoppages than Ontario or the federal jurisdiction. Quebec also has the highest ratio of work stoppages – more than twice Ontario's ratio, both before and after the introduction of the ban. Simply put, the ban on replacement workers has done nothing to change Quebec's status as a hotspot for labour disruptions.

Likewise, there is no evidence that replacement worker bans result in shorter work stoppages. The table below compares the length of work stoppages in the private sector in the federal, Ontario, Quebec and British Columbia jurisdictions.

	Federal	**Ontario**	**Quebec**	**British Columbia**
1975	24.8	31.2	37.8	34.2
1976	22.4	30.0	35.0	30.6
1977	53.1	23.5	38.1	16.3
Average	**33.4**	**28.2**	**37.0**	**27.0**

1990	59.6	39.8	42.4	36.6
1991	36.8	42.2	37.2	43.3
1992	71.3	37.0	40.8	51.9
Average	**55.9**	**39.7**	**40.1**	**43.9**

2003	51.0	38.2	46.3	34.5
2004	46.5	30.1	57.0	36.7
2005	34.3	46.0	36.4	15.4
Average	**43.9**	**38.1**	**46.6**	**28.9**

Source: Human Resources and Social Development Canada, "Key Observations Regarding the Effect of Replacement Worker Legislation on Workers" (2006) at 3.

Despite Quebec's legislation, the average length of a work stoppage in that province has risen from an average of 37 days in the period from 1975 - 1977 to 47 days in the period from 2003 - 2005. The current average duration of work stoppages in Quebec is the highest of all four jurisdictions examined.[8] Clearly, replacement worker bans do not achieve their objectives of reducing the duration or frequency of strikes.

Independent academic experts have determined that replacement worker bans are actually harmful to sound labour relations. In the most comprehensive study done to date, Cramton, Gunderson and Tracy found that the average duration of a strike is 86 days when replacement workers are banned and only 54 days when replacement workers are permitted. The same study also concludes that a ban on replacement workers increases the probability of a strike occurring from 15 percent to 27 percent.[9]

Unions also advance the argument that a reduction in picket line violence will occur if there is a ban on replacement workers. However, there are no reliable statistics respecting violent conduct on Canadian picket lines. While there have certainly been some high-profile labour disputes where violence has occurred, in our members' experience, the vast majority of picket lines are quite peaceful. Where picket line violence does occur, it is just as likely to be directed at employees who are entitled under legislation like Bill C-415 to cross picket lines (managers or supervisors, for example) as at newly-hired temporary replacement workers or bargaining unit members who elect to cross the picket line. There is absolutely no evidence that the replacement worker bans in British Columbia or Quebec reduced picket line violence.

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8 It should also be noted that the federal average has been driven artificially high due to a small number of lengthy work stoppages.

9 Peter Cramton, Morley Gunderson & Joseph Tracy, "Impacts of Strike Replacement Bans in Canada" (1999) 50 Lab. L.J. 173.

Furthermore, picket line violence is already subject to sanctions under criminal and tort law, and so granting trade unions additional power in collective bargaining through a ban on temporary replacement workers in order to reduce illegal picket line violence would be tantamount to rewarding criminal and tortious conduct. From a public policy perspective, we submit it would be unsound and improper to fashion labour laws in this manner.

Bill C-415 Should Not Be Adopted Because the Careful Study of the Sims Task Force Determined such a Provision was Unwarranted

The most compelling argument against adopting a prohibition on temporary replacement workers is that such a change to the *Code* was already rejected after a thorough study of the issue. The Sims Task Force fully considered this issue in 1995 and concluded that the balance of power between employers and trade unions required that federally-regulated employers be permitted to use temporary replacements during a strike or lockout. The Sims Task Force was an expert panel that engaged in an extensive tripartite consultation process, and had the benefit of full submissions on this issue.[10] The majority determined that employers should be permitted to engage temporary replacement workers during a legal strike or lockout so long as the demonstrated purpose of doing so is not to undermine the trade union's representational capacity rather than to pursue legitimate bargaining objectives. The Woods Task Force on labour relations likewise held that the use of replacement workers was a necessary countervailing right to the right to strike:

> [T]he employer's economical sanction equivalent to the union's right to strike rarely is a lockout: it is his ability to take a strike. ...However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of the 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.[11]
>
> (Emphasis added)

In considering the place of temporary replacement workers in the labour relations balance, it is important to note that trade unions typically compensate bargaining unit members through strike pay (often with contributions from other trade unions), and striking workers are entitled to seek alternative employment.[12] In addition, trade unions are able to engage in expressive activities such as picketing or calls for consumer boycotts, to exert further economic pressure on the employer. A balance is achieved on the employer side partly through the right to lockout but mostly through mechanisms by which the employer can attempt to sustain its operations, albeit in a strained manner, to exert some economic pressure on the trade union and bargaining unit members to come to a resolution at the bargaining table. These mechanisms include assigning bargaining unit work to managers and supervisors, permitting

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10 Consultations were conducted on the trade union side with the CLC, CSN, FTQ and on the employer side with FETCO, WGEA and the CBA.

11 *Woods Task Force*, *supra* note 1 at para. 607.

12 Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 77-78.

bargaining unit members to return to work, temporarily contracting out work to third parties and hiring temporary replacement workers.

The principal goal of the Sims Task Force was to achieve a labour relations balance within the *Code* through a tripartite consultative process. Bill C-415 is the antithesis of the consultative, tripartite approach adopted by the Sims Task Force: it is a highly politicized attempt to skew the labour relations balance in favour of trade unions. The Bill would leave intact the features of the labour relations system that favour trade unions and workers – the ability to strike, the ability to pay strike pay, the ability to seek alternative employment, the ability to picket and engage in other expressive activities – while severely limiting the ability of employers to counter trade union tactics.

If Bill C-415 were passed, the tradition of the depoliticized labour law reform at the federal level would be shattered. Experience at the provincial level suggests that the politicization of labour law is ultimately counterproductive, since it leads inevitably to instability and a "swinging pendulum", as labour law shifts to mirror the ideological positions of the government of the day.[13] This is precisely what has occurred in Ontario, and, to a certain extent, British Columbia, where successive governments of different political stripes have made sweeping amendments to labour legislation. This pendulum-swinging is counter-productive to healthy labour relations, fuels economic uncertainty and creates litigation between labour and management.

Economic Arguments Favouring Temporary Replacement Workers

There are a number of economic arguments supporting the ability of employers to use temporary replacement workers during a work stoppage.

First, as noted in the study by Cramton, Gunderson and Tracy, there is evidence that bans on the use of replacement workers actually increases both the number of work stoppages and the length of these work stoppages.[14] If one of the goals of labour law is to promote industrial stability, then allowing employers to use temporary replacements is justified.

Second, there is evidence to support the conclusion that a ban on replacement workers (and the associated imbalance in bargaining power) results in higher costs to employers in the form of more and longer strikes and higher wage settlements.[15] There is also evidence to support the conclusion that these increased costs have an adverse impact on employment levels. In one 2000 study, it was found that the ban on temporary replacement workers in Quebec, British Columbia and Ontario led to,

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13 Paul C. Weiler, "The Process of Reforming Labour Law in British Columbia" in J.M. Weiler & P.J. Gall, eds., *The Labour Code of British Columbia in the 1980s* (Vancouver: Carswell, 1984); Tim Armstrong, "Contemporary Collective Bargaining: How Well is it Working?" (Paper presented at the Larry Sifton Memorial Lecture, March 6, 2003), online: Centre for Industrial Relations and Human Resources <www.chass.utoronto.ca/cir/library/electronicarchives/seftonlectures/SeftonLecture21st_2002-03_Armstrong.pdf.>.

14 *Cramton, et al.* "Impacts of Strike Replacement Bans in Canada"; *supra*, note 9, at 176.

15 *Ibid*, at 177-78.

> ...a lower provincial employment-to-population ratio ... and a drastically lower bargaining unit employment growth rate. Both estimated relationships are statistically significant at conventional levels of significance controlling for other potential determinants of employment.[16]

Third, a work stoppage could be economically devastating for many employers, particularly if they operate 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.

Fourth, it has been argued that employers' use of temporary replacement workers performs the function of a "test of economic realities" on the demands of a striking trade union.[17] If an employer can easily attract temporary replacement workers, this indicates that the trade union's demands may be excessive and that it should pursue a compromise. If the employer has difficulty attracting temporary replacements, then it is the employer who should consider a compromise. In both instances, market forces determine the price for labour. A ban on replacement workers introduces an artificial element for those workers who can be readily replaced. Thus, employers of such workers may well end up paying an artificial premium for their services if there is a ban on using replacement workers in the event of a labour dispute.

Fifth, a ban on temporary replacement workers may well encourage employers to establish workplaces outside the jurisdiction so that some operations can be maintained in the event of a strike or lockout. This is precisely what occurred after Quebec and Ontario introduced their bans on replacement workers; a myriad of employers established operations across the border in the United States and in other provinces to avoid a complete shutdown of their operations in the event of a strike or lockout. Highly paid unionized jobs were lost in these jurisdictions. Since the *Code* extends across Canada, the adoption of Bill C-415 might result in several federally-regulated employers establishing operations in the United States or elsewhere overseas. It has been our members' experience that once businesses move out of a jurisdiction, they rarely return.

THE UNIQUE NATURE OF THE FEDERAL SECTOR

As noted, the federal sector is unique because many federally-regulated companies constitute the national social and economic infrastructure. For this reason, there has historically been little tolerance for work stoppages in the federal sector, and back-to-work legislation has been common. When the *Code* was amended in 1999 in response to the recommendations of the Sims Task Force, one of the goals was to diminish the federal government's role in labour disputes. For this reason, the *Code* included new provisions on the maintenance of essential services during a work stoppage (section 87.4),

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16 Budd, *supra* note 4 at 243.

17 H.W. Arthurs, "The Right to Strike in Ontario and the Common Law Provinces of Canada" *Proceedings of the Fourth International Symposium on Comparative Law, 1966* at 192; Luc Vaillancourt, "Amendments to the *Canada Labour Code*: Are Replacement Workers an Endangered Species?" (2000) 45 McGill L. J. 757 at 777-778.

to ensure that federal employers continue services that are essential to prevent "an immediate and serious danger to the safety or health of the public". Federal employers, however, continue to have the right to use temporary replacement workers to provide services that are not "essential" within the meaning of section 87.4 of the *Code*, but may nonetheless be essential to the Canadian economy and social fabric. There has been only very limited back-to-work legislation in the federal sector since the *Code* was amended following the Sims Task Force's Report.

If the use of temporary replacement workers were prohibited under the *Code*, then it would not be possible for employers to maintain services during a work stoppage beyond those considered "essential" under section 87.4. This means that services which are crucial to the economy could be halted, like mail delivery by Canada Post, at least some flights by Air Canada, and operation of the railways, to name but a few examples. The country would likely require renewed political intervention in labour relations in the form of back-to-work legislation to ensure that Canadian society can function. This would run counter to the goal of restricting political intervention in labour disputes in the federal sector.

CONCLUSIONS

Statistics, evidence, and previous studies strongly indicate that Bill C-415 would undermine the *Code's* careful balancing of rights between management and labour, create more labour disruptions, and have a detrimental impact on the Canadian economy as a whole. CACE thoroughly opposes this Bill, and believes it to be ill-conceived and borne from political motivations that are contrary to the best interests of the country.

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SUBMISSIONS TO MR. PETER ANNIS
WORK STOPPAGES STUDY / ÉTUDE SUR LES ARRÊTS DE TRAVAIL

May 30, 2008

I. INTRODUCTION

The Canadian Association of Counsel to Employers ("CACE") is a not-for-profit corporation whose members include over 400 Canadian lawyers who devote the majority of their practices to the representation of management and labour and employment law. Our members include partners and associates in virtually every firm across the country where management is represented as well as many in-house counsel with responsibility for these issues. Our members act for virtually every major employer in the federal jurisdiction. We believe that our collective expertise provides us with a unique vantage point to provide comments to this study. We thank you for allowing us the opportunity to do so.

CACE is of the view that the current provisions enshrined in Part I of the *Canada Labour Code*[1] (the "*Code*") represent a careful balancing of the rights of management and labour, which have been developed over the preceding decades in large part as the result of compromises. Indeed, while the incidence of lost time due to work stoppages is inordinately high in Canada, the problem is much more acute in provincial jurisdictions (including, notably, Québec) than in the federal private sector. We thus firmly believe that no wholesale re-working of the balancing of power enshrined in Part I of the *Code* should be undertaken.

CACE submits, however, that certain aspects of the *Code* could be adjusted to further foster settlement of collective agreements without work disruption and that many administrative measures could be adopted by the Federal Minister of Labour to facilitate labour peace. We also believe that there are more effective mechanisms than those in the current *Code* for structuring interest arbitration in those circumstances where it is required. We address all of these issues below.

1 R.S.C. 1985, c. L-2, as amended.

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II. IS THERE A PROBLEM WITH WORK STOPPAGES IN THE FEDERAL PRIVATE SECTOR?

We understand that the impetus for this study (as reflected in the Terms of Reference) is the concern that Canada ranks very poorly in the incidence and duration of work disruptions as reported under the statistics compiled by the Organization for Economic Cooperation and Development) ("OECD").[2] Although the OECD statistics appear to highlight the significant productivity issues that Canada faces relative to other OECD countries, we believe that much of the concern stems from the provincial as opposed to the federal jurisdiction.

In fact, a relatively small proportion of work stoppages occurred in the federal private sector as compared to provincial jurisdictions. In the nine years from 1999 (when the current version of Part I of the *Code* came into force) to 2007, the federal private jurisdiction represented about 5% of all work stoppages and approximately 18% of all lost days in Canada.[3] By comparison, over the same period, undertakings subject to provincial jurisdiction in Québec accounted for approximately 35% of work stoppages and 24% of lost days.[4]

What the statistics suggest, we submit, is that the problem with work stoppages in this country lies largely in provincial jurisdictions. The worst performing jurisdiction is the province of Québec, whose labour legislation differs in one significant respect from that in all other jurisdictions: notably, there is a total ban in that jurisdiction on the use of replacement workers in the event of a legal strike or lock-out.

III. THE NEED FOR A BALANCED APPROACH: A REPLACEMENT WORKER BAN MUST BE REJECTED

Particularly in light of the foregoing, we urge that any approach to reform Part I of the *Code* must be undertaken in a studied and thoughtful way. In large part, the current system is operating as it was designed to operate. There is thus no reason for a radical shift in the balance of power under Part I of the *Code*.

It is vital to recognize that Canadian businesses face unprecedented competition. Work stoppages have a dramatic impact on Canadian businesses, many of which are small and operate on tight budgets. Canada's labour laws and policies have a serious impact on Canadian businesses' ability to remain viable and competitive in the global marketplace. In the face of this reality, now is not the time to put added pressure on Canadian businesses by banning replacement workers.

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2 "Focused Study of Work Stoppages," speaking notes for The Honourable Jean Pierre Blackburn, Minister of Labour and Minister of the Economic Development Agency of Canada for the Regions of Quebec, March 6, 2008. <Online:http://www.hrsdc.gc.ca/cgi-bin/hrsdc-rhdsc/print/print.asp?Page_Url=/en/corporate/newsroom/speeches/blackburnjp/2008/080306.shtml>

3 <Online: http://www110.hrdc-drhc.gc.ca/millieudetravail_workplace/chrono//index.cfm?doc=english> See Appendix "1" for the precise figures used to make these calculations.

4 *Ibid.*

We anticipate that many unions will be advocating that you recommend that Part I of the *Code* be amended to prohibit the use of replacement workers in the event of a work disruption. CACE firmly believes that the adoption of any such legislation would be a very serious mistake. Indeed, our members felt so strongly about this position that we took the time and effort to write a detailed position paper on the issue on a completely pro-bono basis. The position paper was drafted in the context of the pending Bill C- 415. Attached to these submissions as Appendix "2" are our submissions with respect to Bill C- 415. We believe they outline the very real and substantial reasons why a replacement worker ban should not be considered. For the reasons detailed in Appendix "2", we submit that you should not consider suggesting that Part I of the *Code* be amended to introduce a ban on the right of employers to hire replacement workers in the event of a work disruption. The continued existence of such a right is an important ingredient in ensuring that there are as few work disruptions as possible in the federal private sector.

IV. Areas where small Amendments could be made to Part I of the *Code* to Decrease Work Disruptions

We believe that the following amendments would foster negotiated settlements (and minimize the number of work disruptions):

(a) affording the Minister of Labour discretion to delay the appointment of a conciliation officer by up to 60 days if the Minster (through FMCS) is satisfied that the parties are not at impasse when the request for appointment is made;

(b) requiring that trade unions hold an employee vote (via secret ballot) on a the employer's last offer prior to issuing a strike notice under section 87.3 of the *Code*; and

(c) amending the maintenance of activities ("MOA") provisions in section 87.4 of the *Code* to decouple the designation of essential workers from the bargaining process and clarify the impact of a MOA agreement or CIRB order.

Each of these suggestions is commented on below.

A. Threshold for the appointment of a conciliation officer

It has been the experience of many of our members that under the provisions currently contained in the *Code*, unions sometimes seek the appointment of a conciliation officer before the parties have reached impasse and sometimes even before the parties have undertaken really serious bargaining. This is unfortunate because HRSDC resources are engaged before they are needed and sometimes the right to strike or lock-out will accrue before the parties have reached a true impasse. When this happens, strikes may occur that otherwise might have been avoided and rational and informed decision-making may be impeded.

We believe it would be preferable if conciliation were not engaged until the parties were further advanced in the bargaining process. Thus, we suggest the *Code* be amended to afford the Minister of Labour (through FMCS) discretion to delay the appointment of a conciliation officer by up to 60 days if the Minister believes doing so would be conducive to free collective bargaining. We do not advocate extension beyond this point, as we believe the current model recommended by the Sims Task Force - which contains finite end dates - is effective in encouraging timely resolutions in bargaining. In our view, the extra 60 days we propose should give ample time for issues to gel in most negotiations.

B. Votes

It has likewise been our members' experience that sometimes trade unions will not put the employer's last offer to a vote in a clear manner, prior to issuing a strike notice under section 87.3 of the *Code*. We believe that the interests of sound labour management relations - and the avoidance of unnecessary work disruptions - require that employees be afforded an opportunity to vote on the employer's last offer. While many trade unions do put the employer's last offer before the membership for a vote before striking, we believe there should be a legislative mechanism to require this to occur. Such a mechanism will ensure that employees are properly informed prior to voting in favour of a strike in every instance.

C. Decoupling the maintenance of activities provisions from the bargaining process and other suggested amendments to s. 87.4 of the *Code*

Section 87.4 of the *Code* requires bargaining with respect to essential services to take place at the same time as collective bargaining. In our members' experience, this has often resulted in a lack of success both in bargaining and in MOA negotiations. Where the parties have been unable to reach MOA agreements, the bargaining process has sometimes been frustrated or unduly lengthened where issues related to the MOA are referred to the CIRB. Moreover, the need to first bargain about the consequence of what will occur if bargaining is unsuccessful may cast a pall on negotiations before they even commence.

We believe that the MOA negotiations and CIRB review of MOA issues (when required) should take place between rounds of collective bargaining. The separation of the two processes would likely result in more effective (and successful) collective bargaining as the MOA process could not be used tactically and delays in bargaining would be avoided.

We further suggest that the *Code* should be amended to provide that an MOA agreement or order of the CIRB to maintain services should not be of limited duration, as presently, but rather should be valid and binding unless amended by the parties or the CIRB (if it is satisfied that the previous arrangement is no longer suitable). In practice, we anticipate that there will be few situations where major changes to MOA provisions will be required from one round of bargaining to the next. The *Code* should also be amended to clarify when the CIRB should order binding arbitration in the face of an MOA agreement or order.

We also suggest that the *Code* be amended to delete the presumption that the expired collective agreement terms and conditions will apply to those providing essential services in the event of a labour disruption. In many instances, employees performing essential services will not perform the full range of their normal duties. Thus, there should not be a presumption that the expired collective agreement terms will apply to them. Similarly, many provisions in the expired agreement (including, notably, seniority and work rules) make no sense in the context of a reduced work force. By setting the expired collective agreement as the norm for the working conditions of those performing essential services, the range of issues that need to be negotiated is increased. Moreover, negotiation of the essential service agreement is complicated if the expired agreement is the norm as any derogation – however necessary or sensible - will risk being perceived as a concession. Thus, we suggest that subs. 87.5(2) of the *Code* be abrogated.

V. Non-Legislative Responses

We believe that the following non-legislative responses should be pursued:

- a process for labour management consultation for appointments to the CIRB, which would afford the Chair of the CIRB an influential role in all Vice-Chair and Member appointments;
- establishment of a labour management advisory council to advise the Minister of Labour on important issues;
- expansion of the FMCS preventative mediation program; and
- ensuring quality appointments to FMCS.

Each of these points is elaborated on below.

A. Process for appointments to the CIRB

Labour and management and counsel acting for them have been critical of the CIRB and its perceived inability to issue timely and consistent decisions that "make labour relations sense". Indeed, an argument could be made that some of the more significant labour disruptions experienced in the federal jurisdiction in recent years were caused in part by decisions made by the CIRB or delays that the CIRB took in making decisions. While it is to be hoped that recent appointments to the Board will ameliorate some of these issues, we believe it important that a more structured and transparent process be adopted for Board appointments in order to ensure that individuals with the requisite expertise are appointed to the CIRB.

In our view, no amendments need to be made to the *Code* or the *Canada Industrial Relations Board Regulations*[5] to give the Board authority to effectively manage labour relations in the federal

[5] C.R.C. 1978, c. 1013, as amended.

jurisdiction. All the required powers are currently set out in the statute. However, what has been lacking in many instances since 1999 were appointees who had both adjudicative and labour relations expertise.

In response to criticism leveled at the Board, the former Chair of the Board, Warren Edmondson, created a Consultation Committee, comprised of representatives of labour and management and the labour and management bars. The current Chair, Elizabeth MacPherson, has continued the Committee. CACE, its counterpart on the union side, the Canadian Association of Labour Lawyers, FETCO, the CLC and the CSN all send delegates to the Consultation Committee. The Committee unanimously agreed on the contents of a report to the Board Chair regarding the problems in the CIRB appointment process and solutions which it proposed needed to be brought to bear. A copy of that report is attached as Appendix "3". We urge you to recommend the adoption of the suggestions contained in the report.

We believe that the role of the Board Chair in Vice-Chair and Member appointments is crucial. During those periods where the Canada Labour Relations Board functioned exceptionally well (i.e. the Lapointe Board), the Board Chair exercised a power of effective recommendation with respect to such appointments. We understand that the same occurs in provincial jurisdictions (like Ontario) where there is a well-functioning and well-respected Board. The role of the Board Chair in the appointment process cannot be underestimated; in our view, it is essential to the creation of a collegial, consistent and coherent Board that the Board Chair play a role in the appointment process of Vice-Chairs and Members and that the Chair consult with the labour-management community.

With respect to the appointment of the Board Chair, we believe that consultation with management and labour is likewise critical. The best qualified candidates may not submit applications, but might be agreeable to having their names put forward, if labour and management jointly request them to do so.

B. Labour management advisory council

Along the lines of the CIRB Consultation Committee, we suggest that the Minister of Labour should consider instituting a labour management advisory council, whose role would be to advise the Minister on various issues, including appointment of the CIRB Chair. We believe that the CIRB Consultation Committee structure and process may provide an interesting model for consideration. The Consultation Committee functions by way of consensus. It is not chaired by a member of the Board but, rather, by an outsider (Michael McDermott). No detailed minutes are kept. All that is kept is a record of the consensus decisions that Committee reaches. There is an agreement that details of the Committees' discussions are kept "in camera" between members of the Committee, to allow for the free exchange of views. This structure has allowed the Consultation Committee to develop consensus positions on many different issues, including Board processes, about which the Committee has provided suggestions. (Many of these have been implemented and appear to be decreasing some of the delays at the CIRB.)

If a Ministerial consultation committee is created, it should be separate and distinct from the CIRB Consultation Committee to ensure the institutional independence of the CIRB.

C. Preventative mediation

Many of our clients have found the preventative mediation service of FMCS to be useful. The time for parties to work on difficult relationships is when they are mid-term in their collective agreements and not when they are bargaining. We would advocate increased funding for this program and expansion of it.

D. FMCS Mediators and Conciliators

Unfortunately, FMCS staff are not always skillful mediators or conciliators. In particular, many seem to be reluctant to "push" parties to close a deal. We suggest that the Minister must ensure that quality appointments are made to these positions and that staff receive adequate training. Early feed-back with respect to FMCS' current apprenticeship program is positive; many of our clients believe this to be a useful initiative.

VI. Back to Work Legislation and Interest Arbitration

In situations where work disruptions occur, we believe the current model of *ad hoc* back-to-work legislation (where necessary) is preferable to the suggestion of a Ministerial cooling off period. It has been the experience of many of our members and the clients they represent that even where back-to-work legislation has been proclaimed, negotiated agreements are often reached, after the adoption of the legislation. In our view, a cooling-off period would merely extend uncertainty and prolong the process.

In terms of a format for interest arbitration, we believe that a tri-partite panel, with a representative appointed by each of management and labour and a neutral chair, agreed to them or appointed by the Minister, is a very good model. Under such a model, we believe the most effective structure is to require that the panel must reach a **majority** decision. Parties who have voluntarily adopted this formulation in interest arbitration (or mediation-arbitration) have found it to be effective. Under this formulation, each party's nominee is incented to take reasonable positions, and the chair does not have unilateral authority to side with one party or the other nor the opportunity to obtain information from one side that is not disclosed to the other.

While we believe that a tripartite arbitration model is the most effective, we note that the final offer selection model of interest arbitration has been successful in some recent disputes. We believe that the final offer selection model can encourage all parties to submit reasonable, attractive final offers, which works to foster settlement. Both the tripartite and final offer election models are superior to the standard interest arbitration model where arbitrators are not required to come to a majority decision.

VII. Conclusion

While the *Code* provides a good balance of power between labour and management, the incidence of lost time due to work stoppages can be improved. Small adjustments to the *Code* would further foster

settlement of collective agreements without work disruption. To that end, CACE submits the following recommendations:

1. A replacement worker ban must be rejected;

   The right to hire replacement workers is vital to the ability of our members to operate viable businesses in the face of labour disruption. Canadian businesses face strong competition from businesses in countries around the world, who would take advantage of any ban on replacement workers. Such a ban would put undue pressure on Canadian businesses that would decrease our global competitiveness.

2. The Minister of Labour should be given the power to delay the appointment of a conciliation officer by up to 60 days;

   Curtailing the collective bargaining process is not in any party's best interest; the premature appointment of a conciliation officer can stifle free negotiation. If the parties are not at an impasse, the Minister should have the discretion to delay the appointment of a conciliation officer and allow the bargaining process to continue unimpeded.

3. Trade unions should be required to hold an employee vote on the employer's last offer;

4. The maintenance of activities provisions of the *Code* should be amended to decouple the designation of essential workers from the bargaining process and clarify the impact of a MOA agreement or CIRB order;

   If maintenance of activity negotiations take place between rounds of bargaining, the collective bargaining process will not be disrupted by tactical delays in negotiating the MOA protocol.

5. The Chair of the CIRB should play an important role in selecting Vice-Chairs and CIRB members;

   Labour and management should also be consulted during the process of selecting CIRB Vice-Chairs and members.

6. A labour management advisory council should be established to advise the Minister of Labour on important issues.

7. The FMCS preventative mediation program should be expanded.

8. Recognize that a tripartite arbitration board is the most effective model of interest arbitration.

   However, the final offer selection model of interest arbitration is also successful in some circumstances.

The *Canada Labour Code* does a good job of balancing the interests of labour and management and preventing labour disruptions in the federally regulated private sector. However, the subtle changes we recommend would further decrease the incidence work stoppage and, therefore, enhance the productivity of Canadian businesses.

Enclosures: 3