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Notice to employers under federal jurisdiction: amendments to the Canada Labour Code will take effect on October 31, 2014

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Author

Josiane L'Heureux

Partner, Lawyer

On December 12, 2013, A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures[1] (“Bill C-4”) received royal assent. Bill C-4, which consists of more than 300 pages, proposes a significant number of legal amendments, some of which relate to the *Canada Labour Code*[2] (“CLC ”). On June 18, 2014, the amendments were set to take effect on October 31, 2014.[3]

According to a consultation paper issued by the Government of Canada, the amendments regarding Part II of the CLC , entitled “Occupational Health and Safety”, are intended in the following context:

Over 80% of refusals to work in the last 10 years – from 2003 to 2013 – have been determined to be situations of no danger, even after appeals. By clarifying the definition of “danger” employees and employers will be better able to deal with health and safety issues through the Internal Responsibility System.[4]

The amendments made by Bill C-4 concern, in particular, changing the definition of the term “danger”, the abolition of “health and safety officers” as well as changes to the process applicable to investigations relating to the right to refuse to work (section 128 of the CLC) or to complaints made under section 127.1 of the CLC (an employee who believes on reasonable grounds that there has been a violation of Part II of the CLC or that there is likely to be an accident or a disease arising out of, linked with or occurring in the course of employment).

Well in advance of its enactment, several labour unions reacted to Bill C-4, alleging in particular that it compromises the rights of workers regarding workplace health and safety matters, even going so far as to state that the proposed amendments could lead to increased injury and health risks.

Currently, section 122 of the CLC defines the concept of “danger” as follows:

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

It is interesting to note that this definition of danger follows the amendments to Part II of the CLC enacted in September 2000.[5] In the course of this legislative amendment, the concept of “danger” was changed to include potential dangers as well as the conditions or activities, present or future, which could reasonably result in injury or illness. Such amendments were made to “improve” the previous definition of “danger”, which was “believed to be too restrictive to protect the health and safety of employees”[6]:

[...] According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer’s investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. [...][7]

Therefore, it is interesting to note that the amendments made by Bill C-4 appear to, in some way, remove these additions in order to re-establish a concept of “danger” that more resembles the one which existed prior to the legislative amendments in the year 2000. In fact, the new definition of “danger” in section 122 of the CLC provided by Bill C-4 now reads as follows:

“danger” means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.[8]

As a result, the danger must be reasonable rather than “existing or potential”, as well as “be an imminent or serious threat to the life or health of a person exposed to it”, as opposed to “likely to cause injury or illness”. It is therefore possible that after Bill C-4 is enacted, the jurisprudential interpretation of the concept of “danger” established over the past ten years will be modified.

The term “danger” also appears in section 128 of the CLC regarding the right of an employee to refuse work that he considers to be dangerous; this provision will need to be interpreted in light of the new concept of “imminent or serious threat to the life or health of a person exposed to it” once Bill C-4 is enacted. The burden of employees who wish to invoke a right of refusal will thereby be changed, given that the exercise of their right will depend on the presence of a situation that could reasonably result in an imminent or serious threat to their life or their health, as opposed to a reasonable and objective possibility that a risk will materialize.[9]

As well, Bill C-4 abolishes the concept of “health and safety officer”.[10] Currently, Part II of the CLC sets out the procedures to follow when a complaint is made regarding occupational health and safety.[11] At a certain stage, these complaints are referred to health and safety officers for investigation. As a result, the removal of said officers, as well as the additional amendments contained in Bill C-4, will result in changes to the investigation process related to these complaints. It will henceforth be a matter of an internal investigation between the employer and employee and if the internal investigation does not lead to a resolution of the complaint, it will be referred directly to the Minister of Labour.[12]

The impact of removing health and safety agents still remains, in our opinion, to be seen. However, we should point out that in the *Order Fixing October 31, 2014 as the Day on which Division 5 of Part 3 of the Act Comes into Force*,[13] under the section entitled "Implications", the text mentions that:

[…] These changes will reinforce the internal responsibility system to improve protection for Canadian workers and allow the Labour Program to better focus its attention on critical issues affecting the health and safety of Canadians in their workplace. The amendments will also help improve the quality and consistency of decisions being made by the Labour Program […].

It is also a matter of granting the Labour Program discretionary power and greater flexibility so that it can exercise its functions at "optimum efficiency". Finally, the Order specifies that "the Minister will have the authority to decline to investigate refusals to work which can be more effectively dealt with under another act or which are deemed to be trivial, frivolous, vexatious, or made in bad faith."

Lavery will keep a close watch on the implementation of the changes that Bill C-4 will bring about after it comes into force on October 31, 2014 as well as their impacts in the short-, mid- and long-term, and will keep you informed of any significant trends.

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1 SC 2013, c.-40.

2 RSC 1985, c. L-2.

3 *Order fixing October 31, 2014 as the day on which Section 5 of Part 3 of the Act comes into force*, C.P. 2014-13, TR/2014-52 (Gaz. Can. II).

4 Government of Canada, Department of Finance Canada, ''Bill C-4'', *Economic Action Plan 2013 Act, No. 2 - Part 3 - Various Measures: Division 5: Canada Labour Code*, online: < http://www.fin.gc.ca/pub/c4/7-eng.asp > (site consulted on July 23, 2014).

5 *An Act to amend the Canada Labour Code (Part II) in respect of occupational health and safety, to make technical amendments to the Canada Labour Code (Part I) and to make consequential amendments to other Acts*, SC 2000, chapter No. 20.

6 *Welbourne* and *Canadian Pacific Railway Company* (March 22, 2001), decision No. 01-008, par. 17.

7 *Id*.

8 Bill C-4, section 176 (2).

9 *Laroche* v. *Attorney General of Canada*, 2013 FC 797, par. 60.

10 Bill C-4, section 176 (1).

11 W e refer in particular to sections 127.1 (8) and 129 of the CLC.

12 Bill C-4, sections 179 and following.

13 *Supra*, note 3, page 1758.