BRIEF

TABLED AT THE COMMITTEE ON LABOUR
AND THE ECONOMY

September 17, 2019

Bill 33

Act to amend the Labour Code concerning the maintenance of essential services in public services and the public and parapublic sectors

FIQ | SECTEUR PRIVÉ

Foreword

The Fédération interprofessionnelle de la santé du Québec–FIQ and Fédération interprofessionnelle de la santé du Québec | Secteur privé–FIQP represents 76,000 nursing and cardio-respiratory healthcare professionals, the vast majority of nurses, licensed practical nurses, respiratory therapists and clinical perfusionists working in the Québec health and social services institutions. This entrenchment at the heart of the system fuels their valued expertise recognized by decision-makers from all walks of life. The FIQ and FIQP has wide variety of work experience with various types of patients in the health and social services system.

As first-hand witnesses of how the healthcare system functions on a daily basis, the healthcare professionals are able to see the many effects of the socioeconomic inequalities on health, as well as the sometimes deplorable impacts of the decisions taken at all levels of the political and hierarchal structure. As labour organizations, the FIQ and FIQP represent a very large majority of women who are both healthcare professionals, workers in the public and private system, and users of the services. They target the preservation of social gains, greater equality and social justice with their orientations and decisions.

With this mission in mind, the FIQ and FIQP defend the interests and concerns of the members they represent, but also those of the population.

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Introduction

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A strike is the ultimate tool, but essential for resolving impasses in the practice of labour relations in Canada. Since 2015[1], a strike has been recognized as a right with constitutional protection because of its crucial role in a genuine collective bargaining process.

In this context, in 2017[2], the TAT (Administrative Labour Tribunal) recognized that the binding framework of the Labour Code unnecessarily deprived employees in the health and social services system of this means of claiming rights, which is just as relevant today as ever before.

The healthcare professionals, like their unions, always worry about the consequences from a work stoppage on the quality and continuity of the care provided to the population. At the same time, the members of the FIQ and FIQP | Secteur privé acknowledge the need for collective action and taking actions likely to put effective pressure on the employer.

Bill 33, long overdue, is an opportunity to improve the Québec system determining essential services in favour of a better balance between the parties' interests.

The Federations (FIQ and FIQP) believe that although this may seem contradictory, there is an interest for the population that the essential services plan reduce a strike's impact as much as possible, because the union demands in the health and social service network target preserving public services, and setting up working conditions for providing humane, quality and safer care.

The Federations welcome the idea of removing the government's discretionary and unilateral powers to suspend the right to strike in the public services system (covering the private non-subsidized institutions). The new system, giving the TAT control over essential services shows greater respect for the right to a genuine collective bargaining process.

Furthermore, with regard to the public sector system (covering the public and private subsidized institutions), though some elements of the Bill need to be discussed, we welcome the main idea adopted that essential services will be determined through the negotiation of an agreement or filing of a list, without predetermined percentages and under the TAT's control to ensure the adequacy of essential services.

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[1] *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4.

[2] *Syndicat des travailleuses et travailleurs du CIUSSS du Centre-Ouest-de-l'Île-de-Montréal — CSN et CIUSSS du Centre-Ouest-de-l'Île-de-Montréal*, 2017 QCTAT 4004.

A clear system adapted to the reality of the parties

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As the reforms that have marked the health and social services network progressed, the TAT applying a unique percentage of services to maintain per facility, regardless of the mission of each centre of activities in this facility, has become particularly outdated.

The negotiation of agreements on essential services to maintain during a strike by the FIQ and FIQP unions has long been done based on a reality well known to them, that of "centre of activities". This concept comes from the laws governing the process of negotiation of the working conditions in the health and social services sector and more specifically defined by the parties in the local collective agreements.

Although the Federations welcome the proposal that essential services are no longer analyzed by facility and that they will now be based on a more representative concept of the healthcare professionals' reality, the parties are unfamiliar with the terms used in the bill such as "unit of care and class of care or services" (L.C. section 111.10.1) and they are not defined.

The Federations want to caution the legislator on the introduction of terms not defined in either the law or collective agreements. This situation could lead to a variety of interpretations and thus needlessly complicate determining the essential services to ensure.

Moreover, the wording used does not leave any leeway for the parties to negotiate essential services, based on their own reality. In fact, in reading the proposed law, the concepts of units of care or classes of services would be cumulative. This would then result in adding more criteria than necessary and restrict the negotiation of the essential services to maintain.

The FIQ being concerned that the parties have all the leeway necessary to determine the essential services required when there is a strike based on their reality and needs, we think it is necessary to clarify the wording to ensure effective application.

Recommendation 1

The FIQ and FIQP demand that the words “unit of care” are replaced by “centre of activities” and that after “unit of care”, the “and” is replaced by an “or” in section 12 of the bill.

Recommendation 2

In line with Recommendation 1, the FIQ and FIQP demand that the words “unit of care” are replaced by the words “centre of activities or service” and that after “unit of care”, the “and” is replaced with an “or” in section 13 of the bill.

Presently, the Labour Code stipulates that the percentage of staff to maintain is calculated based on the number of employees from the bargaining unit usually at work. The government’s proposal is silent on this aspect.

The Federations believe that it would be preferable to specify that the essential services must be negotiated between the parties and that they concern the employees in the bargaining unit, because the agreement concluded by a certified association can only bind the employees it represents.

Recommendation 3

The FIQ and FIQP demand that “for the employees in this certified association” is added after “the institution” in the first paragraph of 111.10.1 in section 12 of the bill.

A system restoring a fair balance between the right to strike and essential services

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The FIQ and FIQP welcome the removal of the mandatory percentages set out in section 111.10 of the Labour Code. This modification is likely to give more freedom to the parties to negotiate at the local level.

Remember that these percentages, which determine a minimum level of services to maintain, were initially set without the unions' participation and do not reflect the real level of services required to avoid endangering the health and safety of the population.

Professor Jean Bernier denounced the arbitrary nature of these percentages with no bearing in reality, in his book published in 2018[3]. Without counting that managers of centre of activities often function every day with less staff than these percentages!

Nevertheless, in terms of the bill, the Federations are concerned about the way the TAT will interpret and apply the concept of essential services (L.C. section 111.10), defined as "whose interruption may endanger public health or safety".

The concept of essential services is an elastic concept with an interpretation of the definition that may vary based on the interests of the various people involved. In this regard, the FIQ and FIQP favour a strict interpretation in order to ensure a balance between the employees' fundamental rights and those of the population.

At first glance, the bill has such a strict interpretation, as opposed to a broad and liberal interpretation, aimed at eliminating any feared inconveniences in the event of a strike. Simple inconveniences or discomforts for the public, for example, should not be considered as relevant elements in assessing the adequacy of essential services.

However, to avoid difficulties in the interpretation of this concept or that the Tribunal is tempted to more liberally assess the criteria of the population's health and safety, it would be appropriate to state more strongly that the TAT must preserve essential services while allowing the strike to still have meaning and be an effective pressure tactic.

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[3] Jean Bernier, *Les services essentiels au Québec et la Charte canadienne des droits et libertés*, Québec, PUL, 2018.

Not long ago, the FIQ and FIQP denounced the too liberal interpretation of the concept of essential services by the TAT and the Federations demanded a more objective analysis of the right to strike in the health and social services sector. To mark the shift in paradigm from the constitutional entrenchment of the right to strike, the law has to state more clearly that the TAT must weight the right to strike with the protection of the public. The right to strike should only be limited to essential services in the strictest sense of the word. Otherwise, the evolution of the system could rupture the bargaining power necessary for a genuine negotiation.

Recommendation 4

The FIQ and FIQP demand that the system include a provision indicating that the essential services mission of the TAT, failing an agreement between the parties, is to determine them, by a weighting exercise aimed at a fair balance between maintaining essential services and the employees' right to strike.

On another note, the FIQ and FIQP propose reducing the imposed delays before being able to exercise the right to strike. The obligation to give advance notice before initiating a work stoppage is not being challenged, providing the time for an advance notice is reasonable.

In this case, the TAT has 90 days to decide on the adequacy of services before a list or agreement is considered approved (L.C. section 111.10.7). A strike may not be declared either during the 90 days following transmission of a list or agreement to the employer (L.C. section 111.12).

These delays seem too long to us for the certified associations to exercise their right to strike effectively in the event of an impasse in the negotiations.

Recommendation 5

The FIQ and FIQP demand a reduction in the periods provided in section 17 in the bill regarding section 111.10.7 and for the sake of consistency, in the L.C. section 111.12 from 90 to 60 days.

A system restoring a balance of power at the local level

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The method of mandatory percentages now considered illegal, there is a need to trust the local parties to determine essential services through a negotiated agreement between them at the local level, and failing an agreement, through a union list, all monitored by the TAT.

The FIQ and FIQP have fought for a long time for the parties to determine the criteria and negotiate the essential services during a strike, like the system for the public service. We can only commend this change proposed by the government.

Moreover, the Federations welcome the amendment proposed in the L.C. section 111.10.2. The latter forces the institution to give the union the information required for negotiating the essential services to be maintained. However, the FIQ and FIQP think that in order to avoid any undue delay in preparing the work for negotiating essential services, the institutions must send the requested information within 15 days. Furthermore, it would be appropriate to provide that this information include the work schedules that are a key tool for preparing the union lists.

Recommendation 6

The FIQ and FIQP demand the addition of the words, "within 15 days" after "for the period indicated in the request in section 13 of the bill amending section 111.10.2".

Recommendation 7

The FIQ and FIQP also demand, "the work schedule including the information on" Is added after "upon request, inform the Tribunal of" in section 13 of the bill.

As healthcare professionals, the FIQ and FIQP members know the care needs of the patients they care for every day. Therefore, they have the necessary expertise to determine the essential services that meet the patients' needs.

The health and social services network institutions obviously have a similar expertise, as they are obliged to ensure health services for the population.

To give every chance of success for the work determining essential services, the FIQ and FIQP think that the best stakeholders to complete this process are primarily the parties at the local level.

Some terms used in section 12 of the bill that amend L.C. section 111.10.1 are ambiguous. In fact, in this text, the parameters are agreed "between the association or a group of associations and an institution and its representative". The term "representative" not being defined in the Labour Code, it is difficult at this stage to know if this is a representative of an institution or if this representative has a mandate to represent several institutions.

Hence, the Federations want to know if this wording would allow a body such as the Comité patronal de négociation du secteur de la santé et des services sociaux (CPNSSS) to act on behalf of the institutions in determining the parameters on essential services at the provincial level.

The FIQ and FIQP think it is crucial to keep the determining of essential services at the local level as well as the negotiation of the parameters. In the event that the parameters would be negotiated by other stakeholders, it seems clear that this would reduce the institutions' accountability in this process and prevent genuine negotiation of essential services to maintain during a strike that reflect their local reality.

The FIQ and FIQP welcome the legislator's willingness to want to review the system for determining the essential services to provide when there is a strike to make it comply with the Supreme Court judgments. The Federations think that it is an improvement over the present situation in the public and parapublic sectors. In fact, these amendments give a strategic role to the local unions in determining essential services and in the implementation of means to back their demands during negotiations.

Furthermore, the system of negotiations in the health and social services sector also includes the negotiation of the local provisions for which the Labour Code and laws governing this system formally forbid taking strike action. It would be preferable that this system is also the subject of an in-depth review in order to respect the constitutionality of the right to strike and give the parties genuine bargaining power in their negotiations.

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Recommendation 8

Repeal L.C. section 111.14 prohibiting a strike pertaining to matters negotiated at the local level.

A system ensuring stability in decisions

The FIQ and FIQP is concerned about the changes announced in sections 18 and 19 in the bill on the TAT's remedial powers when the essential services set out in a list or agreement "are found to be not enough". In the current system, the TAT can use its remedial powers if a list or agreement is not respected. Adding a criterion of adequacy is a problem for the Federations.

In practice, the Federations are worried that anyone involved can ask the TAT to reconsider its decision after the Tribunal has already evaluated the adequacy of the essential services (L.C. section 111.10.4) and approved a list or agreement (L.C. section 111.10.5).

These amendments to L. C. sections 111.16 and 111.17 are not justified and furthermore, they are likely to endanger the Tribunal's authority and create more confusion and conflicts between the parties involved and the population in general.

The parties need to know what they are dealing with. Unless informed of new facts, the TAT should not be modifying its decisions. The principle of the stability of decisions ensures that an agreement or list approved by the Tribunal cannot be challenged.

That the TAT may reconsider its own evaluation of the adequacy of the essential services, without evidence of new facts, would unfairly place a sword of Damocles on the unions and their members when they have respected a duly approved agreement or list. These conditions are likely to substantially hinder exercising a genuine right to strike.

In this respect, if the TAT deems a list or agreement on essential services adequate, this decision must be binding and without appeal, subject to applications to review already strictly regulated by the law[4].

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[4] *Act to establish the Administrative Labour Tribunal*, CQLR c T-15.1:

49. The Tribunal may, on application, review or revoke a decision, or an order it has rendered or made:

1° if a new fact is discovered which, had it been known in sufficient time, could have warranted a different decision;

2° if an interested party, owing to reasons considered sufficient, could not make representations or be heard;

3° if a substantive or procedural defect is of a nature likely to invalidate the decision.

In the case described in subparagraph 3 of the first paragraph, the decision or order may not be reviewed or revoked by the member who rendered or made it.

Recommendation 9

The FIQ and FIQP demand the removal of sections 18 and 19 from the bill amending L.C. sections 111.16 and 111.17.

In line with this, it is suggested to remove the capacity for the TAT to change a list it has already approved (L.C. section 111.10.6) or change a list or agreement after the deadline for ruling on the adequacy of the essential services (L.C. section 111.10.7).

Recommendation 10

Amend L.C. section 111.10.6 by the deletion of "except at the latter's request".

Recommendation 11

That section 17 of the bill amending L.C. section 111.10.7 stipulate the deletion of the second paragraph of this section.

The lists or agreements approved by the Tribunal already stipulate that the union provide the number of employees required in a force majeure or urgent situation.

Conclusion

The healthcare professionals have always been concerned with providing the population quality, safe care. Everyone agrees on the need to maintain essential services during a strike. The disagreement comes on the scope of these services.

The government has acknowledged that the right to strike is a key component to collective bargaining and the charters guarantee the right to join an association. By eliminating the mandatory percentages and leaving the task of determining essential services to the parties at the local level, the bill restores a balance between the interests of the opposing parties to a certain extent.

In practice, it remains to ensure that the Tribunal concretely acknowledge the employees' right to use their power relationship to obtain adequate working conditions that foster the preservation of quality public health services. It is all a question of balance.

Unfortunately, the health and social services system institutions have been operating for a long time with a major lack of qualified personnel. The periods of austerity in recent years have hurt. It is the FIQ and FIQP's opinion that, beyond the scope of this bill, the government's priority should be to ensure that the institutions do everything in their power to staff the institutions with an adequate number of healthcare professionals at all times and not only when there is a strike.

We are confident that the appropriate measures will be taken quickly for this purpose, particularly to eliminate the systemic use of mandatory overtime.

Lastly, on the eve of the provincial negotiations and work to determine the essential services, the Federations can only highlight the necessity for the bill to go into effect quickly so that the parties know the parameters of this future round of negotiations in a timely manner.

List of recommendations

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