

Using replacement workers during a strike

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Labour Spotlight Series

Grow | Protect | Operate | Finance

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Using replacement workers during a strike in Alberta

Cristina Wendel, Partner
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Using replacement workers - AB

Legislative restrictions

- In Alberta, other than for essential services, there are no statutory restrictions on the use of replacement workers during a strike or lockout.
- The legislation does address what happens to the employment of striking employees after the strike ends:
 - Section 90(1) of the *Labour Relations Code* (Alberta) (“Code”) requires that where a strike or lockout ends either as a result of a settlement, the termination of the bargaining agent’s bargaining rights or 2 years after the strike started, any employee who is affected by the dispute and whose employment has not otherwise been lawfully terminated, is entitled to resume employment in preference to any replacement workers who were hired to replace that employee.
 - The employee must make the request in writing within 14 days after the employee learns the strike or lockout has ended and within 30 days after the date it ended (if by settlement or termination of bargaining rights) or forthwith (if it ended after 2 years).

Using replacement workers - AB

Legislative restrictions

- Section 90(1) does not prevent the parties from agreeing to a mechanism for a return to work.
- Section 90(1) does not require the employer to reinstate the employee where:
 - The employer no longer has persons engaged in the same or similar work to what the employee did before; or
 - There has been a suspension or discontinuance for cause of an employer's operations or any part of them.
- Otherwise, on the employee's request, the employer must reinstate the employee in their former employment on any terms that the employer and employee may agree on, provided the employer does not discriminate against the employee for exercising their rights under the Code.

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Essential services

- The situation for essential services is different.
- Part 2, Division 15.1 of the Code requires certain employers and bargaining agents to ensure essential services will be maintained during a strike or lockout.
- Essential services is defined as those services:
 - The interruption of which would endanger the life, personal safety or health of the public; or
 - That are necessary to the maintenance and administration of the rule of law or public security.
- Division 15.1 sets out a list of employers who are covered by the Division, together with the bargaining agents who represent their employees.
 - The list includes the Government of Alberta, Alberta Health Services, hospital operators, nursing home operators, etc.
 - These employers must have either an essential services agreement or an exemption before a strike or lockout may occur.

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Essential services agreements

- The parties to the bargaining relationship (employer and union) are responsible for negotiating the essential services agreement.
- Either party may give written notice to the other party at any time to begin negotiations for an essential services agreement.
- Parties are required to negotiate in good faith and make every reasonable effort to enter into an essential services agreement.
- An essential services agreement should provide that sufficient bargaining unit employees will continue to work, providing essential services, in the event of a strike or lockout.
 - These employees are referred to as designated essential services workers.
 - They are prohibited from participating in a strike or lockout.

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Essential services agreements

- The essential services agreement must include the following:
 - Provisions to identify the essential services to be maintained;
 - Provisions to classify the employees, including the number of positions in each classification;
 - Provisions to assign capable and qualified employees to perform the essential services;
 - Provisions to deal with emergencies and foreseeable changes to the essential services;
 - Provisions describing changes to terms and conditions of employment applicable to designated essential services workers; and
 - Provisions that identify sufficient umpires to provide timely resolution of disputes.

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Essential services agreements – election

- Employers must make an election within a reasonable time after the parties are required to begin negotiations for an essential services agreement.
- The employer must elect how essential services will be performed during a strike or lockout; whether it will use:
 - designated essential services workers; or
 - replacement workers.
- An employer is not required to make this election if:
 - Its bargaining unit employees do not perform essential services; or
 - It intends to maintain essential services during a strike or lockout by using the services of other capable and qualified persons who are neither members of the bargaining unit nor replacement workers.
- Instead, these employers can apply to the Commission for an exemption from the requirement to negotiate an essential services agreement.

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Essential services agreements – use of replacement workers

- If an employer elects to use replacement workers to provide essential services during a strike or lockout, it must apply to the Commissioner for an exemption order, exempting them from the requirement to negotiate an essential services agreement.
- The Commissioner may grant the order if it is satisfied that the essential services performed by the bargaining unit employees can be maintained during a strike or lockout by other capable and qualified persons, including replacement workers who are not bargaining unit employees.
- The employer's election is not valid until the Commissioner grants the exemption.
- If the exemption is granted, the employer may use replacement workers to provide essential services during a strike or lockout.
 - Then no bargaining unit employees will be required to work as designated essential services workers.

Using replacement workers - AB

Essential services agreements – use of replacement workers

- Employers must use the form provided by the Alberta Labour Relations Board's Rules of Procedure.
- The form includes a requirement for an individual authorized by the employer to make a statutory declaration attesting that:
 - The employer declares that the description in the form of how essential services will be maintained will ensure that essential services will be maintained during a strike or lockout;
 - The employer declares that the description in the form of how it plans to obtain the necessary number of replacement workers to meet the staffing levels required to maintain the essential services are reasonably practicable; and
 - The employer will make best efforts to implement those plans.
- Exemption applications are typically decided without oral evidence.

Using replacement workers - AB

Practical considerations

- While Alberta employers generally can use replacement workers during a strike or lock out, the question remains whether they should.
- Considerations include:
 - Potential for violence
 - High conflict picket lines
 - Need for increased security
 - Potential for lengthier labour disputes
 - Health and safety concerns

Prohibition on the use of replacement workers under the Québec Labour Code

Arianne Bouchard, Partner
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Quebec Labour Code

Scope of application

The ***Labour Code*** is the main law governing collective labour relations in provincially-regulated companies in Quebec.

- Unionization process
- Collective bargaining
- Grievance arbitration
- Labour disputes

Separate statutes create specific regimes which are distinct from the Labour Code for certain sectors:

- **Construction Industry:** *Act respecting labour relations, vocational training, and workforce management in the construction industry*
- **Entertainment Industry:** *Act respecting the professional status of artists in the visual arts, film, recording arts, literature, arts and crafts, and the performing arts*
- **Home Day Cares:** *Act respecting the representation of certain home educational childcare providers and the negotiation process for their group agreements*

****** Unlike the *Labour Code*, these laws do not contain provisions prohibiting the use of replacement workers. ******

Limits on the use of replacement workers

Section 109.1 of the Labour Code

109.1. For the duration of a strike declared in accordance with this Code or a lock-out, every employer is prohibited from:

- a. utilizing the services of a person to discharge the duties of an employee who is a member of the bargaining unit then on strike or locked out when such person was hired between the day the negotiation stage begins and the end of the strike or lock-out;
- b. utilizing, in the establishment where the strike or lock-out has been declared, the services of a person employed by another employer or the services of another contractor to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out;
- c. utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee who is a member of the bargaining unit then on strike or locked out unless
 - i. an agreement has been reached for that purpose between the parties, to the extent that the agreement so provides, and, in the case of an institution contemplated in section 111.2, unless the agreement has been approved by the Tribunal;
 - ii. in a public service, a list has been transmitted or, in the case of an institution contemplated in section 111.2, approved pursuant to Chapter V.1, to the extent that the list so provides;
 - iii. in a public service, a decision has been rendered pursuant to section 111.0.24;

Limits on the use of replacement workers

Relevant provisions

- 109.1.** For the duration of a strike declared in accordance with this Code or a lock-out, every employer is prohibited from:
- d. utilizing, in another of his establishments, the services of an employee who is a member of the bargaining unit then on strike or locked out;
 - e. utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee he employs in another establishment;
 - f. utilizing, in an establishment where a strike or a lock-out has been declared, the services of a person other than an employee he employs in another establishment, except where the employees of the latter establishment are members of the bargaining unit on strike or locked out;
 - g. utilizing, in an establishment where a strike or lock-out has been declared, the services of an employee he employs in the establishment to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out.

Limits on the use of replacement workers

Pre-conditions

Prohibitions are applicable in all cases of lock-out and in cases of strikes declared in accordance with the Labour Code:

- Must be declared by an employee association (union) certified to represent the affected employee group (s. 106).
- Strike must be declared within the time periods permitted by the Code (minimum 90 days after the issuance of the notice to bargain and never during the term of a collective agreement or after the parties submitted their dispute to an arbitrator) (s. 58 and 106.).
- Additional obligations / pre-conditions in public services to ensure that essential services are maintained (s. 111.0.15 and ff.) and in public and parapublic sectors (s. 111.1 and ff.).
- Failure to comply with other applicable requirements when commencing a strike does NOT affect the legality of the strike:
 - Strike shall be authorized by secret ballot decided by the majority vote of the members of the certified association who are comprised in the bargaining unit and who exercise their right to vote (s. 20.2 and ff.).
 - Obligation to notify the Minister of Labour in writing within 48 hours following the declaration of the strike (s. 58.1).

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Limits on the use of replacement workers

Concept of “using the services”

- The verb "use" implies a positive act by the user. Consequently, when an employer indirectly and passively benefits from the services of individuals, it does not use their services.
- Conversely, actively subcontracting services that are normally performed by striking employees amounts to using the services of subcontractors.
- The fact that an employer has given strict instructions to its employees not to perform the duties of striking employees is generally not a sufficient ground of defence, as the employer is liable for the actions of those acting under its direction contrary to its instructions, especially if they are management personnel. Thus, even implied and tacit "use" of the services of a person may be contrary to section 109.1.
- Prohibitions apply even in the case of very occasional work; as soon as the employer asks or accepts that a person perform one task, it uses their services.

Limits on the use of replacement workers

Concept of establishment

Syndicat canadien de la fonction publique, section locale 1450 c. Journal de Québec, 2011 QCCA 1638 (leave to appeal to the SCC denied)

- The concept of establishment is limited to the physical establishment to which the striking employees report, i.e. the physical building whose doors has (theoretically) been locked by the employer.
- Thus, an employer does not violate the provisions of the Labour Code by having contractors carry out the tasks of the locked-out employees as long as they do it outside the establishment to which reports the employees on lock-out reports (even if it's in the same place where the employee themselves usually carry their work).

Unifor, section locale 177 c Groupe CHR Canada inc., 2021 QCTAT 5639 (application for judicial review)

- In the Tribunal's view, the widespread deployment of telework as a result of the Covid-19 pandemic justifies revisiting the concept of establishment.
- The Tribunal ruled that [translation] "to the extent that the employer's "establishment" is deployed to allow work to be performed by telecommuting employees from their homes and under the authority of the employer, in the same manner as if they were in the physical establishment, it is appropriate to hold that these workers are performing their work "in the "establishment."
- Thus, the prohibitions preventing work in the "establishment" would also prevent the employer from using individuals working remotely to perform such work.

Limits on the use of replacement workers

Employees included in the bargaining unit affected by the strike or lock-out

Very limited possibilities to use the services of an employee on strike or locked out in the establishment where the strike or lock-out is taking place (s. 109.1 c)

Only exceptions :

- there is an agreement for the use of the services of a worker between the parties (employer and certified union) (s. 109.1c) (i);
- in a public service, the use of the services of a worker is provided for by the list of essential services that the parties have agreed to maintain or, in the absence of agreement, that has been imposed by the Administrative Labour Tribunal (s. 109.1c) (i) and (ii); and
- in the public and parapublic sectors, the use of the services of a worker is provided for by the list of essential services approved by the Administrative Labour Tribunal (s. 109.1c) (i));
- In all cases, the use of services shall be limited to what the Tribunal has agreed or decided;
- Complete prohibition to use the services of the employees on strike or lock-out in any other establishments of the employer (s. 109.1 d)).

Limits on the use of replacement workers

Other employees of the employer (non-management)

Complete prohibition to use, in an establishment where a strike or lock-out has been declared, the services of a person employed in another establishment (s. 109.1e)

- Prevents the employer to use current non-management employees coming from another establishment, including those employed in the same position as an employee on strike or lock-out, to perform any work in the establishment where a strike or lock-out has been declared.
- The prohibition is not limited to the “discharge of the duties of the employees on strike or lock-out” but covers any work that could be performed in the establishment affected by the strike or lock-out.
- Does not prevent the employer from reassigning the work employees on strike or lock-out to employees employed in other establishments, as long as this work is not performed in the establishment where a strike or lock-out has been declared (e.g. to be performed at the establishment where the replacement workers normally work).

Limits on the use of replacement workers

Other employees of the employer (non-management)

Prohibition to use, in an establishment where a strike or lock-out has been declared, the services of an employee employed in this establishment to discharge the duties of an employee on strike or lock-out (s. 109.1g)

- Prevents the employer to use the current non-management employees coming from the establishment on strike or lock-out to perform the normal work of employees on strike or lock-out.
- Does not prevent non-unionized employees or employees from units not on strike or lock-out to continue to work in the establishment on strike or lock-out, as long as it is not to perform the duties of the latter. In the case of duties normally shared with employees on strike or lock-out, the employees covered by this prohibition may continue to perform it as long as they do not assume greater responsibility than usual.

Prohibition to use the service of a person hired by the employer after the beginning of the negotiation stage to discharge an employee's duties on strike or lock-out (s. 109.1a)

- Prevent employers to use non-managers employees, both from the establishment on strike or lock-out or from other establishments, to perform the normal work of employees on strike or lock-out.
- Prohibition is not limited to the establishment where the strike or lock-out has been declared.
- Negotiation stage begins on the date on which the notice to bargain is received by the employer or the union (depending on who is sending it), or alternatively the date of the expiry of the collective agreement.

Limits on the use of replacement workers

Managers of the employer

Concept of managers

- An employer claiming that a person is a manager must prove that the person actually participates in the authority of the employer, by acting as the employer's representative in its relations with the employees.
- A manager is usually vested with the ability to assign work, control and monitor its execution or evaluate employees. They can often hire and terminate employees, but this is not essential.
- A person who does not exercise line authority over other employees may still be a manager if they have significant authority to bind the employer to third parties or is highly involved in the strategic orientations of the company.

Complete prohibition to use, in an establishment where a strike or lock-out has been declared, the services of a person employed in another establishment, except where the employees of the latter establishment are members of the bargaining unit on strike or locked out;(s. 109.1e)

- Prevent the employer to use managers coming from another establishment as replacement workers, except if there are employees of the same bargaining units as the employees on strike or lock-out in such other establishment (those employees will also be on strike or lock-out).
- The prohibition is not limited to the “discharge of the duties of the employees on strike or lock-out” and it does not matter when the person has been hired.

Limits on the use of replacement workers

Managers of the employer

Prohibition to use the service of a person hired by the employer after the beginning of the negotiation stage to discharge the duties of an employee on strike or lock-out (109.1a)

- Prevents the employer from using managers whose normal place of work is the establishment that is on strike or locked out, but who were hired after the bargaining phase began, as replacement workers.
- Other managers from the establishment may be used as replacement workers.
- This prohibition applies even if the manager has been hired to replace another person who left the company.
- A person hired before the start of the negotiation phase, but promoted to management after that date, is not covered by this prohibition and may be used as a replacement worker.

Limits on the use of replacement workers

Persons employed by another employer or self-employed contractors

Prohibition to use, in the establishment where the strike or lock-out has been declared, the services of a person employed by another employer or the services of a contractor to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out

- Prevents the employer to use employees of another employer or contractors as replacement workers in the establishment where the strike or lock-out has been declared.
- Applies even if such other employer or contractor acts free of charge.
- Does not prevent the employer from contracting out the work of employees on strike or lock-out, as long as the contractor or its employees do not perform such work in the establishment where a strike or lock-out has been declared.

Exceptions

Compliance with an agreement or a list of essential services

109.2. Where the certified association violates or the employees it represents violate an agreement, a list, or an order contemplated in subparagraph i, ii, or iii of paragraph c of section 109.1, the employer is exempt from the application of section 109.1 to the extent that that is necessary to ensure compliance with the violated agreement, list or order.

Exceptions

Measures taken to avoid the destruction or serious deterioration of the employer's property

109.3. *The application of section 109.1 does not have the effect of preventing an employer from taking, where such is the case, the necessary measures to avoid the destruction or serious deterioration of his property.*

Such measures shall exclusively be conservation measures and not measures designed to enable the continuation of the production of goods and services which section 109.1 would not permit otherwise.

As an exception to the general rule, this provision must be interpreted restrictively.

- The risk of destruction or deterioration of the property must be probable, imminent, and not merely hypothetical or apprehended.
- The measures taken must be strictly limited to what is necessary.
- If it is possible to take the measures without breaching s. 109.1, this must be done (e.g. have the work done by a manager).

Use of replacement workers

Investigation by an investigator designated by the Minister of Labour

- The application of the provisions of sections 109.1 to 109.3 of the Labour Code is subject to verification by an investigator whom the Minister of Labour may designate at his or her discretion, upon request by any interested party (s. 109.4).
- The investigator may visit the place of work at any reasonable time and be accompanied by a person designated by the certified association, by a person designated by the employer, and by any other person whose presence the investigator considers necessary for the purposes of his investigation.
- Upon completion of his investigation, the investigator shall make a report to the Minister and send a copy of that report to the parties.
- The investigator's report, may be filed and is relevant to an interim safeguard order before the Administrative Labour Court. However, it is not binding on the Tribunal.

Use of replacement orders

Safeguard orders

A union that considers that the employer is in violation of section 109.1 of the Labour Code may apply to the Tribunal for a safeguard order requiring the employer to cease using the services of certain persons

- To be successful, the union must then prove that there is a sufficient appearance of right, that it will suffer irreparable harm if the safeguard order is not issued, and that the balance of convenience favors the issuance of an order.
- At this stage, the proof is made by affidavits, the content of which is taken as proven by the Tribunal.

Use of replacement workers

Potential consequences

Penal Consequences

Any person who contravenes section 109.1 is guilty of an offence and is liable to a fine of not more than \$1,000 for every day or part of a day during which the offence continues. (s. 142.1 of the *Labour Code*) - takes proof beyond a reasonable doubt.

“Civil” Consequences

If the Administrative Labour Tribunal considers that an employer has breached the provisions of the Labour Code regarding replacement workers, it may make any order it considers appropriate to safeguard the parties' rights, including:

- order the employer or any of its representative to refrain from using certain persons to perform the duties of employees on strike or lock-out in the establishment where the strike or lockout has occurred (prerequisite to file a contempt claim against the employer in case of subsequent violations).
- order the employer to allow union representatives to visit the workplace at any time during the labour dispute to ensure compliance with the provisions regarding the use of replacement workers (rarely done – reserved to cases of repeated violations of the Labour Code).
- order the employer to pay damages to the union or to employees who have been harmed by the employer's use of replacement workers (very rare in practice).

In summary...

Categories of individuals	Applicable prohibitions
Employees on strike*	<ul style="list-style-type: none"> Cannot work anywhere for the employer, except as agreed by the parties (or imposed by the Tribunal if related to essential services) (s. 109.1 c) and d))
Managers from the establishment on strike from another establishment where employees belonging to the same bargaining unit	<ul style="list-style-type: none"> If hired <u>before</u> the beginning of the negotiation phase: no limitation If hired <u>on or after</u> the beginning of the negotiation phase: cannot do the work of the employees on strike, regardless of where it's done, but can perform any other work in the establishment(s) where the strike or has been declared (s. 109.1 a))
Managers from other establishments not affected by a strike of the unit	<ul style="list-style-type: none"> If hired <u>before</u> the beginning of the negotiation phase: Can't perform any work in the establishment(s) where the strike has been declared, but can perform the work of the employees on strike elsewhere (s.109.1 f)) If hired <u>on or after</u> the beginning of the negotiation phase: Cannot perform any work in the establishment(s) where the strike has been declared and cannot do the work of the employees on strike regardless of where it's done (s. 109.1 a) and f)
Non-management employees from the establishment where the strike has been declared (other units or non-unionized)	<ul style="list-style-type: none"> If hired <u>before</u> the beginning of the negotiation phase: Cannot do the work of the employees on strike in the establishment where the strike has been declared (s. 109.1g)) If hired <u>on or after</u> the beginning of the negotiation phase: Cannot do the work of the employees on strike, regardless of where it's done (s. 109.1 a) and g))
Non-management employees from other establishments not affected by a strike of the unit (other units or non-unionized)	<ul style="list-style-type: none"> If hired <u>before</u> the beginning of the negotiation phase: Can't perform any work in the establishment(s) where the strike has been declared, but can perform the work of the employees on strike elsewhere (s. 109.1 e)) If hired <u>on or after</u> the beginning of the negotiation phase: Can't perform any work in the establishment(s) where the strike has been declared and cannot do the work of the employees on strike, regardless of where it's done (s. 109.1 a) and e))
Employees of other employers and contractors	<ul style="list-style-type: none"> Can't perform the work of the employees on strike in the establishment(s) where the strike has been declared, but can perform the work of the employees on strike elsewhere and can perform other work in the establishment(s) where the strike has been declared (s. 109.1 b)

Despite these prohibitions, an employer is not prevented from taking the conservative measures which are necessary to avoid the destruction or serious deterioration of its property. (s. 109.3)

* Wherever it is used in this table, the use of "on strike" also includes "on lock-out".

Bargaining trends

Russell Groves, Partner
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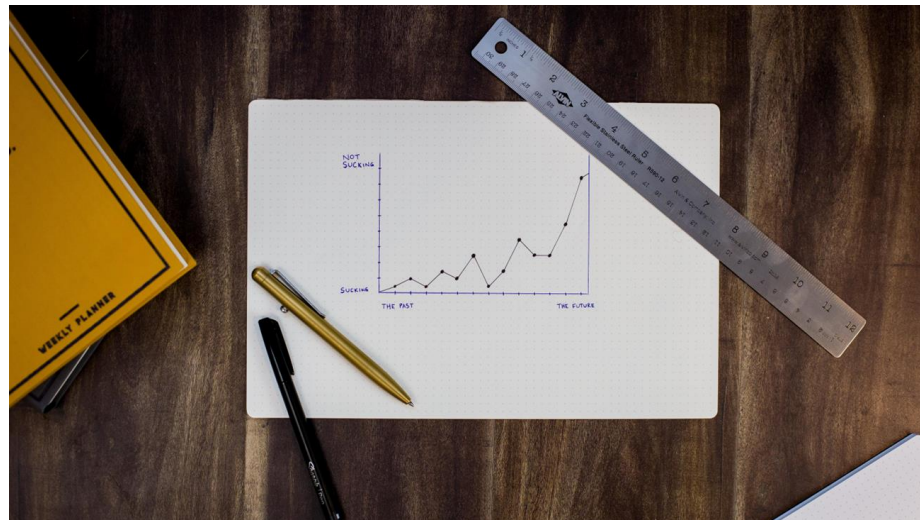
Bargaining Trends (so far) for 2023

What employers need to know

(1) Wage trends by:

- Sector
- Industry

(2) Trends in how resolutions are reached in 2022 (compared to 2019)



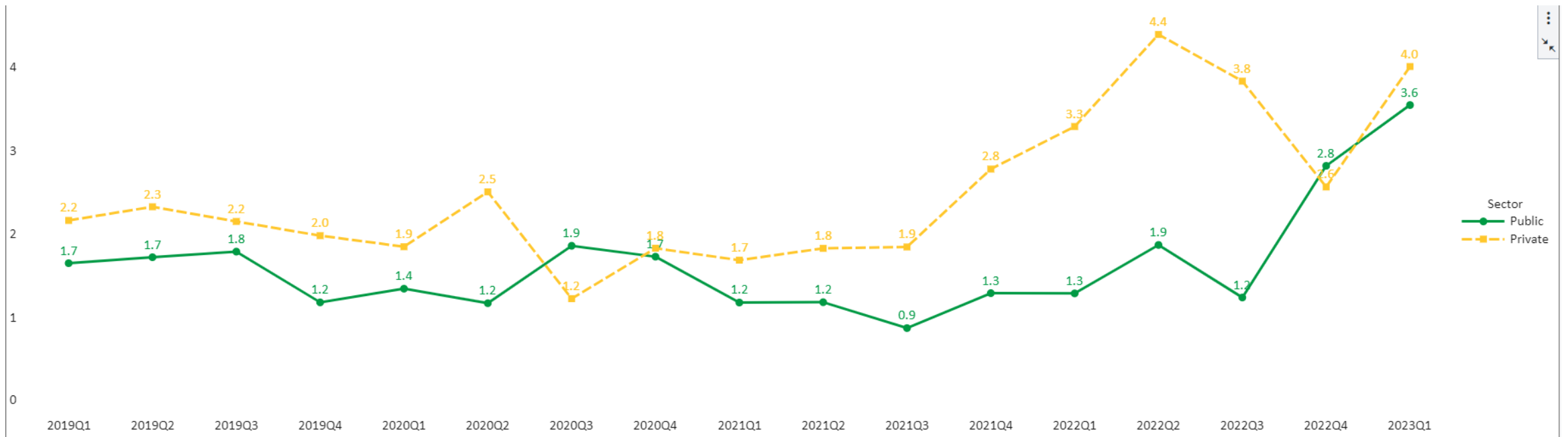
Wages – by sector

Wage trends in times of inflation

- Average annual base wage increases over the past 12 months:
 - **Public Sector**
 - Q3 2021: 0.9% Q4 2021: 1.6% Q1 2022: 1.3% Q2 2022: 1.9% Q3 2022: 1.2%
 - Q1 2023: 3.6%
 - **Private Sector**
 - Q3 2021: 1.8% Q4 2021: 2.5% Q1 2022: 3.2% Q2 2022: 4.4% Q3 2022: 3.1%
 - Q1 2023: 4%
- A noticeable uptick in wage increases in Q2 2022 and again in Q1 2023, perhaps in response to heightened fears over inflation and the Canadian economy.

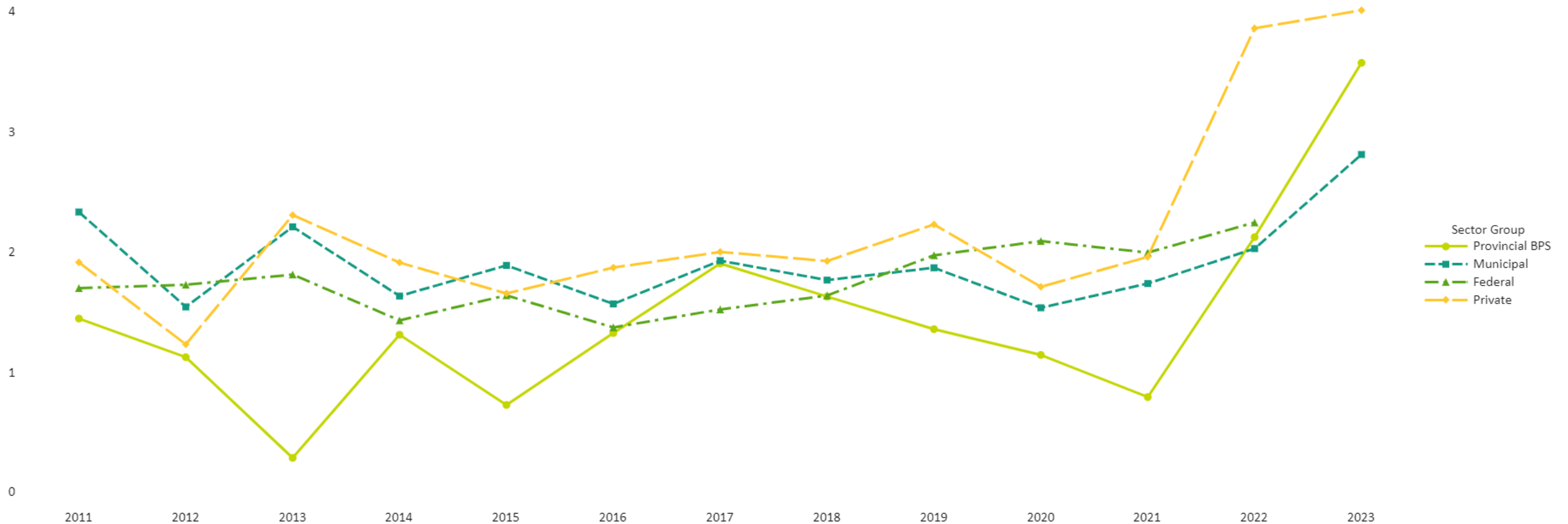
Wage trends – by sector

Average Annual Wage Increases (2019-2023)



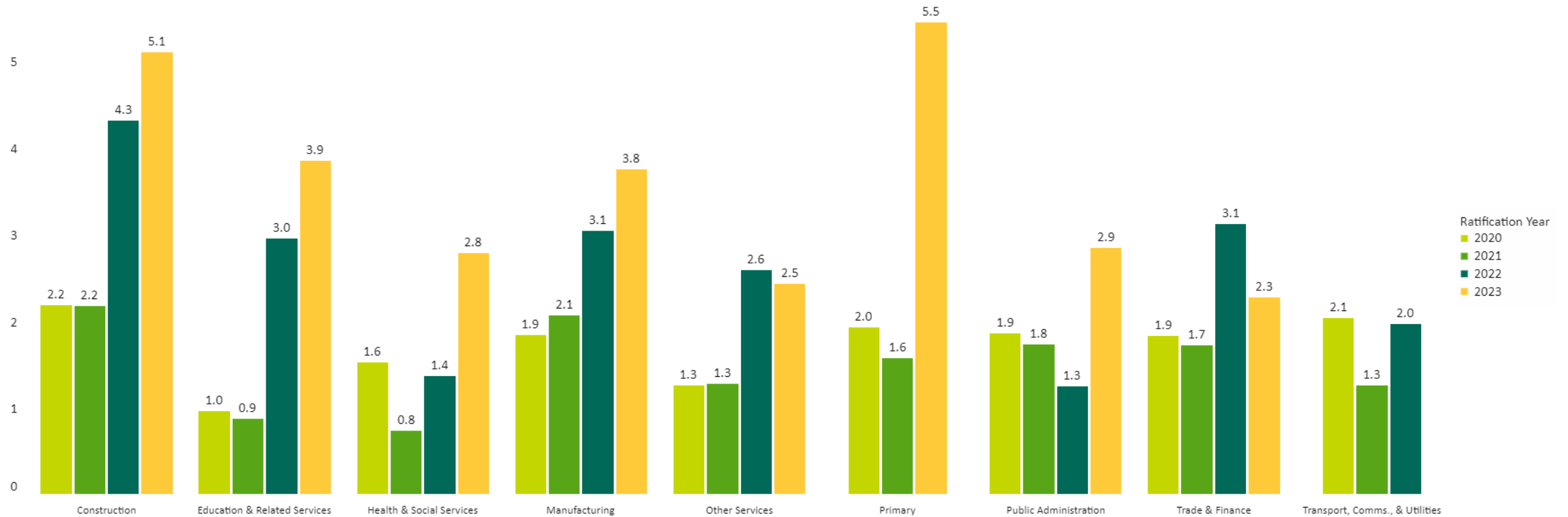
Wage trends – by sector

Average Annual Wage Increases across the Municipal, Provincial and Private Sectors (2011-2023)

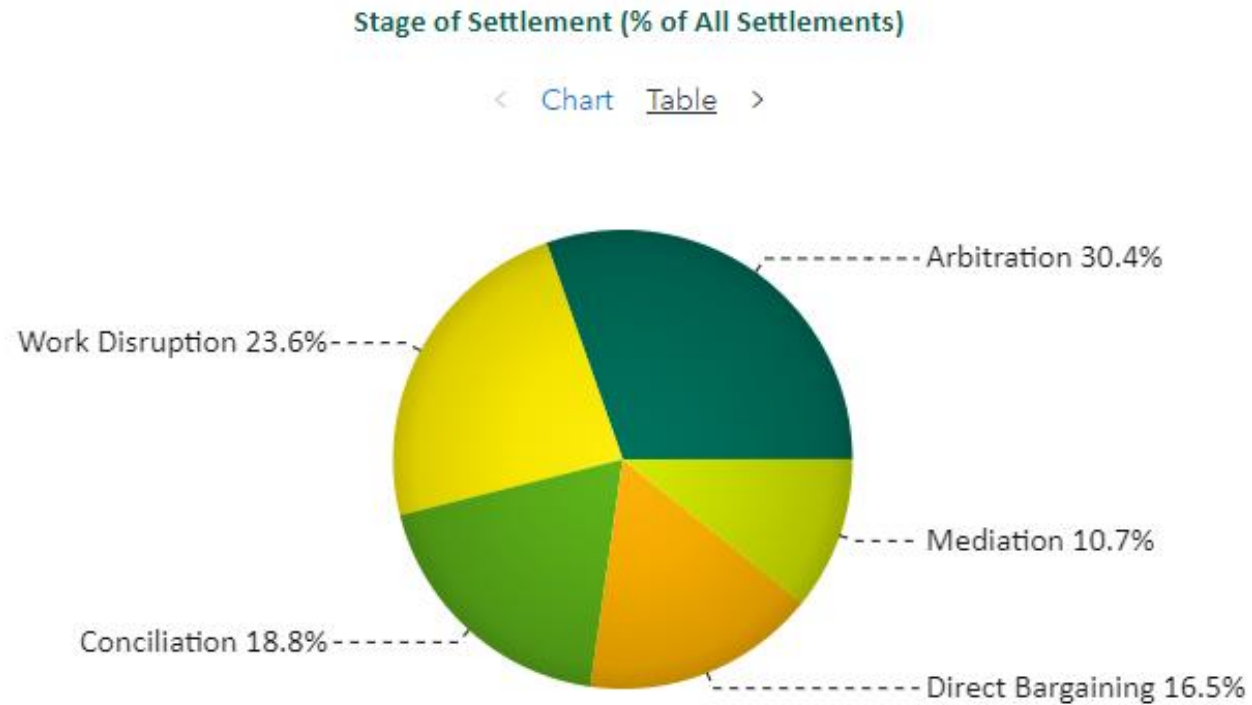


Wage trends – by industry

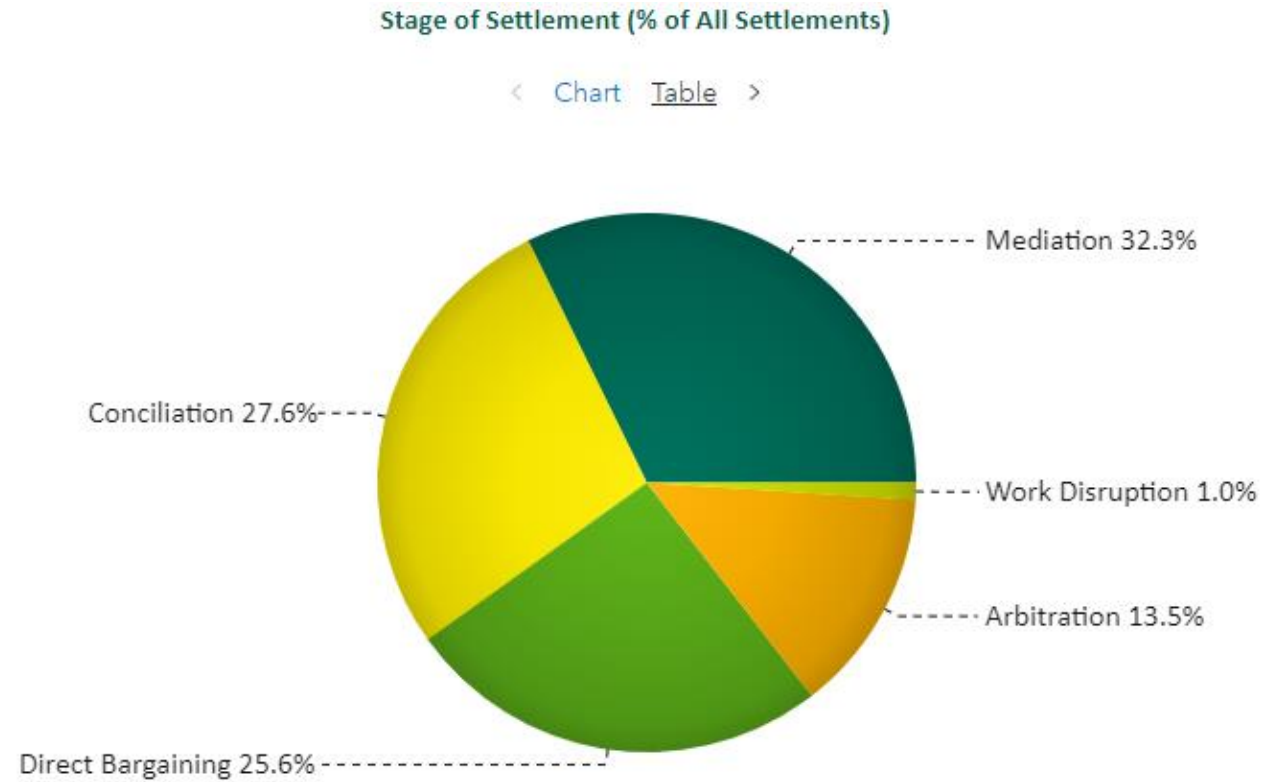
2020 - 2023



How resolutions were reached in 2022



Compared to 2019 (pre-pandemic)



The background of the slide features a close-up photograph of a fossilized animal, possibly a small insect or arachnid, embedded in a light-colored, textured rock surface. The fossil is dark and shows distinct leg structures. A large, semi-transparent purple shape, resembling a speech bubble or a stylized arrow pointing towards the bottom right, is overlaid on the left and center of the image. The word "Questions?" is written in white, bold, sans-serif font within the purple area.

Questions?

Thank you



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