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Bill C-4's Impact on Federal Public Sector Unions

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1. INTRODUCTION

On October 22, 2013, the Government introduced *Bill C-4, A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures* ["Bill C-4"], its omnibus budget implementation bill. Much to the surprise of federal public service unions, Bill C-4 contained a number of sweeping and far-reaching reforms to federal public service labour laws, aimed at weakening the position of federal public sector unions and stacking the deck in the Government's favour.

These reforms include, among others, changes to essential services provisions, the process for resolution of disputes in negotiating collective agreements, grievance and grievance adjudication, and the handling of human rights complaints arising in the federal public service. If enacted, these changes will have a profound impact upon the ability of unions to bargain effectively with the Government and to protect and promote the rights of the employees they represent.

The proposed changes to the *Public Service Labour Relations Act* [the "*PSLRA*"] and related acts found in Bill C-4 are extremely troubling from a number of perspectives. From a process perspective, the manner and form in which these far-reaching changes have been introduced show a disdain for democratic process and debate and for the important role played historically and presently by federal public sector unions in the evolution of the federal public service. Notably, by introducing these changes in the context of omnibus budget legislation, the Government has limited any review of the legislation by subject matter experts in the context of committee hearings. As well, in contrast to the last major reform to federal public service legislation in the early-mid 2000s, which saw extensive consultation with the federal public service unions prior to the introduction of the *Public Service Modernization Act, S.C. 2003, c. 22* and the *PSLRA*, there has been no consultation whatsoever with the unions with respect to any of the changes affecting federal public sector workers in Bill C-4.[1] This lack of consultation and the rushed manner in which the legislation was prepared resulted in poor statutory drafting in some of the Bill's provisions, creating unnecessary ambiguities.

[1] In a case from Newfoundland, the Freedom of Association Committee of the Governing Body of the ILO has critiqued the lack of consultations with the unions prior to the introduction of labour legislation, emphasizing the "importance which should be attached to full and frank consultations taking place with the trade unions on any questions or proposed legislation affecting trade union rights." This comment is equally applicable to the present circumstances. See Case No 1260 (Canada) - Complaint date: 03-FEB-84, *The Canadian Labour Congress (CLC) on behalf of the Newfoundland Association of Public Employees (NAPE),* Definitive Report - Report No 241, November 1985 (97 - 155).

From a substantive perspective, the proposed amendments risk severely weakening the ability of federal public sector unions to function. By its very nature, labour relations is essentially about bargaining power. As expressed by the British labour law scholar, Otto Kahn-Freund:

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[2]

When taken as a whole, the changes to essential services, strike and arbitration provisions in Bill C-4 threaten to essentially eliminate the union's bargaining power by making the right to strike hollow and the right to arbitrate meaningless in the case of a labour impasse.

While this Memorandum focuses on the impact of Bill C-4 on the collective bargaining process, it should be noted that Bill C-4 also contains significant changes to Part II of the *Canada Labour Code*, which deals with occupational health and safety. For example, the Bill redefines "danger" in such a way that it significantly increases the threshold of when a worker will be able to legally refuse to perform dangerous work, while at the same time removing the authority and powers of health and safety officers to monitor and enforce health and safety protections. These changes, which put the lives of workers at increased risk, will impact not only federal public sector workers, but all federal workers.

Bill C-4 is currently before the Standing Committee on Finance, after having passed second reading on October 29, 2013. Debate at second reading was shortened, in order to expedite passage of the Bill.

2. DISCUSSION OF EXISTING LEGISLATION AND PROPOSED CHANGES

(a) Essential services

Existing provisions dealing with essential services

Essential services are dealt with in sections 119 to 134 of the *PSLRA*. Under the current Act, the essential services provisions apply to bargaining units that have chosen to proceed by conciliation, and potentially strike action, in order to resolve disputes.[3]

The current *PSLRA* defines essential services as "a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public".[4] It gives the employer "the exclusive right to determine the level at which an essential service was to be provided to the public … including the extent to which and the frequency with which the service is to be provided".[5] However, the Act then

[2] Otto Kahn-Freund, *Labour and the Law*, 2nd ed., (London: Stevens & Sons, 1977) at p. 6.
[3] *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ["*PSLRA*"], ss. 119, 103(1).
[4] *PSLRA*, s. 4(1), "essential service".
[5] *PSLRA*, s. 120.

requires the employer to bargain an "essential services agreement" with the bargaining agent,[6] which sets out the types and number of positions necessary to provide essential services.[7] If the parties are unable to negotiate such an agreement, either party can refer the issue to the Public Service Labour Relations Board [the "PSLRB"].[8]

Both parties are also allowed to give notice to seek an amendment of the essential services agreement, and to refer any failure to negotiate such an amendment to the PSLRB.[9] In addition, either party can apply to the Board for a temporary amendment to, or suspension of, the agreement where necessary because of an emergency.[10]

In other words, under the longstanding provisions of the current Act, and consistent with the approach taken by legislatures across Canada (save in Saskatchewan where a constitutional challenge is currently before the Supreme Court of Canada), there is independent labour board oversight over the designation of essential services.

Bill C-4 provisions dealing with essential services

Bill C-4 revises the treatment of "essential services". Most importantly, it gives the Government the exclusive right to determine whether "any service, facility or activity of the Government of Canada is essential because it is or will be necessary for the safety or security of the public or a segment of the public", eliminating any recourse for unions to the PSLRB in the event of a dispute.[11] The Government also has the exclusive right to designate the positions that are necessary for the employer to provide those essential services.[12] The employer must give notice that it has – or has not – designated positions as essential at least three months before notice to bargain can be given, or within 60 days after certification.[13]

Bill C-4 eliminates the concept of an "essential services agreement" from the *PSLRA*.[14] Instead, after giving notice that it has designated positions as necessary to provide essential services, the employer must "begin consultations" with the bargaining agent about the designated positions, for up to 60 days. It then has 30 days to notify the bargaining agent of the positions that it has or will designate as essential.[15]

The other modalities around essential services remain generally the same after Bill C-4, except that Bill C-4 clarifies that the statutory freeze over terms and conditions of employment for

[6] *PSLRA*, s. 122.
[7] *PSLRA*, s. 4(1), "essential services agreement".
[8] *PSLRA*, s. 123.
[9] *PSLRA*, ss. 126, 127.
[10] *PSLRA*, s. 131.
[11] Bill C-4: A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures ["Bill C-4"], ss. 294(2), 305, modifying *PSLRA*, ss. 4(a) "essential services", 119(1) and repealing current ss. 123 and 127. .
[12] Bill C-4, s. 305, replacing *PSLRA*, s. 120(1).
[13] Bill C-4, s. 305, replacing *PSLRA*, s. 121.
[14] Bill C-4, s. 294(1), repealing *PSLRA*, s. 4(1) "essential services agreement".
[15] Bill C-4, s. 305, replacing *PSLRA*, s. 122.

designated positions during bargaining does not limit "the employer's right to require that an employee who occupies a position that is designated … perform all of the duties assigned to that position and be available during his or her off-duty hours to report to work without delay to perform those duties".[16]

In other words, under the proposed legislation, one of the parties to the collective bargaining process can unilaterally determine and restrict the bargaining strength of the other, in this case, by eliminating the right to strike. Indeed, as set out below, given the proposed legislative restrictions on access to interest arbitration under Bill C-4 where workers are designated as essential, the proposed legislation could be used to eviscerate the capacity of federal government employees to engage in meaningful collective bargaining altogether.

(b) Strikes and arbitration

Existing provisions dealing with strikes and arbitration

Under the current *PSLRA*, a bargaining agent can choose either arbitration or conciliation (and strike) as the means of resolving disputes in situations where the parties have bargained to impasse.[17]

Under arbitration, either party can provide a notice requesting arbitration of any term or condition that can be included in an arbitral award.[18]The Chairperson of the PSLRB then establishes an arbitration board, and refers the matters in dispute to that board.[19] The board is charged with assisting the parties to come to a collective agreement,[20] or making an award setting out the contents of an agreement.[21] In making an award, the board must consider a broad range of factors, namely:[22]

a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;

b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;

[16] Bill C-4, s. 305, replacing *PSLRA*, s. 125(2).
[17] *PSLRA*, ss. 103, 104.
[18] *PSLRA*, s. 136. This includes any term or condition of employment, except: if it would require Parliament to amend legislation; if it relates to "standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees"; if it relates to termination of employment, other than for breach of discipline or misconduct, in a separate agency; or if it "would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service. See *PSLRA* s. 150.
[19] *PSLRA*, ss. 137, 144.
[20] *PSLRA*, s. 145.
[21] *PSLRA*, s. 149.
[22] *PSLRA* s. 148.

c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;

d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

Alternatively, if the union has chosen conciliation as a means of resolving disputes, then either party can request it when they are unable to reach a collective agreement.[23]

If no agreement is reached during the conciliation process, the union can hold a strike vote, in order to have the authority to declare or authorize a strike.[24] The Minister can, at any time, order a vote by employees on the employer's last offer.[25]

Bill C-4 provisions dealing with strikes and arbitration

Under Bill C-4, the right of unions to unilaterally choose arbitration is eliminated altogether, and the process for resolving disputes is presumptively conciliation/strike.[26] Arbitration can be used only in two circumstances:

- where the employer and the bargaining agent agree to use arbitration;[27] and
- where 80% or more of the positions in the bargaining unit have been designated by the government as essential, in which case the only option is arbitration.[28]

If the dispute relates to a separate agency, then a decision to agree to arbitration must be approved by the President of the Treasury Board.[29]

Where a dispute proceeds to arbitration, either because both the union and the employer agree or because more than 80% of the bargaining unit is designated as essential, then Bill C-4 modifies the factors that must be considered by the arbitrator in determining the provisions of a collective agreement. In determining "whether compensation levels and other terms and conditions

[23] *PSLRA*, s. 161.
[24] *PSLRA*, s. 184.
[25] *PSLRA*, s. 183.
[26] Bill C-4, s. 302, replacing *PSLRA*, s. 103.
[27] Bill C-4, s. 302, replacing *PSLRA*, s. 104(1).
[28] Bill C-4, s. 302, replacing *PSLRA*, s. 104(2).
[29] Bill C-4, s. 302, replacing *PSLRA*, s. 104(1).

represent a prudent use of public funds and are sufficient to allow the employer to meet its operational needs", the arbitration board will be charged to "give preponderance" to:[30]

a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians; and

b) *Canada's fiscal circumstances relative to its stated budgetary policies* [emphasis added].

The arbitration board *may* also, but is not required to, take into account factors similar to those currently found in the *PSLRA* and listed above.

Bill C-4 adds that the arbitration board cannot ignore "all terms and conditions of employment of, and benefits provided to, the employees in the bargaining unit … including salaries, bonuses, allowances, vacation pay, employer contributions to pension funds or plans and all forms of health plans and dental insurance plans."[31]

Bill C-4 further allows the Chairperson of the PSLRB, on an application by either party or on his or her own, to direct the arbitration board to review its award if, in the Chairperson's opinion, it does not represent a reasonable application of the enumerated factors.[32]

The amendments in Bill C-4 to the arbitration provisions of the *PSLRA*, combined with the amendments to the essential service provisions, are a severe infringement upon the right to strike. On the one hand, the proposed changes allow the Government to unilaterally determine which services will be designated as essential and preclude any further access to the PSLRB by unions in cases of disputes about such designations. On the other hand, the proposed changes provide that so long as not more than 80% of the bargaining unit is declared essential, both the union and the employer must agree to go to arbitration, or it is not available. Taken to its most extreme, together these provisions allow the Government to declare up to 79% of a bargaining unit essential and then refuse arbitration in the event of a contract dispute, forcing the remaining 21% out on strike. It is not difficult to imagine the limited effectiveness of a strike where 79% of employees are denied the right to strike.

Arguably these changes to the arbitration and essential services provisions violate the right to bargain collectively as protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms*. These changes are also contrary to Canada's international legal obligations. The International Labour Organization [the "ILO"] has consistently recognized that the right of employees to strike is an intrinsic part of the right to organize recognized by Convention No. 87. Notably, in Case No. 1260 (Canada),[33] the Freedom of Association Committee of the Governing Body of the ILO was asked to consider legislation from Newfoundland, the *Public Service (Collective*

[30] Bill C-4, s. 307(1), replacing *PSLRA*, s. 148.
[31] Bill C-4, s. 309, adding *PSLRA*, s. 149(1.1).
[32] Bill C-4, s. 310, adding *PSLRA*, s. 158.1.
[33] Case No 1260 (Canada) - Complaint date: 03-FEB-84, *The Canadian Labour Congress (CLC) on behalf of the Newfoundland Association of Public Employees (NAPE),* Definitive Report - Report No 241, November 1985 (97 - 155).

Bargaining) Act. Like Bill C-4, that legislation dealt with the designation of essential services and placed limits on strike action, but unlike Bill C-4 provided for arbitration if even 50% of workers were deemed essential. Even at that much lower threshold, the Committee found it to be insufficient, noting:

> [A]lthough strikes can take place even in services such as health-care institutions, the strike may be rendered ineffectual as a result of the procedure for the designation of a certain number of "essential workers". In addition, recourse to arbitration may be impeded if the number so designated by the Labour Relations Board falls below 50 per cent of the employees involved. In other words, it would seem in such circumstances that *the limitations placed on unions to carry out an effective strike are not adequately compensated by unimpeded access to arbitration machinery* [emphasis added].

If a 50% essential service worker threshold renders a strike "ineffectual," how could the same not be true with the far greater 80% threshold proposed in Bill C-4?

At the same time, the requirement for both employer and union to choose arbitration will potentially force many federal public sector unions who have traditionally avoided a conflictual model of labour relations, and who as a result may have limited strike reserves, into the conciliation-strike route. Undoubtedly, these provisions will create unnecessary labour unrest in the federal public service in the years to come. One must question why the Government is limiting access to a dispute resolution method, which has been largely effective at avoiding disruptions to public services in recent years.

For those remaining bargaining units that go to arbitration, either because over 80 per cent are designated essential or because the employer agrees, this route will also almost certainly reduce the confidence of the parties in the neutrality and fairness of the process. By requiring that paramount consideration be given to its unilaterally determined fiscal and budgetary policies, the Government has stacked the deck, usurped the independence of the arbitration board, and failed to provide for an fair and adequate replacement for the right to strike.

(c) The Grievance and Adjudication Process

Existing provisions dealing with grievances and adjudication

Under the current *PSLRA*, an employee can present an individual grievance in respect of the following:

> (a) the interpretation or application of a provision or a statute or regulation, or of a direction or other instrument made or issued by the employer that deals with terms and conditions of employment;
>
> (b) the interpretation or application of a provision of the collective agreement or arbitral award; or

(c) any occurrence or matter affecting terms and conditions of employment.[34]

However, an employee must have the approval and representation of his or her bargaining agent in order to bring a grievance in respect to the interpretation or application of a provision of a collective agreement or arbitral award.[35]

Employees may file individual grievances in relation to violations of the *Canadian Human Rights Act* [the "*CHRA*"], [36] except in respect to the right to equal pay for work of equal value.[37]

Section 209 of the *PSLRA* sets out the matters that can currently be referred to adjudication. These include the interpretation or application of a provision of a collective agreement or an arbitral award, most disciplinary actions, and demotion, termination and deployment in a number of situations. As with the grievance process, as employee must have the approval and representation of his or her bargaining agent if he or she wishes to refer a grievance in respect of the interpretation or application of a provision of a collective agreement or arbitral award to adjudication.[38]

As well, in cases involving the interpretation or application of the *CHRA*, the grievor is required to notify the Canadian Human Rights Commission [the "CHRC"],[39] which has standing in adjudication proceedings to address the interpretation and/or application of the *CHRA*.[40]

The *PSLRA* provides that the PSLRB will bear the costs of adjudication in those cases in which the employee does not have the representation of a bargaining agent.[41] If an aggrieved employee is represented in the adjudication process by a bargaining agent, the employee is still not required to bear the costs of the adjudication: the bargaining agent is liable to pay any part of the costs as determined by the PSLRB.[42] To our knowledge, this power has never been used.

Bill C-4 provisions dealing with grievances and adjudication

From the perspective of the individual employee, Bill C-4's proposed changes to the grievance and adjudication procedure represent a further erosion of individual rights.

First, employees will now require the approval and representation of their bargaining agent in order to bring any grievance, except for grievances regarding ss. 7, 8, 10 or 14 of the *CHRA*. This means that employees will no longer be able to grieve matters such as discipline or

[34] *PSLRA*, s. 208 (1).
[35] *PSLRA*, s. 208(4).
[36] *PSLRA*,. s. 208(2).
[37] *PSLRA*,. s. 208(3).
[38] *PSLRA*, s. 209.(1).
[39] *PSLRA*, s. 210.(1).
[40] *PSLRA*, s. 210(2).
[41] *PSLRA*, s. 235.(1).
[42] More specifically, by the Executive Director of the PSLRB with the approval of the PSLRB. See *PLSRA*, s. 235.(2).

terminations on their own. Employees will also require the approval and representation of their bargaining agent to refer these same matters to adjudication.[43]

Second, although Bill C-4 allows individual employees to file and refer to adjudication on their own behalf grievances regarding ss. 7, 8, 10, or 14 of the *CHRA* (which deal with employment, employment applications and advertisements, discriminatory policies and practices, and harassment), at the same time it eliminates their right to file workplace discrimination complaints pursuant to the same provisions under the *CHRA* itself, thereby foreclosing access to the CHRC's investigative powers and the Canadian Human Rights Tribunal (CHRT).[44] Furthermore, Bill C-4 repeals the provisions that require notice to the CHRC and provide it with standing in grievance adjudications at the PSLRB,[45] thus removing any role that could be played by the CHRC. Given the CHRC's expertise in the area of discrimination, this is unfortunate.

Since it precludes access to the CHRC for federal public servants, Bill C-4 attempts to mirror some of the *CHRA* provisions. For example, employees will now have one year to present a grievance regarding ss. 7, 8, 10 or 14 discriminatory practices at the first step, the same limitation period applicable at the CHRC, rather than the much shorter grievance time limits found in collective agreements.[46]

However, some of these attempts to mirror the *CHRA* have resulted in unclear or poor drafting. For example, the new proposed s. 208(9) of the *PSLRA* provides that, at any stage in the grievance process, an individual grievance (not just human rights grievances) may be dismissed for being trivial, frivolous, vexatious, or made in bad faith.[47] While the CHRC has the same power to dismiss a complaint[48] and the PSLRB has a similar power to dismiss complaints or grievance at the adjudication stage,[49] it is unheard of to grant such a power to dismiss a grievance to an employer. Either this provision merely means that the employer can deny a grievance at any level on the grounds that the employer believes it is trivial, frivolous etc., in which case the provision is redundant given the employer's existing power to deny grievances at any level in the grievance process, or it means that the employer can summarily dismiss any grievance at the first level grievance step and thereby unilaterally preclude access to adjudication, in which case it is extremely troubling and problematic, because it would deprive employees and their unions of the ability to enforce the collective agreement.

Another ambiguity in Bill C-4 relates to whether the individual or the union will have carriage rights of grievances that relate both to discriminatory practices within the meaning of s. 7, 8, 10, or 14 of the *CHRA* and to the interpretation or application of a provision of a collective agreement.[50] For example, a grievance could relate to family status and to the leave provisions

[43] Bill C-4, s. 326.(1), amending *PSLRA*, s. 209(1).
[44] Bill C-4, s. 328, amending *PSLRA*, s. 211 and s. 209(1).
[45] Bill C-4, s. 327, repealing *PSLRA*, s. 210.
[46] Bill C-4, s. 325.(3), amending *PSLRA*, s. 208.
[47] *Ibid.*
[48] *CHRA*, s. 41.
[49] *PSLRA*, s. 40(2)
[50] Most collective agreements in the federal public service also include non-discrimination clauses.

in a collective agreement. Another example would be a grievance relating to disability and shift scheduling. Under the current form of the Bill, it is unclear how this conflict would be resolved in practice.

Bill C-4 also includes changes with respect to group and policy grievances. Some of these are similar to the changes with respect to individual grievances, such as those repealing the existing provisions regarding notice to the CHRC and its standing to make submissions at adjudication.[51]

Other changes include precluding policy grievances from being brought by employers or bargaining agents if they pertain to an issue that "may be the subject of a grievance of an employee in the bargaining unit to which the agreement or award applies."[52] Also, Bill C-4 restricts the grounds for policy grievances to "seeking to enforce an obligation" arising out of a collective agreement or arbitral award, [53] whereas the current *PSLRA* allows for policy grievances "in respect of the interpretation or application of the collective agreement or arbitral award,"[54] generally.

These restrictions on policy grievances will make the grievance process less efficient and further tax union resources. Rather than being able to file one grievance in situations where multiple employees are affected, unions will instead be forced to file multiple individual grievances.

Bill C-4 also restricts the human rights remedies that an adjudicator can award by removing the power of the adjudicator to order an employer to cease a discriminatory practice and take measures, in consultation with the CHRC, to redress the practice or to prevent the same or a similar practice from occurring in the future.[55] On the issue of remedy, another notable change in Bill C-4 is that, in respect of policy grievances, while the adjudicator may be able to require the employer or bargaining agent to interpret the collective agreement or arbitral award in a specified manner, it can only do so on a going-forward basis.[56] Such an approach will not remedy past wrongs.

Bill C-4 also includes significant amendments in relation to costs for adjudication. Under the new regime, the determination as to which party must bear the costs will be dependent upon what type of grievance was referred to adjudication. For example, for individual grievance**s** regarding the interpretation of a provision of the collective agreement or discipline and termination, adjudication expenses will be borne in equal parts by the employer and the bargaining agent.[57] Individual employees who grieve a human rights issue on their own will not have to pay costs. The expenses of the adjudication are to be determined by the Chairperson.[58]

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[51] Bill C-4, s. 330, repealing *PSLRA*, s. 217; Bill C-4 s. 332, repealing *PSLRA*, s. 222.
[52] Bill C-4, s. 331., amending *PSLRA*, s. 220.(1).
[53] *Ibid.*
[54] *PSLRA*, s. 220.(1).
[55] Bill C-4, s. 331.(1) replacing *PSLRA* s. 226(1)(h). See also *CHRA*, s. 52 and 53(3).
[56] Bill C-4, s. 334, replacing *PSLRA*, s. 232.
[57] Bill C-4, s. 335, replacing *PSLRA*, s. 235.
[58] See for e.g. Bill C-4, s. 335, replacing *PSLRA*, s. 235 at s. 235(8).

Overall, the changes to the grievance and adjudication procedure, including those which preclude individuals from grieving and referring to adjudication on their own issues such as discipline and termination, will impose greater representational obligations on federal public sector unions at a time when the current Government's initiatives – new legislation, massive downsizing, changes to performance management, amongst others - have already placed significant additional burdens on them. Furthermore, these additional representational obligations will, in turn, expose federal public service unions to increased liability for duty of fair representation complaints.

(d) Merger of the Public Service Labour Relations Board and the Public Service Staffing Tribunal

Bill C-4 would see the creation of a new Public Service Labour Relations and Employment Board, which would result from the merger of the PSLRB and the Public Service Staffing Tribunal [the "PSST"].[59]

Given that there are already delays in the adjudication of grievances and other cases before the PSLRB, this merger of the PSST and PSLRB will no doubt compound the problem and put greater workload pressures on board members at the new Board.

(e) Transitional Provisions

Bill C-4 contains a number of transitional provisions. One such provision stipulates that if, prior to the "commencement day"[60] of the Act coming into force, each of the following steps have been taken, the *PSLRA* will continue to apply to an arbitration:

> (a) the bargaining agent has given notice to bargain to enter into or to revise or renew a collective agreement;
>
> (b) the bargaining agent or the employer made a request for arbitration; and
>
> (c) the Chairperson notified the parties of the establishment of an arbitration board.[61]

In other words, the old *PSLRA* arbitration rules will apply to those bargaining units for which the PSLRB has already established an arbitration board. However, bargaining units that have merely made a request for arbitration, but for which an arbitration board has not yet been established, will be caught by the new legislation. Effectively, this would mean that bargaining agents that have already chosen the arbitration route would have it denied to them if the

[59] See for e.g. Bill C-4, s. 366.(1) replacing the definition of "Board" with the Public Service Labour Relations and Employment Board. See also Bill C-4, s. 403.(1), similarly repealing the definition of "Tribunal" and adding the definition of "Board" in s. 2(1) of the *Public Service Employment Act*. See also references to the enactment of the *Public Service Labour Relations and Employment Board Act*, Bill C-4, s. 365 and onward.

[60] "[C]ommencement day" is defined in Bill-C4 as "…the day on which this Act receives royal assent." See s. 338.(1)

[61] Bill C-4, s. 338.(3) and (4).

employer is not willing to agree to it. Even if the employer is willing to agree to arbitration, for those bargaining agents caught by the transitional provisions, the arbitration board will be required to give primary consideration to the factors of recruitment and retention and ability to pay, in keeping with the Bill C-4 amendments.

3. CONCLUSION

Bill C-4 contains a number of sweeping and far-reaching reforms to federal public service labour laws aimed at weakening the position of federal public sector unions, disabling them from protecting and promoting the rights of the employees they represent, and stacking the deck in the Government's favour. The impact of Bill C-4 changes in the federal public service upon essential services, bargaining, the resolution of labour disputes, grievances, grievance adjudication, and the handling of human rights complaints, amongst other issues, will undoubtedly be profound.

Many aspects of Bill C-4 may be subject to challenge under s. 2(d) of the *Charter*, including the changes to the strike and arbitration provisions, which in combination with the essential services changes, may well violate the right to bargain collectively as recognized by the Supreme Court of Canada in its decisions in *Health Services* and *Fraser*.[62] Similar essential services legislation from Saskatchewan is currently the subject of a s. 2(d) challenge before the Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan*.[63]

[62] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[2007] 2 SCR 391; *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3.

[63] *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62 (CanLII), overturned on appeal 2013 SKCA 43 (CanLII), currently on appeal to the SCC (SCC Docket 35423). In this case, the Saskatchewan Federation of Labour was successful in establishing a breach of the *Charter* at the Saskatchewan Court of Queen's Bench, but that decision was overturned by the Saskatchewan Court of Appeal on the basis that, although the more recent Supreme Court cases like *Health Services* and *Fraser* had significantly shifted the approach to s. 2(d) of the *Charter*, the 1987 *Alberta Reference*, in which the Supreme Court explicitly held that freedom of association guarantee in s. 2(d) does not protect a right to strike, was still good law and was binding on the Court of Appeal.