Confédération
CSN des syndicats nationaux

Memorandum presented
by the
Confédération des syndicats nationaux

to the Standing Committee of Finance

with regards to the tabled Bill C-4,
A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures

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Confédération des syndicats nationaux
1601, De Lorimier Avenue
Montréal (Québec)  H2K 4M5
Phone: 514 598-2271
Fax: 514 598-2052
www.csn.qc.ca

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### *Introduction*

The Confédération des syndicats nationaux (CSN) is a labour organization made up of almost 2,000 unions representing more than 300,000 workers, mainly in the territory of Québec, gathered on a sector or professional basis within eight federations, as well as on a regional basis in 13 central councils.

### *Omnibus Bills, Symbol of the Primary Anti-Democracy*

From the outset, CSN denounces this legislation, which appears to be part of a strategy of the Conservative government to introduce omnibus bills that significantly amend several existing laws, and which serve to confuse more or less attentive observers. The CSN wholly disapproves of the omnibus legislative approach, which upsets the parliamentary process and is a risk, even a danger, for democracy.

### *An Anti-Union Bill*

Part I of *A second act to implement certain provisions tabled in Parliament on March 21, 2013 and other measures presents measures relating to the Income Tax Act; Part II concerns the Excise Tax Act; and Part III deals with a variety of measures, modifying several laws, including the Public Service Relations Act,* 2003, c. 22. In fact, it is yet another legislative tool used by the Conservative government to attack the union movement and to weaken it.

### *A New Notice to Bargain Collectively Which Aims to Satisfy Political Imperatives*

With respect to the Notice to Bargain Collectively, it will now be given within twelve months before a collective agreement ceases to be in force1, as opposed to the four-month period currently in force. This amendment is only intended to allow the federal government to update its list of essential services. It serves no purpose for the parties' own interests and therefore aims only to satisfy political imperatives.

### *A New Dispute Resolution Process, Without the Right to Strike*

Regarding dispute resolution, if, on the day on which notice to bargain collectively may be given, at least 80% or more of the positions in the bargaining unit have been designated as essential services, a bargaining agent can no longer choose between conciliation and arbitration, as is currently the case[2].
As well, the wording is clever in that it suggests that conciliation is the method of dispute resolution. However, once the employer compiles its list of essential services, the method of dispute resolution becomes arbitration[3].

Ever since the Union of Canadian Correctional Officers (UCCO-SACC-CSN) has been affiliated with the CSN, it has always opted for conciliation. This has allowed negotiating parties to conclude satisfactory collective agreements.

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[1] Section 300 of *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other* measures (hereafter, "the Bill"), replacing Section 105(2)b)
[2] Section 103(1) of the *Public Service Labour Relations Act* (hereafter, "the PSLRA"), L.C. 2003, c. 22.
[3] Section 302 of the Bill, replacing Section 104(2) of the PSLRA.

For the CSN, arbitration is a method of dispute resolution to which parties should be free to submit. Its compulsory nature represents an unjustified limit on freedom of negotiation.

The fact of falling automatically in the category of essential services and compulsory arbitration inevitably leads to a ban on the right to strike[4].

The CSN finds it unacceptable that establishing a list of essential services for at least 80% of the public servants in a bargaining unit determines the method of negotiation – arbitration – a method that takes away the right to strike.

### *Political Interference in Establishing Working Conditions*

The Conservative government amends the established rules in its favor. Criteria are added amending the mandate of the arbitration board, namely (a) whether compensation levels represent a prudent use of public funds and (b) are sufficient to allow the employer to meet operational needs[5].

The arbitration board must be guided by and give preponderance to the following factors, namely (a) the necessity of attracting competent persons to the public service in order to meet the needs of Canadians, and (b) Canada's fiscal circumstances relative to its stated budgetary policies[6].

These two (2) factors are already in the current law. Three (3) other criteria found in the current law[7] are relegated to factors relating to relevance. It is not a stylistic device, but a substantial amendment that could have consequences.

As well, only if relevant to the arbitration board, the latter may take any of the following factors into account:

a) relationships with compensation and other terms and conditions of employment among the various classification levels within the same occupation and between occupations in the public service;

b) the compensation and other terms and conditions of employment relative to employees in similar occupations in the private and public sectors, including any geographical, industrial or other variations that the arbitration board considers relevant;

c) compensation and other terms and conditions of employment that are reasonable (the words "fair and reasonable" are repealled) in relation

[4] Sections 322 and 323 of the Bill, replacing Sections 194 (1)e) and 196 (1)e) of the Bill.
[5] Section 306 of the Bill, replacing Section 148(1) of the PSLRA.
[6] Section 306 of the Bill, replacing Sections 148(1) a) and b) of the PSLRA.
[7] Section 148 of the PSLRA.

to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;

d) the state of the Canadian economy[8].

The arbitration board shall render its decision as soon as possible and state grounds for each of the issues in dispute[9]. It may not render its decision without taking into account all the employment conditions of public servants in the bargaining unit in question, as well as the benefits they receive, including salaries, allowances, bonuses, vacation pay, employer contributions to pension funds or plans and all forms of health plans and dental insurance plans[10].

Within seven days of the board's decision, the chairperson of the Public Service Labour Relations Board[11] or the parties[12] may demand a review if they are of the opinion that it does not constitute a reasonable application of the criteria listed above[13] (section 148 of the Act). The arbitration board will render its decision within 30 days of the original ruling[14].

The CSN believes additions to criteria in the execution of the arbitration board's mandate to be unacceptable. The concepts of "prudent use of public funds" and "sufficient funds," as well as the preponderant factors of retaining employees and of Canada's fiscal circumstances used primarily for traditional criteria of "compensation and other terms and conditions of employment relative to employees in similar occupations in the private and public sectors," constitutes political interference in setting working conditions in the public service.

The CSN also believes it is unacceptable for the chairperson of the Public Service Labour Relations Board to request a review of a ruling rendered by an arbitrator. This is clearly political interference in the arbitration process.

Equally unacceptable is the right granted to parties to request a review of an arbitrator's decision on the grounds that it did not represent a reasonable application of the factors referred to in section 148 of the Act. As written, it is clearly the right of direct appeal of an arbitrator's decision, contrary to the majority of administrative laws, which only allow the review of an original decision in relation to errors in law[15].

[8] Section 306 of the Bill, replacing Section 148(2) of the PSLRA.
[9] Section 309 of the Bill, replacing Section 149(1) of the PSLRA.
[10] Section 309 of the Bill, replacing Section 149(1.1) of the PSLRA.
[11] Section 310 of the Bill, introducing Section 158.1(1) of the PSLRA.
[12] Section 310 of the Bill, introducing Section 158.1(2) of the PSLRA.
[13] Section 310 of the Bill, introducing Sections 158.1(1.1) and 158.1(2) of the PSLRA.
[14] Section 310 of the Bill, introducing Section 158.1(3) of the PSLRA.
[15] Section 158 of the PSLRA.

### *Essential Services, We Forget the Intention of the Act*

Regarding essential services, it is no longer possible for a bargaining agent and the employer to reach a decision on the designation of essential positions and their number[16]. Only the employer has the exclusive right to determine whether any service is essential, in whole or in part (this was already the case).

What drastically changes with this bill is that there are no longer negotiations about essential services (the number of positions required) and, therefore, no agreement is possible[17].

The employer must notify the union of the essential services required not later than three months before the first day on which a notice to bargain collectively may be given[18] (instead of 20 days, as is now the case). After giving notice, the employer must begin consultations with the bargaining agent on the designated positions that are identified in the notice. These consultations must end 60 days after the day on which the notice given. No parameter is set in the law regarding the subject of consultations. Within the 30 days that follow the end of the 60 days, the employer must again notify the bargaining agent of the positions designated essential[19].
If a position becomes vacant, the employer will identify another position[20]. The employer must provide a designated employee with a notice as soon as possible[21] (unlike the current situation, where it is expected that a notice will be simply sent to him). Designated positions are covered by the freeze on working conditions (in other words, by provisions in the collective agreement) [22]. However, the law requires a designated public servant to be available during off-duty hours to report to work without delay if required to do so by the employer[23].

Disagreement is now impossible since an agreement on essential services is no longer required. As a result, it is no longer possible to submit a complaint to the Public Service Labour Relations Board in the case of a disagreement on what constitutes an essential service[24].

The CSN considers abusive and unacceptable that there is no further need for an agreement between the bargaining agent and the employer on the designation and number of essential positions. Is it necessary to reiterate that essential services in themselves are a limit to freedom of association and the ability to exert legitimate pressure tactics? The right to negotiate essential services is an important precondition to the legitimate exercise of the right to strike. Depriving

[16] Section 121 of the PSLRA.
[17] Section 305 of the Bill, replacing Section 121 of the PSLRA
[18] Section 305 of the Bill, replacing Section 121(3) of the PSLRA
[19] Section 305 of the Bill, replacing Sections 122(1) and 122(2) of the PSLRA
[20] Section 305 of the Bill, replacing Section 123 of the PSLRA
[21] Section 305 of the Bill, replacing Section 124(1) of the PSLRA
[22] Section 305 of the Bill, replacing Section 125(1) of the PSLRA
[23] Section 305 of the Bill, replacing Section 125(2) of the PSLRA
[24] Section 123 de la LRTFP.

bargaining agents of this option undermines their right to freedom of association and their right to collective bargaining.

The ban on the right to strike for bargaining agents who are automatically placed in binding arbitration if 80% of the public servants in the bargaining unit are designated as "essential services" is also unacceptable.

### *We Tear to Pieces the Public Service Labour Relations Board*

The Public Service Labour Relations Board no longer provides research services[25]. Its only roles are mediation and adjudication.

The CSN believes the Conservative government's decision to deprive the Board of its research services is unacceptable and unfounded. Conservative government policy is behind this strategy, which is also employed in other sectors, to deprive public officials of the relevant information they need to make informed policy decisions.

### *Rigth to Grieve: An Attack on the Bargaining Agent's Role*

Currently, a public servant cannot file a grievance if another administrative procedure for redress is provided for in another federal law. However, an individual grievance that involves certain provisions of the *Canadian Human Rights Act* can be filed instead of submitting a complaint to the Canadian Human Rights Commission[26]. One option is therefore possible.

Bill C-4 ensures that a public servant can no longer choose between a grievance and a complaint to the Canadian Human Rights Commission, except in regard to certain provisions of the *Canadian Human Rights Act*.
The grievance becomes the only avenue for a public servant who alleges a discriminatory practice set out in certain provisions of the *Canadian Human Rights Act*[27].

The scope of grievances is also amended. The bargaining agent cannot file a policy grievance if a public servant can submit the grievance[28]. As well, the grievance adjudicator can no longer give retroactive effect to its decision[29]. Expenses associated with adjudication are also amended so as to provide, in some cases, an equal sharing between the employer and the bargaining agent[30] (this was already the case, but following different conditions).

[25] Section 296 of the Bill, repealing Section 16 of the PSLRA.
[26] Section 208(2) of the PSLRA.
[27] Sections 325 and 326 of the Bill, replacing Sections 208(4) and 209(2) of the PSLRA.
[28] Section 331 of the Bill, replacing Section 220(1) of the PSLRA.
[29] Section 334 of the Bill, replacing Section 232, especially paragraph c) of the PSLRA.
[30] Section 335 of the Bill, replacing Sections 235 and 235.1 and 235.2 of the PSLRA

The CSN believes it is unacceptable that a bargaining agent cannot file a policy grievance if an employee can submit the grievance. This deprives the bargaining agent of its duty to represent and of the legitimate exercise of theright to association. The CSN also finds it unacceptable that a grievance adjudicator cannot give retroactive effects to a decision, an option normally permitted in most Canadian labour laws.

### *Canada Labour Code and a Violated Consultation Process on Occupational Health and Safety*

Bill C-4 also amends the *Canada Labour Code*, (1985) R.S.C. c. L-2, in the context of occupational health and safety. Unlike the consultation process followed in 2000 during a previous reform of the *Canada Labour Code*, there has been no consultation this time around with unions or employers, or with organizations that intervene on this subject. The CSN believes the lack of consultation is anti-democratic and unproductive.

With regards to the amendments, the duties of the health and safety officer and the regional health and safety officer are eliminated. These duties would henceforth be assigned to "the Minister." [31]

The definition of "danger," outlined in subsection 122(1) is modified as follows[32]:

| Current Legislation | Proposed Amendment |
|---|---|
| "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. | "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. |

[31] Section 176(1) of the Bill, repealing the definitions of "Health and safety officer" and "Regional health and safety officer" contained in Section 122(1) of the Canada Labour Code (hereafter, "the Code")
[32] Section 176(2) of the Bill, replacing Section 122(1) of the Code.

This change is far from insignificant. The CSN considers the reduction in the level of protection afforded to Canadian workers to be unacceptable, because it permits far too much discretion in assessing whether the risk of an existing or potential hazard or condition presents an imminent or serious threat.

Limiting the definition of danger to imminent and serious threats to life excludes potential threats "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." This will increase the risk for employees.

We are particularly concerned about the impact of the new definition of danger on the right to refuse work for certain types of federal government employees serving a violent clientele whose behaviour can be unpredictable.

For example, following the amendments brought to the *Canada Labour Code* in 2000, the Federal Court first ruled on the danger definition in 2004 and acknowledged that correctional officers had the right to carry handcuffs, affirming that the "danger" included any existing or potential hazard or condition, or any activity reasonably likely to cause injury or illness, which included unpredictable human behaviour (*Verville v. Canada* 2004 FC767, paragraphs 31, 32 and 34. This definition was later also taken in *Armstrong v. Canada (Correctional Service)* 2010 OHSTC 006 paragraph 49 for the Oleoresin Capsicum Spray).

Considerable progress has been made since the amendments to the *Canada Labour Code* in 2000 and from subsequent jurisprudence. Changing the definition of danger is an unprecedented setback for workers. "The Code does not require anyone to go so far as to put their health, safety or life on the line even if their job entails working with dangerous offenders." (*Johnstone, Allain & Martin vs. CSC (Atlantic Institution)*, decision no. 05-020, paragraph 131)

In addition, Bill C-4 repeals references to situations involving exposure to asbestos or chemical products causing cancer, as well as products that can damage the reproductive system. The CSN considers this an unacceptable omission.

The CSN considers it equally unacceptable that issues involving the health and safety of Canadian workers are politicized to the point of putting duties currently exercised by health and safety officers in the hands of the Minister.

This change raises fears that the Minister will call on contractors to conduct investigations. The Minister's new powers jeopardize the independence and the impartiality of health and safety officers and undermine their authority, even more so for contractors who do not benefit from job security. As well, the issue of training contractors must be raised: will they be as experienced and trained as

health and safety officers? It is crucial that employees have job security in order to make decisions relating to government employees.

Sections 128 and 129 (1) make it mandatory to report at every stages of the right of refusal. This obligation will inevitably introduce delays in the processing of applications.

Section 129 gives the Minister the right not to investigate if the matter is judged to be trivial, frivolous, vexatious, or in bad faith. Furthermore, there does not seem to have a process to challenge this decision. The CSN believes that these subsections provide extensive powers both to the employer and the government and discriminate against workers.

For all these reasons, the CSN believes the amendments to the *Canada Labour Code* unduly increase the power of employers and discriminate against workers. These amendments should be withdrawn.

### *Conclusion*

The CSN believes that Bill C-4 is a direct attack on the right of association for the following reasons:

- Since most unions will be declared essential services, they will not be able to choose between conciliation or arbitration, as is the case according to the current legislation

- Arbitration is a method of resolution to which parties should be free to submit. Its compulsory nature represents an unjustified limit on freedom of negotiation.

- The compulsory nature of arbitration inevitably leads to a ban on the right to strike, which is also an unjustified limit to the freedom of association.

- The right to strike is prohibited if 80% of the public servants in the bargaining unit are designated as “essential services”, which is also an unjustified limit to the freedom of association.

- Bill C-4 amends the powers of the arbitration board and relegates to relevance consideration the analysis of similar occupations in the private and public sectors;

- Duties currently exercised by health and safety officers are put in the hands of the Labour Minister during occupational health and safety investigations, *Canada Labour Code*, Part II: occupational health and safety becomes political

- The definition of “danger,” outlined in subsection 122(1) of the Canada Labour Code is modified to reduce the level of protection afforded to Canadian workers.

The CSN believes that this bill is yet another legal mean to weaken unions. We believe it is unconstitutional. Bill C-4 is so tainted that we simply ask for it to be withdrawan.