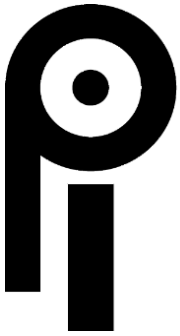
Submission to the House of Commons Standing Committee on Finance Bill C-4 *Budget Implementation Act* (Part 2)



The Professional Institute of the Public Service of Canada

November 26, 2013

Introduction

The Professional Institute of the Public Service of Canada represents 55,000 professionals across Canada's public sector, the vast majority of whom work in the federal public service. Institute members work in the federal Government's departments, agencies, Crown corporations, museums, archives, laboratories, research institutes and field research stations. Our members are directly affected by Bill C-4, in particular Divisions 17 and 18, which amend the *Public Service Labour Relations Act* (PSLRA), the *Public Service Employment Act* (PSEA) and the *Canadian Human Rights Act* (CHRA). It is our contention that the proposed legislation significantly impairs the right to collectively bargain, to the point where it constitutes a violation of the freedom of association protected by s. 2d of the *Canadian Charter of Rights and Freedoms* (the Charter) and the International Labour Organization's (ILO) Convention 87. This brief presents a summary of the Institute's analysis of these violations and other erosions of the right to collectively bargain, along with a commentary on the provisions, which, although not illegal, represent a substantial erosion of individual rights and raise practical challenges that require this Committee's attention.

Process

We first wish to highlight the process followed by the government to initiate the proposed changes which, essentially put, represent a major overhaul of the labour relations regime in the federal public sector. In fact, if implemented, many longstanding tenets of the labour relations framework for federal public employees will be dismantled. While the Institute believes that modernization of the legislation is necessary, burying such important amendments into omnibus legislation is not the proper way to go about it. Instead, the changes should have formed part of a stand-alone piece of legislation that would have allowed for meaningful consultation with subject-matter experts.

In the last forty years, federal public sector labour legislation has seen few legislative updates.[1] The last review included extensive consultation with stakeholders before the introduction of the legislation. This government's approach – imposing sweeping changes without consultation with stakeholders – has been severely criticized by the ILO and considered to be an attack on the freedom of association[2] -- a right that is also enshrined in the *Charter*.

I. EROSION OF COLLECTIVE BARGAINING RIGHTS

Dispute Resolution Process

Pursuant to the current legislation, bargaining agents may select, at the outset of collective bargaining, one of two methods of dispute resolution in the event of impasse: either interest arbitration or conciliation/strike. The result has been years of relative labour peace. Bill C-4 imposes conciliation/strike as the default method of dispute resolution, forcing a more confrontational approach, in the absence of any rationale for such a dramatic shift.

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[1] Canada, Treasury Board of Canda Secretariat, *Report of the Review of the Public Service Modernization Act*, 2003.

[2] *Newfoundland Association of Public Employees v. Canada* - case No 1260 where the ILO was critical of the lack of consultation with the bargaining agents in the context of a labour legislative review.

While the right to strike is an essential extension of the freedom of association in the labour context, C-4 combines the imposition of the conciliation/strike route with the revamping of essential services designations. This combination results in the serious impairment of the right to strike. The proposed system forces confrontation and then stacks the deck against workers when the confrontation happens. The employer will have complete control over who can strike, when they can strike, and the proposed legislation provides the employer the power to change that designation at any time.

Essential Services

Positions designated as essential are those that are prevented from exercising the right to strike because they are purportedly needed to ensure the delivery of services considered necessary for safety or security of the public[3]. The existing legislation sets out a process where the employer and the unions negotiate essential service agreements.[4] The types and number of positions necessary to provide essential services are bargained and if an agreement is not reached, either party can refer the issue to the Public Service Labour Relations Board (PSLRB). This access to an independent labour board oversight to deal with essential service designations is consistent across all labour relations jurisdictions in Canada, with one important exception in Saskatchewan.

Bill C-4 gives the employer exclusive rights with regards to determining: a) what services are essential; and b) how many and which positions are required to deliver those services. The role of the bargaining agent is reduced to limited "after-the-fact" consultation and no dispute resolution mechanism is established to contest any of these determinations.

The proposed legislation also allows the employer to require that an employee, who occupies a position designated as essential, perform all duties assigned to that position and be available during off duty hours to report to work, without delay, to perform those duties. Briefly stated, non-essential work will be performed during a strike.[5]

Access to interest arbitration for bargaining units where the majority of workers are designated as essential is also taken away. Arbitration will be available to the unions only where 80% or more of the positions of the bargaining unit have been designated by the government as essential. This is a considerable infringement on the right to strike and constitutes a violation of the right to bargain collectively protected by the freedom of association guaranteed by s. 2d of the Charter.[6] It also violates ILO Convention No. 87, which recognizes that the right of employees to strike is a necessary part of the freedom of association.

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[3] *Public Service Labour Relations Act*, S. C. 2003, c. 22, s. 2 ["*PSLRA*"], s. 4(1).

[4] *PSLRA*, ss. 119 to 134.

[5] In *Newfoundland Association of Public Employees v. Canada* - case No 1260 at paras 150 to 152, the ILO, while recognising the necessity to limit the right to strike where interruptions would endanger the life, personal safety or health of the population, cautions that the right to strike cannot be rendered ineffectual as a result of the procedure for the designation of "essential workers".

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

It is noteworthy that the Saskatchewan legislation on essential services[7] proposes a scheme that is almost identical to that contained in Bill C-4; and that scheme is the subject of a constitutional challenge to be heard by the Supreme Court of Canada this winter.[8]

Unfair Dispute Resolution Process

Where parties are able to access arbitration as a dispute resolution mechanism, the proposed factors to be considered by the arbitration board are significantly altered by Bill C-4. The current language allows for five factors described in section 148 of the PSLRA:

(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;
(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.

The proposed changes require the arbitration board to "give preponderance to" two factors: recruitment and retention, and the government's fiscal circumstances relative to its budgetary policies. Other factors *may* be considered, but at the discretion of the arbitration board. This raises serious concerns for the Institute, which are discussed below.

Recruitment, Retention and Asymmetric Information

It is accepted that recruitment and retention is an important factor in determining arbitral awards. However, putting more emphasis on this one factor puts the bargaining agent at a disadvantage. Recruitment and retention is less tangible than other factors like pay relativity and therefore harder to prove. When the employer discloses information in the lead up to bargaining, it is virtually impossible to prove recruitment and retention problems from the data received. It is rare that any documentation of a recruitment and retention problem ever exists. When it does, it is rare that we are given access to it without having to file an access to information request. In practice, budgetary constraints prevent employers from voluntarily admitting they have a recruitment and retention problem, even when a considerable amount of evidence is presented that shows otherwise. Recruitment and retention is a valid consideration, but the new emphasis placed on this one factor gives the employer considerable leverage.

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[7] *Public Service Essential Services Act*, S.S. 2008, c. P-42.2.

[8] *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).

Compounding the problem of misaligned access to relevant information is the proclamation that the PSLRB will no longer carry out compensation analysis. This announcement is problematic because it implies that even less objective information will be available than is currently the case. For the process to be fair, both sides need access to relevant information to guide their priorities and make appropriate decisions. Unfortunately the bill will change the core values of arbitration, moving the process away from being an evidence driven procedure.

Fiscal Circumstances and Budgetary Policies

One of our more serious concerns is with the second of the new considerations: "government's fiscal circumstances relative to its budgetary policies". In reality this second factor can be divided into two, government's fiscal circumstances and its budgetary policies. The first, "government's fiscal circumstances", is essential and should undoubtedly be central to any discussion related to bargaining. It is necessary for the arbitrator to look objectively at the economic climate and the fiscal health of the country when making awards. The second part, "relative to its budgetary policies", will completely change the landscape of the arbitral process and will compromise the impartiality of the public service. This addition will dilute the value of objective analysis of relevant economic factors and replace this factual evidence with ideological preference. Any labour negotiation, public or private, includes a discussion about whether or not a proposal is reasonable and whether or not the employer has the ability to pay for a reasonable proposal. This change stifles debate about "ability to pay" and replaces it with "desire to pay", regardless of ability or necessity.

Impartiality ensures continuity and institutional strength over generations -- no matter what political party is in power. Impartiality allows public servants to continue providing public services consistently to Canadians, irrespective of political scandals and partisan storms that may be swirling around them. Giving public servants access to fair, evidence-based, nonpolitical channels to negotiate is a key tenet of impartiality. Removing access to these channels politicizes the public service, taking us back fifty years. The resulting changes will lead to more reactionary and short-sighted resource allocation, a less cooperative relationship between politicians and public servants, and compromises the temporal continuity of the public service afforded by impartiality.

This same approach of giving preponderance to only two factors mirrors through to the conciliation process, thus again is increasing the likelihood of labour strife.

To summarize, Bill C-4 completely stacks the deck in favour of the employer: from corralling unions to the conciliation/strike route while keeping the exclusive and unchecked control over how many workers actually get to strike and ensuring that arbitration or conciliation boards have their hands tied by the government of the day's desire to pay.

II – EROSION OF INDIVIDUAL RIGHTS

Merging of PSLRB and PSST

Bill C-4 calls for the PSLRB and the Public Service Staffing Tribunal to be consolidated to form a new entity, the Public Service Labour Relations and Employment Board (PSLREB). While the purpose of such an exercise is usually to find efficiencies, the legislation will likely have the opposite effect.

In particular, there are currently long delays at both organizations and it is not apparent how merging the two will shorten the delays. Compounding these current problems, the proposed legislation will increase the volume of complaints by forcing similar individual grievances to be filed separately instead of being combined in policy grievances. Without considerable investment in this new body, the PSLREB will inevitably be less efficient than the two existing entities under the current legislation, resulting in longer wait times to dispose of the various grievances and complaints within the PSLREB's jurisdiction.

Human Rights

The proposed legislation strips the Canadian Human Rights Tribunal (CHRT) of any jurisdiction in relation to allegations of violations of the Canadian Human Rights Act (CHRA) in the workplace for federal public service workers granting exclusive jurisdiction to the PSLREB. Federal public service employees will continue to be able to bring allegations of discrimination under ss. 7, 8, 10, or 14 of CHRA to adjudication, but only to the PSRLEB. Furthermore, the Canadian Human Rights Commission (CHRC) will no longer be able to deal with complaints of discrimination or intervene in Board proceedings and make submissions on the interpretation of the CHRA.

In addition, the Institute is very concerned by a restriction in remedies available to the PSLREB. Under the present federal Human Rights scheme, a finding of discrimination against an employee may attract a direction that the employer cease the discriminatory practice and take measures, in consultation with the CHRC, to redress the practice or prevent it from occurring in similar situations in the future.[9] This power is the only power of the CHRT, in terms of remedies, that is not provided to the PSLREB in Bill C-4.

Changes to the Grievance Process

For all grievances, including those related to human rights, the proposed legislation will extend the discretion to dismiss grievances on the basis that they are considered "trivial, frivolous, vexatious or made in bad faith" to the employer. Traditionally this power is one granted to independent bodies like the CHRT or the PSLRB. It is unprecedented for the employer to have the ability to unilaterally dismiss cases before they are heard. This may well lead to a more cavalier approach to dealing with grievances by employers and a corresponding increase in the number of grievances referred to the new Board, which is problematic for the reasons discussed above.

CONCLUSION

Bill C-4 erodes the associational rights of public servants to fair collective bargaining and their individual rights to prompt, efficient and unbiased resolution of disputes arising in the workplace. The impairment of the right to strike contained in the proposed legislation renders Division 17 unconstitutional as it constitutes an unjustified violation of the freedom of association guaranteed by s. 2d of the Charter.

Divisions 17 and 18 should be separated from Bill C-4 to allow for proper consultations with stakeholders, so that a true *modernization* of labour relations in the federal public sector can occur, as opposed to proceeding with this regressive proposed legislation.

[9] *Canada Human Rights Act*, R. S. C. 1985, c. H-6, s. 53(1).