Submission to the House of Commons Standing Committee on Finance Bill C-59 *Economic Action Plan 2015, No. 1 (Division 20)*

The Professional Institute of the Public Service of Canada

L'Institut professionnel de la fonction publique du Canada

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The Professional Institute of the Public Service of Canada (the "Institute") represents 55,000 professionals across Canada's public sector, the vast majority of whom work in the federal public service. Its members are directly affected by *Economic Action Plan 2015, No. 1,* ("Bill C-59"), in particular Division 20, which grants to Treasury Board the unilateral power to establish and modify, despite the *Public Service Labour Relations Act* [PSLRA], terms and conditions of employment related to the sick leave of employees in the core public administration.

Bill C-59 grants Treasury Board the power to impose whatever sick leave terms it wants, whenever it wants, and in so doing, fundamentally upsets the balance of power in collective bargaining in favour of the employer and undermines the very process of collective bargaining. It also overrides important statutory rights in the PSLRA, such as the statutory freeze in s. 107, and overrides arbitral awards. Also of concern is the fact that the proposed legislation provides that orders made by Treasury Board under sections 254, 260 and 266 of the Bill are not subject to the *Statutory Instruments Act,* thereby avoiding review for *Charter* compliance, as would happen in the ordinary course.

Most problematically, Bill C-59 undermines the constitutionally protected right to a meaningful process of collective bargaining and also the right to strike. The Institute submits that the proposed legislation significantly impairs the right to collectively bargain and the right to strike, to the point where it constitutes a violation of the freedom of association protected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). This proposed legislation is solely about granting to the employer the power to impose its sick leave/short-term disability plan on federal public servants, in violation of its constitutional obligations.

In light of the fact that Division 20 of Bill C-59 is unconstitutional and fundamentally flawed, the Institute is not proposing specific amendments to the Division but rather that it be struck completely from Bill C-59.

1. Unfairly Stacking the Deck at the Bargaining Table

Bill C-59 effectively stacks the deck against unions at the bargaining table, by granting to the employer, Treasury Board, the power to unilaterally impose certain terms and conditions of employment. The result is a fundamentally unfair collective bargaining process skewed entirely in the employer's favour with respect to the employer's most important issue for this round of bargaining: sick leave.

Sections 254, 260 and 266-267, grant to Treasury Board – the very party that is negotiating with the bargaining agents – the power to establish terms and conditions of employment with respect to sick leave and disability. For sick leave, the content of these terms and conditions is virtually unrestricted and, subject to s. 254(2), can include, but is not limited to, the number of hours of sick leave per year, the use of sick leave credits from year to year, and what is to happen to unused sick leave credits that employees currently have banked. Indeed, there is nothing in the Bill that would preclude Treasury Board from eliminating sick leave all together and erasing all banked sick leave credits if it were to so choose. As well, pursuant to s. 256, these terms are unilaterally made part of existing collective agreements, overriding existing provisions.

Also troubling is the fact that the time period when Treasury Board can make an order imposing sick leave terms is unlimited and at its discretion (see s. 254(3)). This period can theoretically start the day after the bill receives Royal Assent or any number of years later. As well, the period can last for months or possibly years as it only ends when Treasury Board specifies the date on which the short-term disability program becomes effective, pursuant to s. 266.

Not only does the Bill give Treasury Board the power to impose whatever sick leave terms it wants, whenever it wants, it also allows Treasury Board to decide which bargaining units will be affected (see s. 254(1) and s. 260(2)). This power will permit Treasury Board to potentially target particular bargaining agents or units that are attempting to engage in meaningful bargaining over this issue.

This federal government has previously passed legislation, such as the *Expenditure Restraint Act,* that unilaterally imposes terms and conditions of employment on federal public servants. In the Institute's view, this type of legislation always fundamentally undermines collective bargaining and is unconstitutional. Bill C-59, like previous legislation that interferes with collective bargaining, is a troubling continuation of this trend. However, in some ways it is also unprecedented as it grants to Treasury Board – the party at the bargaining table – the power to impose terms and conditions of employment as and when it see fits. As well, because the terms and conditions of employment imposed by Treasury Board pursuant to s. 254 override existing terms in collective agreements (s. 256), Bill C-59 allows Treasury Board to erase, with the stroke of a pen, hard-fought gains made by bargaining agents at the table. While in theory, it may be possible to bargain sick leave provisions at some distant time in the future, the damage to the accrued rights of public servants will be immediate and permanent if this legislation is sanctioned, as the sick leave provisions will have been gutted and the banked sick leave credits erased.

Given that Bill C-59 fundamentally upsets the balance of power in collective bargaining and undermines the very process of collective bargaining, it is impossible for the bargaining agents and their members to have any confidence in such an unfair process.

While Bill C-59 is limited to terms and conditions of employment related to sick leave and disability, it sets a dangerous precedent for future bargaining and will make it easier for future governments to grant similar powers to federal government employers whenever they do not want to engage in meaningful bargaining on important issues.

2. Overriding Important Statutory Rights and Arbitral Awards

Bill C-59 overrides important statutory rights in the PSLRA that are designed to protect workers. Specifically, s. 257, s. 262(1)(b) and s. 268(1)(b) provide that s. 107 of the PSLRA, the statutory freeze provision, does not apply with respect to sick leave and disability terms and conditions that are imposed pursuant to Bill C-59.

However, the employer's duty, under s. 107, to observe terms and conditions of employment after a notice to collectively bargain has been given, is an important one for workers. Indeed the Supreme Court of Canada has recognized that the "true function" of a statutory freeze is

to "foster the exercise of the right of association,"[1] by circumscribing the employer's power to change terms and conditions in order to ensure that the parties can bargain a new collective agreement in good faith. Thus, Bill C-59 also seriously undermines free and fair collective bargaining by overriding the statutory freeze protection contained in the PSLRA.

Similarly, s. 258, s. 262(1)(a) s. 268(1)(a) allow Treasury Board to override any provisions of arbitral awards that may be made pursuant to the PSLRA, if those provisions are inconsistent with any sick leave or disability provisions imposed under Bill C-59.

Given that pursuant to s. 254(3), s. 266 and s. 253(1), the time period during which Treasury Board can impose terms and conditions may run for years, followed by a four year "application period", this overriding of statutory rights and arbitral awards may in practice continue for several bargaining rounds.

3. Avoiding Constitutional Review

Also of concern is the fact that, as a result of s. 273 of Bill C-59, any orders made by Treasury Board under sections 254, 260 and 266, regarding sick leave and disability, are not subject to the *Statutory Instruments Act.*

Notably, s. 3(2)(c) of the *Statutory Instruments Act* provides that proposed regulations are to be examined by the Clerk of the Privy Council and the Deputy Minister of Justice to ensure that the regulation "does not trespass on existing rights and freedoms" and is not, in any case, inconsistent with the purposes and provisions of the…*Charter."*

By excluding these Treasury Board orders from the application of the *Statutory Instruments Act,* Bill C-59 effectively ensures that these orders can avoid any scrutiny whatsoever with respect to *Charter* compliance. In light of the fact that the Supreme Court of Canada has within the past 6 months released a new trilogy of labour cases - *Saskatchewan Federation of Labour v. Saskatchewan,*[2] *Mounted Police Association of Ontario v. Canada,*[3] and *Meredith v. Canada*[4] – addressing the freedom of association under s. 2(d) of the *Charter,* this avoidance of any form of *Charter* review can only be described as an affront to the rule of law.

4. Violating the Constitutional Right to a Meaningful Bargaining Process

Not only does Bill C-59 avoid *Charter s*crutiny for any orders made by Treasury Board under sections 254, 260 and 266, the Institute submits that the Bill itself is unconstitutional. In particular, Bill C-59 undermines the constitutionally protected right in s. 2(*d*) of the *Charter* to a meaningful process of collective bargaining.

The Supreme Court of Canada has recognized that s. 2(*d*) protects the right of employees to engage in a meaningful process of collective bargaining. Legislation which amounts to a substantial interference with that right violates s. 2(*d*) of the *Charter.* Recently, in the *MPAO*

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[1] *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.,* [2014] 2 S.C.R. 323 at para. 36.
[2] *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4 [*SFL*].
[3] *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 [*MPAO*].
[4] *Meredith v. Canada (Attorney General),* 2015 SCC 2.

case, the Supreme Court of Canada discussed what meaningful collective bargaining entails and what types of government action constitute a substantial interference with that right:

> The right to a meaningful process of collective bargaining is…a necessary element of the right to collectively pursue workplace goals in a meaningful way…Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . . " (para. 84). **A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2 (d).**
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> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. **Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence**.[5]

As described above, by granting to Treasury Board, the employer, the power to impose whatever sick leave and disability terms and conditions that it wants to, whenever and on whomever, Bill C-59 fundamentally upsets the balance of power in collective bargaining, reduces employees' negotiating power, and denies employees any control or influence over the bargaining process with respect to the central issue of sick leave and disability coverage in the current round of bargaining, thereby substantially interfering with a meaningful process of collective bargaining.

Similarly, by effectively removing sick leave as a matter that can be bargained over, Bill C-59 also restricts the subject matter that can be discussed at bargaining and allows Treasury Board to unilaterally impose arbitrary outcomes. This too constitutes substantial interference with a meaningful process of collective bargaining.

5. Violating the Constitutional Right to Strike

Along with violating the right to meaningful collective bargaining, Bill C-59 also violates the constitutionally protected right to strike in s. 2(*d*) of the *Charter.*

In its recent decision in the *SFL,* the Supreme Court held that the right to strike is an essential and indispensable part of a meaningful collective bargaining process in our system of labour relations and that where strike action is limited in a way that substantially interferes with a meaningful process of bargaining, it violates s. 2(*d*).[6] In particular, the Court noted:

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[5] *MPAO, supra* at paras. 71-72 (emphasis added).

[6] *SFL, supra* at para. 2-3, 25.

> The ability to strike...allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.[7]

For the current round of bargaining, the Government has made sick leave/short-term disability its central issue at the bargaining table. It is an issue over which public servants might very well be willing to strike if an acceptable agreement cannot be reached. With Bill C-59, Treasury Board now has the unilateral right to take this issue off the table and to impose terms in collective agreements. True and meaningful collective bargaining over this issue is no longer possible given the imbalance of power. Despite the fact that s. 271 of Bill C-59 states that nothing in this Division affects the right to strike, in practice, as soon as Treasury Board exercises its authority under s. 254 to make an order and impose sick leave terms and conditions of employment on a particular bargaining unit, the right of that bargaining unit to strike over that issue will be eliminated. This is a clear violation of the right to strike under s. 2(*d*) of the *Charter.*

6. The Government's Proposal Is Contrary to the Interests of the Public and Public Servants

While the Government has asserted that its sick leave/short term disability proposal is in the public interest and will result in savings, this assertion is not supported by evidence. In fact, the $900 million dollars of supposed savings that the Government has reported in the 2015 Budget is, to the best of the Institute's knowledge, really just about getting the unfunded liability of banked sick days off its books. There is no evidence that all or even most of these banked days would have ever been used. To the extent that they would have been used, it would have been spread out over many, many years. As such, these "savings" are in many ways an artificial accounting exercise. As well, the cost of paying a private insurer to operate and run a new short-term disability program has never been publicly provided. Without this information, it is impossible to know how much, if any money, the government will actually be saving in the next five to ten years.

At the same time, the government's proposed sick leave/short-term disability plan is bad for public servants. It will result in a significant drop in the number of sick leave days and the loss of banked sick leave credits. In many cases, public servants will have to either take unpaid sick days or go to work while ill, which is neither in their interest nor the public's interest. It is unfortunate that the Government's supposedly balanced budget has been made on the backs of its employees who fall ill in the future.

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[7] *Ibid.* at para. 54.