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ASSOCIATION OF JUSTICE COUNSEL
ASSOCIATION DES JURISTES DE JUSTICE

Bill C-4 - Economic Action Plan 2013 Act no. 2 – Part 3, Division 5 (*Canada Labour Code*) and Part 3, Divisions 17 and 18 (*Public Service Labour Relations Act)*

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PREFACE

The Association of Justice Counsel (“AJC”) is the sole bargaining agent for approximately 2,700 lawyers employed by the government of Canada, who work for the Department of Justice, the Public Prosecution Service of Canada, and provide in-house legal services to various federal agencies, tribunals and courts across the country, including but not limited to Veterans’ Affairs Canada, the Office of the Integrity Commissioner, Elections Canada, and Canadian Human Rights Commission.

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I. INTRODUCTION

The Association of Justice Counsel ("AJC") has considered the proposals in Bill C-4 (the Bill) and is pleased to offer its comments.

On balance, the AJC does not support the manner in which sweeping amendments to the *Public Service Labour Relations Act*[1]*, Public Service Employment Act*[2] *and Canada Labour Code* [3] have been introduced through a budget bill.[4]

By virtue of introducing these changes under the umbrella of a budget bill, the government has effectively sidestepped the much-needed consultation process with stakeholders. The scope of this Bill, combined with the very short time span, is unduly pressuring elected officials to make uninformed decisions without the benefit of a solid understanding and healthy discussion and debate. We need to look at the risks at play, both in terms of the overall increase in the tangible and intangible cost to Canadians and dare we say, the heavy toll on the public servants' health and safety, and their constitutionally-protected right to collectively bargain and freedom to associate.[5]

In addition to the above, the AJC does not support the proposed changes to the *Public Service Labour Relations Act* and the *Canada Labour Code*. If the government is serious about its claims to align itself with the private sector, and streamlining processes, something that the AJC and other bargaining agents in fact support as it relates to labour-management processes, then, any proposed bill will require meaningful consultation with bargaining agents at a minimum. One would be surprised to know how much bargaining agents can contribute in the form of knowledge and

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[1] S.C. 2003, c. 22, s. 2 or http://laws-lois.justice.gc.ca/PDF/P-33.3.pdf
[2] S.C. 2003, c. 22., ss. 12, 13 or http://lois-laws.justice.gc.ca/eng/acts/P-33.01/page-1.html
[3] R.S.C., 1985, c. L-2 or http://laws-lois.justice.gc.ca/eng/acts/L-2/page-1.html
[4] *See also* the Canadian Bar Association's Labour and Employment Section Submission dated November 18, 2013 to the National Finance, and the Social Affairs, Science and Technology Committees of the Senate of Canada, and to the National Finance, and the Human Resources, Skills and Social Development Committees of the House of Commons at http://www.cba.org/CBA/submissions/pdf/13-47-eng.pdf .
[5] *Health Services & Support Facilities Subsector Bargaining Assn v. British Columbia*, [2007] 2 S.C.R. 391 or http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/2366/index.do .

expertise and how with proper consultation, employer-driven initiatives can be successful[6].

The *Values and Ethics Code for the Public Sector*[7], which was prepared in consultation with public servants, public sector organizations and bargaining agents, requires that public servants maintain respect for democracy, respect for people, act with integrity, use resources responsibly and demonstrate professional excellence.

It is therefore in the ongoing promotion of these values in addition to the government's declared commitment to open government that the AJC offers its comments and requests that Part 3, Division 5, *Canada Labour Code* amendments and Part 3, Divisions 17 and 18, *Public Service Labour Relations Act* be rejected and consequently removed from the Bill's umbrella.

II. PRELIMINARY COMMENTS

Before we analyse the Bill itself, the AJC wishes to address two points that appear in the introduction of the Bill. First, Division 17 of Part 3 is said to "modernize the collective bargaining and recourse systems provided by the *Public Service Labour Relations Act* regime."

The proposed changes outlined in Division 17 are also said to "streamline the recourse process set out for grievances and complaints".

This Bill as proposed is neither a form of modernization nor a form of streamlining. In fact, the public service labour relations and employment provisions, are a step in the wrong direction. If passed with the proposed overhaul to the labour relations scheme, the Bill will have the effect of:

- watering down the bargaining agents' and their members' constitutional right to collectively bargain, and
- interfering with the bargaining agents and their members' right to self-determination in terms of the options they choose to exert influence on the employer in the course of the collective bargaining process.[8]

As for the government's contention that the changes will streamline processes, we will show how the proposed changes to the labour relations framework will actually have the

[6] Examples of successful labour-management consultations have led to the development of the Public Service Code of Values and Ethics (2012) and the Disability Management Initiative (2012) that led to the launching of employee and employer resources and training in the area of accommodation and return to work programs. See http://www.tbs-sct.gc.ca/hrh/dmi-igi/wds-mst/disability-incapacite02-eng.asp.

[7] See http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049&section=text.

[8] Under section 186(1) of the *PSLRA,* the employer is prohibited from interfering "with the administration of an employee organization or the representation of employees by an employee organization."

reverse effect, resulting in additional costs, multiple processes across departments and an increased number in court challenges.

There are a lot of unknowns in this Bill and members of Parliament are duty-bound to ensure that they understand the Bill in its entirety along with its implications. What is certain is that no formal impartial risk assessment of the potential fallout of this Bill has been shared with the public.[9] What is certain is that bargaining agents are taking this legislation as a direct affront to workers' rights. What is certain is that this legislation will most certainly not result in less labour unrest. What is also known is that the public and parliamentarians will only know how the Minister will exercise his discretion in unilaterally determining what constitutes an essential service, after the Bill is passed. If this Bill is passed as proposed, the government is taking a real gamble at the expense of all Canadians in the hopes that public servants, including professionals, will not take a firm stance against their employer by instituting job action if pushed to the limit. Certainly, with all the public attacks and criticisms against public servants and bargaining agents lately and the lack of any meaningful consultation on important employment-related issues, the limit is not very far as labour relations are admittedly at an all-time low, filled with rhetoric, disrespect and exclusionary tactics that lead to the elimination of consultation altogether.

Is this Bill really a gamble worth taking? We just finished witnessing Canada's very first legal strike by some 1500 provincial government lawyers in the province of Quebec in 2011[10], who were forced by the Charest government to strike as a way to avoid binding arbitration. That strike lasted 2 weeks until back-to-work legislation was passed.

We also just witnessed foreign-service lawyers and other professionals engage in legal job action this year in support of their requests for fair and equal treatment with other public service employees who do similar work. Members of the Professional Association of Foreign Service Officers were without a contract for two years after their collective agreement had expired.

As you can see from these examples, being forced to strike has no place in the modernization of labour relations when interest arbitration remains a viable option and most often times, the most efficient and streamlined approach to conflict resolution. What is being proposed in our view is a solution looking for a serious problem at the expense of Canadians and public service employees.

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[9] Prior to the Conservative government abolishing the Law Commission of Canada in 2006, there was an independent and impartial review of proposed draft legislation enabling parliamentarians to make informed decisions. Despite the abolition of this commission and the Royal Law Reform Commission before that, there was at least the benefit of public consultations through a mechanism under s. 252 the *PSLRA*. For a list of all participants to the *Review of Public Service Modernization Act, 2003,* see http://www.tbs-sct.gc.ca/reports-rapports/psma-lmfp/psma-lmfp16-eng.asp#a5.1.

[10] See http://www.cbc.ca/news/canada/montreal/quebec-government-lawyers-strike-1.1032068 .

III. BILL C-4: A SUBSTANTIVE REVIEW AND LIST OF OTHER CONCERNS

We have divided our submission in order to address the government's claim that:

a. these changes are intended to modernize the collective bargaining and recourse systems;
b. these changes will streamline the recourse process for grievances and complaints.

We will then address the AJC's serious concerns relating to health and safety in the workplace.

Finally, we will provide you with a cursory review in table format of the public service labour relations legislation across the country in terms of their practices in the area of a) essential service and b) Chairperson independence.

A. What Modernization?

What modernization? This is about weakening unions at all cost.

The International Labour Organization's Declaration on Fundamental Principles and Rights at Work has long recognized the importance of governments' role in providing for an enabling and conducive environment in labour relations. As the organisation clearly states in its fundamental principles, "[a] legislative framework providing the necessary protections and guarantees, institutions to facilitate collective bargaining and address possible conflicts, efficient labour administrations and, very importantly, strong and effective workers' and employers' organizations, are the main elements of such an environment."[11] [Emphasis added]

Unfortunately, the Bill contravenes several of our international obligations by severely curtailing the public service's right to collectively bargain and weakening bargaining agents, whose remedies are already the subject of several legislative limitations under the current scheme.[12]

[11] See Declaration of Principles at http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm.

[12] Contrary to the private sector, certain terms and conditions of employment are not negotiable and subject to legislation. An example includes federal public service pensions which are governed by the *Public Service Superannuation Act,* R.S.C.,1985, c. P-36 or at http://laws-lois.justice.gc.ca/eng/acts/P-36/ .

a) Minister's Unilateral Power to Determine Essential Service

Under the **current legislative** scheme, the designation of **essential service** is based on consultations carried out in a climate of collaboration where the main goal of both the bargaining agents and the Employer is to ensure the delivery of essential services necessary to maintain the safety and security of the public. According to section 122 of the *PSLRA*, " […] the employer and the bargaining agent must make every reasonable effort to enter into an essential services agreement[…]" In the unlikely event that both parties were to disagree, the **Public Service Labour Relations Board would be called upon to act as an independent third party and arbitrate the dispute.**

If this Bill becomes law, the government will have the exclusive right to determine whether any service, facility or activity of the Government of Canada is considered an **essential service** at any time with little to no constraint.[13] By doing so, the employer effectively gains the power to weaken the effectiveness of bargaining agents, to change the rules on a whim in order to limit possible strike action. Such changes would leave the door open to Ministerial abuses of authority in order to unilaterally determine what constitutes an essential service. As you are all aware, Mr. Clement has already refused to provide details on what would constitute an essential service and has indicated that Canadians would be informed after the Bill is passed.

b) Eliminating Unionized Workers' Right to Choose to Strike

In addition, if the Bill becomes law, unions and their members' right to collectively select how to bargain will be removed.[14] Under the new legislative scheme, if 79% or less of the positions within a bargaining unit is considered essential, arbitration will not be available unless both parties agree. In other words, if the Bill receives royal assent, binding arbitration, will only be mandatory for bargaining units in which 80 % or more of their membership have been designated as an essential service. Bargaining agents and their members will have therefore lost their right to self-determination with respect to their preferred bargaining options, i.e. arbitration or conciliation-strike.

This therefore means that many unionized members will be forced to take job action or strike even though their **preferred course involves dialogue and the arbitration process.**

[13] See sections 294, 304 and 338 of Bill C-4.
[14] See sections 322 of Bill C-4.

c) Compromising PSLRB Independence, Due Process and Impartiality

If passed, the Bill will significantly alter the binding arbitration process to the extent that such process is even available. Under the new legislation, the PSLRB's Board of arbitration would be required to take into consideration Canada's fiscal circumstances in relations to the government's stated budgetary policies.[15] As a result, through this mechanism, the government will essentially be able to dictate, or at the very least influence greatly, the outcome of the next round of collective bargaining through a budget or policies specifically designed to curb or restrict any form of reasonable settlement with public servants.

In addition, all language relating to maintaining the balance between different groups or the necessity of offering reasonable compensation or working conditions will have in practical terms, been gutted from the *PSLRA*.[16] This removal will undoubtedly have a "levelling down effect" with regards to compensation not only between the private and public sectors but between different groups within the public service.

If modernization were the true intent here, boards of arbitration would not be deprived from looking at the entire picture that drives compensation and other terms and conditions of employment in the marketplace and from assessing how much weight and importance to attribute to each of the factors being considered. Telling boards of arbitration to look at compensation issues primarily from the employer's point of view is hardly unbiased.

If passed, the Bill will eliminate the impartial compensation studies examining both the private and public sectors, currently being performed in consultation with bargaining agents and departments, including Treasury Board.[17]

If the Bill is passed, it will, in our view, also **take away the independence of the Public Service Labour Relations Board** ("PSLRB"), by letting the government use the PSLRB as a political tool. More specifically, if passed, the government will have **effectively politicized the role of the Chairperson** of the PSLRB (which stands to be renamed) by granting the Chairperson the authority to review decisions of adjudicators on request of Treasury Board[18] in order to avoid the judicial review process, a legal doctrine protected by the *Federal Courts Act*[19] which preserves access to justice and ensures no undue interference by the executive and legislative branch of government. While the

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[15] See section 307 of Bill C-4.
[16] See *PSLRA,* s 148 or http://laws-lois.justice.gc.ca/PDF/P-33.3.pdf.
[17] See *PSLRA,* s. 13 or http://laws-lois.justice.gc.ca/PDF/P-33.3.pdf which currently provides for compensation analysis studies. See also s. 295 of Bill C-4 which purports to eliminate this function.
[18] See s. 310 of Bill C-4.
[19] R.S.C., 1985, c. F-7.

proposed Bill actually states that either party can request that the Chairperson review an adjudicator's decision, this is in our view a ruse. The AJC and other bargaining agents will have no interest in accessing a process that would have the effect of eliminating their rights to judicially review an adjudicator's decision. By allowing the Chairperson to interfere with a duly-appointed adjudicator's decision, the Chairperson would be seen as interfering and influencing the outcome of cases that he or she has not effectively heard.

This would be in our view, **a flagrant abuse of the rule of law, principles of natural justice and due process.** More importantly, this would not be a question of streamlining the process but rather a question of unilaterally directing the process to suit one's agenda. As for modernization, it is clear that the way of the future is to ensure that administrative tribunals and courts, maintain their independence. To provide the opportunity to the employer to influence the outcome of a duly-appointed adjudicator's decision is to not recognize his or her expertise or authority. This is not modernization.

If it were not enough, the Bill is also seeking to penalize bargaining agents financially by having them assume 50% of the costs relating to the grievance adjudication process even in the most legitimate of cases that bargaining agents are successful in their claims of wrongful termination or collective agreement violations.[20] Currently, the PSLRB has discretion on whether costs should be imposed.[21] We see no reason why the PSLRB's current discretion to impose costs as it considers appropriate should be eliminated.

Are you absolutely sure that this isn't about stacking all the decks in the government's favour in order to ensure that Crown action is no longer challenged by bargaining agents?

B. Streamlining the Grievance Process?

Under the current *PSLRA*, bargaining agents can file a **policy grievance** with Treasury Board and request a remedy that will have retroactive effect and which will benefit the whole of the membership. Under the proposed amendments introduced by the Bill[22], the government has removed the adjudicator's authority to grant a remedy in response to a policy grievance that has retroactive effect despite the fact that the actions taken by the employer or departments may have been in violation of the collective agreement. What does this mean?

[20] See ss. 383 and 435 of Bill C-4.
[21] See *PSLRA*, s. 235.
[22] See ss. 331-334 and 381 of the Bill.

This means that the government will have overcomplicated the grievance process forcing bargaining agents to file multiple grievances. By multiple, we mean thousands.

More specifically, in order to protect the rights of its members, bargaining agents would be required to engage in **multiple parallel processes** by filing:

- a policy grievance with Treasury Board for a decision in relation to the interpretation and application of the collective agreement as only Treasury Board has this exclusive employer right under the *Financial Administration Act*[23] and

- several individual or group grievances with each of the departments involved in order to secure and ensure that an adjudicator can, in the case of a violation to the collective agreement, award a remedy with retroactive effect.

Those members who do not sign such individual or group grievances will not reap the benefits of any potential settlement or arbitral ruling arising from the employer's intentional or unintentional violation of the its contractual commitments.

This **duplicated and multiple processes will increase the costs relating to a dispute resolution.** The government now risks having to involve several public servants across departments in grievance processes that currently require no more than 2 to 5 public servants at Treasury Board.

C. Endangering the Health and Safety of Public Servants

What does the Bill mean in terms of health and safety in the workplace? If the Bill is passed:

- the concept of danger as a potential occurrence will have been removed;
- workers will not benefit from protection against activities or conditions that could cause them danger in the future;
- an inspectorate of autonomous neutral trained professional health and safety officers will be replaced with political appointees who the Minister deems to be qualified;
- health and safety will be politicized as a result of the transferred authority and powers of health and safety officers to the Minister of Labour;
- the Minister would not be a compellable witness in a civil suit related to health and safety in the workplace.[24]

[23] R.S.C., 1985, c. F-11.
[24] See Division 5 of Bill C-4.

All in all, the Minister of Labour, who likely does not have expertise as a health and safety professional, will have the final say on the health and safety of all workers within the federal public service without actually being held accountable. The Bill simply waters down the seriousness and extent of the employer's legal and moral obligations to maintain a safe and healthy work environment for federal public service workers, free from dangerous substances and circumstances, including but not limited to harassment in the workplace such as cyber-bullying. Is this a step in the modernization direction where the majority of jurisdictions have recognized harassment for years as a form of workplace violence?

Under this Bill, for example, if there is a carcinogen such as asbestos in your workplace for which long-term exposure would cause serious health problems in the future, public servants will no longer be able to exercise their current right to call in a health and safety officer or refuse unsafe work.

D. Labour Relations Practices in Other Public Sector Jurisdictions across the Country

Attached in appendix A to this submission is a summary table of the public sector practices across the country in relation to the question of who determines what an essential service is and whether the Chairperson has the authority to review the decision of an adjudicator or board of arbitration. You will note that there is very little information in terms of essential service determinations and that the majority of such determinations are concluded by mutual agreement of the parties. You will also note that we were unable to identify any jurisdiction where the Chairperson had a right to review an adjudicator or board of arbitration's decision, which serves to further support our contention that Board independence and impartiality would be compromised and influenced by political agendas.

IV. CONCLUSION AND RECOMMENDATIONS

In conclusion, the AJC does not support the inclusion of Part 3, Division 5, *Canada Labour Code* amendments and Part 3, Divisions 17 and 18, *Public Service Labour Relations Act* in the Bill. Nor does it support these sections as stand-alone items if they were to be presented in a separate bill that allowed for debate and consultation.

It is surprising to note that the government's goal in the 1960's was to introduce collective bargaining in the federal public service was to improve the workplace, including morale and service to the public. That philosophy should remain at the root of

ongoing modernization, which is to be distinguished from the deterioration of employees' rights at the increased expense to taxpayers both in the form of anticipated legal challenges, overcomplicated processes, and more strikes.

The AJC recommends the government reconsider its approach altogether and revive the previous consultations, from various professionals and stakeholders in the field, similar to the Public Service Modernization Act review process, as previously managed by the Privy Council Office in 2009.

Annex “A” – Statutory Provisions – Public Sector
Essential Services and Chairperson’s Right of Review

	Alta.	BC	Federal (PSLRA currently in force)	Man.	NB	Nfld.	NS	Ont.	PEI	Que.	Sask.[1]	Yukon	NWT	Nunavut
Does Statute Provide for Essential Services?	N/A	Yes	Yes	Yes	Yes	Yes	N/A[2]	Yes	N/A	Yes	Yes	Yes	Yes	Yes
Do the Parties Have a Right to Negotiate Essential Services?	N/A	Yes	Yes	Yes	Yes	Yes	N/A	Yes	N/A[3]	Yes	No[4]	Yes	Yes	Yes
Does the Chairperson Have a Right to Review the Adjudication Decisions?	No	No	No	No	No	No	No	No	No	No	No	No	No	No

[1] This table reflects the changes brought forth by the *Saskatchewan Employment Act*, which has passed the 3rd reading in the house (not yet proclaimed).
[2] Although there are no legislative provisions providing for essential services, police officers and firefighters are prohibited from going on strike. Their only recourse is interest-based arbitration.
[3] Under the Prince Edward Island *Labour Act*, there are no essential services agreement per say. However, several categories of services, such as police officers and firefighters, are prohibited from striking.
[4] The *Public Service Essential Services Act* is now before the Supreme Court of Canada.

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