Submission by the Public Service Alliance of Canada to the Senate Standing Committee on National Finance

Response to Bill C-62, An Act to Amend the Federal Public Sector Labour Relations Act and other Acts

November 8, 2018
The Public Service Alliance of Canada represents more than 180,000 workers in every province and territory in Canada and in some locations outside Canada. Our members work for federal government departments and agencies, Crown corporations, universities, casinos, community services agencies, Indigenous communities, airports, and the security sector among others.

Bill C-62, An Act to Amend the Federal Public Sector Labour Relations Act and other Acts, finally restores some of the balance to collective bargaining in the federal public service that was lost by the passage of the previous government’s Bills C-4, A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures (Economic Action Plan 2013 Act, No. 2) and C-59, An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures (Economic Action Plan 2015 Act, No. 1).

Bill C-59 continues to violate the right to meaningful collective bargaining

Bill C-59, Division 20 took away the collective bargaining rights of federal public service workers by giving the government the unilateral right to amend the sick leave provisions of their collective agreements at any time. It is not free collective bargaining when the employer has the legal power to impose a predetermined outcome. Bill C-62 will reverse that power.

At the time Bill C-59 was introduced and became law, the government of the day started talking about “fiscal responsibility” in relation to the sick leave provisions in federal public service collective agreements. Starting in 2012-13, the Government of Canada had reviewed its approach for the evaluation accounting and reporting of accumulated sick leave entitlements. Before then, the Government of Canada recognized sick leave benefit expenses when they were used by employees and no liability for accumulated sick leave benefits was recorded in the condensed consolidated financial statements as it was not considered significant.

The Parliamentary Budget Officer subsequently demonstrated that the government calculations were inflating sick leave usage of federal public service employees.

The PBO also concluded that federal public service employees do not take more sick days than workers in the private sector. Furthermore, and contrary to some mistaken beliefs, accumulated unused sick leave is not now, nor has it ever been, paid out when employees leave the federal public service for any reason, including retirement.

PSAC is aware of some of the shortcomings of the current sick leave regime. However, simply removing sick leave provisions from the collective agreements and replacing them unilaterally is not the answer. Nor is it constructive to level accusations of sick
leave fraud against federal public service employees who have demonstrated their dedication to providing services to Canadians.

Employees are more effective, happier and healthier when they know they have sick leave protection. Our union has been, and continues to be, prepared to discuss options to ensure that the health of all our members in the federal public service is protected.

We believe the government should be focusing on promoting healthier workplaces and ensuring workers who are sick get the help they need when they need it so that they can continue to deliver quality public services to Canadians. To that end, in our last collective agreements with Treasury Board, we negotiated a memorandum of agreement to establish a task force to develop recommendations on measures to improve employee wellness and reintegration into the workplace of employees who have been on sick leave.

In 2015, PSAC negotiated the establishment of a joint mental health task force. Made up of an equal number of union and employer representatives, the task force has a long-term focus of improving mental health in the workplace. Since its inception, the taskforce has issued three reports leading to the creation of the Centre of Expertise on Mental Health in the Workplace co-governed by a Treasury Board and a PSAC representative.

Finally, we strongly emphasize that any discussion and improvements to employees’ sick leave system must be the subject of negotiations and agreed to by both parties.

**Bill C-4 violates our members’ right to strike and right to collectively bargain under the Canadian Charter of Rights and Freedoms**

C-62 will restore rights taken away through the changes that were made by Division 17 of Bill C-4 to the Public Service Labour Relations Act that placed fundamental restrictions on our members’ collective bargaining rights such as those affecting the designation of essential services.

The Supreme Court has confirmed that the right to collective bargaining is a protected right under the Canadian Charter of Rights and Freedoms.

Subsection 2(d) of the Charter guarantees the right of unions and employees to act in common to reach shared goals related to workplace issues and terms of employment. The freedom of association is also guaranteed by the Canadian Bill of Rights.

In 2007, the Supreme Court of Canada ruled that the freedom of association includes the right to collectively bargain. Therefore, subsection 2(d) of the Charter constrains the exercise of legislative powers that seek to restrain the scope of collective bargaining. Where legislative measures or government conduct substantially interfere

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with collective bargaining by restricting the ability of employees to engage in a process of good faith negotiations in respect of important terms and conditions of employment, there is a violation of the freedom of association.

In 2015, the Supreme Court of Canada ruled that the right to strike is protected by subsection 2(d) of the *Charter*. The Court held that the right to strike is an essential part of a meaningful collective bargaining process in the Canadian system of labour relations.

Without the ability to participate in collective work stoppages, the collective bargaining process lacks balance. Courts have long recognized the deep inequalities that structure the relationship between employers and workers, and the vulnerability of workers in this context. It is the ability to strike that enables employees to negotiate with the employer with approximate equality, as articulated by the Supreme Court in *Saskatchewan Federation of Labour*.

The Court held that numerous provisions of the Saskatchewan legislation violated the right to strike by giving the employer the unilateral authority to determine how essential services were maintained in a work stoppage, providing no adequate mechanism for review and providing no dispute mechanism to resolve impasse in bargaining, among other factors.

Parties must be free to negotiate essential services agreements and have recourse before the Federal Public Service Labour Relations and Employment Board (FPSLREB) at impasse.

The repeal of Division 17 of C-4 will result in the return to negotiated essential services agreements and the former regime under the PSLRA.

PSAC continues to work with Treasury Board on the basis of an agreement notwithstanding Bill C-4 to negotiate essential services agreements. The levels of essential services designations have held demonstrably steady over the years and we have been able to build and adapt on past agreements.

Where there has been disagreement, PSAC and Treasury Board have argued their case before the FPSLREB, or its predecessor, and received clarity from adjudicators. These decisions have aided us going forward in negotiating new essential services agreements.

**Summary**

Bills C-4 (Division 17) and C-59 (Division 20), respectively, violated our members’ *Charter* rights of freedom of association and the right to bargain collectively by:

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3 *Public Service Alliance of Canada v Treasury Board*, 2011 PSLRB 130.
• Denying the right of employees to good faith bargaining by giving the employer the unilateral authority to establish all terms and conditions related to sick leave, including establishing a short-term disability program and modifying the existing long-term disability program;
• Allowing the Treasury Board to nullify unilaterally the terms and conditions in existing collective agreements; and
• Giving the employer the authority to override many provisions of the Public Service Labour Relations Act (PSLRA), including the statutory freeze provisions that maintain the status quo while the parties are engaged in collective bargaining.

We welcome the repeal of these unconstitutional provisions.

When PSAC appeared before the House of Commons committee tasked with reviewing Bill C-62, we asked that the Bill be amended. These amendments are consistent with a decision made by the Supreme Court of Canada three years ago. We recommended that Bill C-62 be amended to remove clauses 9 121(2)(a), 123(6)(a) and 127(6)(a).

All three read as follows:

“(a) without regard to the availability of other persons to provide the essential service during a strike;”.

The Supreme Court of Canada’s January 30, 2015 decision4 directly affects the wording of the Public Sector Labour Relations Act (PSLRA) that would be restored by Bill C-62.

Saskatchewan’s The Public Service Essential Services Act (PSESA) contained identical language that allowed the government to avoid using management or non-union staff to provide essential services during a strike. The Court ruled the PSESA was unconstitutional as it violated employees’ s.2 rights under the Canadian Charter of Rights and Freedoms.

Bill C-62 will return the Federal Public Sector Labour Relations Act to its original state before Bill C-4 was enacted, restoring the rights that were lost. It is so important to do so that we are not pressing for amendments to the C-62 at this stage in the process.

The PSLRA is not perfect and is due for review every five years. The current government is on record in support of fair and balanced labour laws that respect due process and are developed through real consultation, and to fostering a more harmonious and collaborative approach to labour relations; built on trust and mutual respect.

With the passage of Bill C-62, PSAC looks forward to meaningful consultation with the government going forward to improve the Act which has not been reviewed for many years. At that time, we will have an opportunity to propose these amendments.

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Constitutional challenges remain before the courts

PSAC filed two constitutional challenges to the two bills impacting our members’ fundamental bargaining rights, one challenging C-4, Division 17 in March 2014 and another challenging C-59, Division 20 in June 2015.

PSAC and other federal bargaining agents also filed a motion for injunction on August 10, 2015 that would prevent the government from using its powers under C-59’s Division 20 until after the constitutional challenge is heard on its merits.

That motion on the original injunction was scheduled to be heard in the fall of 2015 and then was pushed to March 2016 in order to give the new government an opportunity to revise the previous government’s position and provide instructions to counsel.

The challenge to Bill C-4 was scheduled to be heard before the Ontario Court in June 2016.

PSAC has adjourned both court proceedings pending repeal of the offending provisions that were contained in C-4, Division 17 and Division 20 of C-59.

An interim agreement was reached between the parties in July 2016 that included measures to address concerns regarding choice of dispute resolution mechanism, rules governing public interest commissions and arbitration boards, essential services designations, etc. This interim agreement continues into the current round of negotiations with Treasury Board.

PSAC is maintaining its constitutional challenges until such time as the legislation is repealed. Interim agreements do not provide certainty about the bargaining process for both parties going forward.

We urge this Committee to expedite the passage of Bill C-62. Thank you for considering our submission.