Complaint brought by the Canadian Labour Congress on behalf of the National Joint Council Bargaining Agents, Respecting the Failure of the Government of Canada to Ensure Conformity with International Labour Organization Convention 87, *Convention concerning Freedom of Association and Protection of the Right to Organise, 1947* as a result of the enactment by Canada of Bill C-4

A. NATURE OF THE COMPLAINT

1. This complaint is brought by the Canadian Labour Congress on behalf of the National Joint Council (the "NJC") Bargaining Agents (the "complainant"), an association of eighteen bargaining agents from a variety of trade unions who represent approximately 230,000 employees working for the federal government of Canada (the "government") and a number of other federal agencies (jointly the "employer"). The Canadian Labour Congress requests that this complaint be examined by the Committee on Freedom of Association.

2. This complaint concerns legislative measures taken by the Government of Canada, specifically amendments to the *Public Service Labour Relations Act* (the "PSLRA"), contained in omnibus budget implementation legislation entitled *Economic Action Plan 2013 Act, No. 2* ("Bill C-4"), as well as related transitional measures, which infringe guarantees of freedom of association and in particular Convention 87, the *Convention concerning Freedom of Association and Protection of the Right to Organise, 1947,* of the International Labour Organization ("ILO") as interpreted by the Committee on Freedom of Association (the "CFA") and the Committee of Experts on the Application of Conventions and Recommendations (the "CEACR"). Convention No. 87 was ratified by Canada in 1972.

3. It is the position of the complainant that the PSLRA, as amended by Bill C-4, undermines free collective bargaining and the right to strike in violation of Canada's obligations under Convention 87 in a number of key respects. First, the amendments to the essential service designation process, which give the government a broad power to unilaterally determine and designate which services and positions are essential without access to any independent review, have resulted in many non-essential employees being improperly designated as essential, contrary to the strict and narrow definition of essential services adopted by the ILO, and accordingly improperly denied the right to strike.

4. Second, the amendments have resulted in some other non-essential employees being denied the right to strike and forced instead to use compulsory arbitration as the dispute resolution mechanism in the event of bargaining impasse, even though they are not performing essential service work and should as a result be entitled to exercise their right to strike.

5. Third, the legislation as amended fails to provide essential service employees, who as a result of being essential are prohibited from striking, with the appropriate and necessary guarantees to compensate for the loss of the right to strike, including access to adequate, impartial and speedy arbitration proceedings. As well, it requires that they perform non-essential duties during a strike, thereby further undermining the effectiveness of any strike action by their non-essential colleagues.

6. Fourth, there are concerns with respect to both the arbitration and conciliation processes themselves. For those limited groups of employees who have access to arbitration and are truly essential, the adequacy of the arbitration process as a replacement for the right to strike is vitiated by the fact that the legislation statutorily prescribes and limits the criteria that an arbitration board may consider when making an arbitral award, thereby compromising the independence and impartiality of the arbitration process. The independence and impartiality of the public interest commission as part of the conciliation process are similarly undermined by the same statutorily prescribed limits on the criteria that the commission may consider in its report.

7. Finally, Bill C-4 was introduced and rushed through the legislature without consulting the affected unions, contrary to the CFA's often repeated stipulation that workers' organizations should be consulted with respect to the preparation and implementation of laws and regulations affecting their interests.

8. Along with Convention 87, the NJC Bargaining Agents submit that Bill C-4 is also inconsistent with other ILO Conventions. While Canada is not a signatory, the *Labour Relations (Public Service) Convention, 1978 (No. 151)* is nonetheless relevant to the present complaint and provides helpful context. In particular, article 8 of this Convention 151 states that the "settlement of disputes arising in connection with the determination of terms and conditions of employment [in the public service]

shall be sought…through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved." As noted above, the NJC Bargaining Agents have serious concerns with the independence and impartiality of both the conciliation and arbitration procedures under Bill C-4, which no longer have the confidence of all parties involved.

B. FACTS ON WHICH THE COMPLAINT IS BASED

9. Created in 1944, the National Joint Council today includes 18 public service bargaining agents, Treasury Board, and a number of "separate employers" as official members. Its official purpose is to facilitate co-development, consultation and information sharing between the government as employer and public service bargaining agents in federal public service on topics such as work force adjustment, safety and health, the bilingual bonus, and public service health plans.

10. The 18 unions and workers' associations which belong to the NJC Bargaining Agents group are as follows:

- Association of Canadian Financial Officers
- Association of Justice Counsel
- Canadian Air Traffic Control Association, CATCA Unifor, Local 5454
- Canadian Association of Professional Employees
- Canadian Federal Pilots Association
- Canadian Merchant Service Guild
- Canadian Military Colleges Faculty Association
- Federal Government Dockyard Chargehands Association
- Federal Government Dockyard Trades and Labour Council (East)
- Federal Government Dockyard Trades and Labour Council (West)
- International Brotherhood of Electrical Workers, Local 2228
- Professional Association of Foreign Service Officers
- Professional Institute of the Public Service of Canada
- Public Service Alliance of Canada
- Research Council Employees' Association
- Unifor, Local 2182
- Unifor, Local 87-M
- Union of Canadian Correctional Officers - CSN

11. Jointly, the NJC Bargaining Agents represent approximately 230,000 federal government workers, occupying diverse positions including foreign service, law,

translation, health services, computer systems, program and administrative services, correctional services, and border services to name but a few. Thus, the NJC bargaining agents represent both public servants exercising authority in the name of the state as well as many other public servants who do not exercise state authority. A complete list of the bargaining units affected by the Bill C-4 amendments to the PSLRA and represented by NJC bargaining agents can be found at Appendix A.

> Appendix A: National Joint Council Bargaining Agent Side Members and the Bargaining Units They Represent that are Impacted by Bill C-4;
>
> Public Service Labour Relations Board, *Annual Report 2013-2014,* at Appendix 1, pp. 11 to 15, ["PSLRB Annual Report"], Tab 1.

12. Employees in these bargaining units are employed by the Treasury Board of Canada Secretariat (TB) in the core federal public service, as well as at the following federal government agencies and organizations:

- Canada Revenue Agency (CRA)
- Canadian Food Inspection Agency (CFIA)
- Canadian Nuclear Safety Commission (CNSC)
- Canadian Security Intelligence Service (CSIS)
- Communications Security Establishment, DND (CSE)
- National Capital Commission (NCC)
- National Energy Board (NEB)
- National Film Board (NFB)
- National Research Council of Canada (NRCC)
- Office of the Auditor General Canada (OAGC)
- Office of the Superintendant of Financial Institutions (OSFI)
- Parks Canada Agency (PCA)
- Social Science & Humanities Research Council (SSHRC)
- Staff of the Non-Public Funds, Canadian Forces (SNPFCF)
- Statistical Survey Operations (SSO)

> PSLRB Annual Report, *supra,* Appendix 1, Tab 1.

13. Bill C-4 was introduced at first reading in the federal House of Commons on October 22, 2013. This complex omnibus budget implementation legislation was over 300 pages long and amended approximately 20 different federal statutes including the *Public Service Labour Relations Act* (PSLRA).

> Excerpts from *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40 ("Bill C-4"), Tab 2;
>
> *Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2, as amended ("PSLRA"), 2.

14. The Bill C-4 amendments to the PSLRA were neither minor nor technical but rather entailed a fundamental overhaul of the statutory labour relations regime as it applies to federal public servants, particularly with respect to the dispute resolution process in the event of bargaining impasses and the process for the designation of essential service positions. Bill C-4 also contained transitional provisions applicable to the current round of bargaining. A detailed description of the impugned provisions is provided in the next section.

15. The Bill C-4 amendments to the PSLRA were introduced in Parliament without any prior consultation with the unions or workers affected by the changes, nor with the affected administrative tribunals. This is in sharp contrast to the last major reform to federal public service legislation, the *Public Service Modernization Act*, S.C. 2003, c. 22, which saw extensive consultation over an almost three year period with the federal public service unions and other stakeholders and academics prior to the Act's introduction. Notably, in 2011, just two years prior to the introduction of Bill C-4, Parliament received the *Report of the Review of the Public Service Modernization Act, 2003*. The release of this report followed a broad consultation from stakeholders and experts over a five year period and concluded, with respect to the existing collective bargaining legislative regime, that "generally speaking the legislation adequately supports collaborative labour-management relations". At that time, there was no suggestion from the Government or the Review Team that a complete and unilateral overhaul of the federal labour relations regime was needed or

appropriate, nor were there any subsequent changes or events which warranted this type of overhaul.

> Evidence of the Standing Committee on Finance, House of Commons, Tuesday, November 26, 2013, (No 11, 2nd session, 41st Parliament) at 11:21 and 12:36, ("Standing Committee Evidence") Tab 4;
>
> *Report of the Review of the Public Service Modernization Act, 2003* (Treasury Board Secretariat, Ottawa, ON: 2011) at p. 126, Tab 5.

16. As well, the short time frame between when Bill C-4 was introduced (October 22, 2013) until when it received royal assent (December 12, 2013), made it practically impossible for the bargaining agents, or other subject matter experts, to be adequately consulted in good faith or to have sufficient time to express their views. While a handful of union representatives appeared before the Standing Committee on Finance to express concerns with the amendments to the PSLRA contained in Bill C-4, the total time allotted for their testimony was less than three hours. Even more problematically, the deadline for amendments to the Bill was at nine a.m. on the morning of the union representatives' testimony before the Committee, which only commenced at 11 a.m. In other words, the testimony of all the representatives of the bargaining agents was scheduled after the deadline to submit amendments to the Bill had passed. Thus, this process can in no way be considered adequate consultation.

> Standing Committee Evidence, *supra* at 13:21, Tab 4;
>
> Minutes of Proceedings from Standing Committee on Finance, Tuesday November 26, 2013, ("Minutes"), Tab 6.

17. Further amendments to the transitional provisions to the PSLRA amendments in Bill C-4 were included in s. 309 of *Economic Action Plan 2014 Act, No. 1* ("Bill C-31"), which received royal assent on June 19, 2014.

> Excerpts from *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20, ("Bill C-31"), Tab 7.

18. The NJC Bargaining Agents are currently in bargaining with the employer in an attempt to reach new collective agreements. Pursuant to the Bill C-4 amendments to the PSLRA, the employer has followed the new essential service designation process to unilaterally determine which services are essential and designate essential service positions. Bargaining is expected to continue for all bargaining units in the coming months. A summary of the current bargaining status of all of the affected bargaining units is included in Appendix A.

PSLRA, *supra,* ss. 119-125, Tab 3; Appendix A, *supra*.

19. On March 24, 2014, the Public Service Alliance of Canada, one of the NJC bargaining agents, filed an application in the Ontario Superior Court of Justice alleging that a number of the Bill C-4 amendments to the PSLRA are unconstitutional and violate section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")*,* and that this violation is not saved by section 1 of the *Charter.* On May 13, 2015, the Professional Institute of the Public Service of Canada, another NJC bargaining agent, also filed a separate application to challenge the constitutionality of the amendments under Canadian law.

Canadian *Charter of Rights and Freedoms*, *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, Tab 8;

PSAC Notice of Application filed March 24, 2014, Tab 9.

PIPSC Notice of Application filed May 13, 2015, Tab 10

20. On January 30, 2015, the Supreme Court of Canada released its decision in *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4. This case concerned essential service legislation affecting public service workers in the province of Saskatchewan. In a 5-2 decision, the Supreme Court of Canada recognized that the right of employees to participate in strike action for the purpose of negotiating the terms and conditions of their employment is constitutionally protected under s. 2(*d*) of the *Charter,* and that the impugned Saskatchewan legislation violated this right because it "prevents designated employees from engaging in *any* work stoppage as part of the bargaining

process." As well, the majority held that the impugned legislation was not saved under s. 1 of the Charter as a "reasonable limi[t] prescribed by law as can be demonstrably justified in a free and democratic society," since it was not minimally impairing. In particular, the Court expressed concern that the legislation gave employers the unilateral right to determine essential services with no adequate review mechanism and no meaningful dispute resolution mechanism to resolve bargaining impasses.

> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*"), Tab 11.

21. Accordingly, it is the position of the complainant that the impugned Bill C-4 amendments to the PSLRA are not only contrary to Canada's obligation under international law but also a violation of Canada's domestic law.

C. BILL C-4 MEASURES SPECIFICALLY COMPLAINED OF:

22. As noted above, the Bill C-4 amendments to the PSLRA fundamentally overhauled the statutory labour relations regime as it applies to federal public servants, particularly with respect to the process for the designation of essential service positions and the dispute resolution process in the event of bargaining impasse. The text of the specific measures complained of can be found in Tab 3.

> PSLRA, *supra,* Tab 3.

23. Sections 119-125 of the amended PSLRA set out a new process for the designation of essential services and essential service positions that allows for the employer to unilaterally determine which services are essential and to designate essential service positions at any time. Previously, under the prior version of the statute, if the employer and bargaining agent were unable to enter into an essential services agreement, either of them had the option to apply to the Public Service Labour Relations Board (now the Public Service Labour Relations and Employment Board, the "Board") to determine of which services are essential and the type, number and specific positions to be designated as such in an agreement, and so order. Indeed, there are numerous examples of

cases where the parties effectively used this process in the past to resolve disputes. The government has provided no rationale for why this model, that worked well for all parties in the past, should not continue.

PSLRA, *supra* at ss. 119-125, Tab 3;

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2, as it appeared on 11 December 2013, at s. 123, Tab 12;

See for example *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 60 (CanLII), Tab 13 and *Public Service Alliance of Canada v. Treasury Board,* 2009 PSLRB 155 (CanLII), Tab 14.

24. In the revised statute, the definition of essential services in section 119 (1) is not limited to only clear and imminent threats but broadly defines essential services as any service, facility, or activity that "is or will be necessary for the safety or security of the public or a segment of the public."

PSLRA, *supra* at s. 119, Tab 3.

25. Under sections 119 and 120 of the PSLRA, the employer has the "exclusive right to determine whether any service, facility, or activity… is essential" and the "exclusive right to designate the position in the bargaining unit that include duties that, in whole or in part, are or will be necessary" for the provision of essential services. As well, the employer can unilaterally designate positions as essential "at any time."

PSLRA, *supra* at s. 119, s. 129, Tab 3.

26. Furthermore, while section 122 requires the employer to "consult" with the bargaining agent about the designated positions during the course of a 60 day consultation period, there is no mechanism to independently review or challenge the employer's unilateral designations. As noted, this is in contrast to the previous version of the statute, pursuant to which a bargaining agent had the right to an independent review by the Board of the identification of essentials services and the type, number and specific positions to be designated as essential.

PSLRA, *supra* at s. 122, Tab 3;

Repealed PSLRA, *supra* at s. 123, Tab 12.

27. Also of concern to the complainant is the fact that, pursuant to s. 125(2), an employee who is designated essential must perform all of the duties of their position, not just those duties that are essential during a strike.

PSLRA, *supra* at s. 125, Tab 3.

28. Sections 194(1)(f) and (2) and s. 196(f) prohibit employees whose positions have been designated as essential under the statute from engaging in any form of strike action.

PSLRA, *supra* at s. 194, s. 196, Tab 3.

29. Along with essential service designations, the Bill C-4 amendments have also changed the process for dispute resolution in the event of bargaining impasse. While section 103 provides that the process for the resolution of disputes between an employer and the bargaining agent for a bargaining unit is conciliation/strike in the ordinary course, section 104 provides two exceptions. Arbitration is the dispute resolution mechanism pursuant to section 104(1), where both the employer and bargaining agent agree, and pursuant to section 104(2), where if, on the day on which notice to bargain collectively may be given, 80% or more of the positions in the bargaining unit have been designated as essential under section 120.

PSLRA, *supra* s. 103 – s. 104, Tab 3.

30. The combined effect of sections 103-104 and 119-125 is two-fold. On the one hand, non-essential workers in bargaining units with over 80% designation are denied the right to strike and forced to accept compulsory arbitration, regardless of whether or not they want to strike and/or believe they can mount an effective strike. On the other hand, in bargaining units where the level of designation is 79% or less, although the non-essential workers are allowed to strike, the essential service workers in the bargaining unit are prohibited from striking pursuant to s. 194(2) and also denied access to independent arbitration to

compensate for that prohibition. This 80% threshold for accessing arbitration is both unduly high and arbitrary. Indeed a bargaining unit's ability to mount an effective strike is severely undermined in a situation where the level of essential service designation makes impossible the meaningful exercise of the right to strike, and there is no provision for an alternative, effective and independent dispute resolution mechanism.

PSLRA, *supra* s. 103 – s. 104, s. 119-125, s. 194(2), Tab 3.

31. Furthermore, as a result of the employer's interpretation of transitional provisions in Bill C-4 as amended by Bill C-31, the situation is made even more severe for certain bargaining units. According to the employer's interpretation, pursuant to s. 338(6) of Bill C-4, as amended by Bill C-31, any bargaining unit which had previously chosen arbitration as the dispute resolution mechanism under the previous version of the statute, and accordingly did not have an essential services agreement in force on December 12, 2013, is on the conciliation/strike route for the current round of bargaining, even if over 80% of the bargaining unit is designated essential and prohibited from striking.

Bill C-4, *supra* at s. 338(6), Tab 2;

Bill C-31, *supra* at s. 309, Tab 7.

32. For the limited number of bargaining units that have access to arbitration in the event of bargaining impasse, s. 148 of the PSLRA requires an arbitration board **to give preponderance** to two factors when making an award, including "Canada's fiscal circumstances relative to its stated budgetary policies," thereby unduly interfering with the independence of the arbitration board. As well, the board is to make its decision on the basis of whether the award "represents a prudent use of public funds" and is "sufficient to allow the employer to meet its operational needs."

PSLRA, *supra* at s. 148, Tab 3.

33. Section 175 requires a Public Interest Commission ("PIC") as part of the conciliation process to consider the same preponderant factors and make its decision on the same narrow basis.

PSLRA, *supra* at s. 175, Tab 3.

34. Finally, sections 158.1 and 179 further interfere with the independence and impartiality of the arbitration and conciliation processes by giving the Chairperson of the Public Service Labour Relations and Employment Board, on his or her own initiative, the authority to direct either the arbitration board or the PIC to review its arbitral award or report if "in his or her opinion" the preponderant factors have "not been properly applied."

PSLRA, *supra* at s. 158.1 and s. 179, Tab 3.

D. THE ILO AND THE RIGHT TO FREEDOM OF ASSOCIATION

35. Convention No. 87 on the Freedom of Association and Protection of the Right to Organise was ratified by Canada in 1972. Article 3 of Convention No. 87 provides that

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), July 9, 1948, 68 UNTS 17 ("Convention No. 87") at art. 3(1), Tab 15.

36. Article 8 of Convention No. 87 provides that

> …
>
> 2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention
>
> Convention No. 87, *supra* at art. 8, Tab 15.

37. Article 10 of Convention No. 87 provides that the objective of workers' organizations is to "further and defend the interests of workers."

> Convention No. 87, *supra* at art. 10, Tab 15

38. The CFA has determined:

> The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.
>
> ILO, Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition, Geneva, 2006 ["Digest"] at para. 881, Tab 16.

39. Furthermore, the CFA has explained that all "public servants, like all other workers, without distinction whatsoever, have the right to establish and join organizations of their own choosing, without previous authorization, for the promotion and defence of their occupational interests."

> Digest, *supra* at para. 219, Tab 16.

40. This right has also been recognized by the CEACR, which has stated that "Convention No. 87 guarantees the right to organize to workers in the public service."

> ILO, *General Survey, 1994, Freedom of Association and Collective Bargaining* ("General Survey 1994"), at p. 68, para. 156, Tab 17.

41. Relying on articles 3, 8 and 10 of Convention No. 87, the CFA and CEACR have recognized that the right to strike is a " fundamental right of workers and of their organizations" and "an intrinsic corollary to the right to organize protected by Convention No. 87." As with the right to bargain collectively, the right to strike is a legitimate and essential means by which workers and their organizations defend their economic and social interests.

Digest, *supra* at paras. 520-523, Tab 16;

Case no. 2894 (Canada), 367th Report of the Committee on Freedom of Association, 2013, GB.317/INS/8, at pp. 80-81, paras. 335, 338 ('Case no. 2894"), Tab 18.

Case no. 2467 (Canada/Quebec), 344th Report of the Committee on Freedom of Association, 2007, GB.298/7/1, at pp. 109-114, paras. 461-487 (Case no. 2467), Tab 19;

General Survey 1994, *supra* at para. 151. Tab 17.

42. The right to strike was recently reaffirmed by the CEACR in 2012, which commented at that time that the "affirmation of the right to strike by the supervisory bodies lies within the broader framework of the recognition of this right at the international level, particularly in the International Covenant on Economic, Social and Cultural Rights of the United Nations (Article 8, paragraph 1(d))." Canada ratified the Covenant in 1976.

ILO, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, ILC.101/III/1B, 2012, p. 49, para. 120, ("General Survey 2012"), Tab 20.

43. Over the years, both the CFA and CEACR have recognized a number of key elements to the right to strike, including the following:

(i) the right to strike is a right which must be enjoyed by workers' organizations (trade unions, federations and confederations);

(ii) the right to strike is an essential means of defending the interests of workers through their organizations, and only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise;

(iii) the objectives of strikes must be to further and defend the economic and social interests of workers and;

(iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination.

General Survey 2012, *supra* at para. 122, Tab 20.

44. Even more recently, at the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike, held 23-25 February 2015, the Workers' and Employers' Groups, confirmed in a joint statement "the right to take industrial action by workers and

employers in support of their legitimate industrial interests." At the same meeting, the Government Group recognized that the "right to strike is linked to freedom of association" and that "without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized."

> Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), 23-25 February 2015, pp. 2, 5, ("Tripartite Meeting") Tab 21.

45. While both the CFA and CEACR have acknowledged that the right to strike can be restricted or prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community, those prohibitions should be interpreted narrowly.

> Digest, *supra* at paras. 574-576, Tab 16;
>
> Case 2894, *supra* at para. 335, Tab 18;
>
> General Survey 2012, *supra* at para. 127, Tab 20.

46. As well, for public servants, the right to strike may only be restricted or prohibited for those "exercising authority in the name of the State," since "too broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers." Examples of categories of workers exercising authority in the name of the State include higher government officials, judges, public prosecutors, police officers, prison officers, army personnel, and inspectors. Examples of categories of public service workers who are not exercising authority in the name of the state include teachers, postal workers, railway employees, and health workers, amongst others. In other words, the class of public servants "exercising authority in the name of the State" appears to be limited to only the most senior of public servants, or to those whose roles involve law enforcement or state security on some level.

> Digest, *supra* at paras. 574-575, Tab 16;
>
> General Survey 2012, *supra* at paras. 127, 129-130, Tab 20;
>
> Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), 2004 at p. 81, Tab 22.

47. Similarly, the CFA has stated that essential services should be interpreted strictly and that the right to strike should only be restricted or prohibited where the interruption of the service would result in "the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population." Economic considerations "should not be invoked as a justification for restrictions on the right to strike." The CEACR has likewise admonished States who continue to define essential services too broadly.

> Digest, *supra* at para. 576, 581-582,Tab 16;
>
> Case 2894, *supra* at para. 339, Tab 18;
>
> General Survey 2012, *supra* at paras. 131-132, Tab 20.

48. Furthermore, with respect to the determination of essential services and designation of essential service workers, the CFA has stated that both employers and workers should participate in the determination of essential services and that the determination of the same must be consistent with the principles elaborated by the CFA with respect to essential services. The CEACR has also noted that the authorities should not have "too much discretion…to unilaterally declare a service essential."

> Case no 1438 (Canada), 265th Report of the Committee on Freedom of Association, June 1989, pp. 12-13, para. 401, (Case no., 1438), Tab 23;
>
> Case no. 2654, 356th Report of the Committee on Freedom of Association, March 2010, para. 375, ("Case no. 2654"),Tab 24;
>
> General Survey 2012, *supra* at para. 132, Tab 20;
>
> ILO, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, p. 53, para. 132, Tab 25.

49. As set out above, CFA has stated that the right to strike may be limited or prohibited for public servants "exercising authority in the name of the State," defined narrowly. As well, it can be limited for those engaged in services whose interruption would endanger the life, personal safety, or health of the whole or part of the population. However, in those circumstances, the CFA has also stated that "adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action" and such limitations or

prohibitions must be offset by "adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented."

Digest, *supra* at paras. 595 -596, 600, 994, Tab 16;

Case no. 1260 (Canada), 241st Report of the Committee on Freedom of Association, November 1985, pp. 11-12, para. 150, (Case no. 1260), Tab 26;

Case no. 2401 (Canada), 338th Report of the Committee on Freedom of Association, November 2005, at p. 13, para. 601, (Case no. 2401), Tab 27;

Case no. 2383 (United Kingdom), 336 Report of the Committee on Freedom of Association, March 2005, at p. 10, para. 769 (Case no. 2383), Tab 28;

Case no. 2654, *supra* at para. 376, Tab 24;

Case no. 2467, *supra* at para. 578, Tab 19.

50. Similarly, the CEACR has explained that "workers should be afforded adequate protection so as to compensate for the restrictions imposed on their freedom of action" and that such protection should include "impartial conciliation and eventually arbitration procedures which have the confidence of the parties."

General Survey 2012, *supra* at para. 141, Tab 20.

51. The CFA has also stated that where the ability of unions to mount an effective strike is undermined as a result of the level of essential service designation, they must be "adequately compensated by unimpeded access to arbitration machinery." In this regard, the Committee has stated that a strike may be rendered ineffectual in situations where the procedure for essential service designations results in 50 per cent or more of employees being so designated, for example.

Case no. 1260, *supra* at paras. 150-152, Tab 26.

52. In addition, the CFA has stated that compulsory arbitration to end a collective labour dispute is only acceptable if it is voluntary and at the request of both parties involved in a dispute, or in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term.

Digest, *supra* at paras. 564-565, 993, Tab 16;

Case no. 2803 (Canada), 360th Report of the Committee on Freedom of Association, June 2011, at p. 5, para. 343, Tab 29;

Case no. 2983 (Canada), 370th Report of the Committee on Freedom of Association, October 2013, at p. 17, para. 284 ("Case no. 2983"), Tab 30;

Case no. 2894, *supra* at para. 340, Tab 18.

53. With respect to arbitration proceedings themselves, the CFA has further explained that in order to "gain and retain the parties' confidence, any arbitration system should be truly independent and the outcomes of arbitration should not be predetermined by legislative criteria." While financial considerations may be taken into account in the context of a public service arbitration, such considerations cannot restrict the arbitrator to such an extent that the confidence of either party in the process is lost. All members of an arbitration board should not only be strictly impartial, but should also appear to be impartial to both parties.

Digest, *supra* at paras. 569, 598 and 995, Tab 16;

Case no. 1768 (Iceland), 299th Report of the Committee on Freedom of Association, June 1995, at p. 10, para. 110 ("Case no. 1768"), Tab 31;

Case no. 2983, *supra* at para. 286, Tab 30;

Case no. 2984, *supra* at para. 341, Tab 18;

Case no. 2305 (Canada), 335th Report of the Committee on Freedom of Association, November 2004, at pp. 9-10, para. 507 ("Case No. 2305"), Tab 33.

54. The CFA has also stated that any limitation on collective bargaining by public authorities "should be preceded by consultations with the employers' and workers' organization in an effort to obtain their agreement." In this regard, Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), Paragraph 1 provides that measures should be taken to promote effective consultation and cooperation between public authorities and employers' and workers' organizations without discrimination of any kind against these organizations. Paragraph 5 of the Recommendation also provides that , such consultation should "aim at ensuring that the public authorities seek the views, advice and assistance of employers' and workers' organisations", particularly in

"the preparation and implementation of laws and regulations affecting their interests." The consultations should take place in good faith and the parties should be allotted sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise.

Case no. 2467, *supra* at para. 568, Tab 19;

Digest, *supra* at paras. 1068 and 1071, Tab 16;

Recommendation concerning Consultation and Co-operation between Public Authorities and Employers' and Workers' Organisations at the Industrial and National Levels, 1960, R113 at paras. 1 and 5, Tab 33.

E. VIOLATIONS OF ILO CONVENTIONS

55. As set out at the outset, the complainant submits that the impugned provisions of Bill C-4 amending the PSLRA undermine free collective bargaining and the right to strike and violate Convention No. 87 in a number of key respects:

1) Allowing improper essential service designations, contrary to the strict and narrow definition of essential services adopted by the ILO;

2) Denying certain federal employees the right to strike and instead forcing them to use compulsory arbitration;

3) Failing to provide certain essential federal employees with adequate guarantees to compensate for the prohibition on striking;

4) Statutorily prescribing the criteria that an arbitration board or public interest commission may consider when making an arbitral award or conciliation report, thereby undermining and calling into question the appearance of impartiality of those bodies; and

5) Failing to effectively and adequately consult with workers organizations about Bill C-4 despite the fact that the legislation significantly affected their interests and rights.

Each of these violations will be examined in turn below.

1) Improper Essential Service Designations

56. As noted, the CFA has stated that essential services should be interpreted strictly and that prohibitions on the right to strike should be limited to situations where the interruption of the service would result in "the existence of a clear and imminent threat to the life, personal safety, or health of the whole or part of the population." However, contrary to this narrow requirement, section 119(1) of the PSLRA defines essential services as any service, facility, or activity that "is or will be necessary for the safety or security of the public or a segment of the public." Thus, while the ILO definition requires the "existence of a clear and imminent threat", the complainant submits that the PSLRA allows a service to be identified as essential on the low threshold of "if it is or will be necessary" for public safety and security. In other words, even the hypothetical possibility that a service may be essential at some point in the distant future is captured by the definition, which as a result, allows services and positions that are not truly essential to be so designated.

Digest, *supra* at paras. 595-596, 600, 994, Tab 16.

57. The problems with the overly broad essential services definition are compounded by the fact that, pursuant to section 119-120 of the PSLRA, the employer has the unilateral power to determine essential services and designate positions as essential. While section 122 requires the employer to "consult" with the bargaining agent about the designated positions, there is no mechanism to independently review or to challenge the employer's unilateral designations. The complainant submits that this is contrary to the direction of the CEACR that authorities should not have sole discretion to unilaterally declare a service essential. As the Supreme Court of Canada has recently held on this same point:

> There is no evidence…that the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority. And [the] view that public employers can be relied upon to make fair decisions has the potential to sacrifice the right to a meaningful process of collective bargaining on the altar of aspirations. The history of barriers to collective bargaining over the past century represents a compelling reality check to such optimism.

SFL, supra at para. 90,Tab 11;

General Survey 2012, *supra* at para. 132, Tab 20.

58. The complainant further submits that, as a result of this new essential service designation process, which allows the employer to unilaterally designate positions essential without any independent review mechanism to challenge those designations, the employer has improperly designated a number of positions as essential in the most recent round of bargaining commencing in 2014, contrary to the ILO's strict definition of essential services, as "services whose interruption could endanger the life, personal safety, or health of the whole or part of the population."

Digest, *supra* at paras. 576, 583, Tab 16.

59. For example, the employer has designated as essential 78% of all federal government meteorologist positions in the Applied Science and Patent Examination (SP) Group. In the view of the Professional Institute of the Public Service of Canada, the SP Bargaining Agent, many of these are improper designations of positions that are not truly essential, including interns who are on a developmental work plan and whose work must be continually supervised, meteorologists who are engaged in daily public forecasting, as opposed to essential weather forecasting, such as severe weather, maritime or aviation forecasting, and meteorologists engaged in ongoing research and long-term software maintenance. Despite the fact that the bargaining agents challenged the improper designation of these positions in the context of the consultation process, the employer made almost no changes to the designations.

Email from Patrizia Campanella to Colleen Bauman dated April 23, 2015, Tab 34.

60. Another example of improper essential service designations can be seen in the Border Services Group (FB), which is composed of border guards, along with other individuals working in border services, including those involved in the collection of duties and taxes and trade compliance. Pursuant to a draft essential services agreement that was proposed by the government in 2013 and governed by the previous legislation, approximately 80% of the FB bargaining unit was designated essential but union members working at the border were only required to perform duties related to safety and security and were not required to collect duties and fees during a strike. However, the same day that the Bill C-4 changes came into effect, the bargaining agent received notification that approximately 88% of positions in the same bargaining unit were being unilaterally designated as essential by the

employer and that under the new legislation all duties were to be performed, not just those related to safety and security. Given that neither the positions nor the services they provided changed in any significant manner in the months between, the complainant submits that there is no justifiable basis for the employer to have designated so many more positions as essential. Rather, the increase in designations is a result of positions that are not essential within the meaning of the ILO's definition being designated as such.

Letters from Mr. Peter Field to Ms. Helen Berry dated March 13, 2015 and March 14, 2015, Tab 35.

61. As well, it should be noted that the employer designated hundreds of new positions that deal exclusively with monetary trade policies and had never been designated as essential previously. However, as the CFA has clearly stated, economic considerations "should not be invoked as justification for restrictions on the right to strike."

Case no. 2894, *supra* at para. 339, Tab 18.

62. As well, pursuant to s. 125(2), an employee who is designated essential must perform all of the duties of their position, not just those duties that are essential. In other words, an employee who only performs essential services duties for 10% of the time, must still perform 100% of their duties. As a result, the statute allows for non-essential services to be continued during a strike creating an incentive for the employer to sprinkle essential service duties between a number of positions resulting in a higher number of positions being designated essential overall. The complainant submits that this too is in violation of the CFA's direction that essential services should be narrowly defined and include only those positions providing services "whose interruption could endanger the life, personal safety or health of the whole or part of the population." It should be noted that the ILO definition of essential services has been adopted into domestic Canadian law, most recently in the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour.*

PSRLA, *supra* at s. 125, Tab 3;

SFL, *supra* at para. 84, Tab 11.

2) Denial of Right to Strike/Compulsory Arbitration

63. As discussed above, the CFA and CEACR have recognized that the right to strike is a "fundamental right of workers and of their organizations" and "an intrinsic corollary to the right to organize protected by Convention No. 87". The right to strike and the right of workers to take industrial action has also been reaffirmed recently at the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention

Digest, *supra* at paras. 520-523, Tab 16;

Tripartite Meeting, *supra* at pp. 2, 5, Tab 21.

64. In violation of this right, s. 104(2) of the PSLRA provides that, if on the day which notice to bargain collectively may be given, 80% or more of the positions in the bargaining unit have been designated as essential under section 120, the process for the resolution of disputes between the employer and the bargaining agent is compulsory arbitration. Accordingly, all workers in a bargaining unit so designated are prohibited from striking, even those workers who the government itself has identified as non-essential.

PSLRA, *supra* at s. 104(2), Tab 3.

65. The CFA has stated that arbitration as an alternative to striking should not be compulsory. In Case No. 2305 (Canada), involving back to work legislation in Ontario which unilaterally imposed compulsory mediation/arbitration, the CFA explained as follows:

> As regards the compulsory nature of the mediation-arbitration process, the Committee recalls once again that bodies appointed for the settlement of such disputes should be independent, that recourse to these bodies should be on a voluntary basis [Digest, op. cit., para. 858] and that recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in essential services in the strict sense of the term [Digest, op. cit., para. 860].

Case No. 2305, *supra* at para 506, Tab 32;

See also Case No. 2803 (Canada), 360th Report of the Committee on Freedom of Association (June 2011), at para. 343, Tab 36.

66. The complainant submits that s. 104(2) of the PSLRA both prohibits non-essential workers from striking and forces them instead to accept compulsory arbitration,

contrary to the CFA position. An example of the impact of s. 104(2) on the right to strike can be seen in the Border Services Group (FB), which includes both essential border guards and other essential Border Services employees, along with non-essential Border Service employees. In the current round of bargaining, which began in 2014, the Border Services (FB) Group have been unilaterally designated at 88% essential by the government and, pursuant to s. 104(2) are required to use compulsory arbitration as a dispute resolution mechanism. Even though 12% of the bargaining unit are not essential, want to exercise their right to strike, believe that they may be able to mount an effective strike, they too are prohibited from striking and forced to use compulsory arbitration in the event of bargaining impasse. Thus, the right to strike of these non-essential border service employees is clearly being violated.

67. In situations where there is a high level of essential service designation in a given bargaining unit, whether or not a bargaining unit can mount an effective strike with only a small proportion of the bargaining unit will depend upon the specific circumstances of the unit and the nature of the work performed by its members. For example, in a situation where the non-essential members of the bargaining unit perform a valued or high-profile service for the public or have the ability to cause significant delays or economic hardship, that bargaining unit may be of the view that a strike will still provide it with sufficient bargaining power to resolve the impasse, even if for example only 20% of the bargaining unit can go out. In other circumstances however, for example where the work performed by non-essential services workers in a bargaining unit is more low profile or behind the scenes or has less of a direct impact on the public, the fact that a significant portion of the bargaining unit is precluded from striking may limit the bargaining unit's bargaining power to such an extent that a strike by the remainder of the bargaining unit is completely ineffective and meaningless, and require access to some form of compensatory mechanism such as arbitration. The important point here however, that consistent with the ILO's commentary, it should be the choice of the workers in the bargaining unit whether or not to strike in such a situation. Compulsory arbitration, as set out in s. 104(2) of the PSLRA denies workers that fundamental choice.

3) Failure to Provide Essential Service Workers with Access to Impartial Arbitration Proceedings to Compensate for Prohibition on Striking

68. As set out above, while the CFA and CEACR have recognized that the right to strike can be restricted in situations of true essential services or for a narrow group of public servants exercising authority in the name of the state, they have also stated that in such circumstances adequate protection should be given to workers so affected to compensate for the loss of the right to strike.

> Digest, *supra* at paras. 595-596, 600, 994, Tab 16;
>
> Case no. 1260, *supra* at para. 150, Tab 26.

69. Specifically, in Case No. 2654, a case involving the essential service legislation in Saskatchewan referred to above, the CFA has stated:

> > The Committee recalls that, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned have confidence and can take part at every stage and in which the awards, once made, are fully and promptly implemented [see Digest, op. cit., paras 595 and 596].
>
> Case no. 2654, *supra* at para. 376, Tab 24.

70. The complainant submits that the PSLRA as amended by Bill C-4 violates this requirement to provide adequate compensatory guarantees when the right to strike is prohibited to a significant proportion of bargaining unit members. As discussed above, sections 103-104 of the PSLRA provide that arbitration is the dispute resolution mechanism only in two situations: where both the employer and bargaining agent agree or, where over 80% of the bargaining unit has been designated as essential. Thus, essential service employees in a bargaining unit where less than 80% of the unit is designated essential are both prohibited from striking and are also denied access to arbitration to compensate for that prohibition.

71. The ability of the remainder of the bargaining unit to mount an effective strike is further undermined by s. 125(2), which requires workers who are designated as essential to perform both their essential and non-essential duties during the strike.

72. The CFA has recognized that a strike may be rendered ineffective as a result of a high level of essential service designation and that in such a situation, alternative compensatory guarantees are required. In Case No. 1260 against the Government of Newfoundland and Labrador, which also involved essential services legislation, the CFA explained as follows:

> The Committee notes that the right to strike is available to public service employees in Newfoundland subject to a number of limitations concerning, in particular, employees deemed to be essential. Essential employees are defined in the principal Act as "employees whose duties consist in whole or in part of duties, the performance of which at any particular time or during any specified period of time is, or may be, necessary for the health, safety or security of the public" (section 10.1).
>
> In this connection, the Committee would, in the first place, recall that it has accepted that the right to strike may be limited or prohibited as regards public servants acting in their capacity as agents of the public authority or engaged in services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Such limitations or prohibitions should, however be offset by adequate, impartial and speedy conciliation and arbitration procedures...
>
> The problem in Newfoundland is that, although strikes can take place even in services such as health-care institutions, the strike may be rendered ineffectual as a result of the procedure for the designation of a certain number of "essential workers". In addition, recourse to arbitration may be impeded if the number so designated by the Labour Relations Board falls below 50 per cent of the employees involved. In other words, it would seem in such circumstances that the limitations placed on unions to carry out an effective strike are not adequately compensated by unimpeded access to arbitration machinery.
>
> The Committee considers that, while the method of designating essential employees is not inconsistent with the principles of freedom of association, the Government should nevertheless review the relevant provision in such a manner as to facilitate access to independent arbitration in the event of a dispute.
>
> Case no. 1260, *supra* at paras. 149-152, Tab 26.

73. Thus, as the CFA has noted, in bargaining units where even 50% of employees have been designated essential, a strike may be rendered ineffectual and require access to an alternative compensatory guarantees. Sections 103-104 of the PSLRA clearly violate this principle since the practical implication of the combined effect of these sections is that bargaining units, where up to 79% of the unit has been designated essential and prohibited from striking, thereby rendering a strike ineffectual, are denied access to adequate, impartial and speedy arbitration proceedings.

74. In the current round of bargaining, the Operational Services (SV) group, which is composed of employees responsible for the operation of federal buildings and services, including firefighters, trades workers, stores people, cooks and hospital workers, light keepers, and ships' crews has been designated at 59.3% essential. All of those essential service workers are both prohibited from striking and also denied access to arbitration, unless the employer agrees.

> Letter from Mr. Don Graham to Ms. Robyn Benson re: Notice of Designated Positions for the Operational Services (SV) Group dated January 28, 2015, Tab 37.

75. Similarly, the Veterinary Medicine ("VM") Group, which is employed by the Canadian Food Inspection Agency, has been designated at 70% essential. As with the SV group, the essential service workers in this group are prohibited from striking and not provided with access to arbitration to compensate for that limitation on their rights. While in previous rounds of bargaining the VM group under the now repealed PSLRA provisions, chose the strike route over the arbitration, their ability to mount an effective strike with the remaining non-essential portion of the bargaining unit has been undermined by the fact that pursuant to s. 125(2) of the PSLRA their "essential" colleagues are required to perform non-essential work during the strike.

Email from Patrizia Campanella to Colleen Bauman dated April 17, 2015, Tab 38.

76. In the current round of bargaining, even groups that have been designated at over 80% essential have been denied access to arbitration as a result of transitional provisions in Bill C-4. According to the employer's interpretation of these provisions, any bargaining unit which did not have an essential services agreement in force on December 12, 2013, is on the conciliation/strike route for the current round of bargaining, even if over 80% of the bargaining unit is designated essential and prohibited from striking.

Bill C-4, *supra* at s. 338(6), Tab 2, as amended by Bill C-31, *supra* at s. 309, Tab 7.

77. One such group caught by the transitional provision is the Ships Officers (SO group), which represents Captains, Engineers, and other Officers working on vessels for the Canadian Coast Guard and in non-military positions on certain vessels of the Department of National Defence. For the current round of bargaining, 96% of the bargaining unit has been designated as essential. Given the nature of the services provided by the Coast Guard, the Ships Officers group does not dispute the fact that these positions are essential. In fact, it was precisely because such a high percentage of its membership was engaged in providing essential services that the Ships Officers group had previously chosen arbitration as the dispute resolution mechanism under earlier rounds of collective bargaining. Despite this high level of essential service designation, the government has informed the SO group that they are on the conciliation/strike route currently, pursuant to the transitional provisions. As a result, in the event of bargaining impasse 96% of the group will be denied the right to strike and also denied access to any arbitration proceedings.

Letter from Mr. Peter Field to Mr. Mark Boucher re: Notice of Designated Positions for the Ships' Officers (SO) Group, January 13, 2015, Tab 39.

78. The Health Services Group (SH) was also negatively affected as a result of the transitional provisions. The SH group is made up of medical professionals employed by the federal government, including doctors, nurses, and

psychiatrists, among others. In the current round of bargaining, they have been designated at 88.6% essential by the government. Despite this high level of designation, the employer originally took the position that, as a result of the transitional provisions, this group was not on the arbitration route and, in the event of bargaining impasse, would have to strike with only 15% of the bargaining unit being allowed to go out. While the SH group recognizes that a large proportion of its work is essential, it argued that, consistent with the ILO position, where the right to strike is limited as regards public servants engaged in true essential services, such limitations or prohibitions must be offset and compensated for by "adequate, impartial and speedy conciliation and arbitration proceedings." Only recently, after extensive lobbying on the part of the Professional Institute of the Public Service of Canada, did the government agree to put the SH group on the arbitration route, pursuant to s. 104(1). Throughout the government has maintained its position that the transitional provisions apply and continue to apply to the SH group. In other words, the fact that the group is on the arbitration route now is completely a matter of the employer's discretion, leaving the SH group at the mercy of the employer's whims and preferences.

> Letter from Mr. Peter Field to Ms. Debi Daviau re: Notice of Designated Positions for the Health Services (SH) Group, January 22, 2015, Tab 40.

4) Conciliation and Arbitration Proceedings Are Not Sufficiently Independent and Impartial

79. The complainant submits that, even for those few who have access to arbitration under the PSLRA as amended, the adequacy of the arbitration process as a replacement for the right to strike is vitiated by the fact that the legislation statutorily prescribes and limits the criteria that an arbitration board may consider when making an arbitral award, thereby calling into question the independence and impartiality of the arbitration process.

80. As set out above, where conciliation and eventually arbitration is provided as a dispute resolution mechanism in order to compensate for restrictions on the right to strike, the CFA and CEACR have stated that those proceedings must have the

"confidence of the parties" and "be truly independent and the outcomes…should not be predetermined by legislative criteria." Not only must the members of the board entrusted with arbitration and conciliation function be impartial, but they must appear to be impartial to both the employers and workers concerned. As has been stated:

> The independence of arbitration is of paramount importance. It is the feature of the system in the public sector which seeks to balance the non-existence of the right to strike…Confidence in arbitration is easily destroyed so everything must be done to ensure that doubts as to independence should be assuaged.
>
> Official Bulletin on the Reports of the Committee on Freedom of Association (241st and 242nd Reports), Vol. LXVIII, 1985, Series B, No.3, at para. 156 Tab 41;
>
> ILO, Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 4th (revised) edition, Geneva, 1996, at paras. 515-553, Tab 42;
>
> General Survey 2012, *supra* at para. 141, Tab 20;
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> Digest, *supra* at paras. 569, 598, 995, Tab 16;
>
> Case no. 1768, *supra* at para. 110, Tab 31;
>
> Case no. 2983, *supra* at para. 286, Tab 30;
>
> Case no. 2984, *supra* at para. 341, Tab 18.

81. In the complainant's view, the PSLRA as amended by Bill C-4 violates this requirement for impartial and independent conciliation and arbitration proceedings. As noted**,** sections 103-104 of the PSLRA provide that arbitration is the dispute resolution mechanism where both the employer and bargaining agent agree or, where over 80% of the bargaining unit has been designated as essential, and not caught by the transitional provisions. However, for those who have access to arbitration under the statute, the independence of the arbitration proceedings is undermined by section 148 (1) of the PSLRA, which provides that in the conduct of its proceedings and the making of an arbitral award, an arbitration board must "determin[e] whether compensation levels and other terms and conditions represent a prudent use of public funds and are sufficient to allow the employer to meet its operational needs", and in so doing is to give

preponderance to two factors: “(a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians; and (b) Canada’s fiscal circumstances relative to its stated budgetary policies.”

82. The independence of the arbitration board is further undermined by s. 158.1 of the PSLRA which gives the Chairperson of the Public Service Labour Relations and Employment Board the authority on his or her own initiative to direct either the arbitration board to review its arbitral award if the Chairperson is of the view that the preponderant factors were not reasonably applied.

PSLRA, *supra* at s. 158.1, Tab 3.

83. These same concerns apply equally with respect to the independence and impartiality of the Public Interest Commission (PIC) pursuant to the conciliation process. Section 175 provides the same problematic preponderant factors are to be considered by the PIC in making its report and s. 179 gives the Chairperson of the Public Service Labour Relations and Employment Board the authority on his or her own initiative to direct either the PIC to review its report if the Chairperson is of the view that the preponderant factors were not reasonably applied.

PSLRA, *supra* at ss.175 and 179, Tab 3.

84. Thus, contrary to the ILO requirement that conciliation and arbitration proceedings must be and must appear to be truly independent and impartial and that the outcomes of arbitration should not be predetermined by legislative criteria, these provisions effectively dictate the outcome of the proceedings. In particular, the factor “Canada’s fiscal circumstances relative to its stated budgetary policies” is problematic since it creates a lopsided process skewed in favour of the government, and in practice allows the government to dictate the arbitral criteria to be applied via the government’s “stated” policy of the day as set out in the budget. Effectively, not only is the arbitration board required to give

preponderance to the government's *ability* to pay but to the government's *willingness* to pay as determined by the government itself. The complainant submits that the legislative imposition of fiscal limitations and government policy on arbitration boards and PICs compromises the independence and integrity of the arbitral and conciliation processes and fundamentally undermines the confidence of the parties in those processes.

5) Failure to Consult

85. Finally, the complainant submits that the government failed to effectively consult in good faith with any of the bargaining agents prior to the introduction of Bill C-4, and failed to provide them with sufficient time to express their views.

86. As noted, the CFA has clearly stated that any limitations on collective bargaining by public authorities should be preceded by consultations with workers organizations, particularly in situations involving new laws and regulations affecting their interests.

> Case no. 2467, *supra* at para. 568, Tab 19;
>
> Digest, *supra* at paras. 1068 and 1071, Tab 16.

87. The Bill C-4 amendments to the PSLRA had a major impact on the rights of federal public workers to bargain effectively and to strike. Despite the importance and significance of these changes, the government made these changes in a massive government omnibus budget bill as opposed to a labour bill, thereby ensuring that specialized review of the bill by labour experts would be limited. As well, the government did not consult with any of the bargaining agents representing affected employees prior to introducing the legislation.

88. Furthermore, as noted above, while a handful of union representatives appeared before the Standing Committee on Finance to express concerns with the amendments, during the course of the legislative process, this was far from effective consultation. Indeed, the total time allotted for their testimony was less

than three hours, with part of that time wasted on irrelevant questions from Committee members about performance management, two issues that are not addressed in Bill C-4 and which can also not be the subject of collective bargaining in the federal public service. Most problematically, the testimony of these union representatives before the Committee did not result in any amendments being made to the bill, no doubt in large part due to the fact that the deadline for amendments to the Bill was at nine a.m on the morning of their testimony before the Committee, which only commenced at 11 am. In other words, the testimony of all the representatives of the bargaining agents was scheduled after the deadline to submit amendments to the bill had passed. Thus, this process can in no way be considered adequate consultation.

Standing Committee Evidence, *supra* at 13:21, Tab 4;

Minutes, *supra*, Tab 6.

89. As well, Bill C-4 was rushed through Parliament by the government, which did not give unions adequate time to consider the legislation, express their views, and to be consulted. It was less than a month and a half from when the Bill was introduced until it received royal assent, this despite the fact that Bill C-4 was complex, multi-faceted budget implementation legislation that entailed amendments to over 20 statutes and was over 300 pages long.

90. Thus, the whole process was marred and undermined from the outset by the government's failure to effectively consult with those workers affected by the legislation.

6) Convention No. 151

91. Along with Convention 87, the Complaint submits that Bill C-4 is also inconsistent with *Labour Relations (Public Service) Convention, 1978 (No. 151)*. Although Canada is not a signatory to this Convention, it nonetheless provides relevant and helpful context for the present complaint. In particular, article 8 of this Convention provides as follows:

> The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.
>
> ILO, *Labour Relations (Public Service) Convention, 1978, (No. 151),* art. 8, Tab 43.

92. As noted above, the NJC Bargaining Agents have serious concerns with the independence and impartiality of both the conciliation and arbitration procedures under Bill C-4, which no longer have the confidence of all parties involved.

E. CONCLUSION

93. In conclusion, it is the complainant's position that in implementing the Bill C-4 amendments to the PSLRA, the government has violated workers' fundamental freedom of association, contrary to Canada's obligations under Convention 87. The impugned provisions outlined in this complaint taken alone and together have both the purpose and effect of undermining free collective bargaining and the right to strike in a number of key respects. The amendments to the essential service designation process, which now allow the government to unilaterally determine which services are essential and to designate which positions are essential without access to any independent review, have resulted in many non-essential employees being improperly designated as essential, contrary to the strict and narrow definition of essential services adopted by the ILO. As well, the amendments have resulted in certain federal employees being denied the right to strike and forced instead to use compulsory arbitration as the dispute resolution mechanism in the event of bargaining impasse, even though they are not performing essential service work.

94. Furthermore, the legislation as amended fails to provide employees deemed essential and prohibited from striking with the appropriate and necessary guarantees to compensate for the loss of the right to strike, including access to adequate, impartial, independent and speedy arbitration proceedings. For those

who have access to arbitration, the adequacy of the arbitration process as a replacement for the right to strike is vitiated by the fact that the legislation statutorily prescribes and limits the criteria that an arbitration board may consider when making an arbitral award, thereby calling into question the independence and impartiality of the arbitration process. The independence and impartiality of the conciliation process is similarly undermined.

95. Finally, the government failed to effectively consult in good faith with any of the bargaining agents prior to the introduction of Bill C-4, and failed to provide them with sufficient time to express their views.

96. Thus, the Bill C-4 amendments to the PSLRA violate the rights of the affected public sector workers to bargain collectively and to strike under Convention No. 87 and they are not in conformity with the promotion of collective bargaining as the means for resolving disputes regarding terms and conditions of employment.

97. Questions in respect of this complaint may be addressed to:

Peter Engelmann / Colleen Bauman
Barrister and Solicitor
Sack Goldblatt Mitchell
300-50 Metcalfe St.
Ottawa ON
Canada
K1P 5L4

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ..... day of May 2015.

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Peter Engelmann/Colleen Bauman

APPENDIX A: National Joint Council Bargaining Agent Side Members and the Bargaining Units They Represent that are Impacted by Bill C-4:

Bargaining Agent and Bargaining Units	**Current Round of Bargaining**	
	Status of Negotiations	**Dispute Resolution Mechanism**
Association of Canadian Financial Officers		
Financial Management (TB)	Expiry Date of Collective Agreement: November 6, 2014 Notice to Bargain: July 9, 2014	Conciliation
Association of Justice Counsel		
Law (TB)	Expiry Date of Collective Agreement: May 9, 2014 Notice to Bargain: January 9, 2014 Bargaining Dates: May 26, 27 and July 28, 2014	Conciliation
Canadian Air Traffic Control Association, CATCA Unifor, Local 545		
Air Traffic Control (TB)	Expiry Date of Collective Agreement: June 30, 2014 Notice to Bargain: September 29, 2014	Arbitration
Canadian Association of Professional Employees		
Economics and Social Science Services (TB)	Expiry Date of Collective Agreement: June 21, 2014 Notice to Bargain: February 24, 2014 Bargaining Dates:	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	June 11 and 14, July 22 and 23, 2014	
Translation (TB)	Expiry Date of Collective Agreement: April 18, 2014 Notice to Bargain: March 7, 2014 Bargaining Dates: June 17-19, 2014	Conciliation
Canadian Federal Pilots Association		
Aircraft Operations (TB)	Expiry Date of Collective Agreement: January 25. 2015 Notice to Bargain: September 25, 2014	Conciliation
Canadian Merchant Service Guild		
Ships' Officers (TB)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: February 4, 2014 Bargaining Dates: June 17-18, 2014	Conciliation
Canadian Military Colleges Faculty Association		
University Teaching (TB)	Expiry Date of Collective Agreement: June 30, 2014 Notice to Bargain: February 28, 2014	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Federal Government Dockyard Chargehands Association		
Ship Repair Chargehands and Production Supervisors-East (TB)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: December 5, 2013 Bargaining Dates: February 17-18, 2014	Conciliation
Federal Government Dockyard Trades and Labour Council (East)		
Ship Repair-East (TB)	Expiry Date of Collective Agreement: December 31, 2011 Notice to Bargain: September 3, 2014	Conciliation
Federal Government Dockyard Trades and Labour Council (West)		
Ship Repair-West (TB)	Expiry Date of Collective Agreement: January 30, 2015 Notice to Bargain: September 30, 2014	Conciliation
International Brotherhood of Electrical Workers, Local 2228		
Electronics (TB)	Expiry Date of Collective Agreement: August 31, 2014 Notice to Bargain: May 1, 2014	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	Bargaining Dates: July 8, 9, 10, 2014	
Professional Association of Foreign Service Officers		
Foreign Service (TB)	Expiry Date of Collective Agreement: June 30, 2014 Notice to Bargain: February 28, 2014	Conciliation
Professional Institute of the Public Service of Canada		
Administrative & Foreign Service (NFB)	Expiry Date of Collective Agreement: July 30, 2014 Notice to Bargain: March 21, 2014	Conciliation
All employees of the Employer (NEB)	Expiry Date of Collective Agreement: October 31, 2014 Notice to Bargain: October 24, 2014	Conciliation
All employees of the Employer in the Applied Science and Patent Examination Group (TB)	Expiry Date of Collective Agreement: September 30, 2014	Conciliation
All employees of the Employer in the Architecture, Engineering and Land Survey	Expiry Date of Collective Agreement: September 30, 2014	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Groups (TB)	Notice to Bargain: June 2, 2014	
All employees of the Employer who are not in another bargaining unit (OSFI)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: March 20, 2014	Conciliation
All employees, regardless of pay band, at the RL-5 to 7 levels who are not excluded from collective bargaining by law or determination of the Board (CNSC)	Expiry Date of Collective Agreement: March 31, 2014	Conciliation
Audit, Commerce and Purchasing (TB)	Expiry Date of Collective Agreement: June 21, 2014 Notice to Bargain: February 24, 2014	Conciliation
Audit, Financial and Scientific (CRA)	Expiry Date of Collective Agreement: December 21, 2014 Notice to Bargain: October 21, 2014	Conciliation
Computer Systems (TB)	Expiry Date of Collective Agreement: December 21, 2014 Notice to Bargain: August 21, 2014	Conciliation
Health Services (TB)	Expiry Date of Collective Agreement:	Arbitration pursuant to

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	September 30, 2014 Notice to Bargain: June 2, 2014	employer agreement under s. 104(1)
Informatics (CFIA)	Expiry Date of Collective Agreement: May 31, 2014 Notice to Bargain: May 28, 2014	Conciliation
Information Service (NRCC)	Expiry Date of Collective Agreement: June 20, 2014 Notice to Bargain: June 18, 2014	Conciliation
Library Science (NRCC)	Expiry Date of Collective Agreement: July 1, 2014 Notice to Bargain: June 18, 2014	Conciliation
Research (TB)	Expiry Date of Collective Agreement: September 30, 2014 Notice to Bargain: June 2, 2014	Conciliation
Research Officers & Research Council Officers (NRCC)	Expiry Date of Collective Agreement: July 19, 2014 Notice to Bargain: July 8, 2014	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Scientific & Analytical Group (CFIA)	Expiry Date of Collective Agreement: September 30, 2014 Notice to Bargain: September 23, 2014	Conciliation
Scientific and Professional Category (NFB)	Expiry Date of Collective Agreement: June 30, 2014 Notice to Bargain: March 21, 2014	Conciliation
Translation (NRCC)	Expiry Date of Collective Agreement: June 20, 2011 Notice to Bargain: June 18, 2014	Conciliation
Veterinary Medicine (CFIA)	Expiry Date of Collective Agreement: September 23, 2014 Notice to Bargain: October 1, 2014	Conciliation
Public Service Alliance of Canada		
Administration Support Category and Operation Category - CFB Valcartier (SNPFCF)	Expiry Date of Collective Agreement: June 30, 2015	
Administration Support Category and Operation Category - CFB Bagotville (SNPFCF)	Expiry Date of Collective Agreement: November 30, 2015	

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Administration Support Category and Operation Category - CFB Goose Bay (SNPFCF)	Expiry Date of Collective Agreement: June 30, 2013 Notice to Bargain: June 25, 2013	
Administration Support Category and Operation Category - CFB Petawawa (SNPFCF)	Expiry Date of Collective Agreement: April 30, 2013	
Administrative & Foreign Service (SSHRC)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: February 19, 2014	Conciliation
Administrative Support Category - CFB Gagetown (SNPFCF)	Expiry Date of Collective Agreement: February 28, 2014 Notice to Bargain: February 4, 2014	
Administrative Support Category - CFB Trenton (SNPFCF)	Expiry Date of Collective Agreement: November 30, 2013 Notice to Bargain: November 26, 2013	
All employees of the Employer (CFIA)	Expiry Date of Collective Agreement: December 31, 2014	Conciliation
All employees of the Employer (CSIS)	Expiry Date of Collective Agreement:	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	March 31, 2014	
All employees of the Employer (CSE)	Expiry Date of Collective Agreement: February 9, 2015 Notice to Bargain: October 22, 2014	Conciliation
All employees of the Employer (NCC)	Expiry Date of Collective Agreement: December 31, 2014 Notice to Bargain: October 22, 2014	Conciliation
All employees of the Employer (PCA)	Expiry Date of Collective Agreement: August 4, 2014 Notice to Bargain: July 22, 2014	Conciliation
All employees of the Employer in the Administrative Support Category (SSHRC)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: February 19, 2014	Conciliation
All employees of the Employer primarily engaged in secretarial functions, clerical functions and/or other administrative support functions involving the routine application of rules and regulations (OSFI)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: March 6, 2014	Conciliation
All Employees of the Staff of the Non-Public	Expiry Date of Collective	

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Funds, Canadian Forces, employed at CFB-Suffield (SNPFCF)	Agreement: March 31, 2016	
Audit Services Group (OAGC)	Expiry Date of Collective Agreement: September 30, 2014 Notice to Bargain: June 27, 2014	Arbitration
Border Services (TB)	Expiry Date of Collective Agreement: June 20, 2014 Notice to Bargain: April 16, 2014 Bargaining Dates: July 8, 9, 10 2014	Arbitration
Education and Library Science (TB)	Expiry Date of Collective Agreement: June 30, 2014 Notice to Bargain: February 28, 2014 Bargaining Dates: July 8, 9, 10 2014	Conciliation
Interviewers - Field (SSO)	Expiry Date of Collective Agreement: November 30, 2011	Arbitration

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	Notice to Bargain: November 24, 2011	
Interviewers - Regional (SSO)	Expiry Date of Collective Agreement: November 30, 2011 Notice to Bargain: November 24, 2011	Arbitration
Operational Category - CFB Kingston (SNPFCF)	Expiry Date of Collective Agreement: June 30, 2015	
Operational Category - CFB Montreal (SNPFCF)	Expiry Date of Collective Agreement: October 31, 2015	
Operational Category, Administrative Support Category and Technical Category - NDHQ (SNPFCF)	Expiry Date of Collective Agreement: February 28, 2014 Notice to Bargain: February 3, 2014	
Operational Services (TB)	Expiry Date of Collective Agreement: October 4, 2014 Notice to Bargain: April 4, 2014 Bargaining Dates: July 8 and 10, 2014	Conciliation
Program and Administrative Services (TB)	Expiry Date of Collective Agreement: June 20, 2015 Notice to Bargain:	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
	February 24, 2014 Bargaining Dates: July 8, 9, 10 2014	
Program Delivery and Administrative Services (CRA)	Expiry Date of Collective Agreement: October 31, 2012 Notice to Bargain: July 3, 2012	Conciliation
Technical Services (TB)	Expiry Date of Collective Agreement: June 21, 2014 Notice to Bargain: February 24, 2014	Conciliation
Research Council Employees' Association		
Administrative Services (NRCC)	Expiry Date of Collective Agreement: April 30, 2011 Notice to Bargain: February 3, 2011	Conciliation
Administrative Support (NRCC)	Expiry Date of Collective Agreement: April 30, 2011 Notice to Bargain: February 3, 2011	Arbitration
Computer Systems (NRCC)	Expiry Date of Collective Agreement: December 21, 2014 Notice to Bargain: December 12, 2014	Conciliation

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Operations Category - Non-Supervisory (NRCC)	Expiry Date of Collective Agreement: July 30, 2011 Notice to Bargain: May 31, 2011	Arbitration
Purchasing and Supply Group (NRCC)	Expiry Date of Collective Agreement: April 30, 2011 Notice to Bargain: February 3, 2011	Arbitration
Technical Category (NRCC)	Expiry Date of Collective Agreement: March 31, 2014 Notice to Bargain: January 21, 2014	Conciliation
Unifor, Local 2182		
Radio Operations (TB)	Expiry Date of Collective Agreement: April 30, 2014 Notice to Bargain: January 17, 2014	Arbitration
Unifor, Local 87-M		
Printing Operations (non supervisory) (TB)	Expiry Date of Collective Agreement: October 11, 2014 Notice to Bargain: June 2, 2014	Conciliation
Union of Canadian Correctional Officers - CSN		

Bargaining Agent and Bargaining Units	Current Round of Bargaining	
	Status of Negotiations	**Dispute Resolution Mechanism**
Correctional Services (TB)	Expiry Date of Collective Agreement: May 31, 2014 Notice to Bargain: February 17, 2014	Arbitration