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LEGISLATIVE SUMMARY

Bill C-62:
An Act to amend the Federal Public Sector Labour Relations Act and other Acts

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-62
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-62: AN ACT TO AMEND THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT AND OTHER ACTS

1 BACKGROUND

Bill C-62, An Act to amend the Federal Public Sector Labour Relations Act and other Acts,[1] was tabled in the House of Commons on 17 October 2017 by the President of the Treasury Board of Canada. The bill restores the public service labour relations regime that existed prior to the coming into force of certain budget implementation acts, including Bill C-4, A second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures (short title: *Economic Action Plan 2013 Act, No. 2*),[2] and Bill C-59, An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures (short title: *Economic Action Plan 2015 Act, No. 1*).[3]

Aspects of the public service labour relations regime that are restored through Bill C-62 include those related to essential services and the resolution of collective bargaining disputes, along with the right of bargaining agents to negotiate terms and conditions of employment related to sick leave and disability matters. In addition, provisions related to the public service recourse processes that have not yet been brought into force are repealed.

1.1 PREVIOUS CHANGES TO THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT* AND OTHER ACTS: BILL C-4

The *Federal Public Sector Labour Relations Act* (FPSLRA) is the federal legislation that governs labour relations for the federal public service.[4] It is administered by the Federal Public Sector Labour Relations and Employment Board (FPSLREB)[5] and applies to approximately 200,000 employees in 100 bargaining units.[6]

Canada's federal public service consists of the federal departments and agencies of the core public administration for which the Treasury Board is the employer. These are listed under Schedules I and IV of the *Financial Administration Act*.[7] It also includes separate agencies listed under Schedule V of that Act. In accordance with the FPSLRA, the Treasury Board is authorized to enter into collective agreements with certified bargaining agents in the core public administration, while separate agencies conduct their own negotiations and their collective agreements are subject to the approval of the Governor in Council.[8]

While the FPSLRA has been amended on a number of occasions, amendments introduced by Division 17 of Part 3 of Bill C-4 were significant in that they changed various aspects of the public service labour relations regime, particularly with respect to essential services and the resolution of collective bargaining disputes. Bill C-4 was introduced and given first reading in the House of Commons on 22 October 2013, and was enacted as the *Economic Action Plan 2013 Act, No. 2* upon Royal Assent on 12 December 2013.[9] While most of the provisions of Bill C-4 came into force upon

assent, others related to the public service recourse procedures have not yet come into force.[10]

1.1.1 Essential Services

Before Bill C-4's provisions regarding essential services came into force, the employer and the bargaining agent were required to negotiate an essential services agreement, which set out which services would be deemed essential in the event of a strike, with the employer being able to determine the level of the essential services to be performed. The parties were also able to negotiate which specific positions in a bargaining unit would be necessary to perform those essential services. The FPSLREB, upon request by either party, was responsible for making a determination with regard to any unresolved matter to be included within the essential services agreement.

Bill C-4 changed this process significantly by, for example, repealing the definition of "essential services agreement" contained in the FPSLRA while also giving the employer the exclusive right to determine which services are essential and to designate the positions in a bargaining unit it considers necessary to perform those essential services. In addition, the employer was now only obliged to consult the bargaining agent after having made these decisions, and only for a limited period of time. Bill C-4, which enacted the FPSLREB, also stripped this new entity of the powers of its predecessor with respect to the resolution of essential services disputes.

1.1.2 Dispute Resolution Process

Prior to the coming into force of the provisions of Bill C-4 with respect to dispute resolution, a bargaining agent could choose between arbitration and conciliation as the process for resolving collective bargaining disputes. While arbitration culminates in an award that is legally binding on both parties and that precludes subsequent strike action, conciliation results in a public interest commission (PIC) report. The commission, which is provided for in the FPSLRA, assists the parties in entering into a collective agreement by making recommendations on how to resolve the dispute; however, its report is not binding on the parties unless they agree to be bound by it before the commission issues its report. Under conciliation, a strike remains a possibility, provided that certain conditions are met. Further, during a strike, the parties may continue to negotiate.[11]

Amendments to the FPSLRA introduced by Bill C-4 removed the choice of dispute resolution method for the core public administration and made conciliation the primary mechanism, except in cases where 80% or more of the positions in a bargaining unit are designated by the employer as essential or upon mutual consent of the Treasury Board and the bargaining agent. Separate agencies, where the employer is not the Treasury Board, nonetheless require the approval of the President of the Treasury Board in order to choose arbitration over conciliation.

Bill C-4 also modified the factors an arbitration board and a PIC must consider when making awards or reports, respectively, by giving "preponderance" to specific factors, such as the need to attract and retain competent public servants and Canada's fiscal circumstances in relation to its stated budget objectives. Changes regarding the

procedures for selecting certain members of a PIC were also introduced at this time. For example, ministerial appointments in relation to a commission consisting of a single member, or in relation to the chairperson and third member of a commission consisting of three members, would no longer be made based on a list of names prepared by the chairperson of the FPSLREB, in consultation with the parties, but upon a name jointly recommended by the parties in each case.

1.1.3 Public Service Recourse Procedures

Under the FPSLRA, an employee or group of employees may submit a grievance with respect to the interpretation or application of a collective agreement or arbitral award, or any matter affecting the terms and conditions of employment (individual and group grievances). If at the end of the departmental or agency internal grievance procedure the grievance has not been resolved, it may in certain cases be referred for adjudication before the FPSLREB. Policy grievances, which are grievances in relation to an alleged violation affecting the employees generally, may also be referred for adjudication.[12]

The FPSLRA also allows employees, bargaining agents and employers to make a complaint to the FPSLREB under certain circumstances, including with respect to whether an employer or bargaining agent has failed in its duty to bargain collectively in good faith. Further, since the merger of the Public Service Labour Relations Board and the Public Service Staffing Tribunal to create the FPSLREB, the new entity also has jurisdiction to deal with staffing complaints under the *Public Service Employment Act* (PSEA) in relation to internal appointments and lay-offs within the federal public service.[13]

While it is currently possible to refer grievances that raise issues under the *Canadian Human Rights Act* (CHRA) to the FPSLREB, with the exception of pay equity grievances, the Canadian Human Rights Commission is entitled to be notified of these grievances and can make submissions to an adjudicator.[14] The same is true of staffing complaints involving a discrimination component under the PSEA.[15] Public servants may also file employment-related discrimination complaints with the Canadian Human Rights Commission.[16]

Bill C-4 proposed amending various aspects of the public service recourse procedures established under the FPSLRA, the PSEA and the CHRA. Amongst other matters, these amendments, which have not yet come into force, sought to modify certain aspects of the grievance process, change the complaints procedures in relation to internal appointments and lay-offs, as well as eliminate the power of the Canadian Human Rights Commission to deal with employment-related discrimination in the public service.

1.2 Previous Changes to the Public Service Sick Leave and Disability Programs: Bill C-59

During the round of collective bargaining that started in 2014, the Treasury Board proposed a series of changes to the existing sick leave and disability programs covering employees of the core federal public administration. These proposals, with an expected implementation date of 1 September 2016, included the following components:

- Reducing the number of annual sick leave credits from 15 to six days with a two-day carry-over of unused days.
- Introducing a short-term disability plan outside the collective agreement covering a maximum of 26 weeks, which would include a one-week waiting period for benefits, a 100% income replacement rate for the following six weeks, and a 70% income replacement rate for the remaining weeks. After 26 weeks in the short-term disability program, employees could be eligible to enrol in a long-term disability program lying outside the scope of the collective agreement.
- Allowing employees to use any sick leave accrued before the implementation of the new provisions in order to increase their short-term disability benefits from the 70% income replacement rate to 93% for the period between 1 September 2016 and 1 September 2018. Any accrued sick leave remaining as of 1 September 2018 would be eliminated.[17]

While collective bargaining was still ongoing, the federal government announced in Budget 2015 its intention to implement a new sick leave and disability regime if the parties were unable to reach a negotiated agreement:

> In the event that agreement [with the bargaining agents] cannot be reached, the Government will take the steps required to implement a modernized disability and sick leave management system within a reasonable timeframe.[18]

With the parties unable to agree on changes to the programs, the government went ahead with its proposal to establish a new sick leave and disability regime, which was put into effect through Division 20 of Part 3 of Bill C-59, the implementing legislation for Budget 2015. The bill's provisions authorized the Treasury Board to establish and modify terms and conditions of employment related to the sick leave and disability regime of employees of the core federal public administration, notwithstanding the provisions of the FPSLRA. Indeed, any such changes would have normally been negotiated between the Treasury Board and bargaining agents in accordance with the existing provisions of the FPSLRA. Bill C-59 was introduced and given first reading in the House of Commons on 7 May 2015, and was enacted as the *Economic Action Plan 2015 Act, No. 1* upon receiving Royal Assent on 23 June 2015.[19] The relevant provisions of Bill C-59 came into force upon assent, but have not been implemented.[20]

Had the Treasury Board exercised its new legislative powers, the sick leave and disability regime of employees of the core federal public administration would have changed considerably. The system of banked, unused sick leave is, in the absence of a short-term disability program, intended to allow employees who are ill or disabled for extended periods of time to receive their regular salary while waiting

a minimum of 13 weeks to access the long-term disability program. A full-time employee earns sick leave at the rate of 9.375 hours each calendar month, which is equivalent to 15 days each year.[21]

1.3 Subsequent Federal Government Initiatives and Related Matters

Following the 42nd general election, on 21 January 2016, the new President of the Treasury Board advised bargaining agents of the core federal public administration that the federal government would not exercise the powers conferred by Division 20 of Part 3 of Bill C-59, and that steps would be taken during the current parliamentary session to repeal the relevant provisions of the legislation.[22] Subsequently, the Department of Finance outlined the "reversal of sick leave savings" in a background document on the Canadian economic outlook.[23]

Further, in June 2016, the President of the Treasury Board confirmed in a letter to the heads of the bargaining agents the federal government's intention to repeal the majority of the measures introduced through Division 17 of Part 3 of Bill C-4. Key interim measures announced at this time for the purposes of the ongoing round of collective bargaining included the following:

- All bargaining units within the core public administration and/or separate agencies that were on the conciliation/strike route could request to switch to either arbitration or binding conciliation. Similarly, those on the arbitration route by agreement of the parties could switch to binding conciliation.
- For bargaining units within the core public administration that remained on the conciliation/strike route, a process would be put in place to review the list of essential services designations, allowing bargaining agents to dispute any positions on the list. Parties would also be allowed to refer any remaining disputed positions to a neutral third party, who would make a final recommendation. Separate agencies would be advised to follow the same measures.
- For the core public administration, the Treasury Board would issue a directive to each department advising that any employee occupying a position designated as essential would not be assigned non-essential work in the event of a strike.
- Bargaining agents within the core public administration and separate agencies could make a submission to a PIC or arbitration board that the commission or board would be free to weigh the factors as they saw fit without regard to preponderance. The employer would not be allowed to object to this submission or argue that any factor was preponderant.[24]

1.3.1 Court Challenges

In 2015, the Supreme Court of Canada struck down Saskatchewan's essential services legislation, which included similar provisions to Division 17 of Part 3 of Bill C-4.[25] In *Saskatchewan Federation of Labour v. Saskatchewan*,[26] the Supreme Court ruled that section 2(d) of the *Canadian Charter of Rights and Freedoms* (Charter),[27] which guarantees freedom of association, also protects the right to strike. In this regard, the Supreme Court explained that the right to strike is an essential component of a meaningful collective bargaining process and that, as

such, legislation interfering with the right to strike infringes section 2(d) of the Charter when it amounts to a "substantial interference" with collective bargaining.

Such was found to be the case of Saskatchewan's *The Public Service Essential Services Act*,[28] which allowed employers to unilaterally determine whether and how essential services were to be maintained during a work stoppage, without an adequate review mechanism for this determination, and which did not provide a meaningful dispute resolution mechanism to resolve bargaining impasses.

At the federal level, public service bargaining agents also challenged the constitutionality of the federal measures introduced through Division 17 of Part 3 of Bill C-4, especially in light of the above-noted decision.[29] Similarly, opposition to Division 20 of Part 3 of Bill C-59 took the form of constitutional challenges that were based on the employee protections guaranteed under section 2(d) of the Charter.[30]

2 DESCRIPTION AND ANALYSIS[31]

2.1 AMENDMENTS TO THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*

2.1.1 CHANGES TO ESSENTIAL SERVICES PROVISIONS (CLAUSES 1, 3, 5 AND 9)

2.1.1.1 DEFINITIONS

Clause 1 of Bill C-62 restores the definition of the term "essential service" in section 4(1) of the FPSLRA to remove the reference to section 119(1), which currently establishes the employer's exclusive right to determine what are essential services. Under the amended definition, for a service, facility or activity of the Government of Canada to be considered essential, it must be one that is, or will be, "necessary for the safety or security of the public or a segment of the public."

Clause 1 also restores the term "essential services agreement" to the list of definitions in section 4(1) of the FPSLRA. An "essential services agreement" is defined as an agreement between the employer and the bargaining agent that identifies the following:

- the types of positions in the bargaining unit that are necessary for the employer to provide essential services;
- the number of those positions that are necessary for that purpose; and
- the specific positions that are necessary for that purpose.

In this regard, clause 1 also adds section 4(2) to provide that, for the purposes of such an agreement, a position that is necessary for the employer to provide essential services is one that requires employees occupying it to perform essential services–related duties, or to be available after hours to report to work to perform those duties if so required by their employer.

2.1.1.2 Employer's Rights and Obligations

Consequently, clause 9 of the bill amends sections 119 to 125 of the FPSLRA, which currently set out the employer's exclusive rights to determine essential services and to designate positions in a bargaining unit that are necessary to provide those essential services, along with related administrative matters. Clause 9 also restores sections 126 to 134 of the FPSLRA, which had been repealed by Bill C-4.

Specifically, under the amended provisions, Division 8 of Part 1 of the FPSLRA, entitled "Essential Services," applies to the parties when conciliation is the dispute resolution process applicable to the bargaining unit (amended section 119). As mentioned above, a strike remains a possibility when the process for dispute resolution chosen is conciliation.

In addition, the right of employers to determine essential services and to designate positions in a bargaining unit as essential is eliminated and replaced with the right to determine the level at which an essential service is to be provided, including its extent and frequency (amended section 120). Further, the number of positions that are necessary for the employer to provide essential services is to be determined without regard to the availability of other persons that may be able to provide those essential services during a strike, and on the basis that the employer is not required to change the manner in which it operates normally in order to provide essential services during a strike. Thus, the employer and the bargaining agent may agree that some employees in the bargaining unit will be required to perform a greater number of essential services–related duties during a strike (amended section 121).

The obligation to negotiate an essential services agreement arises specifically where the employer has given notice in writing to the bargaining agent that employees in the bargaining unit occupy positions that are necessary for the provision of essential services (amended section 122). This obligation replaces the current requirement for the employer to consult with the bargaining agent, but only after the employer has designated the positions necessary for the provision of essential services, and only for a stated period of time.

2.1.1.3 Application to the Federal Public Sector Labour Relations and Employment Board

Clause 9 further stipulates that where the parties are unable to enter into an essential services agreement, either of them may apply to the FPSLREB for the determination of any unresolved matter, within a specified period of time. The FPSLREB will deal with the application once it is satisfied that the parties have made "every reasonable effort" to enter into an essential services agreement. After considering the application, the FPSLREB may make an order deeming the matter to be part of an essential services agreement, and deeming that the parties have entered into an essential services agreement. The FPSLREB, however, is constrained from requiring the employer to change the level at which an essential service is to be provided, including its extent and frequency.

The FPSLREB must also abide by the criteria referred to above in order to determine the number of positions that are necessary for the provision of essential services. In addition, where the application to the FPSLREB relates to a specific position to be identified in the essential services agreement, the FPSLREB must respect the employer's proposal in this regard, unless it determines that the position is not of the type necessary for the provision of essential services (amended section 123).[32]

Similarly, where the parties are unable to amend the essential services agreement despite having made reasonable efforts, either party may make an application to the FPSLREB. The FPSLREB may make an order amending the essential services agreement if it considers the amendment necessary for the employer to provide essential services. In this regard, the FPSLREB must abide by specified requirements similar to those outlined above (new sections 126 and 127).

In addition, where either party is of the opinion that an essential services agreement needs to be temporarily amended, or suspended, as a result of an emergency, but the parties cannot agree to do so, either party may make an application to the FPSLREB for an order to temporarily amend or suspend the essential services agreement (new section 131).

2.1.1.4 Coming into Force and Other Administrative Matters

Clause 9 also provides that the essential services agreement comes into force once signed by the parties or on the day the order deeming the parties to have entered into an essential services agreement is made (amended section 124). An amendment to an essential services agreement will come into force when the agreement containing the amendment is signed by the parties or on the day the order amending the agreement is made (new section 128).

At any point while the essential services agreement is in force an employer may replace a position identified in it that has become vacant, provided the new position is of the same type as the one being replaced (new section 129).

The essential services agreement will be in force until the parties jointly determine that there are no employees in the bargaining unit who occupy positions that are necessary for the provision of essential services (amended section 125). Revocation of the certification of the employee organization that is a party to the essential services agreement (by virtue of being the organization certified as the bargaining agent for the bargaining unit) will also result in the agreement ceasing to be in force (new sections 67(e) and 101(1)(c)), as provided in clauses 3 and 5 of the bill.

Finally, clause 9 of the bill also sets out various timelines and other administrative matters with respect to essential services agreements. Notably, the FPSLREB reserves the power to extend any period referred to in Division 8 of Part 1 of the FPSLRA, on the application of either party (new section 133). Also of note is the fact that employers are required to notify every employee occupying a position identified in an essential services agreement as necessary for the provision of essential services (new section 130).[33]

2.1.2 Changes to Dispute Resolution Provisions

2.1.2.1 General (Clauses 6 and 20)

Clause 6 of the bill amends sections 103 and 104 of the FPSLRA, which currently set out conciliation as the primary mechanism for dispute resolution subject to certain exceptions, in order to allow a bargaining agent to choose between arbitration and conciliation as the process for the resolution of collective bargaining disputes. The amendments also give bargaining agents the ability to change their choice of process for dispute resolution at a later time. The choice of process for dispute resolution applies from the day a notice to bargain collectively has been given (provided this is after the choice has been made) until the choice of process is changed.[34]

Further, clause 20 of the bill amends section 182 of the FPSLRA, which allows parties at any point in the negotiation of the collective agreement to refer any term or condition of employment to any eligible person for "final and binding determination" by whatever alternate dispute resolution process they agree to, in order to eliminate the requirement for separate agencies to seek the approval of the President of the Treasury Board to do so.

2.1.2.2 Arbitration (Clauses 10 to 12)

Clause 10 of the bill amends section 148 of the FPSLRA by eliminating the requirement for the arbitration board to consider specified "preponderant factors," before taking into account others also set out in the legislation, when conducting proceedings and making an arbitral award. Under the amended provision, the arbitration board must consider the following factors, in addition to any others it considers relevant:

- the need to recruit and retain competent public servants in order to meet the needs of Canadians;
- the comparability of terms and conditions of employment in different segments of the public and private sectors;
- the relationships between different classification levels within an occupation and between occupations in the public service, with respect to the terms and conditions of employment;
- the fairness and reasonableness of the terms and conditions of employment in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
- the state of the Canadian economy and the Government of Canada's fiscal circumstances.[35]

Clause 11 of the bill amends section 149 of the FPSLRA to eliminate the additional requirements for the arbitration board, when making an award, to consider all terms and conditions of employment of, and benefits provided to, the employees in the bargaining unit to which the award relates, and to indicate in the award the reasons

for its decision in respect of each matter in dispute. The requirement that remains under this provision is for the arbitration board to make an arbitral award "as soon as feasible" in relation to all matters in dispute referred to it.

Further, clause 12 of the bill repeals section 158.1 of the FPSLRA. This section currently authorizes the chairperson of the FPSLREB to direct an arbitration board to review an arbitral award, on the chairperson's own initiative or at the request of either party to the award, if in the chairperson's opinion the award does not represent a "reasonable application" of the preponderant and other factors referred to above. Section 158.1 also stipulates that the arbitration board must confirm or amend the arbitral award within a specified period of time and provide reasons in writing for doing so to the chairperson.

2.1.2.3 Conciliation (Clauses 13 to 19)

Clauses 13 to 16 of the bill amend sections 164, 165, 167 and 170 of the FPSLRA with respect to the establishment of a PIC for the purposes of conciliation. Section 166 of the FPSLRA, which had been repealed by Bill C-4, is also restored. These amendments reintroduce the requirement for the chairperson of the FPSLREB to prepare, in consultation with the parties, a list of names from which to select the following members of the PIC: the sole member of a commission consisting of one member, or the chairperson and third member of a commission consisting of three members.

The chairperson of the FPSLREB is also provided with greater discretion to recommend eligible persons, including upon the death, incapacity or resignation of the member of a commission consisting of a single member. As indicated above, no requirement to prepare such a list of names exists currently under the legislation.

Clause 17 of the bill amends section 175 of the FPSLRA so that, in conducting its proceedings and in making a report to the chairperson of the FPSLREB, the PIC is no longer bound to consider specified preponderant factors before taking into account others also set out in the legislation. The PIC must instead consider factors that are similar to those set out in clause 10 in relation to the process of arbitration and any others it considers relevant.[36]

Clauses 18 and 19 of the bill amend sections 176 and 179 of the FPSLRA so that, as in the case of an arbitration board, the PIC is no longer required to consider all terms and conditions of employment before submitting its report; indicate in its report the reasons for each of its recommendations; or be directed by the chairperson of the FPSLREB to reconsider matters contained in its report for not having properly applied the preponderant and other factors referred to above.

2.1.3 Other Changes to Collective Bargaining Provisions (Clauses 7 and 9)

Clause 7 of the bill makes consequential amendments to section 105 of the FPSLRA to add a requirement with respect to when a notice to bargain collectively may be given. Specifically, it is no longer sufficient for an employee organization to be

certified as the bargaining agent for the bargaining unit in order for a party to be authorized to give notice to bargain collectively; it is also necessary for the choice of process for dispute resolution to have been recorded by the FPSLREB. Clause 7 also restores the timelines previously in place with regard to providing a notice to bargain collectively.

Further, clause 9 restores section 132 to provide that terms and conditions of employment in respect of which a notice to bargain collectively has been given will continue to apply to employees occupying positions identified in an essential services agreement until a new collective agreement is entered into, unless the parties agree otherwise. This provision replaces a similar one in relation to positions designated as essential by the employer, currently set out in section 125(1) of the FPSLRA.[37]

2.1.4 Transitional Provisions (Clause 27)

Clause 27 sets out the transitional provisions that apply with respect to the resolution of collective bargaining disputes, where a notice to bargain collectively is given before Bill C-62 receives Royal Assent.

Specifically, it stipulates that the provisions of the FPSLRA, as amended on or after the day the bill receives Royal Assent, will apply if the parties have not yet chosen arbitration or conciliation or, if they have requested a specific dispute resolution process, the relevant proceedings have yet to take place.

If, however, one of the parties has requested either arbitration or conciliation and any of the relevant proceedings have taken place, the provisions of the FPSLRA in place before the day the bill receives Royal Assent will apply. In the case of conciliation, the amended text of section 194(2), which prohibits a strike that would have the effect of involving employees whose positions are necessary under an essential services agreement for the employer to provide essential services, will also apply.

2.1.5 Changes to Grievance Provisions (Clause 32)

Clause 32 of the bill repeals various provisions regarding grievances that were introduced by Bill C-4 but are not yet in force. Amongst other matters, these provisions would have amended the FPSLRA to require employees to have the approval of and be represented by the bargaining agent for their bargaining unit when presenting an individual grievance or referring it to adjudication. The sole exception would have been grievances related to workplace discrimination. Currently, employees can file an individual grievance on their own, or refer it to adjudication, provided that the grievance does not relate to the interpretation or application, in respect of that employee, of a provision of a collective agreement or arbitral award, amongst others.

With respect to policy grievances, the role of adjudicators would have been modified so that their remedies in this regard could no longer have a retroactive effect. In other words, adjudicators would no longer have been able to require the employer or

bargaining agent to interpret the collective agreement or arbitral award in a specified manner that could have had retroactive effect.

Finally, the apportionment of the expenses of adjudication of grievances under the FPSLRA would also have been modified and expanded by Bill C-4 such that, for example, expenses would have been equally shared by the bargaining agent and the employer (or deputy head) in certain circumstances. The exceptions would have been grievances related to workplace discrimination or where the aggrieved employee is not included in a bargaining unit, in which cases the expenses would have been borne by the FPSLREB. Under the existing provisions, however, if an aggrieved employee is represented by a bargaining agent, the latter is liable for these expenses. Where the aggrieved employee is not represented by a bargaining agent, the cost of adjudication is borne by the FPSLREB.

2.2 Amendments Affecting Other Acts

2.2.1 *Public Service Employment Act* and *Canadian Human Rights Act* (Clause 33)

2.2.1.1 Other Changes to Public Service Recourse Procedures

Clause 33 of the bill repeals provisions of the PSEA and the CHRA regarding the public service recourse system, which were introduced by Bill C-4 but have not yet been brought into force.

Specifically, it repeals various provisions of the PSEA regarding the complaints processes for internal appointments and lay-offs. Amongst other matters, these provisions would have amended the criteria regarding who is allowed to make a complaint to the FPSLREB about the internal appointment process. Indeed, whereas currently any unsuccessful candidate in an advertised internal appointment process can bring a complaint, the amendments would have limited candidates who did not meet the essential qualifications for the work to be performed to challenging their own assessment and not that of the appointee.

Further, in situations of lay-off, the right to complain would only have been triggered when a merit-based selection for retention or lay-off exercise had been carried out amongst a group of employees who "occupy positions at the same group and level and perform similar duties."[38] The requirement for "same group and similar duties" does not currently exist under the PSEA.

Clause 33 also repeals those provisions of the CHRA that would have had the effect of eliminating the Canadian Human Rights Commission's jurisdiction to consider discrimination-based complaints from public servants. In addition, it should be noted that the provisions that would have removed the requirements under the FPSLRA and the PSEA to notify the Commission of grievances or complaints involving issues under the CHRA, and to allow the Commission to make submissions in this regard, are also being repealed at this time.[39]

2.2.2 *Economic Action Plan 2015 Act, No. 1* (Clause 36)

2.2.2.1 Sick Leave

Clause 36 of the bill repeals Division 20 of Part 3 of Bill C-59 which, amongst other aspects, authorized the Treasury Board to establish and modify the terms and conditions of employment related to the sick leave of employees of the core federal public administration, notwithstanding the FPSLRA. Such terms and conditions of employment include:

- the number of hours of sick leave in a fiscal year;
- the maximum number of hours of unused sick leave that an employee may carry over from one fiscal year to the next; and
- the disposition of sick leave hours that are unused immediately before the date on which the short-term disability program becomes effective.

2.2.2.2 Disability Programs

Division 20 also authorized the Treasury Board to establish and modify, despite the FPSLRA, a short-term disability program providing:

- the rates of benefits and the period during which the rates apply;
- the maximum period for which benefits may be paid; and
- the case management services that are to be provided.

In relation to the short-term disability program, the legislation required the Treasury Board to establish a committee, consisting of employer and employee representatives, to make joint recommendations regarding any modifications to the program. The Treasury Board was also allowed to specify the date on which the short-term disability program would become effective.

Finally, Division 20 gave the Treasury Board authority to modify the existing public service long-term disability program with respect to the period during which employees are not entitled to receive benefits, notwithstanding the FPSLRA.

NOTES

1. Bill C-62, An Act to amend the Federal Public Sector Labour Relations Act and other Acts, 1st Session, 42nd Parliament.
2. Bill C-4, A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures (short title: *Economic Action Plan 2013 Act, No. 2*) 2nd Session, 41st Parliament (S.C. 2013, c. 40), Part 3, Division 17.
3. Bill C-59, An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures (short title: *Economic Action Plan 2015 Act, No. 1*) 2nd Session, 41st Parliament (S.C. 2015, c. 36), Part 3, Division 20.

4. *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 [FPSLRA]. The former *Public Service Labour Relations Act* was renamed the *Federal Public Sector Labour Relations Act* with the enactment of Bill C-7, An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures, 1st Session, 42nd Parliament (S.C. 2017, c. 9). For the purposes of clarity, this Legislative Summary will use the current name for the relevant legislation throughout.

   For more information, see Robin MacKay and Mayra Perez-Leclerc, *Legislative Summary of Bill C-7: An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures*, Publication no. 42-1-C7-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 July 2016.

5. The Federal Public Sector Labour Relations and Employment Board [FPSLREB] was created on 1 November 2014 by the merger of the Public Service Labour Relations Board and the Public Service Staffing Tribunal. See *Economic Action Plan 2013 Act, No. 2*, Part 3, Division 18. For purposes of clarity, the term "FPSLREB" will be used to refer to the current entity and its precursors.

6. FPSLREB, *Federal Public Sector Labour Relations and Employment Board*. See also Government of Canada, *Population of the Federal Public Service*; and FPSLREB, *Fact Sheet on Collective Bargaining*.

7. *Financial Administration Act*, R.S.C. 1985, c. F-11.

8. FPSLRA, ss. 111 and 112.

9. Government of Canada, *Frequently Asked Questions – Changes to collective bargaining, essential services and recourse processes*.

   For more information, see *Legislative Summary of Bill C-4: A second Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, Publication no. 41-2-C4-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 January 2016.

10. Government of Canada, *Table of Public Statutes and Responsible Ministers*, p. 2.

11. FPSLREB, *Fact Sheet on Collective Bargaining*. See also Government of Canada, *Frequently Asked Questions – Collective Bargaining in the Core Public Administration*.

12. FPSLREB, *Frequently Asked Questions about Grievances (labour relations matters)*.

13. FPSLREB, *Complaints under the* Federal Public Sector Labour Relations Act; and FPSLREB, *Staffing Complaint Procedural Guide*. See also *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 [PSEA].

14. FPSLREB, *Frequently Asked Questions about Grievances (labour relations matters)*. See also *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

15. FPSLREB, *Staffing Complaint Procedural Guide*.

16. *Canadian Human Rights Act*, s. 40.

17. National Joint Council Bargaining Agents, *Complaint Submitted to the International Labour Organization By the Canadian Labour Congress and Public Service International on behalf of the National Joint Council Bargaining Agents With Respect to the Failure of the Government of Canada to Ensure Conformity with International Labour Organization Convention 87, Convention concerning Freedom of Association and Protection and the Right to Organise, 1947 as a result of the enactment by Canada of Bill C-59*, 9 September 2015, paras. 41–49. See also Professional Institute of the Public Service of Canada [PIPSC], "Short Term Disability Plan" [Treasury Board proposal], December 2014.

18. Government of Canada, *Strong Leadership: A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security*, Budget 2015, 21 April 2015, p. 171.

19. For more information, see *Legislative Summary of Bill C-59: An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures*, Publication no. 41-2-C59-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 May 2015.

20. Government of Canada, *Table of Public Statutes and Responsible Ministers*, p. 4.

21. Government of Canada, *Collective agreements for public service*; and Government of Canada, *Disability Insurance Plan – member booklet*. See also National Joint Council Bargaining Agents (2015), *Complaint submitted to the International Labour Organization*, paras. 36–40.

22. Treasury Board of Canada Secretariat, "Government of Canada Moves to Repeal Bill C-59 and Reaffirms Commitment to Fair Negotiations," News release, 5 February 2016.

23. Department of Finance Canada, "Table B.1 – Summary of Economic and Fiscal Developments Since the Fall Update," *Backgrounder – Canadian Economic Outlook*, Annex B.

24. The Honourable Scott Brison, President of the Treasury Board, *Letter to Head of Bargaining Agents* [regarding the government's intention to repeal Division 17 of Bill C-4], 3 June 2016. The President of the Treasury Board also indicated in his letter that those provisions removing the compensation analysis and research function from the mandate of the FPSLREB would not be repealed.

25. Treasury Board of Canada Secretariat, "Government of Canada tables legislation to restore fair and balanced labour laws," News release, 28 November 2016.

26. *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

27. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

28. *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2.

29. Union of Safety and Justice Employees, *PSAC launches court action against Bill C-4*, 27 March 2014. See also PIPSC, *Bill C-4 Challenge Case Summary*, 22 January 2016; and PIPSC, *Bill C-4 Constitutional Challenge Update*, 3 May 2016.

30. PIPSC, *Update – Constitutional Challenge to Bill C-59*, 23 September 2015; and PIPSC, *Constitutional Challenge to Conservative Government's 2015 Budget Bill*, 29 June 2015. See also Public Service Alliance of Canada, *PSAC launches court action against Bill C 59*, 30 June 2015.

31. Clauses 1 to 25 and 27 to 35 of Bill C-62 were originally contained in Bill C-34, An Act to amend the Public Service Labour Relations Act and other Acts, 1st Session, 42nd Parliament. Bill C-34 was introduced in the House of Commons on 28 November 2016 by the President of the Treasury Board.

    Clause 36 of Bill C-62 was originally contained in Bill C-5, An Act to repeal Division 20 of Part 3 of the Economic Action Plan 2015 Act, No. 1, 1st Session, 42nd Parliament. Bill C-5 was introduced in the House of Commons on 5 February 2016 by the President of the Treasury Board. For more information, see Mayra Perez-Leclerc, *Legislative Summary of Bill C-5: An Act to repeal Division 20 of Part 3 of the Economic Action Plan 2015 Act, No. 1*, Publication no. 42-1-C5-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 14 March 2016.

32. Under clause 4 of Bill C-62, the FPSLREB is also authorized to determine the rights, privileges and duties under an essential services agreement that may have been acquired or retained by a bargaining unit, or an employee in the unit, as a result of a merger, amalgamation or transfer of jurisdiction of bargaining agents (amended section 79 of the FPSLRA).

33. Additional consequential amendments are made in clauses 23 to 25 of the bill with respect to sections 194, 196 and 199 of the FPSLRA, in order to restore references to essential services agreements. These sections, which establish various prohibitions relating to strikes and the provision of essential services, are set out under Division 14 of Part 1. For example, section 194(2) is amended in order to prohibit a bargaining unit from declaring or authorizing a strike that would have the effect of involving employees whose positions are identified under an essential services agreement as necessary for the provision of essential services during a strike, rather than employees whose positions are designated by the employer alone as essential, as was the case under Bill C-4.

34. Under clause 2 of the bill, the FPSLREB is given regulatory powers in relation to the notice of choice of process for dispute resolution, and the application to have this choice changed (new section 39(h)).

    Clauses 28 and 29 of the bill make consequential amendments to provisions of the *Public Sector Equitable Compensation Act*, S.C. 2009, c. 2, s. 394 [PSECA], that are not yet in force, in order to reflect the amended text of section 103 of the FPSLRA. These provisions stipulate that, where either arbitration or conciliation has been chosen as the process for dispute resolution under the FPSLRA, questions concerning the provision of equitable compensation to employees may be the subject of a request for arbitration or conciliation under that Act.

    The PSECA was enacted to address equal pay for equal value within the federal public sector in a manner that is more proactive and timely than under the CHRA. If it came into force, this legislation would apply to the Treasury Board, separate agencies, the Royal Canadian Mounted Police [RCMP] and the Canadian Armed Forces. However, on various occasions, the federal government has signalled its intention not to bring the PSECA into force, indicating that proactive pay equity legislation will be introduced by late 2018. For additional information, see Government of Canada, *Fact Sheet: The Public Sector Equitable Compensation Act*; and Government of Canada, *FAQ: Pay equity reform*.

35. A consequential amendment is made in clause 26 of the bill with respect to section 238.21 of the FPSLRA in order to reflect amended section 148. Section 238.21 stipulates that, when making an arbitral award in relation to a collective agreement that applies to a RCMP bargaining unit, the arbitration board may consider "the impact of the determination on the operational effectiveness of the RCMP," in addition to the factors set out in section 148.

36. Clauses 30 and 31 of the bill repeal various provisions of the FPSLRA, which were introduced by Bill C-4 but are not yet in force. These provisions stipulate that the preponderant and other factors an arbitration board or public interest commission must currently consider do not preclude the operation of those provisions under the PSECA setting out the dispute resolution of pay equity–related matters.

37. In addition, a series of consequential amendments are made in clauses 8, 21 and 22 of the bill with respect to sections 107, 190(1)(f) and 192(1)(a) of the FPSLRA, respectively, by replacing the references to section 125(1) with references to section 132 of the FPSLRA.

38. *Economic Action Plan 2013 Act, No. 2*, s. 349(1).

39. Clauses 34 and 35 of the bill repeal provisions of the FPSLRA that were introduced by Bill C-31, An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures (S.C. 2014, c. 20). These provisions, which have not yet come into force, set out the remedies an adjudicator would have been able to order where the employer has engaged in a discriminatory practice.