

15-64817

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, COLIN MUISE,
STAN BUDAY, CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES, NICK
GIANNAKOULIS, ASSOCIATION OF CANADIAN FINANCIAL OFFICERS, CANADIAN
MERCHANT SERVICE GUILD, ASSOCIATION OF JUSTICE COUNSEL, FEDERAL
GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (ESQUIMALT),
FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (EAST),
CANADIAN FEDERAL PILOTS ASSOCIATION, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,
UNIFOR LOCAL 588-G AND UNIFOR LOCAL 2182**

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

**APPLICATION UNDER Rule 14.05 of the *Ontario Rules of Civil Procedures*,
s. 2(d), s. 24(1), and 32 of the *Canadian Charter of Rights and Freedoms*,
and s. 52 of the *Constitution Act, 1982***

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date and time to be fixed by the Registrar, at 161 Elgin Street, Ottawa, ON, K2P 2K1.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedures, serve it on the applicant's lawyer or, where

the applicant does not have a lawyer, service it on the applicant, and file it, with proof of service, in this court office, and you and your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: June 26, 2015

Issued by: _____


Local Registrar
Ontario Superior Court
161 Elgin Street, 2nd Floor,
Ottawa, ON K2P 2K1

TO: The Attorney General of Canada
Department of Justice
500-50 O'Connor Street
Ottawa, ON K1A 0H8

APPLICATION

A. The Applicants make application for:

1. A declaration that Division 20 (s. 253 – s. 273) of the *Economic Action Plan 2015, No. 1*, (Bill C-59), infringes and denies the rights and freedoms guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), insofar as it interferes with the rights of employees to engage in a meaningful process of collective bargaining and prevents employees from participating in strike action over the issue of sick leave and/or disability coverage, and that such infringement cannot be demonstrably justified as a reasonable limit pursuant to section 1 of the *Charter*;
2. A declaration that, insofar as the impugned provisions infringe and deny the rights and freedoms guaranteed by s. 2(d) pursuant to section 52 of the *Constitution Act*, the above provisions of Bill C-59 are of no force or effect;
3. An Order pursuant to subsection 24(1) of the *Charter*, providing for such relief as is appropriate in the circumstances in order to remedy the harm to the collective bargaining process arising from the impugned provisions, whether or not a collective agreement was or has been entered into;
4. The costs of this Application; and
5. Such further and other relief as counsel may request and this Honourable Court may deem to be just and appropriate.

B. The grounds for the application:

The Applicants

1. The Professional Institute of the Public Service of Canada (the "Institute") is the second largest bargaining agent for employees in the federal public service. It was founded as an association of employees in 1920 for the purpose of protecting the interests of professional public service employees and first became a certified bargaining agent for public service employees in 1967;
2. The Institute has approximately 55,000 members and is the bargaining agent for over 41 knowledge-based groups employed by approximately 27 different employers in seven jurisdictions. With respect to the federal public service, the Institute represents over 34,000 employees in 6 different bargaining units, who are affected by the impugned provisions. The employees represented by the Institute who are employed by the federal public service are a highly skilled and well-educated workforce, comprised largely of scientists and other professionals;
3. For all 6 affected bargaining units, the Institute is currently in the process of negotiating collective agreements with the Treasury Board Secretariat ("Treasury Board"). Sick leave/short-term disability is a key item in the current negotiations;
4. Colin Muise is a registered nurse in the Nurses (NU) occupational group, employed at the CHN 03 level at Canadian Forces Base Greenwood, Nova Scotia, Department of National Defence. He is also the Bargaining Team President for the Health Services (SH) Group of the Institute for its current round of bargaining;
5. Stan Buday is a Technical Support Analyst at Service Canada. He is also the President of the Computer Systems (CS) Group Executive of the Institute and a member of the CS bargaining team for the current round of bargaining;

6. The Canadian Association of Professional Employees ("CAPE") is the third largest bargaining agent for employees in the federal public service. CAPE has over 12,000 members. CAPE was created in 2003 from a merger of the Canadian Union of Professional and Technical Employees, the bargaining agent representing translators, interpreters and terminologists, with the Social Science Employees Association;
7. CAPE is the bargaining agent for the Economics and Social Science Services (EC) bargaining unit and the Translation (TR) bargaining unit, both of which are affected by Bill C-59;
8. Nick Giannakoulis is the National Vice-President of CAPE. He previously held various Local and nationally elected positions with CAPE beginning in 2005. He is substantively a Manager in the EC bargaining unit, currently employed at the EC-07 level at the Public Health Agency of Canada in Ottawa, with 17 years of service in the federal Public Service. He has also been a Bargaining Team member of the EC Group for CAPE in its current round of bargaining, since 2013;
9. The Association Of Canadian Financial Officers ("ACFO") represents financial officers and financial managers employed in the federal public service. ACFO has approximately 4500 members in the Financial Management (FI) bargaining unit that are affected by Bill C-59;
10. The Canadian Merchant Service Guild is a national association of Ships' Officers and Marine Pilots. The Guild was originally established by an Act of Parliament in 1919 and it represents the majority of Ships' Officers and Pilots in the Canadian Maritime Industry. The Guild has approximately 1100 members in the Ships' Officers (SO) bargaining unit that are affected by Bill C-59. The SO Group comprises positions that are primarily involved in the on-board command and control of deck, engine room, electronic or electrical, radio or supply operations on board vessels, floating plants or submersibles and in the training and preparation

for continuing employment as a Ships' Officer; the piloting of military vessels in and about a harbour; the instruction of cadets or other officers undergoing training in the knowledge and skills related to the officer activities and the performance of related activities between ship and shore;

11. The Association Of Justice Counsel ("AJC") is the exclusive bargaining agent for federal public service lawyers who work for the Department of Justice ("DOJ"), the Public Prosecution Service of Canada ("PPSC"), the Bureau of Pension Advocates (Veterans' Affairs) and various federal agencies and tribunals across the country, such as Canadian Human Rights Commission, Elections Canada, the Office of the Privacy Commissioner, the Office of the Information Commissioner, Immigration and Refugee Board, the Canadian Human Rights Tribunal. The AJC has approximately 2600 members in the Law Practitioner (LP) bargaining unit that are affected by Bill C-59;
12. The Federal Government Dockyard Trades And Labour Council (Esquimalt) represents employees who carry out the day to day repair and maintenance on the west coast Canadian Naval Fleet at CFB Esquimalt, repair and maintain torpedoes at Canadian Forces Ammunition Depot Rocky Point, and perform live testing on Canadian and American torpedoes at Canadian Forces Maritime Experimental Test Range. They have approximately 750 members in the Ship Repair West (SRW) bargaining unit that are affected by Bill C-59;
13. The Federal Government Dockyard Trades And Labour Council (East) represents employees who carry out the day to day repair and maintenance on the east coast Canadian Naval Fleet. They have approximately 700 members in the Ship Repair East (SRE) bargaining unit that are affected by Bill C-59;
14. The Canadian Federal Pilots Association ("CFPA") represents employees engaged in federal government aviation inspections, pilot flight testing, licensing, aviation regulatory enforcement, certification of air operators, aircraft certification flight

testing, development of aviation operation regulations and standards, Coast Guard helicopter operation, search and rescue, aviation accident investigations, safety analysis and promotion, and the regulation and oversight of the air navigation system. CFPA members are also relied upon to fly government aircraft in support of the national emergency response plan. The CFPA have approximately 430 members in the Aircraft Operations (AO) bargaining unit that are affected by Bill C-59;

15. The International Brotherhood Of Electrical Workers (“IBEW”) represents electronics technologists and electricians who are specialists in the installation and maintenance of electronics equipment for weather facilities, radio frequency allocation and monitoring, as well as air, land, and marine transportation systems. Their members are employed across Canada by NAV CANADA, and several Federal Government Departments including Fisheries and Oceans, Canadian Coast Guard, National Defence, Environment Canada, and Industry Canada, just to name a few. The IBEW has approximately 1000 members in the Electronics (EL) bargaining unit that are affected by Bill C-59;
16. The Canadian Air Traffic Control Association (“CATCA”) represents all Air Traffic Controllers in Canada. It is a local of Unifor. Its members work for Transport Canada, Serco, and NAV Canada. CATCA has approximately 7 members in the Air Traffic Control (AI) bargaining unit who carry out civil aviation safety inspection functions and who are affected by Bill C-59;
17. Unifor Local 2182 represents the Canadian Coast Guard Marine Communications Officers and has approximately 340 members in the Radio Operations (RO) bargaining unit that are affected by Bill C-59;
18. Unifor Local 588-G represents Treasury Board printing employees and has approximately 10 members in the Printing Operations (non supervisory) bargaining unit that are affected by Bill C-59. Unifor Local 588-G has transferred its bargaining

rights to Unifor Local 87-M, which has applied for an updated certification order to recognize the fact that they are being represented by Unifor Local 87-M;

Collective Bargaining and Section 2(d) of the Charter

19. The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and terms and conditions of employment and thereby gain some control over their work, a major aspect of their lives;
20. The Supreme Court of Canada has recognized that the section 2(d) guarantee of freedom of association protects a meaningful process of collective bargaining. Only by coming together in collective bargaining associations, and thereby strengthening their bargaining power with their employer, can employees meaningfully pursue their workplace goals;
21. Legislation that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is inconsistent with the guarantee of freedom of association enshrined in s. 2(d);
22. Law and regulations that restrict the subjects that can be discussed, impose arbitrary outcomes, ban recourse to collective action by employees without adequate countervailing protections, make employees' workplace goals unachievable, or set up a process that employees cannot effectively influence, violate s. 2(d) in that they amount to a substantial interference with meaningful collective bargaining;
23. The right to collective bargaining as part of the freedom of association is also recognized at international law, including in the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Labour Organization's Convention No. 87

(Concerning Freedom of Association). Canada is a signatory to all of these international conventions;

The Right to Strike and Section 2(d) of the Charter

24. To ensure that the constitutional protection of associational interests of employees in the collective bargaining process is meaningful, section 2(d) of the *Charter* also requires the concomitant protection of their freedom to withdraw their services collectively for the purpose of obtaining improved terms and conditions of employment;
25. The right to strike is constitutionally protected by section 2(d) of the *Charter* because it is an indispensable component of meaningful collective bargaining in our labour relations system;
26. The right to strike, like the right to collective bargaining, is also recognized at international law, including in the International Covenant on Economic, Social and Cultural Rights and the International Labour Organization's Convention No. 87 (Concerning Freedom of Association);

The Importance of Paid Sick Leave

27. Paid sick leave is a critically important employee benefit that is found in the collective agreements of all of the Applicant bargaining agents. The current system of sick leave, in various forms, has been a feature of collective agreements in the federal public service for over 40 years, and is the result of numerous trade-offs between the employer and bargaining agents made at the bargaining table. It is a vital part of employee compensation, and is particularly important in protecting employees who are sick or disabled against suffering loss of income during their illness;
28. Paid sick leave is also important to employees' health and well-being. It permits employees to take the necessary time off work to allow them to recover from a

serious or communicable illness, and to ensure that they do not infect their co-workers by attending work while ill. As a benefit, paid sick leave protects the most vulnerable of employees, who may be facing serious illness or disability. Legislative provisions which effectively prevent bargaining over this important issue are a substantial interference with meaningful collective bargaining;

Impugned Provisions Violate Section 2(d) of the Charter

29. The impugned provisions, which grant the employer, Treasury Board, the unlimited power to unilaterally impose certain terms and conditions of employment regarding sick leave and short and long-term disability. These provisions substantially interfere with a meaningful process of collective bargaining and violate section 2(d), including in the following respects:

- (a) The impugned provisions of Bill C-59, in particular sections 254-256, 260-262, 267-268, effectively restrict the subjects that can be meaningfully discussed at collective bargaining by granting to Treasury Board the unilateral power to impose terms and conditions of employment relating to sick leave and short and long term disability. Sick leave is a vital and important benefit to employees and has been included in collective agreements for many decades;
- (b) Even if Treasury Board's is unable to reach agreement with the Applicant bargaining agents at the bargaining table on its proposed terms and conditions of employment regarding sick leave and disability programs, the impugned provisions, in particular sections 254-256, 260-262, 267-268, give Treasury Board the unilateral power to:
 - i. establish and modify terms and conditions of employment related to sick leave;
 - ii. establish a short-term disability program;
 - iii. modify any long-term disability program, and

- iv. override existing terms and conditions of employment in collective agreements related to sick leave;
- (c) The impugned provisions, in particular sections 254-256, allow for unilaterally imposed and arbitrary outcomes by granting to Treasury Board an unlimited power to eliminate sick leave all together and erase all banked sick leave credits, thereby undermining the confidence that bargaining agents and their members have in the collective bargaining process;
- (d) The impugned provisions, in particular section 254-256, provide legislative sanction for what would otherwise amount to bad faith bargaining. Even if the parties were to agree on a sick leave proposal at the bargaining table, under the impugned provisions, Treasury Board can later turn around and impose different terms, or modify those agreed to, thereby completely undermining the collective bargaining process;
- (e) Sections 257, 262(1)(b) and 268(1)(b) of Bill C-59, provide that s. 107 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA), which requires the employer to observe existing terms and conditions of employment once the notice to bargain is given, does not apply during the application period with respect to terms and conditions of employment established by Treasury Board under Bill C-59. The lack of statutory freeze protection for sick leave and disability further undermines meaningful collective bargaining;
- (f) Sections 256, 258, 259, 262 and 268 of Bill C-59 allow Treasury Board to override any provisions in arbitral awards that are inconsistent with the terms and conditions of employment established by Treasury Board under Bill C-59. Where arbitration is the method of resolving bargaining

impasse between parties, it is a central and constitutionally required part of a collective bargaining process. Overriding arbitral awards is thus contrary to a meaningful process of collective bargaining and undermines the confidence that bargaining agents and their members have in that process;

- (g) By conferring on Treasury Board a unilateral and unlimited power to impose sick leave and disability terms and conditions, the impugned provisions of Bill C-59 set up a collective bargaining process that employees cannot effectively influence and thus make employees' workplace goals with respect to sick leave and disability provisions, unachievable;
 - (h) The impugned provisions fundamentally upset the balance of power in collective bargaining, reducing employees' negotiating leverage, and denying employees any control or influence over the bargaining process with respect to sick leave coverage, a vital and important collective bargaining right to employees and Treasury Board's key concern for this round of bargaining;
30. The impugned provisions of Bill C-59 also effectively prevent recourse to collective strike action by employees without adequate countervailing protections, contrary to s. 2(d) of the *Charter*, which protects the right to strike. The ability to strike allows workers, through collective action, to refuse to work under imposed terms and conditions. The right to strike, at the moment of impasse, is an affirmation of the dignity and autonomy of employees. Despite s. 271 of Bill C-59, the impugned provisions of Bill C-59, by conferring on Treasury Board a unilateral power to modify or remove existing sick leave provisions in collective agreements and impose new sick leave provisions, remove sick leave as an issue over which the Applicants' members can effectively strike.

The Infringement is Not Justified under Section 1 of the Charter

31. The infringement of s. 2(d) of the *Charter* does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*, as it neither advances a sufficiently important government objective, nor does it meet the three proportionality requirements of s. 1 of the *Charter*;

Legislative Provisions

32. Sections 1, 2(d), 24(1) and 32 of the *Canadian Charter of Rights and Freedoms*
33. Section 52 of the *Constitution Act, 1982*
34. Rule 14 of the *Rules of Civil Procedure*; and
35. Such further and other grounds as counsel may advise and this Honourable Court may permit.

C. The following documentary evidence will be used at the hearing of the application:

1. Affidavit of Jamie Dunn, to be sworn;
2. Affidavit of Colin Muise, to be sworn;
3. Affidavit of Stan Buday, to be sworn;
4. Affidavit of Hélène Paris, to be sworn;
5. Affidavit of Nick Giannakoulis, to be sworn;
6. Affidavit of Scott Chamberlain, to be sworn; and

7. Such further and other affidavits and materials as counsel may advise and this Honourable Court may permit.

Date: June 26, 2015



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THE PROFESSIONAL INSTITUTE OF
THE PUBLIC SERVICE OF CANADA,
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Respondent

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Proceeding commenced at OTTAWA

NOTICE OF APPLICATION

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