CASE NO. 3057

REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENTS

Complaint against the Government of Canada (presented by

- **the National Union of Public and General Employees (NUPGE)**

supported by

- **the Public Service International (PSI)**
- **the Canadian Labour Congress (CLC) and**
- **the Alberta Federation of Labour (AFL)**

Allegations: The complainant organization alleges that the Government of Alberta adopted the Public Sector Services Continuation Act (Bill 45) with the intent to further limit collective rights of public sector employees in the province

184. The complaint is contained in a communication dated 13 February 2014 from the National Union of Public and General Employees (NUPGE) on behalf of its Alberta component – the Health Sciences Association of Alberta (HSAA/NUPGE). Public Service International (PSI), the Canadian Labour Congress (CLC) and the Alberta Federation of Labour (AFL) associated themselves with the complaint in communications dated 20 February and 9 April 2014.

185. The Government of Canada transmitted observations of the government of Alberta in a communication received by the Office on 22 January 2015.

186. Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

187. In its communication dated 13 February 2014, the NUPGE explains that it is one of Canada's largest unions with over 340,000 members and that HSAA, its component in Alberta, represents 25,000 paramedical technical, paramedical professional and general support employees in more than 240 disciplines. These workers are employed in the public and private health-care sectors in Alberta. Almost all belong to a province-wide bargaining unit, are covered by one collective agreement and are governed by the Labour Relations Code (LRC), which like the Public Service Relations Act (PSERA), prohibits employees in the health-care sector from striking.

188. The NUPGE explains that its complaint concerns the Public Sector Services Continuation Act (Bill 45). The complainant further seeks to have the Committee re-examine the strike restrictions imposed on about 200,000 public sector employees in Alberta.

189. The NUPGE explains that the Bill was introduced by the government in the Alberta legislative assembly on 27 November 2013 with less than one-day notice and without consultation with the HSAA or any other unions impacted by the legislation. The only prior notice of this Bill came on 26 November 2013, when the Minister of Human Resources introduced a motion to limit debate and enforce closure, even before the Bill has been tabled and seen by members of the legislature. The Act was rammed through the legislature with little debate and passed on 4 December 2013.

190. According to the NUPGE, the Public Sector Services Continuation Act (Bill 45) places further restrictions on some 200,000 unionized public sector employees in Alberta who were already denied the right to strike, and broadens the definition of a strike to include "any slowdown or any activity that has the effect of restricting or disrupting production or services". The union further alleges that the Act alters the definition of "strike" by removing the requirement that the intent behind any strike activity is to compel terms and conditions of employment through withholding of work or services. According to the complainant, it also denies individuals the fundamental right to freedom of expression by introducing for the first time in Canada a vague legal concept of "strike threat", which makes it illegal to canvass the opinion of "employees to determine whether they wish to strike", or for an individual to freely express a view that calls for or supports strike action. The union claims that even those who are not directly involved with the union, like academics or public policy commentators, could be prosecuted for suggesting that a strike is the only means to protect the public interest or to draw attention to unsafe working conditions that put the health workers and the general public at risk.

191. The NUPGE alleges that the Act imposes "draconian" fines on unions, their members and even on citizens unrelated to the unions, who encourage or support an "illegal strike" or "strike threat". In this respect, according to the union:

- section 6(1) and (2) provides for an automatic minimum of three months' suspension of union dues of the entire bargaining unit for the first day or partial day that a strike or strike threat occurs, and an additional one-month dues suspension for each "day or partial day" of a strike or strike threat;

- section 9(8) provides for 1 million Canadian dollars (CAD) to be paid in Court under an abatement order for each day that the strike or strike threat occurs, without providing for any maximum amount; and

- section 18(1)(a)(i) and (ii), provides for a fine of CAD250,000 plus CAD50 for each day of a strike multiplied by the number of employees involved in the strike.

192. According to the complainant, these fines will be imposed regardless of whether the union actually knew of, caused, counselled, or consented to the strike or strike threat. They will also be imposed regardless of whether the union had any control over the employees involved in a strike or strike threat, or how many employees were engaged in a strike or strike threat. The NUPGE adds that the Act imposes a reverse onus on HSAA, or other union, if it wishes to challenge the penalties. A union must first satisfy the Labour Relations Board (LRB) that it gave express instructions against a strike or a strike threat before the strike or strike threat happened (section 6(3)(a)), which means that the union has to prove that it had given an advance notice against strike action or making a strike threat regardless of whether it knew of, caused, counselled, or consented to the strike or strike threat. According to the NUPGE, this makes it effectively impossible for the union to avoid the minimum three-month dues suspensions in situations of an illegal strike or other unauthorized strike or strike threat. It further makes a union liable for the actions of non-members who engage in an unauthorized strike or strike threat, and effectively confiscates its funds by holding them in a "liability fund" for up to two years before the employers are even required to make an application to Court for judgment against a union for a strike or strike threat, regardless of whether it knew of, caused, counselled, or consented to the strike or strike threat, or had any advance notice of the strike or strike threat (section 11(3)). The NUPGE further argues that the Act automatically imposes personal fines on union officers or representatives and the individual bargaining unit employees, even if they had advised bargaining unit members not to refuse work, or not to stop working. If the LRB determines that a strike has occurred, the union officers and representatives would still be subject to fines even if the refusal to work or to continue working are undertaken by the members in order to comply with their legal obligations under the Occupational Health and Safety Act and/or the Health Discipline Act.

193. It further indicates that, on 8 January 2014, a constitutional challenge in the Alberta Court of Queen's Bench was lodged against the Act arguing that it violates Canada's Charter of Rights and Freedoms by denying its members' right to freedom of expression, freedom of association, liberty and fundamental principles of justice.

194. The NUPGE alleges that even prior to the introduction of Bill 45, public sector labour relations in Alberta were governed by two of the most restrictive collective bargaining laws in Canada: the PSERA (1977) which governs the collective bargaining process for some 60,000 unionized provincial government employees, and the LRC (2000), which governs the collective bargaining process for the other 100,000 unionized public sector employees not covered by the PSERA. The complainant recalls that almost all of the HSAA's members are covered by the LRC.

195. With regard to the PSERA, the complainant considers the following provisions to be restrictive for the reasons it outlines below:

- section 70, as it prohibits public employees (the majority of which, according to the union, do not provide essential services) and their unions from participating in a strike or causing a strike;

- part 6, division 2, pursuant to which, if the outcome of the collective bargaining process does not reach a negotiated settlement on terms and conditions of employment, the only dispute resolution mechanism available to unionized public sector employees is compulsory arbitration;

- section 69, because it allows employers to suspend for up to six months the deduction and remittance of union dues, assessments, or other fees payable to the union, if the members of the union participate in an illegal strike; and

- section 71, which provides for penalties imposed on any union officer, or representative of a union (up to $10,000), or any other person, who causes a strike (up to $1,000 a day for each day the strike continues).

196. With regard to the LRC, the NUPGE considers that, the following provisions are restrictive for the reasons it outlines below:

- part 2, division 16, because it prohibits health care workers not covered by the PSERA from participating in a strike or causing a strike (the majority of which, according to the union, do not provide essential services);

- section 97, as it makes compulsory arbitration the only dispute resolution mechanism available to unionized public sector employees;

- section 114, as it gives the LRB the authority to direct an employer to suspend the deduction and remittance of union dues for up to six months from employees covered by section 96 who have participated in a strike;

- section 116, as it gives the government the authority to direct the LRB to revoke the certification of a union that causes or participates in a strike; and
- section 160, because it establishes penalties identical to those contained in section 70 of the PSERA for any union officer or representative or any other person who causes or attempts to cause a strike.

197. With regard to both pieces of legislation the NUPGE refers to Cases Nos 893, (examined by the Committee in its Report No. 187, November 1978), and 1234 and 1247 (examined by the Committee in its Report No. 241, November 1985) dealing with the PSERA and the Labour Relations Act (predecessor of the LRC). The complainant requests the Committee, in dealing with this complaint, to take into account these cases and the failure of successive governments to act on the recommendations of the ILO Governing Body.

B. The Government's reply

198. In a communication received by the Office on 22 January 2015, the Government of Canada submits an interim response on behalf of the government of Alberta. The government of Alberta indicates that Bill 45 has not been proclaimed in force as this legislation is currently subject to litigation before the Alberta courts.

199. The government of Alberta explains that the LRC and the PSERA contain measures to hold unions and individuals who break the law accountable. However, the government of Alberta's past experiences with illegal strikes in the public sector indicated a further need to deter and halt illegal strike activity. Bill 45 would apply to unionized public sector workers in Alberta who are already prohibited from striking under the LRC and PSERA. The legislation was introduced to help ensure the continuation of public services by further deterring illegal strikes that have the potential to seriously impact the health and safety of Albertans.

200. The government of Alberta considers that the NUPGE analysis of Bill 45 misstates what Bill 45 means and does. While the government of Alberta understands that the Committee on Freedom of Association is free to reach its own conclusions regarding whether Bill 45 violates Convention No. 87, it considers that the Committee's reasoning must be based on how Bill 45 is understood under domestic law. In particular, unlike the LRC, but similar to the PSERA and to many other labour relations statutes across Canada, Bill 45 does not require that a "strike" be specifically directed at obtaining better terms and conditions of employment, but extends as well to a concerted withdrawal of labour that is designed to achieve goals unrelated to collective bargaining, such as political strikes. It does not follow from this, as the NUPGE claims, that this expanded definition could prevent employees from complying with other statutory and legal obligations including the right to refuse to perform unsafe work as provided for in Alberta's Occupational Health and Safety Act, or avoiding actions or inactions that would result in unprofessional conduct under Alberta's Health Professions Act. While a refusal to work or a diminution of services may constitute unprofessional conduct, actions or inactions genuinely taken in order to comply with professional responsibilities do not constitute a strike. Nor does a genuine refusal to perform unsafe work. For these reasons, the government of Alberta disagrees with the interpretation asserted by the NUPGE.

201. The government of Alberta further considers that there is nothing vague or novel about Bill 45's definition of "strike threat". Particularly in health care, a credible threat of a strike may have effects as great as an actual strike – alternative arrangements need to be made to assure patient care, and patients may have to be moved out of province. Furthermore, throughout Canada bargaining agents are responsible to not, variously "counsel", "procure", "support", "authorize" or "encourage" unlawful strikes in their bargaining units, and may be liable if they do not make all reasonable efforts to bring a strike to an end. It further refutes the allegation that Bill 45 renders a union responsible for a strike or strike threat "regardless of whether the union actually knew of, caused, counselled, or consented to the strike or strike threat", or "regardless of whether the union had any control over the employees involved in a strike or strike threat". A union may avoid penalties if it expressly and consistently repudiates strikes and strike threats as a means for bargaining unit employees to achieve workplace or other goals and if it does not encourage a particular strike or strike threat. Bill 45 creates a regime of strict (not absolute) responsibility for bargaining agents for strikes and strike threats in a bargaining unit.

202. The government of Alberta points out that, given that Bill 45 is not in force and is the subject of domestic litigation, it is continuing in its process of review. It intends to provide further information to the Committee within a reasonable period of time.

C. The Committee's conclusions

203. *The Committee notes that the allegations in this case, submitted by the NUPGE in a communication dated 13 February 2014, relate to the adoption, in December 2013, of the Public Sector Services Continuation Act (Bill 45). The Committee notes that according to the complainant, this piece of legislation was adopted without prior consultation with the workers' organizations. This*

appears to be supported by the evidence submitted by the complainant and is not refuted by the Government. In this respect, the Committee, on a number of occasions, has emphasized the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests. It considered, in particular, that it was essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with the appropriate organizations of workers and employers [see ***Digest of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, paras 1072 and 1075]. The Committee expects that in the future, the Government will engage, at an early stage of the process, in full and frank consultations with the relevant workers' and employers' organizations on any questions or proposed legislation affecting trade union rights so as to permit the attainment of mutually acceptable solutions.*

204. *The Committee notes that according to the NUPGE, this Bill 45 places further restrictions on unionized public sector employees in Alberta, who were already denied their right to strike either under the PSERA or the LRC.*

205. *The Committee observes that pursuant to its section 1(1)(f), Bill 45 applies to the employees to whom division 16 of part 2 of the LRC applies, as well as to employees covered by the PSERA. Whereas the latter governs public service, government agencies and Crown corporations of Alberta (with the exception of bodies listed in a schedule to the PSERA), the former applies to firefighters, all employees of approved hospitals as defined in the Hospitals Act, as well as employees of the regional health authorities and ambulance attendants as defined in the Emergency Health Services Act (section 96(1) of the LRC).*

206. *Pursuant to section 96(2) of the LRC, no employees or trade union to which division 16 of part 2 applies shall strike, cause a strike or threaten to cause a strike. Section 70 of the PSERA prohibits strikes (causing, attempting to cause or consenting to strikes) in the public services and instead establishes compulsory binding arbitration as the method of resolving collective bargaining disputes (part 6, division 2).*

207. *The Committee notes that in its section 4, Bill 45 reaffirms that: (1) no employee and no trade union or officer or representative of a trade union shall cause or consent to a strike; (2) no employee and no officer or representative of a trade union shall engage in or continue to engage in any conduct that constitutes a strike threat or a strike; and (3) no trade union shall engage in or continue to engage in any conduct that constitutes a strike threat.*

208. *With regard to various sanctions for strike action provided by Bill 45, the Committee notes that pursuant to section 6, in the case of a strike threat or a strike, deduction from payroll of union dues, assessments and other fees that would otherwise be payable by employees in the bargaining unit, and their remittance to the trade union concerned shall be suspended by the employer for a period of three months for the first day or partial day on which the strike threat or strike occurs, plus one additional month for each additional day or partial day on which the strike threat or strike continues unless the union satisfies the LRB that the strike threat or strike occurred against the express instructions of the trade union given before the strike threat or strike began; that all the actions of the trade union and its officers and representatives have been consistent with those express instructions since the instructions were given, and that neither the trade union nor any of its officers or representatives has contravened section 4 of Bill 45 in respect of the strike threat or strike.*

209. *In addition, pursuant to section 9 of Bill 45, where, on an originating application made by the minister, an employer or an authorized person, the court is satisfied that a strike threat or a strike has occurred or is occurring, the court shall make a declaration to that effect and shall make an abatement order requiring the trade union to pay into court CAD1,000,000 for each day or partial day on which a strike threat or a strike occurs or continues, unless the union satisfies the court that the strike threat or strike occurred against the express instructions of the trade union given before the strike threat or strike began; that all the actions of the trade union and its officers and representatives have been consistent with those express instructions since the instructions were given, and that neither the trade union nor any of its officers or representatives has contravened section 4 of Bill 45 in respect of the strike threat or strike. An abatement order:*

…

(b) must include the following orders, as applicable:

(i) if a strike threat is occurring, an order requiring the employees and the trade union and its officers and representatives to immediately cease engaging in all conduct that constitutes a strike threat;

(ii) if a strike is occurring:

(A) an order that the trade union immediately instruct the employees who are on strike to end their strike;

(B) an order that the trade union immediately instruct all employees in the bargaining unit to continue or resume, as the case may be, the duties of their employment without slowdown or other diminution of services; and

(C) an order that all employees in the bargaining unit immediately continue or resume, as the case may be, the duties of their employment without slowdown or other diminution of services; and

(c) may include any other order or direction the Court considers necessary or appropriate in the circumstances.

210. *The Committee understands that the amount determined by the court is kept in a liability fund established pursuant to section 10 of Bill 45 and that an employer who suffered "eligible losses" may apply to the court within a two-year period after the day on which a strike threat or strike ends pursuant to section 11 of Bill 45. This remedy given to an employer is in addition to any other remedies available in law to the employer for the recovering of losses from the trade union in respect of a strike threat or a strike (section 12). Where the court determines that an employer has suffered eligible losses, the court shall grant judgment in favour of the employer against the trade union for the amount of the eligible losses as determined by the court to be paid out of a liability fund, unless the union satisfies the court that the strike threat or strike occurred against the express instructions of the trade union given before the strike threat or strike began, that all the actions of the trade union and its officers and representatives have been consistent with those express instructions since the instructions were given, and that neither the trade union nor any of its officers or representatives has contravened section 4 of Bill 45 in respect of the strike threat or strike. After the expiration of two years, any amount remaining in the liability fund is returned to the union.*

211. *The Committee notes that pursuant to section 16 of Bill 45, administrative penalties may be imposed by the minister or an appointed delegate on an employee who has contravened section 4 in the amount not exceeding the amount determined by multiplying the number of days or partial days on which the contravention occurred, or continued by an amount equal to one day's pay for that employee. The Committee understands that pursuant to subsection (8), a person on whom an administrative penalty is imposed and who pays the administrative penalty shall not be charged under Bill 45 with an offence in respect of the same contravention pursuant to section 18 (outlined below).*

212. *The Committee notes the penalties imposed under section 18(1) of Bill 45 on a person or a trade union or other organization that contravenes or fails to comply with the abovementioned provisions of sections 4, 6 and 9:*

(a) in the case of an employer or trade union, to a fine of the sum of:

(i) $250 000; and

(ii) the amount determined by multiplying $50 by the number of employees who, on the day the offence occurs or, in the case of an offence that continues for more than one day, on the last day or partial day on which the offence occurs or continues, belong to the bargaining unit to which the offence relates for each day or partial day on which the offence occurs or continues;

(b) in the case of an officer or representative of a trade union, including an officer or representative who is an employee within the bargaining unit to which the offence relates, to a fine of $10 000 for each day or partial day on which the offence occurs or continues;

(c) in the case of an employee who is not an officer or representative referred to in clause (b), to a fine not exceeding the amount determined by multiplying the number of days or partial days on which the offence occurs or continues by an amount equal to one day's pay for that employee; or

(d) in the case of a person to whom or an organization to which none of clauses (a), (b) or (c) applies, to a fine of $500 for each day or partial day on which the offence occurs or continues.

213. *At the outset, the Committee considers it necessary to draw a distinction between cases where strike action should, as a fundamental right of workers and their organizations, remain lawful, and those, where restrictions and even prohibitions may be imposed on the exercise thereof. The Committee recalls that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests [see **Digest**, op. cit., para. 521]. It nevertheless considered that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services, the interruption of which would endanger the life, personal safety or health of the whole or part of the population) [see **Digest**, op. cit., para. 576].*

214. *The Committee recalls that in has examined the PSERA's provisions prohibiting strikes in the public services in Cases Nos 893 (see Reports Nos 187, 194, 202 and 204) and 1247 (see Report No. 241). In Case No. 1247, with reference to Case No. 893, the Committee considered that the right to strike is an essential means by which workers may defend their occupational interests. It also recalled that, if limitations on strike action are to be applied by legislation, a distinction should be made between publicly-owned undertakings which are genuinely essential, that is, those which supply services whose interruption would endanger the life, personal safety or health of the whole or part of the population, and those which are not essential in the strict sense of the term and requested the Government to consider the possibility of introducing an amendment to the PSERA in order to confine the prohibition of strikes to services which are essential in the strict sense of the term.*

215. *As regards the prohibition on the right to strike by certain categories of workers under the LRC, the Committee recalls that while firefighting and ambulance services as well as hospital sector may be considered to be essential services, within those essential services, certain categories of employees, such as hospital labourers and gardeners, should not be deprived of the right to strike [see **Digest**, op. cit., para. 593].*

216. *With regard to the various sanctions imposed by Bill 45, the Committee considers that while unlawful exercise of the right to strike may give rise to certain sanctions, the national legislative provisions declaring a strike unlawful should themselves be in conformity with the principles of freedom of association, which, as indicated above is not the case as concerns some aspects of the PSERA, LRC and thus the new Bill 45, which prohibit the right to strike of employees other than those exercising authority in the name of the State and those providing essential services in the strict sense of the term. The Committee therefore regrets that by adopting Bill 45, the Government has reaffirmed the prohibition on collective action including on employees who should enjoy the right to strike pursuant to the freedom of association principles enunciated above.*

217. *The Committee expresses concern at the level of sanctions for strike action or even threat of a strike, imposed by Bill 45, which could not only have a significant damaging effect on the financial resources of the union but may very well hinder the union's capacity to undertake lawful strike action due to the uncertainty in the interpretation of Bill 45. With regard to the sanction of deduction from payroll of trade union dues foreseen in section 6 of Bill 45, the Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 475]. The Committee further recalls that penal sanctions should not be imposed on any worker for participating in a peaceful strike. Finally, the Committee emphasizes that legislative provisions which impose sanctions in relation to the threat of strike are contrary to freedom of expression and principles of freedom of association.*

218. *Noting the Government of Alberta's indication that Bill 45 is not currently in force and is the subject of domestic litigation, the Committee requests the Government to keep it informed of the*

outcome of the judicial proceedings and expects that its conclusions above will be taken into account within the framework of the review of Bill 45.

The Committee's recommendations

219. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee expects that in the future the Government will engage, at an early stage of the process, in full and frank consultations with the relevant workers' and employers' organizations on any questions or proposed legislation affecting trade union rights so as to permit the attainment of mutually acceptable solutions.

(b) Noting that the Public Sector Services Continuation Act (Bill 45) is not currently in force and is the subject of domestic litigation, the Committee requests the Government to keep it informed of the outcome of the judicial proceedings and expects that its conclusions above will be taken into account within the framework of the review Bill 45.