SENATE **SÉNAT**

CANADA

Report of the Standing Senate Committee on Human Rights re: The Public Sector Equitable Compensation Act

THIRD REPORT

Chair
The Honourable Raynell Andreychuk

Deputy Chair
The Honourable Mobina S. B. Jaffer

June 2009

INTRODUCTION

On 6 February 2009, the Minister of Finance, the Hon. Jim Flaherty, introduced Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on 27 January 2009 and related fiscal measures.[1] As an omnibus bill, Bill C-10 amended numerous federal statutes and enacted two new ones. One of the new acts of Parliament introduced by the bill was the *Public Sector Equitable Compensation Act* ("PSECA").[2] Bill C-10 was studied by the House of Commons Standing Committee on Finance on 23 and 24 February 2009[3] and the Senate Standing Committee on National Finance on 10, 11 and 12 March 2009.[4]

Bill C-10 received royal assent on 12 March 2009, at which point the bill became the *Budget Implementation Act, 2009* ("BIA")[5] and section 394 of the bill became the PSECA.[6] In light of concerns expressed by the Senate that a more detailed examination of Bill C-10 was warranted, various Senate committees were asked to conduct further studies. On 12 March 2009, the date the bill received royal assent, a motion was adopted in the Senate referring those elements of the new BIA dealing with equitable compensation to the Standing Senate Committee on Human Rights (the "Committee") for study.[7] Other aspects of Bill C-10 were referred to other Senate committees.[8] Each committee is required to report the results of their study back to the Senate by 11 June 2009.

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[1] Legisinfo, Internet site, http://www.parl.gc.ca/legisinfo/index.asp?Language=E&Session=22&query=5697&List=toc.

[2] Part 11 of Bill C-10 contained the PSECA (section 394), certain transitional provisions (sections 395 to 398) and consequential amendments to other legislation (sections 399 to 405). This is explained in greater detail in the section "The Transition Period" below.

[3] House of Commons Standing Committee on Finance, Committee Meetings, Internet site, http://www2.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Cmte=FINA&Language= E&Mode=1&Parl=40&Ses=2.

[4] Senate Standing Committee on National Finance, Committee Proceedings, Internet site, http://www.parl.gc.ca/common/Committee_SenProceed.asp?Language=E&Parl=40&Ses=2&comm_id=13.

[5] *Budget Implementation Act, 2009*, S.C. 2009, c. 2.

[6] *Public Sector Equitable Compensation Act*, S.C. 2009, c.2, s. 394.

[7] Those parts dealing with equitable compensation in the BIA being: Part 11, sections 394 to 405 (the PSECA, the consequential amendments, and the transitional period provisions).

[8] The motion, as adopted, reads:

> That, notwithstanding any rules or usual practices, and without affecting any consideration or progress made by the Senate with respect to Bill C-10, the *Budget Implementation Act, 2009*, the following committees be separately authorized to examine and report on the following elements contained in that bill:
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> (*a*) The Standing Senate Committee on Energy, the Environment, and Natural Resources: those elements dealing with the *Navigable Waters Protection Act* (Part 7);
>
> (*b*) The Standing Senate Committee on Banking, Trade, and Commerce: those elements dealing with the *Competition Act* (Part 12);
>
> (*c*) The Standing Senate Committee on Human Rights: those elements dealing with equitable compensation (Part 11); and

This report begins by setting out the scope of the Committee's study and identifying the witnesses who appeared before us. A general background section follows that provides an overview of the pay equity complaints system included in the *Canadian Human Rights Act* ("CHRA")[9] that has been replaced, in part, by the PSECA. This background section also provides a summary of the key provisions of the PSECA and the equitable compensation system it has introduced.

The substantive commentary provided to the Committee is included under the "What we Heard" section. This commentary is divided into sections covering general statements made in support or in opposition to the changes being brought in by the PSECA and into subsections that cover certain key points of discussion.

Lastly, this report includes a section containing the Committee's conclusions and recommendations.

THE SCOPE OF OUR STUDY

Having received the Order of Reference, the committee commenced its preparation for the study. Two public sector unions, the Professional Institute of the Public Service of Canada ("PIPSC") [10] and the Public Service Alliance of Canada ("PSAC")[11] separately commenced legal proceedings in the Ontario Superior Court of Justice on 6 April 2009 and 28 April 2009, respectively, challenging the constitutionality of the PSECA and the *Expenditure Restraint Act*[12] (the other piece of legislation created by the BIA). Both applicants are alleging, among other arguments put forward, that the PSECA violates the guarantees of freedom of expression and

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(*d*) The Standing Senate Committee on National Finance: all other elements of the bill, in particular those dealing with employment insurance; and

That each committee present its final report no later than June 11, 2009.

Available at: Parliament of Canada, Debates of the Senate, *2nd Session, 40th Parliament, Volume 146, Issue 19*, available at: http://www.parl.gc.ca/40/2/parlbus/chambus/senate/deb-e/019db_2009-03-12-_E.htm?Language=E&Parl=40&Ses=2

[9] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[10] The Professional Institute of the Public Service of Canada, Internet site http://www3.pipsc.ca/portal/page/portal/website.

[11] The Public Service Alliance of Canada, Internet site, http://www.psac.com/news/2009/releases/21-0409-e.shtml

[12] *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393.

freedom of association (sections 2 (b) and (d)) and the equality rights (section 15) included in the *Canadian Charter of Right and Freedoms*.[13]

The Committee respects the right of the Ontario Superior Court of Justice to make the final determination on the cases before it and in no way wishes to interfere in this process. Given that the PSECA is currently the subject of more than one constitutional challenge at this time, and given that the regulations required to fully implement the law are still at the development stage,[14] the Committee has chosen to restrict the scope of this study to an examination of the changes brought in by the PSECA and the key differences between the new equitable compensation system and the old system for public sector pay equity complaints under the *Canadian Human Rights Act* ("CHRA").[15] This study does not question pay equity in Canada, nor does it examine its history.

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

The Committee heard from a number of witnesses on 11 and 25 May 2009, and received their written submissions. On May 11th, the Committee heard from representatives from the Canadian Human Rights Commission: Mr. Ian Fine, Director General and Senior General Counsel, Dispute Resolution Branch and Ms. Fiona Keith, Counsel, Dispute Resolution Branch. We also heard from Mr. John Farrell, the executive director of the Federally Regulated Employers - Transportation and Communication ("FETCO"), and Mr. David Olsen, Assistant General Counsel, Legal Affairs, Canada Post Corporation.

On May 25th, the Committee heard from Hélène Laurendeau, Assistant Secretary, Labour Relations and Compensation Operations, from the Treasury Board Secretariat of Canada, followed by a panel including: Mr. Milt Isaacs, President and Chair of the Board of Directors, Association of Canadian Financial Officers ("ACFO"); Ms. Patty Ducharme, National

[13] Professional Institute of the Public Service of Canada, Submission to the House of Commons Standing Committee on Finance, dated 23 February 2009, available at: http://www3.pipsc.ca/portal/page/portal/website/issues/govtaffairs/fc_brief.en.pdf.
[14] Hélène Laurendeau, Assistant Secretary, Labour Relations and Compensation Operations, Treasury Board Secretariat of Canada, testimony before the Committee, 25 May 2009.
[15] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

Vice-President of PSAC; Ms. Daphne Taras, Professor of Labour Relations, Haskayne School of Business, University of Calgary; and Mr. Geoffrey Grenville-Wood, General Counsel, PIPSC.[16]

BACKGROUND

A. OVERVIEW OF THE CANADIAN HUMAN RIGHTS ACT

Prior to the PSECA, public sector pay equity matters were handled by the Canadian Human Rights Commission ("CHRC") and the Canadian Human Rights Tribunal ("CHRT") under the CHRA. The CHRA was enacted in 1977 to provide an informal and effective process for resolving cases of discrimination in areas of federal jurisdiction. The system is essentially complaints-based in that a complaint of discrimination must be lodged with the CHRC before the process can go forward. The CHRA does not expressly set out rights to equality in the manner of the *Canadian Charter of Rights and Freedoms*,[17] nor does it create negative proscriptions in the manner of the *Criminal Code*.[18] Rather, it simply states that certain conduct amounts to a "discriminatory practice," asserts that such practices can be the subject of a complaint to the CHRC and further, provides that anyone found to be engaging or to have engaged in a discriminatory practice can be ordered to provide a remedy. Sections 7 through 11 of the CHRA prohibit discriminatory employment practices on certain prohibited grounds by federal public sector and federally regulated private sector employers.[19] More specifically, section 11 of the CHRA pertains to pay equity and provides that: "It is a discriminatory practice to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

Upon receipt of a complaint pursuant to section 11 of the CHRA, the CHRC has the power to investigate and then to settle or dismiss complaints, or alternatively, to refer any disputes to the CHRT for hearing and resolution. A number of factors are considered in assessing whether a complaint under section 11 is justified. Regulations passed under the CHRA,

[16] All quotations from witnesses contained in this report are taken from these oral testimonies unless otherwise stated.
[17] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[18] *Criminal Code*, R.S.C. 1985, c. C-46.
[19] Canadian Human Rights Commission, Internet site, http://www.chrc-ccdp.ca.

the *Equal Wages Guidelines, 1986*,[20] establish the principles and criteria to be used in making such an assessment. These guidelines establish, among other rules, that in determining whether a wage-payment practice complained of is discriminatory on the ground of gender, one factor to be considered is whether the "job group" at issue is predominantly male or female. The Guidelines also identify certain exceptions that could justify differences in wages between men and women for work of equal value, such as internal labour shortages, seniority or performance ratings.

In order to determine whether employees are performing work of "equal value", section 11 (2) of the CHRA sets out that an assessment of the "value" of the work being preformed by the complainant(s) must be undertaken, using the following criteria: "the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed." "Reasonable factors" may also be considered in accordance with the *Equal Wages Guidelines* to justify a difference in wages, such as: performance ratings, internal shortages, regional rates or temporary training.

Prior to the enactment of the PSECA, the CHRA applied to all federal public sector and federally regulated private sector employees. Currently, it continues to apply only to the federally regulated private sector for pay equity matters.

B. OVERVIEW OF THE PUBLIC SECTOR EQUITABLE COMPENSATION ACT

The Coming into Force of the PSECA

As stated previously, the PSECA was introduced under a single provision of Bill C-10: section 394. Other provisions in Part 11 of Bill C-10 made consequential amendments to the CHRA and the *Public Service Labour Relations Act* (the "PSLRA") to accommodate the new equitable compensation system (sections 399 to 405), while other provisions in this Part created a transitional period to prepare for the changes being brought in by the PSECA (sections 395 to 398). The transitional provisions came into effect on royal assent of the bill. Sections 394 and 399 to 405 will come into force on a day to be fixed by order of the Governor in Council. This

[20] *Equal Wages Guidelines, 1986* (SOR/86-1082).

date has not yet been publicly announced, though as discussed below, Hélène Laurendeau of the Treasury Board Secretariat explained she expected this to occur within 18 months time.

Objective of the Act

In 2000, the government established the Pay Equity Task Force to review the federal pay equity system and propose recommendations for possible new legislation. The Task Force released its final report in 2004 titled *Pay Equity: A New Approach to a Fundamental Right*, also known as the Bilson Report for the Chair of the task force, Beth Bilson.[21] The Bilson Report noted certain shortcomings in the CHRA system of handling pay equity in the federal public sector, most notably the "lengthy delays . . . and staggering costs associated not only with the outcome [in pay equity cases] but with the very process itself."[22] The Bilson Report recommended, among other reforms, the enactment of separate pay equity legislation that would require employers and employees to develop a pay equity plan and that would include dispute resolution and enforcement mechanisms. Hélène Laurendeau, in her appearance before the Committee, stated that it is the Treasury Board's position that a number of the key recommendations in this report were incorporated into the PSECA. The Committee notes, however, that the Bilson report recommended that: "the new federal pay equity legislation provide that the process for achieving pay equity be separated from the process for negotiating collective agreements."[23]

The PSECA replaces the complaints-based system previously found in the CHRA with a system where employers and bargaining agents must take "proactive" steps to report on their achievements in realizing "equitable compensation". Under the new system, disputes and complaints regarding equitable compensation matters are handled by the Public Service Labour Relations Board ("PSLRB") rather than the CHRC and the CHRT.

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[21] Pay Equity Task Force, "Pay Equity: A New Approach to a Fundamental Right" (the "Bilson Report"), Government of Canada Webarchive, Internet site, http://www.collectionscanada.gc.ca/webarchives/20060209202629/http://www.justice.gc.ca/en/payeqsal/6000.html.

[22] *Ibid*. See the Conclusion to Chapter 3 of the Bilson Report.

[23] *Ibid.* See Recommendation 16.1 at p. 518.

Application of the Act

The PSECA applies to the Treasury Board of Canada as employer of the departments and agencies listed in Schedules I and IV of the *Financial Administration Act*,[24] separate agencies as employers for departments and agencies listed in Schedule V of the *Financial Administration Act*, the Royal Canadian Mounted Police and the Canadian Forces, in both the unionized and non-unionized settings. Those federally regulated employers not covered by the PSECA will remain under the jurisdiction of the CHRA.

The general intent of the PSECA is that "equitable compensation matters" (i.e., situations where equitable compensation is not being achieved) will be addressed at the time employees' wages are set during the collective bargaining process and/or salary negotiations, rather than after a dispute has arisen and through legal proceedings.[25] The PSECA provides that the Governor in Council may make further regulations with regards to a number of the matters covered by it, such as equitable compensation assessments (section 4(5)); however, these regulations are still under development.[26]

Proactive obligations

In unionized workplaces, the PSECA imposes obligations on both public sector employers and bargaining agents to take steps to ensure that employment wages are equitable. It requires employers and bargaining agents to provide reports to employees setting out the measures they have taken to ensure equitable compensation. The PSECA also sets out a process for employers of non-unionized employees to address equitable compensation issues and to report back to their employees on any determinations made with regards to such matters.

Employers and bargaining agents must undertake equitable compensation assessments to determine whether equitable compensation matters exist with regards to job groups that are

[24] *Financial Administration Act*, R.S.C. 1985, c. F-11.
[25] The Treasury Board Secretariat, "Statement by the President of the Treasury Board Welcoming the Public Sector Equitable Compensation Act," Internet Site, http://www.tbs-sct.gc.ca/media/nr-cp/2009/0206b-eng.asp.
[26] Hélène Laurendeau, testimony.

predominantly female. In determining whether a job class is predominantly female for equitable compensation analyses, the threshold for the percentage of employees in the class that are required to be female is set at 70% (section 2). This is to be contrasted with the CHRC and CHRT which had been using different thresholds for different sizes of enterprises as set out in the *Equal Wages Guidelines*: 70% for groups with under 100 employees, 60% for groups between 100 and 500 employees, and 55% for groups of over 500 employees.

To determine the value of work, the PSECA sets out criteria to be applied during an equitable compensation assessment (section 4(2)). These include the skill, effort, and responsibility required to perform the work and the working conditions under which the work is performed. These are criteria that already exist in the *Equal Wages Guidelines*. In addition, the assessment may consider the employer's recruitment and retention needs, the qualifications required to perform the work, and the market forces affecting employees with those qualifications (section 4(2)(b)). A related provision is set out in the preamble to the PSECA, stating that it is intended to recognize that "employers in the public sector of Canada operate in a market-driven economy."

Where an equitable compensation matter is found to exist in a unionized workplace, the PSECA imposes various obligations on employers and unions to make reports available to employees setting out how an assessment was made and how any equitable compensation matters should be addressed, prior to a union submitting a collective agreement to its membership for ratification (sections 15 and 22, for example). Where an equitable compensation matter is found to exist in a non-unionized workplace, the employer must develop a plan to resolve it within a reasonable time and provide a report outlining, among other things, its plan to address the matter, to affected employees (section 7(1)).

Dispute resolution procedures

The PSECA maintains the right to make a complaint for those who believe there is a lack of equitable compensation in a workplace, though complaints will be brought before the PSLRB

rather than through the CHRC. [27] The PSECA also contains provisions that outline procedures that employees may use to contest the conclusions of equitable compensation assessments or to complain that their employer or bargaining agent has not complied with the PSECA. Complaint procedures exist in the Act for both non-unionized (sections 10, 11, 29 and 30) and unionized (sections 23, 24, 31, 32, and 33) employees. The PSECA also sets out the process that employers are to use to respond to a complaint: usually by providing employees with a written response setting out the steps that will be taken to address the complaint and any equitable compensation matters that arise.

The PSLRB has the right to dismiss complaints it receives or to require employers and bargaining agents to provide reports to the Board setting out the equitable compensation assessment. Where the Board is of the opinion that the report contains a "manifestly unreasonable" error, the Board may, by order, require the employer to take measures to correct the error (section 30(2)). It may also order the employer to pay the complainant a lump sum as compensation or to pay equitable compensation to the employees in a particular job class. The procedures for unionized employees are similar; however, in these cases, obligations may be imposed on the bargaining agent as well as the employer.

Arbitration and conciliation procedures are included as options that may be chosen by bargaining agents for unresolved disputes during the course of collective bargaining. If bargaining agents select these options, the arbitration and conciliation procedures in the PSLRA apply (sections 17 to 21). The Board also has the power to order the payment of costs in relation to any PSECA complaint (section 34).

Prohibitions and offences

Sections 36 to 41 of the PSECA contain prohibitions and offences provisions. For example, section 36 states that employers and bargaining agents must refrain from encouraging or assisting any employee in filing or proceeding with a PSECA complaint. Therefore, a union is

[27] Under the consequential amendments to the PSLRA (sections 401 to 403 of the BIA), unions and individuals may bring complaints under the PSECA for "equal work for equal value" related matters, but not grievances under the PSLRA procedures.

not able to assist an employee in bringing forward a complaint and may be fined up to $50,000 if it does so. Section 40 provides that an employer who refuses to employ a complainant or otherwise discriminates against him or her, or a bargaining agent who takes any disciplinary or discriminatory actions against a complainant, may be found guilty of a summary conviction offence, and receive a fine of up to $10,000.

WHAT THE COMMITTEE HEARD

A. THE TRANSITION PERIOD

The Committee heard from witnesses regarding the current legal status of the PSECA and how complaints are currently being handled during the transition period created under the BIA. As explained above, Part 11 of the BIA includes provisions that create the PSECA, consequential amendments to other statutes, and provisions that govern the transition period prior to the coming into force of the PSECA.[28]

The transitional provisions found in sections 395 to 398 of the BIA came into force when Bill C-10 received royal assent. The PSECA and the consequential amendments will come into force on a day to be fixed by order of the Governor in Council. This date has not yet been publicly announced.

Representatives from the Treasury Board Secretariat and the CHRC explained that during the transition period, the CHRC will forward any complaints it receives to the PSLRB for determination. By contrast, all complaints that are currently before the CHRT will continue to be dealt with by this body even if the PSECA comes into force before a particular matter has been concluded. With respect to complaints made either before or after the enactment of the PSECA that are not yet before the CHRT, until such time as the PSECA actually comes into force, the PSLRB will apply the CHRA to resolve complaints based on section 7 or 10 of that Act, if the complaint is in respect of the employer establishing or maintaining differences in

[28] Again, section 394 of the BIA is the PSECA set out in its entirety. Sections 395 to 398 create a framework to govern the transitional period and the transfer of jurisdiction from the CHRC and the CHRT to the PSLRB for matters covered by the PSECA. Sections 399 to 405 contain consequential amendments to the CHRA and the PSLRA.

wages between male and female employees, as well as complaints based on section 11 of the CHRA. In addition to setting out the procedure for handling complaints during the transition period, the transitional provisions contained in sections 395 to 398 of the BIA set parameters regarding remedies and award procedures.

Hélène Laurendeau explained that it is the intention of the Government of Canada to have the PSECA regulations ready within 18 months from now. After the regulations are complete, an order in council will be made bringing the PSECA into force. Once the PSECA is in force, a further set of transitional provisions will take effect to give employers and unions time to adapt to the new law and prepare for the proactive steps it requires of them. According to Ms. Laurendeau, this second transition period will last approximately two years.

Hélène Laurendeau also stated that the Government intends to undertake consultations with relevant stakeholders in preparing the PSECA regulations. On this subject, Milt Isaacs noted that: "Meaningful consultation with all parties affected by [these changes] could mitigate some of the problems with the new process."

Lastly, Hélène Laurendeau explained that the PSECA is intended to ensure that pay equity will be reviewed each time the Government engages in collective bargaining in a unionized environment, or, alternatively, in the case of a non-unionized environment, when an employer revises the salaries of non-unionized employees.

B. PAY EQUITY IN THE PUBLIC SECTOR BEFORE THE PSECA

Witnesses who appeared before the Committee provided various insights and opinions regarding how the former system for addressing pay equity complaints in the public sector functioned under the CHRA, and how it continues to function for the federally regulated private sector (which is not subject to the PSECA).

Representatives from the CHRC explained that the Commission has developed significant experience in handling pay equity issues over the past 30 years.[29] In their view, this system allowed the CHRC in many cases to remedy situations where groups of predominantly female employees were receiving less pay than their male comparator groups. They stated that resulting CHRT decisions benefited "thousands and thousands of individuals, both in the private and public sector."

Having said this, most witnesses who appeared before the Committee were able to identify certain problems with the CHRA system, though some had stronger criticisms than others. The most common concern expressed pertained to the amount of time involved processing pay equity complaints and in resolving disputes in any subsequent litigation. According to Hélène Laurendeau of the Treasury Board Secretariat, most complaints took at least 6 years to resolve, while one federal public service case took 15 years. She added that the former pay equity system in the federal public service was "reactive, lengthy, costly and very adversarial." She added that in 2001, the CHRC found that pay equity cases represented less than 8 per cent of all its cases, but yet absorbed about one-half of the Commission's total spending on legal services. Lawyer David Olson explained that his client, Canada Post Corporation, has been involved in 26 years of "complex litigation" under Section 11 of the CHRA.

Professor Daphne Taras from the University of Calgary explained that compared to average grievance time delays and other types of conflict resolutions within labour relations, the backlog of cases and long delays that has plagued human rights is "unique in labour relations." Patty Ducharme of PSAC commented that "the length of time and cost related to pay equity complaints under the former human rights model is due in large part to the fact that the employer never admits to a pay gap and will fight to the bitter end."

Milt Isaacs of ACFO submitted that some of the difficulties with respect to the resolution of pay equity complaints under section 11 of the CHRA resulted from the fact that the

[29] As noted by the representatives from the CHRC, the Commission has been handling pay equity complaints under section 11 of the CHRA since 1978. The Equal Wages Guidelines were developed in 1986 and provided further clarification of the Tribunal's and the Commission's respective roles.

Commission was chronically under-resourced. In addition, he indicated that the process was set up in such a way that either party could bog claims down should they be so inclined. It was not uncommon for claims to go unresolved for a decade or more as every milestone in the process could be challenged or appealed. However, he added that despite its flaws, he was not convinced that the government had brought forward a strong enough business case to demonstrate that the system under the CHRA was "broken".

CHRC representatives noted that pay equity is a "complex area", acknowledged by courts and tribunals as subsuming many areas of expertise, including "job evaluation, classification, and statistics." The potential of pay equity complaints to involve "sizeable financial remedies" and complex jurisdictional issues were noted as factors that contributed to the litigious nature of the former complaints processes. Professor Taras also underscored the complex nature of pay equity matters.

The CHRC representatives also pointed out that significant changes have been made to their complaints-processing system since its inception, and that these changes have been applied to pay equity complaints where possible. Although pay equity complaints continue to take more time than other files to conclude, and although this processing system does not apply to the litigation process that follows, complaints are being processed in less time now than in the past.

THE NEW "EQUITABLE COMPENSATION" SYSTEM

A New Approach

Witnesses who appeared before us came with very different opinions regarding the PSECA and held many different perspectives. Most, however, agreed that the changes brought in by the PSECA were significant. "By moving pay equity into the realm of collective bargaining," ACFO submitted, "the government has fundamentally changed the way in which public servants enforce their human rights."[30] The main arguments expressed by witnesses in support of the new law pertained to replacing the negative aspects of a reactive litigious model that has been prone

[30] ACFO, written submissions to the Committee, 25 May 2009.

to long delays with a proactive model that obligates employers and unions to take active steps to promote "equitable compensation". The main arguments expressed by witnesses in opposition to the new law pertained to concerns over how pay equity/equitable compensation may be achieved within the collective bargaining process and how individuals will be able to advance pay equity/equitable compensation complaints under the PSECA without the assistance of their bargaining agents.

Several witnesses expressed the view that within the context of unionized workplaces, the collective bargaining process may, in theory at least, be an opportune time to deal with pay equity issues. FETCO, an organization representing employers and employer associations in the transportation and communications sectors coming under federal labour jurisdiction, sees this as a necessary integration. Hélène Laurdeneau expressed the view that "over the course of history, concrete action on many employee rights has been achieved and maintained at the bargaining table through the collective bargaining process", and listed "fair wages, proper hours of work … proper working conditions, and issues such as parental leave and occupational health and safety" as examples. PIPSC stated that it welcomed "the opportunity to negotiate pay equity" with the employer. Support for this approach was previously made by the CHRC in a 2001 annual report when it stated that it is "a good idea" for employers and unions to deal with pay equity issues together: "When you are looking at wage rates, why not put your mind to issues that may impact on any pay inequity? That makes sense." [31] Witnesses were divided, however, on the manner in which the collective bargaining process should be used to address pay equity issues.

The Committee also heard commentary from witnesses with regard to the fact that the PSECA has replaced the term "pay equity" with a new term: "equitable compensation". It was noted, however, that the preamble does state that: "Parliament affirms that women in the public sector of Canada should receive equal pay for work of equal value." "Equal pay for work of equal value" is the phrase used in the CHRA to connote pay equity. Some Senators asked questions to the witnesses about the significance of the use of this new term "equitable compensation" throughout the PSECA and the absence of the phrase "equal pay for work of

[31] Canadian Human Rights CommissiCanadian Human Rights Commission, *Special Report to Parliament on Pay Equity, 2001*, available at: a/publications/special_report-en.asp" |http://www.chrc-ccdp.ca/publications/special_report-en.asp}

equal value" in all but the preamble of the Act. Hélène Laurendeau of the Treasury Board Secretariat explained that: "The Act uses the term "equitable compensation" to reflect more closely the fact that it is not only about pay equity, but also about equity in all elements of compensation, which can extend to working conditions and benefits." She noted also that this language was meant to reflect the language used in Convention 100 of the International Labour Organisation, where the term "equal remuneration" is used. [32]

The Committee heard opposing views on whether or not the PSECA brings Canada into further compliance with its International Labour Organisation obligations. Hélène Laurendeau stated the view that the act does meet these obligations as it applies "the principle of equal pay for work of equal value in our methods for determining compensation." She added that: "These obligations can be found in the International Labour Organization's 1951 convention." Geoffrey Grenville-Wood, by contrast, stated that PIPSC believes that "this legislation violates [Canada's] obligations under the International Labour Organisation's conventions, which protect pay equity and the concept, which is now removed from the legislation, of equal pay for work of equal value." He added that this concept "is now being redefined."

General support for the PSECA

Hélène Laurendeau presented the Treasury Board Secretariat's case for the PSECA. She stated that one of the key components of the PSECA is that it "will achieve and maintain equitable compensation by ensuring that it is addressed at the time that wages are set." She further explained that this will be done "by ensuring that both employers and bargaining agents take the steps necessary to properly assess the issues and address them at the collective bargaining table, the forum for wage setting in a unionized environment."

John Farell and David Olson expressed FETCO's support for the new legislation. David Olson stated that the PSECA "makes sense" because "it integrates equitable compensation, or

[32] Intnerational Labour Organisation, Equal Remuneration Convention, 1951 (No. 100), available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_84_en.pdf

pay equity, into the collective bargaining process" where the level, structure, nature and amount of compensation can be appropriately dealt with.

John Farell, David Olson and Hélène Laurendeau were all of the opinion that unions need to be more responsible for the outcomes of collective bargaining with regards to pay equity issues. They cited instances where unions have been able to file pay equity claims on behalf of employees and against the employer, despite having negotiated and agreed to the very collective agreement that they were now contesting. They saw this as a flaw in the previous complaint-driven pay equity resolution system under the CHRA. FETCO added that where unions can make pay equity complaints regarding a collective agreement they negotiated, this "destabilizes the collective bargaining process" and allow unions to avoid their responsibilities of fair representation to their members.[33]

General concerns about the PSECA

The Committee also heard strong criticisms made against the PSECA. Milt Isaacs of ACFO referred to the PSECA as "an attack on the human rights and freedoms that Canadians hold dear." Patty Ducharme of PSAC stated that public service workers have been "stripped" of their fundamental right to pay equity. PIPSC submitted its contention that the PSECA constitutes an "unwarranted and unnecessary attack on the *Charter* rights of federal public-service employees, and the unions representing them." It described the PSECA's promise of affirming the principles that women should receive equal pay for work of equal value as "hollow and cynical … for the provisions of the Act are designed to ensure that there is no workable or practical means of attaining this objective."[34]

ACFO expressed its doubts that the changes brought in by the PSECA will achieve the "worthwhile goal" of pay equity in the federal public service. It is concerned that there has been "no increase in resources" for the resolution of pay equity matters and that "the regulations necessary to effect these significant changes to the pay equity regime have yet to be defined." It

[33] FETCO, written submissions to the Committee, 11 May 2009.
[34] PIPSC, written submissions to the Committee, 25 May 2009.

is also concerned that the "inherent flaws" in the old CHRA system, namely "a lack of resources and perceived lack of political will to settle pay equity claims," has not "gone away" with the introduction of the PSECA; rather, "they have just been moved into a new, less appropriate forum."

ACFO, PIPSC and PSAC all expressed concerns about the effects the PSECA will have on pay equity, given the manner in which the resolution of pay equity matters has been introduced into the general collective bargaining process. PIPSC submitted that: "Several provincial acts require unions and the employer to bargain pay equity issues. However, the bargaining about pay equity is done separately from negotiations on more standard labour issues, and is about how pay equity is going to be implemented."[35] ACFO fears that pay equity will be reduced to a "bargaining chip" in that it will be subject to debates at the bargaining table, "putting it on the same level as call-back pay, court leave, travel time and stand-by pay." PIPSC stated that with the PSECA "pay equity has become an interest of employees that can be traded off against other improvements in collective agreements, rather than a fundamental right to be free from inequitable compensation rules."[36]

David Olson of FETCO specifically responded to arguments such as these by stating that in his view the PSECA does not in fact make pay equity negotiable, but rather "recognizes the principle and provides a mechanism" in the collective bargaining process, while allowing equal pay and freedom of association to "be addressed together in order for both to be balanced and achieved."

ACFO and PISPC noted that Treasury Board representatives have made public statements to the effect that there has been no analysis made to determine whether the PSECA would save the Government of Canada money or resources. Such statements have, at least in part, led ACFO to question the economic benefits of the PSECA, and to describe the Act as having "questionable merit from a business perspective." It explained that a "business case is supposed to do two things: evaluate a system or program from a dollars and cents perspective

[35] *Ibid.*
[36] *Ibid.*

and apply value to that financial analysis by considering it in the greater context." In making the decision to introduce the PSECA, ACFO claims that the government has not respected the Treasury Board Management Accountability Framework[37] to ensure that business cases are drafted for all major changes made to the public service, and is calling on the Government to respect this Framework.

PSAC expressed its concern that the PSECA "introduces a new mechanism that will actually restrict the capacity of women in the public sector to claim and obtain pay equity." Among a number of criticisms it raised, PSAC argued that the definition of female-predominant job groups included in the PSECA, which requires that women make up 70 per cent of the workers in the group, will restrict the substance and application of pay equity in the public sector. Patty Ducharme explained: "Some workers will be entirely excluded from accessing the new equitable compensation mechanism, since workers who belong to a job group comprised of between 55 to 69 per cent women are no longer considered to be members of a female-predominant group." Milt Isaacs added that: "Lost in much of the talk about this legislation is the fact that the government has unilaterally changed the threshold for making pay equity complaints." He explained that other countries and international precedents have set a threshold for female predominance in job groups at anywhere between 55 to 70 per cent. According to his explanation, this threshold varies depending on the size of the job group and the nature of the work, with the highest threshold being reserved for unique situations. "The government locked on that rare and exceptional threshold," he added, "and applied it across the board, thereby denying a number of groups access to their human rights."

Professor Daphne Taras expressed her view that the PSECA contains provisions that are "uniquely problematic," although she focused her submissions to the Committee on the argument that portions of PSECA "likely violate" the *Canadian Charter of Rights and Freedoms*: namely, sections 2(b) on freedom of expression and 2(d) on freedom of association. She added that: "Instead of becoming a sensible means for resolving long-standing pay equity disputes, PSECA cannot help but provoke *Charter* litigation."[38]

[37] Treasury Board of Canada Secretariat, "Treasury Board Management Accountability Framework," available at: http://www.tbs-sct.gc.ca/maf-crg/documents/booklet-livret/booklet-livret-eng.asp

[38] Daphne Taras, written submissions to the Committee, 25 May 2009.

Ian Fine of the CHRC noted that the Commission has concerns about this legislation, although he was hesitant to comment on them at this time, given that the PSECA is still in an early stage of development and the regulations to the PSECA have not yet been drafted (which may ultimately address many of the Commission's outstanding concerns). He did indicate that he felt safeguards and checks and balances needed to be put into place, and the CHRC is unclear, at this point, whether the new regulations and PSECA processes will ultimately provide these.

Witnesses from the unions submitted a number of recommendations regarding the PSECA and the changes they would like to see made to it. Not surprisingly, as PISPC and PSAC are challenging the constitutionality of the PSECA in court, they argue that the PSECA should be repealed and replaced with legislation more in keeping with how they have interpreted the recommendations contained in the Bilson report. In particular, they contend that if pay equity is to be dealt with as part of the collective bargaining process, it should be dealt with as a separate issue from the other matters being negotiated. In addition, they would like to see pay equity disputes resolved by a tribunal with special expertise in pay equity matters. PIPSC submitted a lengthy list of alternative proposed modifications to the law.[39] ACFO, for its part, is asking the Government to, among other things, "establish a mechanism to allow for meaningful consultation in the development of the regulations associated with the *Public Sector Equitable Compensation Act*"; to "commit to a three-year review of the *Public Sector Equitable Compensation Act* to evaluate the actual financial and procedural impact of the changes to pay equity;" and to "establish a mechanism for meaningful consultation with the bargaining agents when developing future legislation with substantial impact on the public service."[40]

Union representation in disputes

A number of concerns were raised by witnesses with regard to section 36 of the PSECA, the consequential amendments made to the PSLRA that prevent grievance procedures from being used to resolve equitable compensation matters, and, generally, the ability of unions to represent individual employees in equitable compensation matters under the PSECA.

[39] PIPSC, written submissions.
[40] ACFO, written submissions.

Professor Taras explained her view that "section 36 and the consequential amendments deprive workers of asserting their rights by denying them access to readily-available and low-cost expertise" and "detach workers from the unions that have been given a statutory right (under the *PSLRA*, Section 67) to be "exclusive" bargaining agents on behalf of their employees."[41] She further explained how unions can provide litigation support, whereas individual employees may not have the "power, expertise, time, or resources to advance their claims."

"It is natural that people would turn to unions and they would turn even to their human resources experts within their employer," Professor Taras added, "but this act uniquely diverts workers from going to the very people who could help unravel the statutory regime that is creating a barbed wire barrier to their access to justice." She compared certain provisions in the PSECA to employment practices in the middle of the twentieth century where workers "could not join unions as a condition of continued employment." She stated that such provisions "have no place being enacted into Canadian law" and expressed her surprise that in 2009 she has found herself "fighting provisions of a statute that deprives workers of association, a Charter right, as a condition of making a complaint."

Professor Taras also contended that "a collective agreement is a living document, and it is subject to a great deal of mid-contract interpretation." Accordingly, developments may occur at other times than during the collective bargaining process that might justify a pay equity issue being raised by a union.

PISPC added that section 36 of the PSECA would "force unions to abdicate their fundamental role as employees' representatives and criminalize unions who assist their members." PSAC argued that the prohibition against union assistance or encouragement in filing a pay equity complaint "compels women to file complaints alone, without the support of their union;" "precludes the unions from representing their members on crucial issues related to their working conditions, such as wage discrimination;" "constitutes a violation of the right to freedom of association guaranteed in section 2 of the Charter"; and "prevents the unions from expressing their views and advising their members, violating the constitutional right to freedom

[41] Daphne Taras, written submissions.

of expression."[42] PIPSC also asserted that the PSECA's prohibition against unions assisting their members in preparing or processing pay equity complaints "clearly violates freedom of expression (section 2(b)) and freedom of association (section 2(d)) guaranteed by the Charter."[43]

Hélène Laurendeau of the Treasury Board explained that the rationale behind Section 36 is "to put in place accountability [and] to develop good faith" in the bargaining process. She further explained that the purpose of section 36 is to ensure that the parties come to the table fully prepared to discuss equitable compensation, and therefore: "it follows that the obligation is put squarely on the two parties to do their homework and their assessments, to raise the issues in relation to equitable compensation, to resolve them in a transparent fashion, and to go back to the membership so that the membership can see how those issues have been dealt with. Once that process is done, it would be inappropriate to allow one of those two parties to go back and unravel what has been agreed at the bargaining table." She further explained that one of the problems with the pay equity system under the CHRA is that "one of the parties could sit down at the bargaining table, agree on wages, turn around and file a pay equity complaint." Under the new system, an employee has "the benefit of a proactive reassessment on an ongoing basis by their bona fide representative with this process. If there is still an issue after the fact, there is still a capacity for complaint."

Equitable Compensation Assessments

As noted above, under the PSECA, employers and bargaining agents must undertake equitable compensation assessments to determine where equitable compensation matters exist with regard to job groups that are predominantly female. Performing an equitable compensation assessment (and thereby determining whether an equitable compensation matter exists) involves assessing the value of work performed by the employees of a particular job class or group. The PSECA sets out criteria to determine the value of work, including the skill, effort, and responsibility that are required to perform the work, as well as the working conditions under which it is performed. The assessment may also consider the employer's recruitment and

[42] PSAC, written submissions to the Committee, 25 May 2009.
[43] PIPSC, written submissions.

retention needs, the qualifications required to perform the work, and the market forces affecting employees with those qualifications.

Professor Taras explained that it will not be easy: "to operationalize the meaning of skill, effort and responsibility" as these terms have been set out in the PSECA. She stated that to do so "would occupy a cadre of experts like myself for many years, and we would still come to no particular agreement about … how to actually implement" these criteria. She added that the additional factors contained in section 4(2)(b), in particular the terminology which introduces the notion of taking into account an employer's recruitment and retention needs, as well as market forces, when performing equitable compensation assessments, was particularly "vague." She stated: "Let me say: I do pay equity; I teach it … I do not have a clue what that means. So, if I do not have a clue what that means, how will any individual complainant, without the 18 years of learning of labour relations, possibly figure out how to approach the board with an individual complaint?" She concluded that the assessment criteria in the PSECA and the difficulty an employee would likely have in accessing the information used in the assessment would make it "difficult for an individual to mount a complaint." Patty Ducharme also expressed concerns over the inclusion of market forces as a criteria used to evaluate whether or not jobs are of equal value, adding that: "the introduction of the market forces criteria to evaluate whether work is of equal value undermines the ability of women to receive pay equity because market forces have historically and consistently undervalued women's work."

Hélène Laurendeau of the Treasury Board explained that these concepts are in fact not new to the arena of pay equity, but rather, PSECA is simply clarifying that these factors should be considered. She stated: "the notion of skill, effort, responsibility and working conditions to determine internal relativity" is a concept already considered under the CHRA. She added that the issues of recruitment, retention and market forces "already exists in the equal wage guidelines, but it was dealt with through an exception that was extremely difficult to interpret."

CONCLUSION

The Committee has heard from various witnesses expressing their views on the positive and negative aspects of both the former public sector pay equity system under the CHRA and the new equitable compensation system under the PSECA. It has reviewed the PSECA in detail and received submissions expressing differing perspectives on whether the new Act is better suited to promote equality for women in employment in the federal public sector.

The Committee is, however, mindful of the fact that until the regulations under the PSECA are complete, it is not possible to know whether or even to what extent many of the concerns raised by the witnesses will be addressed. Additionally, the fact that the issues raised are all by and large currently before the courts, the Committee will not be making specific recommendations directed at the PSECA itself at this time.

However, the Committee is not prepared to set aside the matter. We currently have a mandate to examine issues of discrimination in the hiring and promotion practices of the Federal Public Service, to study the extent to which targets to achieve employment equity are being met, and to examine labour market outcomes for minority groups in the private sector.

The Committee intends to hold hearings to monitor the formation of the regulations and their implementation, to analyze their effectiveness, and to ensure that effective consultations with stakeholders are carried out.

The Committee will use its existing mandate to continue to monitor the effectiveness of the new equitable compensation system under the PSECA.

The Committee therefore recommends:

(a) That the government create a mechanism to allow for consultation in the development of the PSECA regulations and for a follow-up period of three years.

(b) **That the government consult with stakeholders to investigate what can be offered in the way of legal assistance funding for individuals who are unable to approach their union for assistance with a pay-equity complaint.**

(c) **That the federal government ensure adequate funding and resources for pay equity assessments and job classification.**