Public Service Alliance of Canada Submissions on the *Employment Equity Act* Review

TO THE

Taskforce on *Employment Equity Act* Review

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Public Service Alliance of Canada
Alliance de la Fonction publique du Canada

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Summary of Recommendations

The following are PSAC's recommendations for amendments to the *Employment Equity Act* and related legislation that impacts employment equity initiatives in the workplace:

1. Terminology

Outdated terminology (i.e. "Aboriginal Peoples", "visible minorities", etc.) in the *Employment Equity Act* must be updated to reflect the language and terminologies currently used by those communities.

2. Disaggregated Data for Designated Equity Subgroups and Intersectionality

The *Employment Equity Act* must be amended to collect and analyze disaggregated data for every designated equity group. By so doing, representation rates and barriers faced by distinct groups within designated equity groups can be examined and addressed more appropriately. Each specific designated employment equity group should be broken down (e.g. Black, South Asian, Chinese, Arab, etc.) so that barriers for specific communities can be identified and addressed.

Data should also be collected in a manner that allows for intersectional analysis.

3. Inclusion of LGBTQ2+ Community

The *Employment Equity Act* must be amended to include the LGBTQ2+ community as a designated group and the necessary data (census data) must be collected like other designated groups.

Data collected must be disaggregated and allow for an intersectional analysis since the LGBTQ2+ community is not homogenous and does not experience workplace discrimination in the same manner.

4. Labour Market Availability / Workforce Availability Rate

The *Employment Equity Act* must be amended to ensure accurate and current labour market availability and workforce availability rates that are reflective of each designated equity group. The labour market availability and workforce availability rates must be regularly updated between censuses to reflect the changes in Canada's population (e.g. recent newcomers/immigrants who have international experience, non-Canadian Citizens).

5. Tensions between the *Employment Equity Act*, *Public Service Employment Act* and the *Financial Administration Act*

There be a thorough review and amendments made to the *Public Service Employment Act* and the *Financial Administration Act* to eliminate systemic barriers faced by equity-seeking groups. The review must include strengthening the role of central agencies, examining any provisions that hinder the objectives of the *Employment Equity Act*, and increasing the accountability of departments and agencies.

Furthermore, in situations of legislative conflict, the *Employment Equity Act* should supersede the *Public Service Employment Act* and *the Financial Administration Act.*

The recommendations in the Final Report of the Joint Management-Union Taskforce on Diversity and Inclusion should also be implemented.

6. Complaint Processes

The Taskforce must review all employment equity related complaint processes, including the Federal Public Service Labour Relations and Employment Board and Canadian Human Rights Commission processes carefully to determine the systemic barriers for equity groups in these processes, including removing provisions that prohibit employment equity related complaints. If there is no meaningful mechanism for recourses, then compliance requirements under the *Employment Equity Act* are meaningless.

The Employment Equity Review Tribunal should be replaced with an Employment Equity Commissioner with similar duties, functions and

processes as the Pay Equity Commissioner recently established at the Canadian Human Rights Commission.

The historical underfunding of the Canadian Human Rights Commission must be addressed. The Canadian Human Rights Commission must be properly resourced not only to meet its current mandate but also further resourced to include an Employment Equity Commissioner.

In addition, bargaining agents must be able to bring forward employment equity complaints under the *Employment Equity Act* and trigger an audit, including when they have not been properly consulted. Consultations and Collaboration should be clearly defined in the *Employment Equity Act* and if it does not occur, bargaining agents should be able to make a complaint.

All audit reports should be made public subject to provisions stipulated in Access to Information and Privacy laws.

7. Accessible Canada Act

The Taskforce examine the concurrent jurisdiction between the *Employment Equity Act* and the *Accessible Canada Act* to ensure that each legislation supports and re-enforces the other rather than overlapping each other and leaving gaps in the legislation.

8. Strengthening the role of bargaining agents

The role of bargaining agents must be strengthened in the *Employment Equity Act*. The *Employment Equity Act* should clearly outline the obligation for joint national and regional employment equity committees that meet regularly for meaningful consultation and collaboration. Meaningful consultations and collaboration must be defined in the *Employment Equity Act* to ensure that employers do not try to circumvent their obligations by minimizing their “consultation and collaboration” process.

To ensure compliance of consultation and collaboration, bargaining agents should be able to make a complaint if they believe that the employer failed this requirement. Furthermore, if employers are found to have failed to properly consult and collaborate, then there must be a consequence for them that would compel them to meet this requirement.

The following elements should be in the definition:

a) Establishing joint employment equity committees;
b) Employers and bargaining agents jointly review, prepare and develop, implement and revise together the employment equity plans; and
c) Employers and bargaining agents actively participate in all stages of the employment equity process from the start, to continuous reviewing and monitoring progress.

Bargaining agents should be able to negotiate provisions in the collective agreement that would go above and beyond the provisions in the *Employment Equity Act*. The *Employment Equity Act* should be the floor and not the ceiling for employment equity initiatives.

9. Federal Contractors Program

Contractors under the Federal Contractors Program must have the same requirements as other employers under the *Employment Equity Act*, including statutory requirements and reporting requirements so that the Minister of Labour cannot make changes arbitrarily.
The 2012 amendments to the *Employment Equity Act* must be reversed to decrease the threshold requirement to be under the Federal Contractors Program.

Furthermore, in order to ensure consistency, ESDC should either work with the Canadian Human Rights Commission, or the auditing function should be done solely by one body. Again, this requires the Canadian Human Rights Commission to be adequately resourced.

10. Pay Transparency

The *Employment Equity Act* must be amended to ensure wage gaps are addressed throughout the employment equity process and become part of employment equity plans. In addition, any audit or compliance processes must also take into consideration wage gaps in determining if compliant. If wage gaps aren’t addressed in plans, then there should be a mechanism to make a complaint.

The pay transparency provisions should apply to both federally regulated private and public sectors, as well as Federal Contractors Program.

Introduction

The Public Service Alliance of Canada (PSAC) is pleased that the taskforce is mandated to thoroughly review the *Employment Equity Act* (*EEA*).

The PSAC represents approximately two hundred and fifteen thousand workers. Our members work for federal government departments and agencies, separate employers, federal crown corporations and agencies, territorial governments, universities and a variety of other public and private sector employers. Our members fall both under federal public service and the federal contractors' program.

The PSAC views the *EEA* as a critical tool in combatting workplace discrimination. We understand that employment equity will not in itself eradicate all forms of discrimination, or harassment, from our members' workplaces - but proactive and preventative measures have clear advantages to addressing systemic employment discrimination over reactive processes. When direct and systemic employment barriers are removed, then all workers feel valued, included, and recognized for their abilities and contributions rather than be judged based on intangible and inherent characteristics.

At the outset, it must be noted that unions play an important role because they bring perspectives of workers who may otherwise not have a voice in the development, implementation, monitoring and review of employment equity processes and plans in their workplaces. As such, the PSAC takes its role seriously in critiquing the effectiveness of the current legislation. We reaffirm the need for a comprehensive legislative process to bring equity into the workplaces of all members we represent.

Internal Survey

In preparation for this review the PSAC consulted our members at large and union activists engaged in employment equity work through two internal surveys – one for the membership and another for union activists. Because of the importance of employment equity in workplaces, there were over 5300 responses to our on-line membership survey. Members' and

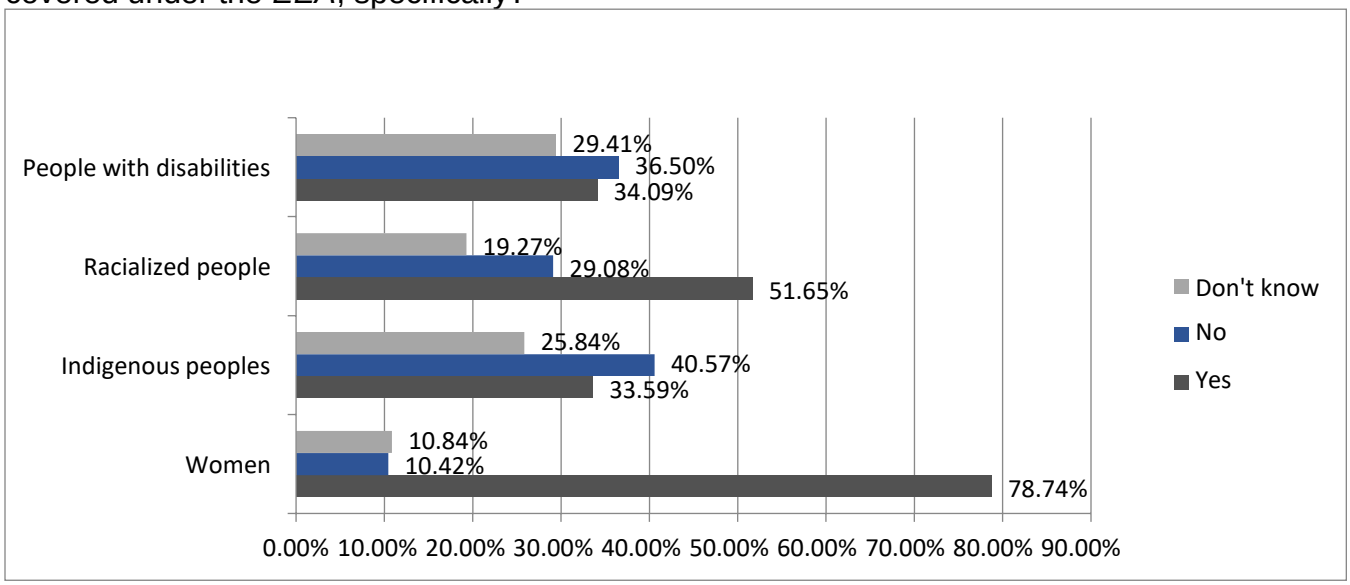
activists' input, and our many years of experience with the *Employment Equity Act*, shaped our recommendations.

The following are some highlights from the survey:

Only 17.6% of participants said they had joint workplace committees that examined employment equity, 66.55% of respondents indicated that they were unaware or not sure of any employment equity initiatives. Only 33.5% said they were aware of equity initiatives in their workplace.

Many participants did not think their workplaces were representative of equity groups.

Figure 1-Q11. Do you believe your workplace is representative of the equity groups covered under the *EEA*, specifically?



As shown above, only 33.6%, 34.1%, 52%, 79% believe that their workplaces are representative of Indigenous workers, workers with disabilities, racialized workers, and women respectively.

Some findings include:

- 48% believed their workplaces are representative of LGBTQ2+ workers and 30.1% believed their workplaces to be representative of religious minorities.
- Participants believe there are barriers in recruitment, hiring, training, promotion, and retention, varying from 24.8% to 37.6% in each of these areas.

- Only 24.8% to 39.3% of participants believe their employer has done something to reduce or eliminate the barriers in each of these areas.
- 38.5% believe the role of the bargaining agent could be strengthened under the *EEA*, while 9.3% said it could not and 52.2% were unsure.
- 42.3% believe that the accountability and enforcement under the *EEA* could be strengthened, while 8.6% said it could not and 49% were unsure.

The report on the PSAC internal survey can be found in **Annex A**.

Analysis and Recommendations

1. Terminology

The language in the *EEA* must be updated. As our understanding of human rights continues to evolve, so does the language used to discuss it. Terms such as “Aboriginal” and “visible minority” are outdated and offensive terms. Consultations with the appropriate communities must be undertaken in examining new terminology. For example, Indigenous communities are using “Indigenous Peoples” in replacement of “Aboriginal Peoples”. However, there is no consensus on the terminology to replace “visible minority”. It should be amended to reflect more appropriate terminology used to describe this community such as racialized, people of colour, etc.

Recommendation 1:

Outdated terminology (i.e. “Aboriginal Peoples”, “visible minorities”, etc.) in the Employment Equity Act must be updated to reflect the language and terminologies currently used by those communities.

2. Disaggregated Data for Designated Equity Subgroups and Intersectionality

Disaggregated data for Designated Equity Subgroups and Intersectionality should be collected for every designated equity group. No equity group is homogenous and, as such, people within designated equity groups experience workplace discrimination and barriers differently. For example, in the 2021 Public Service Commission’s *Audit of Employment Equity*

Representation in Recruitment report, Black federal public service workers had a lower job appointment rate than their job application rate.[1] The federal public service must further analyze any gaps that may exist in the hiring and promotion of Black employees. Just last year, Black federal public service workers mobilized to file the Black Class Action lawsuit. It specifically is seeking long-term solutions to permanently address systemic racism and discrimination in the Public Service. Anti-Black racism is pervasive throughout society and is witnessed through the treatment of the Black community in policy, healthcare, education and other public institution; but we strongly believe the public service should be making a concerted effort to make its' workplaces safe and inclusive.

The Public Service Commission's report also demonstrates that Chinese federal public service workers were found to have the lowest application rates among the four largest racialized sub-groups. It is unclear how anti-Asian hate is impacting employment opportunities for the Asian community. There also may be under-representation of racialized sub-groups in the federal public service, but to really understand this, further analysis with disaggregated data must be undertaken[2]. Clearly, discrepancies in representation, and experiences and barriers within designated equity groups, are not exposed when all racialized groups are categorized into one equity group.

As another example taken from the survey, we can see that depending on their identities, members answer questions differently. For question 10, members were asked if there is clear support for employment equity in the workplace, answers from Indigenous members and members belonging to the LGBTQ2+ community were different. 39% of LGBTQ2+ members think the support exist while that number is at 33.7% for the Indigenous members. While the difference is not huge, it is still notable. As a disclaimer, we also have to keep in mind that for some members those two identities intersect.

Similarly, disaggregated data for Indigenous peoples should include First Nations, Inuit and Métis people. The Call to Actions in the Truth and Reconciliation Commission's Report and the recent discoveries of unmarked graves at residential school territory show that there is much to do in order to achieve reconciliation with Indigenous communities as a result of

[1] https://www.canada.ca/en/public-service-commission/services/publications/audit-of-employment-equity-representation-in-recruitment.html#3_8
[2] https://www.canada.ca/content/dam/tbs-sct/documents/employment-equity-report/20210406-eng.pdf

colonialization and cultural genocide. Therefore, in the spirit of reconciliation, it is important to understand that Indigenous communities are not all homogenous and that First Nations, Metis and Inuit have their own distinct experiences of anti-Indigenous racism.

Disaggregated data for people with disabilities should be based on the Canadian Survey on Disabilities subgroups used to collect census data[3]. The 2016 census revealed that persons with severe disabilities had higher unemployment and lower accommodation rates. Similarly, people with disabilities are also not a homogenous community, with varying severity and types of disabilities.

Disaggregated data also needs to consider the various intersectional identities of women such as women with physical disabilities, learning disabilities, First Nations women, Black women, South Asian women, etc. Finally, when the LGBTQ2+ community is included in the *EEA* then disaggregated data for that community should also be provided.

The PSAC submits that the disaggregated data must be collected in a way that allows for cross-references and an intersectional analysis. As equity analysis has evolved over the last two decades so has our understanding that multiple identities create unique experiences for individuals. For example, systemic barriers faced by Indigenous women with disabilities will be uniquely different than those faced by non-Indigenous women with disabilities. Indigenous communities have distinct lived experiences (e.g. residential schools, inter-generational trauma, stereotypes of Indigenous women, etc.). We note specifically the tragic deaths of Indigenous people in the health care system, policing and other institutions.

Recommendation 2:

The Employment Equity Act must be amended to collect and analyze disaggregated data for every designated equity group. By so doing, representation rates and barriers faced by distinct groups within designated equity groups can be examined and addressed more appropriately. Each specific designated employment equity group should be broken down or be distinct employment equity groups (e.g. Black, South Asian, Chinese, Arab,

[3] https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm

etc.) so that barriers for specific communities can be identified and addressed pursuant to the Employment Equity Act.

The data should also be collected in a manner that allows for intersectional analysis.

3. Inclusion of LGBTQ2+ Community

There is growing evidence that the LGBTQ2+ community experiences systemic workplace barriers and discrimination. The 2016 LGBT Purge class action lawsuit also demonstrated the discrimination in employment faced by former federal public service workers[4]. The most recent Public Service Employee Survey results demonstrate that LGBTQ2+ workers continue to face harassment and discrimination in the Federal Public Service. Given this continued systemic problem, LGBTQ2+ workers must be included as a designated group in the *EEA*. Furthermore, collection of data that adequately reflects the representation rates of these workers through census data or other data collection is required to determine labour market availability and workforce availability rates and representation gaps.

Recommendation 3:

The Employment Equity Act must be amended to include the LGBTQ2+ community as a designated group and the necessary data (census data) be collected like other designated groups.

Data collected must be disaggregated and allow for an intersectional analysis since the LGBTQ2+ community is not homogenous and do not experience workplace discrimination in the same manner.

4. Labour Market Availability (LMA) / Workforce Availability Rates (WFA)

The process in how the labour market availability and workforce rates are calculated for the purposes of the *EEA* must be changed. Currently, it is based on census data that is collected every five years. By the time Employment and Social Development Canada (ESDC) and Treasury Board Secretariat (TBS) calculate their respective rates, these rates are already

[4] https://lgbtpurgefund.com/about/#the-purge

outdated since it takes them a few years after the census to calculate the LMA and WFA rates, respectively.
We note that some of the data is unreliable. For example, there is a perception that census data on Indigenous workforce is not accurate because the census does not fully collect the representation of Indigenous communities. Kate McBride observes that:

> The lack of involvement of communities in the development and use of data, and the drive for data collection from outside authorities, has led to a situation where Indigenous communities do not trust the data collection process and are often resistant to sharing their information (Royal Commission on Aboriginal Peoples, 1997). "This approach has created a situation in which there is a lack of trust, 'buy-in,' and participation on the part of Indigenous communities – inevitably affecting the overall quality of the data" (Steffler, 2016, p. 151).[5]

The changing nature and increased precarity of work – who is included in the employment equity data and who is not – is also of concern. For example, the federal government hires workers through temporary agencies who do the same work as indeterminate workers but may not be counted in workforce.

Also, of concern is the lack of recognition of international work experience and educational credentials of newcomers / immigrants who come to Canada for better employment opportunities. As a result, the census may not accurately reflect the workforce availability (set by TBS) for racialized groups because they are unjustly ineligible for careers in their profession due to the lack of recognition of their experience and credentials.

A further issue was the exclusion of non-Canadian citizens in TBS's workforce availability rates for the federal public service. This was the result of a barrier embedded in the *Public Service Employment Act (PSEA)* which had given preference to hiring Canadian citizens over others. Recently the *PSEA* was amended to expand this preference to include permanent residents. However, for many years, this requirement under the *PSEA* prevented non-Canadian citizens from being included in the workforce availability rates and thus leading to an under-representation of racialized

[5] McBride, Kate, *Document Review and Position Paper: Data Resources and Challenges for First Nations Communities* prepared for the Alberta First Nations Information Governance Centre at page 6.

workers in the labour force. It is yet to be determined whether TBS will adjust the WFA accordingly.

***Recommendation 4*:**

The Employment Equity Act must be amended to ensure accurate and current labour market availability and workforce availability rates that are reflective of each designated equity group. The labour market availability and workforce availability rates must be regularly updated between censuses to reflect the changes in Canada's population (e.g. recent newcomers / immigrants who have international experience, non-Canadian Citizens, etc.).

5. Tensions between the Employment Equity Act (EEA), Public Service Employment Act (and the Financial Administration Act (FAA)

The *EEA* aims to achieve "equality in the workplace" for equity-seeking groups who should not be "denied employment opportunities or benefits for reasons unrelated to ability". Unfortunately, the important goals of the *EEA* will not be achievable until there are changes made to other co-existing legislation that currently impede these objectives.

In the federal public service, staffing and human resource framework fall under the *PSEA* and the *FAA*. These legislations create the Public Service Commission (PSC), the body responsible for all appointments to, and within, the federal public service and, gives Treasury Board (TB) general human resources management authority for the federal public service. The *PSEA* also outlines staffing criteria including the principle of merit.

Section 4(4) of the *EEA* outlines the responsibilities of TB and the PSC, specifically stating that they are the "employer" for the purposes of the *EEA* "as within their scope of powers, duties and functions" under the PSEA and the *FAA*. Section 4(7) of the *EEA* allows for TB and PSC to delegate their obligations under the *EEA* to chief executive officers or deputy heads.

It is often argued that the provisions of the *PSEA*, such as the merit principle and delegated authority to the lowest level of management within departments, are not in conflict with the *EEA*. However, employment equity groups have consistently perceived these as barriers to their career progress in the federal public service. Currently, any employment equity

initiative under the *EEA* must not be inconsistent with the *PSEA* and the *FAA*.

Furthermore, equity groups perceive that hiring managers make decisions on staffing processes without much accountability. According to both TBS and PSC, they are unable to hold departments and agencies accountable because they only have an "enabling" role under the *PSEA* and the *FAA*. It should be noted that the PSC has an audit and investigation role in limited circumstances.

Although TBS and PSC have issued policies or directives, neither can mandate departments to take corrective actions related to employment equity because of the delegated authority. In fact, it is uncertain if either TBS or the PSC receive detailed information about employment equity initiatives from the departments other than the minimum requirements for TBS's Annual Report on Employment Equity that is tabled at Parliament.

It is noteworthy that this issue was raised in the Employment Review undertaken by the House of Common's Standing Committee on Human Resources Development and the Status of Persons with Disabilities[6] in 2002. The Standing Committee felt it was an important issue and required Treasury Board to develop an action plan:

> As the public service employer, Treasury Board remain accountable for all policies, programs and actions within the federal department and agencies with regards to the *Employment Equity Act.*
>
> Where it has delegated authority under the *Employment Equity Act* to departments and agencies … Treasury Board should put in place effective measures to ensure that employment equity policies and programs are in place in the departments. Treasury Board should submit to this Committee an action plan by April 1, 2003 outlining the measures that have been put in place and the ways that these will be monitored."[7]

[6] https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf

[7] Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act, (2002)*

Lastly, there have been recent amendments to the *PSEA* to remove barriers for equity-seeking groups. However, despite the recent changes, systemic barriers continue to exist. During the *PSEA* Review in 2021, PSAC made submissions on the barriers in staffing for equity groups. (These submissions are in **Annex B**).

In 2018, the Joint Management-Union Taskforce on Diversity and Inclusion[8] examined systemic barriers in staffing in great depth. These barriers were not fully addressed by the PSEA amendments. (For this submission, the PSAC fully endorses the observations, findings and recommendations of the Taskforce related to central agencies, staffing, and people management).

Recommendation 5:

There be a thorough review and amendments made to the Public Service Employment Act and the Financial Administration Act to eliminate systemic barriers faced by equity-seeking groups. The review must include strengthening the role of central agencies, examining any provisions that hinder the objectives of the Employment Equity Act, and increasing the accountability of departments and agencies.

Furthermore, in situations of legislative conflict, the Employment Equity Act should supersede the Public Service Employment Act and the Financial Administration Act.

The recommendations in the Final Report of the Joint Management-Union Taskforce on Diversity and Inclusion should also be implemented.

6. Complaint Processes

i. Federal Public Service Labour Relations and Employment Board (FPSLREB)

Since the sweeping changes to the *Public Service Employment Act* under *Public Service Modernization Act* (*PSMA*) in 2003, many PSAC members, including equity members, feel that the recourse processes and remedies

p.65.
https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf.

[8] https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/task-force-diversity-inclusion.html

are completely ineffective in addressing systemic and individual barriers in staffing processes. In order to hold employers accountable for promoting and implementing employment equity initiatives, the staffing complaint process must be changed – specifically, meaningful recourses must be made available in cases of discriminatory staffing.

In 2011, the PSAC made detailed submissions on the impact of the *Public Service Modernization Act* on staffing and other areas in 2011 as part of the five-year legislative review of that Act. Much of the criticism of the changes to the *Public Service Employee Act* remain. (The 2011 submissions are in the **Annex C**).

Since 2014, the Public Service Staffing Tribunal no longer exists. It has been replaced by the Federal Public Service Labour Relations and Employment Board (FPSLREB). Thus, the FPSLREB is responsible not only for dealing with collective agreement related grievances but also staffing complaints pursuant to the PSEA related to internal appointments, appointment revocations and layoffs in the federal public service.[9] More recently the FPSLREB will hear grievances and complaints under the *Accessible Canada Act* (*ACA*).

The ability to address staffing complaints is limited. For example, staffing complaints can only be made once a final notification of an internal appointment or proposed appointment has been issued. The grounds for a complaint are limited to three areas: abuse of authority in the application of merit; abuse of authority in choice of process (advertised or non-advertised); and failure to access the complainant in the language of their choice.

It is asserted that very few cases go forward successfully that deal with discrimination under the grounds of abuse of authority, for a variety of reasons including, the fact that evidence required to demonstrate individual

or systemic barriers are very high and, often in the control of the employer. It is very difficult for a complainant to be able to access information needed to demonstrate discrimination.

In addition, although the FPSLREB is authorized to award damages pursuant to the *Canadian Human Rights Act (e.g. $20,000 for pain and*

[9] See *https://pslreb-crtefp.gc.ca/en/resources/guides/staffing-complaints-guide.html#a12*

suffering and $20,000 for reckless behaviour), other remedies are limited. The FPSLREB states that:

> In relation to appointment related complaints, the Board **cannot order that a complainant be appointed or that a new appointment process be conducted** [s. 82 of the ***PSEA***]. However, the Board has the power, amongst other things, to order the revocation of an appointment, make a declaration of abuse of authority, order the complainant to be assessed or make any recommendation that it sees fit given the circumstances of the case.[10]
>
> It will be important for the taskforce to closely examine whether the FPSLREB provides a meaningful recourse for equity-seeking complainants to address individual or systemic barriers in the staffing processes, whether the process needs to be overhauled or, whether a completely different process is needed.

ii. Canadian Human Rights Commission (Complaint Process)

The *Canadian Human Rights Act (CHRA)* provides another recourse process to federal public service workers. The Canadian Human Rights Commission's (CHRC) role is to screen whether complaints warrant an inquiry and then be referred to the Canadian Human Rights Tribunal.

However, there are provisions in the CHRA that prevent the CHRC from fully addressing employment equity related complaints. Currently, the CHRC cannot deal with any allegations that could be, or have been, addressed through the grievance procedure, staffing complaint processes or other processes available under another *Act*[11].

Furthermore, changes made to the CHRA in 1995 now prevent employment equity related complaints to be adequately addressed through the complaint process. This is important because there have been very few successful cases dealing with systemic employment barriers since the changes. It essentially eliminated the success of the precedent-setting case *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health and Welfare)*[12]. At the time, this case was important because it

[10] https://www.fpslreb-crtespf.gc.ca/en/resources/guides/staffing-complaints-guide.html#a12
[11] Canadian Human Rights Act, section 41(1)(a), (b), and (d)
[12] 1997 CANLII 1433 (CHRT)

highlighted systemic racial discrimination and employment equity in the human rights complaint process and examined the barriers for racialized workers in obtaining senior management positions. Note that this case was filed in 1992, prior to the 1995 amendments.

Also, Section 41(2) of the CHRA prevents the CHRC from dealing with complaints that have been "adequately addressed by an employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*". Nor can complaints be made based solely on statistical information that shows a designated group is underrepresented by employers' workforce data under section 40.1 of the CHRA.

Lastly, Section 54.1(1) of the CHRA limits the Canadian Human Rights Tribunal's ability to offer an employment equity remedy. The Tribunal cannot order an employer to adopt a special program, plan or arrangement containing positive policies and practices to increase representation of designated groups or goals and timetables for achieving that increased representation.

In sum, employment equity related complaints are likely to encounter barriers through the CHRC's complaint process. Even if a complainant was able to overcome these barriers (e.g. demonstrate that it does not fall within the provisions mentioned above), the evidence required to demonstrate systemic employment discrimination is high and again, most likely in the control of the employer.

iii. Canadian Human Rights Commission (Employment Equity Audit process)

The CHRC conducts employment equity compliance audits of federally regulated employers, Crown corporations and federal public sector employers.

The nine legislative requirements for employers under the *EEA* consist of:

1. Collection of workforce information;
2. Workforce analysis;
3. Employment Systems Review (ESR);
4. Employment Equity plan (EE plan);
5. Implementation and monitoring of EE plan;
6. Periodic review and revision of EE plan;

7. Communication and Information about employment equity;
8. Consultation & collaboration with bargaining agents/employee representatives; and
9. Employment equity records.

Once conducting robust audits, the CHRC's audit function has shifted over the years – it is now less proactive and conducts less frequent individual audits. The CHRC now focuses on examining trends of a specific equity group within a sector. This shift is partially due to necessity given the ongoing underfunding and inadequate resourcing of the CHRC.

Lack of resources is not a new issue for the CHRC. In the 2002 *EEA* Review, it was recommended that the CHRC be provided with sufficient resources to conduct compliance audits so that they could conduct follow-up audits more quickly and facilitate employers in fulfilling their obligations under the *EEA*.[13] Sadly, two decades later, this continues to be an issue.

While specific employer audits can be time consuming and, given the large number of employers within the CHRC's jurisdiction to audit, some employers may not be audited at all or for lengthy periods of time. It is, however, critical that proper compliance audits are undertaken on a regular basis to ensure that employers are meeting the requirements under the *EEA*.

Currently, bargaining agents are unable to request a compliance audit even if they have relevant information that should trigger an audit. This is very frustrating, especially as employers are getting away with actions or behaviours that may be contrary to employment equity objectives. When there is evidence of (or even an appearance of) an employer's failure to meet its obligations under the *EEA*, bargaining agents must be able to request a compliance audit by the CHRC. Bargaining agents often have information that would not be provided by the employer because of their representative role and access to their membership.

Even when the CHRC does undertake an audit, the CHRC bargaining agents' representatives have limited involvement. During a meeting with bargaining agents, the CHRC indicated that any unionized worker or any union representative in the workplace can be consulted regardless of

[13] 2002 Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act, p.57.*

whether the bargaining agent assigned them to that role or not. However, even when the proper representatives are consulted, their input into the audit is limited. During that meeting, the CHRC indicated that the employer can meet its obligation under section 15 by the simple act of providing bargaining agents the documents for input and nothing more.

This is further supported by the PSAC internal survey of union activists where 83.9% said that they had not been involved in employment equity audits conducted by the CHRC, while 12.9% said they had been contacted and 2.2% didn't know.

It is important to note that bargaining agents have not always been sidelined in the process. The *Consultation and Collaboration between Departments Under Section 15 of the Employment Equity Act*, a document by Public Service Human Resources Management Agency of Canada (PSHRMAC) (now the Office of the Chief Human Resources Officer – OCHRO) sets out the consultation and collaboration process that is no longer followed.

Lastly, audit results are not public. It is difficult for bargaining agents or individuals from particular departments to examine or challenge the audits. Therefore, summaries of compliance audits should be made public in a manner that is consistent with Access to Information and Privacy laws. This was also recommended in the 2002 *EEA* Review.[14]

iv. Employment Equity Review Tribunal (EERT) Canadian Human Rights Tribunal

The *EEA* outlines the types of employment equity "complaints' that can be addressed through the Employment Equity Act Tribunal. Either the Commission or an employer can apply to the Chairperson of the CHRT to establish an EERT. For example, the Commission can request an EERT be established if an employer has not complied with its direction. An employer can request an EERT, if it does not agree with a direction of the CHRT[15].

[14] 2002 Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act, p.59.*

[15] See CHRT website: https://www.chrt-tcdp.gc.ca/procedures/employment-equity-review-tribunal-en.html for an overview of the EERT role and responsibilities

It is important to note that there are very few publicly reported EERT cases from the last two decades.[16] While it is possible that there have been applications made by parties that were not made public, the fact is that the lack of public cases is demonstrative of the ineffectiveness of this recourse mechanism.

It may be argued that the Commission is directed by a "guiding policy" under section 22(2) of the *EEA.* The "guiding policy" states that the Commission shall discharge its responsibilities in cases of non-compliance through *persuasion and negotiation* of written undertakings and that directions or applications for orders should only be a *last resort*. To that end, one can assume that applying for an order is a recourse that should rarely be used. It does not appear that there are many public decisions of the EERT.

Obviously, persuading employers to comply with the *EEA* is a logical first step. However, it should not be the only step. If there are few to no consequences for non-compliance, there is no incentive for employers to comply with the *EEA*. It will be important for the Taskforce to carefully examine what role the EERT has played over the last two decades and whether there is a better alternative to this forum.

It is asserted that, with the recent addition of an Accessibility Commissioner and a Pay Equity Commissioner, that it is time to establish an Employment Equity Commissioner who would be responsible for enforcing and ensuring compliance of the *EEA* and eliminate the EERT. Like the "Pay Equity Unit" under the CHRA, an "Employment Equity Unit" would support the

Employment Equity Commissioner in the exercise of their powers and performance of their duties and functions. Again, like the "Pay Equity Division", the "Employment Equity Division" could receive complaints dealing with employment equity. The Employment Equity Commissioner would exercise the powers and duties and functions under the *EEA*, again similar to the Pay Equity Commissioner.

[16] The few public cases available dealt with applications made alleging reasonable apprehension of bias of a tribunal or challenging the direction of the Commission. See: *Laurentian Bank of Canada v. Canadian Human Rights Commission*, 2001 CanLII 38294 (CHRT), retrieved on 2021-10-26) and *Canada (Environment Canada) v. Canada (Canadian Human Rights Commission*), 2000 CanLII 28878 (CHRT).

Recommendation 6:

The Taskforce must review all employment equity related complaint processes, including the Federal Public Service Labour Relations and Employment Board and Canadian Human Rights Commission processes carefully to determine the systemic barriers for equity groups in these processes, including removing provisions that prohibit employment equity related complaints.

If there is no meaningful mechanism for recourses, then compliance requirements under the Employment Equity Act are meaningless.

The Employment Equity Review Tribunal should be replaced with an Employment Equity Commissioner with similar duties, functions and processes as the Pay Equity Commissioner recently established at the CHRC.

The historical underfunding of the Canadian Human Rights Commission must be addressed. The Canadian Human Rights Commission must be properly resourced to both meet its current mandate and further resourced to include an Employment Equity Commissioner.

In addition, bargaining agents must be able to bring forward employment equity complaints under the Employment Equity Act and trigger an audit, including when they have not been properly consulted. Consultations and Collaboration should be clearly defined in the Employment Equity Act and if it does not occur, bargaining agents should be able to make a complaint.

All audit reports should be made public subject to provisions stipulated in Access to Information and Privacy laws.

7. Accessible Canada Act

The *Accessible Canada Act* (*ACA*), enacted in 2019, aims to make Canada barrier-free by 2040 by identifying, removing and preventing barriers for people with disabilities in federal jurisdiction in priority areas including employment. One key component of the *ACA* is the requirement for employers to have an accessibility plan. Although the requirements for an accessibility plan is not as detailed as for an employment equity plan under the *EEA*, there will be overlap between the two legislative requirements. The *ACA* does not reconcile the overlapping jurisdiction. It is also important to

note that the recourse process for most unionized federal public service workers' allegations of *ACA* violations will be dealt with by the FPSLREB through the grievance process. Federally regulated workers who do not fall within the FPSLREB jurisdiction will have access to a complaint process via the Accessibility Commissioner.

The ACA is new legislation that hasn't fully taken into effect and employers are in the process of developing accessibility plans. It is vital that the taskforce examine how the *EEA* can support the requirements under the *ACA* rather than become competing priorities or plans.

Recommendation 7:

The Taskforce examine the concurrent jurisdiction between the Employment Equity Act and the Accessible Canada Act to ensure that each legislation supports and re-enforces the other rather than overlapping each other and leaving gaps in the legislation.

8. Strengthening the role of bargaining agents

Currently, bargaining agents play an important role under the *EEA*. They are specifically mentioned in sections 3 and 15. Section 3 defines who is a representative, which includes bargaining agents in unionized workplaces.

Section 15 requires employers to consult and collaborate with bargaining agents on the preparation, implementation and revision of their employment equity plans. While consultation and collaboration are not explicitly defined, ss. 15(4) requires that the consultation cannot be a form of co-management.

Bargaining agents play a unique and important role pursuant to the *EEA*. Historically, national and departmental joint employment equity committees were created where employers and bargaining agents collaborated on developing self-ID surveys, conducting workforce analyses, participating in employment systems reviews, developing employment equity plans and then monitoring and revising plans.

However, over time, employers consulted less and less with bargaining agents to the point where employment equity committees no longer exist in many departments. If there are joint departmental committees, their mandates have changed to "diversity and inclusion committees" and some

no longer are involved in the “technical work” that employment equity committees used to do.

Results of the PSAC internal survey for members indicate that 90.7% of the respondents either think that the role of the bargaining agent could be strengthened under the *EEA* or were unsure. This means more work needs to be done for members to be fully aware of the role and the importance of bargaining agents. In addition, where bargaining against were once invited to collaborate and consult, bargaining agents are now reduced to simply providing “feedback” on already developed initiatives.

In the PSAC internal survey for union activists, the following question was asked:

> Section 15 of the *EEA* requires the employer to consult and collaborate with bargaining agents during the employment equity process. Does the employer consult and collaborate with you on the following:

	YES	**NO**	**DON’T KNOW**
Voluntary self-identification survey	41.94%	41.94%	16.13%
Employment systems review of formal and informal policies and practices	16.13%	38.71%	45.16%
Development of employment equity plan/initiatives	12.90%	51.61%	35.48%
Monitoring the employment equity plan	22.58%	45.16%	32.26%
Providing information to employees about employment equity	3.23%	63.52%	32.26%
Voluntary self-identification survey	16.13%	48.39%	35.48%
Employment systems review of formal and informal policies and practices	32.26%	35.48%	32.26%

The *EEA* must be amended to ensure that joint employment equity committees with a clear mandate are established and receive training on employment equity processes and their role. Furthermore, regular and meaningful well-defined consultations and collaborations must take place As well, it is submitted that national and regional committees be implemented for larger organizations.

It is also posited that additional provisions should be negotiable and included in workplace collective agreements if required to meet the needs their workplaces that may not be covered by the *EEA*. It is not uncommon for health and safety provisions to be negotiated that go beyond the required

legislation because workplaces may have unique considerations that are not covered by the legislation.

Recommendation 8:

The role of bargaining agents must be strengthened in the Employment Equity Act. The Employment Equity Act should clearly outline the obligation for joint national and regional employment equity committees

that meet regularly for meaningful consultation and collaboration. Meaningful consultations and collaboration must be defined in the Employment Equity Act to ensure that employers do not try to circumvent their obligations by minimizing their "consultation and collaboration" process.

To ensure compliance of consultation and collaboration, bargaining agents should be able to make a complaint if they believe that the employer failed this requirement. Furthermore, if employers are found to have failed to properly consult and collaborate, then there must be a consequence for them that would compel them to meet this requirement.

The following elements should be in the definition:

- *establishing joint employment equity committees;*
- *employers and bargaining agents jointly review, prepare and develop, implement and revise together the employment equity plans; and*
- *employers and bargaining agents actively participate in all the stages of employment equity process from the beginning to continuous reviews and monitoring.*

Bargaining agents should be able to negotiate provisions in the collective agreement that would go above and beyond the provisions in the Employment Equity Act. The Employment Equity Act should be the floor and not the ceiling for employment equity initiatives.

9. Federal Contractors Program

The Federal Contractors' Program (FCP) provision must be strengthened in the *EEA*. Under section 42(2) of the *EEA*, the Minister of Labour is responsible for the administration of the FCP. This is the only reference in

the *EEA* to the FCP. It is asserted that it does not provide enough direction to the Minister to properly govern the FCP and allows for arbitrary policy and process changes such as threshold requirements.

Currently, the FCP applies to provincially regulated employers with a combined workforce of 100 or more permanent full time and part time employees in Canada, and who have received an initial federal goods and services contract valued at $1 million or more.

ESDC – Labour Program is mandated to conduct compliance assessment of all federally regulated employers that fall under the FCP. As stated on its website, ESDC:

> conducts compliance assessments to ensure that organizations fulfill the terms of their Agreement to Implement Employment Equity (AIEE). This includes meeting the requirements of the FCP by implementing employment equity in their workplace.[17]

It is important to note that a significant amendment was made to the *EEA* in 2012 which removed the requirement for the Minister to ensure that contractors are subject to the "equivalent ... requirements with respect to the implementation of employment equity by an employer" under the *EEA*. With the removal of this provision, the FCP is no longer required to meet the same criteria as other employers. The amendment allowed the Minister to reduce the threshold requirement without much rationale.

Prior to the 2012 amendment, the FCP applied to employees with a contract valued at $200,000. After the amendments, the requirement went up to $1 million. As a result, the number of employers under the FCP dropped significantly. It was estimated that pre-amendment, there were 1,000 workplaces (which included over one million workers) that were required to have employment equity plans under the FCP.[18] In ESDC's *Employment*

[17] https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors/compliance-assessment.html,

[18] https://ipolitics.ca/2013/06/28/harper-government-reduces-employment-equity-requirements-for-contractors/ . Also see HRSDC's Employment Equity Annual Report 2010 for breakdown of employer prior to the amendment: https://publications.gc.ca/collections/collection_2012/rhdcc-hrsdc/HS21-1-2010-eng.pdf.

Equity Act: Annual Report 2020, as of December 2019, there were only 350 employers covered under the FCP[19].

It is noteworthy that the Standing Committee reviewing the 2002 *EEA* Review had recommended that the Minister of Labour examine the FCP with a view to re-structuring it to ensure that the employment equity obligations of federal contractors are the same as the obligations of federally regulated employers[20]. It was further recommended that the Minister of Labour also examine the feasibility of covering employers who had less than 100 employees and contracts less than $200,000.

The number of staff dealing with employment equity, particularly with compliance assessments, was significantly reduced during the last major federal workforce adjustment both nationally and regionally. It is asserted that the requirements for compliance assessment were changed to accommodate the loss of staff.

Also noteworthy is the change in how many employers were found in non-compliance pre-amendments. For example, in 2010, there were 130 employers who were ineligible to receive contracts due to non-compliance.[21]

The 2020 Employment Equity Annual Report from ESDC contains insufficient information regarding the specific designated groups and does not even provide a list of employers under the FCP. Furthermore, according to ESDC's on Federal Contractors Program Compliance Assessment Policy, very few contractors failed to comply with the requirements[22].

With little public information available on FCP, there is no easy way to access information about specific contractors or to challenge the findings of ESDC. If contractors provide services or goods to the federal public service, then there must be public accountability of their progress. It is noteworthy that the Standing Committee for the 2002 *EEA* Review recommended that the Minister of Labour table an annual report to

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[19] *Employment Equity Act: Annual Report 2020* (ESDC): https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports/2020-annual.html#h2.6.1.

[20] https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf

[21] https://publications.gc.ca/collections/collection_2012/rhdcc-hrsdc/HS21-1-2010-eng.pdf

[22] https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors/compliance-assessment.html

Parliament on the operations of the FCP similar to the annual report tabled for federally regulated employers.[23]

Lastly, the CHRC audit process and the ESDC compliance processes are different. It is unclear why there is a need to have different processes and why two different organizations are needed for these roles. There should be consistency in the application of employment equity requirements.

Recommendation 9:

Contractors under the Federal Contractors Program must have the same requirements as other employers under the Employment Equity Act, including statutory requirements and reporting requirements so that the Minister of Labour cannot make changes arbitrarily.

The 2012 amendments to the Employment Equity Act must be reversed to decrease the threshold requirement to be under the Federal Contractors Program.

Furthermore, in order to ensure consistency, ESDC should either work with the Canadian Human Rights Commission, or the auditing function should be done solely by one body. Again, this requires the Canadian Human Rights Commission be adequately resourced.

10. Pay transparency

The *Employment Equity Act Regulations* were amended in 2020 to measure pay transparency in federally regulated private-sector workplaces subject to the *EEA*. Under the regulations, employers are required to report new salary data for the designated employment equity groups in their annual reporting. These measures, which came into force on January 1, 2021, requires employers to provide information on wages, bonuses, and overtime gaps in the workplaces. Employers will be required to report the new salary data in their 2021 annual employment equity reports which needs to be submitted by June 2022.

[23] 2002 Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act, p.63.*

This is a good first step to address pay inequities for designated groups beyond women. However, the regulations merely require employers to report on wage gaps. The new regulations may raise awareness and prompt employers to act, but there is insufficient incentive that these measures will result in any reduction of wage gaps for designated employment equity groups in a significant way.

The information required under the regulations should be included in the employment equity process like other information under the *EEA*. Wage gap information should be incorporated into the employment equity process and plans. In addition, there must be a mechanism for oversight and compliance to ensure that employers address any and all wage gaps.

Lastly, these requirements must also apply to the federal public service and the FCP. As the *EEA* covers federal and private and public sectors, as well as applicable employers under the FCP, pay transparency provisions must apply to all these employers.

Recommendation 10:

The Employment Equity Act must be amended to ensure wage gaps are addressed throughout the employment equity process and become part of employment equity plans. In addition, any audit or compliance processes must also take into consideration wage gaps in determining if compliant. If wage gaps aren't addressed in plans, then there should be a mechanism to make a complaint.

The pay transparency provisions should apply to both federally regulated private and public sectors, as well as Federal Contractors Program.

Conclusion

Thank you for providing the opportunity to provide submissions on this very important review. As shown in our submissions, the *Employment Equity Act* requires a major overhaul and not just tinkering with a few sections. Our extensive experience with the *Employment Equity Act* gives us a unique perspective on the progress of employment equity initiatives. It must be acknowledged that some gains were made through the *Employment Equity Act,* but progress has stagnated due to the lack of strong accountability, oversight and recourse mechanisms. If progress is to

continue so that we have an inclusive workplace that values the abilities, skills, experience and knowledge of everyone, then an extensive overhaul of the *Employment Equity Act* is imperative.

We look forward to further discussing our recommendations.

ANNEX A

PSAC Employment Equity Survey Report

BACKGROUND

It was not until the seminal report by Justice Rosie Abella, *Equality in Employment: A Royal Commission Report* in 1984 that the federal government examined the idea of creating specific employment equity legislation to address representation of equity groups in the Federal Public Service (FPS). The report concluded that a systemic approach and remedies are required to address the past and ongoing systemic discrimination in the workplace to prevent future discrimination and barriers. The report included recommendations to address the historical disadvantages in employment for women, Indigenous peoples, racialized people and people with disabilities.

The Report led the federal government to enact the *Employment Equity Act* (EEA) in 1986 to ensure that workers would not be denied employment opportunities or benefits for reasons unrelated to ability. The intention was that the EEA would help identify systemic barriers and remove them for designated groups. Although the 1986 EEA did not apply to the federal government, The Treasury Board Secretariat (TBS) issued a Policy on Employment Equity (EE) that applied to the federal public service and the Public Service Commission (PSC) integrated EE into its staffing initiatives. PSAC took the position that this was insufficient and during the first five-year review of the EEA, the union advocated that the Act be applied to the federal public service. In 1996, the EEA was amended to include the federal government workers and the Canadian Human Rights Commission (CHRC) was given the mandate to ensure that employers complied with their obligations.

The Public Service Alliance of Canada (PSAC) has played an active role in providing recommendations to the federal government on ways in which the EEA could be improved whenever the government has initiated a review. Many of the recommendations provided by PSAC over the years has been as a result of the input provided by union activists who are directly involved in employment equity in their workplaces, as well as members of the equity groups in attendance at the PSAC national or regional conferences, the

National Human Rights Committee and other avenues of engagement. PSAC members have continued to be consistent in their feedback: that the EEA needs to be updated and “has no teeth”, meaning that there is little enforcement to ensure employment equity is being applied consistently in the workplace or that recourse processes in relation to staffing initiatives are effective.

Over time, departmental joint employment equity committees have become nothing more than a “checkbox” for the employer to minimally comply with the requirements to consult and collaborate with bargaining agents. Although employers may “pass” the Canadian Human Rights Commission audits, feedback from members consistently highlight issues of discrimination in staffing processes in those workplaces.

In the past, PSAC worked in coalition with like-minded workplace networks such as the National Canadian Council of Visible Minorities in the early 2000’s. However, it was dismantled by the federal government. Most recently, PSAC has been working with the Federal Black Employees Caucus, which has advocated for examining racism in staffing processes involving Black federal workers. As well as the Black Class Action, which has advocated against the governments discriminatory hiring and promotion practices and the exclusion of federal Black public service workers.

INTRODUCTION

The Public Service Alliance of Canada (PSAC) continues to play a vital role in the conversation around Employment Equity. The *Employment Equity Act* is a critical tool in combatting workplace discrimination in federally regulated workplaces. The aim of the EEA is to remove systemic barriers for individuals in the four designated groups under the Act:

- Women
- Indigenous peoples
- Persons with disabilities, and
- Racialized people

These systemic barriers exist in the recruitment, promotion and retention of individuals in the four designated groups.

The EEA imposes a mandatory review of an employers' labour force and provides for measures to ensure better representation of these groups. PSAC has been calling for a review of the Act for the last two decades.

In July 2021, the federal government struck the Task Force on the *Employment Equity Act* Review (The Task Force) with a mandate to study the Act and consult with stakeholders, communities, and Canadians on issues related to employment equity. It has been over 20 years since the EEA has been reviewed, and much has changed since that time. The Task Force is tasked with submitting a final report for consideration by the Minister of Labour that will include:

- results of their research and key findings;
- recommendations based on their own expertise (as well as from engagement session participants and written submissions) and;
- recommendations to modernize and improve the employment equity framework in the federal jurisdiction in Canada.

PSAC has been invited by the Task Force as one of the stakeholder organizations and will provide recommendations to The Task Force on how best to improve the *Employment Equity Act*. PSAC's recommendations are reflective of the current reality faced by marginalized workers that have been, and continue to be, excluded and/or discriminated against in the workplace.

In order to prepare PSAC's submission to the Task Force, a survey was sent to component leaders and members. PSAC also conducted virtual consultations with union activists directly involved in employment equity in their workplaces, as well as members of PSAC's National Human Rights Committee in order to gather qualitative data.

More information regarding survey methodology can be found in Appendix A.
More information regarding virtual consultations can be found in Appendix B.

WHAT WE HEARD

AWARENESS and ACCOUNTABILITY

Results of the PSAC membership survey on employment equity indicate that there is a real lack of awareness of what initiatives the employer has in place

to promote employment equity in the workplace. More than 70% of the respondents to PSAC's survey were unsure of whether their workplaces had joint workplace committees on employment equity. This indicates that either the employer has these committees in place and employees are unaware, or that the committees don't even exist. When asked, only 33.5% of respondents to the member survey were aware of employment equity initiatives in their workplace while almost 25% are not sure if those initiatives exist. A dismal 3.1% of respondents said that they belonged to a joint workplace committee.

Of the respondents who were aware of employment equity initiatives and/or committees, 29.8% indicated that they felt there was no clear support for employment equity in their workplace. In contrast, 45.2% of union activists said that there was no clear support for employment equity in their workplaces. Additionally, 42% of union activists indicated that they do not have joint workplace committees that examine employment equity, while 35.5% identified as a member of such a committee.

It is evident that a lack of awareness on employment equity would yield a higher than anticipated number of respondents (42.35%) indicating that accountability and enforcement of the EEA ought to be strengthened. Furthermore, respondents overwhelmingly shared that the roles of Treasury Board and the Public Service Commission ought to be strengthened in relation to accountability, oversight and monitoring of the EEA.

REPRESENTATION OF EQUITY GROUPS

For years, the federal public service has experienced significant challenges in representation of equity groups in the workforce more generally, but especially in executive positions.[24] Since 2014-2015, the representation of women and racialized employees has increased, whereas the number of Indigenous employees remains the same, and employees with disabilities are further underrepresented.

[24] TBS (2019) Employment Equity in the Pubic Service of Canada: 2018-2019

The following graphs depict responses to PSAC's membership survey on employment equity, specifically regarding representation of equity groups from the perspective of PSAC members.

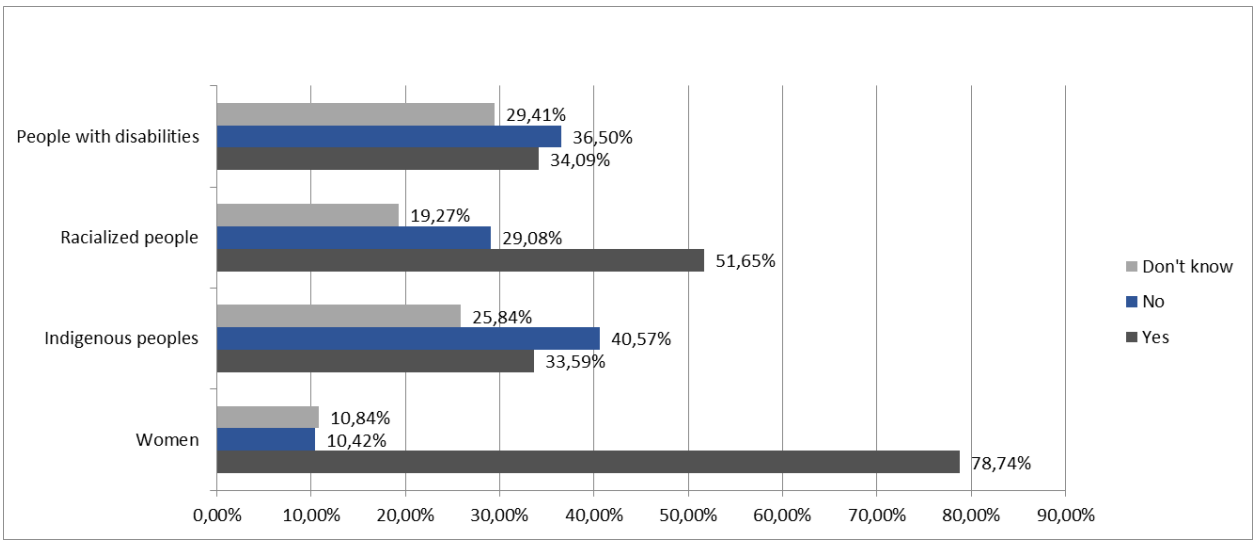


Figure 1.Q11. Do you believe your workplace is representative of the equity groups covered under the EEA, specifically?

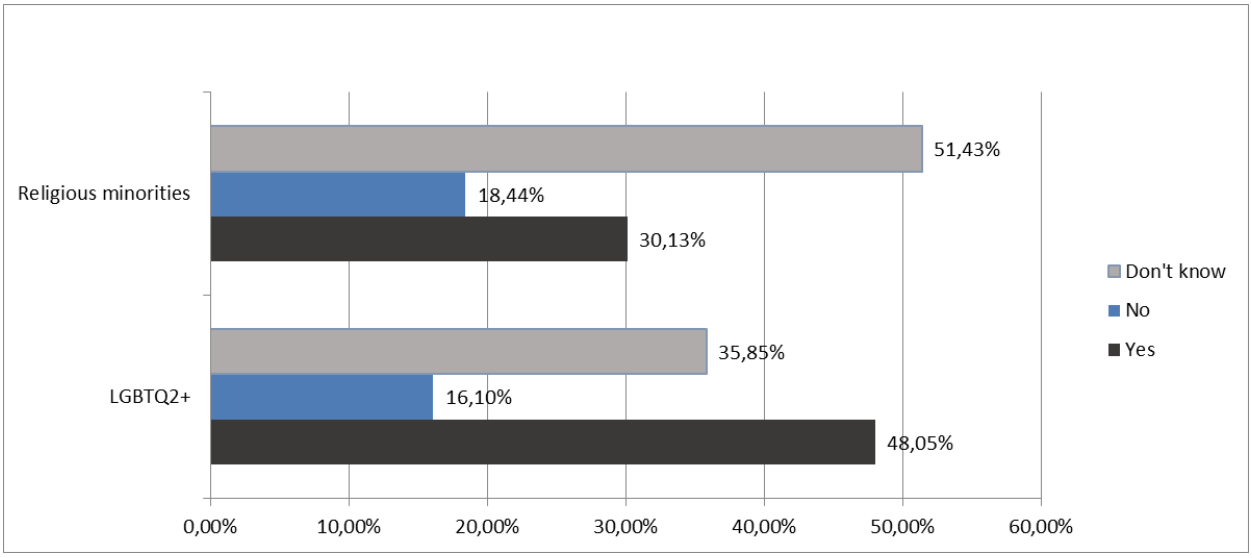


Figure 2.Q12. Do you believe your workplace is representative of other equity groups, such as: religious minorities, LGBTQ2+

PSAC survey respondents indicated that their workplaces have a higher representation of women (78.74%) and racialized people (51.65%), which

follows the statistics gathered in TBS's report, *Employment Equity in the Public Service of Canada: 2017-2018*. However, only 41.3% of racialized respondents to the PSAC survey felt that their workplaces were representative of racialized workers. Respondents indicated that Indigenous peoples (33.59%) had the least level of representation in their workplace and that persons with disabilities (34.09%) also were not represented appropriately.

The LGBTQ2+ community is currently not included in the *Employment Equity Act*. This is troublesome as we have continued to hear from LGBTQ2+ members that they are underrepresented and that they face discrimination in the workplace. PSAC's survey results demonstrate that only 48.05% of respondents felt that the LGBTQ2+ community were adequately represented. This is why PSAC's recommendations includes a push for the inclusion of the LGBTQ2+ community in the *Employment Equity Act* as an equity group.

RECRUITMENT, HIRING, TRAINING, PROMOTIONS & RETENTION

The figure below demonstrates that many of the respondents to PSAC's *Employment Equity Act* Review survey felt that equity groups continue to face barriers in relation to recruitment, hiring, training, promotions and retention.

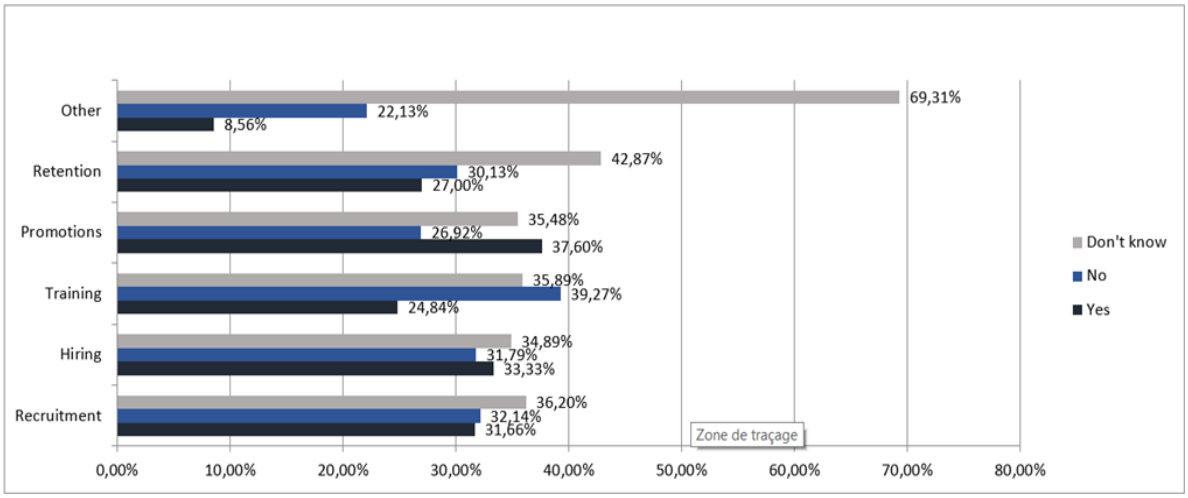


Figure 3.Q13. Are there barriers for equity-seeking groups in the following?

The top three barriers identified by respondents for equity-seeking groups in the workplace were promotions (37.6%), hiring (33.33%) and recruitment (31.66%). Most respondents are unaware of whether the employer has taken any initiatives to reduce or eliminate barriers. Furthermore, racialized respondents demonstrated that they experienced barriers at a higher percentage than all other participants.

STRENGTHS AND WEAKNESSES OF THE *Employment Equity Act*

Respondents were consulted on the strengths and weaknesses of the *Employment Equity Act*. There was an acknowledgement by the membership that there has been increased representation under the EEA, but there is much more work left to be done. There was an overwhelmingly higher amount of weaknesses versus strengths associated with the *Employment Equity Act*, including:

- the exclusion of the LGBTQ2+ community;
- the lack of requirements for disaggregated data for specific equity groups;
- the lack of accountability;
- the lack of consistent monitoring.

Union activists indicated that:

- the effects of employment equity were not visible;
- there was little progress / advancement;
- there is lack of accountability and enforcement;
- there is inadequate funding for employment equity initiatives;
- there is need for more oversight, education, and information sharing; and
- there is a need to update terminology in the Act and the need to include the LGBTQ2+ community.

ROLE OF THE UNION

Union activists indicated that there is a significant need for employers to include bargaining agents in the development of policies impacting

employment equity, as well as analysis and evaluation. Furthermore, 38.5% of respondents to PSAC's survey agreed that the role of PSAC and other bargaining agents should be strengthened under the *Employment Equity Act*.

The following table demonstrates responses from union activists on consultations and collaboration initiatives by the employer:

Section 15 of the EEA requires the employer to consult and collaborate with bargaining agents during the employment equity process. Does the employer consult and collaborate with you on the following:

	YES	NO	DON'T KNOW
Voluntary self - identification Survey	41.94%	41.94%	16.13%
Workforce analysis	16.13%	38.71%	45.16%
Employment systems review of formal and informal policies and practices	12.90%	51.61%	35.48%
Development of employment equity plan/initiatives	22.58%	45.16%	32.26%
Monitoring the employment equity plan	3.23%	63.52%	32.26%
Review and revision of employment equity plan	16.13%	48.39%	35.48%
Providing information to employees about employment equity	32.26%	35.48%	32.26%

The employer must make significant improvements in the way that employment equity plans are monitored. When asked, only 3.2% of respondents indicated that they've been consulted on the monitoring of employment equity plans. This is troublesome as our activists are on the ground and are often in direct contact with workers regarding issues that matter to them in the workplace, such as employment equity. Although, 22.58% indicated that they have been consulted on the development of these plans, it remains insufficient and demonstrates a significant gap in bargaining agent input when looking at consultation in monitoring vs development.

Finally, when employment equity audits are performed in workplaces, the employer must ensure that the Canadian Human Rights Commission is adequately consulting with bargaining agents. Union activists overwhelmingly responded that they are not consulted when employment equity audits are taking place (83.8%).

CONCLUSION

Employment equity is pivotal in garnering a workplace that is inclusive and allows workers to feel valued and respected. The *Employment Equity Act* is a vehicle to ensure that workers receive equal opportunities and are treated fairly by their employers. It is a law that provides protection from unfair treatment and discrimination.

For the last twenty years PSAC has been urging the federal government to review the *Employment Equity Act*, and they now have an opportunity to revolutionize the EEA and create real change in the workplace. The PSAC's *Employment Equity Act* Review survey will prove to be instrumental in identifying the significant gaps that remain in the Act, and the ways in which they can be addressed. PSAC is optimistic that the Task Force will consider our recommendations to improve the EEA.

RECOMMENDATIONS SUBMITTED TO TASK FORCE ON THE EMPLOYMENT EQUITY ACT REVIEW

The following are PSAC's recommendations for amendments to the *Employment Equity Act* and related legislation that impact employment equity initiatives in the workplace:

1. Terminology

Outdated terminology (i.e. "Aboriginal Peoples", "visible minorities", etc.) in the *Employment Equity Act* must be updated to reflect the language and terminologies currently used by those communities.

2. Disaggregated Data for Designated Equity Subgroups and Intersectionality

The *Employment Equity Act* must be amended to collect and analyze disaggregated data for every designated equity group. By so doing, representation rates and barriers faced by distinct groups within designated equity groups can be examined and addressed more appropriately. Each specific designated employment equity group should be broken down (e.g. Black, South Asian, Chinese, Arab, etc.) so that barriers for specific communities can be identified and addressed.

Data should also be collected in a manner that allows for intersectional analysis.

3. Inclusion of LGBTQ2+ Community

The *Employment Equity Act* must be amended to include the LGBTQ2+ community as a designated group and the necessary data (census data) must be collected like other designated groups.

Data collected must be disaggregated and allow for an intersectional analysis since the LGBTQ2+ community is not homogenous and does not experience workplace discrimination in the same manner.

4. Labour Market Availability / Workforce Availability Rate

The *Employment Equity Act* must be amended to ensure accurate and current labour market availability and workforce availability rates that are reflective of each designated equity group. The labour market availability and workforce availability rates must be regularly updated between censuses to

reflect the changes in Canada's population (e.g. recent newcomers/immigrants who have international experience, non-Canadian Citizens).

5. Tensions between the *Employment Equity Act, Public Service Employment Act* and the *Financial Administration Act*

There must be a thorough review, as well as amendments made to the *Public Service Employment Act* (PSEA) and the *Financial Administration Act* to eliminate systemic barriers faced by equity-seeking groups. The review must include strengthening the role of central agencies, examining any provisions that hinder the objectives of the *Employment Equity Act*, and increasing the accountability of departments and agencies.

Furthermore, in situations of legislative conflict, the *Employment Equity Act* should supersede the *Public Service Employment Act* and the *Financial Administration Act*.

The recommendations in the Final Report of the Joint Management-Union Taskforce on Diversity and Inclusion should also be implemented.

6. Complaint Processes

The Taskforce must review all employment equity related complaint processes, including the Federal Public Service Labour Relations and Employment Board and Canadian Human Rights Commission processes carefully to determine the systemic barriers for equity groups in these processes, including removing provisions that prohibit employment equity related complaints. If there is no meaningful mechanism for recourses, then compliance requirements under the *Employment Equity Act* are meaningless.

The Employment Equity Review Tribunal should be replaced with an Employment Equity Commissioner with similar duties, functions and processes as the Pay Equity Commissioner recently established at the Canadian Human Rights Commission.

The historical underfunding of the Canadian Human Rights Commission must be addressed. The Canadian Human Rights Commission must be properly resourced not only to meet its current mandate but also further resourced to include an Employment Equity Commissioner.

In addition, bargaining agents must be able to bring forward employment equity complaints under the *Employment Equity Act* and trigger an audit, including when they have not been properly consulted. Consultations and Collaboration should be clearly defined in the *Employment Equity Act* and if it does not occur, bargaining agents should be able to make a complaint.

All audit reports should be made public subject to provisions stipulated in Access to Information and Privacy laws.

7. *Accessible Canada Act*

The Taskforce examine the concurrent jurisdiction between the *Employment Equity Act* and the *Accessible Canada Act* to ensure that each legislation supports and re-enforces the other rather than overlapping each other and leaving gaps in the legislation.

8. Strengthening the role of bargaining agents

The role of bargaining agents must be strengthened in the Employment Equity Act. The *Employment Equity Act* should clearly outline the obligation for joint national and regional employment equity committees that meet regularly for meaningful consultation and collaboration. Meaningful consultations and collaboration must be defined in the *Employment Equity Act* to ensure that employers do not try to circumvent their obligations by minimizing their “consultation and collaboration” process.

To ensure compliance of consultation and collaboration, bargaining agents should be able to make a complaint if they believe that the employer failed this requirement. Furthermore, if employers are found to have failed to properly consult and collaborate, then there must be a consequence for them that would compel them to meet this requirement.

The following elements should be in the definition:

1) establishing joint employment equity committees;

2) employers and bargaining agents jointly review, prepare and develop, implement and revise together the employment equity plans; and

3) employers and bargaining agents actively participate in all stages of the employment equity process from the start, to continuous reviewing and monitoring progress.

Bargaining agents should be able to negotiate provisions in the collective agreement that would go above and beyond the provisions in the *Employment Equity Act*. The *Employment Equity Act* should be the floor and not the ceiling for employment equity initiatives.

9. Federal Contractors Program

Contractors under the Federal Contractors Program must have the same requirements as other employers under the *Employment Equity Act*, including statutory requirements and reporting requirements so that the Minister of Labour cannot make changes arbitrarily.

The 2012 amendments to the *Employment Equity Act* must be reversed to decrease the threshold requirement to be under the Federal Contractors Program.

Furthermore, in order to ensure consistency, ESDC should either work with the Canadian Human Rights Commission, or the auditing function should be done solely by one body. Again, this requires the Canadian Human Rights Commission to be adequately resourced.

10. Pay Transparency

The *Employment Equity Act* must be amended to ensure wage gaps are addressed throughout the employment equity process and become part of employment equity plans. In addition, any audit or compliance processes must also take into consideration wage gaps in determining if compliant. If wage gaps aren’t addressed in plans, then there should be a mechanism to make a complaint.

The pay transparency provisions should apply to both federally regulated private and public sectors, as well as Federal Contractors Program.

Appendix A: Survey Methodology

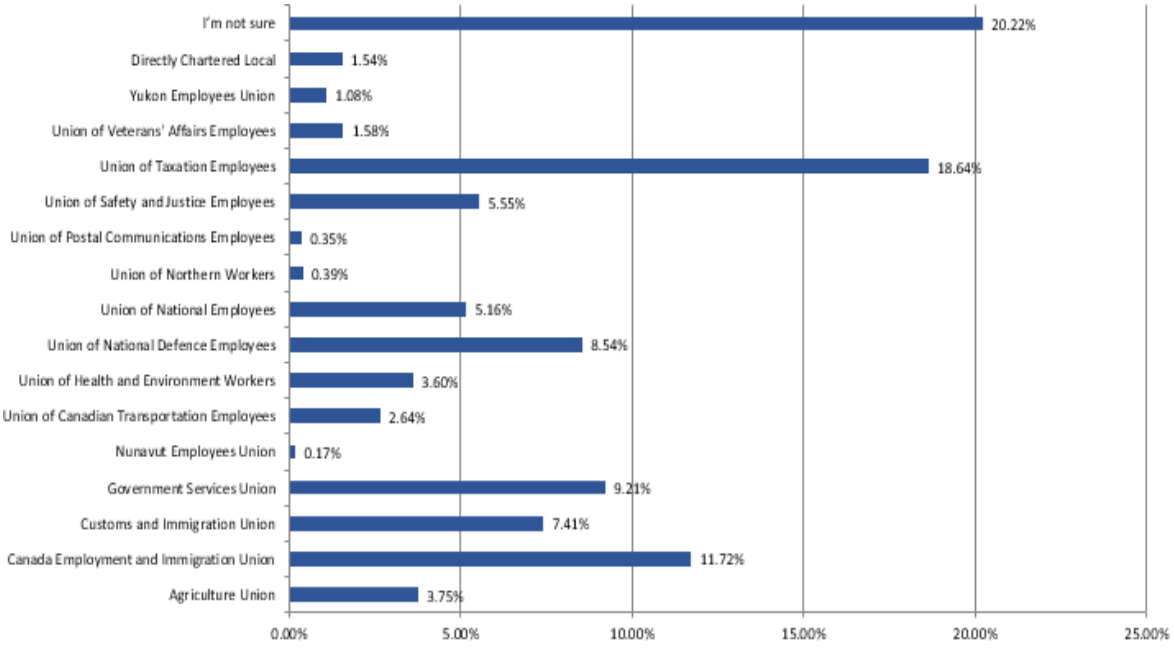
An online bilingual member survey was released on PSAC's national website on August 26, 2021, and members were given until September 9, 2021 to complete the survey. The survey was promoted through mass e-mails and social media posts. The survey garnered the response of 5,386 people.

The survey consisted of 22 closed-ended questions with the possibility of leaving comments and four open-ended questions. Questions were focused on learning more about the identities of the respondents and their affiliation to the union; their awareness around EEA measures in their workplace; the barriers equity-seeking groups face, accountability and the roles of employers and union; the strengths and weaknesses of the EEA, as well as ways to enforce it. PSAC ensured that the survey provided respondents with the option to self-identify, which further allows for analysis by equity group. The following is a breakdown by self-identification:

- 60.8% of respondents identify as women
- 31.89% of respondents identify as men
- 6.7% of respondents identify as non-binary
- 0.61% of respondents chose the option "other"
- 60.8% of respondents identified as racially visible
- 21% of the respondents identified as a person with a disability
- 11.45% of the respondents identified as being a part of the LGBTQ2+ community
- 9.7% of the respondents identified as Indigenous

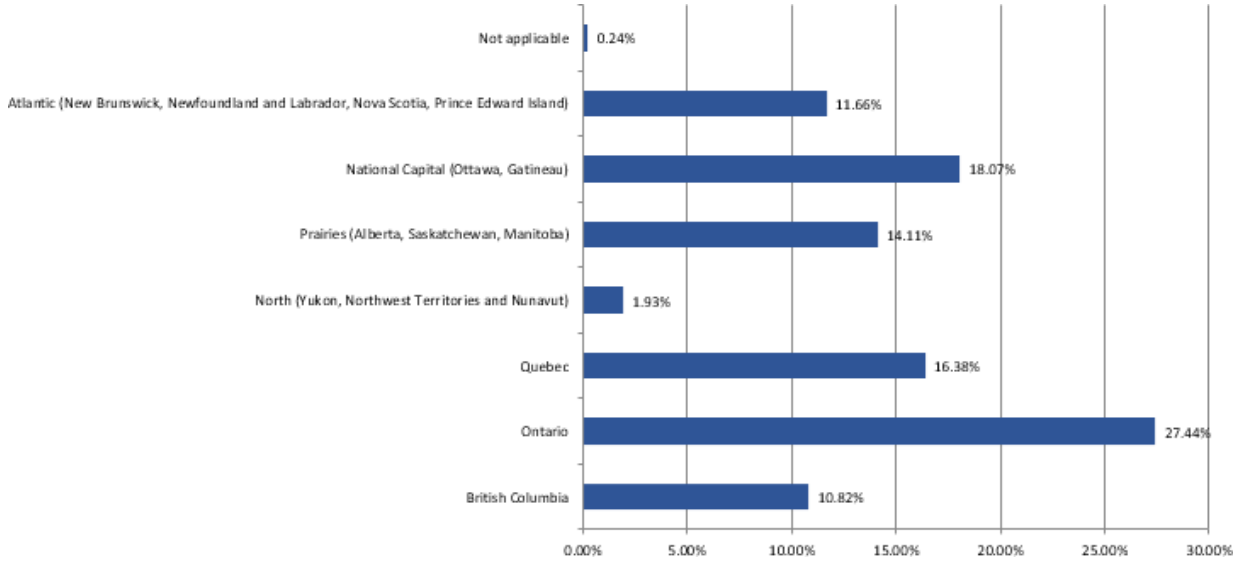
Component Participation

The following graph depicts member participation by component:



Regional Participation

The following graph depicts member participation by region:



Out of all the respondents, 62.9% are subject to the EEA and 30.8% were not sure, and 6.3% were not covered by the Act. 49.8% of respondents said they were part of the “Core Public Service (Treasury Board and Public Service Commission as the employer)”, while 24.1% said they were part of a separate agency or organization in the federal public service (not under

TBS). Less than 1% said they were either part of the private federally regulated or part of the Federal Contractors Program. 26.5% were unsure which employer category they fell under.

Appendix B: Virtual Consultations

Virtual consultations took place with union activists involved in employment equity in the workplaces and with the PSAC Nation Human Rights Committee on Sept 8 & 9, 2021. Participants were asked the following three questions:

1. What is working under the EEA?
2. What is not working under the EEA?
3. What are possible solutions and recommendations to improve the EEA?

The virtual consultations confirmed many of the findings of the survey:

- lack of adequate staffing recourse processes
- lack of meaningful joint consultations throughout employment equity process (e.g. self-ID, workforce analysis, employment systems review, developing an employment equity plan or monitoring it
- employees have rarely been contacted by the CHRC during an audit to get their input on whether the employer was meeting their obligations under the EEA
- there is little accountability on employment equity, despite the Management Accountability Framework

Recommendations from virtual consultations include:

- requirement for public reporting of data
- update to terminology
- mandatory EE committees
- updating the *Employment Equity Act* to include LGBTQ2+ as an equity group
- having subgroups of the various equity groups
- conduct and implement an intersectional analysis
- clearly define “consult and collaboration of bargaining agents”
- funding and training for mandatory joint committees

- changes to the PSEA and the Federal Public Sector Labour Relations Act to have meaningful recourses
- stronger language on accountability
- adequate funding for the CHRC
- the ability to have bargaining agents involved in the audit and make a complaint

ANNEX B PSAC Submission on Staffing in the Federal Public Service

In preparation for this consultation, the Public Service Alliance of Canada (PSAC) compiled input received at conferences and events as well as input received directly from the membership. The following are PSAC's written submissions that were, in part, presented at the session on staffing with the Treasury Board Secretariat (TBS)/Office of the Chief Human Resources Officer (OCHRO) on January 28, 2021.

Introduction

- The issue of staffing is very important for all PSAC members and especially for our equity group members.

- Every employee is impacted by staffing, both new and seasoned workers, as well as indeterminate, term and precarious workers.

- Staffing issues are consistently raised at conferences held for racially visible members and other equity conferences. There are many stories about members experiencing racism, sexism, and ableism within the staffing process with few effective recourses.

- From the Public Service Employee Surveys (PSES) it is known that many federal public service employees are afraid to file grievances and/or complaints. This is even more so for members who identify in an equity group. There is an understandable fear of retaliation, harassment, discrimination, or limits to members' career aspirations.

- Members are losing motivation, commitment, and morale. Employees who feel this way do not stay in the workplace.

- The impact of racism and discrimination experienced in the staffing process has impacted the mental health of many Black, racialized and Indigenous employees.

- Federal public service employees do not have confidence in the *staffing pro*cess. They do not believe the process is fair or transparent. Rather, many employees believe managers are able

to use the system to hire whomever they want.

- As directed by the Prime Minister's recent supplementary mandate letter to the TBS, the recognition that the *Public Service Employment Act* (*PSEA*) must be more inclusive is welcomed. The PSAC looks forward to actively participating in the review process.

- In addition, we believe that the Privy Clerk's recent "Call to Action on Anti-Racism, Equity and Inclusion in the Federal Public Service" demands major changes to both the staffing process and to the legislation.

- The recent announcement this past Tuesday, confirming that the TBS will look at the framework for recruitment in the FPS is to be commended. Specifically, the PSAC supports amendments to the *PSEA* and a review of the *Employment Equity Act*, as outlined by the Minister of Labour.

- Such an important issue cannot be dealt with within a few weeks and one consultation. **It is thus the PSAC's expectation that there will be further meaningful consultation and collaboration with bargaining agents. This current consultation process with such short deadlines was very inadequate to bring forward the full experience of our members.**

- The 2017 Taskforce on Diversity and Inclusion in the Public Service highlighted some key problems and barriers with staffing processes. The PSAC submits that the findings and recommendations in that report be implemented without further delay.

  Furthermore, we believe that the devolution of staffing authority from central agencies (TBS and the Public Service Commission (PSC)) to departments (stemming from the changes to the *PSEA* and *Public Service Labour Relations Act* (*PSLRA*) under the *Public Service Modernization Act* (*PSMA*) in 2003) played a key role in the barriers that currently exist. Specific barriers include systemic racism, ableism, sexism and discrimination in the staffing process.

- The PSAC provided submissions on this issue when a review of the *PSMA* was launched in 2009. These submissions are still relevant today and are attached.

The following three questions were posed:

1. Have your members experienced barriers in relation to the educational, professional certification, or other requirements of a position? If so, what was the requirement and how was it an issue?

2. Have your members been negatively impacted by the method used to assess them for a position (e.g. written test, interview, reference check)? If so, what was the method and how was it an issue? What practices have they seen that facilitate good assessments?

3. Have your members encountered other issues in selection processes? Please be as specific as possible. What practices have they seen that facilitate good selection processes? If your members have had issues with a selection process, did they pursue recourse (complaint, investigation, informal discussion)? If not, why? If so, were they satisfied with the result?

The PSAC's responses to these questions are divided by issue in the paragraphs to follow.

Issue: Non advertised appointments/positions

- The key staffing issue for PSAC members is the unacceptably high number of non-advertised processes.

- Sub-delegation and use of discretionary authority by managers are misused and contrary to employment equity/diversity and inclusion goals. They are used in a manner that often excludes equity identified staff and allows hiring managers to appoint their preferred candidates.

- In situations where positions were not posted, it is often the case that candidates external to the section, branch or department were appointed thus excluding internal employees with more experience and qualifications.

- Furthermore, insufficient notice is frequently provided in situations of unadvertised staffing processes, providing little time and opportunity to appeal within the timeframe.

- The overuse of unadvertised appointments results in low morale and anger among staff. As noted above, employees are afraid of retaliation and reprisals and thus fail to speak out regarding their concerns about staffing processes.

Examples include:

- Unadvertised appointments are made to fill acting terms. The term is then extended repeatedly without any additional staffing process.

- Non-advertised positions are used to place a preferred candidate in a four month less a day acting assignment to give that candidate experience. The same candidate is then appointed into the exact same position in a subsequent non- advertised selection process. Other staff do not have meaningful recourse rights. The acting assignment ends and therefore challenging the acting assignment becomes moot. In other cases, there is so little confidence in the available recourse options that they are not pursued.

  It is frequently the case that “personal suitability” is the deciding factor in staffing competitions. Thus, a process that should be objective is decided by a subjective determinant. When the qualifications and experience of a candidate meet the criteria, “personal suitability” is claimed. Clearly, it is difficult to challenge such decisions given the subjectivity of the deciding factor. This gives rise to favoritism, nepotism and the hand selecting of candidates and perpetuates the lack of diversity of thinking, values, approaches. People tend to hire those who think, look and act like themselves – be it consciously or unconsciously.
- A racialized employee was told that “the job is not for you” when inquiring about acting opportunities. There are no repercussions to the employer, even if a complaint is made, because the manager used her/his hiring discretion. The racialized staff was asked to train the new hire from outside of the section.

- It is a frequent experience that, staff with less experience external to the section/branch/department are provided acting experience instead of internal employees. For example, someone with 22 years experience and knowledge cannot progress in her career while someone who has been in the department for less than a year gets promoted quickly.

- Managers often cite “time constraints” and “immediate operational requirements” as excuses to use unadvertised appointments. The reality is that, in most situations, the need was present for many months and the manager was aware of the need for a long period of time.

- Finally, it is known that unadvertised positions are used to hire family members. Conflict of interests are not declared. Staff do not complain as they fear retribution.

Issue: “Best Fit” criteria

- Another key issue is the requirement of “best fit”. Even when there are representation gaps, mangers are still not hiring equity groups because they do not have to, especially for acting positions, due to “best fit” criteria. “Best fit” is a subjective criterion when considering an applicant’s ability to succeed in the workplace.

- The “Best fit” criteria perpetuates the ability of hiring managers to hire people like themselves.

- Negative stereotypes of Indigenous peoples are significant barriers in the career progression of Indigenous workers in the Federal Public Service.

- Often, the composition of selection board members reflects the hiring manager’s way of thinking resulting in a board that is not diverse. Furthermore, board members may be chosen because they are unlikely to challenge the hiring manager.

- Unconscious bias/implicit bias plays a role in hiring decisions. Hiring Managers want to hire people who think like them and with whom they feel “comfortable”. The use of “best fit” or “personal suitability”

are reasons used to exclude Black, racialized, Indigenous candidates including those who meet all the qualifications and who have the necessary experience.

Examples include:

- An employee was told to manage as a racialized person by his manager. By attempting to address this comment, the employee was seen as not creating a positive environment for staff. Eventually, he lost job opportunities.

- An employee, who self-identified as an equity member, was outright informed by a manager that his previous supervisory experience in the private sector had no value when applying for a management job in the Federal Public Service.

Issue: Performance appraisal (PAs)/Performance management (PMAs)

- Another key issue that came up was the use of PAs. Candidates are frequently asked to provide PAs during staffing competitions.

- Due to the subjectivity of PAs, equity staff may have been evaluated with a discriminatory lens by managers (consciously or unconsciously, intentionally or unintentionally).

Examples include:

- The top two grades are given to preferred staff intentionally who will then be given a non-advertised position and put under talent management plan. The perception is that the preferred staff needed higher PAs because they would not have otherwise qualified (e.g. someone who had been there only a short period of time).

Issue: Staffing complaint process

- The staffing complaint process is seen as ineffective, non-transparent, and unfair. There are only three grounds to contest a competition. These grounds, which include abuse of authority, are too limiting to successfully prove incidents of racism, sexism, ableism and other forms of discrimination.

- It is near impossible to show abuse of authority for non-advertised positions.

- Due to the discretion of hiring managers, complainants cannot successfully argue that the choice of staffing process itself was an abuse of authority under the staffing complaint process.

- Filing staffing complaints to address favouritism, nepotism and bad-faith tactics have, for the most part, been unsuccessful and as a result of having filed a complaint, the complainant may experience reprisals in the workplace.

- “Abuse of authority” requires the complainant to prove that the sub-delegated authority committed some intentional oversight in their assessment of a candidate. This is very difficult to prove.

- “Less than four months” competitions are difficult to appeal. However, these appointments are often extended repeatedly with no subsequent hiring process. Thus, by the time a complaint is filed and dealt with, the person who was initially appointed obtains the

required essential qualifications.

- Frequently, staff choose not to file complaints for acting positions because the process can take longer the actual appointment.

- During mediation sessions, a member was told that staffing was a managerial choice even after they were able to demonstrate that they had greater experience and qualifications for that position.

- There is a lack of effective remedies. Adjudicators may ask for a reassessment but cannot revoke the appointment. Furthermore, adjudicators cannot award remedies under the *Canadian Human Rights Act (CHRA)* (e.g. appointing the person into that position).

- Fear of being labelled a troublemaker and the semi-judicial process scare many members away from filing complaints.

- The complaint process is far too lengthy, and the standard of proof is high. Thus, the process drags for months/years with little to no chance of success.

Issue: Assessment process can be arbitrary or discriminatory

- Assessment tools are meant to be transparent and treat all candidates equally, but this can be contrary to diversity and inclusion principles which require that the employer provide a level playing field through equity initiatives. However, the onus is on the applicant to fit into the job description and absolve the selection board from assessing whether barriers have been created (e.g. unconscious bias, lack of cultural awareness, accent bias, etc.).

- There is a lack of consistency in the tools and/or processes used for assessments. Managers can make up their own assessment processes before, during, and after the assessment. There are situations where the tools and processes utilized fail to adequately measure a candidate's qualifications or experiences.

Examples include:

- One process for a position was seven hours long with a short break and no lunch while another process for the same level of

position was simply an application form.

- During a written test, a candidate was accidently provided the answers. When the candidate brought it to the attention of the assessors, the candidate was told that he was holding up the staffing process. The assessors changed the assessment process due to this error but did not advise the candidate of the change. When he complained that candidates had not been informed of the change and therefore the assessment process was flawed, the assessors did not change the process.

- A candidate had technical problems with the written exam, but the assessor did nothing about it (e.g. restart computer, provide additional support).

- A test is administered that had nothing to do with the job and that seemed arbitrary (e.g. assessment using shapes and patterns). People who may have been already doing the job were unable to do that test. Managers are supposed to hire from pools when they are staffing. However, managers may choose an employee for promotion from outside of an existing pool because of their discretionary authority. Even when they are told of an existing pool, managers often find a reason not to select from that pool (e.g. pools were not being used for short term opportunities).

- If a manager does not wish to use employees in a pool, they will fill positions through non-advertised processes.

- Standardized testing is used to assess candidates but when the test is challenged, managers refuse to provide the methodology and test material to the candidates. Therefore, it becomes difficult to challenge it effectively. Candidates feel that some of the tests are discriminatory for candidates with learning disabilities and from the perspective of cultural biases.

- There is a perception that written tests and interviews are subjective to enable managers to hire their preferred candidates regardless of qualifications and experience.

Examples include:

- It is not clear to candidates how answers are “weighted”, since not all components are scored the same. Neither the method nor the answers are made clear to the applicant. Scoring can be "customizable" by regional hiring boards to "target" the selection of specific candidates.

- Testing methods favor internal applicants that are already familiar with the work, the work units, and the hiring manager.

- Written testing is biased against First Nations’ traditional ways of conveying thoughts and information. There is little consideration given to alternative ways of testing that are culturally more appropriate. The cultures, teachings, and traditions of applicants must be considered as factors when assessing the answers provided.

- Candidates with disabilities feel discriminated against due to lack of or delays in accommodation.

Examples include:

- Unclear information is sometimes provided by human resources when accommodations have been requested.

- Assessment processes during COVID-19 were modified with little consideration of the impact on persons with disabilities and accommodation requirements. For example: A test over the internet was used to evaluate applicants. An applicant with a diagnosed learning disability and ADHD felt disadvantaged during the exam. The candidates’ disability affected their test performance on cognitive processing questions (i.e. shapes and patterns). In addition, he could not solve the questions in the allotted time even with an accommodation for extra time. Consequently, the candidate did poorly on the test. This same candidate had previously succeeded very well on a similar test without the processing questions.

Issue: Screening process

- Screening processes are used to eliminate candidates who then have little recourse. The only recourse provided is an informal discussion. This process does not change the outcome and has little effect. During informal discussions, candidates cannot provide additional information, even if there were barriers faced by equity groups (e.g. cultural, disability).

- Examples include:

    - Members screened out for words dropped during an assessment to meet word counts, and boards not willing to allow additional information as it will disadvantage other candidates.

    - Members screened out for not using “I’ statements.

Issue: Self assessment tools

- Despite the existence of a guidance document on inclusion, it would appear as though the tools provided in the document are rarely followed or monitored in staffing processes. This document identifies Indigenous people as disadvantaged by self-assessed experience questions. However, job posters use self-assessed experience as the primary tool. Most boards do not allow additional information during informal discussions which could mitigated the barriers for equity groups. (See PSC Public Service Hiring Guide: https://www.canada.ca/en/public-service-commission/services/public-service-hiring-guides/Fair-assessment-diverse-workplace/removing-barriers-part-5.html).

- Employees are not allowed to bring additional evidence at informal discussions (such as reference checks and performance appraisals which could validate competencies that can mitigate bias).

Issue: Education

- Degree or qualification requirements are tailored to a preferred candidate or meant to exclude certain candidates.

- There are inconsistent requirements or qualifications needed for different level of jobs. For example, qualifications for a lower-level job may be higher than for some higher-level jobs in the same department.

- Asset qualifications can exceed TBS requirements for positions which create barriers. For example, a position required a B.A. but a candidate was screened out because they did not have a Masters' degree.

- Educational requirements change for the same position. This is particularly difficult for older workers who want to progress in their career but came into the federal public service with different educational background that met the requirements at that time.

- No access to meaningful educational leave support for employees who want to upgrade their certifications to meet educational requirement for further career opportunities. Too often, employees are denied leave because the training they seek is not required for their current job and/or "operational requirements" do not allow for the approval of non-job-related training.

Issue: International credentials and experiences are not accepted

- The public service commission must develop a way to evaluate international credentials.

- There is often an assumption that an applicant will not succeed in a particular job because they lack Canadian experience.

- There may be requirements to have prior Canadian work experience to be eligible for a particular job.

- International work experience is weighed less than Canadian work experience; thus, creating a disadvantage to the applicants with foreign work experience.

Examples include:

- Employees with educational certifications (high school, college, and university) from overseas often accept lower positions that

don’t require their education simply to get their feet in the door.

- Employees apply for positions which require a high school or university degree but are turned down because they do not have “Canadian” equivalencies, even if they have been acting in those positions.

- To have one’s credentials evaluated by a provincial body is a lengthy and cumbersome process.

- Candidates from lessor developed countries often give up trying to have their credentials accepted as it can be near impossible to validate these international credentials.

Issue: Language barriers

- Employees are not given language training for careers designated with language requirements. Managers may require “bilingual or unilingual” solely depending on their preferred candidate’s profile. Bilingual qualifications may be required for positions that really operate solely unilingually either in English or French. This may be a barrier for some equity groups.

Issue: Geography

- Geographical requirements can limit the “area of selection” for competitions. Therefore, staff can be excluded when applying to internal jobs/ pools and positions even though they have the full capacity to work out of a sub-office or telework. This is a significant problem if an office has closed and people are losing their jobs.

Issue: Reference Checks

- Hiring managers add references that were not provided by the candidate.

- Employees who file complaints are not given good references for future opportunities.

- References can be biased/subjective because managers give good references to their preferred candidate.

Issue: Notices

- In the past, notice of interest was sent prior to making an appointment, especially for an acting position. Unfortunately, this practice has changed. Currently, there is no, or little notice provided. For example, a notice of appointment may be posted just before a long weekend, thus providing little time to apply but also little time to appeal.

Conclusion

It is clear, given the examples and situations outlined above, that the staffing process requires a full review and evaluation. Employees of the federal public service, not to mention the general public, expect the TBS to offer a bias and discriminatory free staffing process.

The PSAC welcomes the opportunity to continue discussions and dialogue to ensure that the necessary changes are made. The TBS must represent the diversity of the communities it serves at all levels and in all capacities

ANNEX C PSAC Report on the *PSMA* Five Year Legislative Review (2011)

OVERVIEW

Enacted in 2003, the *PSMA* has changed the way unions bargain within the federal public service as well as the recourses available to employees involved in labour disputes. In 2005, two components of the *PSMA* came into force, effecting significant changes to the labour relations framework of the federal public service; they are the *Public Service Employment Act* ("*PSEA*") and the *Public Service Labour Relations Act* ("*PSLRA*"). Both pieces of legislation contain clauses providing for a five (5) year legislative review.

The review was launched in 2009 when "the Prime Minister appointed Susan Cartwright, Senior Advisor to the Privy Council Office, to lead the process for both Acts, and prepare a report for the President of the Treasury Board to be tabled in Parliament in early 2011."[1]

We do not believe that the employer's process will provide for proper institutional independence nor that PSAC's concerns on key change will be properly communicated to Parliament in the Treasury Board's final report.

Although PSAC has provided some input into the review conducted by Ms. Cartwright's office, PSAC has prepared its own report on the *PSMA*. We do not
believe that the employer's process will provide for proper institutional independence nor that PSAC's concerns on key changes will be properly communicated to Parliament in the Treasury Board's final report.

The following provides PSAC's views on the five (5) years under the new legislative framework and will include submissions on both *Acts*, including submissions on staffing, political activity in the public service, bargaining rights and recourse mechanisms.

[1] Treasury Board of Canada, retrieved from http://www.tbs-sct.gc.ca/psma-lmfp/index-eng.asp.

SCOPE AND METHODOLOGY

The scope of the report is limited to the substantive changes that the *PSMA* has enacted within the two pieces of legislation. There are areas in both *Acts* that have not changed, and which continue to be of concern to PSAC. However, for the purpose of this exercise these are not discussed in the report.

As far as methodology is concerned, in preparing this report we have gathered information from PSAC Components who in turn consulted with their staff and members working at the forefront of the new legislations. PSAC's subject matter experts have assisted in all areas with their technical expertise on topics such as managerial exclusions, essential services, grievance arbitrations, compensation, consultation and co-development as well as alternative dispute resolution mechanism. PSAC's in-house counsel also provided input on the *PSEA including* an outline of our concerns over the new definition of merit and the application of the *Act* by the employer and the Public Service Staffing Tribunal (PSST). Finally, we have reviewed the input from other stakeholders such as the Public Service Labour Relations Board (PSLRB) and the Public Service Commission (PSC).

1. PUBLIC SERVICE EMPLOYMENT ACT (PSEA)

1.1 Introduction

The *PSMA* made sweeping changes to the *PSEA,* the stated objectives of which were to allow for flexibility, while preserving the values of merit, non-partisanship, excellence, integrity, diversity, accountability, fairness, transparency and respect; all of which are expressly cited in the preamble of the new *Act.*

Under the prior *Act,* staffing accountability had largely been ensured via a statutorily established process of appeals. These appeals were overseen by the Public Service Commission ("PSC" or "Commission") and were heard and decided by neutral third parties.

They were informal and more often than not, the representatives of both parties were not lawyers.

Appeal Board chairs considered allegations as to whether appointments had been made in accordance with merit. The merit principle was not defined in the *Act.* However, a considerable body of jurisprudence developed as to what represented an appointment in accordance with the merit principle, some of which was at the Supreme Court level.[2]

In addition, the Commission was empowered to conduct investigations. Sections 33(1) & (2) of the former *Act* gave the PSC authority over the political activities of public service workers, but large portions of these provisions were struck down as unconstitutional by the 1991 Supreme Court decision in *Osborne.*[3]

1.2 Staffing Recourses Under the New *Act*

The new *PSEA* provides for the following mechanisms for staffing accountability:

1) Informal discussion (s. 47)

2) Investigations by deputy heads or the PSC (ss. 15(3), 66 & 67)

3) Audits by the PSC (ss. 17 – 19)

4) PSC investigations of political influence or fraud (ss. 68 & 69)

5) Complaints to the Public Service Staffing Tribunal (ss. 65, 74, 77 & 83)

While it may appear that more avenues of recourse are provided under the new legislative scheme than previously existed, in reality this is far from the case. The rights of public service workers to seek staffing recourse have been considerably reduced.

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[2] See, for example, *Evans v. Canada (Public Service Commission Appeal Board),* [1983] 1 S.C.R. *582*; *Doré* v. *Canada*, [1987] 2 S.C.R. 503; *Canada (Attorney General)* v. *Brault,* [1987] 2 S.C.R. 489.

[3] *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

The reasons for this are complex and overlapping, but a central issue has been the new definition of merit which has been introduced in the new *PSEA,* which is discussed in more detail below.

Our members have expressed profound frustration with the current regime of staffing accountability and recourse. While the old system of appeal boards was far from perfect, it did provide for an independent third party to consider the effect of errors, irregularities and omissions in the selection process, and it was informal and easily accessible. These characteristics are absent from the current regime.

Under the new *Act*, far fewer staffing irregularities are being identified. The Public Service Staffing Tribunal ("PSST") has decided that it is not responsible for "mere" errors and omissions[4], and these matters rarely come before the PSC or deputy heads. The Commission now only has exclusive authority over allegations of political interference and fraud.[5] PSC investigations into other matters can only occur where the investigation is requested by the deputy head, or where the Commission itself has conducted the staffing process[6], which is relatively rare. As for Deputy Heads, they refuse the majority of requests for investigations which are made of them.

Although organizations under the *PSEA* conducted over 120,000 hiring and staffing activities in 2009-2010,[7] the PSC conducted only 60 investigations into appointments, in the face of 305 requests. Only 32 of these were determined to be founded.[8] No requests were made with regard to appointments tainted by political influence, and only thirteen (13) were alleged to have been affected by fraud (of which 4 were determined to be founded). In the last six (6) years, the PSST has found fewer than twenty cases where it has determined that there has been an abuse of authority.

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[4] *Tibbs v. National Defence* 2006 PSST 0008 para. 65.
[5] *Public Service Employment Act,* S.C. 2003, c. C-22, ss. 68 and 69.
[6] *Ibid.,* s. 67.
[7] *Public Service Commission Annual Report 2009-2010*, Appendix 2, Table 36, retrieved from http://www.psc-cfp.gc.ca/arp-rpa/2010/appendice2-annexe2-eng.htm#app2-2
[8] *Ibid.*, p. 108.

While recognizing that many cases are settled through the informal processes, these facts clearly point to a decrease in the staffing accountability within the public service.

When investigations are conducted by a deputy head, there is often no formalized process. Investigations have been out-sourced to private investigative firms, with little uniformity of process or result. Fundamentally, such an investigation, even when performed by a contractor, is not conducted by an independent third party, as in the former third party, as in the former appeal process. While it is possible to have a fair outcome in such circumstances, the possibility of compounding the original problem is increased.

Our members have expressed profound frustration with the current regime of staffing accountability and recourse. While the old system of appeal boards was far from perfect, it did provide for an independent third party to consider the effect of errors, irregularities and omissions in the selection process, and it was informal and easily accessible.

Further, the PSC has identified that deputy heads have assumed responsibility for investigation processes even where they themselves are personally implicated.[9] Issues have also arisen with compliance with procedural fairness and assessment of merit criteria where these concepts have been imperfectly understood by deputy heads.

1.3 A New Definition of Merit

The definition of merit has been a core problem in the new *Act.* The *Act* defines merit at s. 30(2) as follows:

> (2) An appointment is made on the basis of merit when:
>
> (a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency. […]

[9] *Public Service Commission Annual Report 2009-2010*, Appendix 2, Table 36, retrieved from http://www.psc-cfp.gc.ca/arp-rpa/2010/appendice2-annexe2-eng.htm#app2-2. p. 114

This is at odds with what most Canadians would understand a merit-based process to be, especially as there is no longer a requirement to consider more than one candidate (*PSEA* s. 30(4)). The problem is further compounded by the fact that the *Act*, at s. 30(3), expressly allows the criteria through which merit will be determined to include present and future needs. This inclusion creates tremendous latitude to establish criteria for selection for which there can be no accountability, as future needs are entirely speculative. The employer has absolute authority to set qualification standards under the *PSEA* s. 31(1).[10]

> The current definition of when an appointment is made according to merit[11] does not even require a selection committee to hire the highest ranked candidate in a competitive process. It is interesting that, even given this flexibility, many managers use the results of competitive processes to guide their hiring decisions, having found that this is, for them, the best way to comply with the *PSEA's* core values.
>
> The definition of an appointment according to merit in the current *Act* contradicts standard dictionary definitions of the word (i.e. a claim to respect and praise; excellence; worth). Under the *PSEA*, any person who meets the present or future qualifications of a job, even in the barest or most minimal sense, has merit.

The former concept of merit as being the most qualified candidate amongst a pool of qualified individuals no longer exists. This new definition also sits oddly with the references to excellence and accountability in the *PSEA* preamble.

1.4 The Role of the Public Service Commission

> The greatly reduced role of the Commission also stands at odds with a climate of transparency and accountability. The substantial jurisprudence which previously existed, as developed by the appeal

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[10] *Op. cit.,* note 7, *PSEA* s. 31. (1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

[11] *Ibid*., s. 30 (2).

board chairs pursuant to s. 21 of the former *Act*, provided considerable guidance, not just for other chairs, but also for hiring managers and selection committees.

The PSC now must provide guidance in other ways. It has attempted to champion what it describes as a "values-based" culture,[12] in which stakeholders, committed to the values which should inform the staffing process, respect these values even in the absence of recourse methods which would enforce them. The new "values-based" system of accountability places tremendous responsibility on deputy heads to oversee staffing decisions which have been delegated to the lowest level of management and to conduct investigations of errors, omissions and irregularities when they are alleged.

One way which the PSC can provide some direct guidance to departments is through the audit process. The PSC's audit powers allow it to scrutinize closely whether a department is complying with the staffing framework of the *PSEA.* The recent news on this front is not good. In 2010, while 2 departmental audits (of the PSLRB and ACOA, both of which are comparatively very small organizations) revealed few real staffing problems, the remaining 6 were far less rosy. Further, a follow up audit of the Canadian Space Agency indicates that it has not yet addressed all the concerns raised in its audit from the previous year.

All of the problems identified by the Audits are directly linked to the *PSEA's* flawed definition of merit, and to the regime of minimal accountability which it established. These problems included: excessive use of non-advertised processes, inadequate justifications for the use of non-advertised processes, an increasing failure to document staffing processes in a way that would allow their compliance with the *PSEA* to be evaluated. Audits have also found that there are inadequate departmental monitoring processes, which are needed to catch staffing

[12] *Op. cit.,* note 7, p. 13.

irregularities and errors. In some cases, audits have determined a failure to adhere to the values of the *PSEA.*[13]

1.5 The Public Service Staffing Tribunal

The Tribunal has so far issued fewer than twenty decisions in which it has accepted the allegations which have been put before it with regard to abuse of authority and other matters falling within its statutory mandate. In its 2008-2009 annual report, the Tribunal noted that it had received 821 complaints in the previous year, and further noted that 90% of the 295 complaints which were referred to its dispute resolution service were settled. No statistics exist on the degree to which these settlements addressed or corrected problems in the staffing process or satisfied the concerns of the complainants.

The Tribunal has a profoundly limited mandate. However, even within this limited mandate, its approach has been highly conservative, and it has required recourse to the courts to force the Tribunal to recognize that assessment tools must be demonstrably capable of assessing the qualification in question.[14]

The Tribunal's approach has been anything but welcoming to complainants. One complainant had his confidential and highly sensitive medical information shared with over 700 other candidates, many of whom were distressed to receive the information in question. When the complainant raised this serious breach of privacy with the Tribunal, the Tribunal defended its disclosure of the confidential information and persisted in this approach to confidential information until it was rebuked by the Privacy Commissioner.

Of even greater impact has been the Tribunal's consistent use of an excessively legalized environment, which clearly runs contrary to its stated purpose. There is no requirement that workers be

[13] *Op. cit.,* note 7, p. 100.
[14] *Hammond* v. *Canada (Department of Human Resources and Social Development)*, [2009] F.C.

represented by legal counsel to appear before the PSST; indeed, the *Act* contemplates that complainants may be unrepresented.

However, since its inception, the PSST has adopted a style of proceedings which is far more formal than that of the PSLRB and has resisted all calls to change this. There can be no justifiable reason for this Tribunal to behave in a manner which appears calculated to discourage any worker who wishes to "blow the whistle" on abuses of authority.

In 2007, PSAC's National President John Gordon wrote a strongly worded letter to Tribunal Chair Guy Giguere to remind him of PSAC's long-established tradition of having representatives without formal legal training in matters of staffing. Under the former *PSEA*, these union volunteers and staff members had played a vital role in the overall accountability of staffing the federal public service.

From the outset, the Treasury Board made it clear that they would take a highly legalistic approach to proceedings before the Tribunal. The law can sometimes be used to obfuscate and intimidate. We remained confident, at that time, that the Tribunal would protect the rights of all those who appeared before it to a hearing which was in accordance with the principles of fundamental justice. This confidence has since been disappointed.

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In particular, we have stressed the following issues with the Tribunal:

- The necessity of sufficient notice of lengthy case law and obscure legal doctrines which any party seeks to introduce;

- The importance of granting adjournments of an appropriate length where a party has not been given adequate notice of the above;

- The need for Tribunal decisions which can be understood without legal training (training which the vast majority of complainants before the Tribunal will lack); and

- The expectation of respectful treatment by all parties and witnesses present at a hearing.

Unless the above principles are respected, there will be no way for the PSST to effectively fulfill its mandate to identify and correct abuses of authority in staffing.

Conclusions with Regard to Staffing Accountability

While we appreciate that the PSC works hard to monitor staffing and provide guidance, the current non-mandatory regime of departmental investigations is simply not working.

In the absence of any real accountability for botched staffing actions, staffing practices (which the *PSEA* delegates to the lowest level possible) are becoming looser, and, in some cases, slip-shod. We are on the cusp of a culture shift in public service staffing – less accountability will, inevitably, mean more unfairness.

As the system continues to break down, the staffing process will become increasingly vulnerable to partisan appointments, one of the evils which the PSC was originally created to avoid.

The regime the *PSEA* mandates is incompatible with the values of merit, transparency and fairness that it sets out. The need for flexibility and efficiency in staffing must be balanced by recognition of the need for true accountability. Just as the fact that most staffing processes proceed in good faith must be balanced by an

understanding that a flawed staffing accountability system invites abuse.

Political Activities and Expression

In the absence of any real accountability for botched staffing actions, staffing practices (which the PSEA delegates to the lowest level possible) are becoming looser, and, in some cases, slip shod. We are on the cusp of a culture shift in PS staffing – less accountability will, inevitably, mean more unfairness.

Since the 1991 Supreme Court of Canada decision in *Osborne* (which struck down most of the prior restrictions on public service workers' political activity), there has been no discernible change in the actual level of impartiality of the public service. Political expression is a constitutionally protected right. Most public service workers – and the vast majority of our members – don't have jobs which justify much, if any, limitations on their political expression and activity.

However, PSAC is concerned that the Commission wants to exceed its *PSEA* mandate with regard to political activity. The *PSEA* only entitles the Commission to restrict political activity when this activity impairs impartiality in the performance of a worker's duties.

The PSC has openly stated that it is considering monitoring <u>all</u> "advocacy" work by public service workers – this expanded definition could easily include union activity, or work on behalf of a faith group or charity. The PSC is also considering the monitoring of Facebook and other social networking sites for what it considers to be potentially partisan activity by public service workers.[15]

What makes this especially surprising is that so few allegations of improper political activity have come forward since the enactment of the new *PSEA,* although the *Act* gives <u>any</u> person the right to make such an allegation.[16] Only 16 allegations of improper political activity

[15] *Op. cit.* note 7, p. 59 & 62.
[16] *Op. cit.,* note 5, s. 118.

by public service workers were received in 2009-2010. Of these, only six merited further investigations; only one complaint was upheld.

There is no evidence that public perception of public service impartiality is so tarnished that the interference in, and monitoring of, private life suggested by the PSC is justifiable. Such an approach would be highly invasive and will stifle political discussion. The Privacy Commissioner has already expressed concern that 1) the PSC is over-reaching its mandate and 2) there would be huge privacy risks associated with creating data banks of the opinions and political views of public service workers.

The touchstone of any discussion of impartiality must be balance. The legitimate interest of the public in an impartial public service must be balanced against the constitutional rights of workers. Any contemplated restriction of these rights must be balanced against the real contexts in which individual workers perform their duties.

The implication (which pervades much of the commentary from the Commission on this topic) that all public services workers must be held to a high and broad standard of political neutrality is often combined with a linkage between political neutrality and the Duty of Loyalty. This suggests that the PSC is taking the position that those public service workers who wish to actively participate in Canada's democracy are somehow guilty of disloyalty. There is little recognition of the fact that the purpose of Part 7 of the *PSEA* **"…**is to recognize the right of employees to engage in political activities..." (emphasis added).[17]

The Commission has applied restrictions which go beyond its mandate of preserving political neutrality in assessing applications made by those public service workers wishing to become political candidates. The Commission website includes a "self-assessment" tool to allow public service workers to determine the level of political activity in which they are allowed to engage. The "tool" suggests that very minimal levels of activity are permissible, even for those with no policy role or public visibility.

[17] *Ibid*., s. 112.

While the penalties awarded as a result of political activities investigations have generally been minor, the Commission has favoured broadly worded restrictions on those applying to be permitted to stand as candidates in municipal, provincial/territorial or federal elections. These restrictions have been difficult for candidates to interpret and bear little relationship to the actual process of political campaigning.

Much of the commentary from the Commission, both in its annual reports and in the 2008 special paper which it published on the subject[18], seems to implicitly divide public service workers into those who plan or devise policies or programs of the government, and those who deliver them. The Commission fails to recognize the large numbers of federal public service workers whose work supports the infrastructure of government – the clerical and support staff, plant operators, receptionists, information specialists and technicians whose work makes the machinery of government possible. The one example of a non-policy-oriented job (at page 30 of the paper) – is an administrative assistant to a deputy head. This is a rare form of clerical support, performed by only a small minority of workers.

Even where public service workers are involved in the delivery or planning of a government initiative, their participation is likely to be limited to a highly specific matter, contained within one department. Restrictions on their political expression should correspond to the true nature and scope of their duties.

When the Supreme Court last considered this issue, in the *Osborne* case, it determined that only at the deputy head level was the public interest in neutrality so paramount as to justify the suppression of all political expression other than voting. In every other instance, a public service worker is entitled to have his/her right to political expression balanced against the legitimate interest of the public in a neutral civil service. The Public Service Commission must continue to respect this principle.

[18] Public Service Commission, *Public Service Impartiality; Taking Stock,* July 2008 retrieved from http://www.psc-cfp.gc.ca/plcy-pltq/rprt/impart/index-eng.htm.

Conclusions with Regard to Political Activities and Expression

The public service cannot serve the interests of Canada or promote the constitutional goal of peace order and good government, by unduly curtailing the constitutional rights of its own workers.

The touchstone of any discussion of impartiality must be balanced. The legitimate interest of the public in an impartial public service must be balanced against the constitutional rights of workers. Any contemplated restriction of these rights must be balanced against the real contexts in which individual workers perform their duties.

THE PUBLIC SERVICE LABOUR RELATIONS ACT (PSLRA)

2.1 Introduction

The "raison d'être" of the *PSLRA* is described in the Summary to the *PSMA* as follows:

> "*[…] the Act is to provide for a labour relations regime in the public service which is based on greater cooperation and consultation between the employer and the bargaining agents, notably by requiring labour-management consultation committees and enabling co-development […]. It provides for the establishment of conflict management capacity within departments and more comprehensive grievance provisions. It also establishes the Public Service Labour Relations Board whose mandate is to provide adjudication services, mediation services and compensation analysis and research services*."

The following will examine the changes that the *PSMA* has brought to the labour relations framework in the federal public service and provide PSAC's views on these changes.

2.2 Consultation, Co-Development and Alternative Dispute Resolution

The Preamble of the *PSLRA* sets out the following principles which explain the underlying philosophy of the *Act* and are meant to guide

individuals responsible for its application and interpretation:

> […] effective labour-management relations represent a cornerstone of good human resource management and ***collaborative efforts between the parties, through communication and sustained dialogue***, improve the ability of the public service to serve and protect the public interest;
>
> […]
>
> the Government of Canada is committed to ***fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment*** [emphasis added]

It sets the tone for consultation, co-development and alternative dispute resolution mechanisms which are codified throughout the *Act*.

There are significant differences between information sharing, consultation and co-development. Information sharing is when one of the parties provides information to another party, often as a courtesy, however the input or opinion of the party receiving the information is not being sought. It is a one-way type of communication. Consultation entails the provision of input from both parties into the solution or end product. Co-development involves a cooperative, but still negotiated approach, where the end results (directive, policy, guidelines) or solutions, have been jointly developed.

2.2.1 Consultation

Although language regarding consultation has just been incorporated into the *Act*, it is not a new concept in the federal public service. Most departments have had union-management consultation committees for well over 20 years.

The *Act* now states that Deputy Heads ***must***, in consultation with the bargaining agents, establish a consultation committee consisting of both employer and union representatives. The purpose of these committees is to exchange information and obtain

views and advice on issues affecting employees in the workplace. Issues such as harassment in the workplace[19] or whistle blowing[20] are provided as examples of areas that may be discussed or addressed through these committees.

The requirement of Deputy Heads to establish a labour-management consultation committee ("LMCC") has, for the most part, been implemented. However, this requirement has been somewhat more difficult to implement in some of the very small departments.

Notwithstanding, the *Act* does not provide guidance as to the manner in which these committees should operate nor does it define the meaning of consultation. As such, the effectiveness of these committees to jointly broker solutions to workplace problems appears to have been, for the most part, limited. The feedback received from many of our union representatives who sit on these committees is that they are used by the employer as platforms for information dumping on decisions that have already been made, as opposed to consultation where there is a back and forth exchange of information and opinions.

The legislator obviously believed that co-development was an important enough concept to incorporate into the new Act. Unfortunately, the current political climate is not conducive to co-development initiatives.

2.1.2 Co-Development

The *Act* defines co-development as consultation between the parties on workplace issues which includes participating in the identification of workplace problem and the development and analysis of solutions to the problems ***with a view to adopting mutually agreed to solutions*** [emphasis added].[21] Although co-development contains a consultation component, in many ways it is closer to interest based negotiations where common interests are identified and where solutions are jointly developed by the parties.

[19] *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 8 (a).
[20] *Ibid*., s. 8 (b).
[21] *Ibid*., s. 9.

As opposed to the consultation provisions in the *Act*, co-development is not mandatory and can be initiated by either the employer (i.e. Treasury Board) or by a Deputy Head[22]. The NJC Directives are probably the best examples of co- development, but these pre-date by far the *PSMA*. The Directives have been jointly developed and cannot be modified unilaterally by neither of the parties. However, save and except a few isolated and mostly localized instances, co- development is pretty much non-existent in the core public service. In preparing this report, we sought input from Components and PSAC staff and were hard pressed to find any example of co-development outside of the NJC Directives.

The legislator obviously believed that co-development was an important enough concept to incorporate into the new *Act.* Unfortunately, the current political climate is not conducive to co-development initiatives.

2.3.3 National Joint Council ("NJC")

PSAC is a member of the NJC and PSAC National President John Gordon sits on the NJC's Executive Committee.

> The NJC complements collective bargaining between individual unions and employers by offering an alternate and innovative way of addressing issues on a public service-wide basis. Participating employers and bargaining agents take joint ownership of broad labour relations issues and develop collaborative solutions to workplace problems. Employers and bargaining agents have agreed that the NJC is the "Forum of Choice" to share information, consult on workplace policies and co-develop directives which provide public service-wide benefits.[22]

The new *Act* officially recognizes the NJC[24] as an entity in which the employer and bargaining agents ***may*** co-develop workplace improvements.[25] Although the NJC has existed since 1944, its

[22] National Joint Council, retrieved from http://www.njc-cnm.gc.ca/doc.php?sid=18&lang=eng.

formal recognition ensures funding to operate as an entity and provides it with formal institutional recognition. However, there is no mandatory requirement under the *Act* to use it as the forum in which to consult or co-develop.

With regards to its effectiveness as a forum to co-develop workplace policies or conduct meaningful consultation, it is really dependent on the individuals assigned to the committees or the working groups and their ability to come to the table with a mandate to enter into "real" consultation which implies a certain amount of give and take.

In the last five (5) years, PSAC has walked away from several "consultation" initiatives with Treasury Board; our experiences have been that consultation has been viewed as information sharing on the employer's part. The employer has provided PSAC with documents that are obviously in their end form and given the union very short deadlines to provide input (often just a couple of days) into lengthy documents.

For a three (3) month period the PSAC walked away from the cyclical review of the Occupational Health and Safety Directive as the employer was not participating in meaningful consultation. In addition, all the bargaining agent members of the NJC walked away from consultation around the employer's People Management Policy Suite Review, as the employer made it clear that they did not have the mandate to effect changes to the documents provided. However, in the last six (6) months the parties have reopened discussions regarding what constitutes meaningful consultation. PSAC hopes that the current trend around consultation will change. We recognize that meaningful consultation on decisions impacting the workplace is in the best interest of our members.

2.3.4 Alternative Dispute Resolution Mechanism

PSLRB's Mediation Services

Although the former *Act* did not explicitly confer on the Board the mandate to provide mediation services, the Board did offer

PSAC would like to see the Board take a pro-active role in managing the process including the expectations of the parties prior to mediation. The purpose of which would be to ensure that the individual tending have the delegated authority to settle the dispute.

these services prior to the enactment of the *PSMA* and has had professional mediators on staff since 2000.

The Board's mediation services include assisting the parties in negotiating collective agreements; assisting in the management of relations resulting from the implementation of collective agreements; mediating grievances and assisting the Chair of the Board in discharging his or her responsibilities under the *Act.*[23]

PSAC uses these services extensively, particularly in the area of grievance adjudication. The Board's mediation services have also been used in early intervention situations where there is a dispute, but grievance rights have not necessarily crystallized. In certain instances, they have been very useful in avoiding the further escalation of a dispute.

PSAC's experience with the Board's mediation services has ranged from very positive to extremely frustrating. The most important thing to bring to the mediation process is a mandate to settle and the ability to sign off and implement the agreement reached by the parties. Unfortunately, several large departments have not taken the mediation process seriously, sending inexperienced human resources staff and managers with no mandate to enter into meaningful settlement discussions.

Further, in some instances, the mediation process is being used by the employer to gather information in preparing for their "case" at adjudication. When the process is not taken seriously it affects the credibility of the Board's mediation services. In cases where the grievance has a human rights component to it, this approach to mediation aggravates the employee's feeling of victimization and escalates the dispute to a higher level of animosity which is the polar opposite of the objective of mediation.

PSAC would like to see the Board take a proactive role in managing the process including the expectations of the parties prior to

[23] *Op. cit*., note 19, s. 15.

mediation to ensure that the individuals attending have the delegated authority to settle the dispute. For example, if the grievance relates to the duty-to-accommodate and the employer has no mandate to consider accommodation options, this should be known prior to the mediation and be communicated to the union and the grievor at which point an informed decision can be made on proceeding or not.

We believe this would prevent further deterioration of working relationships, provide more legitimacy to the process as well as saving time, resources and money.

Informal Conflict Management System ("ICMS")

The provision for ICMS was introduced in the new *Act* at article 207 and reads:

> Subject to any policies established by the employer or any directives issued by it, every Deputy Head in the core public administration ***must***, ***in consultation with bargaining agents*** […], establish an informal conflict management system and inform the employee of its availability [emphasis added].

In preparing this report, we sought input from the Components on their experiences with ICMS; both on the development phase of ICMS and on its effectiveness in resolving workplace disputes. The input received varied from department to department.

Amongst the concerns expressed with the functioning of ICMS we found:

- System appears to be skewed to favour the employer;
- System is not perceived as being objective;
- The program is administered by the Human Resources Section, which in most instances has provided the manager with labour relations advice on the same issues which are being addressed through the ICMS;

- The employer does not always involve the union, even in cases involving collective agreement interpretation;
- Some agreements violate rights negotiated under the collective agreements (appearance of “side-deal”).

We also received positive feedback stating that the system has been effective in resolving workplace disputes before they escalate and is timelier than the grievance process.

In closing, PSAC does not view the language in the *Act* relating to consultation, co-development and alternative dispute resolution as problematic per se; our concern lies with the application of these provisions. PSAC is alarmed with the lack of consistency throughout the core public service with regards to the application of these provisions as well as the lack of accountability of Deputy Heads in the interpretation and application made of these new provisions.

Compensation Analysis and Research Services (CARS)

After the government disbanded the Pay Research Bureau in 1993 there has been a lack of reliable, independent information regarding how federal public sector workers fare against other employees in the labour market.

The lack of such information led to more conflictual labour relations, and in this context unions and employers have agreed to do some joint studies to look at compensation of groups where vast anecdotal evidence suggested that there were wage gaps.

For example, the Operational Services pay study in 2002 looked at the labour market in relation to skilled trades, unskilled labourers, firefighters and other operational group members for the SV bargaining unit, and the pay study helped the parties reach a collective agreement.

It is within this context, that the PSLRB Compensation Analysis and Research Services (CARS) was established in 2006. PSAC was initially pleased with the establishment of the service as it was viewed as a means of providing compensation analysis to assist the

parties during collective bargaining. In the 2007-2008 PSAC-Treasury Board bargaining round, CARS oversaw a study for members of the TC group.

The methods used by CARS at that time involved contracting-out data collection to an outside consultant who then relied on self-reporting of participants. Unfortunately, the survey included cumbersome data submission requirements on the part of the participants related to compensation. This cumbersome data requirement and subjective self-reporting likely reduced the response rate and skewed results.

PSAC was also disappointed with the PSLRB's approach to consultation. The *PSLRA* mandated the creation of an Advisory Board to provide advice on the compensation analysis and research services provided by the Board. In our view, this Board was underutilized during the first years of CARS' operation when compensation studies affecting our members were being planned. Furthermore, in our view the Advisory Board was not provided with a sufficient opportunity to meaningfully address, let alone debate, key CARS methodological policies. This meant that CARS failed to produce useful data for the 2007-2008 round of negotiations.

Since late 2007, the Minister responsible for the PSLRB has not made any appointments to the Advisory Board, and it is, in effect, defunct. As such, there has been a missed opportunity for input from key federal public sector compensation experts.

There have been some broad-based consultation sessions, but it is unclear at this point as to whether the input from the participants of those sessions will shape the outcomes either in the design of the survey or the selection of the groups to be studied.

In the view of PSAC, if CARS is to be successful it must directly involve representatives of the employer and unions at every stage of the research phase. The Advisory Board should be re-established with representatives of the parties appointed by the parties, not the Minister, and CARS staff needs to work much more closely with the parties on specific studies.

In early 2010, the PSLRB unfurled a new process that seems far more ambitious than the studies it engaged in the last round, claiming it had learned from its negative experiences with the TC study and its more positive experience with the Health Services group study. CARS appear thus far to have adjusted its methods and expanded its scope. However, it is important to note that the new phase of CARS pay research is still in its infancy and there are still important details to be worked out, including which classifications will be surveyed and what information will be gathered.

PSAC continues to have concerns around the possible inclusion of female- dominated classifications in a labour market study. Inclusion of female-dominated positions for labour market studies could undermine pay equity through
comparisons to employers that have not implemented pay equity to the extent of federal government employers. Even within the federal government there are employers that have introduced gender-neutral classification plans and such introduction could also account for an additional labour market gap.

Essential Services

The essential services provisions set out in the *PSLRA* are a prime example of the contradiction between the purported "*raison d'être"* of the *Act*, as detailed in its preamble, and the realities of the regressive nature of the legislation.

PSAC has always been extremely critical with regards to essential services provisions, but the government has managed to exacerbate these problems with additional provisions that serve to strengthen our belief that the aim of the legislation is to hamstring the union's ability to mobilize its members and unreasonably limits members' right to strike.

We firmly believe this is deliberate and directly linked with the employer's plan to reduce the benefits and levels of compensation of its workforce while

PSAC believes that the Essential Services exercise is not a numbers game and is not, despite what the employer seems to believe, a negotiation. We have a principled and pragmatic approach to essential services, i.e. if specific duties are identified as essential to ensure

severely curtailing the ability of certified bargaining agents to effectively represent their members.

PSAC predicted that this would be the outcome of the new provisions in our 2003 submission to Parliament. We are disappointed but hardly surprised that our predictions were not only accurate but perhaps even understated.

Following are the main points of contention PSAC has with the essential services provisions under the PSLRA.

Service Levels

Our primary issue with the essential services provisions is the fact that the employer has the sole and exclusive right to determine the level at which an essential service is required. No consideration is given to whether there is sufficient non-represented (managerial) staff on-hand to perform essential duties and the legislation expressly prohibits the union from demanding that the employer use alternate arrangements such as overtime or altered hours of work to ensure essential services are delivered.

PSAC is in full agreement that service levels during a strike should be maintained at a level which ensures that there is no possible danger to the safety and security of the Canadian public. However, the employer is utilizing the employer- friendly *PSLRA* to maintain levels of service which would effectively make the workplace “business as usual”, minimizing the effect of a strike and mocking the constitutional rights of our members to take job action.

Timelines

Outside of the general provisions in section 122 of the *PSLRA* that oblige the parties to enter into an essential services agreement “as soon as possible”, there are no specific time limits to guide or force the parties to act.

PSAC has been as proactive as possible since 2003 in attempting to negotiate essential service agreements in good faith, but given the magnitude of the exercise and the attempts of the employers to use the leverage the *Act* affords them to their advantage, we sit here, eight (8) years and three (3) rounds of collective bargaining later, with only one (1) agreement signed (CRA) and numerous complaints filed with the PSLRB.

Since there are no specific sanctions to encourage the employer to act quickly or in good faith in the ESA process, and PSAC bargains for extremely large groups, such as 75,000 members across 50 departments at the PA table, the process has moved at a snail's pace, to the advantage of the employer and the detriment of our members.

We are also concerned that, once ESAs are finally in place, the employer will choose to propose a large number of amendments as soon as is feasible for them to do so. All this is done under the auspices of an *Act* that was written to improve labour-management relations.

PSLRB Intervention and Union Recourse

PSAC has encountered several instances where, in the face of objection by the union, the employer has abused its exclusive "right" and has invoked "level of service" to maintain and even increase the number of positions proposed as essential. The only option left to the union is to file an objection with the PSLRB.

The Board has been encouraging the union and the employer to engage in mediation to resolve disputes over essential services. PSAC has participated in several mediations but these have proven time-consuming and frustrating and were ultimately referred back to the PSLRB for hearings.

PSAC believes that the Essential Services exercise is not a numbers game and is not, despite what the employer seems to believe, a negotiation. We have a principled and pragmatic approach to essential services, i.e. if specific duties are proven as

essential to ensure the safety and security of the Canadian public, then we agree that they should be performed in the event of a strike.

The employer, however, is doing everything it can to ensure that exaggerated pre-*PSLRA* levels of designated employees are preserved, regardless of the real service level requirements, or, alternately, that enough services are declared essential to ensure little or no disruption in the event of a strike.

In addition, rather than present any real arguments or evidence of substance to support their often ludicrous essential services proposals, the employer is utilizing the tactic of refusing to discuss or concede on any designated position and subsequently forcing the issue to the PSLRB, further drawing-out an already painfully slow exercise.

2.4.5 Conclusions with Regard to Essential Services - the Silver Lining

Of note, the PSLRB has taken some positive steps to try to address some of the ESA confusion created by the wording of the *PSLRA*. Through its decisions, the Board has made it clear that we are in a new regime of essential services and that lists of designated employees under the old cumbersome process no longer apply.

The Board has also made it quite clear that the burden of proof that the designated services are essential to the safety and security of the Canadian public rest solely with the employer.

Further, the Board has also issued strong language that in all cases brought before them, they will be mindful of the balance that must be struck between ensuring the safety of the Canadian public and ensuring that the rights of represented members to strike are respected.

PSAC also believes that it would be helpful, to all parties involved with essential services, if timeframes were incorporated into the *PSLRA*'s regulations, similar to those currently found in the

Canada Labour Code.[24] This would expedite the discussions around essential services agreements, remove some of the uncertainty around strikes or lockout and provide the Board with the necessary legislative authority to force the parties into reaching agreements in a timely manner.

Exclusions (Managerial and Confidential Positions)

The *PSMA* has modified what is commonly known as the "exclusion provisions" in the following four (4) areas:

- Elimination of blanket exclusions;
- Shift in the onus of proof to the unions in
- Certain instances; collection and withholding of
- union dues;

- Requirement to have an order issued by the PSLRB for each excluded position and revoked if the position is returned to the bargaining unit.

The following will examine each of these changes.

Elimination of blanket exclusions

One of the positive aspects of the new legislation is the removal of automatic exclusions of certain positions. This means that there are no longer positions in the federal public service that are automatically excluded, such as positions with Treasury Board or legal officers from the Department of Justice or at the Canada Revenue Agency. Positions are now excluded on a case-by-case basis. Although this is a positive change, the impact is fairly minimal for PSAC as these represented only 10% of exclusions and of this 10% many would have been represented by another bargaining agent.

Shifts in the onus of proof

The *PSLRA* establishes the process under which challenges to

[24] *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 87.4(2).

exclusions are to be carried out and specifies when the onus of proof lies with the employer and when it falls with the bargaining agent.

However, it has been a long-recognized principle and common practice in labour relations that the employer should demonstrate why a particular position should be excluded from a bargaining unit. The underlying rationale for this principle is that the employer is in a better position to explain its internal workings and why operationally a position meets one or more exclusion criteria. The new *Act* has shifted, in certain instances, the onus from the employer to the bargaining agent.

Subsections 62(2) and 74(2) have explicitly shifted the onus to the bargaining agent, to demonstrate that a position should ***not*** be excluded, in the following situations:

- when the position is confidential to the Governor General, a Minister, the Crown, a Deputy Head or to a judge (Supreme Court, Federal Court of Appeal, Federal Court, Tax court).[25]
- when the position is classified as being in the executive group[26]; and
- when the position provides advice on labour relations, staffing or classification[27]

This legislative change has placed the union in the unfortunate situation of having to produce evidence typically held by the employer, as well as relying on departmental representatives or even members who may have an inherent bias against the union. Having to call as witnesses employees who oppose their own inclusion in the bargaining unit is very challenging for unions.

Further, this is counter intuitive and clearly disadvantages bargaining agents when they appear before the PSLRB. The employer maintains the onus of proof in cases other than the ones listed above.[28]

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[25] *Op. cit*., note 19, s. 59 (1) (a).
[26] *Ibid.*, s. 59 (1) (b).
[27] *Ibid*., s. 59 (1) (c).
[28] *Ibid*., ss. 59 (1) (d), (e), (f), (g) and (h).

Collection and withholding of union dues

Another significant change is the addition of a provision that requires the employer to withhold union dues, which are to be held in trust, when the union files an objection to an exclusion[29]. Under the previous *Act*, the dues continued to be deducted and remitted to the union until such time as the position was officially excluded. Given the large number of disputes over exclusions, this new measure has had a significant financial impact on the union. There is constant movement in departments which has resulted in an increase demand for exclusion the orders.

We encounter situations where individuals are hearing grievances over subject matters for which they would not have the initial delegated authority to decide.

Vast majority of these exclusion requests are based on the employer alleging that amongst the responsibilities of the position is the hearing of grievances, usually at the first step of the grievance process.

PSAC strongly believes that in order for a position to be responsible for replying to grievances on behalf of the employer they first must meet the criteria of being a manager. We encounter situations where individuals are hearing grievances over subject matters for which they would not have the initial delegated authority to decide.

PSAC also believes that departments are abusing the exclusion provisions. The overwhelming use of this rationale was a major irritant under the former *Act* (*PSSRA*) and continues to be one of PSAC's main concerns with the exclusions provisions under the new *Act.*

The increased demand for exclusions has resulted in the union having to devote additional internal resources to analyse and remediate exclusion orders while simultaneously depriving the union of large amounts of union dues for considerable periods of time.

[29] *Ibid*., s. 76.

Order issued and revoked by the PSLRB

The *PSLRA* now requires the Board to issue an order for each excluded position as well as an order for each position that is returned to the bargaining unit. This has resulted in a longer process, a larger backlog at the Board and the need for all parties to assign more resources to deal with exclusions.

Grievance Adjudication

In many ways, even with the passage of five years, it is difficult to establish clear trends given the inherent time lags that exist in the grievance adjudication process. While group grievances and policy grievances are important, practical tools which make the PSLRB more responsive to the challenges of resolving disputes; it will take time to develop a significant base of experience to draw from in order to make a more thorough analysis.

Policy Grievances

Policy grievances are union grievances that also must relate to the interpretation or application of the collective agreement – they are filed at the final level with PSAC's approval as the bargaining agent [similar to the way section 99 references under the former *Act* were processed]. Policy grievances are "new" because the union can file a policy grievance whether an individual could also grieve the issue or not (the limitation that existed for section 99 references). This is critical in that it allows for a more comprehensive and proactive approach to disputes impacting workers. The PSAC has used policy grievances to expedite the resolution of collective agreement interpretation issues. We will continue to do so in the future, believing that policy grievances offer an effective means for unions and employers to resolve differences of interpretation.

Group Grievances

Group grievances are filed by the union and must relate to the interpretation or application of the collective agreement – but individuals sign on to a consent form, thereby allowing the issue to move forward more efficiently and providing a remedy to the

signatories. While the PSAC has made limited use of group grievances to date, we see this provision of the *PSLRA* as one which will help make the grievance and adjudication process operate more efficiently.

Human Rights' Grievances

Adjudicators can now interpret and apply the *Canadian Human Rights Act*, and they can award the damages set out in that *Act* for pain and suffering (maximum of $20,000) and punitive damages (maximum of $20,000). We had some concerns over this expanded jurisdiction when the *PSLRA* came into force in 2005.

However, the broadened jurisdiction over human rights' issues is a positive change which brings this jurisdiction in closer alignment with the practice in other jurisdictions and has great potential to improve the administration of justice by dealing with both the labour relations and human rights' aspects of disputes in one arena. We remain cautiously optimistic as the expertise of the decision makers develops and the body of human rights' jurisprudence expands.

Enforceability of Settlements - *Amos* decision

The *Amos*[30] decision relates to the PSLRB's jurisdiction over issues of non- compliance of settlement agreements.

Mr. Amos referred his grievance to adjudication pursuant to the provisions of the *PSLRA*. Several days of hearing took place before Adjudicator Butler. During the hearing, the parties decided to explore the possibility of settling the matter through mediation. Mr. Butler switched hats from adjudicator to mediator and assisted the parties in reaching a settlement pursuant to his powers under subsection 226 (2)[31] of the *Act*.

A few months later, Mr. Amos wrote the Board requesting that his

[30] *Amos* v. *Deputy Head (Department of Public Works and Government Services)* [2008] P.S.L.R.B. No. 74.

[31] Op. cit., note 19, 226. (2) At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.

original grievance be rescheduled as the employer had failed to comply with the settlement. In fact, the employer did not dispute the allegation of non-compliance.

Under the former *Act*, once a valid settlement was reached, an adjudicator no longer had jurisdiction over the issues in dispute, including issues related to the implementation of the agreement. Given the legislative changes, the issue before the Board was to determine if the adjudicator's powers under the new *Act* extended to allegations of non-compliance of settlement agreements.

PSLRB Decision

In a detailed analysis of both the old and new *Acts*, Butler found that the powers of adjudicators had been broadened under the *PSLRA* and extended to determinations of non-compliance of settlements, as long as the original issue in dispute was a matter that was arbitrable under the *Act*.

Reasons for Decision

The provisions of the new *Act* should be given a "…fair, large and liberal construction and interpretation…" consistent with the objects of the *Act* to promote "…collaborative efforts between the parties…" to support the "fair, credible and efficient resolution of matters…" and to encourage "…mutual respect and harmonious labour-management relations…"[32]

Butler went on to say, "a cornerstone of the new *Act* is its emphasis on the voluntary resolution of disputes through mediation. Essential to the effectiveness of mediation processes is the expectation that the terms of a settlement agreement will be respected."[33]

Finally, "the *Act* must be viewed as the exclusive and comprehensive regime for the resolution of disputes that proceed by way of grievance. The jurisdiction of an adjudicator must be understood within that framework."[34]

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[32] *Op. cit.*, note 33, p. 27.
[33] Ibid. p. 28.
[34] Ibid. p. 25

The employer applied for judicial review of this decision.

Federal Court Decisions[35]

> The Federal Court found that the adjudicator erred when he found that he had jurisdiction to consider a breach of settlement. The Federal Court stated that "the parties' dispute was brought to an end by the MOA and hence, the adjudicator's jurisdiction ceased to exist."[39]

This decision was appealed and was heard by the Federal Court of Appeal in December 2010

Federal Court Appeal[36]

> In a unanimous decision rendered February 3, 2011, the Federal Court of Appeal overturned the Federal Court's decision and restored the adjudicator's decision. The Federal Court of Appeal stated "enforceability of settlement agreements is vital to the objectives of the *Act***.** Without clear, efficient and economical means to enforce settlement agreements, mediation runs the risk of becoming meaningless and falling into abeyance."[37]

Comments

> When we started the PSMA five (5) year legislative review the Federal Court's decision in *Amos* was of serious concern to PSAC. On the one hand, the PSLRB was actively promoting its mediation services and strongly encouraging parties to use this alternative dispute resolution mechanism. On the other hand, if a settlement was reached and the employer decided not to fulfill its obligation under the terms of the agreement, members would have been left without any meaningful recourse to address the original grievance or the breach of settlement.
>
> This was not only a concern to the unions. In its submissions on the

[35] *Canada (Attorney General)* v. *Amos,* (2009) FC 72.
[36] *Amos* v. *Canada* (Attorney General) 2011 F.C.A. 38.
[37] *Ibid*. p. 27.

PSMA five (5) year legislative review, the PSLRB recommended legislative amendments to the *PSLRA* to address the issue of jurisdiction over enforcement of valid agreements.

The board stated in its report:[38]

> It is of public interest that the Board or adjudicator be capable of dealing with a claim by one of the parties that the settlement agreement that resulted in the Board or adjudicator losing jurisdiction over the matter is invalid under the common-law rules of contracts. […] Our view is that it is preferable that
>
> those questions be determined by the Board or adjudicator rather than by the Courts.[39]

As such, the Board recommended that the *PSLRA* be amended to "provide explicitly for the jurisdiction of an adjudicator and the Board over disputes relating to the validity, the binding effect and the enforcement of settlement agreements of adjudicable grievances and of complaints and applications filed with the Board."[40]

We hope that the employer recognizes the mutual benefit and efficiency of allowing adjudicators to remain seized over issues of non-compliance of settlement agreements.

CLOSING REMARKS

Almost six (6) years after the enactment of the *PSMA*, we need to stop, reflect and remember what the intent and purpose was of changing the legislative framework of labour relations in the federal public service. As stated in the title, the *Act* was meant to "modernize" labour relations, which were operating under a 40 year old regime that pitted the union and the employer in an extremely adversarial arena.

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[38] Public Service Labour Relations Board, *Legislative review of the Public Service Labour Relations Act*, retrieved from http://pslrb-crtfp.gc.ca/legislation/legislative_review_e.asp.
[39] Public Service Labour Relations Board, *Legislative review of the Public Service Labour Relations Act*, retrieved from http://pslrb-crtfp.gc.ca/legislation/legislative_review_e.asp. P. 15
[40] Ibid

But, what does “modernize” mean and does it have the same connotation for all parties involved (the unions, the employer, the departments, the PSST, the PSLRB)?

The Fryer Report[41], which triggered the legislative review, provides insight as to the intent of the *Act* and sets out the guiding principles of what this new modernized framework should look like. The following comments in the overview to the Report are informative:

We propose a new framework based on a collaborative approach to solving workplace problems. This framework is based on the fundamental principle that joint efforts by employees, their unions and management will improve the quality of services delivered.

Consultation, co-development and collective bargaining are all appropriate mechanisms for the creation of "win-win" solutions to workplace concerns. This basic change from an adversarial to a more joint problem-solving approach requires the rebuilding of trust and a willingness on both sides to explore different approaches - in short what is often referred to as "a cultural change".

Similar values are echoed in the Preambles of both the *PSLRA* and the *PSEA.* Now the question is: where are we on this road to “cultural change”? The short answer is not very far.

After reviewing all the major changes to both pieces of legislation (including the way they have been interpreted and applied by the employer) and after gathering extensive information from many PSAC stakeholders who work with them, we believe that not only has the *PSMA* failed to reach this so-called cultural change, but that labour relations in the federal government are no better than they were in the 90s. Those were years where laws were passed seriously crippling the union’s ability to collectively bargain, where we saw several major strikes and where the employer reduced significantly its workforce. Does this sound familiar?

The raison d’être of the *PSMA* was to improve working relations and produce

[41] Advisory Committee on Labour Management Relations in the Federal Public Service, *“Working Together in the Public Interest”* (Final Report June 2001), online at the Treasury Board of Canada website, retrieved from http://www.tbs-sct.gc.ca/report/fryer/wtpi-teip-eng.asp.

a better work environment in the federal public service. The rationale was that a better work environment would translate into better, more efficient, services for Canadians.

The legislative changes have not improved staffing in the federal public service. It continues to be an obscure, lengthy and bureaucratic process and the new definition of merit combined with the reduced level of accountability have increased the possibility for abuse.

The legislative changes regarding political impartiality have not resulted in a "more" politically impartial public service. We do not believe that this was a real problem prior to the enactment of the *PSMA*. However, the position being taken by the PSC with regards to its authority around political activity and expression is of serious concern to PSAC as it unreasonably encroaches on the constitutional rights of public service workers to play an active role in Canadian politics. Furthermore, some of the proposals regarding monitoring advocacy work of public service workers as well as their use of various social networking sites seriously undermine individual rights to privacy.

Even though language regarding consultation and co-development has been incorporated into the *PSLRA*, the actual effectiveness of these new provisions has been limited. In preparing this report, we were hard pressed to find examples of co-development initiatives in the core public service. Furthermore, Labour-management consultation committees continue to be used as a forum in which the employer provides information to unions on decisions that have already been made. It is clear, in most cases, that there is no room for union input.

The legislative changes have not improved the manner in which exclusions and essential services are being administered.

Although providing adjudicators with jurisdiction over grievances containing a human rights' component is an improvement over the old system of bounce back we previously had with the Canadian Human Rights Tribunal, for the most part there has been very little changes in the way parties (union, employer, PSLRB) approach adjudication. Adjudications before the Board continue to be over-legalized, long and formal.

In closing, although there are a few individuals in the stratospheres of power who continue to adhere to the principles outlined in the Fryer report they are

few and far between. The employer representatives generally see no value in a collaborative approach to labour relations and in the last six (6) years there has not been a rebuilding of trust between the parties.

The lesson we have learnt from this exercise is that it takes a whole lot more than changing the wording of a piece of legislation to effect change. It takes a real willingness and leadership from the individuals in power. When government shows its willingness to use its executive powers to override labour legislation – what kind of signal does that send?