Submission by the Public Service Alliance of Canada to the Senate Standing Committee on National Finance

Regarding Division 14 of Bill C-86, Budget Implementation Act, 2018, No. 2

December 6, 2018
The Public Service Alliance of Canada represents more than 180,000 workers in every province and territory in Canada and in some locations outside Canada. The majority of PSAC members work for federal government departments and agencies and federal Crown Corporations.

Overall, PSAC is pleased with the proposed Pay Equity Act. For decades our union has been at the forefront of fighting for women’s right to equal pay for work of equal value.

While we have had successes, the time it took to get results through a complaint-based process often meant that the women who did the work and should have received the pay died before they saw a penny.

PSAC believes this Act is a good step towards redressing existing pay inequities while at the same time creating a culture where equal pay for work of equal value can flourish and become the norm.

We are pleased to see that a Pay Equity Commissioner and Unit is being established. However, we caution that it must have sufficient resources to be able to fulfil the important role of ensuring the successful implementation of the Act.

While generally pleased, we have two very important concerns about the proposed Act.

**Section 2 – Purpose**

Section 2 reads as follows:

*Purpose*

2 The purpose of this Act is to achieve pay equity through proactive means by redressing the systemic gender-based discrimination in the compensation practices and systems of employers that is experienced by employees who occupy positions in predominantly female job classes so that they receive equal compensation for work of equal value, while taking into account the diverse needs of employers, and then to maintain pay equity through proactive means. (Emphasis added)

This section begins by asserting that the purpose of the Act is to achieve pay equity through proactive means and to redress systemic gender-based discrimination in compensation.

However, it is PSAC’s position that this language is undermined by the following phrase: “while taking into account the diverse needs of employers”.
PSAC is concerned that the inclusion of this statement in the purpose of the Act, may give employers significant legal weight to be able to challenge decisions of the Commissioner and the Canadian Human Rights Tribunal.

On November 28th, this Senate Committee heard from the government representative, Lori Straznicky, Executive Director, Pay Equity Task Team, Labour Program (Employment and Social Development Canada) who explained that the Purpose clause does not confer substantive legal rights onto employers that would undermine pay equity, however, both legal scholars and caselaw from the Supreme Court of Canada suggests otherwise.

Professor Ruth Sullivan writes the following about purpose statements in legislation in her leading book *Sullivan on the Construction of Statutes*:

> Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms or policies. Unlike preambles, purpose statements come after the enacting clause of the statute and are part of what is enacted into law. *This makes them binding in the sense that they carry the authority and weight of duly enacted law.* However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation — that do apply to facts — are to be interpreted. (Emphasis added)

In 1989, the Supreme Court of Canada considered the legal significance of a statutory purpose clause with regards to legislation that conferred discretion on administrative boards and tribunals, as the Pay Equity Act does.

In *Caimaw v. Paccar of Canada Ltd.*, the Court found that because the Labour Relations Board of British Columbia had ignored the goals of its mandate as set out in its purpose clause, it had reached a patently unreasonable solution and so exceeded its jurisdiction.

Justice L’Heureux-Dubé wrote the following:

> General purpose clauses such as s. 27(1) of the *Labour Code* not only aim to provide guidance to the administrative agency; they also identify the limits of the discretion it enjoys in the exercise of its statutory powers…

> [G]eneral purposes and objects clauses such as s. 27(1) of the *Labour Code* are not enacted in a juridical vacuum. Such clauses codify the

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1 6th Ed. at section 14.39
2 [1989] 2 S.C.R. 983
3 Ibid., at 465.
common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute. In this historical context, s. 27(1) amounts to more than a simple guide to the Board; it constitutes a statutory direction to carefully consider the goal of developing effective industrial relations having regard to certain specific purposes and objects. (emphasis added)\(^4\)

Given that the Pay Equity Act authorizes the Pay Equity Commissioner and the Canadian Human Rights Tribunal to interpret and resolve numerous provisions in the Act, it is incumbent on the legislator to be as clear as possible about its intention of the legislation, including the purpose.

In 2011, the Court of Appeal for British Columbia was required to interpret the legal significance of a statutory purpose clause. While finding that the clause did not confer the substantive rights that the Respondent was trying to rely on, Madam Justice Newbury wrote the following:

\[ \ldots \text{I do think it regrettable that the Province chose to state the “principles” it did in s.3(c) if it did not intend them to have any legal effect. It may be that one or more regional districts have taken some comfort from s. 3(c), or have even relied on it to their detriment… Perhaps the technique of including aspirational goals in statutes should be reconsidered, and statements of this kind should return to preambles where they are clearly differentiated from substantive and enforceable statutory obligations.} \(^5\) \]

PSAC does not believe it was the government’s intention to undermine the objectives of the new, proactive law.

**Recommended amendment:**

PSAC recommends that this Committee amend Section 2 by deleting the following: ‘while taking into account the diverse needs of employers.’

While we recognize that responsibility to achieve pay equity resides with the employer, there are multiple provisions in the Act allowing an employer to apply to the Commissioner to request flexibility, extensions and exemptions that will support the employer’s diverse needs.

For instance, employers may apply to the Pay Equity Commissioner:

- For a determination that multiple employers constitute a single employer (ss 4, 106);

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\(^5\) *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345, at para. 47
For the authority to establish more than one pay equity plan for employees (ss 30, 107);

For the authority to establish or update a pay equity plan without a pay equity committee (ss 25, 26, 73, 74, 108);

For the authority to alter the composition of a pay equity committee’s membership (ss 19, 27, 67, 68, 75, 109);

For the authority to establish or update a pay equity plan where the committee, in the opinion of the employer, cannot perform its work (ss 28, 29, 76, 77, 110);

For the authority to use a compensation comparison method, other than those provided for by legislation or regulation (ss 48, 111);

For an extension of the time for posting a final or final revised pay equity plan (ss 57, 85, 112); and

For an extension of the time to make payments or phase-in compensation increases (ss 63, 113).

Section 20

Section 20 of the Act deals with decision-making on employer/employee pay equity committees and raises another major concern. Section 20 reads as follows:

Vote

20 (1) The members who represent employees have, as a group, one vote and the members who represent the employer have, as a group, one vote. A decision of a group counts as a vote only if it is unanimous. If the members who represent employees cannot, as a group, reach a unanimous decision on a matter, that group forfeits its right to vote and the vote of the group of members who represent the employer prevails.

This provision requires all employee representatives on a committee to come to a unanimous decision or forfeit the employee-side vote, allowing the employer’s decision to prevail.

On November 28th, Ms. Straznicky, explained that this provision was drafted after taking into consideration the decision-making methods on pay equity committees in both Ontario and Quebec and also taking into consideration the recommendations from the Bilson Task Force report.
PSAC is concerned that the committee decision-making process the Pay Equity Act prescribes does not properly address any of the concerns raised in the Bilson Task Force Report.

While the Bilson report did raise concerns about minority voices being drowned out by larger, more established, employee representatives using the Quebec model of majority decision-making, the Bilson Report did not recommend that the employer’s decision would prevail if the employee representatives could not agree.

The Bilson report recommended that in the case of pay equity committee disagreements between employer and employee or employee representatives, the dispute should be submitted to the Commissioner to assist the parties or make a determination.6

Recommendation 8.9 and 8.107

8.9 The Task Force recommends that the new federal pay equity legislation provide that where employer and employee representatives on the pay equity committee disagree, the dispute is submitted to the proposed Canadian Pay Equity Commission, described in Chapter 17. The proposed Commission must assist the parties to resolve the dispute, failing which the Commission makes a decision.

8.10 The Task Force recommends that the new federal pay equity legislation provide that where employee representatives on the pay equity committee disagree, the dispute is submitted to the proposed Canadian Pay Equity Commission, described in Chapter 17. The proposed Commission must assist the parties to resolve the dispute, failing which the Commission makes a decision.

PSAC has had decades of experience working with other bargaining agents in the Federal public service. In the 1980s and 1990s we participated in a public service – wide job evaluation project to measure the work of female and male job duties in the public service - the Joint Union Management Initiative. While this project successfully brought different bargaining agents and bargaining units together with a single goal, it was not without controversy and conflict. That conflict was not based on the size of the bargaining agents or units, but on the gendered-nature of the work that their union members performed.

Often, small bargaining agents with a majority of male union members were the most vocal in their disagreements, ultimately leading to litigation and complaints before the Human Right Tribunal.

PSAC had a similar experience when trying to conduct a job evaluation for the mostly-female clerical workers at Canada Post. The male –dominated unions would not agree

6 Pay Equity Task Force Final Report, 2004 at p.234
7 Ibid. at 235
to let their union members participate in the project as a male-comparator group. Ultimately, this benefited the employer far more than any of the women or other unionized workers.

It is more likely that the requirement for employee-side unanimity will most significantly disadvantage representatives of female-predominant classes over those who may not have the same interest in having a robust pay equity plan, including the employer.

Again, PSAC does not believe that this was the intention of the Government in an Act that is trying to redress systemic gender wage discrimination.

**Recommended amendment**

PSAC asks the Committee to amend section 20 by removing:

“A decision of a group counts as a vote only if it is unanimous.”

And replacing with:

“A decision of a group counts as a vote if a majority of the group agrees.”

And to further amend section 20 by removing the following sentence:

“If the members who represent employees cannot, as a group, reach a unanimous decision on a matter, that group forfeits its right to vote and the vote of the group of members who represents the employer prevails.”

We believe our proposed amendments are essential to the effective implementation of the new law and we ask the committee to agree to amend the bill accordingly.

Thank you for considering our submission.

PSAC looks forward to working with the government on the development of the regulations and assisting in any way we can with the expertise many of our staff and union members have in pay equity in the federal sector.