

**EXECUTIVE SUMMARY OF THE
PUBLIC SERVICE ALLIANCE OF CANADA'S
SUBMISSION TO THE
HOUSE OF COMMONS STANDING COMMITTEE
ON GOVERNMENT OPERATIONS AND ESTIMATES
ON
BILL C-25, *PUBLIC SERVICE MODERNIZATION ACT***

I am very pleased to be here today and to have the opportunity to express the views of the Public Service Alliance of Canada on the *Public Service Modernization Act*.

The PSAC has long held the position that the existing legislation is flawed and should be replaced by the *Canada Labour Code*. From our perspective, the *Code* provides a much better framework for labour-management relations in that it recognizes that all of the terms and conditions affecting a worker's employment can, and should be, negotiated between the employer and the union. Under the *Code*, for example, areas of great concern to PSAC members, such as staffing and classification, are clearly within the scope of collective bargaining. Under the new *Act*, they are not.

We have long wondered why the government is reluctant to extend the provisions of the *Code* to its own workers. Having reviewed the Bill in some detail, we think we know the answer. This employer knows no restraint when making the rules for its own labour relations. The government has, as the employer, ensured that all the rules are in its favour.

We have a number of specific concerns about Bill C-25, which I will explain in some detail. We think that some provisions can be improved, while others should not be included at all. At no time, should our comments be construed as supplanting our position that federal public sector workers should fall under the jurisdiction of the *Canada Labour Code*, or new legislation that incorporates its principles.

The exclusion of staffing and classification from collective bargaining, the watering-down of the merit principle and the provisions on essential services and picketing are our greatest concerns. For the purpose of this presentation, I will highlight these and other issues in the same order as they appear in the Bill. I will begin with the *Public Service Labour Relations Act*.

Division 3 - Consultation Committees and Co-Development

The PSAC welcomes the formal recognition in the *Act* of the consultation committees that already exist and the mandatory establishment of such committees at the departmental level. However, there is no obligation for the parties to consult in good faith nor is there a mechanism for resolving differences, should an impasse be reached. As such, this legislation requires the parties to establish committees whose recommendations could, in fact, be ignored.

We therefore recommend that consultation committees be required to establish agendas on an annual basis and to meet and consult in good faith. As well, the Public Service Labour Relations Board (PSLRB) should be able to investigate any complaint that the employer or the union failed to comply with the requirement to consult in good faith.

Section 53 - Advisory Board

The PSAC is pleased that the government has recognized the importance of compensation analysis and research and restored these functions to the PSLRB. However, as the provision now stands, the majority of the appointees to the board could be industry analysts entirely sympathetic to the employer's position. In order for the findings of the board to be supported by both parties, we believe that the advisory board must be composed entirely of an equal number of employer and union nominees, with a neutral chair.

Division 5 - Bargaining Rights

Sections 59-63 and 71-78

Managerial and Confidential Positions

The provisions on managerial and confidential positions overturn the presumption, long recognized in labour relations that all positions described in the certificate are bargaining unit positions unless the employer can justify their exclusion. Subsections 62(2) and 74(2) place the burden of proof on the union to demonstrate that a position is not one which should be excluded in accordance with the grounds for exclusion laid out in subsection 59(1). This shift in onus, if maintained, would put the union in the very awkward position of not only having to provide evidence that is generally produced and held by the employer, but also having to call upon witnesses who may not want to be included in the bargaining unit.

We also strongly oppose section 76, which requires that membership dues be held in trust when the union files an objection to the exclusion of a position. By giving effect to exclusions on the date that applications are filed, rather than on the date a decision is rendered, this provision could deprive the union of dues for considerable periods of time. We believe that a position should remain in the bargaining unit until the PSLRB rules otherwise and the exclusion should take effect upon the date of the ruling. If this provision is left as is, it would mean that a union maintains the duty of fair representation without the funding to discharge that duty.

Division 7 - Collective Bargaining and Collective Agreements

Section 110 - Two-Tier Bargaining

It is difficult to conceive of any circumstance which would lead the PSAC to agree to two-tier bargaining if this provision remains in its current form. We are particularly concerned that the section does not make it clear how this process relates to collective bargaining under section 106. We question not only whether it was intended that any matter, including rates of pay, be the subject of two-tier bargaining, but also how disputes are to be resolved. This provision is so vague as to render it unworkable and must not be left to regulation to clarify.

Division 8 - Essential Services

The essential services provisions of the new legislation broaden the definition of essential services and give the employer the exclusive right to determine the level of essential services required and the frequency with which these services are to be provided.

Furthermore, the PSLRB cannot take into account whether there is managerial staff available and able to provide the essential services, nor can it require the employer to change hours of work or use overtime in order to facilitate the delivery of such services.

We also note with concern that essential services "agreements" are in force until there are no employees in the unit who occupy the positions designated as essential, or until a notice to amend the agreement is served. Employees in positions identified as essential will receive their notice once an agreement comes into effect, and this notice remains valid as long as the employee occupies the position, unless notified otherwise. As a result, it will be difficult, if not impossible, to keep track of which positions are designated and which ones are not. In the long run, these provisions are likely to increase picket line problems, rather than eliminate them.

We accept that some form of an essential services provision is inevitable. What offends us about this one, however, is that it goes much further than is necessary to ensure the safety and security of the public, and is instead designed, in the guise of protecting essential services, not only to insulate the employer from feeling the effect of a strike, but to deter union members from exercising their constitutionally protected rights, such as the right to picket.

Division 9 - Arbitration

The PSAC is disappointed that the government has failed to lift the limitations on the scope of bargaining in section 150. It is our view that the government has, in fact, extended the limitations on free collective bargaining by inserting new factors in section 148 that an arbitration board must take into account when fashioning an arbitral award.

We are also disappointed to note that the new legislation has removed the right of arbitration boards and the Public Interest Commission to order the production of documents that may be of relevance in matters before them. We believe that full disclosure is critical to the successful resolution of disputes.

Division 14 – Prohibitions and Enforcement

Section 199 – Prohibition Relating to Essential Services

Sections 200 and 205 – Offences and Punishment

Section 199 stipulates that no person shall attempt to impede or prevent designated employees from entering or leaving their place of work. As mentioned previously, the essential services provisions contained in this Bill would make it very difficult to know who is designated and who is not.

Consequently, an employee could breach this section without even realizing it. To add insult to injury, under section 200, this same employee could then be convicted of a summary conviction offence for having violated section 199.

Likewise, under section 202(1), every officer or representative of the union who is found to have committed an unfair labour practice, as described in sections 187 and 188, would be guilty of a summary conviction offence. Not surprisingly, there is no analogous liability placed on employer representatives. The extension of personal responsibility to officers and representatives of the union is particularly offensive to us since it will undoubtedly discourage many members from taking an active part in their union.

Draconian measures such as these which could turn representatives into criminals have no place in legislation purporting to improve labour-management relations.

I would now like to address Part 3 of C-25, the *Public Service Employment Act*. In tabling the new *PSEA*, the government has told

Parliament, this Committee, the public, employee organizations and its own employees that Part 3 is “enabling legislation”.

After having reviewed this part of the Bill, the PSAC is compelled to ask: “What will Bill C-25 enable?”

The Preamble states that Canada will continue to benefit from a public service where appointments to positions are based on merit, the principle of merit will be independently safeguarded and those exercising staffing authority will be accountable to the Public Service Commission, an independent tribunal and Parliament.

There is, however, a troubling contradiction between the Preamble’s stated intent and the framework provisions of this Bill. Part 3 of Bill C-25, in its current form, represents a wholesale retreat from a public service defined by the appointment of the best qualified individuals. Bill C-25 delivers on its promise of increased flexibility for management, but contains very little protection for employees or the principle of merit. And, we would argue, very little accountability.

Bill C-25 delegates the authority to staff positions in the public service to the lowest possible managerial levels. It continues to exclude staffing from collective bargaining and thus continues to exclude duly-certified employee organizations from voicing concerns on behalf of their members. Bill C-25 unambitiously defines merit by the standard of the minimally qualified, thereby downplaying the immense expertise and insight that public service employees can, and do, bring to their work. Bill C-25 creates a right of recourse that is so exceptionally narrow as to render the staffing process largely immune from scrutiny by tribunals, the Public Service Commission and, ultimately, Parliament.

In so doing, the PSAC fears that the new *PSEA* has the potential to usher in a new era of patronage, favouritism and a lack of accountability that is inconsistent with the Government’s stated objectives.

As if that were not enough, Bill C-25 has the potential to create a public service characterized by front-line managers with the direct authority to affect the career advancement of employees who speak out in the face of mismanagement or wrongdoing, who exercise recourse or grievance rights, who are union activists or who provide representation on behalf of their co-

workers. Will employees be as willing to speak out if they fear that their opportunities for career advancement could be blocked by a manager? Will they speak out knowing that a manager cannot be faulted for considering

only one individual for appointment? At a time when stakeholders from across Canada, including the PSAC, are crying out for improved whistleblower protections, Bill C-25 has the potential to create a chill on any forms of activity designed to expose wrongdoing in the workplace.

Moreover, the removal of the concept of “relative merit” leaves a vacuum in terms of a transparent and principled approach to lay-offs. Bill C-25 offers no alternative criteria for determining which positions are subject to lay-off.

For these reasons, the PSAC urges this Committee to make extensive amendments to the new *PSEA*. I know that you will agree that public service employees are the most valuable assets the public service has. Silencing them, and their unions, by providing limited recourse rights and independent safeguards severely hampers our ability to scrutinize the Government’s management practices and to hold managerial authority to the high standard that responsible government in Canada requires.

The watering-down of the merit principle, as we now know it, is not our only concern with Part 3. In the interest of fairness alone, we believe that the one-way mobility contained in section 35 of the new *Act* for employees of separate agencies should be reciprocal - that is, employees of the core public administration should be able to apply to positions with separate agencies. Similarly, third-party review of deployments should not be restricted to whether or not a deployment was made without an employee’s consent.

My last point has to do with the new definition of “political activity”: Under sections 111 and 113, handing out leaflets could be considered “political activity” and one which could be found to impair an employee’s ability to “perform his or her duties in a politically impartial manner”. This is clearly a step backward in that it could restrict, if not remove, the right of public federal sector workers to participate in, and express their views on, the political questions that confront all of us in our daily lives.

In closing, I wish to remind you of the government’s reasons for adopting the *Canada Labour Code*:

“[AND WHEREAS] the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of

good industrial relations to be in the best interest of Canada in ensuring a just sharing of the fruits of progress to all”.

Unfortunately, the government has abandoned these principles in drafting legislation for its own workers. We regret to say that this Bill, if passed into law, will not bring the harmony in labour-management relations that the government has promised.

**SUBMISSION TO THE
HOUSE OF COMMONS STANDING COMMITTEE
ON GOVERNMENT OPERATIONS AND ESTIMATES
ON
BILL C-25, *PUBLIC SERVICE MODERNIZATION ACT*
BY THE
PUBLIC SERVICE ALLIANCE OF CANADA
MARCH 25, 2003**

PUBLIC SERVICE LABOUR RELATIONS ACT

INTRODUCTION

1) The Public Service Alliance of Canada is very pleased to have the opportunity to address the Committee on the *Public Service Modernization Act*. As the largest union in the federal public sector, we have long advocated for changes to the legislation under which we operate in this sector. From our perspective, the *Public Service Staff Relations Act* and the *Public Service Employment Act* are seriously flawed and outdated and should have been replaced many years ago. Our position has long been that these pieces of legislation should have been replaced by the *Canada Labour Code*, which more appropriately reflects the collective bargaining relationship between the union and the employer, and which more accurately reflects the wishes and aspirations of our members.

2) Unfortunately, it seems that we are to be disappointed again. The *Public Service Modernization Act* (Bill C-25) that we are here to discuss is certainly not the answer to this union's requirements, and we can predict without much need for clairvoyance, that this Bill, if passed into law, will not bring the harmony in labour-management relations promised.

3) Having reviewed the Bill in depth now, we can only wonder why the Government would think that the union would embrace provisions that would seek to make criminals of our activists, that would interfere with our constitutionally protected right to picket, that would tip the balance of bargaining power even more firmly to the employer's side than it already is, and that would overturn the fundamental principle of merit that has long been the cornerstone of fairness in hiring in the federal public sector.

4) This union has long wondered why the Government is so afraid to extend the provisions of the *Canada Labour Code* to its own workers. It cannot be based on safety and security issues, because the *Canada Labour Code* covers air traffic controllers, ports workers, workers in nuclear power facilities, like AECL and Nordion, as well as rail, trucking and communications workers. This latest example of statutory revision has finally revealed the answer to us: There is no restraint on this employer when writing the rules for its own labour relations. The Government, as employer, has ensured that all the rules are in its favour. No other employer has the advantage that this employer has.

5) Can you imagine if the CEO of a large private corporation could say to the union: "I have the unilateral right to determine what aspect of my operations are essential, without review by anyone, and even though you can question how many workers might be necessary to run that essential operation, neither you nor any labour board can require me to change my operations during a strike, to use overtime or otherwise to inconvenience myself in anyway. Furthermore, because I have directed that some of my staff are essential, you can't set up any picket lines in front of my operation, because it might impede their ability to enter their place of work".

6) The argument has always been, of course, that neither the CEO nor a private sector union has to be concerned over much about the public interest, but the President of Treasury Board must be. Bill C-25 gives paramountcy to the public interest. But is not free collective bargaining in the public interest? Did the Government have its fingers crossed when it passed the Preamble to the *Canada Labour Code*?

"AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interest of Canada in ensuring a just sharing of the fruits of progress to all".

7) The PSAC has a number of specific concerns about Bill C-25, and they are set out below. In some cases, we have been able to suggest ways in which the provision could be improved or made palatable to us. In other cases, we simply do not believe that the provision should be included in the legislation at all. At no time, however, should our comments on this specific legislation be taken as superseding or replacing our position that federal public sector workers ought to be brought under the jurisdiction of the *Canada Labour Code*, or new legislation that incorporates its principles.

PART 1 – PREAMBLE

8) No section of the proposed legislation illustrates quite as clearly as this Preamble the fundamental difference between the Government's and the union's approach to labour relations in the federal public sector. Nowhere in this Preamble can one find the ringing commitment to free collective bargaining that is the cornerstone to the Preamble of the *Canada Labour Code*. To recognize the paramountcy of the public interest, it is not necessary to override or overshadow free collective bargaining. It is in and of itself, in the public interest, and there ought to be a recognition in this

legislation that the “encouragement of free collective bargaining and the constructive settlement of disputes” promotes the common good, as the Preamble to the *Canada Labour Code* does.

DIVISION 1 – EMPLOYEE FREEDOMS

9) The PSAC notes with some concern the wording of section 5, which provides that employees are free to join “any employee organization” of their choice. This is a change from the current language, which uses the phrase “an employee organization”. Since statutory amendment is usually presumed to have a purpose, we find this change puzzling. It appears to the union to imply the freedom to join more than one employee organization at one time, and if this is the intention, we expect that it will give rise to confusion amongst employees and create a potential conflict with the exclusive right of bargaining agents to represent the members of the bargaining units for which they are certified. The PSAC prefers the language found in the *Canada Labour Code*, which we believe is more conducive to labour peace, and which reads: “Every employee is free to join the trade union of their choice and to participate in its lawful activities.”

DIVISION 3 – CONSULTATION COMMITTEES AND CO-DEVELOPMENT

10) While the PSAC welcomes the formal recognition in the *Act* of the consultation committees that currently exist, we must register our disappointment that the Government has missed an opportunity to make consultation and co-development committees truly effective. While this provision makes the establishment of the committees mandatory, and therefore, we presume, subject to enforcement, there is, in fact, no mandatory obligation to consult in good faith, and no mechanism for resolving differences, should impasse be reached in the consultation committees. Ultimately, this legislation requires the parties to establish committees that may then legitimately be ignored.

11) If consultation committees are to be truly effective, the PSAC recommends that the committee itself be given the authority to determine the subject matter of consultation, including the co-development of workplace improvements, and a mechanism for resolving any differences between the parties.

12) We believe that a new section should be added following section 8, which requires the consultation committees to establish agendas on an annual basis and to meet and consult in good faith, making every reasonable effort to reach agreement.

13) We also believe that a new provision should be added to section 190(1), that would require the Board to examine and inquire into any complaint that the employer, or a bargaining agent, has failed to comply with the requirement to consult in good faith.

DIVISION 4 – PUBLIC SERVICE LABOUR RELATIONS BOARD

Section 17 -National Joint Council

14) The PSAC welcomes the recognition in the legislation of the National Joint Council, but notes with some concern the failure of the amendment to provide for funding of the NJC. While we recognize that the legislation imposes an obligation on the PSLRB to provide facilities and administrative support, we believe that the NJC is of sufficient importance to all of the parties engaged in labour relations in the federal public sector to warrant independent and secure funding.

15) Section 17 ought to be amended to read that the “Board’s mandate includes the provision of secure funding, facilities and administrative support to the National Joint Council”.

Section 53 – Advisory Board

16) The PSAC is pleased that the Government has come to recognize the importance of compensation analysis and research and has restored these functions to the PSLRB. However, we are concerned that subsection 53(4) is not specific enough to ensure a representative advisory board. We believe that it is essential that the advisory board be composed completely of an equal number of employer and union nominees, with a neutral chair. If there is to be any value in restoring these functions to the PSLRB, they must be supported by both parties. As the provision now stands, it is possible that the majority of the appointees to the advisory board could be industry analysts who, while not necessarily nominated by the employer, could be entirely sympathetic to the employer’s position. In these circumstances, the advantage and purpose of situating the compensation analysis and research functions within the PSLRB would be entirely lost and the research produced would be without credibility to the unions.

17) The PSAC recommends that subsection 53(4) be amended to read: “All appointments to the advisory board are to be equally representative of the employer and of bargaining agents”.

DIVISION 5 – BARGAINING RIGHTS

Sections 59–63 and 71–78—Managerial and Confidential Positions

18) These provisions overturn the presumption, long recognized in labour relations, that all positions described in the certificate are bargaining unit positions unless the employer can justify their exclusion. Subsections 62(2) and 74(2) shift the onus of proof, and place the burden on the union to prove that a position is not one described in subsection 59(1), which sets out the grounds for exclusion. This shift in onus is problematic for the union, as it requires us to prove evidence that is generally produced by and in the hands of the employer, and to rely on witnesses who may be hostile to the notion of being included in the bargaining unit.

19) The PSAC is opposed to section 76, which requires that membership dues be held in a trust when the union files an objection to the exclusion of the position. It is our position that a position remains in the bargaining unit until such time as the PSLRB rules otherwise, and that the exclusion ought not to take effect from any other date. This provision, in essence, gives effect to the exclusion on the date that the application is filed, rather than on the date that the PSLRB issues a decision and could create a situation where wholesale applications for exclusion deprive the union of dues for considerable periods of time, regardless of the merits of the applications. This is a particularly harsh measure which is in no way warranted in labour relations.

20) The PSAC recommends that these provisions be deleted from Bill C-25.

Section 87 – Notice to Bargain Given Before Conversion

21) This provision, in combination with section 89, would prevent a bargaining agent from initiating collective bargaining for a newly-created agency until the PSLRB has determined the appropriate bargaining unit, despite the fact that the existing collective agreement has expired. The union is concerned that this provision could delay collective bargaining for a considerable period of time, since the determination of appropriate bargaining units can often take at least eighteen months, and, in complicated situations, longer. We note that under the *Canada Labour Code*, bargaining agents are not prevented from bargaining following a conversion, despite the fact that the CIRB has not completed the determination of appropriate bargaining units, so we do not believe that this provision is necessary. Furthermore, we believe that the inability to initiate collective bargaining following a conversion can contribute to labour instability.

22) The union recommends that this provision be deleted.

DIVISION 7 – COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Section 105 – Notice to Bargain Collectively

23) The PSAC regrets that the Government has not taken this opportunity to amend the period for serving notice to bargain where a collective agreement or arbitral award is in force to four months, as was done in the amendments to the *Canada Labour Code*. Such an amendment would be reflective of the parties' desire to start bargaining earlier in the process, and to shorten the bargaining cycle, and we consider this a missed opportunity by the Government to signal its commitment to effective, speedy collective bargaining.

Section 110 – Two-Tier Bargaining

24) It is hard to conceive of any circumstance which would lead the PSAC to agree to two-tier bargaining if this provision remains in its current form. As it stands now, the provision is so vague as to render it unworkable, and it is the view of the PSAC that any matter which alters the form of collective bargaining so significantly ought not to be left to regulation to clarify. The union is particularly concerned that the section does not make it clear how this process interacts with collective bargaining under section 106. We question whether it was intended that any matter, including rates of pay, may be the subject matter of a second tier of bargaining, and we question just how disputes in the second tier of bargaining are to be resolved. Is it intended that the full panoply of rights, including the right to strike, apply to the second tier? If not, how are disputes to be resolved, particularly if the first government-wide collective bargaining concludes before the second tier does? Given these concerns, the PSAC would be reluctant to engage in such a process. Fortunately, the one part of the section that we support makes it clear that participation in two-tier bargaining is voluntary.

25) The PSAC recommends that section 110 be deleted from Bill C-25 in its entirety, and that it be replaced only when all the parties to collective bargaining in the federal public sector can agree on a workable process.

DIVISION 8 – ESSENTIAL SERVICES

26) The essential services provisions of the new legislation combine the worst features of the *Public Service Staff Relations Act* and the *Canada Labour Code* and extend them further than any other piece of legislation that the union operates under or knows. We are extremely disappointed that the Government has seen fit to draft such regressive measures in a piece of legislation apparently intended to improve labour relations in the federal public sector.

27) While the essential services regime is as a whole insupportable by the PSAC, there are several specific clauses which cause us particular concern. We fear that the new definition of essential services will result in an expanded application of essential services. We also wonder what exactly is left to negotiate with respect to essential service agreements, since the employer has the exclusive right to determine the level of essential services required and the frequency with which these services are to be provided.

28) Furthermore, the PSAC finds it particularly troubling that the PSLRB cannot take into account whether there is managerial staff available and able to provide the essential services, nor can it require the employer to change hours of work or use overtime in order to facilitate the provision of essential services. This provision is deliberately designed to insulate the employer from the impact of a strike, and is unique, we believe, to this employer. Even the *Canada Labour Code*, which has rigorous essential services provisions applying to Crown Corporations and other governmental bodies, such as airports, does not go this far. Since the purpose of a strike is to impact the employer's operations, we believe that this provision is intended to make the weapon ineffective. While it may have that impact, in our view it is more likely to result simply in more prolonged and bitter disputes, and to create divided workplaces. This is not the way to improve labour relations.

29) The union is also extremely concerned that subsection 4(2) of the legislation requires employees occupying positions that have been identified as essential to be available during off-duty hours and to report to work without delay if required to do so by the employer. This provision does not take into account the individual circumstances of employees, such as the requirements for single parents to be at home at particular times, and we believe that the potential for abuse in such situations is immense. With this statutory blessing, employees could be kept captive at work for long periods of time, without recourse, and we have reason to believe that this will happen, since we saw a few such situations during the last strike, when there was no such statutory sanction.

30) We also note with concern that essential services “agreements” continue in force until such time as there are no employees in the unit who occupy the essential services positions, or until such time as a notice to amend the agreement is served. Furthermore, employees occupying positions identified as essential will receive a notice that the position is essential once an agreement comes into force, and this notice remain valid as long as the employee occupies the position, unless notified by the employer otherwise. This provision will, in the union’s view, give rise to innumerable practical problems and rather than eliminate picket line problems is likely to increase them.

31) At the end of the day, the union appreciates that there are functions within the federal government that are essential to the safety and security of the public and we know that some form of essential services provision is inevitable. What offends us about this provision is that it goes much further than is necessary to ensure the safety and security of the public, and is instead designed, in the guise of protecting essential services, not only to insulate the employer from feeling any effect of a strike but to deter union members from exercising constitutionally protected rights, such as the right to picket.

32) The union recommends that this entire provision be deleted, and that it be replaced with the essential services provisions of the *Canada Labour Code*, which, while onerous to the union, have proven themselves to be workable. At a minimum, we recommend that the definition of essential services found in the *Code* replace the one introduced in this legislation, and that any dispute about what is essential, the level of essential services or the number of employees required to provide essential services be referable to the Public Service Labour Relations Board. We believe that section 120, subsections 121(2), 123(6), and 127(5)(6), section 129, subsection 130(2), section 133, paragraphs 194(i)(j) and 196(h)(i), section 199 and subsection 4(2), should be deleted completely.

DIVISION 9 - ARBITRATION

33) The PSAC believes that the Government’s continued refusal to expand the scope of free collective bargaining will hinder effective and harmonious labour relations in the federal public sector, and we are disappointed that the Government has continued to limit the scope of bargaining in section 150. Indeed, it is our view that the Government has extended the limitations on free collective bargaining by inserting new factors in section 148 that an arbitration board must take into account when fashioning an arbitral award.

34) The union is also disappointed to note that the new legislation has removed the right of arbitration boards and the Public Interest Commission to compel the production of documents that may be of relevance to the matter before it. Arbitration and conciliation boards established under the *Public Service Staff Relations Act* had this power, and the union believes that this power is critical to the successful resolution of disputes. Indeed, we can only question the commitment of the Government to improving labour relations when it has systematically removed the tools with which the parties can achieve labour peace.

DIVISION 11 – STRIKE VOTES

35) The union does not object to holding strike votes. We hold them as a matter of course, legislatively required or not. We are concerned, however, that the ability of employees in the bargaining unit to file applications to have the vote declared invalid may significantly impede the ability of the union to plan and declare a strike, particularly in light of the requirement that a strike vote be held within 60 days of the calling of a strike. This is especially worrisome in the absence of any definition of “irregularities” in the provision.

36) This is a provision that the union believes must be clarified by regulation before it comes into force, and any regulation dealing with this provision must be sensitive to the geographic and demographic conditions under which the bargaining agents operate.

DIVISION 14 – PROHIBITIONS AND ENFORCEMENT

Section 196 – Participation prohibited

37) This section sets out prohibitions for employees relating to strikes. These prohibitions, which are set out in 18 paragraphs covering over three pages of text, are excessive and are, in the PSAC’s opinion, designed to discourage employee participation in strikes. The *Canada Labour Code* manages to accomplish the same end in a very simple provision, which reads as follows:

S.89(2) No employee shall participate in a strike unless:

- (a) the employee is a member of the bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and

(b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member.

38) Subsection (1) referred to in paragraph 89(2)(b) sets out the requirements which must be met before the union can engage in a legal strike. The PSAC recommends that this language replace the 18 paragraphs and 3 pages of text found in section 196.

Section 199 – Prohibition Relating to Essential Services

39) This section provides that no person “impede or prevent or attempt to impede or prevent” designated employees from entering or leaving their place of work if they are occupying positions designated essential. The PSAC is very concerned that this provision goes farther than is necessary to ensure that designated employees are able to work. We are concerned that the language of this provision could be interpreted as prohibiting the establishment of a picket line in front of any building where there are designated employees working. We believe that because this provision is potentially quite broad in its application, it could conceivably capture an extraordinary range of picket line and non-picket line actions. In many cases, it would be impossible for picketers to know that particular persons are covered by essential services agreements. Consequently, an employee could breach this section without even realizing it. To add insult to injury, under Section 200 (below), the employee could be convicted of a summary conviction offence for having violated section 199.

40) The PSAC recommends that this provision be deleted from the proposed legislation.

Section 200 - 205 – Offences and Punishment

41) Subsection 202(1) provides that not only the union, but every officer or representative of the union, that contravenes section 187 or 188 is guilty of a summary conviction offence. The union is quite concerned that the extension of personal responsibility to officers who are volunteers is extreme and will create a serious chill in involvement in union activity, particularly representation on complaints and grievances.

42) As with subsection 202(1), section 203 seeks to extend personal responsibility to officers and representatives of the union. Our objection to this provision is the same, and we note, parenthetically, that a corresponding personal liability is not extended to employer representatives who contravene subsections 186(1) or 186(2).

PART 2 – GRIEVANCES

Section 209 – Reference to Adjudication

43) The PSAC is extremely disappointed that the Government has not taken this opportunity to extend the right to refer to adjudication terminations of employment of a non-disciplinary nature of employees of separate employers. Employees of Treasury Board have this right, but only employees of separate employers who are designated by the Governor-in-Council have the same right, and there are few such designations. The effect of this provision is that an employee of Parks Canada whose employment is terminated as a result of incapacity or incompetence cannot challenge this termination, whereas an employee of Treasury Board can. The unfairness of this is underscored by the fact that employees of Parks Canada, as former Treasury Board employees, had the right, but lost it on the creation of the agency.

44) The PSAC recommends that the distinction between “core public administration” and “separate agencies” in this provision be deleted.

PUBLIC SERVICE EMPLOYMENT ACT

45) In tabling the new *Public Service Employment Act*, the Government has told Parliament, this Committee, the public, employee organizations and its own employees that Part 3 of Bill C-25 is “enabling legislation”. As such, Bill C-25 is only framework legislation – with the details to be developed through the drafting of regulations and policies during the long transitional phase between Royal Assent and Proclamation.

46) After having reviewed this proposed legislation, however, the PSAC is compelled to ask: What will Bill C-25 enable?

47) The Preamble states that Canada will continue to benefit from a public service characterized by appointments to positions on the basis of merit, that the principle of merit will be independently safeguarded, and that those exercising staffing authority will be accountable to a restructured Public Service Commission, a new independent Tribunal and Parliament.

48) There is a ringing dissonance, however, between the Preamble’s stated intent and the framework provisions of this Bill.

49) Part 3 of Bill C-25 – in its current form - represents a wholesale retreat from a public service defined by the appointment of the best qualified individuals. Bill C-25 delivers on its promise of a great deal of flexibility for management, but contains very little protection for employees or the principle of merit. And, the PSAC would argue, very little accountability.

50) Bill C-25 vests the authority to staff positions in the public service to the lowest managerial levels possible. It continues to exclude staffing from collective bargaining, thereby continuing to preclude duly certified employee organizations from effectively addressing concerns on behalf of their members. Bill C-25 unambitiously defines merit by the standard of the minimally qualified, thereby vastly underutilizing the immense expertise and insight that public service employees can, and do, bring to their work. Bill C-25 creates a right of recourse that is so exceptionally narrow as to render the staffing process largely immune from scrutiny by Tribunals, the new Public Service Commission and, ultimately, the Parliament of Canada.

51) In so doing, the PSAC fears that the new *Public Service Employment Act* has the potential to usher in an era of patronage, favouritism and a lack of accountability that is anathema to the objective of an accountable public service and our Parliamentary and Constitutional traditions of responsible government.

52) Bill C-25 has the potential to create a public service characterized by front-line managers with the direct authority to affect the career advancement of employees who speak out in the face of internal Government mismanagement or wrongdoing, who exercise recourse rights or grievance rights, who are union activists or who provide representation on behalf of their co-workers. Will employees be as willing to speak out if they fear that their opportunities for career advancement can be blocked by a manager? Will they be emboldened to speak out knowing that a manager cannot be faulted for only considering one individual for appointment? At a time when stakeholders from across Canada, including the PSAC, are crying out for improved whistleblower protections, Bill C-25 has the potential to create a serious chill on any form of proactive, but critical, action by employees designed to ensure that the high standards of accountability and transparency in the public service are maintained.

53) The PSAC urges this Committee to make extensive amendments to this Bill. It is uncontroversial that public service employees are the most valuable assets the public service has. Silencing them by providing limited recourse rights and feeble independent safeguards necessarily circumscribes our ability to scrutinize government action in personnel management and to hold managerial authority to the high standard that responsible government in Canada requires.

54) We trust that this Brief will highlight the serious reservations the PSAC has about aspects of this Bill. Through its participation in the Parliamentary review process, the PSAC intends to be constructive in its critique and to offer praise where warranted. We have not touched upon every aspect of the Bill, but have attempted to highlight some areas which cause the greatest concern to us and to our members.

PART 1 PUBLIC SERVICE COMMISSION, DEPUTY HEADS AND EMPLOYER

55) The PSAC has long fought for the ability to negotiate matters relating to staffing, thereby eradicating the need for the Public Service Commission as watchdog. This Bill revamps the Public Service Commission and, unfortunately, confirms that the PSAC's struggle for a meaningful seat at the table on questions of such fundamental importance to its members will continue.

56) By way of default, however, the PSAC welcomes the introduction of a statutory right to consultation with the Commission with respect to lay-offs and priorities for appointment, as well as mandatory consultation with Employers relating to its regulatory authority and its authority to set

classification standards.¹ However, the duty to consult must be meaningful and, accordingly, must be subject to a duty to consult in good faith subject to independent review.

57) Is this asking a lot? The Government itself, in introducing Bill C-25, has recognized that there is a lot of work to be done in improving labour-management relations in the public service. Indeed, the stated rationale for introducing changes such as co-development and two-tier bargaining in the labour relations context is directed at encouraging an open and meaningful culture of communication between the employer, departments and bargaining agents. However, we are not there yet. To fail to provide for a duty to consult in good faith and a means of enforcing that duty simply renders illusory the possible benefits of consultation.

58) The mandate of a reorganized Public Service Commission is to appoint or provide for the appointment of persons to or from within the public service, to conduct investigations and audits, and to administer the provisions of the Act relating to political activities of employees and deputy heads.²

59) In light of the Preamble's emphasis on independent safeguards, transparency, and the continued importance of merit in the management of the public service, the PSAC is extremely disappointed by the PSEA's weak accountability mechanisms.

60) Section 15 authorizes the Commission to delegate to the deputy heads of departments the authority to do virtually³ everything the Commission is empowered to do with respect to the staffing of positions in the public service of Canada. Indeed, the Preamble and the statute itself actively encourage the delegation of this authority to the lowest level possible. In the PSAC's view, this undermines – from the outset - the prospects for a meaningful and independent assessment of the overall health, neutrality and fairness in relation to staffing in the public service.⁴

¹ See sections 14, 27 & 31

² See section 11.

³ The PSC may not delegate its functions relating to section 17 (audits), 20 (exclusions), 22 (regulations), investigations under sections 66-69 (external appointments, certain internal appointments, political influence and fraud) and political activities.

⁴ See the Preamble and section 24 of the new *PSEA*.

61) The PSAC expects that subsection 15(2) is meant to offer some comfort in that the Commission can revise or revoke its delegation to the deputy head. Given the rarity – or non-existence – of such revocations under the current Act, the PSAC takes little comfort in the presence of subsection 15(2).

62) The Commission's power to investigate is limited. For example, where a deputy head conducts an internal appointment process – whether by competition or not - the Commission may only investigate it *on the request of the deputy head*.⁵ Given the emphasis on delegation of authority to low level managers, this serves as another blow to accountability.

63) One might think that the Commission's overall audit power represents a meaningful recognition of the goal of accountability and transparency in the management of the public service. Look closely, however. Its authority to conduct audits relating to "any matter within its jurisdiction" is only a power to make recommendations to deputy heads to correct unlawful staffing practices – it cannot issue binding orders.⁶

64) Finally, except for a full-time President, the Commission is only required to have another two Commissioners and they are only part-time at that.⁷ The PSAC considers this to be a further erosion of the Commission's ability to develop and enforce sound and consistent staffing practices for all public service employees. As such, there is no central agency capable of ensuring, and enforcing, the values and principles set out in the Preamble to the Act. On the contrary, there appears to be a willingness to forfeit – rather than balance - the values of accountability, transparency, fairness, consistency and merit with the objective of management flexibility.

Recommendations

65)

✍ The Commission's audit power must include the authority to make binding orders for corrective action. Accordingly, the PSAC recommends that section 17 of the *PSEA* be amended to read:

s.17 The Commission may conduct audits on any matter within its jurisdiction and may order the deputy to take any corrective action the Commission considers to be in the best interests of the public service.

⁵ See subsection 67(2)

⁶ See section 17

⁷ Subsections 4(1) & (3)

66)

- ✍ All Commissioners appointed to the Public Service Commission shall serve on a full-time basis with, at a minimum, a single Commissioner assigned to each of the three distinct mandates of the Commission set out in section 11 of the *PSEA*.

67)

- ✍ Sections 14 and 27 must be amended to include the words “in good faith” as follows:

s. 14 The Commission shall, on request or if it considers consultation necessary or desirable, consult in good faith with the employer or any employee organization certified as a bargaining agent under the *Public Service Labour Relations Act* with respect to the principles governing lay-offs or priorities for appointment.

s. 27 An employer shall, on request, or if it considers consultation necessary or desirable,

- (a) consult in good faith with the Commission, or any employee organization certified as a bargaining agent under the *Public Service Staff Relations Act*, with respect to regulations made under paragraph 26(1)(b) or (d) or corresponding policies made under subsection 26(2), as the case may be; and
- (b) consult in good faith with any employee organization so certified with respect to regulations made under paragraph 26(1)(a) or (c) or corresponding policies made under subsection 26(2), as the case may be, or with respect to any standards established under subsection 31(1).

68)

- ✍ A section should be added to Part 5 of the *PSEA* as follows:

s. 87.1 A party to whom sections 14 and 27 applies may – in the manner and within the period provided by the Tribunal’s regulations – make a complaint to the Tribunal of a breach of the duty to consult in good faith.

PART 2 – APPOINTMENTS

Current

69) To see just how far Part 3 of Bill-25 retreats from a public service based on merit, it is critical to restate that the driving force for staffing in the public service is the principle of “selection according to merit” currently enshrined in section 10 of the *Public Service Employment Act*. The merit principle takes two forms:

70) Most appointments to positions in the public service are made on the basis of “relative merit” (subsection 10(1) of the current *Act*⁸). This means that the *most* qualified candidate must be appointed to a position.

71) An appointment may also be made on the basis that an individual simply meets the qualifications for the position - commonly referred to as “individual merit” (subsection 10(2) of the current *Act*). These appointments can only be made in limited circumstances specified in the Commission’s regulations.

72) Currently, the right of appeal against selections for appointment requires that an Appeal Board satisfy itself the process of personnel selection was consistent with the merit principle. This means that candidates for positions must be assessed on the basis of criteria that are *relevant* to the issue of merit. The operation of the merit principle – and a meaningful right to recourse – serve to assure Parliament, the public and public service employees that staffing in the public service remains free from abuses of authority such as political patronage, cronyism and favouritism.

73) The PSAC does not suggest that the current process for personnel selection is above criticism. On the contrary, there remains a pervasive view on the part of PSAC members that the current staffing process is biased and unfair.

74) For example, departments rely heavily on a candidates’ “personal suitability” in assessing their relative qualifications for a position. It is not uncommon for employees to feel, and sometimes prove, that factors such as union involvement or the exercise of grievance, deployment, staffing or harassment recourse mechanism has weighed heavily against them during the selection process. The PSAC is not speculating, therefore, when it worries that increased staffing power in the hands of front-line managers to determine “merit” may put a chill on dissent, constructive criticism and union activism.

⁸ Section numbers refer to the new *PSEA* unless otherwise specified.

75) The PSAC has long advocated that the process for personnel selection must be simplified and made more transparent and consistent across departments and agencies. In addition, the PSAC maintains that persons employed by a separate agency must be entitled to the same, or analogous, levels of transparency and consistency as exist for other public service employees.

76) It is unfortunate that Bill C-25 does not address these long-standing concerns.

The Definition of Merit

77) Bill C-25 defines merit as follows:

- 30(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; and
 - (b) the Commission has regard to
 - (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
 - (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and
 - (iii) any current or future needs of the organization that may be identified by the deputy head.

78) Accordingly, an individual need not meet *all* the qualifications for a position – but only the *essential* ones. One cannot be faulted for wondering why Bill C-25 even uses the term “merit”. The new *PSEA* and its Preamble ought to simply say that “only minimally qualified persons will be appointed to positions in the public service”.

79) Moreover, managerial discretion – and the potential for abuse – is incorporated by the addition of such broadly crafted criteria as those set out in paragraph 30(2)(b).

80) Subsection 30(4) goes on to provide that:

30(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

81) Thus, the hiring manager does not even have to consider, or solicit, applications from more than one person to be acting in a manner consistent with 'merit'. Within this statutory framework, one is left to wonder how an employee can ever challenge the basis for a hiring or staffing decision where the manager need not consider anyone but the minimally qualified person he or she wishes to hire for the job.

Employee Mobility

82) Section 35 allows employees from all separate agencies and specified designated organizations to apply for advertised appointment processes within the core public administration where certain criteria are met. This increased mobility is a positive and welcome change. It does not go far enough, though.

83) The PSAC is troubled by the ongoing failure to provide for a reciprocal right for employees of the core public administration to apply for positions in separate agencies. The federal public administration is made up of workers paid by the public to provide services to the public. Access to the fullest range of opportunities possible allows public service employees to gain invaluable training and experience is worthwhile. It seems shortsighted to fail to facilitate movement from the core public administration to separate agencies - especially in light of demographic projections for occupational shortages.

84) The only reason we have been given for one-way mobility is that the change would affect too many pieces of legislation. Given that we are currently dealing with an omnibus bill providing for consequential amendments to those Acts governing separate agencies, this rationale rings hollow.

Recommendations

85)

- ✍ Paragraph 30(2)(b) and subsection 30(4) ought to be deleted in their entirety.

86)

- ✍ The word “essential” ought to be deleted from subsection 30(2).

87)

- ✍ Section 35 should be amended to allow persons employed in the core public administration to apply for positions in separate agencies in prescribed circumstances.

PART 3 – DEPLOYMENTS

Current

88) There are some key characteristics to deployments under the current *PSEA*. Overall, the right to deploy is simply the authority to transfer an employee from one position to another position where that transfer does not result in a promotion or a change in tenure. Employees cannot be deployed anywhere in the public service. The transfer can only be *from* a separate employer that remains subject to the *PSEA* to a position in the department in question or *between* positions *within* the same department. Deployments must be made with the consent of the employee unless a willingness to be deployed was made a condition of their employment.

89) Some of the rationales for granting to the deputy head the exclusive authority to make deployments are to meet operational needs and to fulfill the career development and individual needs of employees. Given the career benefits of access to deployment opportunities, employees in the work unit to which a deployment is being made currently have the right to file a complaint with the Commission that the deployment was not authorized by or made in accordance with the Act or that it constituted an abuse of authority.

90) Without rationale or explanation, Bill C-25 will severely curtail public service employees access to recourse in the context of deployments and continues to curtail access by employees in the core public administration to deployment opportunities in separate agencies.

Proposed

91) Bill C-25 makes significant rollbacks to the deployment process. The purpose and effect of these changes are to insulate transfers from third party review and to circumscribe employees' ability to challenge management practices on the basis of abuse of authority.

92) Is the PSAC being harsh or alarmist? Not at all.

93) Bill C-25 transfers recourse rights relating to deployments to the grievance process established under the new *Public Service Labour Relations Act*. However, third party review – adjudication under section 209 of the *PSLRA* – is ONLY available to the employee deployed and ONLY on the basis that the deployment was made without his or her consent.

94) For all other employees, including those who are currently able to assert that a deployment constituted an abuse of management authority, their sole recourse is to file a grievance that will be referred to the very managers who authorized the deployment in the first place. There is no right to refer these questions to adjudication.

95) The PSAC states that this cannot, by any standard, be held up as a model of transparency and accountability. Moreover, at a time when employee morale in the public service is low, this change sends out a signal that the group and individual interests of public service employees in lateral job mobility – and the related access to learning, skill and career development - are no longer important enough to be protected. In our view, this message is anathema to the Preamble's emphasis on a public service characterized by respect for employees, and transparency and accountability in the management of the public service.

96) These changes are further exacerbated by the fact that the Commission is no longer responsible for defining a "promotion". This authority now rests with Treasury Board and is immune from third party review.

97) Finally, the PSAC remains troubled by the failure to facilitate the movement of persons – by way of deployment – from the core public administration into the separate agencies. Under the new Bill, persons employed by those separate agencies who request it, and whose staffing programs are reviewed by the Commission, will now be able to benefit from deployments into positions in the core public administration.

98) If the Commission has reviewed the staffing program and, presumably, determined that there exists a sufficient level of consistency between the two to provide for deployments – why penalize employees in the core public administration by denying them access to these opportunities? Again, the excuse the PSAC has heard is that to do so would require the amendment of too many pieces of legislation. Again, Part 6 of the Bill providing for consequential amendments to other Acts in the face of Bill C-25 makes clear that this excuse is hollow indeed.

Recommendations

99)

- ✍ There must be a right for any individual deployed, or any individual in the work unit to which the deployment is made, to refer a grievance against the deployment to adjudication on the basis that the deployment was contrary to the Act or constituted an abuse of authority.

100)

- ✍ Access to deployment opportunities ought to be available to employees within the federal public administration at large. Accordingly, the PSAC recommends that Part 6, Division 2 – Consequential Amendments Arising From Part 3 – be amended to provide, in respect of every separate agency for which the Commission does not have the authority to appoint, for the deployment of employees from the core public administration to a separate agency whose staffing program has been reviewed by the Commission.

PART 4 – EMPLOYMENT

Current

101) Where there are lay-offs in the public service, the merit principle requires that such lay-offs be made in “reverse order of merit”. While there are exceptions, the current presumption is that a lack of work, transfer of work or discontinuance of a function ought not to result in the loss of the most qualified of our public service employees.

Proposed

102) Through Bill C-25, the concept of relative merit is gone - leaving a vacuum in terms of a readily apparent and principled approach to lay-offs. Bill C-25 offers no criteria to assure employees, the PSAC or this Committee what approach will be used in determining who will be subject to lay-off.

103) The PSAC has advocated for the application of barrier-free seniority⁹ in the context of lay-offs. This approach is not only consistent with employer's duty to manage the public service in a manner consistent with concepts of substantive equality, but also recognizes the expertise and commitment that comes with long service to the public through employment in the core public administration.

104) Again, the PSAC is wary of the status of Bill C-25 as "enabling legislation" – with critically important questions such as lay-offs left to be answered through a regulatory/policy making process in the future. In light of the absence of any statutory guidance with respect to lay-offs, the PSAC considers the inclusion of limitations on the subject matter and scope of complaints relating to an abuse of authority on lay-off are without merit or foundation.

105) Finally, there is no requirement that this regulatory/policy making process will include mandatory consultation with bargaining agents. The PSAC cannot accept its continued exclusion with respect to matters of such fundamental importance to its members.

Recommendations

106)

- ✍ During the transitional phase of this legislation, there must be mandatory consultation with bargaining agents with respect to developing the criteria to be used in determining the manner of selecting the employees to be laid off;

107)

- ✍ As one can presume that incumbents to positions affected by a lay-off are qualified, subsection 64(2) should be amended to read as follows:

⁹ The PSAC emphasizes that the concept of seniority must be understood as barrier-free: meaning that seniority must be determined in a manner that is consistent with notions of substantive equality and, for example, does not penalize employees who have been absent from work due to illness, injury, and pregnancy.

64(2) Where the deputy head determines under subsection (1) that some but not all of the employees in any part of the deputy head's organization will be laid off, such lay-offs shall be made with reference to the barrier-free seniority of the employees affected.

108)

- ✍ With respect to recourse on lay-off, the PSAC urges the Committee to recommend that the limitations on the right of recourse in subsection 65(2) be deleted.

PART 5 – INVESTIGATIONS AND COMPLAINTS RELATING TO APPOINTMENTS

109) The PSAC commends the Government for its decision to create an expert Tribunal for the hearing and resolution of staffing complaints. Moreover, the PSAC congratulates the Government for ensuring that, in disposing of these complaints, the Tribunal is authorized to interpret, apply, and remedy violations of the *Canadian Human Rights Act*. These changes represent a significant enhancement to the quality of the decision-making and remedies available to public service employees.

110) We are, however, concerned with the limited grounds available to employees to bring their concerns to the proposed expert Tribunal. This not only unnecessarily limits review of the staffing process as a whole, but has the potential to severely limit the beneficial effects of the Tribunal's authority over human rights issues. Given the total absence of detail as to how, and whether, classification standards and selection processes and tools will be consistent with human rights principles – the limited grounds of recourse are troubling indeed.

111) There are three general circumstances that give rise to the right to file a complaint to the Tribunal. The Tribunal can determine whether the decision by the Commission or a deputy head to revoke an appointment pursuant to an investigation into an external or internal appointment process was "reasonable".¹⁰

112) In addition, subsection 77(1) sets out the general grounds for complaints relating to internal selection processes only:

¹⁰ See sections 74 and subsections 15(3), 67(1) & 67(2)

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may - in the manner and within the period provided by the Tribunal's regulations - make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of:

- (a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);
- (b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or
- (c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

113) The PSAC has several concerns with the wording of subsection 77(1). At the outset, it is evident from section 15 of the *PSEA* that the Commission may, and is indeed *encouraged*, to delegate its staffing authority to managers. Accordingly, to refer only to a right of complaint against the *Commission's* exercise of authority is confusing. If the limitation on the Tribunal's jurisdiction is by design, the PSAC is of the view that it *must* be amended to include reference to the deputy head.

114) Moreover, read together with the definition of merit in section 30, proving an abuse of authority will be virtually impossible. The right to complain rests on the ability of a complainant to show that he or she ought to have been appointed. Given that the Bill expressly provides that it is not inconsistent with merit to only consider one individual for appointment makes it difficult to conceive of how one might prove an abuse of authority such as personal favouritism.¹¹ Moreover, the requirement that the individual prove that he or she ought to have been appointed, not that the process itself reflected an overall abuse of authority, is unnecessarily limiting and sets the standard of proof too high.

115) The third form of complaint relates to an allegation of an abuse of authority in the implementation of corrective action ordered by the Tribunal in response to a complaint under section 77.

¹¹ See subsection 30(4)

116) There is no right to file a complaint to the Tribunal in the case of external appointment processes. Given that the Government has removed the statutory preference for hiring from within the public service, the PSAC is concerned that a higher percentage of external appointment processes will be used and, accordingly, a higher number of staffing decisions will not be subject to recourse. The PSAC urges this Committee, therefore, to recommend that the Government return the statutory preference for hiring within the public service as set out in section 11 of the current Act.

Recommendations

117)

- ✍ The words “or the deputy head acting under section 15” must be added after each reference to the “Commission” in section 77;

118)

- ✍ The phrase “that he or she was not appointed or proposed for appointment by reason of” in subsection 77(1) must be replaced with “the appointment or proposed appointment constituted”;

119)

- ✍ The phrase “abuse of authority” should be replaced with “a violation of the Act or on the basis of irrelevant considerations”;

120)

- ✍ A statutory preference for hiring from within the federal public administration must be added.

PART 7 – POLITICAL ACTIVITIES

121) The prohibitions on political activity in Bill C-25 are clearly designed to bring under scrutiny the fullest range of political activities and forms of political participation engaged in by public service employees. It provides:

s.111(1) The following definitions apply in this Part,

“political activity” means

- (a) carrying on any activity in support of, within or in opposition to a political party;

(b) carrying on any activity in support of or in opposition to a candidate in an election; or

(c) seeking nomination as or being a candidate in an election.

113. (1) An employee may engage in any political activity so long as it does not impair, or is not perceived as impairing, the employee's ability to perform his or her duties in a politically impartial manner.

122) Section 113 does little to clarify what balance will be struck between a politically impartial public service and public service employees' Constitutional right to participate in, and express their views on, the political questions that confront all of us in our daily lives.

123) The PSAC will be vigilant in ensuring that those who have chosen to serve their country by contributing to the public service do not, by virtue of that service, become second class members of Canada's political mosaic.