

**BILL C-25: THE PUBLIC SERVICE MODERNIZATION ACT**

**Margaret Smith  
Law and Government Division**

**13 March 2003**



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## LEGISLATIVE HISTORY OF BILL C-25

### HOUSE OF COMMONS

Bill Stage	Date
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First Reading:	6 February 2003
Second Reading:	20 February 2003
Committee Report:	16 May 2003
Report Stage:	28 May 2003
Third Reading:	3 June 2003

### SENATE

Bill Stage	Date
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First Reading:	3 June 2003
Second Reading:	13 June 2003
Committee Report:	18 September 2003
Report Stage:	
Third Reading:	4 November 2003

Royal Assent: 7 November 2003

Statutes of Canada: 2003, c 22

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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PUBLIÉ EN FRANÇAIS

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BILL C-25: THE PUBLIC SERVICE MODERNIZATION ACT\*

INTRODUCTION

On 6 February 2003, Bill C-25, the Public Service Modernization Act,<sup>(1)</sup> was introduced in the House of Commons.

Bill C-25 contains four main public service reform initiatives.

1. It will repeal the current *Public Service Staff Relations Act* and enact a new Public Service Labour Relations Act to govern labour relations in the federal public service.
2. It will repeal the existing *Public Service Employment Act* and enact a new Public Service Employment Act to regulate appointments to the public service.
3. It will amend the *Financial Administration Act* to transfer certain human resources management powers from the Treasury Board to deputy heads.
4. It will amend the *Canadian Centre for Management Development Act* to pave the way for the amalgamation of the Canadian Centre for Management Development, and Training and Development Canada, into the new Canada School of the Public Service.

The bill also contains a number of transitional provisions and consequential and coordinating amendments.

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\* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) Bill C-25's long title is An Act to modernize employment and labour relations in the public service and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other acts.

## BACKGROUND

The present legislative framework governing human resources management in the public service consists of:

- the *Public Service Employment Act* (PSEA), which creates the Public Service Commission (PSC), makes the PSC responsible for appointments to and within the public service and for recourse on appointments, and establishes the rules governing the political activities of public servants;
- the *Public Service Staff Relations Act* (PSSRA), which establishes the Public Service Staff Relations Board, regulates labour relations in the public service, and provides for the Treasury Board's role as the "employer" for the purpose of conducting collective bargaining; and
- parts of the *Financial Administration Act* (FAA), which confer on the Treasury Board general human resources management authority for the public service.

Other laws such as the *Official Languages Act*, the *Employment Equity Act*, the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, the *Privacy Act* and Part II of the *Canada Labour Code* underpin this framework.

Initiatives to reform the public service have long been part of the federal policy agenda. Noteworthy initiatives include:

- the 1962 report of the Royal Commission on Government Organization ("Glassco Report");
- reforms in 1967 that transformed the Civil Service Commission into the Public Service Commission, established collective bargaining rights and created the Public Service Staff Relations Board;
- the creation of the Canadian Centre for Management Development (1991);
- additional public service reforms (1992); and
- the establishment of new "separate employers" such as the Canada Customs and Revenue Agency, the Parks Canada Agency and the Canadian Food Inspection Agency.

Most recently, in the 2001 Speech from the Throne, the Government stated that it would make "... the reforms necessary [to] ensure that the public service is innovative, dynamic

and reflective of the diversity of the country [and] able to attract and develop the talent needed to serve Canadians in the 21st century.”

In addition, recent studies and reports have highlighted the challenges facing the federal public service in the areas of recruitment and staffing, pointed to concerns about how the Government manages human resources, and identified the need for major changes to the legislation governing labour-management relations.<sup>(2)</sup>

## ANALYSIS

### A. New Public Service Labour Relations Act

Part 1 of the Public Service Modernization Act (PSMA) enacts a new Public Service Labour Relations Act (PSLRA) to replace the current *Public Service Staff Relations Act* (PSSRA).

#### 1. Preamble

The new PSLRA contains a preamble that emphasizes the importance of effective, harmonious labour relations and the value of collective bargaining within a context where the protection of the public interest is the paramount consideration.

#### 2. Consultation Committees and Co-development

The new Act requires each deputy head, in consultation with the relevant unions, to establish a labour-management consultation committee for his or her department to discuss workplace issues affecting employees (s. 8).

The employer or the deputy heads will be able to undertake “co-development of workplace improvements” with the unions, through the National Joint Council or any other forum they choose. “Co-development of workplace improvements” is defined as “the consultation between the parties on workplace issues and their participation in the identification of workplace problems and the development and analysis of solutions to those problems with a view to adopting mutually agreed to solutions” (s. 9-11).

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(2) These reports include: the *Report of the Auditor General (2000)*, the Public Service Commission annual report to Parliament in October 2002, and the final report of the tripartite labour-management-academic Advisory Committee on Labour-Management Relations in the Federal Public Service (“Fryer Report”), June 2001.

### 3. Public Service Labour Relations Board (PSLRB)

The PSLRA establishes the new Public Service Labour Relations Board (PSLRB), the mandate of which is to provide adjudication, mediation, and compensation analysis and research services. It will also continue to provide facilities and administrative support to the National Joint Council, as acknowledged in s. 17 of the Act.

The PSLRA defines each of these types of services (s. 14-16):

- adjudication services consist of hearing applications on labour relations and occupational safety and health, and the referral of grievances to adjudication.
- mediation services consist of assisting in the conclusion of collective agreements and in the management of labour relations, as well as mediating grievances.
- compensation analysis and research services consist of compiling and analyzing compensation data, making such information available to labour, management and the public, and conducting market-based compensation research.

The new PSLRB will consist of a Chairperson, up to three Vice-Chairs, and other members appointed by the Governor in Council (GIC) for a term of five years (subject to reappointment) during “good behaviour” and subject to removal for “cause” (s. 22).

To the extent possible, an equal number of Board members, other than the Chair and Vice-Chairs, will be appointed from among persons recommended by the employer and from among those recommended by the unions (s. 19).

Matters brought before the Board under Part I of the PSLRA (non-grievance matters) are to be heard by a panel of not less than three members (s. 31). Board decisions are final and binding and are not subject to judicial review, except under certain provisions of the *Federal Court Act* (s. 51).

### 4. Certain Exclusions Eliminated

Lawyers of the Department of Justice and the Canada Customs and Revenue Agency and employees of the Treasury Board Secretariat will no longer automatically be considered to be managerial or confidential and thus excluded from collective bargaining. Generally, positions will be excluded on a case-by-case basis by Board order (s. 59). But unions will be able to challenge an employee’s classification as managerial or confidential. In respect of certain types of classification, the burden will be on the union to prove the classification wrong; in other cases, the employer will bear the burden (s. 62).

## 5. Scope of Bargaining

Under the new PSLRA, the scope of bargaining will not change. Matters that are now not subject to collective bargaining, such as those under the *Public Service Employment Act*, will remain as such (s. 113).

## 6. Two-tier bargaining

The new PSLRA provides for two-tier bargaining – public service-wide bargaining to establish broad parameters for terms and conditions of employment in a bargaining unit, and individual departmental bargaining to allow for the negotiation of detailed provisions. The employer, union, and relevant deputy head must agree to the two-tier process before it can be used (s. 110).

The purpose of two-tier bargaining is to allow collective agreements to be tailored to the needs of departments and employees.

## 7. Mediation

Under the new PSLRA, the PSLRB Chairperson can appoint a mediator to assist the parties in resolving a collective bargaining dispute. The techniques available to the mediator include mediation, fact-finding and facilitation. If requested, the mediator can make recommendations for resolving the dispute (s. 108).

## 8. Choice of Dispute Resolution Process

The PSLRA continues the PSSRA process of unions choosing which dispute resolution process – binding arbitration or conciliation – they will use to resolve a bargaining stalemate (s. 103). The PSLRA also allows the parties to settle disputes by “binding determination” (s. 182).

A new conciliation process will be established. Public interest commissions – non-permanent bodies consisting of one or three persons, appointed by the Minister responsible on the PSLRB Chairperson’s recommendation, to assist the parties to resolve disputes and make recommendations for settlement – will replace conciliation boards and conciliation commissioners (s. 162-167). A public interest commission can be appointed in two instances: upon receipt of a request for conciliation, and on the initiative of the PSLRB Chairperson.

## 9. Essential Services

The PSLRA contains a number of new provisions relating to essential services that are to be maintained in the event of a strike. Essential services are defined as services, facilities or activities necessary for the safety and security of the public (s. 4). The employer has the exclusive right to establish the level at which an essential service must be provided, including the extent to which and the frequency with which the service is rendered (s. 120).

The employer and the union are required to negotiate and make every reasonable effort to enter into an essential services agreement (s. 122). If an agreement cannot be reached, either the employer or the union can apply to the PSLRB to resolve any issues (s. 123). In settling unresolved issues, the PSLRB can identify the number of positions necessary for the employer to provide an essential service, but it cannot require the employer to change the manner in which it operates normally.

A strike cannot occur until 30 days after an essential services agreement has been concluded or amended (s. 194). Employees who provide essential services cannot participate in a strike (s. 196(j)).

## 10. Strike Votes

Under the new PSLRA, unions will be required to hold a strike vote by secret ballot before going on strike (s. 184).

## 11. Unfair Labour Practices

The unfair labour practices provisions of the PSLRA are comparable to those of the *Canada Labour Code*. Section 186 of the Act provides that it not an unfair labour practice for the employer to permit employees to attend to union business during work hours. In addition, it will not be an unfair labour practice for an employer to express its opinion as long as it does not use threats, coercion, intimidation, promises or undue influence. The remedies for unfair labour practices include damages that reflect the amount that an employee would have been paid in the absence of the unfair practice (s. 192).

## 12. Grievances

The PSLRA makes a number of changes to the grievance system.

Deputy heads in the core public administration will be required, in consultation with the union representatives in their respective departments or organizations, to establish an informal conflict management system (s. 207).

The Act refers to three types of grievances: individual grievances, group grievances and policy grievances.

a. Individual grievances

Individual grievances relate to the interpretation or application of a collective agreement or arbitral award or any matter affecting the terms and conditions of a specific individual's employment, such as disciplinary action, demotion, termination, suspension or financial penalty (s. 208).

Employees will now be able to file grievances involving issues under the *Canadian Human Rights Act*, except in relation to pay equity, and be awarded monetary relief as provided under that Act (s. 208). The Canadian Human Rights Commission is entitled to be notified of such grievances and will have standing to make submissions to an adjudicator.

If an employee grieves against a termination of employment or demotion for unsatisfactory performance and refers the grievance to adjudication, s. 230 of the PSLRA requires the adjudicator to find that the termination or adjudication was for cause if he or she determines that the deputy head's opinion about the unsatisfactory nature of the employee's work was reasonable.

The PSLRA will allow grievances against deployment. Such grievances, however, can be referred to adjudication only when they relate to deployment without consent (s. 209(1)).

When the employer's internal policy expressly states that employees must give up their right to grieve when they pursue relief under the policy, such employees will have to choose between presenting a grievance and filing a complaint under applicable internal policy.

b. Group grievances

A group grievance involves more than one employee in a single portion of the federal public administration who are similarly affected by the interpretation or application of a collective agreement or arbitral award (s. 215). The bargaining agent for a bargaining unit is

responsible for bringing a group grievance. However, employees can drop out of a group grievance if they wish (s. 218).

#### c. Policy Grievances

A policy grievance relates to the interpretation or application of a collective agreement or an arbitral award (s. 220). Either the bargaining agent or the employer can bring a policy grievance.

#### 13. Judicial Review

The PSLRA limits the ability to appeal decisions. A decision rendered at the final level of the grievance process that cannot be further sent to adjudication is final and binding (s. 214). Under s. 233, decisions of adjudicators are final and binding and may not be questioned in any court.

Furthermore, employees are prohibited from bringing civil actions in respect of disputes relating to their terms and conditions of employment (s. 236).

#### 14. Seven-year Review

Under s. 252 of the PSLRA, a designated minister will be required to conduct a review of the PSLRA after seven years. The report on the review is to be tabled in the House of Commons and the Senate.

#### B. Amendments to the *Financial Administration Act*

Part 2 of the Public Service Modernization Act amends parts of the *Financial Administration Act*. The FAA confers the responsibility for human resources management in the public service on the Treasury Board.

The thrust of the proposed amendments to the FAA is to transfer a number of Treasury Board powers in relation to human resources to deputy heads. These changes are in keeping with the approach to reform expressed in the preamble to the new Public Service Employment Act – to have staffing decisions made at the lowest possible level.

Bill C-25 changes some of the terms and definitions used in the FAA. Paragraph 7(1)(e) of the FAA, which confers personnel management authority on the Treasury Board, will now refer to “human resources management” rather than to “personnel management.”

Also, certain definitions will be changed:

- “core public administration” will be the main government departments listed in Schedule I of the FAA and the agencies, tribunals and organizations listed in Schedule IV of the Act; and
- “public service” is defined as the departments and agencies listed in Schedules I and IV of the FAA, the separate agencies listed in Schedule V and any other portions of the public service that may be so designated by the GIC.

Proposed s. 11.1(1) of the FAA defines the scope of the Treasury Board’s human resources management responsibilities. This provision is essentially the same as the existing provision except for two new elements. The first is the addition of new responsibilities that require the Board to establish policies and directives in relation to:

- the exercise of the human resources powers granted to deputy heads in the core public administration, and the reporting by deputy heads on the exercise of those powers (s. 11.1(1)(f)); and
- the manner in which such deputy heads deal with grievances and the reporting in connection with such grievances (s. 11.1(1)(g)).

The second is the removal of certain Treasury Board responsibilities which, pursuant to proposed s. 12(1) of the FAA, will be transferred to deputy heads in the core public administration, subject to the policies and directives of the Treasury Board. Deputy heads will have authority to:

1. determine and establish learning, training and development requirements;
2. provide merit awards;
3. establish standards of discipline and set penalties;
4. terminate or demote unsatisfactory employees;
5. terminate or demote employees for non-disciplinary reasons; and
6. terminate employees whose work is transferred outside the core public administration.

Proposed s. 12(2) ensures that deputy heads of separate agencies can exercise similar powers, subject to terms and conditions set by the GIC.

Deputy heads will be able to sub-delegate any of the powers with respect to human resources management.

New s. 12.3 provides for the continued application of National Joint Council agreements to employees whose jobs are transferred from the core public administration to a separate agency.

The President of the Treasury Board will be required to report annually to Parliament on the administration of the human resources provisions of the FAA, which will incorporate information from deputy heads with respect to their human resources management activities (s. 12.4).

### C. New Public Service Employment Act

Part 3 of the PSMA enacts a restructured Public Service Employment Act (Division 1 of Part 3) and amends the existing *Public Service Employment Act* (Division 2 of Part 3). The amendments to the existing PSEA lay the foundation for the new PSEA by:

- creating a new Public Service Commission to administer the Act and establish the policy and regulatory framework for the new Act;
- putting in place new rules governing political activity by public servants; and
- establishing the new Public Service Staffing Tribunal.

#### 1. Preamble

The new PSEA contains a rather lengthy preamble of some eight clauses that establish the framework for the changes to be implemented by the new Act. The preamble recognizes a merit-based, non-partisan public service that is representative of Canada's diversity, able to serve the public with integrity and in their official language of choice and strives for excellence. It also acknowledges the authority of the Public Service Commission to make appointments to and within the public service, and states that this authority can be delegated to deputy heads within an accountability framework. In addition, the preamble points to a new direction in staffing – that staffing decisions should be at “as low a level as possible within the public service” and should allow managers flexibility in staffing arrangements.

## 2. Public Service Commission

Section 4 of the PSEA continues the Public Service Commission (PSC), consisting of a full-time President and two or more part-time Commissioners, all appointed by the GIC for a seven-year term.

Set out in s. 11 of the new PSEA, the PSC's mandate is to:

- appoint persons to or from within the public service (s. 29);
- conduct investigations (s. 66-69);
- undertake audits of any matter within its jurisdiction (s. 17-19); and
- administer the provisions of the PSEA relating to the political activities of public service employees and deputy heads (s. 111-122).

If requested or if it considers it necessary, the PSC is required to consult with employers and the public service unions with respect to the principles governing lay-offs or priorities for appointment (s. 14).

The PSC also has authority, subject to approval by the GIC, to exclude positions from the application of the PSEA. Regulations can be made prescribing how such excluded positions are to be dealt with (s. 20-21).

The PSC's regulation-making authority is found in s. 22 of the new PSEA.

Under s. 26, Treasury Board, as the employer, can make regulations:

- respecting deployments;
- defining the word "promotion" in relation to deployments;
- establishing probationary periods for new employees; and
- in relation to any occupational group, extending or changing to levels the provisions of the PSEA that apply to positions.

## 3. Annual Reports

Both the PSC (s. 23) and the Treasury Board (s. 28) are required to prepare and present to Parliament annual reports on their activities under the PSEA.

#### 4. Delegation of PSC Authority

The PSEA allows the PSC to delegate to deputy heads any of the powers and functions conferred on it by the Act, other than its authority to conduct audits, make regulations, establish exclusions from the Act, investigate appointments and administer the political activity provisions (s. 15(1)). The PSC can direct how, and the terms and conditions under which, a deputy head is to exercise any of the delegated powers, including policies relating to the making and revoking of public service appointments and taking corrective action.

Any delegation of authority to a deputy head to make appointments from within the public service includes the power to revoke such appointments and to take corrective action where the deputy head investigates and finds that an error, omission or improper conduct affected a person's appointment (s. 15(3)).

The PSEA allows deputy heads, with the approval of the PSC, to sub-delegate any of the powers and functions conferred on them under the Act. The power to revoke appointments, however, cannot be sub-delegated (s. 24).

#### 5. Appointments and Merit

The new PSEA makes significant changes to the process of appointing individuals to the public service. As noted earlier, the PSC will be able to delegate appointment authority to deputy heads, who, in turn, can further delegate this authority to others.

Under the present PSEA, appointments are based on merit. The merit principle is set out in s. 10 of the PSEA, which states:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.

(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.

The new PSEA continues the concept of appointments based on merit, but redefines the concept.

Section 30(1) states that appointments to or from within the public service must be based on merit and free of political influence. According to s. 30(2), an appointment is based on merit when the person meets “the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency” and having regard to:

- additional qualifications that the deputy head considers to be an asset; and
- current or future operational requirements and needs of the organization as identified by the deputy head.

Under this definition, deputy heads establish the staffing requirements, by defining:

- the needs of their department or organization;
- operational requirements;
- essential qualifications;
- qualifications that will be an asset to the job but that are not essential.

The new PSEA provides that it is not necessary to consider more than one person in order for an appointment to be based on merit (s. 30(4)). Moreover, advertised or non-advertised appointment processes can be used (s. 33).

The current PSEA states that appointments must be made from within the public service where possible (s. 11).<sup>(3)</sup> Under the new PSEA, there will no longer be a preference for hiring from within the public service.

The PSC will be able to create an “area of selection” for external or internal appointments by establishing geographic restrictions, organizational restrictions or occupational criteria or by establishing equity parameters (s. 34(1)). Employees of separate agencies will be eligible to apply for jobs that may be limited to applicants from the core public administration (s. 35(1)).

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(3) Section 1 of the PSEA states: “Appointments shall be made from within the Public Service except where, in the opinion of the Commission, it is not in the best interests of the Public Service to do so.”

The new PSEA establishes a priority continuum for appointing individuals to positions in the public service. The following types of employees have priority in obtaining positions, in order ranking from the top downwards:

- employees scheduled to be laid off (surplus employees) (s. 40);
- employees on a leave of absence (s. 41(1));
- employees on the staff of a Minister, the Leader of the Opposition in the Senate or the Leader of the Opposition in the House of Commons who were public service employees prior to taking on that position or who have met the essential qualifications for a public service position in an advertised external job competition (s. 41(2));
- senior staff – executive assistants, special assistants or private secretaries – who have been employed for at least three years in the offices referred to above have priority for appointment to positions equivalent to that of executive assistant to a deputy head (s. 41(3));
- employees who have been laid off (s. 41(4)); and
- persons who by PSC regulation have been given priority (s. 22(2)(a)).

Subject to the above-listed priorities, veterans have priority over other applicants in an external job competition (s. 39).

The priority for laid-off employees, however, does not extend to laid-off term employees (s. 45). Furthermore, employees who refuse a reasonable job offer or accept an unreasonable job offer in situations where their work is being transferred outside the core public administration are deemed to be laid off and thus relegated to a lower position on the priority list (s. 46).

## 6. Casual Employees

Section 50 deals with casual employees – employees who work for no more than 90 days in a calendar year. Casual employees are not eligible to participate in internal appointment processes.

## 7. Deployment

Deployment is the transfer of a person from one position in the public service to another. The deployment provisions of the new PSEA are generally similar to those of the current Act. However, the new provisions relating to consent to deployment are more specific than the equivalent provisions of the existing PSEA. Section 34.2(3) of the current PSEA states that an employee may not be deployed without his or her consent unless deployment is a condition of the employee's present job. The new PSEA continues this provision, and also allows a deputy head to deploy an employee without consent when the employee is found to have harassed another person in the course of employment (s. 51(6)).

Under the present PSEA, a PSC investigator handles deployment complaints. Under the new legislation, such complaints are subject to a grievance procedure under the PSLRA.

## 8. Term Employees

Sections 58 and 59 of the new PSEA cover term employees – employees who are employed for a fixed term. Term employees will be automatically converted to indeterminate status at the end of the cumulative period of employment specified by the employer (the Treasury Board or a separate agency) and in circumstances determined by the employer. These conversions will not be considered new appointments and will not be grounds for initiating a complaints procedure under the Act.

In addition, the renewal of a term employee will not constitute an appointment and will not be grounds for initiating a complaint.

## 9. Probation

The provisions of the new PSEA relating to probation (s. 61-62) are essentially the same as those of the present Act (s. 28), except that employees who are dismissed while on probation may, under the new provision, be given severance pay for their notice period.

## 10. Layoffs

Under s. 65 of the new PSEA, a laid-off employee can bring a complaint to the new Public Service Staffing Tribunal that his or her selection for layoff constitutes an abuse of authority. He or she cannot complain, however, about the decision to lay off employees, the number of employees to be laid off or the part of the organization to be laid off.

## 11. Investigations and Complaints

The new PSEA makes several important changes to the investigations and complaints procedures found in the current Act.

Under s. 21 of the existing Act, appointments made through internal appointment processes can be appealed to a PSC Appeal Board in the following circumstances:

- unsuccessful candidates in an internal competition can appeal the appointment of a successful candidate;
- individuals who meet the established selection criteria can appeal an appointment made from within the public service without competition.

The new PSEA replaces the s. 21 appeals process and the appeals boards with a new process and a new adjudicative body – the Public Service Staffing Tribunal (PSST).

Under sections 74, 77 and 83 of the new PSEA, complaints can be made to the PSST in the following situations:

- A person whose appointment has been revoked by the PSC or a deputy head after an investigation of an internal appointment process reveals an error, omission or improper conduct affecting the selection of the person can lodge a complaint with the PSST that the revocation was unreasonable (s. 74).
- An unsuccessful candidate in an area of selection for an advertised internal appointment process, or any person in an area of selection in relation to a non-advertised internal appointment process, may file a complaint with the PSST about an appointment on the following grounds:
  1. abuse of authority by the PSC or the deputy head in choosing a particular person in relation to the merit criterion;
  2. abuse of authority by the PSC in choosing between an advertised or non-advertised internal appointment process;
  3. denial of the right to be assessed in the official language of one's choice (s. 77).
- Where an appointment is made as a result of implementing corrective action ordered by the PSST, a complaint can be initiated with the PSST on the basis of abuse of authority (s. 83).

With respect to most complaints to the PSST, complainants will have to prove that there has been an abuse of authority associated with action about which a complaint has

been launched. In the case *Tucci v. Attorney General of Canada*,<sup>(4)</sup> the Federal Court accepted five generic types of abuses in the exercise of discretion that could apply when abuse of authority was being claimed. These are:

- an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations;
- acting on inadequate material, including where there is no evidence or without considering relevant matters;
- an improper result, including unreasonable, discriminatory or retroactive administrative actions;
- an erroneous view of the law; and
- refusing to exercise discretion by adopting a policy that fetters the ability of the decision-maker to consider individual cases with an open mind.

The remedies available to the PSST when a complaint has been substantiated include: ordering the revocation of an appointment, or that an appointment not be made, and taking appropriate corrective action (s. 81). However, the PSST cannot order the PSC to make an appointment or to conduct a new appointment process (s. 82).

Under s. 80 of the new PSEA, the PSST can interpret and apply the *Canadian Human Rights Act* if a discrimination issue arises, and can order monetary relief in accordance with that Act. The Canadian Human Rights Commission will have a right to be notified of discrimination issues raised before the PSST and will have standing to make submissions to the PSST.

Section 87 of the new PSST sets out the types of appointments that do not give rise to a complaint to the PSST under s. 77. These include certain types of reappointments and appointments stemming from the priority appointment provisions.

Under the new PSEA, the PSC will have authority to investigate external appointments and can take corrective action, including revocation, if it determines that merit has not been applied, or an error, omission or improper conduct affected the selection (s. 66). It will

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(4) *Tucci v. Attorney General of Canada*, (1997-02-11) FC T-623-96,  
<http://www.canlii.org/ca/cas/fc/1997/1997fc20126.html>.

have the same authority in relation to internal appointments when the appointment authority has not been delegated to deputy heads; in the latter situation, the responsibility to investigate rests with deputy heads (s. 67).

The PSC will also have the authority to investigate whether an appointment was politically influenced (s. 68) or whether fraud occurred in an appointment process (s. 69), and can take corrective action, including revocation.

## 12. Composition of the Public Service Staffing Tribunal

Sections 88-110 of the new PSEA pertain to the Public Service Staffing Tribunal. The PSST will consist of five to seven permanent members appointed by the GIC for a term of up to five years, subject to reappointment. Temporary members can also be appointed when the workload requires.

The PSST adjudicates complaints in relation to internal appointments and layoffs and can make regulations with respect to complaint procedures.

Decisions of the PSST are protected by a comprehensive privative clause which restricts appeal rights. Section 102(1) states that all PSST decisions are “final and may not be questioned or reviewed in any court.” Section 102(2) goes on to state:

No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.

The presence of a privative clause does not mean that a court can never review a PSST decision. However, the test that one must meet to persuade a court to overturn such a decision is severe. In past decisions, the Supreme Court of Canada (SCC) has indicated that it will review a decision of a tribunal protected by a strong privative clause where the tribunal has either made “an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function.”<sup>(5)</sup>

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(5) *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, La Forest J., <http://www.canlii.org/ca/cas/scc/1989/1989scc111/html>.

The SCC is wary of overturning the decisions of tribunals and other expert adjudicative bodies, pointing out that a “tribunal has the right to make errors, even serious ones, provided it does not act in a manner ‘so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.’”<sup>(6)</sup>

Furthermore, the SCC notes that “mere disagreement with the result arrived at by the tribunal does not make that result ‘patently unreasonable.’ The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.”<sup>(7)</sup>

The definition of “patently unreasonable” was dealt with by Mr. Justice Cory in the 1993 SCC decision in *Canada (Attorney General) v. Public Service Alliance of Canada*.<sup>(8)</sup>

It is said that it is difficult to know what “patently unreasonable” means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary “patently”, an adverb, is defined as “openly, evidently, clearly”. “Unreasonable” is defined as “[n]ot having the faculty of reason; irrational . . . . Not acting in accordance with reason or good sense”. Thus, based on the dictionary definition of the words “patently unreasonable”, it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

### 13. Political Activities

Part 7 of the new PSEA deals with political activity by public service employees. The stated purpose of this part is to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service (s. 112).

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(6) *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 237 as quoted in *CAIMAW v. Paccar of Canada Ltd.*

(7) *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.

(8) *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, Cory J., <http://www.canlii.org/ca/cas/scc/1993/1993scc34.html>.

Section 33 of the current PSEA prohibits public servants from working on behalf of, or against, any political party or candidate.<sup>(9)</sup> Political activity is limited to contributing funds as well as attending political meetings. This section was challenged under the *Canadian Charter of Rights and Freedoms* and struck down by the Supreme Court of Canada in 1991, in so far as it applies to public servants other than deputy heads. Commenting on section 33, Sopinka, J. noted:

...the restrictions apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy.<sup>(10)</sup>

The new PSEA provisions allow public servants to engage in any political activity as long as it does not impair their ability to do their job in a politically impartial manner (s. 113). Political activity is defined in terms of supporting or opposing a political party or a candidate or seeking a nomination or being a candidate in a federal, provincial, territorial or municipal election (s. 111). The scope of prohibited political activities will be further defined in regulations to be made by the GIC on the recommendation of the PSC.

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(9) Section 33 of the PSEA states, in part:

33. (1) No deputy head and, except as authorized under this section, no employee, shall

- (a) engage in work for or against a candidate;
- (b) engage in work for or against a political party; or
- (c) be a candidate.

(2) A person does not contravene subsection (1) by reason only of attending a political meeting or contributing money for the funds of a candidate or of a political party.

(3) Notwithstanding any other Act, on application made to the Commission by an employee, the Commission may, if it is of the opinion that the usefulness to the Public Service of the employee in the position the employee then occupies would not be impaired by reason of that employee having been a candidate, grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election, for a period ending on the day on which the results of the election are officially declared or on such earlier day as may be requested by the employee if the employee has ceased to be a candidate.

(10) *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69,  
<http://www.canlii.org/ca/cas/scc/1991/1991scc51.html>.

The new PSEA also establishes certain ground rules for public servants wishing to seek a nomination as a candidate or to be a candidate in a federal, provincial, territorial or municipal election (s. 114-115). In all these situations, the individual must obtain the consent of the PSC. The present PSEA requires PSC permission to be a candidate in federal, provincial and territorial but not municipal elections.

Deputy heads cannot participate in any political activity other than voting (s. 117). Under the current PSEA, deputy heads can also contribute money to a candidate or a party.

The PSC has authority to investigate allegations that an employee has breached the political impartiality provisions or has failed to obtain PSC permission to become a candidate. The PSC also has authority to investigate allegations that a deputy head has contravened the applicable prohibitions relating to political activity. In all situations, a PSC investigation can be initiated only pursuant to allegations made by an individual who has been or is a candidate for election (s. 118-119).

#### 14. Statutory Review

Section 126 provides for a review of the new PSEA after seven years by a Minister designated by the GIC. The Minister's report of the review is to be tabled in the Senate and the House of Commons.

#### D. Amendments to the *Canadian Centre for Management Development Act*

Part 4 of the PSMA amends the *Canadian Centre for Management Development Act* ("CCMD Act").<sup>(11)</sup>

Among other things, the *Canadian Centre for Management Development Act* will be renamed the *Canada School of the Public Service Act*, and the *Canadian Centre for Management Development* will be renamed the *Canada School of the Public Service*. Training and Development Canada, currently administered by the PSC, will be amalgamated into the new *Canada School of the Public Service* (CSPS).

The scope of the School's operations will be extended beyond public sector management to encompass research, study and training in relation to public sector employees generally. It will also assist deputy heads in meeting the learning requirements of their organizations, including the delivery of training and development programs (s. 4).

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(11) Statutes of Canada, 1991, c. 16, <http://laws.justice.gc.ca/en/C-12.8/26440.html>.

The title of the head of the School will be changed from the “Principal” to the “President” (s. 13).

Like the CCMD, the CSPS will be able to charge fees for services and the use of facilities. Under a new provision, however, revenue from fees in a given year can be carried forward and applied to expenditures in the next fiscal year (s. 18(2)).

## COMMENTARY

Bill C-25 makes significant changes to legislation governing the federal public service. A number of these changes have widely been seen as constructive. Allowing the new Public Service Staffing Tribunal to apply the *Canadian Human Rights Act*, converting term employees to indeterminate status after a specified term, requiring all departments to establish labour-management committees to discuss workplace issues, establishing the ability to file policy grievances and introducing public interest commissions to deal with breakdowns in labour-management negotiations are just some of the changes that have received positive comments.

Other changes are likely to generate considerable discussion. The new definition of “merit” is one of these. Under the current *Public Service Employment Act*, hiring on the basis of merit essentially means that the “best qualified” candidate for the job is chosen. The new definition of merit – meeting the essential qualifications for the work to be performed – introduces a measure of flexibility into the hiring process, but it may also, in the view of some, open the door to favouritism and result in a less qualified public service.

The new political activities provisions of the PSEA may also raise some concerns. While many may welcome increased flexibility for public servants when it comes to political activity, others question the impact of the provisions on the ability to maintain a politically neutral public service. In a recent article in the *National Post*, Gordon Robertson, a former Clerk of the Privy Council, expressed concern about the changes, as did Professor Donald Savoie, who argued that political involvement should be banned for all senior managers in the public service.<sup>(12)</sup>

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(12) Bill Curry, “Letting public servants become politically active a ‘mistake’: former advisor to PMs,” *National Post*, March 2003.