The Public Service Modernization Act
Christopher Rootham, Nelligan O'Brien Payne LLP

Introduction

On February 6, 2003 the government introduced the *Public Service Modernization Act.* This Act makes four significant amendments to the way the public service is managed. First, it enacts a new *Public Service Labour Relations Act* (*PSLRA*) to regulate the relationship between unions and the employer. Second, it amends the *Financial Administration Act* to devolve certain powers from the Treasury Board to Deputy Heads. Third, it enacts a new *Public Service Employment Act* to regulate the appointment process in the public service. Finally, it creates a new Canada School of Public Service, amalgamating the Canadian Centre for Management Development and Training and Development Canada.

We have prepared a short summary designed to briefly analyze the important legal changes proposed in the *Public Service Modernization Act.* It highlights the most important initiatives in the Act, as well as those areas that have caused us some concern. This summary only discusses the first three changes mentioned above, and does not touch on the creation of the Canada School of Public Service.

The changes proposed in the *Public Service Modernization Act* with respect to appointments and human resource management are significant and will affect the working lives of federal public servants. The government has made these changes with an eye to making the public service appointments process more efficient, and empowering lower level management to exercise greater decision-making over staffing. However, we are concerned that the government has also stripped away some important procedural rights in its quest for greater efficiency. Our summary below identifies some of our more significant concerns with the new *Public Service Employment Act.*

The *Public Service Modernization Act* also purports to strengthen the current framework for labour relations by providing a more cooperative relationship between management and unions. The Advisory Committee on Labour-Management Relations in the Federal Public Service (the "Fryer Report") recommended major changes in the legislation governing labour-management relations in the public service. The new *Public Service Labour Relations Act* has accepted some of those recommendations, but has fallen short of implementing the sweeping changes recommended in the Fryer Report. The new Act goes some way to bringing public service labour relations in line with what is provided in the *Canada Labour Code*; however, the new Act falls short of expectations in several key areas including dispute resolution and co-development initiatives.

Unions and employees should be aware that this Act has only just been introduced in the House of Commons. Also, the Act has been structured in a way that almost guarantees a phased-in approach to implementation. This gives people interested in the Act the time to argue in favour of changes to this new Act. A reasoned critique of the Bill will hopefully cause Members of Parliament to rethink some parts of the Act that cause the greatest concern. We hope that this summary will allow you to begin considering just how to make such a reasoned critique to the committee.

1. Addition of a preamble

The government has added a preamble to the new *PSLRA*. Among the purposes of the legislation are a commitment to mutual respect and harmonious labour relations, and fair, efficient and credible resolution of the terms and conditions of employment. The paramount purpose of the new *PSLRA*, however, is the protection of the public interest.

The Fryer Report recommended that any revised Act contain a preamble setting out the principles underlying the legislation.

2. A New Board: Public Service Labour Relations Board

With the new Act comes a new Board: the Public Service Labour Relations Board (PSLRB). The new Board has three mandates: adjudication, mediation and compensation and research services. The Board is also required to offer administrative support to the National Joint Council. Some other minor amendments have been made: board members serve for 5 years instead of 10, and disputes under Part I of the new Act (i.e. disputes that do not result from the grievance process) are determined in front of a panel of 3 Board members instead of just 1.

The most significant change to the PSLRB from the old Public Service Staff Relations Board is that the PSLRB will be a "representative" Board. This means that the Board will be comprised of union nominees, employer nominees, and neutrals. There must be an equal number of union and employer nominees selected to become members of the Board.

Board members remain so long as they demonstrate "good behaviour"; however, the new Act adds that the government can dismiss Board members for "cause." This brings the new Act in line with the *Canada Labour Code*.

The powers of the Board include anything "incidental to the attainment of the objects of the Act." However, there is no explicit power to grant time extensions. This power is most likely implied in the Board's general power to attain the objects of the Act; however, the *Canada Labour Code* states explicitly that the Canada Industrial Relations Board may extend any time limit in Part I of the *Code*. It remains to be seen whether this was a deliberate omission on the part of the government, and whether it will seek to rely upon this omission when defending late applications brought before the PSLRB. The old Act did not have a provision allowing for the extension of time either; however, the PSSRB Regulations do have such a provision to extend any time contained in those Regulations.

The new Board also has been granted a new explicit power to order a pre-hearing conference. This simply reflects the current Board's practice of assisting parties in deciding issues on their own. It also reflects the new conciliatory thrust of the legislation as a whole.

The government has added a privative clause to the new *PSLRA*. The *Public Service Staff Relations Act* used to have a privative clause; however, it was removed by the government in 1993 after it lost a court

case against the Public Service Alliance of Canada. A "privative clause" is a clause in legislation that protects the decision of a particular board or tribunal from interference from the courts. Usually, the presence of a privative clause means that a Board's decision on most issues cannot be overturned unless it was "patently unreasonable." The Supreme Court of Canada in the 1993 decision concluded that decisions of the Public Service Staff Relations Board could not be overturned unless its decision was "patently unreasonable". As a consequence, the government removed the privative clause from the old Act. In the *PSLRA*, the government has put a strongly worded privative clause back in. This will mean that courts will treat decisions of the new Board with greater deference.

Finally, the *PSLRA* gives the new Board standing to intervene when parties challenge its decisions in the courts. This means the Board has the same powers that were recently granted to the Canada Industrial Relations Board.

3. New Employees who may join unions

For the first time, legal officers (in both the Department of Justice and the Canada Customs and Revenue Agency) and Treasury Board officers are not *per se* excluded from union membership and collective bargaining.

The main exclusions left are managerial and confidential employees. When determining whether an employee is in a "managerial or confidential", the burden is on the union to demonstrate that the employer's classification is wrong. This distinguishes the new Act from other labour relations statutes in Canada, where the burden is on the employer to demonstrate that a person is a managerial or confidential employee.

4. Consultation Committees

The new Act creates an institutional structure for co-development between unions and employers known as "Consultation Committees". The Deputy Head must establish a Consultation Committee within each department. This Committee may then negotiate "co-development of workplace improvements." Negotiation may take place under the auspices of the National Joint Committee.

The Fryer Report advocated that co-development take place on a department-level on certain issues such as work schedules, operations issues and technological change. The Fryer Report also recommended that the National Joint Committee play a role in this co-development, which the new Act provides. However, the Fryer Report further recommended that co-development disputes be resolved through a third-party impasse resolution system, similar to that used by the National Joint Committee. The new Act does not set up any system for dispute resolution, leaving the final authority with the employer.

5. Certification of Bargaining Units

The *PSLRA* has added a new "statutory freeze" period during the certification process and 30 days thereafter. A "statutory freeze" means that the employer cannot change the terms and conditions of employment without the union's consent after a union has applied to be certified as the bargaining agent for a particular bargaining unit. This type of provision is standard in private sector labour Acts, and is

designed to prevent the employer from offering inducements to employees to vote against a union or punishing them if they do.

The old Act forbade unions who represent civil servants from receiving money from or donating money to political parties. That provision has been removed, meaning that public sector unions are free to donate money to political parties.

The new Act allows parties to apply to the Board for a review of bargaining unit structures, and to review whether certain employees are managerial or confidential and therefore excluded from a bargaining unit.

Finally, the new Act sets out provisions with respect to the conversion of a part of the core civil service to a separate agency. The transitional provisions are similar to those in the Act creating the Canada Customs and Revenue Agency, and in the old Act. Those provisions include:

- The continuation of the collective agreement in the new agency;
- The Board will determine new bargaining units;
- A party can apply to the Board for permission to negotiate a new collective agreement; and
- If notice of collective bargaining was given before the new agency was created, that notice is not binding on the new agency and the union must wait 120 days to apply to the Board for permission to engage in collective bargaining. This is designed to give the Board a chance to decide all consequential issues (such as bargaining unit structure) before collective bargaining begins in earnest.

6. Collective Bargaining and Dispute Resolution

The new Act maintains the old Act's provisions concerning the union's choice between arbitration and conciliation. Essentially, the union involved gets to choose between binding arbitration and conciliation/strike as the final dispute resolution mechanism for their bargaining unit. The union can apply to change the process, but only up until the day that notice to bargain has been given.

However, the new Act does permit the union and employer to agree to settle their dispute by way of binding determination. This joint election can be made at any time, including during the collective bargaining process or even during conciliation.

The Fryer Report recommended that this "choice of procedures" model be replaced by a more flexible dispute resolution procedure run by an independent Public Interest Dispute Resolution Commission. The government has gone part of the way towards that model. If the union has chosen conciliation, then a conciliation board called the "public interest commission" will be appointed. The Minister appoints the commission, but must appoint those commissioners recommended by the Board, who in turn must defer to the wishes of the parties. The parties can then decide that the commission's decision on some or all of the issues being examined will be binding on them. As stated above, the parties are also free to agree to have their dispute settled by binding determination if they so agree.

The government has undermined the credibility of the "choice of procedures" system over the past few decades by periodically passing legislation preventing unions from choosing binding arbitration. The most recent "arbitration freeze" spanned from 1996 until 2001. If the government is serious about allowing unions to choose arbitration, then it must somehow assure them that it will not remove that option. The Fryer Report's independent commission model would have served that purpose; since it is unwilling to go that far, the government must strive to restore its credibility by not legislating away a union's right to choose arbitration.

7. Essential Services Provisions

The old Act stated that employees in positions "necessary in the interest of the safety or security of the public" were not permitted to go on strike. The new Act keeps that basic definition, but gives greater discretion to the employer in determining the number of employees that may not go out on strike.

First, the employer has the exclusive right to determine the level at which an essential service must be provided to the public. In any dispute over an essential services agreement, a union is not permitted to argue that the level of service designated by the employer is too high, or is unnecessary to protect the health or welfare of the Canadian public. This distinguishes the new Act from the *Canada Labour Code*, which states that during a strike or lockout, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods "to the extent necessary to prevent an immediate and serious danger to the safety or health of the public." Instead, the employer gets to choose an arbitrary level of service that needs to be provided to the public, and designate enough employees to ensure that the level of service is met.

Second, the employer does not need to make any changes in the manner in which it operates. Therefore, the union cannot argue that the employer designated too many employees as essential on the grounds that some employees could work more overtime.

Third, the employer and the union must negotiate which employees are essential. If the parties cannot come to an agreement, then the PSLRB decides which employees are essential. However, the Board order cannot affect the level, extent or frequency of the essential service, nor can the Board have regard to the possibility of hiring new workers or contracting out services during the strike.

Finally, under the old Act the essential services agreement would be renegotiated 3 months prior to each strike. Now, the essential services agreement continues in force until renegotiated. Either party can trigger a renegotiation.

8. Other Strike Limits

The new Act, for the first time, requires unions to hold secret ballots before going out on strike. This brings the legislation in line with most other labour legislation in Canada. Since most unions canvassed their members in some form before going out on strike, and would not call a strike without some assurance that its members supported it, this legislative change is unlikely to make much difference.

There are also new limits on when a strike may occur. Strikes may only occur:

- More than 30 days after an essential services agreement is in place (or has been amended); and
- More than 7 days after the Public Interest Commission (the conciliation body) has sent its report, or more than 7 days after the Commission has given notice that it will not send a report.

There is also a new provision preventing striking employees from interfering with essential services, breach of which is punishable by fines.

9. Unfair Labour Practices

The new Act revamps its unfair labour practice provisions. The old prohibition on discrimination against employees who engage in union activities remains, as does the duty of fair representation.

The new Act adds a provision allowing employer "free speech": the employer is free to express its opinion so long as it does not use threats, coercion, intimidation, promises or undue influence.

The new Act contemplates union members being allowed to conduct union business during working hours or while being paid by the employer by explicitly stating that such an arrangement does not constitute an unfair labour practice.

The remedies for unfair labour practices have been set out in greater detail. Damages are to be paid to reflect amount that an employee would have been paid had the unfair labour practice not have been committed. However, the remedial section states that remedies "include" that amount; therefore, the new Act leaves open the possibility of "punitive damages" or an award that is designed to punish the employer for unfair labour practices.

10. Grievances

The new Act makes several changes to the way that grievances are adjudicated.

First, the Deputy Head now has a duty to establish a "conflict management system" in consultation with the union. This means that each department may implement a different grievance system.

Second, the new Act states that an employee may not present a grievance on an issue in respect of which an administrative procedure for redress is provided under another Act of Parliament, except for the *Canadian Human Rights Act.* This provision is designed to overturn the 1999 decision of the Federal Court of Appeal in *Canada (Attorney General)* v. *Boutilier*, which held that any matter that could be determined by the Canadian Human Rights Commission was outside the jurisdiction of the grievance process. In *Boutilier* itself, Boutilier's collective agreement provided for "marriage leave." Boutilier applied for "marriage leave" when he underwent a "commitment ceremony" with his same-sex partner. When he was refused, he grieved. The Federal Court of Appeal held that this was a matter for the Canadian Human Rights Commission, not the grievance procedure. This statutory change brings the Act

in line with the rest of the country where arbitrators have jurisdiction over human rights matters that arise out of the interpretation of the collective agreement. It also allows human rights matters to be determined more expeditiously, instead of using the cumbersome human rights complaint procedure. However, the Canadian Human Rights Commission is not left out completely; it must be given notice of any human rights issue that arises in adjudication, and has standing to appear before the adjudicator. Presumably this is to ensure that adjudicators – who are not experts in human rights law – have the benefit of the Commission's expertise when necessary.

Third, an employee can now send a deployment complaint to adjudication where the complaint is that the deployment was made without consent. This used to be determined by a Public Service Commission investigator.

Fourth, the type of matter that may be referred to adjudication has changed slightly. Instead of requiring a "financial penalty" for non-disciplinary adjudications, the Act now requires a demotion or termination. For example, a non-unionized employee could not bring a dispute about overtime to adjudication. A dispute impacting terms and conditions of employment that does not result in a termination or suspension may only be grieved up to final level.

Fifth, decisions of an adjudicator are now protected by a strong privative clause. This again brings the new Act in line with other labour relations statutes in Canada.

Sixth, unions are now allowed to bring a "group grievance" – or what we are calling a "class action grievance" – in certain cases. Group grievances involve matters that could be brought by an individual, but affect a number of employees. One example of a possible group grievance would be Treasury Board's interpretation of the Terms and Conditions Policy as it applies to retroactive increases in pay when an employee is deployed to a new position. Currently, there are many grievances awaiting determination on the issue of whether an employee who is promoted receives a retroactive increase in pay level if her old position receives a retroactive increase in pay as a result of a new collective agreement or arbitration award. Under the new Act, instead of proceeding by way of numerous individual grievances, the union could consolidate the grievances into one group grievance. The union must get the consent of each employee prior to bringing the grievance, and the group grievance can only relate to a single "portion" of the federal public administration. Employees can withdraw from the group grievance at any time.

Seventh, the new Act explicitly sets out a procedure for policy grievances – grievances that relate to the application of a collective agreement to the bargaining unit generally. Arbitrators have also required policy grievances to be about subjects that could not be brought by one or more individual grievance. An adjudicator's remedial powers in a policy grievance are limited to a declaration as to the correct interpretation of the collective agreement, and an order requiring the employer or union to apply the collective agreement correctly.

Eighth, Adjudicators have been given the power to give an award under the *Canadian Human Rights Act* of up to $20,000 for "pain and suffering", and up to $20,000 as punishment for intentional or reckless violation of the employee's human rights.

Finally, the new Act has ordered Adjudicators to defer to the decision of a Deputy Head when determining whether a demotion or termination based on unsatisfactory performance was for just cause. Essentially, the employee must now demonstrate not that the Deputy Head was wrong, but that the Deputy Head was "unreasonable" in his or her assessment of performance.

11. Conclusion

The new Act makes a number of changes to the labour relations scheme in the federal public service. However, when compared to the sweeping changes recommended in the Fryer Report, the new Act falls short of expectations. By our analysis, the new Act implements 8 of the 33 recommendations of the Fryer Report in their entirety, and goes some way towards implementing another 4 recommendations. For example, the new Act allows for departmental co-development negotiations, but does not provide for any dispute resolution system in the event that the parties are unable to come to an agreement. The new Act ignores certain other recommendations of the Fryer Report, including:

- Allowing unions to negotiate changes to the classification system and the pension plan;
- Defining essential services as those necessary to prevent "immediate and serious danger to the safety or health of the public", which is the definition in the *Canada Labour Code*; and
- Creating an independent Public Interest Dispute Resolution Commission that reports directly to Parliament.

Changes to the Financial Administration Act

1. Some changes to common terms

The new Act makes two changes to common terms in the *Financial Administration Act.* First, the term "personnel management" has been changed to "human resources management."

Second, the new Act divides the public service into parts. The "public service" now refers to all departments and agencies listed in Schedules I, IV and V to the Act. Schedule I includes the main departments of the civil service; Schedule IV lists various agencies, tribunals and other entities; and Schedule V lists the "separate agencies". The term "special agency" means what is commonly referred to as a "separate employer" – Canada Customs and Revenue Agency, for example. The "core public administration" is comprised of employees in Schedules I and IV.

2. Increase in power of Deputy Heads

The amendments to the *Financial Administration Act* devolve many powers of the Treasury Board to the Deputy Heads. The powers devolved to Deputy Heads are:

- Training and development;
- Merit awards;
- Standards of discipline, including what penalties to impose; and
- Power to impose non-disciplinary penalties (for unsatisfactory work).

The Treasury Board always had the power to authorize Deputy Heads to act on its behalf on these matters, and in many cases Deputy Heads were already exercising these powers. However, the statutory change is consistent with the general thrust of the new *Public Service Employment Act* (discussed below) – namely, that decisions be made at the lowest possible level of authority.

The Treasury Board has gained two new powers under the *Financial Administration Act*: to establish policies and issue directives for the exercise of power by Deputy Heads, including policies and directives concerning the grievance process. Essentially, Treasury Board's role is meant to be advisory and supervisory: it develops policies, and then ensures that those policies are implemented by Deputy Heads.

3. National Joint Council

The new Act states that National Joint Council agreements do not apply when or if part of the core public administration is transferred outside of the public service. This means that NJC agreements still apply to employees whose departments are changed into separate agencies.

A New Public Service Employment Act (PSEA)

1. A new preamble

The new *Public Service Employment Act* contains a preamble setting out its general purposes. The most interesting clause in the preamble is as follows:

> Delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service mangers the flexibility necessary to staff, manage and to lead their personnel to achieve results for Canadians.

As mentioned above, this is part of the cultural change that the Bill as a whole is trying to achieve: delegating authority to as low a level as possible.

2. The Public Service Commission

The new *PSEA* makes several changes to the Public Service Commission. First, 2 of the 3 PSC Commissioners are now part-time.

Second, the new *PSEA* sets out three duties of the PSC:

- Appointing to the public service;
- Conducting investigations and audits; and
- Administering the oversight of political activities of public service employees.

Third, the new *PSEA* requires the PSC to consult with unions on the appropriate principles for appointments and lay-offs.

Fourth, the provisions concerning revoking appointments have been amended. A Deputy Head can now revoke an appointment directly so long as the appointment was made from within the public service. The PSC then can re-appoint that employee to another position in the public service. The Deputy Head is subject to PSC policies in this regard.

Fifth, the PSC has the power (upon the approval of the Governor in Council) to exclude any position from the *PSEA*. The PSC must consult with the employer in making this decision, but not with the unions. The PSC then makes regulations that exclude employees from the *PSEA*.

Finally, the PSC has been granted new regulatory power to set out the timelines and process for any complaints or investigations. The Treasury Board also has new regulatory power under the *PSEA* to define a "promotion" and establish probation periods and "notice periods" for probationary employees.

3. Appointments

Probably the most fundamental changes to the *PSEA* relate to the appointments process.

First, the definition of "merit" has been radically altered. The new definition declares that a meritorious appointment is one free from political influence. More importantly, the definition of "merit" has been altered so that it is no longer necessary to appoint the most qualified candidate in order for the appointment to be in accordance with merit. Instead, all that the new "merit principle" requires is that:

- The PSC is satisfied that the candidate meets the essential qualifications for the job;
- The candidate meets such additional (non-essential) qualifications that the Deputy Head considers an asset;
- The candidate meet the current and future operational requirements (as defined by the Deputy Head); and
- The candidate meets the current and future needs of the organization or the public service.

The last three qualifications are not necessary conditions to an appointment: the only necessary condition is that the appointee be basically qualified.

It is no longer necessary to consider more than one candidate in order for an appointment of that person to be according to "merit." Further, the employer (Deputy Head or separate agency) establishes the qualifications standards, not the PSC.

This new definition of merit places tremendous power in the hands of Deputy Heads (or their delegates) to choose which person they want to appoint. Instead of appointing the best or most qualified candidate, Deputy Heads will simply appoint a candidate of their choosing so long as they meet the essential qualifications for the job. This new procedure will certainly be faster and easier for management to implement. However, it also sends a negative message to Canadians about the public service. The new *PSEA* states that the public service is not out to hire the best candidate, but one that is basically qualified. Essentially, Canadians are being told that appointees to the public service are "good enough for government work", instead of the most qualified individual for the job. The new system may also be seen to be unfair to employees who are the most qualified for an appointment but, for whatever reason, are passed over in favour of a less qualified candidate who meets the minimum requirements of the job.

Third, the preference for hiring from within the public service has been removed. The old *PSEA* (section 10(2)) stated that appointments were to be made from within the public service where possible; that protection for public servants is now gone.

Fourth, the employer may use a non-advertised process in order to fill an appointment. This has always been done to some extent: if a competition was just held for a position and another identical position has opened up, the PSC would just use the list of candidates for the old position. However, this statutory approval of non-advertised process may mean that the public service intends to hire without advertising positions more frequently. Recently, Justice Strayer of the Federal Court of Appeal has commented on the importance of letting all possible candidates know of a competition in the interests of fairness:

> A Selection Board cannot change the advertised qualifications by eliminating one or more of them: to do so is unfair to those who might otherwise have applied but failed to do so because they recognized that they did not have all the advertised qualifications. (*Boucher* v. *Canada (Attorney General)* (2000).

The government obviously does not think that it is unfair to appoint somebody to a position without allowing other potentially interested candidates to apply. The principle of fairness espoused in *Boucher*—that every interested person should be allowed to apply for a position that they are qualified for – is not followed in the new *PSEA*.

Fifth, the PSC can establish an "area of selection" for appointments. This area of selection may include geographic restrictions, organizational restrictions (i.e. the appointment must come from within a certain department or agency), or even equity concerns. These restrictions may apply for both external and internal candidates. Any restrictions requiring applicants to be employees of the core federal administration do not apply to employees of the separate agencies that will be listed by the Governor in Council at some future date.

Sixth, the new *PSEA* sets out a new sequence of priority for certain candidates. Six categories of employees have priority in hiring, and in this order:

- Employees declared surplus (i.e. employees who will be laid off, but whose lay-off is not effective yet);
- Employees on leave of absence;
- Employees on a Minister's staff;
- Minister's senior staff, regardless of whether they were an "employee" prior to working on the Minister's staff; and
- Employees who have been laid off.

In addition, veterans receive priority to other candidates in all external competitions. Finally, employees on "surplus" who refuse a reasonable job offer will be moved to "lay-off" status and therefore lower on the priority list

4. Investigations and Complaints

Along with the change to the definition of "merit", the new *PSEA*'s most significant changes are to the investigations and complaints procedure. The right to appeal an appointment (a section 21 appeal) has been removed entirely, and the Appeal Board has been disbanded. Instead, there are two procedures: an investigation and a complaint.

The PSC may investigate any external appointment process to ensure that its policies have been followed. The PSC may also investigate any internal appointment process when the appointment was not made by the Deputy Head. In those cases, the Deputy Head needs to request an investigation.

The main dispute-resolution system will be the new complaints procedure. The new *PSEA* has created a new Tribunal: the Public Service Staffing Tribunal (PSST). It will have between 5-7 permanent members, plus as many temporary members as required. Permanent members can be full time or part time. The PSST has the power to mediate disputes prior to hearing the complaint.

The PSST, unlike the old Appeal Board, is protected by a strong privative clause. This makes its decisions less susceptible to judicial review. Appeal Board decisions that interpret the merit principle

must be correct in order to avoid being overturned on judicial review. With the new privative clause, it is more likely that PSST decisions must be patently unreasonable in order to be overturned.

When a person brings a complaint to the PSST, it may be made on only one of three grounds:

- Abuse of authority in the choice of person to appoint (this is only available on an internal appointment process);
- Abuse of authority in choosing between an internal and external process; and
- Failure to assess the candidate in the language of their choice.

There are some judicial decisions that discuss the definition of "abuse of authority". The current Act states that a deployment can be complained against on the ground that it constituted an "abuse of authority." The Federal Court has defined the term to mean that a deployment cannot be used as a way to circumvent the appointment process. For example, in *Laidlaw* v. *Canada (Attorney General)* (1999) Revenue Canada tried to deploy an employee into a vacant position, and then give them an immediate promotion as an acting assignment, thus circumventing the appointment process. The Federal Court held that the use of deployment to create the appearance of compliance with the Act is an abuse of authority.

Since the merit principle has been radically altered in the new *PSEA*, this type of activity is less likely to constitute an abuse of process. Instead, an abuse of process will probably fall into one of five categories identified in *Tucci* v. *Canada* (1997):

- An improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations;
- Inadequate material, including where there is no evidence or without considering relevant matters;
- An improper result, including unreasonable, discriminatory or retroactive appointments;
- An erroneous view of the law; and
- Adopting a policy, which fetters the decision-maker's ability to consider individual cases with an open mind.

The term "abuse of authority" is also found in the federal government's harassment policy. In that policy it is defined as follows:

> *Harassment also includes abuse of authority which means an individual's improper use of power and authority inherent in the position held, to endanger an employee's job, undermine the performance of that job, threaten the economic livelihood of the employee, or in any way interfere with or influence the career of such an employee. It includes such acts or misuses of power as intimidation, threats, blackmail or coercion.*

This definition of abuse of authority is an extension of the first category identified above in *Tucci.*

The PSST's remedies include revoking an appointment and awards of up to $40,000 ($20,000 for pain and suffering, $20,000 to punish the employer) if the appointment was made contrary to the human rights of the complainant. The PSST may <u>not</u> order a particular candidate to be appointed, nor may it order the

Deputy Head or PSC to conduct a new competition. If an appointment is revoked, the PSC may appoint that person to another position.

If the remedy chosen constitutes a further abuse of authority, then a person may bring another complaint.

Finally, no complaint can be made where the appointment was made on the basis of one of the six "priorities" listed above.

5. Term Employees

Term employees cannot be "laid off", and so do not receive priority when their contracts come to an end. However, a provision in the new *PSEA* allows a Deputy Head to extend a term employee's term, and this extension cannot be challenged by any other person. Further, a Deputy Head has the right to convert an employee from term to indeterminate, and this appointment cannot be challenged under the procedure discussed below. The new *PSEA*'s only limit on this power is that the employer must specify the circumstances in which it will move a term employee to an indeterminate position. Therefore, the appointment must be by formula, not on a case-by-case basis.

6. Deployment

The definition of "consent" for a deployment is set out more explicitly in the new Act than in the old Act. Consent to a deployment is deemed in two circumstances:

- Where agreement to be deployed is a condition of employment
- Where the deployment is the result of a harassment complaint being made out against the deployed employee.

As stated above, deployment complaints are now handled through the grievance process instead of the PSC dispute resolution system.

7. Probation

The provisions concerning probation are the same as in the old *PSEA*, with one exception. An employee who is dismissed during the probationary period may be offered a severance payment instead of working during their notice period.

8. Lay-offs

An employee can bring a complaint about being laid off, but may not argue about the number of layoffs, or about which part of an organization was laid off. The employee is limited to arguing that his or her layoff constituted an abuse of authority.

Further, an employee on the lay-off list (or a "surplus" employee) no longer has an automatic right to an appointment without a competition, but is just at the top of a priority list. However, since they are on the top of the priority chain, they will be appointed to the first job for which they are qualified.

9. Political Activities

The final change made in the new *PSEA* concerns the political activities of employees in the public service. Public service employees may engage in political activities in accordance with regulations, which have yet to be published. However, there are explicit rules in the new *PSEA* concerning standing for election as a candidate.

If a public service employee stands as a candidate in a federal, provincial or territorial election, they must apply to the PSC for and be granted a leave of absence. Their request for leave will be approved by the PSC only if it is of the opinion that the candidacy will not be perceived as impairing the employees' ability to perform his or her duties impartially.

A public service employee also needs to apply to the PSC for permission to run in a municipal election. A leave of absence is not automatically required; however, the PSC has the power to make the municipal candidacy a condition of its permission.

Deputy Heads may not engage in any political activity. This includes making donations to political parties, unlike the old Act, which permitted donations.

Finally, the new *PSEA* limits on "political activity" apply only to activities related to political parties. This seems to imply that "issue politics" – membership in grassroots movements or interest groups – is permitted under the *PSEA*. However, the new *PSEA* still states, as one of its principles, "political impartiality"; therefore, it is important for employees of the public service to ensure that they continue to be seen as impartial.