



Public Service Commission
of Canada

Commission de la fonction publique
du Canada

Merit and non-partisanship under the *Public Service Employment Act* (2003)

A special report to Parliament by the
Public Service Commission of Canada

March 2011

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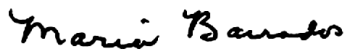
Minister of Canadian Heritage and Official Languages
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

We have the honour of asking you to transmit for tabling in Parliament the Special Report of the Public Service Commission of Canada, *Merit and non-partisanship under the Public Service Employment Act (2003)*.

It is submitted in accordance with sub-section 23(3) of the *Public Service Employment Act*, (S.C. 2003, c. 23, ss.12, 13, as amended).

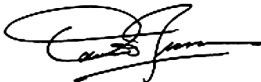
Yours sincerely,



Maria Barrados
President



Manon Vennat
Commissioner



David Zussman
Commissioner

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1. Introduction

- 1.1 We are pleased to provide Parliament with our assessment of the *Public Service Employment Act*¹ (PSEA) after five years of operation.
- 1.2 Over the past 18 months, the Public Service Commission (PSC or Commission) has examined where progress has been made in implementing the Act since it came into full force in 2005 and where improvements are still required. We have also explored what is necessary to more fully realize the potential of the Act and the values-based system that is the cornerstone of both the Act and Canada's professional, merit-based, non-partisan public service. We present the major conclusions of our work here.
- 1.3 Our assessment focuses on three key issues that, in our opinion, need attention and suggested approaches for addressing them over the next four to five years: improving the effectiveness of the staffing system; enhancing the approach for safeguarding the non-partisanship of the public service; and strengthening the governance and operation of the Commission. The analysis in the assessment is supported by a series of documents which, together, provide a unique portrait of activities under the PSEA over the five-year period from 2005-2006 to 2009-2010 and are listed in Appendix 1. Our recommendations for limited legislative change are summarized in Appendix 2.
- 1.4 As the first President and Commissioners appointed under the current PSEA, we have had a privileged vantage point on its implementation. We have drawn on this experience in preparing our assessment, as well as the PSC's various oversight and operational activities of the past five years. We have also consulted with public servants, departments and agencies, human resources professionals, academics, bargaining agents and other interested parties. We have been sharing our analysis with the team working on behalf of the President of the Treasury Board to conduct the formal legislative review of the PSEA that is required under section 136 of the Act. We hope that our observations and recommendations are helpful for Parliament as it considers the results of their work.

¹ *Public Service Employment Act* (2003, c. 22, ss. 12, 13). While some provisions of the PSEA came into effect sooner, following Royal Assent of the *Public Service Modernization Act* in November 2003, the PSEA came into full force as of December 31, 2005.

2. Ensuring the merit and non-partisanship of the public service

- 2.1 One of the cornerstones of an efficient, well-functioning liberal democracy is an independent, professional public service based on the core, interconnected values of merit and non-partisanship. Traditionally, merit and non-partisanship are achieved through the staffing system, by requiring that hiring into the public service, and appointments within it, are based on merit and free of any political influence.
- 2.2 In Canada, the legislative framework for staffing in the federal public service is established by the PSEA. Through the Act and its predecessors, for more than a century Parliament has vested exclusive authority to make appointments to and within the public service in an independent body, the PSC, unless provided for otherwise.
- 2.3 The federal public service is a vital national institution that serves the public interest by providing high-quality advice and support to the government without partisan bias, for today and the longer term. As a result, it is not – and cannot be – staffed in the same way as other organizations. As the Preamble to the PSEA recognizes, in order to serve Canadians well, the public service must be based on the values of merit and non-partisanship, be representative of Canada’s diversity and consist of people “drawn from across the country, reflect[ing] a myriad of backgrounds, skills and professions” and “embod[y] linguistic duality and [...] fair, transparent employment practices.”
- 2.4 The Preamble and the PSEA as a whole also recognize that, given the role of the public service, its staffing practices must be subject to greater scrutiny. The PSC plays an integral institutional function in this regard. It provides independent assurance to Parliament on the merit and non-partisanship of the public service.

3. The *Public Service Employment Act* (2003): From implementation to sustainability

- 3.1 Five years after the coming into full force of the PSEA is too early to draw final, definitive conclusions about its implementation. What we do know is that significant progress has been made.
- 3.2 As we noted in our 2009-2010 Annual Report to Parliament, the essential elements of the Act are now in place, including a highly delegated system for staffing and an effective approach for PSC oversight, as well as a regime for administering Part 7 of the Act regarding political activities by public servants. Progress continues to be made in achieving the objectives of the Act in areas of long-standing concern to the PSC, such as organizational human resources planning and capacity; the use of acting appointments * the hiring of individuals with no previous public service experience directly into indeterminate positions; the recruitment of post-secondary graduates; and access to public service positions. Moreover, the core PSEA values of merit and non-partisanship are being respected overall and the guiding values of fairness, access, transparency and representativeness are generally being respected in staffing decisions across the public service.
- 3.3 The Clerk of the Privy Council, deputy heads and the public service modernization agenda have played key roles in this progress. The efforts made by managers across the public service and the federal human resources community have also been instrumental.
- 3.4 Progress has been achieved, but challenges remain.
- 3.5 Efficiency considerations were major drivers behind the reforms introduced in the current PSEA. The framework governing human resources management in the core public service was widely considered to be unduly rule-bound, complex and outdated, with infrastructure that was cumbersome, costly and outmoded.² The challenge was seen to be to find a way to modernize the existing legislative framework to address these concerns and foster, overall, a more efficient system. In order to ensure that efficiency would be gained without compromising the integrity of the staffing system, the Act set out the values that had to be protected and the results to be achieved.
- 3.6 Five years on, the hoped-for efficiency gains have generally not been achieved. In retrospect, the *diagnostique* underlying the 2003 reforms may not have sufficiently appreciated the challenges of changing staffing in a large, complex public institution. Many expectations were overly optimistic, given the broad, deep and interconnected changes in governance, policies, systems, tools, services and behaviours necessitated by the reforms. This included implementing a regime with broad, values-based policy requirements and balancing increased delegation with strong accountability mechanisms, all in the context of a period of sustained growth in

² See, e.g., Auditor General of Canada, Report to Parliament (April 2000), Chapter 9, "Streamlining the Human Resource Management Regime."

the public service. The need for continued momentum to successfully implement reforms of such magnitude was also underestimated. So, too, was the importance of fostering ongoing learning and adjustment by all key stakeholders, not just the deputy heads and managers who were viewed at the time to be the chief change agents. Staffing reform was much more than a matter of improving efficiencies.

- 3.7 The system established by the PSEA will be tested in the medium term in an environment of continued fiscal restraint in government, where there is still an ongoing need to recruit and retain high-quality employees. Within the public service, hiring and staffing activities are slowing down, baby boomers are retiring and more than half of all permanent public servants now have ten years or less of continuous service. Externally, more pressure will come from a persistently tight Canadian labour market, the increased use of new and existing technologies in the workplace and social and demographic change.
- 3.8 As we noted in our last Annual Report, we believe the system established by the Act will, on the whole, pass the test. Our observations and recommendations are intended to help ensure its sustainability so that Canadians will continue to have the professional, merit-based, non-partisan public service they need and deserve in the years to come.

*** Chapter 3, page 7, paragraph 3.2 - The *Public Service Employment Act* (2003): From implementation to sustainability**

In the text describing the progress made in achieving the objectives of the Act in areas of long-standing concern to the PSC, "... the use of acting appointments and casual workers..." should read, "... the use of acting appointments...".

4. Key issues and future directions

Improving the effectiveness of the staffing system

- 4.1 For more than 100 years, recruitment and staffing have been recognized as key factors in achieving a professional public service that is based on merit and non-partisanship and serves the elected government-of-the-day and Canadians. The decision to make an appointment to or within the public service has major implications for managers, current and future employees and the public service as an institution and each has a legitimately different perspective on what makes staffing effective. Ultimately, the question is how well the staffing system is realizing the values set out in the PSEA and its Preamble and contributing to sustaining the public service as a vital element in Canada's system of governance.
- 4.2 Five years after the coming into force of the PSEA, there remain substantial opportunities to improve the effectiveness of the staffing system. We have chosen to focus on four: finding an appropriate balance between delegated decision-making and centralized support functions; integrating planning of the permanent and contingent workforces; addressing limitations in the current approach to recourse; and the underlying need for improved data, analysis and measurement for the purposes of accountability.

Focusing on efficiency and effectiveness

- 4.3 As noted earlier, one of the common hopes and expectations of the PSEA was that it would improve the efficiency of staffing. For managers in particular, the focus was on reducing the time to staff and ensuring that candidates were appointed to positions as expeditiously as possible. Despite significant progress having been made over the past five years in reducing the time to staff for collective indeterminate advertised processes, overall, the average time to staff indeterminate positions through an advertised process has remained virtually unchanged since the coming into force of the Act, as has the average time to staff for distinct advertised processes.³
- 4.4 But, more importantly, it is an effective staffing system that is the backbone of a modern, well-functioning professional public service. Effectiveness is not just a matter of time. Rather, the effectiveness of the staffing system must be assessed in terms of the core values of the PSEA and the guiding values which stem from it and are set out in the PSC's appointment policy framework. The perspectives of hiring managers, current and potential employees and the public service as an institution must also be taken into account.
- 4.5 Managers have a legitimate need for a staffing system which offers a variety of resourcing options that are responsive to their operational needs. They also require one which allows them to recruit and appoint qualified candidates in a timely way, often in competition with the private sector. Cost and speed are normally paramount considerations.

³ See PSC Annual Report 2009-2010.

- 4.6 For employees and potential recruits, hiring processes must be fair and transparent. Appointment decisions must be, and must be seen to be, made objectively and free of political influence or personal favouritism. Employees and potential recruits have the right to be assessed in the official language of their choice and it is critical that formal and informal mechanisms be available to address concerns that may arise over the course of the staffing process.
- 4.7 From the perspective of the public service as an institution, staffing represents a major investment of public funds, with the costs increasing substantially if the consequences of poor-quality appointments are taken into account. From this perspective, too, public service positions must be accessible to all Canadians and the public service must be representative of those it serves.
- 4.8 Under the framework established by the PSEA, managers are expected to be guided in their appointment decisions by the values of merit, non-partisanship, fairness, access, transparency and representativeness. Since 2005, significant effort has been made by the PSC, organizations and others to help realize this approach and raise the level of comfort that managers have in operating under the values-based legislative and policy framework.
- 4.9 As we noted in our last Annual Report, managers are still not consistently demonstrating that they understand how to apply and operationalize the values of the PSEA. We therefore encourage continued efforts to strengthen understanding of how a values-based staffing system should work and enhance the information, guidance and tools available to managers and employees.

Balancing delegated decision-making with centralized support functions

- 4.10 The reforms introduced in the current PSEA were intended to produce a highly delegated staffing system – and they have. The PSC has delegated nearly all of its appointment and appointment-related authorities to deputy heads and they, in turn, have sub-delegated these authorities to hiring managers. In addition, under the PSC's appointment framework, deputy heads are responsible for customizing staffing programs and processes in their organizations in accordance with operational requirements. The highly delegated system is accompanied by an integrated system of oversight and accountability, which allows the PSC to fulfill its responsibility to Parliament to provide assurance on the integrity of the staffing system.
- 4.11 In contrast to many expectations in the early phases of PSEA design and implementation, a system of highly delegated decision-making with strong oversight and accountability does not necessarily prescribe a highly decentralized system for operations. The past five years have confirmed the enduring need for some centralized services to assist deputy heads and managers in assuming their roles under the Act, and that centralized services can foster greater efficiencies and improvements in the effectiveness of the staffing system.
- 4.12 There are many staffing services and products that are commonly required and used across the public service where it does not make sense for organizations to duplicate efforts and build their own. These include services leveraging modern information technology (e.g. the Public Service Resourcing System and e-selection tools); processes where there are economies of scale

(e.g. post-secondary recruitment and large collective staffing processes); services requiring specialized expertise (e.g. assessment products); and staffing advice and support that foster consistency in the application of merit and the guiding values.

- 4.13 The PSC has made significant investments to respond to this reality through the transformation of its services and products. After an initial period of internal and external debate about the role staffing services should play following the reforms introduced by the new Act,⁴ in 2006 the PSC launched a four-year initiative to modernize its services and products. Demand – such as for the jobs.gc.ca Web site for job seekers, post-secondary recruitment initiatives, e-testing of candidates and electronic transmission of results to organizations and services to assist managers with volume management – is strong. As Luc Juillet notes in his study on the PSC’s role in the implementation of the PSEA, as of the fall of 2010, the PSC is the “service provider of choice” for over 50 federal organizations.⁵
- 4.14 Looking forward, the PSC’s work with the members of its deputy head-level Advisory Committee⁶ will ensure that its service delivery model continues to adjust and respond to the needs of managers and their organizations in the years ahead. In addition, with the results of the government-wide review of administrative functions and overhead costs, announced in Budget 2010, the PSC and its stakeholders will work together to reduce costs while improving efficiency and effectiveness. The staffing system can make a contribution to this goal through greater centralization of staffing infrastructure.

Integrating planning of the permanent and contingent workforces

- 4.15 Solid planning is an essential element of an effective staffing system. It enables organizations to align their resources with operational requirements and adapt to changes in the environment, including the labour market and the broader economy.
- 4.16 The PSC’s analysis of organizational performance in staffing since 2005 confirms that better human resources planning is critical.⁷ Staffing performance is improved when plans and strategies are concrete and realistic and are used to direct recruitment and staffing activities; when results are assessed against the plans and strategies; and when managers are held accountable for results.

⁴ See PSC, “The Public Service Commission and the implementation of the *Public Service Employment Act* (2003),” a research paper prepared by Luc Juillet, Graduate School of Public and International Affairs, University of Ottawa, 2011.

⁵ See *ibid.*

⁶ The Advisory Committee, made up of deputy heads, provides advice to the PSC on issues concerning the delivery of staffing and assessment services.

⁷ See, e.g., the results of the PSC’s analysis of organizational performance presented in the PSC Annual Report 2007-2008, Chapter 6, “Progress in achieving the objectives of the *Public Service Employment Act*”; and in the PSC Annual Reports 2008-2009 and 2009-2010, Chapter 5, “Management of staffing in departments and agencies.”

- 4.17 Since 2005, departments and agencies have made progress on improving planning for staffing. As shown in our latest Annual Report, about two out of three organizations now demonstrate “acceptable” or “strong” performance in the area of planning for staffing priorities and strategies, compared to one in six in 2007-2008.⁸ The areas of monitoring of staffing results and organizational accountability for results still require attention.
- 4.18 In recent years, integrated planning of the permanent workforce with the contingent workforce has increasingly been identified as another leading determinant of the effectiveness of staffing.⁹
- 4.19 In the federal public service, the contingent workforce is composed of individuals hired for specified periods as term employees, casual workers and students and individuals contracted for specified periods as temporary help workers and contractors.¹⁰ The PSC recognizes the need for these resourcing options because they allow managers and their organizations to meet short-term operational requirements and access specialized skills for a fixed period of time. However, in the public service context, the choice to resource using the contingent workforce must be properly balanced with the need to respect the core PSEA values of merit and non-partisanship and the guiding values of access, transparency, fairness and representativeness.
- 4.20 Over the past five years, the PSC has consistently noted concerns about how parts of the contingent workforce, mainly casuals and temporary help services, are used.¹¹ We are concerned that the contingent workforce has become a *de facto* recruitment strategy for the permanent workforce.¹² Entry into the contingent workforce is generally not subject to the core and guiding values and, once in the contingent workforce, these individuals often have

⁸ This year is used for purposes of comparison, as it was the first year for which the PSC has comparable data.

⁹ See, e.g., National Audit Office. Office of the Comptroller and Auditor General. Central Government's Use of Consultants and Interims (London, October 2010); Conference Board of Canada, Treating Contingent Workers as a Strategic Resource (Ottawa, September 2010); Conference Board of Canada, Contingent Work: Trends, Issues and Challenges for Labour (Ottawa, 1998); and U.S. Merit Systems Protection Board, Temporary Federal Employment: In Search of Flexibility and Fairness (Washington, 1994).

¹⁰ Over the last five years, term employees, casual workers and students have accounted for about 12-13% of the PSEA population. During the same period, as shown in the PSC's Study on the Use of Temporary Help Services in Public Service Organizations, growth in expenditures for temporary help services exceeded growth in expenditures for any of the PSEA employment options available to managers.

¹¹ See, e.g., PSC, Annual Reports 2005-2006 to 2009-2010 and PSC, Study on the Use of Temporary Help Services in Public Service Organizations (October 2010).

¹² PSC studies show that a significant share of contingent workers are eventually hired into an indeterminate position in the public service. The PSC's October 2010 update to its study To What Extent do Casuals Become Employed Under the *Public Service Employment Act*? found that the proportion of casuals with subsequent appointment as a specified term or indeterminate employee has continued to increase, rising from 41% in 1997-2005 to 54% in 2008-2009.

an advantage in subsequent staffing processes and tend to be drawn from the local area, thereby impacting negatively on the guiding values of access and representativeness. This creates risks for the overall integrity of the staffing system.

- 4.21 In this context, more proactive, integrated planning of the permanent and contingent workforces and better tools for workforce management are critical for maximizing the effectiveness of the staffing system. They assume even more importance in the period of ongoing fiscal restraint now facing the public service. This means there must be:
- A shared understanding of the hiring options available to managers to meet short-term requirements and ensure that existing mechanisms are used appropriately;
 - Guidance on the appropriate use of the contingent workforce within the broader context of human resources planning;
 - Improved approaches for recruiting contingent workers, for instance through the establishment of pre-qualified pools of casuals who meet merit in key demand areas¹³; and
 - Added flexibility within the Act, for example with respect to the use of casual workers.
- 4.22 The PSC has initiated research and analysis on the contingent workforce, including drivers of its use, its composition (e.g. demographics and occupational categories) and the routes by which contingent workers enter both the contingent workforce and the permanent workforce. We have also invited the PSC Advisory Council¹⁴ to provide practical suggestions for improving the use of temporary help services.

Addressing difficulties in the approach for recourse

- 4.23 An effective recourse system is another basic element of an effective staffing system. It ensures the integrity of the staffing system.
- 4.24 The delegated staffing model introduced under the PSEA sought to ensure that issues arising from appointment processes could be resolved as expeditiously and as close to the source as possible. The Act established several different mechanisms to address appointment concerns, both formal and informal, as well as new roles and responsibilities. The changes included the creation of the Public Service Staffing Tribunal (PSST), as well as the introduction of informal discussion for those eliminated from an appointment process. The Act also requires that, when the authority to make internal appointments is delegated to deputy heads, they must also be delegated the authority to take corrective measures when, after investigation, they are satisfied that an error, omission or improper conduct affected the selection process.

¹³ Under section 50 of the PSEA, the other provisions of the Act, including that of merit, do not apply to casual workers.

¹⁴ The PSC Advisory Council is a forum for discussion of matters of common concern and interest related to the PSEA. The membership consists of representatives of bargaining agents and the employer.

- 4.25 Progress has been made in achieving the primary objective of the new approach for recourse. This is especially true with respect to informal discussion.¹⁵ In addition, relatively few founded complaints of abuse of authority have been heard at the PSST and many cases put forward to the PSST are closed prior to hearing, or proceed to mediation rather than a formal hearing.
- 4.26 However, as the recourse system has evolved over the past five years, three important problems have come to light.
- 4.27 Our first area of concern is the system of notification set out in section 48 of the Act, in which unsuccessful candidates in an internal process must be notified at least twice: of the name of the person being considered for each appointment resulting from the process; and then of the name of the person(s) to be appointed, or proposed to be appointed, as a result of the process.
- 4.28 The dual nature of the PSEA's notification system means that organizations are required to advise unsuccessful candidates before the final decision to staff has been formalized. It has created significant administrative burden for managers and organizations, especially in the case of processes with large volumes of applicants and processes being used to staff multiple positions. Furthermore, it has created unintended consequences, such as multiple complaints being made by a single unsuccessful candidate as a result of one appointment process.
- 4.29 In our view, section 48 should be amended to establish a system involving only one notification. For instance, unsuccessful candidates could be notified of the name of the person proposed to be appointed as a result of the process to which they have applied, with the proposed appointment to take effect after a waiting period in order to allow a final opportunity for informal discussion. No other notification would be necessary. A requirement could then be introduced in the PSC's policy on informal discussion to ensure that unsuccessful candidates have at least one opportunity to participate in informal discussion as soon as possible after they have been excluded from any process. Combined, these measures would ensure that the benefits of increased transparency are retained and the rights of unsuccessful candidates to recourse are protected, but reduce the administrative burden.
- 4.30 Our second concern is about what has emerged as a key gap in the recourse system: providing effective mechanisms for delegated internal appointments when a deputy head is personally involved in the appointment process, or when an error, omission or improper conduct in a delegated internal appointment comes to light as a result of a PSC audit.
- 4.31 A deputy head may be personally involved in a delegated internal appointment process by serving on an assessment board or providing a letter of reference for a candidate. When a deputy head is involved, given the potential conflict of interest, any subsequent investigation of the appointment process by the deputy head is not an appropriate mechanism.

¹⁵ Based on the Survey of Staffing – Candidates: 2007-2008 and 2008-2009 (weighted data), almost half of unsuccessful candidates in advertised staffing processes participate in an informal discussion following their elimination from a process and, of those, about two-thirds are satisfied with the outcome and 85% with the time it took.

- 4.32 A PSC audit may identify the possibility of an error, omission or improper conduct in a delegated internal appointment process. When this happens, after the final audit report is provided to the audited organization, discussions between the entity and the PSC usually take place to determine whether an investigation of the appointment process should be conducted and, if so, whether it should be conducted by the organization or the Commission.¹⁶ This is often a lengthy process that results in delays in taking necessary corrective action.
- 4.33 The Act currently provides two principal ways to address these situations. Under subsection 67(2), deputy heads with delegated staffing authorities may ask the Commission to conduct an investigation of an internal appointment process and report its findings to the deputy head. Such requests are at the discretion of the deputy head, as are any corrective actions taken by the deputy head in response to the Commission's findings.
- 4.34 For its part, the Commission always has the option of responding to staffing concerns such as those identified through an audit by withdrawing the authorities it has delegated to the deputy head, or imposing conditions on the delegation. This is a heavy-handed and blunt approach. It cannot address an error, omission or improper conduct that has occurred in the past, nor does it allow corrective measures to be taken against particular individuals.
- 4.35 In this context, we recommend that the PSEA be amended to specifically provide the PSC with the authority to investigate delegated internal appointments involving a deputy head or following an audit.
- 4.36 Our third concern is that revocation or corrective action following a fraud investigation is limited to the position for which the investigation was conducted. Employees have attempted to avoid the consequences of a founded fraud investigation by being appointed or deployed to a position elsewhere. To prevent this behaviour, we recommend that the Act be amended to give the Commission the authority to order that no appointment or deployment be made during a fraud investigation and also to revoke any subsequent appointment or deployment that may have taken place.

Improving data, analysis and measurement for greater accountability

- 4.37 Improving data, analysis and measurement must be part of improving the effectiveness of the staffing system. From an accountability standpoint, it is especially crucial in a highly delegated appointment system, where accountability is held *ex poste*, that the right measures are in place to assess performance. While progress has been made on this front since 2005, it remains a persistent challenge.¹⁷

¹⁶ Under the Act, a deputy head may request that the Commission investigate a delegated internal appointment process or choose to conduct an investigation.

¹⁷ See Auditor General of Canada, Report to Parliament (Spring 2010), Chapter 2, "Modernizing Human Resource Management."

- 4.38 The Staffing Management Accountability Framework (SMAF), which sets out elements for a well-functioning appointment system, is the primary basis for the PSC's monitoring and assessment of organizational performance. As such, it is a fundamental accountability mechanism. It must be reviewed and updated on a regular basis as the staffing system matures.
- 4.39 Earlier this year, the PSC started planning for a five-year review of the SMAF. The goal is to ensure that a meaningful accountability framework is in place, one that fosters ongoing improvement. The work is being undertaken in close consultation with departments and agencies, the human resources community and other key internal and external stakeholders and is planned to be completed in 2011-2012.
- 4.40 As recommended by the Independent Review Committee on PSC oversight in 2009, the PSC is implementing a formal data strategy and upgrading supporting information and technology infrastructure to improve reporting capacity and tools and, therefore, accountability. This will facilitate collaboration with all stakeholders to address gaps in data, analysis and measurement and help ensure that policies, guidance, tools and services, at the PSC and in departments and agencies, are evidence-based.
- 4.41 Specific data gaps that constrain performance measurement and effective accountability will need to be addressed. This includes enhancing data collection and analysis regarding collective staffing, time to staff, employment equity, the nature and scope of the contingent workforce, the use of the different recourse mechanisms available under the Act and other factors affecting the effectiveness of the staffing system.

Enhancing the approach for safeguarding the non-partisanship of the public service

- 4.42 The Preamble to the PSEA recognizes the importance of independently safeguarding the merit and non-partisanship of the public service, and Part 7 sets out specific obligations regarding political activities by public servants. In carrying out its work over the past five years, the Commission has identified a number of gaps that require attention.

Experience to date

- 4.43 The current PSEA created several important changes for the PSC and how it implements its responsibilities for protecting the non-partisanship of the public service. In response to the Supreme Court of Canada's 1991 Osborne decision,¹⁸ the Act reintroduced provisions on political activities, while recognizing the right of employees to be politically active. The Court

¹⁸ *Osborne v. Canada* (Treasury Board), [1991] 2 S.C.R. 69.

had found the broad ban in the former Act to be unconstitutional on the grounds that it constituted an unjustifiable infringement of subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.¹⁹

- 4.44 The current Act explicitly recognizes the right of employees to participate in any political activity so long as doing so does not impair, or is not seen to impair, their ability to perform their duties in a politically impartial manner.²⁰ However, it also maintains the distinction in the former Act between how candidacy-related and non-candidacy-related political activities are treated.
- 4.45 The current Act provides a definition of “political activity,” which encompasses both candidacy-related and non-candidacy-related activity. Under the Act, employees must obtain the permission of the PSC before seeking nomination as, or being, a candidate before or during an election period for federal, provincial and territorial elections, as well as for municipal elections. In addition, for federal, provincial and territorial candidacy, employees must request and obtain from the PSC a leave of absence without pay for the election period. Other requirements regarding candidacy activity are set out in the *Political Activities Regulations*. Employees are not required to obtain the PSC’s permission to participate in non-candidacy-related political activities. However, they are responsible for determining whether engaging in such activities would impair, or be perceived by others as impairing, their ability to perform their duties in a politically impartial manner. Advice and guidance is available from the PSC, their organization’s designated political activities representative or their manager. The PSC may investigate any allegation of improper political activity of employees, whether candidacy-related or non-candidacy-related.
- 4.46 Overall, the approach in the current Act seeks to address the concerns raised in *Osborne* by creating a “fine balance” between the individual rights of employees and the public interest in imposing reasonable limitations on those rights in the name of a non-partisan public service.
- 4.47 Operationalizing that balance and the broader vision of a non-partisan public service reflected in the Preamble and Part 7 of the PSEA has been a priority for the PSC. The key conclusion from our work over the past five years is that safeguarding the real and perceived non-partisanship of the public service is an issue that goes beyond staffing and the political activities of public servants as defined in the PSEA. It requires being alert to a broader range of risks to the public service, some of which stem from the natural tension between the public service and the political sphere. It also involves ensuring that effective tools and approaches are in place to address the most significant risks.

¹⁹ Subsection 33(1) of the former PSEA prohibited deputy heads and employees from engaging in work for, on behalf of or against a candidate for a federal, provincial or territorial election, or engaging in work for, on behalf of or against a political party. However, under subsection 33(2), the Act provided that employees, but not deputy heads, did not contravene the Act by donating money to a political party, attending political meetings or, subject to PSC approval, standing for federal, provincial or territorial election.

²⁰ In contrast, under the previous legislation, the test to be applied was whether participation in a political activity would impair an employee’s usefulness to the public service.

- 4.48 Implementation of Part 7 has coincided with a number of changes in the external environment.
- 4.49 There has been an expansion in the avenues available to public servants to exercise their right to political expression, frequently with higher profile and broader reach. The proliferation of advocacy initiatives not associated with a specific candidate or political party, which has been facilitated by social media, is a prime example.
- 4.50 The public service has undergone significant renewal since the PSEA came into full force. As we noted in our 2009-2010 Annual Report, 54% of all permanent public servants now have ten years or less of continuous service. This underscores for us the importance of continually instilling in new recruits, as well as those with longer tenure, a strong sense of what it means to be a non-partisan public servant and why a non-partisan public service matters, in addition to a clear understanding of the requirements of Part 7 of the Act.
- 4.51 There is always a tension between the non-partisanship of a professional public service and the need for a public service to respond effectively and loyally to the direction of elected officials. In the Westminster tradition, we expect a clear demarcation between the political and public service spheres. However, politicization of the public service has become a growing phenomenon in many countries in recent years. As a leading international scholar in the field, Ezra Suleiman, describes it, bureaucracies are increasingly regarded as being solely the instrument of the political party in power and they are being transformed accordingly, increasingly deprived of the relative autonomy that they have historically enjoyed.²¹
- 4.52 Politicization can arise in many ways. As studies of Japan and France have shown, it can be manifested through the selection of appointees to public service positions who are politically affiliated, or the internal promotion of public servants who are deemed to be sympathetic to the government-of-the-day.²² In Australia, New Zealand and the United Kingdom, politicization is seen to be primarily the result of increases in the number of ministerial staff and their influence on the work of the public service, the adoption of public management principles, the over-responsiveness of public servants to the priorities of the government-of-the-day and a growing role for public servants in tailoring and communicating public messages.²³
- 4.53 While the pressures of politicization may not be as prevalent in Canada as in some other countries, Canada has not been immune from them. Furthermore, based on the Commission's activities over the past five years, there are ongoing questions.

²¹ See Ezra Suleiman, *Dismantling Democratic States* (Princeton University Press, 2003).

²² See, e.g., Luc Rouban, "Politicization of the Civil Service in France: From Structural to Strategic Politicization," in B. Guy Peters and Jon Pierre, eds. *Politicization of the Civil Service in Comparative Perspective: The Quest for Control* (Routledge, 2004).

²³ See, e.g., Richard Mulgan, "How Much Responsiveness is Too Much or Too Little?," *Australian Journal of Public Administration*, vol. 67, no. 3 (2008), pp. 345–356; and Kathy Macdermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service* (Australian National University E Press, 2008).

- 4.54 As we noted in our 2009-2010 Annual Report, the relationship between the public service and the political sphere is central to a non-partisan public service. If roles and responsibilities are clearly demarcated, the relationship can help sustain and reinforce the non-partisan character of the public service. If they are not clearly demarcated, the relationship can exert pressures. As the guardian of non-partisanship, the responsibility of the PSC is to ensure such pressures are addressed so that, “in the pursuit of immediate objectives, elected officials do not compromise the ability of future governments and citizens to rely on a professional public service that is able to serve the public interest.”²⁴

Addressing gaps

- 4.55 In this context, we believe it will be important to address gaps in three separate but inter-connected areas: non-partisanship in staffing and senior appointments; political activities by public servants; and the relationship between the public service and the political sphere.
- 4.56 The PSEA’s core value of non-partisanship is intertwined with a number of other concepts and governance regimes, notably the *Values and Ethics Code for the Public Service* and the *Guidelines for Ministers and Ministers of State*. Moving forward to address gaps will therefore require collaboration with other key players, including the Treasury Board of Canada Secretariat, the Office of the Chief Human Resources Officer and deputy heads and their organizations.
- 4.57 More generally, fostering and upholding the non-partisanship of the public service, including being alert to inappropriate behaviour, requires ongoing effort. Public servants at all levels and Parliamentarians have roles to play. So, too, do the Clerk of the Privy Council and deputy heads, given the leadership positions they hold at the interface of the public service and the political sphere.

Non-partisanship in staffing and senior appointments

- 4.58 Since the coming into force of the PSEA in December 2005, the PSC has found little evidence of direct political influence in staffing under the Act. This leads us to conclude that existing PSC policies, guidelines, oversight and communications with stakeholders, combined with continued vigilance by deputies and hiring managers, are up to the task.
- 4.59 In our professional, non-partisan public service, it is well-established that appointments must be independent of elected ministers and that appointments must be merit-based, non-partisan and independently overseen. While the Privy Council Office has put processes in place, there is no independent assurance that appointments to many senior positions in the core federal public service are, in fact, based on merit and not politically influenced. It is these positions that are expected to demonstrate leadership on merit and non-partisanship in their own organizations.

²⁴ L. Juillet and K. Rasmussen. *Defending a Contested Ideal: Merit and the PSC of Canada 1908-2008* (University of Ottawa Press, 2008), p. 235.

- 4.60 These principles should apply to the appointments of deputy heads and associate deputy heads. These appointments are the prerogative of the Governor in Council (GIC). They are less of a concern since, by tradition, they are made from within the merit-based, non-partisan public service. The principles should also apply to the population of more than 400 heads and members of separate agencies and boards in the core public service that are appointed by the GIC.²⁵
- 4.61 The Preamble to the PSEA gives the Commission the role of providing independent assurance to Parliament on the merit and non-partisanship of the public service. It is our opinion that it is time for all *external* appointments to the core public service to be based on merit, non-partisan in nature and subject to independent oversight and reporting. This includes the appointments of deputy heads and associate deputy heads from outside the core public service, as well as the appointments of heads and members of separate agencies and boards from outside the core public service.
- 4.62 In both Britain and Australia, reforms have recently been introduced to ensure greater integrity in senior appointments through a broadening of the application of the merit principle and increased transparency.
- 4.63 Late in 2010, the British government announced the combining of the functions of the First Civil Service Commissioner, who is responsible for overseeing appointments to and within the civil service, with those of the Commissioner for Public Appointments, who oversees the process by which ministers make appointments to public bodies. The holder of the new, independent dual post is responsible for ensuring that senior appointments to and within the civil service, including the top senior positions, and appointments and re-appointments to about 10 000 public boards, commissions and other public bodies are based on “the principle of selection on merit.”
- 4.64 Australia has adopted a different approach, but with similar objectives. The Public Service Commissioner provides assurance, through its Merit Protection Commissioner, that employment decisions in the Australian public service are based on merit. The Public Service Commissioner is also responsible for ensuring that assessments of candidates for appointments to and within the senior executive service are merit-based. Since February 2008, appointments to agency head positions and other positions for statutory office holders working in, or in conjunction with, agencies operating under the *Public Service Act, 1999*, must also be merit-based. Candidates must meet a core set of selection criteria and are assessed by a panel, one of the members of which must be the Public Service Commissioner.
- 4.65 We recommend that further steps be taken to ensure that external appointments of deputy heads, associate deputy heads and heads and members of separate agencies and boards to the core public service are merit-based, non-partisan and subject to independent oversight. This could be done by an organization like the Public Appointments Commission, which

²⁵ There were 406 of these appointees in the core public service as of March 2010, based on the PSC’s Job-based Analytical Information System.

was provided for in the 2006 *Federal Accountability Act*.²⁶ Alternatively, it could be added to the responsibilities of the Public Service Commission.

- 4.66 The PSEA currently allows the GIC to appoint individuals as special adviser to a minister. “Special adviser” is a broad category and there is no limit on the number of individuals who may be so appointed. We recommend that this provision of the Act be removed, or that more precision be added to the Act regarding the use of these appointments.

Political activities by public servants

- 4.67 The infrastructure to support operation of Part 7 of the Act is in place and functioning relatively well. However, there are several issues that need to be addressed to ensure that the regime is sustainable for the future.
- 4.68 More work is still required to improve the level of understanding and awareness of organizations and individuals about the core value of non-partisanship in the Preamble to the Act and rights and responsibilities under Part 7. This includes developing enhanced guidelines, communications products, tools and training. In addition, several cases considered by the Commission since 2005-2006 confirm the importance of more attention being paid to the impacts that individual decisions about engaging in political activity can have on the real and perceived political impartiality of the public service as a whole.
- 4.69 Work should continue on exploring regulatory, policy and other options for providing greater clarity to employees about participating in political activities based on the role, level and visibility of different categories of public service positions. The experiences of other countries, including Britain and the United States, and several Canadian provinces and territories, will be helpful in this regard.
- 4.70 The PSEA provides that a deputy head shall not engage in any political activity other than voting in an election. The Commission may investigate any allegation that a deputy head has engaged in a political activity other than voting, but the allegation must come from either a candidate in an election, or a former candidate. We recommend that the Act be amended to provide the Commission with the authority to investigate any such allegation, regardless of from whom it is received.
- 4.71 In addition, the political activity requirements of the PSEA currently do not apply to GIC appointees who are appointed to the core public service under other legislation. We recommend that Parliament address this statutory void by amending the Act to apply Part 7 to these GIC appointees.

²⁶ *Federal Accountability Act*, 2006, c. 9.

The relationship between the public service and the political sphere

- 4.72 This is the most complex dimension of safeguarding a non-partisan public service, given the sensitivity of the relationship between the public service and the political sphere and the difficulty assessing the true nature of risks and their impacts. As a result, we have put special emphasis over the past two years on improving our understanding of how the relationship affects the non-partisanship of the public service. We have also examined implications for how the PSC carries out its responsibilities under the PSEA.
- 4.73 Based on this work, some of the most significant risks to the non-partisanship of the public service stem from real and perceived tension regarding appropriate roles and responsibilities between the two domains. This partly reflects the fact that the traditional relationship between elected officials and the public service has been deeply changed by the emergence of influential ministerial staff.²⁷ Ministerial staff are located “in the space between politics and the public service”²⁸ and are appointed at the pleasure of ministers to provide politically partisan advice.

Clarifying roles and responsibilities

- 4.74 Going forward, there is a need for improved training and communication to ministerial staff about their roles and responsibilities in Canada’s system of responsible parliamentary government beyond that currently provided by the Privy Council Office in *Accountable Government: A Guide for Ministers and Ministers of State – 2008*. Better guidance to ministerial staff about their interactions with the public service is also necessary and would encourage mutual understanding and respect between the two spheres.
- 4.75 Our recommendation is that a code of conduct for ministerial staff be put in place. Britain and Australia have both recently adopted codes setting out standards of behaviour for ministerial staff and expectations for their relationship with the public service. In Britain, the *Code of Conduct for Special Advisers*, introduced by the Cabinet Office in June 2010, indicates that a special adviser must not suppress or supplant advice being prepared for ministers by permanent civil servants, although they may comment on such advice. The 2008 *Code of Conduct for Ministerial Staff* in Australia expressly states that ministerial staff do not have the authority to direct public servants in their own right and cannot make executive decisions.
- 4.76 Guidance is also needed to help clarify the roles and responsibilities of public servants vis-à-vis the political sphere. For instance, guidance should be provided to public servants on their involvement with ministerial staff in general and in specific areas. These latter areas could

²⁷ This is the central theme in Organisation for Economic Cooperation and Development, Expert Group on Conflict of Interest, “Political Advisors,” a background paper presented in Paris, May 5, 2009.

²⁸ *Ibid.*, p. 6.

include communications and consultation activities, both areas which have raised concerns about the non-partisanship of the public service during our tenure.²⁹

Appointments of former ministerial staff and former Governor in Council appointees

- 4.77 As we noted in our 2009-2010 Annual Report, we are concerned about the risks that appointments of former ministerial staff and former GIC appointees who have served as heads and members of separate agencies and boards into the core public service create for the non-partisanship of the public service. When former ministerial staff and former GIC appointees are subsequently appointed to positions in the public service, their appointments, like all others, must respect the core and guiding values and must not be the result of unfair access to public service positions or political influence. In addition, as is the case with other public servants, former ministerial staff and former GIC appointees who are appointed to the public service must perform, and must be seen to perform, their duties in a politically impartial manner.
- 4.78 Overall, progress has been made in managing the movement of former ministerial staff into and back into the public service, following the December 2006 amendment to the PSEA that gave selected ministerial staff eligibility to participate in internal appointment processes. While the total population of ministerial staff was 521 in March 2010, the number of appointments to the public service has dropped steadily, falling from 49 in 2005-2006 to 17 in 2009-2010. However, it will be important for the PSC to continue to examine individual cases that raise concerns, for instance those involving non-advertised and unknown processes that may pose higher risks.³⁰
- 4.79 We remain concerned about the risks that arise when former GIC appointees are appointed to the public service. The number of such appointments is small, totaling 31 in the period 2005-2006 to 2009-2010. However, they can have a significant impact on the real and perceived non-partisanship of the public service. They are concentrated in a small number of organizations and about half are made to relatively senior positions, or following non-advertised or unknown processes. In addition, as discussed earlier, the risks they pose are elevated to the extent that the initial GIC appointments have not been independently assured to be merit-based. The PSC therefore began to monitor the movement of former GIC appointees into the public service more closely last year.

²⁹ In 2009-2010, the PSC investigated an allegation that public servants may have been involved in the posting and amendment of a partisan news release posted on the Department of Justice Canada Web site. The investigation determined that, while the original press release did contain politically partisan language, there was no evidence to indicate any public servant was involved in the drafting of the press release in question. The PSC did conclude, however, that there was a lack of clarity in the roles of public servants and political staff. More information on this case is presented in the PSC's 2009-2010 Annual Report and on the PSC's Web site.

³⁰ Between 2005-2006 and 2009-2010, there were 25 appointments to the public service of former ministerial staff without previous public service employment, through non-advertised or unknown processes.

Strengthening the governance and operation of the Commission

- 4.80 The 2003 PSEA introduced significant changes in the governance structure, authorities, functions and duties of the Commission. In a few key places, however, no changes were made, or the changes that were introduced did not go far enough, meaning that the modernization of the operation of the Commission itself could not be solidified.
- 4.81 Over the past five years, the PSC has successfully reoriented itself to support implementation of the PSEA, both at the PSC and across the public service.³¹ It has reorganized itself internally, smoothly transferred out a number of functions and services to the Canada School of Public Service and what is now the Office of the Chief Human Resources Officer, strengthened its oversight capacity, including monitoring, audit and investigation, and designed and implemented a regime for administering the political activities provisions of the PSEA.
- 4.82 We have put in place a number of measures to ensure the well-functioning of the legislative framework established by the PSEA and the PSC's operations over time. These include initiating an independent review in the fall of 2008 of the PSC's oversight activities, namely monitoring, audit and investigations. The review confirmed that the PSC's oversight activities are the right ones. It noted that some calibration was required in the quality and amount of monitoring and that there was a need to develop further capacity across its monitoring and audit activities. These issues have been addressed through the action plan adopted by the Commission following the review. More recently, we have undertaken reviews of the PSC appointment policy framework and the processes associated with candidacy requests for municipal elections, in order to take stock of progress to date and make adjustments, as necessary.
- 4.83 In addition, in response to the second report of the Prime Minister's Advisory Committee on the Public Service, we proposed that a committee of deputy heads be created to advise the Commission on issues concerning the delivery of its staffing and assessment services and related activities. The Commission's proposal was supported by the Clerk of the Privy Council and the Deputy Minister Committee on Public Service Renewal. The Clerk named the first members of the Public Service Commission Advisory Committee, which began to operate in December 2008 and meets monthly.
- 4.84 We have also introduced changes in how the Commission itself operates within the statutory framework set out in the PSEA, changes which should be retained. The PSEA modified the structure of the Commission from one with three full-time members to one with a full-time President who is also Chief Executive Officer and appointed under the Great Seal after approval by a joint resolution of the Senate and the House of Commons, and two or more part-time Commissioners. The President and part-time Commissioners are now each appointed for a

³¹ See PSC, "The Public Service Commission and the Implementation of the *Public Service Employment Act* (2003)" (2011).

seven-year term that is renewable, compared to a renewable 10-year term under the former Act. These modifications required significant changes in both the form and manner of decision-making for the Commission.

- 4.85 The PSEA provides the Commission as a whole with the decision-making authority for its powers and functions. The Commission may authorize any Commissioner, including the President, to exercise or perform powers and functions under the Act. If so authorized, they are deemed to have been exercised by the Commission.
- 4.86 Given this, and the fact that Commissioners now hold office part-time, a delegation instrument adopted in January 2006 authorizes the President to exercise, on behalf of the Commission, certain powers, functions and duties related to the day-to-day decision-making and operations of the Commission. The Commission as a whole retains the authority to make regulations and policies and focuses its decision-making on certain duties that are required by legislation, setting strategic directions, developing regulations and policies and reporting to Parliament.
- 4.87 This arrangement has made a major contribution to the efficiency and effectiveness of the Commission. It ensures that the Commission can conduct its business on a day-to-day basis, not just when the part-time Commissioners are present. We therefore recommend to Parliament that the PSEA be amended to provide that the President shall execute any powers or functions of the Commission on its behalf, other than those related to its regulatory and policy-making authorities and reporting to Parliament.
- 4.88 Based on our experience of the past five years, there are several other changes that would further increase the capacity of the Commission to fulfill its responsibilities. We recommend that the following legislative amendments therefore be made:
- The President and other Commissioners acquire knowledge, insight and experience as they carry out their responsibilities, which can be very valuable for the selection of future Commissioners and facilitate the transition of the Commission. We therefore recommend that the PSEA be amended to provide the Commissioners in office, including the President, with a role in making recommendations on the appointment of other Commissioners.
 - Under the Act, the salary of the President is determined by the GIC. This approach to remuneration is inconsistent with the independence of the body the President governs. We recommend that the PSEA be amended to provide for a fixed rate of pay for the President, comparable to one for counterparts such as the Chief Justice of the Federal Court.
 - Under the Act, Commissioners shall not accept or hold office or employment or carry on any activity inconsistent with their functions and the President shall devote all of his or her time to his or her functions. Generally, these restrictions may be viewed

as excessive. Given that the President and Commissioners are subject to the *Conflict of Interest Act*, the restrictions are unnecessary and we recommend that the Act be amended to remove them.

- The PSEA currently stipulates that the designated minister must cause the Commission's Annual Report to be tabled in each House of Parliament within the first 15 days on which that House is sitting, after the designated minister receives it. This creates uncertainty and has had operational implications for the Commission. We recommend that the Act be amended to provide for direct tabling in Parliament of the Commission's Annual Report.

4.89 The past five years have also resulted in the identification of several critical gaps in the existing legislative authorities of the PSC that negatively impact the ability of the Commission to carry out its mandate, and we recommend that they be addressed through amendments to the PSEA. In particular:

- The Commission currently does not have the authority to contract for goods and services without a delegation from a minister, except for certain experts. Because ministers do not provide direction to the Commission, it should be able to directly enter into contracts with various public and private bodies for the purpose of carrying out its mandate, similar to the Canada Revenue Agency. We recommend that the PSEA be amended to clearly provide the Commission with its own contracting authority.
- Universities, provincial governments and other countries frequently look to the PSC for language testing services. The Commission does not have the authority to provide these services, or other kinds of staffing and assessment services, beyond the core public service. In addition, the PSC does not have the authority to carry over revenue generated from fees from one fiscal year to the next. We recommend that the PSEA be amended to allow the PSC to provide language testing services, as well as other staffing tools and professional services consistent with its mandate, to public institutions outside the federal public service and to allow the Commission to carry forward unused revenue.
- PSC investigators and auditors currently do not have protection under the PSEA, neither protection for them personally, nor protection of the information they obtain during an investigation or audit. We therefore recommend that amendments be made to protect PSC auditors and investigators from criminal and civil proceedings related to activities undertaken in good faith under the Act and to protect information gathered during an investigation or audit from being used against the PSC in other proceedings. Similar clauses are found in legislation governing many federal administrative tribunals.

- Ensuring the integrity of audits is an essential requirement for effective oversight. The disclosure of records that contain audit information compromises audit findings. We therefore recommend that a provision be added to the PSEA to ensure that the Commission does not disclose records that contain information that was obtained or created in the course of an audit conducted by the Commission.

4.90 The PSC is a unique, independent body that serves as the guardian of merit and non-partisanship of the public service. Ensuring it has the governance framework and operational capacities required to play this role effectively is vital for ensuring the sustainability of the system established under the PSEA for the future.

5. Conclusions

- 5.1 Significant progress has been made in putting the fundamentals of the system established by the PSEA in place over the past five years. For more than 100 years, Parliament has given responsibility for staffing the core public service³² and ensuring its non-partisanship to an independent body, the Public Service Commission. This has been a key ingredient in building and maintaining the professional, merit-based and non-partisan federal public service that Canada has today.
- 5.2 Under the new Act that came into full force in December 2005, the roles and responsibilities of the PSC are clear. The PSC has put in place a highly delegated system for staffing, with an approach for ensuring oversight of the authorities that have been delegated to deputy heads and providing policy and service support. The PSC has struck a careful and important balance between empowering deputy heads, overseeing the system and answering to Parliament for its performance. In the same way that deputy heads audit their internal responsibilities, the PSC audits its responsibilities for Parliament.
- 5.3 In this Assessment, we have discussed some ongoing areas of concern related to the staffing system, as well as the non-partisanship of the public service and the governance and operation of the Commission. Where in our view adjustment is still required, we have recommended legislative change or other measures.
- 5.4 Going forward, it will be important to enhance the effectiveness of the staffing system from the perspectives of hiring managers, employees, potential recruits and the public service as an institution. It will also be important to pursue opportunities to improve the effectiveness of the system. This can be done through more integrated planning of the permanent and contingent workforces, centralization of staffing infrastructure where there are economies of scale to be gained, moving to a single notification system and addressing difficulties in the recourse system as it relates to delegated internal appointment processes.
- 5.5 On the non-partisanship of the public service, our experience carrying out the role set out for the Commission in the Act and its Preamble has shown that there are gaps in the existing approach for safeguarding the non-partisanship of the public service. Some of the gaps can be addressed by the Commission. This includes providing greater clarity to employees about participating in political activities based on the role, level and visibility of the public service positions that they hold. It also includes working with other key stakeholders to provide guidance to public servants on their roles and responsibilities vis-à-vis the political sphere.
- 5.6 Other gaps are beyond the authority of the Commission to address and require attention by others. In our view, it is time for all external appointments to the core public service to be based on merit, non-partisan in nature and subject to independent oversight and reporting. This includes the appointments of deputy heads, associate deputy heads and heads and

³² Unless otherwise provided for.

members of separate agencies and boards who are appointed from outside the core public service.

- 5.7 The PSEA did not go far enough in modernizing the governance and operation of the Commission. In this area, we have recommended a series of legislative amendments that, based on our experience, will further improve the capacity of the Commission to fulfill its responsibility to safeguard the merit and non-partisanship of the public service on behalf of Parliament and Canadians.
- 5.8 In closing, we would like to extend our gratitude for the tremendous support we have received during our tenure. Parliament has shown ongoing attentiveness to the issues we have raised. Deputy heads have engaged with us and provided advice. Most all, we wish to thank the staff of the PSC who have made all of our work happen.

Appendix 1: Supporting documents

The following is a list of documents that have been drawn upon in the PSC's assessment of the *Public Service Employment Act*, in addition to those already referred to in the assessment. All documents are available on the PSC Web site at www.psc-cfp.gc.ca.

Independent Review Committee. Review of Public Service Commission Oversight. Prepared for the President of the Public Service Commission of Canada. Ottawa: 2009.

Public Policy Forum. Emerging Trends Affecting the Public Service Commission and the *Public Service Employment Act*. Ottawa: 2009.

Public Service Commission. "Administrative Archaeology: The Public Service Commission and the Management of Human Resources in the Federal Public Service." A paper prepared by Maria Barrados and Margaret M. Hill, for The Hodgetts Legacy: Towards the Future. Kingston: Queen's University, October 23, 2009.

Public Service Commission. Audits and Studies, 2005-2006 to 2009-2010.

Public Service Commission. Annual Reports, 2005-2006 to 2009-2010.

Public Service Commission. Public Service Impartiality: Taking Stock. Ottawa, 2008.

Appendix 2: Summary of proposed legislative amendments to the *Public Service Employment Act*

The purpose of this appendix is to provide a summary of the PSC's proposed amendments to the *Public Service Employment Act*. Each proposed amendment includes a summary of the existing legislative provision in the current regime, if applicable, along with the suggested change. The rationale for the proposed amendment is also provided.

Effectiveness of the staffing system:

1. Extension of period of casual workers' employment

Current Regime: Casual workers' employment is not to exceed 90 working days in one calendar year in any particular department or other organization.

Proposed Regime: To allow one additional 90-day period in the same calendar year if it is justified in the interests of safety, security, health, the environment or an essential service to the public.

Rationale: *The 90-day maximum period for casual employment can be restrictive for organizations which need to respond to the particular circumstances described above.*

2. Notification

Current Regime: In internal appointment processes, notification of persons being considered for appointment is provided after the assessment of candidates is completed. Following a waiting period, there is a second notification of the person(s) appointed or proposed for appointment.

Proposed Regime: Only one notification will be issued.

Rationale: *The key issue of a two-step notification is the artificial nature of persons being considered and the fact that organizations are required to communicate who they are considering before the decision has been formalized. Moving to a scheme in which only one notice is provided would more logically reflect the true process. It would also address situations where candidates in a pool who have not been selected for appointment receive multiple notifications and are also provided with multiple opportunities to lodge a complaint with the PSST.*

Recourse system:

1. Internal appointment processes

Proposed Regime: The Commission may investigate a delegated internal appointment process, where the deputy head was involved or following an audit by the Commission, and may take corrective action.

Rationale: *In certain situations, it is more appropriate that the Commission conduct investigations of delegated internal appointment processes. They are 1) when deputy heads are involved in an appointment process and therefore are in a potential conflict situation should they conduct a follow-up investigation, and 2) following a PSC audit.*

2. Fraud: No appointment or deployment

Proposed Regime: During a fraud investigation, the Commission may order that no appointment or deployment of an employee take place.

If the employee is in another position, the Commission may revoke the subsequent appointment or deployment.

Rationale: *Revocation or corrective action following a fraud investigation is limited to the position for which the investigation is conducted. Employees have attempted to avoid consequences by being appointed or deployed to a position elsewhere.*

Non-partisanship and political activities:

1. Investigations: Allegation against deputy head

Current Regime: The Commission may investigate any allegation from a person who is or has been a candidate in an election that a deputy head has participated in a political activity other than voting.

Proposed Regime: Remove the requirement that the allegation come from a candidate or ex-candidate.

Rationale: *The Commission will be able to investigate suspected improper political activity on the part of deputy heads regardless from whom the allegation is received. The principle of political impartiality in the public service will be protected.*

2. Appointment by Governor in Council

Current Regime: Deputy head or deputy minister, associate deputy head or associate deputy minister and positions of equivalent ranks and special adviser to a minister may be appointed by the GIC.

Proposed Regime: Remove the ability of the GIC to appoint a “special adviser” to the minister, or add more precision to the clause by describing the details on how and when it can be used.

Rationale: *Allowing for appointments to the broad category of “special adviser” is too discretionary. There is no limit on the number of people that could be appointed by the clause. In addition, subsection 128(1) already allows a minister to appoint an executive assistant and other persons required in his or her office.*

3. Application of Part 7 to GIC appointees

Proposed Regime: The political activity provisions will apply to GIC appointees appointed in the core public service by other legislation.

Rationale: *GIC appointees appointed under the authority of other statutes currently are not subject to the political activity requirements of the Act. This creates a void in the application of the political activity scheme, in which there is inconsistent treatment of GIC appointees.*

Governance and operation of the Commission:

1. Other employment or activities

Current Regime: Commissioners must not undertake activities inconsistent with their functions, and the President must devote all of her time to the performance of her functions for the Commission.

Proposed Regime: Remove this requirement from the Act. It is unnecessary given that the President and Commissioners are subject to the *Conflict of Interest Act*, which establishes rules surrounding conflict of interest.

Rationale: *Generally, the current restrictions on other employment or activities may be viewed as excessive. As they have been superseded by the Conflict of Interest Act, that scheme is sufficient to govern outside activities.*

2. Appointment of Commissioners

Current Regime: The President and other Commissioners are not formally involved in the appointment process.

Proposed Regime: Provide Commissioners in office (which includes the President) with a discretionary authority to make recommendations on the appointment of other Commissioners.

***Rationale:** The proposal would allow for the appropriate succession of Commissioners.*

3. Salaries

Current Regime: The President's remuneration is determined by the Governor in Council.

Proposed Regime: Provide a fixed rate of pay for the President, based on an established pay scheme, such as for the Chief Justice of the Federal Court.

***Rationale:** Provide a fixed rate of pay comparable to counterparts of the President, to better reflect the independence of the Commission.*

4. President acts on behalf of Commission and Delegation

Current Regime: The Commission may authorize any Commissioner or employee of the Commission to exercise or perform some of its powers and functions under the Act. If so authorized, they are deemed to have been exercised by the Commission.

Proposed Regime: The President shall exercise or perform most of the powers or functions of the Commission, which will be deemed to have been exercised by the Commission. The President may delegate the functions to employees of the Commission.

The Commission as a whole would retain the authority to make regulations and policies and report to Parliament.

***Rationale:** The Act provides the Commission as a whole with the authority for its powers and functions. Given that Commissioners hold office part-time, it follows that the President would be responsible for most decision-making so that operations are not delayed.*

5. Tabling of Annual Report

Current Regime: The designated minister must table the Commission's Annual Report in each House of Parliament within the first 15 days that the House is sitting, after the designated minister receives it.

Proposed Regime: The Commission to be given the authority to table the Annual Report directly in each House of Parliament, without going through a designated minister.

Rationale: *Authority for direct tabling, similar to that provided to the Canadian Human Rights Commission, would provide the Commission with certainty in the timing of tabling and allow for adequate preparation for the subsequent communications and follow-up. Events around the Annual Report would not be dependent on agreement with the designated minister.*

6. Contracting authority

Proposed Regime: Provide the Commission with authority to contract for goods and services without the need for a delegation from a minister.

Rationale: *To provide the PSC with its own contracting authority. This is consistent with its role as an independent body.*

7. Services and cost recovery

Proposed Regime: Provide the Commission with authority to provide services related to its mandate to governments, public organizations and agencies, including those outside the federal public service.

Provide the Commission with authority to set fees and recover costs for providing these services.

Allow the Commission to carry over revenue generated from fees from one fiscal year to the next.

Rationale: *Based on its expertise and experience, the Commission has developed leading-edge tools related to appointments, staffing and assessment, particularly that of language assessment. It is currently unable to make arrangements directly with entities outside the federal public service to provide its expertise and tools.*

8. Protection

Proposed Regime: Investigators and auditors are not compellable as witnesses concerning information obtained in the course of their duties.

Their notes and drafts will not be permitted to be disclosed without their permission.

Criminal or civil proceedings may not be brought against the Commission or anyone acting on its behalf.

***Rationale:** Investigators and auditors currently do not have protection for their work under the Act. Protection is to protect them personally, and to protect the information obtained during an investigation or audit. Similar clauses are found in the legislation governing many administrative tribunals.*

9. Integrity of an audit

Proposed Regime: The Commission shall refuse to disclose records that contain information that was obtained or created in the course of an audit conducted by the Commission.

***Rationale:** To protect the integrity of an audit by ensuring that its findings are not compromised through the disclosure of records that contain audit information.*