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The *Public Sector Equitable Compensation Act* and the Reform of Pay Equity

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Canada

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Executive Summary

The *Public Sector Equitable Compensation Act*[i] (PSECA) is human rights legislation that affirms that women in the federal public sector should receive equal pay for work of equal value. The Act is intended to uphold the Government of Canada's commitment to prevent gender-based discrimination while setting compensation in the federal public sector. This commitment is consistent with the equality guarantee in the *Canadian Charter of Rights and Freedoms*[ii] and with international conventions Canada has signed.

The Act establishes a proactive and collaborative approach to achieving and maintaining equal pay for work of equal value in the federal public sector. It obliges employers and bargaining agents to proactively ensure that employees receive equitable compensation when their wages are set.

Section I of this paper sets out the workforce context, including the gender wage gap, unionization rates and the trend toward feminization. When the PSECA was enacted, the gender wage gap in the federal public service was significantly lower (10.9%) than it was nationally (16.7%). In addition, for federal public servants under 35, it stood at just 3.5%. The wage gap has been decreasing and this trend is expected to continue.

Federal public service employers operate in a highly unionized environment with approximately 89% of employees unionized, compared with approximately 26% for the broader Canadian workforce. Over 25 years, the federal public service has become increasingly feminized, with the percentage of women increasing from 40% in 1983 to 55% by 2007. This trend is expected to continue in the federal public service, given the increasing number of female graduates, the implementation of proactive employment equity and work-life balance policies and the fact that women are occupying a larger share of high-earning and professional work.

As discussed in section II, by the time the PSECA was passed, the federal jurisdiction had had roughly 35 years of experience with pay equity complaints under the *Canadian Human Rights Act*[iii] (CHRA). By then, problems with the complaints-based process were well recognized. It tended to lead to disputes and litigation, it was unevenly implemented, and employees often waited years or decades to receive equal pay for work of equal value. It also allowed bargaining agents both to negotiate wages under a collective agreement and then to act as a petitioner in a pay equity case—complaining against the very wages they had negotiated. Finally, delays in the process also meant employers' liabilities could grow very large by the time cases concluded. This made it impossible for employers to accurately predict and effectively manage their pay equity obligations and their compensation budgets.

In 2001, the Government of Canada set up a Pay Equity Task Force, chaired by Beth Bilson, to review the existing pay equity provisions of the CHRA. The Task Force released its report in May 2004. It recommended numerous changes including replacing the current complaints-based model with new stand-alone, proactive legislation; increasing union responsibility; and establishing a system to achieve and also maintain equal pay for work of equal value.

While the government agreed with many key recommendations, it also said the Task Force report did "not provide an adequate blueprint for implementation of pay equity in a broad range of federally-regulated workplaces."[1] More specifically, the government underlined that the relationship between pay equity and collective bargaining, and the obligations of employers and unions, needed to be part of the "backbone" of effective new pay equity legislation.

The impetus to develop the PSECA was twofold. First, the Task Force confirmed that the existing process under the CHRA was ineffective and did not serve employees well. Second, it became clear that, despite improvements in pay equity and an overall feminization of the federal public service, the possibility of future pay equity complaints remained a significant risk to the government's efforts to manage taxpayers' funds prudently and predictably.

Section III of this paper focuses on the government's main objectives in reforming equal pay for work of equal value legislation in the federal public sector. The PSECA is based on three key principles. First, it reaffirms the government's commitment to equal pay for work of equal value in the federal public sector. Second, it establishes the need to accomplish this proactively. Finally, it recognizes that the federal public sector operates in a market-driven economy.

Other significant objectives of the PSECA include:

- Supporting timely and efficient resolution of equitable compensation matters;
- Ensuring shared accountability between employers and bargaining agents;
- Providing clear definitions and processes to help employers and bargaining agents understand their obligations and avoid litigation and disputes;
- Being transparent, through the use of the collective bargaining mechanism and the ratification process;
- Ensuring processes exist to maintain equitable compensation; and
- Allowing employee recourse to an independent third party when necessary.

1. Government Response to the Fourth Report of the Standing Committee on the Status of Women, October 7, 2005.

In conclusion, the PSECA builds on experience under the CHRA model, the 2004 Task Force recommendations and proactive equal pay for work of equal value models in other jurisdictions. Key policy objectives of the PSECA are to create a proactive and more effective approach to equal pay for work of equal value within existing compensation-setting processes, while recognizing that federal public sector employers operate in a market-driven economy. It gives employees greater assurance of receiving equitable compensation on an ongoing basis.

The PSECA is unique in Canada. It is the only Act that advances joint union-employer accountability for equitable compensation on an ongoing basis by bringing together, into a proactive process, collective bargaining and the right to equal pay for work of equal value.

Introduction

At its core, the *Public Sector Equitable Compensation Act*[iv] (PSECA) is human rights legislation that affirms that women in the federal public sector[2, v] should receive equal pay for work of equal value. The PSECA is intended to uphold the Government of Canada's commitment to prevent gender-based discrimination while setting compensation in the federal public sector. The commitment is consistent with the equality guarantee in the *Canadian Charter of Rights and Freedoms*[vi] and with international conventions Canada has signed.

The existing complaints-based pay equity process under the *Canadian Human Rights Act*[vii] (CHRA) is a lengthy, costly and adversarial process that does not serve public sector employees or employers well. The PSECA replaces section 11 of the CHRA with a proactive, collaborative approach to achieving and maintaining equal pay for work of equal value in the federal public sector. It obliges employers and bargaining agents to proactively ensure that employees receive equitable compensation at the time that their wages are set.

The approach to resolving equitable compensation matters that is promoted in the PSECA has, at its foundation, the intention to address gender-based wage disparities. Also, the PSECA reflects the importance of the role of collective bargaining as a mechanism for addressing workplace issues. Under the PSECA, federal public sector employers and bargaining agents will now be jointly accountable for ensuring that equitable compensation is an integral part of collective bargaining. Equitable compensation discussions undertaken in the context of collective bargaining will be governed by the parties' duty to bargain in good faith and by the union duty of fair representation to all its members.

This paper articulates the principles and purpose underpinning the PSECA as new legislation addressing equal pay for work of equal value in the federal public sector. Section I provides context by giving a brief overview of the federal public sector in terms of the gender wage gap, unionization rates and the feminization of the public service.

2. For the purposes of this paper, the term "federal public sector" refers to those organizations covered by the PSECA. Those organizations are the core public administration (i.e., departments and agencies for which the Treasury Board is the employer and that fall within Schedule I and IV of the *Financial Administration Act*), the separate agencies named in Schedule V to the *Financial Administration Act*, the Royal Canadian Mounted Police and the Canadian Forces. The term "federal public service" refers only to the core public administration and the separate agencies named in Schedule V to the *Financial Administration Act*; it does not include either the Royal Canadian Mounted Police or the Canadian Forces.

Section II outlines the federal public sector experience under the CHRA pay equity provisions. It demonstrates how the work of the 2004 Pay Equity Task Force was an important reference point in the drafting of the PSECA and how the legislation addresses a number of the key Task Force recommendations. This section also includes a brief discussion of proactive pay equity legislation as experienced in provincial jurisdictions.

Section III focuses on the government's main objectives in setting out to reform how equal pay for work of equal value is achieved in the federal public sector.

Section I. The Changing Nature of the Federal Public Service[3]

The gender wage gap, unionization rates and the feminization of the workforce are all central issues when considering the changing nature of the federal public service in the decade preceding the enactment of the *Public Sector Equitable Compensation Act*[viii] (PSECA).

1.1 The Gender Wage Gap

"Gender wage gap" refers to the difference between the average wages earned by men and the average wages earned by women. Within the federal public service, the wage gap between men and women decreased from 17.7% in 1999–2000 to 10.9% in 2009–10.[4] For public servants under the age of 35, where women and men with higher education levels are recruited into higher paying jobs, the gender wage gap was 3.5% in 2009–10.[5] More recent statistics for 2011–12[6] indicate a further decline in the gender wage gap in the federal public service to 9.4% and, in the case of employees under the age of 35, to just 2.1%.[7]

In the 10 years before the PSECA was enacted, women in the federal public service experienced an annual average wage growth of 3.87% compared with men at 3.22%.[8]

3. See footnote 2 regarding the term "federal public service."
4. Expenditure Management Sector, Treasury Board of Canada Secretariat.
5. Ibid.
6. Prepared by the Expenditure Management Sector of the Treasury Board of Canada Secretariat. Expenditure Management Sector plays an integration role in planning and coordinating the expenditure management initiatives and providing a whole-of-government perspective on matters related to direct program spending, management of reserves and compensation within the federal government.
7. Expenditure Management Sector, Treasury Board of Canada Secretariat.
8. Ibid.

In Canada, the gender wage gap—based on hourly wages—has also been closing and stood at 16.7% as of 2008.[9] Factors that contribute to the gender wage gap involve a variety of characteristics that differ between male and female workers, including unionization rates, educational attainment, occupations which men and women choose, job tenure and experience, age, and family responsibilities.[10] For this reason, policies or legislation that promote employment equity and rising education levels among women, for instance, could have a more positive influence or effect on diminishing the gender wage gap than pay equity legislation alone.

1.2 Unionization Rates

Unionization rates refer to "the percentage of all employees who are members of a union or are covered by a collective agreement or union contract."[11, ix] In 2000, with an overall workforce in Canada of approximately 15.6 million employees, the unionization rate was 26.0%. By 2010, the overall workforce had grown to approximately 18.4 million employees with a unionization rate of 25.3%.[12]

The unionization rate in the broader Canadian private sector has been declining over several decades and now stands at 18%. Approximately 32% of employees who work in the federally regulated private sector[13] are unionized.[14, x]

9. Marie Drolet, "Why has the gender wage gap narrowed?" *Perspectives on Labour and Income,* Statistics Canada, (spring 2011), p. 6. This article indicates that on an hourly basis, the gap in pay between full-time male and female employees closed by more than 5 percentage points from the early 1990s to the late 2000s.
10. Ibid.
11. Human Resources and Skills Development Canada, "Indicators of Well-Being in Canada: Work—Unionization Rates," accessed October 19, 2011.
12. Human Resources and Skills Development Canada; Labour Program; Strategic Policy, Analysis, and Workplace Information Directorate; Union Membership in Canada – 2010.
13. The federally regulated private sector is made up of approximately 12,000 enterprises that include banks; marine shipping, ferry and port services; air transportation, including airports, aerodromes and airlines; railway and road transportation that involves crossing provincial or international borders; canals, pipelines, tunnels and bridges (crossing provincial borders); telephone, telegraph and cable systems; radio and television broadcasting; grain elevators, feed and seed mills; uranium mining and processing; businesses dealing with the protection of fisheries as a natural resource; many First Nation activities; and most federal Crown corporations. Source: Human Resources and Skills Development Canada, Labour Program, "Federally Regulated Businesses and Industries."
14. Human Resources and Skills Development Canada, "Work Stoppages in the Federal Private Sector: Innovative Solutions," accessed October 19, 2011.

Compared with the federally regulated private sector, the federal public service is highly unionized, with relatively few employers. Between 1999 and 2009, the unionization rate in the federal public service increased from 88.4% to 89.5%[15] while the overall employee population grew from 182,000 to 249,000.[16]

1.3 Feminization of the Public Service

Over 25 years there has been a notable change in the gender makeup of the federal public service. Between 1983 and 2007, the federal public service saw the percentage of female employees increase from 40% to 55%.[17]

As noted in the *Eighteenth Annual Report to the Prime Minister on the Public Service of Canada*,[xi] in 2009–10, women made up 55.1% of the core public administration and 55.5% of new hires.[18]

In 1999–2000, 11.56% of women received promotions compared with 9.32% of male employees. In 2009–10, 11.03% of women were promoted compared with 8.91% of male employees. Promotions include interdepartmental transfers with promotion and internal promotions.[19]

There are numerous reasons why the federal public service has seen such a marked increase in female employees. Among these reasons are the following.

1.3.1 Increasing Numbers of Female Graduates

Statistics Canada reported that women earned 60% of all degrees, diplomas and certificates awarded in 2006. This continued a long-term trend of women graduates outnumbering men at all

15. In 1999, 88.4% or 161,170 of the 182,319 active full-time employees working in the federal public service (core public administration and separate agencies) were unionized. 171,781 employees were working in the core public administration, with 88.9% of them being unionized, while 80.2% of employees working in separate agencies were unionized.

    In 2009, 89.5% or 222,824 of the 248,965 active full-time employees working in the federal public service were unionized. 191,792 employees were working in the core public administration, with 89.3% of them being unionized, while 90.2% of employees working in separate agencies were unionized. Source: Expenditure Management Sector, Treasury Board of Canada Secretariat.
16. Expenditure Management Sector, Treasury Board of Canada Secretariat. Similar comparative data is unavailable for the federally regulated private sector.
17. Public Policy Forum, *Emerging Trends Affecting the Public Service Commission and the "Public Service Employment Act,"* September 2009, p. 10.
18. *Eighteenth Annual Report to the Prime Minister on the Public Service of Canada*, March 31, 2011, p. 18.
19. Expenditure Management Sector, Treasury Board of Canada Secretariat.

levels, except at the doctoral level, since 1994.[20] Moreover, while men make up a larger share of workers nearing retirement (aged 55 to 64), there are more women than men in all younger age cohorts. As noted by the Public Policy Forum, "given the trends in educational attainment, it is reasonable to expect that that this feminization of the federal workforce will deepen in the years ahead."[21]

1.3.2 Effective Implementation of Proactive Employment Equity and Work-Life Balance Policies

The federal government has developed and implemented policies that support women at work and help them achieve a measure of work-life balance. These practices and policies came into effect as a result of the work of the Consultation Group on Employment Equity for Women, established in 1991 to advise the Secretary of the Treasury Board and deputy ministers on the recruitment, retention and advancement of women in the federal public service. A number of studies by the Consultation Group were published, including *Gender Balance: More Than Numbers*,[22] *Case Studies on Best Practices in the Employment of Women*[23] and *Looking to the Future: Challenging the Cultural and Attitudinal Barriers to Women in the Public Service.*[24]

The Consultation Group concluded that simply increasing the representation of women in all occupations and levels of the federal public service via recruitment was not a sufficient goal. It was also necessary to put in place measures to build an environment, infrastructure and culture that encourage and support the employment of women. To this end, the Government of Canada supports job-sharing, working from home, parental leave, care and nurturing leave, leave for family-related reasons and self-funded leave.

The federal government has implemented proactive employment equity practices as required under the *Employment Equity Act*,[25, xii] which applies to the federal public sector and the federally regulated private sector. The implementation of employment equity has contributed to an increase in the recruitment rates of women into the federal public service. In fact, recruitment

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20. Public Policy Forum, *Emerging Trends Affecting the Public Service Commission and the "Public Service Employment Act,"* September 2009, p. 10.
21. Ibid.
22. Consultation Group on Employment Equity for Women, *Gender Balance: More than Numbers*, 1992.
23. Consultation Group on Employment Equity for Women, *Case Studies on Best Practices in the Employment of Women*, 1993.
24. Consultation Group on Employment Equity for Women, *Looking to the Future: Challenging the Cultural and Attitudinal Barriers to Women in the Public Service*, 1995.
25. The Treasury Board of Canada Secretariat is responsible for reporting on employment equity for the federal public service and tables an annual report on employment equity to Parliament.

rates of women have exceeded their workforce availability for the last several years. The percentage of appointments to indeterminate positions and specified terms of three months and over in the public service for women is as follows: 55.6% in 2006–07; 58.0% in 2007–08; 57.1% in 2008–09; and 55.5% in 2009–10.[26]

The trend toward the feminization of the federal public service is expected to continue: fair selection processes, a recognition of the need for work-life balance and a broad range of family-friendly benefits, including parental leave, leave for family-related reasons, and leave for the care and nurturing of children, make the federal public service an acknowledged leader in the employment of women.[27, xiii]

1.3.3 Women Occupying a Larger Share of High-Earning and Professional Work

In the 10 years before the PSECA was enacted, women accessed more top jobs in the federal public service than ever before. The share of women with earnings greater than $100,000 in the federal public service increased to 36% in 2009–10 from 30% in 2005–06.[28]

More and more women are taking on work in the higher-paid executive and professional groups.[29] For example, 2009 data indicate that women made up:

- 44% of the executive ranks, compared with 28% in 1999–2000;
- 56% of the Economics and Social Science Services group, compared with 39% in 1999–2000;
- 55% of the Law group, compared with 49% in 1999–2000; and
- 46% of commerce officers, compared with 35% in 1999–2000.[30]

The trend toward feminization of these once male-dominated occupations is expected to continue.

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26. Public Service Commission, *2008-2009 Annual Report* and *2009-2010 Annual Report*.
27. "Canada's Top Family-Friendly Employers for 2012," *Globe and Mail*, December 7, 2011. This article notes that Human Resources and Skills Development Canada was selected as one of the top 100 employers in Canada for 2012 and one of the top family-friendly employers for 2012, in part because of its exceptional health and family benefits, benefits available to employees of the public service. See also Kathryn May, "Female Executives in Public Service on the Rise," *Ottawa Citizen*, April 12, 2010.
28. Expenditure Management Sector, Treasury Board of Canada Secretariat. Population includes all employees working in the federal public service, as well as Governor-In-Council appointments, ministers' exempt staff and Royal Canadian Mounted Police temporary employees.
29. Ibid. This relates to active employees working in the core public administration only.
30. Ibid.

Section II. Evolution of the Pay Equity Legislative Framework in Canada

2.1 Pay Equity Under the *Canadian Human Rights Act*

By the time the *Public Sector Equitable Compensation Act*[xiv] (PSECA) was passed, the federal jurisdiction had had about 35 years of experience with the complaints-based pay equity system established under the *Canadian Human Rights Act*[xv] (CHRA).[31] Subsection 11(1) of the CHRA states that "it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

For the Canadian Human Rights Commission (CHRC) to commence an investigation, the CHRA requires a complaint from an employee, a group of employees, their union or the Commission itself. The CHRC then assesses and investigates the complaint to determine if there is sufficient evidence of wage discrimination to merit referral to the Canadian Human Rights Tribunal.

In a special report to Parliament on pay equity,[32, xvi] the CHRC noted that the complaints-based system was an accepted method of dealing with compensation issues in 1977, but went on to say:

> However, experience since has shown that complaints are not particularly well-suited to addressing forms of discrimination that are subtle, largely unintentional and integrated into complex systems, — what is now termed "systemic discrimination." […]
>
> The current system has proven ineffective in larger pay equity cases for several reasons. First, allegations of human rights violations tend, by their nature, to generate a defensive reaction and lead to litigation and delays. Secondly, the complaints-based approach produces uneven implementation, since employers not targeted by complaints often choose to keep a low profile and refrain from taking any initiatives on pay equity. This problem is exacerbated by the fact that it takes significant knowledge and resources to mount major pay equity complaints, which generally means they are only filed by unions. The end result is that people performing female-predominant work in non-unionized, federally-regulated settings have benefited little from the federal pay equity provisions.[33]

31. Section 11 of the CHRA was adopted in 1977. Section 11 applies to federal government departments and agencies, Crown corporations and the federally regulated private sector.
32. Canadian Human Rights Commission, *Time for Action: Special Report to Parliament on Pay Equity*, February 2001. An executive summary of the report is available on the CHRC website.
33. Ibid.

Under the CHRA, it is not unusual for employees to wait a decade or more for a resolution to pay equity complaints after gruelling, divisive and costly debates in court.[34] The system permits a union to both negotiate wages under a collective agreement and then act as a petitioner in a pay equity complaint after the fact.

Since the enactment of the CHRA, a number of pay equity complaints have been filed against the Treasury Board as the employer of employees in the core public administration. The largest was filed in 1984 by the Public Service Alliance of Canada (PSAC) on behalf of six female predominant occupational groups.[35] It was settled for approximately $3.2 billion in 1999 following two decisions of the Canadian Human Rights Tribunal. This represented accumulated liabilities in relation to approximately 200,000 employees over a period of approximately 15 years.

In 2007, the Treasury Board was notified of two new complaints filed by the PSAC on behalf of its members in the PA and EB groups.[36] These complaints alleged that a new discriminatory wage gap had emerged for the six groups covered under the 1999 settlement, among others.[37] In 2008, a $340-million agreement was reached with the PSAC to settle this complaint.

These examples show that because the complaints-based process is so lengthy, potential pay equity liabilities can accrue to large amounts. Moreover, without a mechanism to maintain pay equity, there is the potential for inequities to creep back into compensation, even after pay equity settlements have been reached. The Government of Canada is exposed to infrequent, but potentially very large, pay equity settlements or awards with significant payouts and wage adjustments. This occurs outside of the collective bargaining process, which is the mechanism

34. For example, a complaint filed by the Public Service Alliance of Canada (PSAC) in 1984, alleging discrimination between the Clerical and Regulatory (CR) and the Program and Administration (PM) classification standards, as well as gender-based wage discrimination between the two groups, was settled in 1999, following two Canadian Human Rights Tribunal decisions. A second example is the Bell Canada pay equity complaint filed by Bell Canada employees in 1988. This complaint was finally resolved in 2006 through a settlement with the Communications, Energy and Paperworkers Union of Canada (CEP) following multiple legal proceedings. The longest case to get resolved was the Canada Post complaint filed in 1983. The complaint remained with the Canadian Human Rights Commission for eight years, and was then referred to the Tribunal in 1992. An additional 13 years passed before the Tribunal disposed of the complaint in 2005. Canada Post then successfully applied for judicial review to the Federal Court. Applications for judicial review and appeals ensued; the matter was finally decided in November 2011 when the Supreme Court of Canada restored the Tribunal's 2005 decision in its entirety.
35. Clerical and Regulatory (CR); Secretarial, Stenographic, Typing (ST); Data Processing (DA); Educational Support (EU); Hospital Services (HS); and Library Sciences (LS).
36. Program and Administrative Services (PA) and Education and Library Science (EB) groups.
37. Administrative Services (AS), Program Administration (PM), Welfare Program (WP), Information Services (IS) and Education (ED) groups.

for establishing wages for most public sector employees and the biggest component of the government's system for managing its compensation budget. This makes it impossible for federal public sector employers to accurately predict and effectively manage their pay equity obligations and, at the same time, manage their compensation budget. It also makes it impossible for them to be assured at any given time that they are in compliance with their pay equity obligations under the CHRA.

Further, despite being an equal party to collective bargaining, the complaints-based system has placed no accountability on bargaining agents to ensure that wages are not discriminatory at the time they are set. This absence of accountability has permitted bargaining agents to file pay equity complaints based on wage settlements that they themselves negotiated.

2.2 The Pay Equity Task Force

On October 29, 1999, in response to widespread criticism of the federal pay equity legislation, the federal government announced a review of section 11 of the CHRA in order to clarify the way pay equity was being implemented.[38] In 2001, the federal Ministers of Justice and Labour appointed the Pay Equity Task Force to review section 11 of the CHRA. The Task Force, chaired by Beth Bilson, released its report in May 2004.

The Standing Committee on the Status of Women has summarized the work of the Task Force as follows:

> Between 2001 and 2004, the Pay Equity Task Force commissioned independent research on a wide range of relevant issues and conducted a cross-Canada consultation seeking the views of a diverse population of individuals, stakeholder groups, and government departments and agencies. Consultation by the Task Force was extensive. The Task Force received oral submissions from almost 200 people and 60 written submissions from groups across the country. There were five round tables with multi-stakeholder groups. In addition, the Task Force looked at proactive pay equity legislation in a number of jurisdictions in Canada to identify best practices.[39, xvii]

38. Department of Justice Canada, *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, Appendix B—Terms of Reference, p. 523.

39. Fourth Report of the Standing Committee on the Status of Women, *Moving Forward on the Pay Equity Task Force Recommendations*, June 2005.

In May 2004, the Task Force submitted to the Ministers of Justice and Labour a 571-page report entitled *Pay Equity: A New Approach to a Fundamental Right*.

The Task Force concluded the following with regard to the CHRA system:

- "That it has shown limited effectiveness as a means of meeting the stated objective of ensuring that women are paid as much as men for work of equal value."[40]
- "That there may be something dysfunctional about a system which is characterized by a procession of applications of such number and variety as those which have attended the consideration and adjudication of complaints under section 11."[41]
- "That the processing and hearing of complaints was extraordinarily protracted and expensive for those involved, and frustrating for those employees whose compensation was at issue."[42]
- "That the regime in place under section 11 has provided an inadequate foundation for significant and systematic progress towards the goal of pay equity across the federal jurisdiction as a whole."[43]
- "That the current system does not constitute an effective means of advancing towards equitable wages[, and participants in the process] have experienced frustration, uncertainty, lengthy delays, an acrimonious atmosphere, and staggering costs associated not only with the outcome, but with the very process itself."[44]
- "That the history of section 11 has demonstrated that adequate pay equity legislation cannot be based on the assumption that the majority of employers will voluntarily take meaningful steps towards achieving pay equity."[45]

The Task Force called for the creation of stand-alone pay equity legislation and the introduction of a proactive model. It concluded that "the most effective way of addressing the problem of wage discrimination is through a separate pay equity statute that can provide the specialized technical framework required."[46]

40. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, p. 97.
41. Ibid., p. 100.
42. Ibid.
43. Ibid., p. 108.
44. Ibid.
45. Ibid.
46. Ibid., p. 151.

The Task Force reviewed different legislative schemes employed for achieving pay equity in Canada and noted the following:

> It can be seen from this review that Canadian jurisdictions have tried in many different ways to give legislative effect to the principle of equal pay for work of equal value. The legislative options which have been tried include labour standards and human rights legislation; complaint-based models and proactive models; legislation which is restricted to the public sector or the Public Service, or which also covers private-sector employers; and legislation which assigns the administration of pay equity provisions to human rights or labour agencies, or which establishes specialized tribunals to deal exclusively with equal pay.[47]
>
> The review of legislation concerning equal pay also speaks of a recognition over time that the goal of pay equity is more likely to be achieved if legislation contains more focused criteria and standards. There is also a discernible trend in this legislative record in the direction of increasingly positive and proactive legislative schemes.[48]

The Task Force report also recommended that employers formulate a pay equity plan covering all their operations[49] and suggested establishing a decision-making structure that would include joint employer-employee pay equity committees[50] and a separate appeals mechanism through a pay equity commission and a pay equity tribunal.[51] The report did not take into account the influence of the market in setting compensation, except under narrow circumstances, allowing for the purposes of pay equity analysis a temporary exemption for compensation attributable to "shortages of skilled workers."[52]

In its June 2005 report, *Moving Forward on the Pay Equity Task Force Recommendations*,[xviii] the Standing Committee on the Status of Women recommended that the Government of Canada draft and table legislation based on the Task Force recommendations.[53]

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47. Ibid., pp. 75–76.
48. Ibid., p. 76.
49. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, Chapter 7.
50. Ibid, Recommendation 8.3, p. 507.
51. Ibid, chapters 14 and 17.
52. Ibid., p. 362.
53. Fourth Report of the Standing Committee on the Status of Women, *Moving Forward on the Pay Equity Task Force Recommendations*, June 2005.

In their 2005 response to the Standing Committee, the Ministers of Justice and Labour indicated that the Task Force report did "not provide an adequate blueprint for implementation of pay equity in a broad range of federally-regulated workplaces."[54] More specifically, they underlined that the relationship between pay equity and collective bargaining, and the obligations of employers and unions, needed to be part of the "backbone of effective pay equity legislation."[55]

The Task Force recommendations were considered extensively in the work leading to the development of the PSECA. Particular attention was paid to a number of the key recommendations of the Task Force, including its call to replace the current complaints-based model with new stand-alone, proactive legislation; increased union responsibility; and the need not only to achieve but also maintain equal pay for work of equal value.

2.3 Provincial Pay Equity Legislation

Within provincial jurisdictions, pay equity legislation has evolved beyond complaints-based systems. The first proactive legislation was introduced in Manitoba in 1986, followed by Ontario in 1987, Prince Edward Island in 1988, New Brunswick[56] and Nova Scotia in 1989, and Quebec in 1996. "Proactive" refers to a process that is not complaints-based; rather, there is a positive legal obligation on an employer to establish equal pay for work of equal value.

All of the provincial schemes apply to the provincially regulated public sector. Only in the cases of Ontario and Quebec do they also cover private sector employers.[57]

In all provincial jurisdictions, the value of work is assessed using the criteria of skill, effort, responsibility and working conditions. Notably, in all except Manitoba, a wage gap can be justified by a skills shortage (i.e., a recruitment and retention issue).

In all provincial models, joint employer–bargaining agent/employee participation is required whether it is through a pay equity committee (for larger organizations) or during the negotiation of pay equity plans with employees' representatives or bargaining agents.

54. Government Response to the Fourth Report of the Standing Committee on the Status of Women, October 7, 2005.
55. Ibid.
56. The 1989 *New Brunswick Pay Equity Act* was replaced by new legislation in 2009.
57. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, pp. 116 and 130.

In these jurisdictions, pay equity is achieved outside of the regular wage-setting process, and there is no specific legislative requirement for emerging pay equity issues to be considered when wages are established or during collective bargaining.

Complaints are heard by labour boards in most provinces except for Ontario, which has a pay equity hearings tribunal, and Nova Scotia, which at one time had a pay equity commission with the power to resolve disputes.[58]

In some provinces, the pay equity legislation imposes specific deadlines for the implementation of pay equity plans (i.e., it was a one-time effort).[59] In other cases, the provincial systems do not provide for any mechanism to ensure that pay equity is maintained on an ongoing basis. Two exceptions are Ontario and Quebec, which established that the maintenance of pay equity would be achieved through negotiations. While Ontario requires pay equity to be maintained once it is achieved, it does not provide for any systematic monitoring of compliance. In Quebec, the *Pay Equity Act* requires that a pay equity audit of the employer's pay equity plan be completed every five years.[60] Additionally, the New Brunswick *Pay Equity Act, 2009*, which replaced the 1989 legislation, now includes provisions for the maintenance of pay equity.[61]

2.4 The *Public Sector Equitable Compensation Act*

The impetus for the development of the *Public Sector Equitable Compensation Act*,[xix] (PSECA) was twofold. First, there was recognition through the work of the Task Force that the existing complaints-based pay equity system under the CHRA was not effective and did not serve employees well. Second, it became clear, despite improvements in pay equity and an overall feminization of the federal public service, that the possibility of future pay equity complaints remained a significant risk to the Government of Canada's prudent and predictable management of taxpayers' funds.

It was concluded that without greater clarity around obligations and process, and without a proactive method for achieving and maintaining equal pay for work of equal value on a regular basis, the government, as an employer, could never be fully confident that equal pay for work of equal value had been adequately addressed or that it could predictably plan the cost of its labour

58. Under the Nova Scotia system, the Pay Equity Commission determined, in accordance with the Act, those matters upon which an employer and its employee representatives fail to agree (section 7). It may summon witnesses, administer oaths, require the production of documents and issue orders and directions to ensure compliance with the Act (section 10). A decision from the Pay Equity Commission is final (paragraph 2, section 7).
59. For example, the Manitoba *Pay Equity Act* SM 1985 - 86, c. 21.
60. Quebec *Pay Equity Act*, subsection 76.1.
61. New Brunswick *Pay Equity Act, 2009*, sections 24–27.

force. By the same token, employees in female predominant job groups might have been uncertain whether they were receiving equal pay for work of equal value on an ongoing basis.

Furthermore, the CHRA's complaints-based pay equity system did not integrate equal pay for work of equal value with collective bargaining, did not envision a broader role for unions in representing their members' right to equitable compensation at the time their wages are established, and did not recognize that federal public sector employers operate in a market-driven economy.

The legislative framework established by the PSECA builds on the proactive legislation implemented in provincial jurisdictions and the work undertaken by the Task Force. However, the PSECA also sets the bar higher by making employers and bargaining agents jointly accountable for proactively achieving and maintaining equitable compensation when they set employee compensation through their established wage-setting mechanisms.

The work of the Task Force was an important reference point in the drafting of the PSECA in a number of ways. For example, in the first instance, the PSECA addresses the most fundamental of the Task Force's recommendations—namely, the creation of stand-alone legislation on equal pay for work of equal value and the introduction of a proactive model. As advocated by the Task Force, the PSECA establishes positive obligations on employers to review their compensation practices, identify any gender-based inequities and take steps to eliminate them.

As a second example, the Task Force recommended that non-unionized and unionized employees be involved in achieving and monitoring pay equity.[62] The PSECA requires that employees be proactively informed of their rights and of what has been done by their employers (and/or bargaining agents) to ensure equitable compensation, before their wages are set. Of course, unionized employees may also participate in establishing equitable compensation through their certified representative in collective bargaining (i.e., their bargaining agent).

In a third example, the Task Force recommended that new legislation provide for the maintenance of pay equity on an ongoing basis, establish a process for managing complaints, and provide clear guidance on the content of pay equity plans and various aspects of assessing pay equity. The PSECA reflects these key recommendations.

62. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, Recommendation 8.1.

Section III. Objectives of the *Public Sector Equitable Compensation Act*

This section shows how the *Public Sector Equitable Compensation Act*[xx] (PSECA) builds on the work of the Pay Equity Task Force, the lessons learned from the *Canadian Human Rights Act*,[xxi] (CHRA) pay equity experience, and the proactive pay equity legislation in other Canadian jurisdictions.

3.1 Three Key Principles

The PSECA is based on three key principles as set out in its preamble. First, it reaffirms the government's commitment that women in the federal public sector should receive equal pay for work of equal value. Second, it establishes that the desirable method to accomplish this is through proactive means. Finally, the preamble recognizes that the public sector of Canada operates in a market-driven economy.

3.1.1 Recognition of "equal pay for work of equal value"

The preamble of the legislation asserts that "women in the public sector of Canada should receive equal pay for work of equal value." Through this statement, the PSECA affirms the principle of equal pay for work of equal value as a fundamental human right for women and the need to address potential gender discrimination in compensation-setting.

The preamble also reflects Canada's commitment to its obligations under International Labour Organization (ILO) Convention 100.[xxii] ILO Convention 100, also known as the Equal Remuneration Convention, aims to ensure equal remuneration for work of equal value for male and female workers. Canada ratified this convention in 1972.

Relevant excerpts from the ILO Convention 100 appear in the Appendix.

3.1.2 Proactive system

With an increasing number of women in the federal public sector, the Government of Canada wanted to put in place a new equitable compensation system that is modern, timely and proactive. It wanted to ensure that women receive equitable compensation at the time they earn it (not a decade or more later). It also wanted to provide employers with the enhanced predictability required for prudent management of compensation expenditures and greater certainty as to the exact nature of their legislative obligations.

Subsection 3(1) of the PSECA sets out the proactive obligation for employers and bargaining agents to take measures to provide equitable compensation to employees in accordance with the Act, with the greater part of the PSECA setting out a step-by-step method for accomplishing this.

While the CHRA prohibits employers from establishing or maintaining differences in wages between male and female employees performing work of equal value in the same establishment, the legislation does not require employers to demonstrate that they do not discriminate unless a complaint is filed.

The proactive nature of the PSECA means that the parties involved in setting compensation are responsible for ensuring that it is set in a way that produces an equitable result. Making parties accountable for results is intended to ensure that equitable compensation will be achieved in a manner that is more timely, less adversarial and considerably less litigious and costly. By moving away from a complaints-based pay equity system, the PSECA aims to avoid the confrontational and divisive approach that has marked previous pay equity cases brought under the CHRA.

Specifically, the legislation requires that an equitable compensation assessment for all female predominant groups be conducted before wages are set, thereby embedding gender-based analysis in the wage-setting process on a regular basis. Before wages are set by the employer or a collective agreement is submitted to employees for ratification, the employer and/or the bargaining agent, as the case may be, will be required to prepare and make available to employees a report explaining how the assessment was conducted and how any equitable compensation matters identified by that assessment will be addressed.

3.1.3 Recognition of the market as an influence on compensation

The preamble also recognizes explicitly that federal public sector employers "operate in a market-driven economy." Public sector employers need to be responsive to shifts in the market in determining compensation if they want to remain competitive in recruiting and retaining the workers who are needed to provide services to Canadians.

Section 4 expands how the value of the work is to be assessed (or determined) to include a consideration of the market as it relates to an employer's recruitment and retention needs.

Subsection 4(1) of the PSECA provides:

> An equitable compensation assessment under this Act assesses, without gender bias, the value of work performed by employees in a job group or a job class and identifies, by taking into account the prescribed factors, whether an equitable compensation matter exists.

The first criterion to be applied in assessing the value of work performed by employees is the composite of skill, effort and responsibility required in the performance of work, and the conditions under which work is performed ("SERWC" criterion) (s. 4(2)(*a*)). The SERWC

criterion is identical to the criteria used under the CHRA, the associated *Equal Wages Guidelines*[xxiii] and all equal pay for work of equal value systems in Canada. These systems define the value of the work with reference to the specific content of jobs relative to the work performed by other employees in the same employer or establishment (i.e., internal relativity).

The second criterion to be applied in assessing the value of work is the recruitment and retention needs of the employer in relation to employees in that job group or class, taking into account the qualifications required to perform the work as well as the market forces operating in respect of employees with those qualifications (s. 4(2)(*b*)) ("recruitment and retention needs" criterion). The CHRA and the *Equal Wages Guidelines* allow a limited consideration of recruitment and retention needs through a "reasonable factor" that would allow an employer to justify paying higher wages to one group over another due to the existence of an internal labour shortage in a particular job classification.

Under section 4 of the PSECA, consideration of an employer's recruitment and retention needs is a component of the assessment of the value of work. Recruitment and retention needs are not considered as a "reasonable factor" after the fact as a justification for explaining any differences in wages. The PSECA recognizes that compensation decisions are based on both an internal and an external assessment of the value to an employer of the work performed by employees. There is the value of the work performed by one group of employees relative to the work performed by other employees of the same employer, but the employer must also consider the external market in order to remain competitive (i.e., external relativity).

The approach to determining an employer's recruitment and retention needs is not a mechanical exercise as to whether these needs exist. Rather, it involves thoughtful, gender-neutral consideration of those needs, assessing whether other stakeholders in the market are competing for the same workers and determining what monetary and non-monetary incentives the Government of Canada can offer as an employer without creating market pressure where there is no legitimacy to do so.

The PSECA does not expect or require the federal public sector to bear the burden of reforming the market. Employers, even public sector employers, should not be required to diverge widely from market norms when compensating their employees. Federal public service employers do not seek to lead the market in terms of wages. Rather, depending on the value of the work to them, employers determine if they will meet, lead or lag behind market wage rates.

Eliminating the gender wage gap, either in the federal public sector or in Canadian society, would be a much broader social objective that would require remedial measures beyond the scope of any legislation on equal pay for work of equal value. The goal of the PSECA is to safeguard against systemic, gender-based discrimination within an employer's compensation practices.

To take into account market forces does not necessarily bring discrimination into the assessment of the value of work. Market forces are not inherently discriminatory. Indeed, as previously noted, they were reflected in the CHRA and the *Equal Wages Guidelines*.

Recruitment and retention pressures can drive wages and produce disparities in compensation that cannot be explained solely on the basis of an internal job evaluation. The notion of addressing recruitment and retention through prescribed factors was considered but rejected because, when compensation is established in the open labour market, the value of work to a particular employer varies over time. It depends on that employer's mandate and business needs, the demand for employees with the qualifications required to perform the work, and the availability of such employees.

3.2 Timely and Efficient Resolution of Equitable Compensation Matters

An important objective of the PSECA is to address the delay, expense and haphazardness that hamper the resolution of pay equity issues under the CHRA. One way that the PSECA seeks to accomplish efficiency and timeliness is by merging the obligation to ensure equal pay for work of equal value with the obligation on parties to the collective bargaining process to bargain in good faith when negotiating a collective agreement.

The PSECA creates a streamlined and predictable approach to dealing with equitable compensation so that employees who are entitled to compensation increases as a result of an equitable compensation assessment will realize those gains in a timely fashion.

In several of its provisions,[63] the PSECA requires employees, employers and bargaining agents to execute their respective duties and obligations under the Act within prescribed time limits. The time periods will be set out in the regulations. Under the CHRA complaints-based process, no time limits were established for the resolution of complaints.

63. For example, see section 5 and subsections 6(2), 6(3), 7(2), 7(3), 9(1), 9(3), 11(1) and 12(1).

The objective behind the PSECA is not to reduce equal pay for work of equal value liabilities.[64] The proactive nature of the PSECA will ensure that employers address equitable compensation matters on a regular and ongoing basis when wages are established, rather than face significant retroactive wage adjustments every decade or so. In turn, this will allow for greater predictability in planning compensation costs and assist in the prudent management of public finances. Moreover, under the PSECA, employers will have greater certainty as to the exact nature of their obligations to achieve equal pay for work of equal value.

3.3 Shared Accountability

The CHRA pay equity provisions hold employers solely responsible for pay equity. As a result, unions have had the opportunity to seek wage increases for their members, first at the bargaining table and subsequently through a pay equity complaint before the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal, often many years after negotiating the very wages at issue in the complaint.

The PSECA seeks to create an equitable compensation system that is collaborative and based on a shared commitment to eliminating gender-based discrimination in compensation. Subsection 3(1) of the PSECA makes the employer and the bargaining agent jointly responsible to ensure that equitable compensation matters are identified and resolved at the time wages are set for unionized employees. This is consistent with the recognized principle that unions are jointly liable with employers for any discrimination that may arise in the terms and conditions of employment established during collective bargaining.[65] The PSECA extends this same obligation to the negotiation of equitable compensation during collective bargaining.

Under the PSECA, bargaining agents will be accountable for equitable compensation for their members and will be expected to demonstrate to their membership that they have been actively engaged in ensuring equitable compensation for women through the collective bargaining process.

Section 36 of the PSECA prohibits unions and employers from encouraging or supporting employees in filing a complaint. Both the employer and the bargaining agent are jointly

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64. As stated by Hélène Laurendeau, then Assistant Deputy Minister, Compensation and Labour Relations Sector, Treasury Board of Canada Secretariat, in her testimony before the Standing Senate Committee on National Finance, “The point is not to save money but to ensure that we will plan and address it as we go along…. The intention is to ensure that there is rigour in the system and that it is done on a regular basis, on a go-forward basis, as opposed to being done after 20 years of waiting through a protracted litigation process. The saving on legal fees, however, will be real.” Proceedings of the Standing Senate Committee on National Finance, March 11, 2009, 3:80.

65. *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

accountable for ensuring employees receive equitable compensation at the collective bargaining table where compensation is set. It follows that any complaint filed would be against both parties jointly. The PSECA recognizes that a party should not and cannot encourage, represent or support a complaint against itself.

Joint liability for equitable compensation is designed to enhance the commitment of both employers and bargaining agents to ensuring equitable compensation through the collective bargaining process.

3.4 Clear Definitions and Process

The PSECA establishes definitions and processes for achieving equitable compensation in the context of collective bargaining. The regulations will provide further precision.

For example, subsection 4(3) circumscribes the job groups and job classes that can be considered when conducting equitable compensation assessments in the federal public sector. This subsection clarifies the scope of analysis for equitable compensation. Together with its definition of "employer," this should avoid the confusion that arose under the CHRA in determining such matters as the identity of "the employer" and the scope of the "establishment."

In addition, the use of the term "equitable compensation" in the PSECA (rather than "pay equity") clarifies what should be considered when determining remuneration for work. Compensation is defined in the PSECA as "any form of remuneration payable for work performed by an employee and includes salaries, commissions, vacation pay, severance pay and bonuses; payments in kind; employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and any other advantage received directly or indirectly from the employer."[66] Equitable compensation encapsulates equal pay for work of equal value.

The Pay Equity Task Force's final report recommended that new federal pay equity legislation contain clear standards and criteria for the achievement of pay equity. It noted the following:

> The absence of clear standards and criteria in the legislation seems to have had a number of undesirable effects. […] The uncertainty surrounding the exact nature of employer obligations and the possible consequences of non-compliance had in some cases the opposite effect. It encouraged an adversarial approach in which both employers and the representatives of their employees were continually conscious of potential challenges to

66. PSECA, subsection 2(1).

any pay equity plan, and in some cases clearly inhibited the development of such plans on a voluntary or collaborative basis.[67]

Under the PSECA, employers will have greater certainty as to the exact nature of their obligations to achieve equal pay for work of equal value. Definitions, processes and timelines will be clear. Ambiguity regarding standards for achieving pay equity and related concepts under the section 11 of the CHRA resulted in significant delays in the resolution of complaints.[68]

3.5 Transparency

The PSECA was designed to make the process for achieving equitable compensation and, consequently, the compensation choices for female predominant job groups at the collective bargaining table, more transparent. Transparency is at the core of the PSECA legislation in several significant ways. First, the collective bargaining process itself is transparent. Second, section 22 provides that before a proposed collective agreement is presented to affected employees, the bargaining agent and the employer must provide a report setting out how equitable compensation assessments were conducted for all female predominant job groups and, if an equitable compensation matter was identified, describe the matter and indicate when it will be addressed. Third, sections 17 and 20 provide that the parties have access to dispute resolution by a third party when there is an impasse or dispute, either through the process of arbitration before a board of arbitration or through conciliation by a public interest commission.

Transparency between employers and bargaining agents is needed to assist parties in being accountable and in identifying and resolving equitable compensation issues and then reporting results to employees. The PSECA mandates transparency in several of its provisions.[69]

For unionized employees, a first level of transparency is observed in the manner in which parties to the collective bargaining process develop their respective positions. The PSECA requires the bargaining agent and employer to conduct preparatory work before collective bargaining begins in order to raise or be able to respond to questions concerning the provision of equitable compensation to employees in female predominant job groups.[70]

A second level of transparency between employers and bargaining agents is to be achieved by sharing relevant information required to conduct an equitable compensation assessment, and by

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67. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, p. 98.
68. Canadian Human Rights Commission, *Time for Action: Special Report to Parliament on Pay Equity*, February 2001.
69. PSECA, notably subsections 3(2) and 12(1), and sections 13, 14, 15, 22 and 43.
70. Ibid, section 13.

developing and exchanging positions and solutions to equitable compensation issues during collective bargaining.[71]

A third level of transparency occurs between employees and their bargaining agent and employer. For example, the legislation contains a number of requirements to post or make information available to employees, including posting a notice that describes the obligation of the employer, or the employer and the bargaining agent, to take measures to provide equitable compensation to employees and to respect the rights of employees under the PSECA.[72] Before employees are asked to ratify a collective agreement that includes a female predominant job group, a report must be made available to the employees setting out how the equitable compensation assessment was conducted and when equitable compensation matters, where found, will be resolved.[73] Non-unionized employees will also receive a similar level of disclosure.[74]

Employers' or employers' and bargaining agents' equitable compensation plans for unionized and non-unionized employees will be communicated to these employees.[75] This requirement will help employers and bargaining agents explain to employees the compensation decisions that affect them. Where employees are dissatisfied with an outcome, they can have recourse to the employer and the Public Service Labour Relations Board.[76]

A fourth level of transparency occurs between the employer and the bargaining agent, on the one hand, and the Public Sector Labour Relations Board, on the other. Employers' equitable compensation plans for unionized and non-unionized employees will be filed with the Board.[77] In response to a complaint, the Board may order the employer, or the employer and the bargaining agent, to report on what measures they have taken to conduct an equitable compensation assessment and their plan to resolve any equitable compensation matters.[78] The Board must make such reports available to the public.[79]

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71. Ibid, sections 12, 14 and 15.
72. Ibid., subsection 3(2).
73. Ibid., section 22.
74. Ibid., paragraph 7(1)(*b*).
75. Ibid., paragraph 7(1)(*b*) and section 22 respectively.
76. Ibid., sections 7, 9, 23, 24 and 26.
77. Ibid., section 43.
78. Ibid., sections 30 and 33.
79. Ibid., subsections 30(6) and 33(7).

3.6 Maintenance of Equitable Compensation

Under the PSECA, equal pay for work of equal value is maintained through the requirement that equitable compensation matters be identified and resolved whenever compensation is set for unionized employees. For non-unionized employees, this will be done on a periodic basis.

Both the CHRC[80] and the Task Force[81] recognized the need for measures ensuring the continued maintenance of equal pay for work of equal value once achieved. The Task Force report states that "legislation must provide a clear and detailed framework for the obligation to maintain pay equity, as well as any resulting obligations."[82]

The report further states that "new federal pay equity legislation [should] include a provision indicating that once the pay equity plan has been implemented, the employer is obligated to maintain pay equity and ensure that the maintenance process is gender-neutral and inclusive."[83] Moreover, "a trade union has an obligation, insofar as it has the power to do so, to see that pay equity is maintained with respect to its members when renewing a collective agreement or negotiating a new collective agreement."[84]

The PSECA requires bargaining agents and employers to ensure that equal pay for work of equal value is not only established but also reviewed and maintained on a regular basis. In contrast, under the CHRA, there are no proactive mechanisms to ensure pay equity is achieved and maintained.

3.7 Female Predominance Threshold

The PSECA defines "female predominant" in relation to a job group or a job class as a job group or job class composed of at least 70% female employees. In setting this threshold, consideration was given to the continuing trend of feminization in the federal public service, to precedents that exist in other jurisdictions, and to 30 years of experience with complaints filed under the CHRA.

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80. Canadian Human Rights Commission, *Time for Action: Special Report to Parliament on Pay Equity*, February 2001.
81. *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004. Recommendations 13.1 and 13.3 recommend a pay equity committee be given responsibility for ensuring that pay equity is maintained.
82. Ibid., p. 375.
83. Ibid., Recommendation 13.1.
84. Ibid., Recommendation 13.2.

As discussed earlier in this paper, the percentage of female employees in the federal public service has increased markedly since the enactment of the CHRA 35 years ago.[85] A female predominance threshold of 55% was appropriate in 1977 when women's representation in the federal public service was much lower. By 2009, the representation of women had increased significantly to 55% across the federal public service, making a 70% threshold for female predominance reasonable.

The choice of a 70% female predominance threshold was also influenced by research into other legislative precedents. This research revealed that the same threshold is used to establish female predominance in other jurisdictions, such as Manitoba, New Zealand and Minnesota.

In settling on this threshold, the gender predominance of groups that filed complaints within the core public administration prior to the enactment of the PSECA was examined. Based on an analysis of these complaints, nearly three-quarters of the complainant groups were effectively at or above a 70% female predominance threshold when complaints were filed. Given the increasing feminization of the federal public service, by 2009 all but one of these complainant groups were effectively at or above the 70% threshold for female predominance.[86]

While there has been some concern expressed that the 70% threshold is too high, the right of employees to file complaints in respect of job classes[87] should mitigate any risk there may be that the threshold could prevent some employees from achieving equitable compensation. The employee's ability to file a complaint at the job class level provides an incentive for the parties in the collective bargaining process to consider female predominant job classes within a job group when setting compensation (to avoid employee challenges to negotiated and agreed-upon terms and conditions).

3.8 Dispute Resolution During Collective Bargaining

The PSECA redress process ensures that parties receive guidance and an opportunity to address equitable compensation issues during collective bargaining. For example, where questions arise concerning the provision of equitable compensation to employees, sections 17 to 19 provide that the parties may resort to arbitration, and sections 20 and 21 provide for conciliation through a public interest commission.

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85. Public Policy Forum, *Emerging Trends Affecting the Public Service Commission and the "Public Service Employment Act,"* September 2009.
86. Expenditure Management Sector, Treasury Board of Canada Secretariat.
87. Defined in the PSECA as two or more positions in the same job group that have similar duties and responsibilities, require similar qualifications, are part of the same compensation plan and are within the same range of salary rates.

If the process for resolving disputes chosen by the bargaining agent is arbitration, section 18 of the PSECA provides that the arbitration board can determine whether a job group is female predominant and, if so, how an equitable compensation assessment is to be conducted. Further, under section 19, if the request for arbitration includes any equitable compensation matters, the arbitration board must make an arbitral award that sets out a plan to resolve those matters within a reasonable time. Subsection 19(2) states that the arbitration board must prepare a report that sets out the equitable compensation assessment to which the award relates and specifies whether the matter is to be resolved during the term of the arbitral award.

Section 21 provides that if conciliation is chosen to resolve disputes during collective bargaining, a public interest commission seized of a request for conciliation must, in the absence of agreement by the parties, determine whether any job group is female predominant and, if so, how the equitable compensation assessment should be conducted and must make recommendations regarding the provision of equitable compensation to the employees concerned.

The PSECA dispute resolution process is intended to ensure that employers and bargaining agents are able to address and resolve equitable compensation issues during collective bargaining. As a neutral, independent and well-established third party, the Public Service Labour Relations Board and its predecessor have played a key role in resolving issues around wages and conditions of work between federal public sector employers and bargaining agents for over 40 years.

3.9 Employee Recourse

Before focusing on the recourse provisions of the PSECA that are applicable to unionized employees, it may be useful to underline some of the other provisions that will, in the first instance, assure employees that specific action is being taken to ensure equal pay for work of equal value. First, as outlined earlier in this paper, the PSECA establishes positive obligations on employers and bargaining agents to proactively examine compensation on a regular basis to determine whether there are any equitable compensation issues that need to be addressed. Employers and bargaining agents will be required to address these issues for unionized employees during collective bargaining, which is the mechanism used to establish compensation for these employees. Collective bargaining is a long-established, proven forum where employees through their certified representatives (or bargaining agents) and employers address compensation and other workplace concerns.

It is also important to underscore that bargaining agents have democratic processes in place to ensure that they represent the concerns and needs of all of their members. They have rules about how member input is gathered as well as how decisions are made about bargaining proposals or

demands. Bargaining agents' pre-bargaining processes and preparation ensures employee involvement and fair representation in the collective bargaining process. This allows bargaining agents to adopt a bargaining position that reflects their membership's wishes and increases the probability of negotiating a collective agreement that employees will be satisfied with and will ratify.

Moreover, prior to a collective agreement being submitted to employees for ratification, the employer and the bargaining agent will be required to prepare and make available to employees a report setting out how the equitable compensation assessment was conducted, whether an equitable compensation matter exists and when it is to be resolved. These proactive steps are some of the ways by which employees will know that action is being taken by employers and bargaining agents to ensure that their rights are respected. These obligations also represent some of the important ways that the new Act differs from the CHRA complaints-based model, which relies exclusively on engaging a system of redress when employees believe that their rights are not being respected.

Once a collective agreement has been ratified by employees and entered into, an employee who believes that he or she will not receive equitable compensation can file a complaint to the Public Service Labour Relations Board.[88] The Board has remedial authorities available to it to ensure that the complainant receives equitable compensation.

First, the Board may order the employer and the bargaining agent to do an equitable compensation assessment for the complainant's job class and provide a report setting out the assessment together with a plan to resolve any equitable compensation matters that are identified. If the Board finds that a manifestly unreasonable error was made in the assessment or that the plan fails to make reasonable progress in resolving an equitable compensation matter, it may require the employer and the bargaining agent to take measures to correct the error or alter the plan accordingly and report on the measures taken. Finally, if the Board is still not satisfied with the response of the employer and the bargaining agent, it may do its own assessment and require the employer, or the employer and the bargaining agent, to pay the complainant a lump sum as

88. The Public Service Labour Relations Board was established in 1967 as an independent, neutral third party to decide, among other things, matters arising during collective bargaining in the federal public sector. It has the mandate to act in the capacity of an arbitrator or mediator to resolve disputes relating to the negotiation of collective agreements. It also provides grievance or complaints adjudication and mediation, as well as compensation analysis and research services. In 2005, the Board was given jurisdiction to decide discrimination matters in the employment context, with the exception of matters of equal pay for work of equal value. As such matters will now be addressed during collective bargaining, it is appropriate that the Board have responsibility for adjudicating complaints under the new Act.

compensation and to modify the collective agreement to ensure that employees in the job class receive equitable compensation for the remainder of the term of the collective agreement.

Thus, the redress mechanisms under the PSECA are incremental. If the Board determines that the employer or the employer and the bargaining agent have committed an error, the Board does not have the authority to immediately remedy a violation. The parties are given two opportunities to address the matter; only after that can the Board issue orders that would impose an equitable compensation solution.

This incremental approach is intended to provide sufficient opportunity for employers, or employers and bargaining agents, as the case may be, to carry out their obligations and resolve matters independently. The Board will only intervene when the parties are unable to come to a resolution and, even then, only to the degree necessary.

The PSECA also sets out mechanisms for non-unionized employees to seek redress if they believe that their employer is not adequately carrying out its obligations.

The PSECA requires employers of non-unionized employees to periodically determine, for each job group, whether it is female predominant and, if so, whether an equitable compensation matter exists. If such matters exist, the employer must prepare a plan to resolve them within a reasonable time. The employer must provide notices or reports to employees of its determinations at each step of the process.

A non-unionized employee in the job group may use an internal process to require the employer to revisit those determinations and to report back on whether the employer will take any measures in response. In addition, an employee may request the employer to provide him or her with equitable compensation based on his or her asserted job class. A job class will typically be a subset of the job group: this allows challenges to inequities that may arise on a more localized level. The employer is again required to respond to such a request.

If an employee is not satisfied with the employer's response at any stage, he or she may file a complaint with the Board.

Conclusion

The *Public Sector Equitable Compensation Act*[xxiv] (PSECA) builds on the federal experience under the complaints-based *Canadian Human Rights Act*[xxv] (CHRA) model. It also draws inspiration and lessons learned from the proactive legislation and jurisprudence on equal pay for work of equal value in other jurisdictions, as well as from the extensive study and recommendations of the independent 2004 Pay Equity Task Force.

The PSECA's policy objective is to create a proactive and more effective approach to addressing equal pay for work of equal value within existing compensation-setting processes while recognizing that federal public sector employers operate in a market-driven economy. It seeks to improve consistency in the application of the equal pay for work of equal value principle, promote collaborative labour-management relations, achieve equal pay for work of equal value efficiently, and make both employers and bargaining agents accountable for equitable compensation. It will give employers greater certainty about the exact nature of their obligations and allow predictability in planning compensation costs, thereby assisting in the prudent management of public finances. Finally, it will give employees greater assurance that they are receiving equitable compensation on an ongoing basis.

The PSECA is unique in Canada. It reflects many of the features of the provincial models, but is the only Act in Canada that advances joint union-employer accountability for equitable compensation on an ongoing basis. The PSECA brings together, into a proactive process, collective bargaining and the right to equal pay for work of equal value.

Appendix: International Labour Organization C100—Equal Remuneration Convention, 1951 (No. 100)

Article 1

For the purpose of this Convention:

(a) the term *remuneration* includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

(b) the term *equal remuneration for men and women workers for work of equal value* refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of:

(a) national laws or regulations;

(b) legally established or recognised machinery for wage determination;

(c) collective agreements between employers and workers; or

(d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as

being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each Member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

Endnotes

i. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

ii. *Canadian Charter of Rights and Freedoms*, http://laws-lois.justice.gc.ca/eng/Const/page-15.html

iii. *Canadian Human Rights Act*, http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html

iv. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

v. *Financial Administration Act*, http://laws-lois.justice.gc.ca/eng/acts/F-11/index.html

vi. *Canadian Charter of Rights and Freedoms*, http://laws-lois.justice.gc.ca/eng/Const/page-15.html

vii. *Canadian Human Rights Act*, http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html

viii. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

ix. "Indicators of Well-Being in Canada: Work-Unionization Rates," http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17

x. "Work Stoppages in the Federal Private Sector: Innovative Solutions," http://www.hrsdc.gc.ca/eng/labour/labour_relations/wsfps/page02bb.shtml

xi. *Eighteenth Annual Report to the Prime Minister on the Public Service of Canada*, http://www.clerk.gc.ca/eng/feature.asp?featureId=19&pageId=275

xii. *Employment Equity Act*, http://laws-lois.justice.gc.ca/eng/acts/E-5.401/index.html

xiii. "Female Executives in Public Service on the Rise," http://www.ottawacitizen.com/life/Female+executives+public+service+rise/2800828/story.html

xiv. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

xv. *Canadian Human Rights Act*, http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html

xvi. *Time for Action: Special Report to Parliament on Pay Equity*, executive summary, http://www.chrc-ccdp.ca/publications/tfa_summary-eng.aspx

xvii. *Moving Forward on the Pay Equity Task Force Recommendations*, http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1928318&Language=E&Mode=1&Parl=38&Ses=1

xviii. *Moving Forward on the Pay Equity Task Force Recommendations*, http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1928318&Language=E&Mode=1&Parl=38&Ses=1

xix. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

xx. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

xxi. *Canadian Human Rights Act*, http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html

xxii. International Labour Organization (ILO) Convention 100, http://www2.ohchr.org/english/law/equalremuneration.htm

xxiii. *Equal Wages Guidelines*, http://laws-lois.justice.gc.ca/eng/regulations/SOR-86-1082/index.html

xxiv. *Public Sector Equitable Compensation Act*, http://laws-lois.justice.gc.ca/eng/acts/P-31.65/index.html

xxv. *Canadian Human Rights Act*, http://laws-lois.justice.gc.ca/eng/acts/H-6/index.html