June 3, 2010

Ms. Susan Cartwright
Senior Advisor
Legislative Review of the *PSMA*
Treasury Board of Canada
300 Laurier Avenue West
Ottawa, Ontario K1A 0R5

Dear Ms. Cartwright:

First we must start by stating that it is CAPEôs opinion that the revised *Public Service Labour Relations Act* (*PSLRA*) is not balanced labour legislation such as one finds in many provinces. It is legislation which favours the employer rather than endeavouring to strike a balance between the government and its unions.

You may remember that changes to the *Public Service Staff Relations Act* (*PSSRA*) were deemed necessary following a very confrontational period in labour relations in the 1990s when collective bargaining and arbitration were suspended, the pension surplus was appropriated unilaterally by the employer, and 50,000 positions were cut from the federal public service. Independent observers, as well as Treasury Board Secretariat (TBS) and Bargaining Agents, all agreed that the imbalance in the legislation that accentuated the employerôs ability to act unilaterally needed to be addressed if labour relations were to improve rather than deteriorate even further.

One of CAPEôs founding organizations, the Social Sciences Employeesô Association (SSEA), was one of Treasury Board Secretariatôs partners on the steering committee of the Public Policy Forum (PPF) research initiative which summarized its conclusions in the PPFôs publication entitled *Levelling the Path: Perspectives on Labour Management Relations in the Federal Public Service.* At the invitation of the Treasury Board Secretariat, SSEA and the Canadian Union of Professional and Technical Employees (CUPTE), the other union that founded CAPE, participated in consultation with the TBSôs Advisory Committee on Labour Management Relations in the Federal Public Service. CAPEôs two founding unions met several times with TBSôs Task Force to Modernize Human Resources Management. Repeatedly CAPEôs predecessors and then CAPE explained the imbalances in the legislation that needed to be corrected in order to move in a positive way away from the troubled times of the 1990s. Yet, the proposals for change to the legislation that were eventually presented by the Treasury Board to Parliament exacerbated and accentuated the imbalance to such an extent that CAPE and other bargaining agents needed to present

a long series of amendments to the parliamentary committees that studied the bill at the time, but to no avail. I have provided for your information a copy of the brief that SSEA presented at the time.

Thus modifications to the *Public Service Staff Relations Act* (*PSSRA*) that resulted in the *PSLRA* increased the imbalance of power between the employer and bargaining agents rather than reduced it. Moreover, this imbalance is reinforced when one adds two other building blocks brought about with the *Public Service Modernization Act* (*PSMA*), the changes to the *Federal Administration Act* and the ñnewò *Public Service Employment Act* (*PSEA*).

Some of our concerns regarding the regressive nature of the *PSLRA* are currently being advanced in our constitutional challenge based on the prohibition of bargaining issues such as pensions, staffing, and classification. Therefore, all comments made below on both the *PSLRA* and the *PSEA* are made without prejudice. We respectfully put to you that these matters should be discussed at the bargaining table. You should expect CAPE to bring some of these matters to the bargaining table in the next round of bargaining.

This is our response to your request for CAPEôs input into our experience with the administration and operation of the *PSEA* and the *PSLRA* in relation to the original intentions of the *PSMA*. After carrying out extensive consultation with our membership seeking direction on their experience in the areas of staffing and labour/management relations, we take this opportunity to provide the following observations.

The *PSEA*

The proclaimed objective for enacting the *PSMA* was to modernize the way human resources management was carried out in the federal public service. The new *PSEA* was supposedly designed to address concerns of employees and management regarding hiring processes and practices. The main goals were to:

- Transform the way public servants were hired ï by now hiring the ñright personsò;
- Strive to have a public service representative of Canadaôs diversity;
- Transform the way public servants were managed and supported;
- Focus on learning and development for employees at all levels;
- Clarify roles and responsibilities and hold managers accountable for their decisions in the hiring processes;
- Streamline the hiring process by making it faster, more transparent, more accessible, fair, and respectful of employees and to foster effective dialogue between employees and management.

Were these achieved? In a nutshell, not at all.

It is our experience that the concept of ñright fitò in hiring decisions is open to abuse and has not led to the stated goal of finding the right person for the job in the majority of situations. Qualifications and ability to actually carry out the responsibilities of the position do not seem to be a priority consideration for staffing decisions. It has become easier for managers to

simply confirm acting appointments into positions and abuses in the non-advertised hiring processes seem to be a continuing theme across departments.

On the issue of management accountability for their decisions in the hiring process, the extremely limited grounds for challenging staffing decisions leads to a cynicism amongst employees in the process and a feeling that managers cannot be held accountable for their staffing decisions. Of note, our members conveyed to us the untenable situation they find themselves in when facing an error or perceived abuse of authority in the hiring process. They now have to accuse someone ï their current manager or one they would like to go work for ï of abusing their authority. They can no longer try to attack a process, but must now accuse a person. This creates conflicts, fear or reprisals and leads in most cases to our members deciding against exercising their rights. Any exercise of such rights is seen as a ñcareer limiting moveò.

In addition, it is an overwhelming consensus that the changes made to the *PSEA* have not led to a faster hiring process as was envisioned under the new legislation. We have heard from many of our members that staffing actions from initial posting to notification of appointment to a staffing pool can take upwards of 14 months and more.

On the issue of transparency, the very subjective nature of selecting a candidate for a position based on the concept of ñright fitòdoes not lend itself to a transparent process when you cannot quantify the decision-making criteria. Moreover, the lack of any requirement to provide timely notice in cases of acting assignments have lead to ridiculous situations where notice of acting assignments and recourses available were provided only after the assignment periods were over.

The issues of fairness and accessibility of the staffing processes raise serious concerns with our membership. The process has become more cumbersome under the new legislation. There is a general sense of resignation in the process as the grounds for recourse are extremely limited. Although we were promised a process that would be fairer with the addition of a quasi-judicial tribunal to review managementôs decisions, we quickly realized that the enabling Act in fact did the opposite. The *PSEA* limits the grounds for complaints so much that it is next to impossible to meet the burden of proof that must be established for the tribunal to intervene. This is compounded by the realities of the Tribunalôs extremely limited powers of redress and the constant intervention of the Public Service Commission ï that is supposed to be an impartial intervener, ña guardian of merit and non-partisanshipòï against the interest of employees filing complaints.

One example of the limited powers of redress can be found in the *Cameron and Maheux v. Deputy Head of Service Canada et al* (2008 PSST 16) case. Despite finding that the appointment made in that case was done so on bad faith and not based on merit, the Public Service Staffing Tribunal (PSST) found that revocation of the appointment was not an appropriate corrective action in the case. If complainants go through the time and effort of successfully proving bad faith by filing complaints aptly described as ñcareer limiting movesò with no effective remedy, are others likely to bother? We doubt it.

The *PSLRA*

The *PSLRA* was also amended for the stated purposes of encouraging and fostering labour-management dialogue, joint problem-solving and more effective collective bargaining. The amendments also expanded the scope of the Public Service Labour Relations Boardôs (PSLRB) jurisdiction concerning human rights issues duty of fair representation (DFR) complaints and other issues.

Concerning the dialogue between labour and management, we can only conclude that the legislation did not have the expected outcome. In the absence of a clear definition of ñconsultationò, several departments and managers have decided to interpret this requirement in its simplest and inadequate version: providing information. Relationships between management and CAPE have not improved in several (or most) departments as consultation continues to be seen as an importune obligation rather than a cornerstone of good human resources management. Furthermore, in the absence of a third party resolution process, co-development initiatives are nothing more than uneven partnerships where bargaining agent resources are abused while the employer maintains full control over the decision-making process.

With respect to the adjudication process and efficiency, CAPE wishes to raise concerns about the jurisdiction of the PSLRB to function and process adjudications and DFR complaints efficiently. On the adjudication side, a recent case from the Federal Court, *AG of Canada v. Amos,* illustrates some of the inefficiency of the current adjudication process. The Court determined that an Adjudicator under the *PSLRA* could not inquire into an alleged breach of a settlement because of a lack of express language in the *PSLRA* allowing adjudicators to do so. Adjudicators/Arbitrators under the *Canada Labour Code* can in fact determine whether or not grievance settlements have been breached without the necessity of the parties recommencing litigation with a new grievance. This lack of jurisdiction may discourage the settlement of grievances and lead to more litigation, either of the initial grievance(s) or new ones filed post settlement. The language of the *Canada Labour Code* would thus be preferable.

In dealing with unfair labour practice complaints, the *PSLRA* specifies in Section 190 that

> *ñThe Board must examine and inquire into any complaint made to it thatò*
>
> *ñ(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.ò*

In addition, the Board has the duty and power in accordance with s. 191 that states: (1) Subject to subsection (3), on receipt of a complaint made under subsection 190(1), the Board may assist the parties to the complaint to settle the complaint. If it decides not to do so or if the complaint is not settled within a period that the Board considers to be reasonable in the circumstances, it must determine the complaint.

Under the current legislation, the requirement for the Board to inquire into any complaint can be particularly onerous for smaller bargaining agents given the expanded scope of DFR

provisions which has lead to a greater complexity of issues and a corresponding increase in the time required to respond.

In our view, the PSLRB should adopt procedures that would allow a representative of the PSLRB to inquire into allegations that the Union acted in a manner that is arbitrary, discriminatory or in bad faith in its representation of a member(s).

In several jurisdictions, including Ontario, the Board may be asked by the responding party to dismiss a complaint (or may do so on its own initiative) if it does not meet the basic requirements of an arguable case. The Board can then dismiss the complaint without a consultation or hearing.

The Boardôs Rules of Procedure in Ontario provide that after an application is filed, a Labour Relations Officer is normally assigned to meet with the employee and the Union to try and help them reach agreement. If there is no agreement reached, a consultation (or informal hearing) is held with a Vice Chair of the Board. At the consultation, the employee must establish that the union violated the *Labour Relations Act*.

By using more informal procedures, the Ontario Labour Relations Board and other labour boards have been able to deal with DFR complaints much more effectively.

It is our view that DFR complaints would be dealt with in a much more expeditious manner if the legislation was written to allow the PSLRB to adopt more effective means to resolve them. The Board has not been given sufficient powers to screen or otherwise efficiently dispose of these complaints. While the Board does have the power to dismiss complaints of a frivolous and/or vexatious nature, under s.40(2)[1], there are many complaints that may pass this low threshold but not meet an arguable case test. This then causes all parties, the employer, unions and complainants to expend time and resources of their own and the Board, when more efficient and cost effective procedures could and should be used.

In closing, let me repeat that many of the matters above should not be the object of consultations with all its limitations. They should be negotiated. I respectfully put to you that if Treasury Board is serious about its review and wishes genuinely to improve legislation in order to amend labour relations, it should begin by changing those sections of the *PSLRA* that prohibit unconstitutionally bargaining matters related to classification, staffing and pensions. Moving the discussion of these matters away from the consultation table to the bargaining table will go a long way to establishing a better balance between the parties which was after all the original purpose of changing the statutes that structure relations between the employer and bargaining agents in the federal public service.

Yours very truly,

Claude Poirier

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[1] Even this provision does not explicitly allow the PSLRB the power to declare a person a vexatious litigant, a process adopted by the OLRB to deal with individuals who are abusing the Boardôs processes. Wording such as that found in the PSSTôs regulations (s.27) should be adopted for the PSLRB to provide the PSLRB with additional authority to make such declarations when appropriate.