



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**TREASURY BOARD**

Employer

and

**ASSOCIATION OF PUBLIC SERVICE  
FINANCIAL ADMINISTRATORS**

Bargaining Agent

**RE:** Post-Certification Identification of Managerial  
or Confidential Positions -  
Manager, Financial Planning & Analysis, FI-03 (IAN-22229),  
Atlantic Region, Indian and Northern Affairs Canada -  
Manager, Financial Services, FI-03 (24053),  
Ontario Region, IANAC

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**Before:** [Evelyn Henry, Deputy Chairperson](#)

**For the Employer:** Georges Hupé

**For the Bargaining Agent:** Steve Waller, Counsel

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Heard at Ottawa, Ontario,  
September 8, 1998.

## DECISION

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The Association of Public Service Financial Administrators (APSFA) objects to the identification as managerial or confidential positions by the employer pursuant to section 5.2 of the *Public Service Staff Relations Act* (PSSRA) of two positions in the Financial Management Subgroup of the General Services Group bargaining unit for which it is the certified bargaining agent. The employer has identified as managerial or confidential positions under paragraphs 5.1(1)(b) and 5.1(1)(d) of the PSSRA the position of Manager, Financial Planning and Analysis, FI-3 (IAN-22229) Atlantic Region, Indian and Northern Affairs Canada (IANAC) which is encumbered by Mr. Tom Keagan and that of Manager, Financial Services, FI-3 (24053), Ontario Region, IANAC which is occupied by Ms. L. Jessen

In arguing this case the parties relied solely on the examiner's reports issued on April 27, 1998 and April 23, 1998. For ease of reference, the two reports are reproduced below.

### ***REPORT OF THE EXAMINER***

1. By Board decision, I was authorised to inquire into and report to the Board on the duties and responsibilities of the above mentioned position. This examination was held in Moncton, N.B. on November 20, 1997 and in Ottawa, Ont. on December 1, 1997.
2. Appearances:  
For the Bargaining Agent  
A. Mr. Claude Archambault  
For the Employer  
B. Mr. Georges Hupé
3. The employer proposed this designation by request dated February 26, 1997. It has been proposed that the position ought to be designated under paragraphs 5.1(1)b and 5.1(1)d of the **Public Service Staff Relations Act** by reason of the occupant's duties and responsibilities to the employer.

### ***EXHIBITS***

4. Exhibit 1: Job description of the Manager, Financial Planning & Analysis, (IAN-2229) dated October 1, 1994.
5. Exhibit 2: Organisation Chart of Corporate Services - Atlantic Region dated July 1997.
6. Exhibit 3: Delegation of Personnel Authorities

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**WITNESSES**

7. The following persons were questioned:

Mr. Dougal MacDonald, Acting Director, Corporate Services, Atlantic Region, who has been in this position since April 1997. This is not his first acting assignment in this position. His substantive position is Manager, Program Planning and Allocation (an excluded position) and previously he was the Manager, Accounting Operations. He has worked 15 years with the government.

Mr. Tom Keagan, Acting Manager, Financial Planning and Analysis (the position being examined) since October 1, 1997. He has worked 10 years with the Government. His substantive position is Manager, Program Assessment and Review.

Mr. Norman Tibbetts, Senior Resource Analyst since October 1997. He was previously Manager, Financial Planning and Analysis, Atlantic Region (the position being examined) between September 1989 and September 1997. He has worked with the Government since June 1981.

**ORGANIZATION**

8. Mr. Dougal MacDonald, Acting Director, Corporate Services, explained that the Corporate Services Directorate provides services to the regional office in four primary areas, each of which is headed by a manager. These are Accounting Operations, Financial Planning and Analysis (position being examined), Informatics and Administration as shown in exhibit 2.
9. The Financial Planning and Analysis area provides service in relation to budgets and quality assurance, so that the management and administrative processes work as intended explained the Acting Director, Corporate Services.
10. Mr. Tom Keagan, Acting Manager, Financial Planning and Analysis introduced the organisational chart of Corporate Services - Atlantic Region (exhibit 2). He explained his section.

**FUNCTIONS, ROLES AND RESPONSIBILITIES****Organisational Review:**

11. The Acting Director, Corporate Services said that each manager is responsible for the organisation of his shop and how work is assigned. If a change is intended, a recommendation would be provided to the Director and to human resources. For example, a manager could delay filling an opened FI position. Another example from last summer when there was a vacancy, the decision was left to the manager to fill the position by a casual employee or to take someone from another directorate. Mr. MacDonald added they do not need his approval.
12. The former Manager, Financial Planning and Analysis, said he had the latitude to change his organisation. For example he had one FI-02 and two FI-01s reporting to him. He changed the reporting relationship of one FI-01 to report

- to the FI-02 instead of to him. Also if there was a vacant position, he would decide whether to staff it immediately or later down the road. He never tested the system but he does not think he could have staffed two CR positions instead of an FI-02 position. The salary budget at the time was with the Director, Corporate Services.
13. When Mr. Tibbetts occupied the position he would run the competitions even though the Director was sitting on the Board.
  14. Mr. Tibbetts put out the poster while the Director signed the staffing action. Mr. Tibbetts reclassified an FI-01 position to an FI-02. The Director signed it after Mr. Tibbetts had done all the work. The signing authority to hire someone rested with the Director.
  15. The Acting Director, Corporate Services explained that as part of on going alignment and adjustment, they studied the structure of Corporate Services during the summer months and looked at options such as collapsing the financial planning and accounting operations under one manager as was done in other regions. No decisions have yet been taken, but the discussions on the organisation of the Financial Service Section are taking place. In the end it is up to the Regional Director General who has the final word in the region.
  16. The Manager, Financial Planning and Analysis stated he is privy to confidential information such as salary forecast information, and re-organisations which are an annual event. They result in positions being deleted, created with new job descriptions, or being reclassified. Information received on proposed organisations is changing continuously. There is one other person (part of the bargaining unit) who works very closely with the salary forecasts and is possibly aware of some of these initiatives mentioned earlier.

#### **Financial Planning and Analysis:**

17. The former Manager, Financial Planning and Analysis explained that his position entailed financial analysis, financial planning, making scenarios, budgeting, quality assurance and reviewing of agreements with First Nations, challenging program people on the possible content of agreements based on departmental model agreements, First Nations accountability, reporting, transfer payment system reporting, and budget reporting.
18. Mr. MacDonald said the budgeting side of the organisation provides a service to all the regional management. He added they develop operational budget management regimes (vote 15) for the regional office such as salary management. They monitor the budgets and report to the Regional Finance Committee, conduct analysis and provide recommendations on adjustments to be made and identify the problem areas. Between the meetings of the Committee, if there are projected salary deficits, the manager would discuss the validity of it with the director concerned.
19. In terms of the grants and contributions budget (vote 5), Mr. MacDonald explained they provide an overall budget management function. For example, after the money has been allocated by the headquarters, the regional portion is allocated to each of the communities by Funding Services. There are terms and

conditions which are monitored by the Funding Unit Officers. The First Nations communities must report back. Quality assurance of the Financial Planning and Analysis Section helps develop and review the monitoring processes. They are part of the audit review committee for financial audits. In other words they are monitoring the budgets, the processes which allocate the moneys to the communities to ensure national standards are met. If anomalies are found, it would be reported to management of the Funding Services and possibly to the Regional Executive Team depending on the scope of the findings.

20. Mr. Tom Keagan explained that resource acquisition under vote 5 (salary, operation and maintenance), 10 (capital purchases) and 15 (grants and contributions) from the headquarters is a key part of his position. His role is to monitor the resources, and assist in preparing submissions to headquarters and Treasury Board to obtain additional resources.
21. Mr. MacDonald explained that the Manager, Financial Planning and Analysis has a primary budget of between \$12,000 and \$15,000 for travel. Both Mr. MacDonald and Mr. Tibbetts said that the salary budget is the responsibility of the Director, Corporate Services.

**Acting Assignments:**

22. The Acting Director, Corporate Services explained that he is away from his work on average approximately five days a month and he expects the person who acts in his position to do the work, have full authority and have the delegated financial signing authorities. The person acting would be involved in all decisions and attend meetings. The Manager, Financial Planning and Analysis would act in the Director position as would the other Corporate Services managers.
23. Mr. Tibbetts stated that he acted on a number of occasions for Mr. W. Draper who was the Director, Corporate Services at the time. One acting assignment was for two months. Mr. Tibbetts shared it with the Manager, Accounting Operations. There were other similar occasions. When in the acting position, Mr. Tibbetts had the same authorities and the same was expected from him as if it would have been the Director himself.

**Personnel Authorities:**

24. Mr. MacDonald explained that since the new Regional Director General took office, he insists that all personnel authorities (to the extent that the national authorities permit) are delegated to the lowest possible level which is the manager level, e.g. approval of leave and telework. The telework policy is currently being developed and will ultimately be approved by the Human Resource Committee.
25. Mr. MacDonald said the position of Manager, Accounting Operations is not an excluded position.

**Agreements with First Nations:**

26. Mr. Tom Keagan said he is involved in functions which may not be mentioned in the current job description, such as the negotiation of an agreement with First Nations for funding arrangements. He is involved in the negotiation of mismanagement agreements for First Nations in financial difficulties. He also monitors First Nations management plans to rectify the financial situation. One example of special assignment is where one native organisation that has a direct funding arrangement with the department for several program areas and other arrangements which involved not only the department, but the province of Newfoundland and other native communities. The Manager, Financial Planning and Analysis role is to negotiate a new agreement which would incorporate all these agreements. He must also consult with the headquarters land claim negotiating committee. The example of the negotiation of this agreement is a one time assignment, however, he believes he could be assigned others once this one is completed.
27. Mr. Tibbetts said he led one negotiation on budget levels for social development with First Nations. This negotiation is still on-going because he left the region before the negotiation was completed.

**COMMITTEES AND TEAMS****Corporate Services Management Team:**

28. Mr. Dougal MacDonald explained that there is a **Corporate Services Management Team** composed of the four managers and himself which meets weekly. Topics discussed include specific employee issues, compressed work week, overtime, training, salary and travel budgets, organisational changes, and filling vacancies.

**Regional Executive Team:**

29. The **Regional Executive Team** is composed of the five directors with their managers including the four Corporate Services Managers and the Director. It is the main management committee of the regional office according to Mr. MacDonald. The bulk of the discussions at that meeting is information sharing. They identify issues pertaining to human resources, organisation or First Nations. They discuss those issues, sometimes decide on them at the table or they are reviewed and investigated away from the table. There is an active participation around the table from all participants. Mr. MacDonald added that the position of Manager, Accounting Operations is not excluded. He added that the Manager, Accounting Operations, would not get involved in the larger strategic planning type of exercise done outside of the Regional Executive Team meeting.
30. The issues discussed at the **Regional Executive Team** chaired by the Regional Director General, according to Mr. Keagan while he was present, were the **Resourcing Our Priorities** exercise, and the relocation of the offices. It is mostly information sharing but some issues are brought forward for resolution. They include salary forecasts, possibility of laying off term employees, conversion of O&M into salary dollars, and overtime projections.

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31. The role of the Manager, Financial Planning and Analysis at the **Regional Executive Team** meetings, explained Mr. MacDonald, is to co-ordinate all the information and to participate actively in the discussions regarding the recommendations and their impact on the region. The Manager would provide input and recommendations to reach a consensus. He added that ultimately it is the Regional Director General who makes the decision of what goes forward and what gets implemented, but the recommendations are reached by consensus among the management team. The Manager, Financial Planning and Analysis is very much a part of these consensus building discussions.

**Regional Finance Committee:**

32. The Director, Corporate Services explained there is a **Regional Finance Committee** and the members include himself; the Manager of Financial Planning and Analysis; the Manager, Program Planning and Allocation; and all the Directors. This committee deals with salary, management regime and the impact on the regional organisation and structure.
33. The former Manager, Financial Planning and Analysis said that the only **Resourcing Our Priorities (ROP)** matter discussed at the **Regional Finance Committee** was the final report which was the **ROP** plan.

**Resourcing Our Priorities Exercise:**

34. The Manager, Financial Planning and Analysis, according to Mr. MacDonald, is involved in regional planning for both human and financial resources. For example, the Department went into a **Resourcing Our Priorities** exercise where each directorate was to identify opportunities for efficiency savings and re-alignment of resources. The Manager was part of the Regional Director General's table that reviewed all submissions received from each directorate and was part of all discussions for combining the regional plan to be forwarded to Headquarters. The final decision for the regional plan is made by the Regional Director General, but on the basis of reaching an agreement with each of the directors.
35. Mr. Norman Tibbetts, former Manager, Financial Planning and Analysis, explained that the **Resourcing Our Priorities** exercise involved the Regional Director General (RDG), who delegated to the Associate Regional Director General (ARDG); the Directors; the Manager, Human Resources who is now a Director; and himself. It was a downsizing exercise. The group went through a multitude of options. The RDG and the ARDG made the decisions, but everyone present had input. The former Manager, Financial Planning and Analysis, believes he had as much influence as anyone around the table. Everyone around the table talked and if a good idea was mentioned, it was used. Mr. Tibbetts was present as the finance representative. His opinion and objections to certain things were accepted. Everyone had a lot of influence on the outcome of those decisions. Mr. Tibbetts said the original objective was "to identify 20 % of resources for re-allocation", whether it was a movement or downsizing. Typically, the discussion was lead by the ARDG. Everyone brought there own point of view and they brainstormed different scenarios. For example during those meetings, Mr. Tibbetts remembers a competition for a position had just been completed and the region was to hire an outside

- person who had won the competition. He and the Manager, Human Resources, strongly disagreed since that position would be eliminated within three years. They were overruled and the person was hired. Part of his role in Corporate Services was to challenge Directors who appeared to be protecting their own unit to the detriment of the region. Mr. Tibbetts added that the impact of the reductions on individuals and on the work were discussed. This was a secret exercise and was not discussed until the results were published. Only then were the results and the implementation plan discussed.
36. The former Manager, Financial Planning and Analysis, stated that he spent approximately half of his time during the several weeks it lasted, on the **Resourcing Our Priorities** exercise. He was involved in many other similar downsizing exercises prior to this one. Mr. Tibbetts explained that decisions were made at the meeting as it was progressing. The writing of the report was shared, and he wrote some of it as did the Manager, Human Resources as well as the Directors. The Regional Director General signed the report at the end of the exercise. There were no FI positions affected but Mr. Tibbetts supposed that there could have been.
37. The **Resourcing Our Priorities Committee**, which was, according to the Director, Corporate Services, composed of the Directors and the Manager, Financial Planning and Analysis. The Manager was always part of the organisation review exercises. Each director was asked to identify opportunities for savings in their operations. These savings were to be used to meet other priorities. The Manager participated in the discussions, debates and helped in consensus building.
38. The **Resourcing Our Priorities** exercise consisted of downsizing. Mr. Keagan said he participated as did his predecessor, in the development, implementation and monitoring processes. They are now in the implementation stage. He co-ordinates the implementation with the Regional Director General and the Directors. In cases of discrepancies with the original plan, he would inform those concerned that they were not meeting their objectives and that there should be revisions. The Regional Finance Committee is the group where it is discussed.
39. Mr. Keagan explained that currently there are no **Resourcing Our Priorities Committee** meetings. The matters are normally discussed between the Director concerned and himself or referred to the **Regional Finance Committee**.
40. Mr. Keagan explained that the **Resourcing Our Priorities** plan covers services to be contracted out which are currently done by office staff. A cost benefit analysis will be done on a pilot project where third parties perform these functions, to determine if the region would continue or whether third parties should be used. The criteria is efficiency. These would be discussed at the Regional Finance Committee and at the Regional Executive Team meeting in more general terms.



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41. At the end of the examination, the parties indicated that there were no other witnesses or documents to be submitted. The examination is therefore closed.

P.A.L. Morin, Examiner

April 27, 1998

### ***REPORT OF THE EXAMINER***

4. By Board decision dated October 10, 1997, I was authorised to inquire into and report to the Board on the duties and responsibilities of the above mentioned position. This examination was held in Toronto, Ontario, on October 16, 1997.
5. Appearances:
- For the Bargaining Agent
- Mr. Claude Archambault
- For the Employer
- Mr. Georges Hupé
6. The employer proposed these designations by request dated March 13, 1997. It has been proposed that the positions ought to be designated under subparagraphs 5.1(1)b and 5.1(1)d of the **Public Service Staff Relations Act** by reason of the occupants duties and responsibilities to the employer.

### ***Exhibits***

4. Exhibit 1: Work description dated 01/11/95 for Manager, Financial Services, position 24053.
5. Exhibit 2: Organisational charts of IIAP - Ontario Region, Corporate Services, pages 2 and 3.
6. Exhibit 3: Resources Susceptible to Influence - Worksheet.
7. Exhibit 4: Financial Management Steering Committee, July 29, 1997, Record of Decision.
8. Exhibit 5: Record of Acting Assignments, Director - Corporate Services.
9. Exhibit 6: Work Description, dated 01/08/97 for Administration Clerk, position 24939.
10. Exhibit 7: Delegation of Personnel Authorities.

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**Witnesses**

11. The following persons were questioned:
12. Mr. W.M. Philip, Director, Corporate Services - Indian and Northern Affairs Canada, Ontario Region, has been in this position for three months and was previously Director, Funding Services. He has worked for 23 years with the Government.
13. Ms. L. Jessen, Manager of Financial Services, 13 months in this position and with the Government.

**Organisation**

14. The Ontario Region is headed by a Regional Director General and an Associate Regional Director General. Reporting to them are the Director of Funding Services, Director of Inter-Governmental Affairs, Director of Human Resources, Director of Lands and Trust Services, Director of Strategic Direction and Policy, Director of Executive Services, and four District Directors. The district directors are situated in four locations Brantford, Sudbury, Thunder Bay and Sioux Lookout.
15. Referring to exhibit 2 - organisational chart of IIAP Ontario Region, Mr. Philip explained his position is at the top of page 2 while the position being examined is the bottom left position. The Manager, Financial Services is also at the top of page 3.
16. The Manager of Financial Services explained that her position was the amalgamation of two separate FI-03 positions, one was Accounting Services, the other Budget and Resource Allocations. In addition, she oversees database management.
17. Three supervisors who ensure the daily operations, report to the Manager of Financial Services. She mentioned they are the Head of Accounting Operation (FI-02), Head of Budgeting and Reporting (FI-02), and a person on secondment who handles the database management. Ms. Jessen indicated she has 13 employees in her section (exhibit 2, page 3).
18. Mr. Philip the Director, explained that the \$ 633,000,000 regional budget was acquired at the beginning of this year through parliamentary votes 5, 10 and 15. Further funding was acquired during the year from headquarters for a total funding of \$ 674,000,000. The Ontario Region has approximately 25% of the regional allocation across the country. Some of these funds are acquired for specific projects and others through formulas.
19. The Manager of Financial Services says she handles a budget of \$ 89,600 for her own cost centre.

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***Functions, Roles and Responsibilities***

20. One of the functions of Corporate Services in the Ontario Region according to Mr. Philip, is to date, maintain and verify data which is collected in order to substantiate the budget. Corporate Services are accountable for the funds they receive as to when and how they are spent. This function is under the responsibility of the Manager of Financial Services. They verify that the right amount goes to the right person according to sections 32, 33 and 34 of the Financial Administration Act.
21. The Manager of Financial Services described her function as follows: to ensure there is enough money for the Ontario Region to do what they are required to do; to send cheques to First Nations; to cover commitments made; to go to headquarters almost on a weekly basis to get more funds; to ensure there is adequate funding on a budget level and expenditure level; to ensure that checks and balances comply with various budgeting allocation; and to ensure that the books balance.
22. Special requests for extra money are generally approved by the Financial Management Steering Committee explained Mr. Philip, a submission similar to a Treasury Board submission is developed. The submission is presented through the Manager of Financial Services and the Director of Corporate Services to the Committee. The Director of Corporate Services and the Manager of Financial Services meet with the Committee to develop their position and make a recommendation. The Regional Director General will weigh the recommendation and decide. Proposals originate normally from a District Director or a Director. Mr. Philip added that approximately 80% of the recommendations are accepted. The Manager of Financial Services, Ms. Jessen, is more of a technical expert in finance.
23. In order to get more funds Ms. Jesson deals with headquarters to find out where funds could be available. She also has to develop and provide a written rationale. Acquisition of land was an example.
24. The Director explained that generally he would name either the Manager of Financial Services or the Manager of Administration to act when he is out of the office. If both are not available, he would go to a supervisor. The person acting for the Director would have full delegation and signing authority. The Director expects decisions to be made as if he, the Director, were present. The Director expects the person acting to represent him and Corporate Services and participate on whatever committee he attends (with the exception of the Human Resources Committee because only the designated person may attend).
25. The Manager of Financial Services says she shares with another manager, the responsibility of acting for the Director when he is absent. When she does, she has full authority, responsibility and delegation to perform all the duties and has full signing authorities under sections 32, 33, 34 of the Financial Administration Act. For example, she signed as the Acting Director of Corporate Services on job descriptions which were referred to the classification committee (exhibit 6). She also signed various letters. She attended one meeting among others on his behalf where the how and when of letters to be handed to employees whose positions were affected, were discussed. She also

- handed out a letter to an affected employee at the appropriate time. She was prepared to review the letter and attachments with the employee but the meeting was postponed and the Director had returned by then. She added that she has acted for Mr. Philip on a number of occasions. Lately it was about once a week (see exhibit 5), and on those occasions she reports to the Regional Director General. It was the same with the previous Director.
26. Ms. Jessen further explained that she is an advisor to the other directorates of the region with regard to allocation of expenditures. She has a functional role with the district offices. The Manager added she is the liaison between headquarters and the region for all financial and database matters.
  27. When staffing a position, the Manager said she develops the job description, defines the roles and responsibilities, and the relationship on the organisational chart. The Director approves the staffing and then it goes to the Human Resources Committee.
  28. Ms. Jessen explained that according to the Delegation of Personnel Authorities (exhibit 7), she can suspend for disciplinary reasons up to ten days. She also completes employee appraisals and has staffing authorities. While she was in this position, she dealt with an employee who had an absenteeism problem which was resolved after a discussion without disciplinary measures being taken.
  29. Ms. Jessen explained that towards year end she will talk to the directors in order to shift surpluses to where it is needed. She works out deals between the directors. For example, when one directorate would not spend all of its allocated budget while another required additional funds, the money was transferred.
  30. Because of a re-organisation at the district level, she put together a task force of six persons from the districts to develop job descriptions for the new organisational chart. The task force also identified the roles and responsibilities of each of these positions. The result of the work of the task force was presented to the Human Resources Committee for approval. In this new organisation there were a set number of boxes with position levels and her committee recommended changes to these levels based on the perceived needs to meet the objectives. For example, some FI and CR position levels were changed which she says are significant changes to the organisation. All recommendations were accepted.
  31. The Manager said she has functional authority over the district offices. This means she requests and obtains information from financial operations in the districts. For example, she asks for a zero-based budget, monthly variance reports which are then compiled for headquarters. She also monitors and challenges budgets and expenditures. She deals with financial or budget control officers, their managers or directors in the districts. The job description of the incumbent mentions that she provides "advice and instruction to staff in the 4 district offices performing financial administration and program data management activities" (exhibit 1).

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32. The position description of the Manager of Financial Services also stipulates "providing advice to the Regional Director General and other senior Regional Managers". She illustrated this by saying that the Regional Director General or Associate Regional Director General may come to her office or she may go to theirs for specific financial information. With respect to the issuance of policy and directives, she gave the example of relocation where she developed a document which gives the amount required until year end for the transition to the new organisation. It included cash outs, severance pay, vacation pay, and relocation pay. She gave good sound advice on the basis of the figures. She explained her role as a challenging role. She needs to know why the moneys are not expended so it may be used for some other purpose. She tries to maintain a six month lead vision.
33. In reference to a paragraph in the work description, she says that currently there are four different types of methodology in the region. As chair of the meeting to review those, she has to try to condense them into one methodology. Then it is approved by the Policy and Strategy Steering Committee which is composed of the Regional Director General, the Associate Regional Director General and all the Directors.
34. Referring to the work description on page three where it stipulates "...recommending levels of delegation of financial authorities, setting standards...", Ms. Jessen said for example when she deals with the transfer payment management system, once a year they review the level of access in the region such as "read only", "read and input". She reviews them and decides who should and should not have this type of authority.
35. The Manager of Financial Services sees her role as a manager to make sure everything functions OK, and if it does not, she needs to know why and what can be done to change it. She encourages team work, new ideas and initiatives. She also ensures other directorates are kept apprised of what they are doing. She assigns work to her supervisors who determine the best suited employee to perform the task and the supervisors also handle all staff matters. She does the performance appraisals and training plans of her supervisors who do it for their staff.
36. Corporate Services have a good working relationship with the Provincial Ministry of Community and Social Services for the payment of social assistance according to Mr. Philip. The payments are reimbursed by the Federal Government through them.
37. Ms. Jessen mentioned she receives calls from chiefs and councils in relation to the issuance of cheques, she is the liaison with the aboriginal awareness training session which involves National Defence, O.P.P. and the R.C.M.P. She has many dealings with different levels of the provincial government over aboriginal issues on education, training, social assistance, etc.
38. The Manager of Financial Services says her intervention influences how the Federal Government provides funding in Ontario. For example, she is now developing a proposal and negotiates with the Native Canadian Centre to build a Kumik. The plan is to negotiate this project within one year. As the spokesperson of the Department she had to make a presentation and discuss
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Kumik with the Native Canadian Centre, and the Chiefs of Ontario Office, prior to starting the negotiation. This project will be ongoing, but her role will be reduced once the project is negotiated. She will probably work on an advisory committee. With respect to negotiations she reports directly to the Regional Director General. Ms. Jessen added that when dealing with people outside the federal government, she is considered the representative of the Department on the issues being dealt.

### ***Committees and Teams***

39. The **Financial Management Steering Committee**, according to Mr. Philip, is composed of the Regional Director General as chair, Associate Regional Director General, Director of Funding Services, Director of Corporate Services and members of his staff including the Manager of Financial Services. Corporate Services provide a secretarial service to the Committee.
40. The Director of Corporate Services explained he has a **team (Corporate Services Committee)** meeting once a month with the Manager of Financial Services, Manager of Administration, Supervisors in Accounting Operations, Data Collection and Informatics. The purpose is to identify the major problems and the possible resolutions. The Manager of Financial Services is a participant at the same level as the Director. It is also a Corporate Services planning committee who review what has to be or will be done over the next six to twelve months. They review work plans and financial positions. It is an information sharing and not a decision making committee. When decisions have to be made, they are made one on one, between the Director and the Manager concerned. It is not required to be excluded to participate in this committee. There would be only two excluded positions on this committee, the Manager of Administration and the position being examined.
41. The Manager of Financial Services discussed her role in the **Corporate Services Committee**. In one meeting where the purchase of computers was discussed, she was able to provide a list of available funds which permitted the purchase of more computer systems. Other topics include travel and training requests, staffing, costs of overtime to avoid deficits. She provides information and advice. Her job description refers on page two to "Participating as a member of the Corporate Services Management Committee contributes to the strategic vision and the direction of the Directorate and the Region as a whole". For example, previously, when travellers' cheques were given as travel advances, she did a time and cost analysis of the travel and cashier desk, the usage of the cheques and she decided that all persons travelling in the region would be issued EnRoute cards eliminating the need for cash advances. She also made a presentation to the Committee on the possibility of moving employees into different positions within the section so that they could learn new things. She added that it is within her authority to move persons around. For example she can interchange two FI-02. The committee looked at the whole region, at payment of overtime and vacation pay to ensure people took their vacation. Based on the review of expenditures, she could make the recommendation that there would be no more overtime or travel expenses for the region.
42. The Director explained there is a **Regional Management Committee** meeting everyday Monday at 1:00 p.m. and linked by telephone to the district offices. It

- is an opportunity for the Regional Director General to communicate following the Deputy Minister conference call normally on Monday morning, to discuss areas of concern in the region. It is also an opportunity for all participants to share information between directorates. It is more of an information sharing session than a decision making meeting.
43. The Manager of Financial Services said she was expected to but did not sit on the **Regional Management Committee** while acting in the Director's position because the meeting date was changed at the request of the Regional Director General and the Director had returned to attend.
  44. The Director explained the **Human Resource Management Committee** is composed of the Regional Director General, Associate Regional Director General, Director of Personnel, Director of Corporate Services, other directors rotate. It deals with human resources, staffing and staff relations. Decisions to eliminate positions could be taken in this committee. The Director said himself and the Manager of Financial Services can only recommend to this Committee.
  45. The Manager of Financial Services is involved in the **Financial Management Steering Committee** which meets on a monthly basis and more frequently at year end. Her service monitors the expenditures and provides information to the Committee to ensure there are no unnecessary surpluses. The committee is composed of the Regional Director General, Associate Regional Director General, Director of Funding Services, Director of Corporate Services, Head of Budget Allocation and herself. The mandate is to review funding pressures in the region. It is highly confidential and somewhat sensitive. For example, each district is not privy to the other districts priorities. When District offices report funding pressures, she will review whether it should be presented, with pros and cons, and make a recommendation, based on the information she receives, to the committee. She can decide not to put some items on the agenda because of lack of information or based on recommendations from staff. Exhibit 4 is an example of the minutes of the committee. She added that she approves in principle the projects that need to be done and which will be presented to the Committee. She recommends whether to provide or not to provide funding.
  46. The Manager of Financial Services explained she is a member of the **Capital Management Steering Committee** who review funding of a capital nature. Her role is to represent Corporate Services. She also has to monitor and challenge the projects with regard to funding. The Committee meets on a monthly basis and more often at year end.
  47. Ms. Jessen is a member of the **Aboriginal Employment Steering Committee** which meets every two months. The topics discussed are retention of aboriginal people and hiring practices in light of the goal to hire more aboriginal people. She is also the regional representative for native training. The Committee looks at hiring practices, the composition of boards and providing persons with a list a questions. This Committee falls under the Human Resources umbrella.

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**Conflicts**

48. The Director explained that a person who acts in his position could be in conflict of interest if a disciplinary action is taken against an employee who is in the bargaining unit. If a grievance was presented, the Director would expect the person acting on his behalf to reply.
49. In the event of a possible strike, the Manager of Financial Services would assist the Director of Corporate Services to develop a strike contingency plan for financial matters for the delivery of cheques to First Nations which could be a health and safety issue on the reserve. The Director stated that processes have to be developed to ensure that essential services of First Nations are met.
50. Ms. Jessen said that if there was a strike, she would be working on the sensitive issues. She would then have to cross the picket line if there was one. She also feels she is in a conflict of interest when collapsing two CR positions, eliminating one in her own area. She has to determine what will be done with the person in the position.
51. At the end of the examination, the parties indicated that there were no other witnesses or documents to be submitted. The examination is therefore closed.
52. P.A.L. Morin, Examiner  
  
April 23, 1998

**Arguments for the Employer**

Mr. Hupé stated that there is little jurisprudence on the issue of what constitutes substantial management duties, responsibilities and authority over employees within the meaning of paragraph 5.1(1)(b) of the PSSRA. It is only with the *Andres and Webb* case (Board files 172-2-884A and 886A) and what exists under the *Canada Labour Code*, that we can establish what the legislator had in mind. The duties, as described in both the instrument of delegation and in the job descriptions, meet what is described in paragraph 5.1(1)(b) as a position with substantial management responsibilities and authority over employees. We have to appreciate the context in which Indian Affairs operates with a great deal of financial and managerial authority delegated to the incumbents. The incumbents are offered autonomy and responsibilities with full authority to organize their work

According to the jurisprudence and the dictionary, management means: planning, providing, coordinating, directing, evaluating and controlling all available efforts and resources of an organization for the accomplishment of the objectives and



policies which are designated by and handed down from top executives of organizations. Supervision on the other hand is defined as the function and activity of making sure that the objectives of the organization are carried out according to plan and policies which are designated and handed down from management.

Looking at the two definitions it is clear from the report of the examiner that the duties of both incumbents are managerial in nature. Now for specific arguments why these position should be excluded under paragraph 5.1(1)(b), we must see that there are major distinctions between these positions and that of *Andres and Webb*. Of first importance is the broader scope of responsibilities extended to all regional areas as opposed to *Andres and Webb* which was restricted to a national park. In *Andres and Webb* there was little evidence of substantial management duties; they had little to do in terms of discipline; they could only issue reprimands. In the subject positions there are significant and substantial management duties; proof of this is the authority delegated to both Mr. Keagan and Ms. Jessen: they can approve compressed work week; approve and require overtime; schedule and grant vacation leave; authorize cashing out of earned but unused vacation leave; they can grant care and nurturing leave for up to 12 months; grant leave without pay for personal needs up to one year; grant leave without pay for spousal relocation and most importantly they can suspend an employee for up to 10 days. All of this is in addition to other authorities such as allocating work, assessing work and training, etc. The first list of authorities is all above and beyond the authorities given to supervisors. The two subject positions are responsible for the organization of their respective shops, although they have no staffing delegation; for example, they cannot sign letters of offer; they are given much freedom of action when it comes time to staff a position. They basically run the selection boards; they decide when it is most appropriate to staff a position, who will be selected and what process to use, whether the position will be indeterminate, term or contract.

At this point Mr. Waller objected that he felt there was no support in the examiner's report for the assertions just made. Although he did not wish to interfere with Mr. Hupé's submissions, he did not wish his silence on the other hand to be construed as an acquiescence. I indicated that assertions made in argument would be checked against the evidence and suggested that, for an easier flow of procedures, it

would be better if the representatives were permitted to proceed without interruptions.

Mr. Hupé continued stating that Ms. Jessen, the Ontario incumbent, has three supervisors reporting to her and a total of 13 positions in her section. Mr. Keagan had only three reporting to him but he has the same authority and some functional authority over the regional office organization. Both Mr. Keagan and Ms. Jessen act for their directors when they are away, sometimes for long periods of time, and they have full delegation and authority when doing so. The incumbent of the Ontario position has signed off a job description while in that position and the Atlantic incumbent took steps to reclassify a position. The incumbents also have latitude to organize their shop and decide on reporting relationships in their section.

In terms of *Canada Labour Code* jurisprudence it is clear in dealing with supervisory and managerial functions that our two subject positions have managerial functions. Mr. Hupé cited the *Bank of Nova Scotia Port Dover Branch* 77 CLLC 16,090 case which basically states that the basis for the exclusion of certain management persons from the coverage of collective bargaining is the avoidance of conflict of interest for those persons between loyalty to the employer and the union. This avoidance of conflict protects both the interest of the employer and the union. This conflict is pronounced when one person has authority over the employment conditions of other employees; it is most pronounced when the authority extends to the continuance of the employment relationship and related matters, for example, the authority to dismiss or discipline fellow employees.

Paragraph 5.1(1)(d) provides for exclusion because of reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer. Although the two subject positions are very similar in nature, Mr. Hupé highlighted from the respective examiner's report some of the arguments as to why they should be excluded. The incumbent of the Atlantic region is a member of the Regional Executive Team, the main management committee of the regional office. This committee will discuss salary forecast, possible lay-off, etc. Managers' role on this committee is to participate actively in the discussions regarding the recommendations made and their impact on the region. On the subject of lay-offs, the Department went into an exercise of restructuring and priorities, a downsizing exercise where each

directorate was to identify opportunities for efficiency savings and realignment of resources. The manager was part of the discussions looking at a multitude of options and combining plans into the regional plan to be forwarded to Headquarters. In doing so, the group had to discuss and assess the impact of the reductions on individuals and on the work performed. The Manager of Atlantic was involved in other similar exercise in the past. Ressourcing our priorities could also mean possibly contracting out of some of the work presently done by employees.

There are quite a few decisions of the Public Service Staff Relations Board (PSSRB) that established the evolution of the PSSRB's thinking on the concept of the management team. Mr. Hupé referred to the following PSSRB decisions: *Gestrin and Sunga* (Board file 172-2-31); *O'Connell et al* (Board files 174-2-157 and 174-2-158); *Larivière* (Board file 172-2-178) and *Sisson* (Board file 176-2-287).

Mr. Keagan as the incumbent of the Atlantic position is also involved in a review of the organization looking at collapsing the financial and accounting operations under one manager as was done in other regions like Ontario. As for the Manager of the Ontario position, she headed up a task force recommending changes to the organization which were all accepted. These recommendations included the elimination of positions. The incumbent of the Ontario position feels as stated in the report that she was in a conflict of interest situation when she collapsed two CR positions, eliminating one and having to determine what would be done with the incumbent of the eliminated position. The incumbent of the Ontario position is a member of the Aboriginal Employment Steering Committee dealing with hiring practices of native people. She would be expected to assist in the development of strike contingency plan; she feels she should be expected to cross picket lines because she would have to work on sensitive management issues during a strike.

Finally, Mr. Hupé added that the two subject positions have been updated or rewritten in 1994 and 1995 respectively. Management has since been trying to exclude them. Unfortunately, the process is a long and tedious one. The Ontario job is a completely new job as a result of collapsing of the Manager of Accounting Operations and the Manager of Resource Allocations positions. The final point is that there has been, in the last few years, an increase in the delegation of human resources authority to these two positions and for this reason they should be excluded.

Arguments for the Bargaining Agent

The bargaining agent made a submission in four parts: the first deals with the conclusions it wished the PSSRB to reach; the second deals with the relationship between the two new subsections of the PSSRA and how they relate to grievances and comparable sections of the legislation; the third reviews the case law of this and other labour relations boards on the extent of managerial authority that is needed to justify an exclusion and finally a review of the examiner's report in light of the above.

The bargaining agent is of the opinion that three conclusions ought to be reached. First, that neither of the positions at issue entails substantial management duties and authority over other employees to justify its exclusion and likewise neither entails the kind and regularity of labour relations to fall within paragraph 5.1(1)(b) and then 5.1(1)(d).

Their second proposed conclusion is that the apparently management-like duties of the positions cited arise not from the incumbents having themselves substantial managerial authority, but from two other facts:

A) the fact that both positions are occupied by professional financial advisors - essentially accountants who provide technical and professional advice in the area of their expertise and provide this advice to the true managers who have true authority over employees, and the PSSRB's jurisprudence is to the effect that the provision of technical advice does not constitute management and therefore is not ground for exclusion;

B) the second fact which accounts for apparent management is that both are supervisors in that they have some authority over employees and some input in terms of suggestions to the true decision-makers before true managers make decisions. The jurisprudence of this and other labour relations boards is to the effect that this type of upward input makes a supervisor and not a manager to be excluded from collective bargaining.

The third conclusion which flows from the previous two is that the employer's proposal for exclusion should be rejected.

The second topic deals with the genesis of paragraphs 5.1(1)(b) and 5.1(1)(d) and how they compare to the pre-1993 legislation. Counsel for the bargaining agent referred to the definition in the previous legislation which reads:

*“person employed in a managerial or confidential capacity”  
means any person who*

*(a) ...*

*(b) ...*

*(c) is employed in the Public Service and, in connection with an application for certification of a bargaining agent for a bargaining unit, is designated by the Board, or, in any case where a bargaining agent for a bargaining unit has been certified by the Board, is designated in prescribed manner by the employer or by the Board on objection thereto by the bargaining agent, to be a person*

*...*

*(v) who, although not otherwise described in subparagraph (i), (ii), (iii) or (iv), should not, in the opinion of the Board, be included in a bargaining unit by reason of the duties and responsibilities of the person to the employer;*

Subparagraph (c)(v) of the definition is the catch-all provision; in 1993 it ceased to exist. Before 1993 where the employer was trying to exclude on this ground or the catch-all provision, the PSSRB has consistently failed to identify those employees in conflict of interest if not excluded. Counsel submitted that the first basis that the PSSRB found the exclusion prior to 1993 was primary because of substantial management authority over employees; and the second basis was that the persons proposed for exclusion had substantial access to labour relations material.

An important point from the bargaining agent's point of view, is that the new legislation contains paragraph 5.1(1)(b) “a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act”. It is submitted that flowing from *Andres and Webb* (supra) when an employer needs to exclude under substantial managerial authority, the sole basis is now under

paragraph 5.1(1)(b) not under paragraph 5.1(1)(d). The new paragraph 5.1(1)(b) is what was the management team concept under the old catch-all provision.

In short, it is the bargaining agent's position that if Treasury Board must convince the PSSRB it must do so under paragraph 5.1(1)(b) and the current catch-all provision is now left to deal with conflict of interest such as access to management and labour relations material. A final point about the exercise that the PSSRB conducts under paragraphs 5.1(1)(b) and 5.1(1)(d); it is submitted that the PSSRB is performing the same function as private sector labour relations boards when they decide to exclude under managerial duties or confidential duties.

Some of the other paragraphs, of course, provide this employer with many such excluded employees such as employees in Treasury Board, in executive groups, legal officers, employees appointed as steps in the grievance process which do not exist in the private sector. Paragraphs 5.1(1)(b) and 5.1(1)(d) are not different from the point of view of public servants and private employees being proposed for exclusion.

The PSSRB like private sector labour relations boards, has taken the same serious approach to deprivation of collective bargaining rights for employees, such that they are justified for significant, substantial management authority or substantial, regular on-going access to confidential material.

It is clear from the jurisprudence of this and other labour relations boards that these proposed exclusions fall short of meeting those grounds.

As a third part, counsel for the bargaining agent referred to the case law submitted to support the earlier submissions. To start with, he referred to a 1979 decision *Sisson* (Board file 176-2-287). Mr. Sisson was excluded but there is a contrast with his level of authority and those here. Mr. Sisson was a senior security officer at a correctional institution; in paragraph 7 of that decision it is recounted how he supervised a group of officers and he had great authority over them, but in the end it was found to be the authority of a supervisor not that of a manager.

Paragraph 8 refers to Mr. Sisson's being responsible for acting as Head of the Institution as a regular part of his own duties. Almost on a daily basis when the regular boss was not at work at night, during early morning shift Mr. Sisson was

responsible for the Institution; he also acted as Head of the Institution on weekends and holidays. The PSSRB's finding, at paragraphs 72 to 75 of the decision, was that this regular filling in for the Head of Institution justified the exclusion. If there was a prisoners' riot, he would have to take action; it fell to Mr. Sisson every week. Although he was excluded, the PSSRB states principles to limit the access to confidential exclusion starting at paragraph 44; the PSSRB reviewed and adopted other labour relations boards' test for confidential and managerial exclusion. It found that Mr. Sisson's access to labour relations was not enough to justify exclusion. The third subparagraph of paragraph 44 is pertinent in that it has to be a regular part of the person's duty. In applying this test to Mr. Sisson the PSSRB downplayed his access to confidential and managerial material. Mr. Sisson submitted reports to the Head of Institution; he would investigate grievances and make recommendations; at page 53 the PSSRB found that this involvement was not sufficient to justify exclusion. For all this the PSSRB knew he gave his own interpretation to management and management would rely on it; however, that was not enough. In paragraph 54 the PSSRB considered and rejected as ground for exclusion that he had frequent conversations with the Head on policies and discussions of problems arising from them. To be part of the management team the duties had to be inherent to the position and such management-like duties had to be substantial. Counsel relied on paragraph 46 for a statement of the law. Had it not been for routine acting as Head of Institution Mr. Sisson would not have been excluded.

The second case relied upon was *Currell* (Board file 175-2-419) involving PSAC and Treasury Board. Ms. Currell was secretary to a district manager and was proposed as an exclusion under paragraphs (f) and (g) as a person confidential to management.

Because Ms. Currell had a close relationship with the manager, typing grievance reports, her boss did not hold back his thoughts on how grievances should be handled. She was also the recording secretary of the Management Committee which discussed sensitive issues which could be serious if leaked to the bargaining agent. The PSSRB did not exclude Ms. Currell because there was not sufficient and regular access to confidential material. The arguments of the bargaining agent at paragraph 21 acknowledged she obtained confidential information but maintained that her oath of office could be counted on to prevent her from revealing information acquired in confidence. At paragraph 34 the PSSRB noted that, although there was

access, she was not responsible for giving advice. At paragraph 35 it repeated a basis found in *Sisson* that involvement must be a regular part of the incumbent's duties, not merely incidental to the incumbent's duties. The PSSRB stated at page 35 that there is an onus on the employer to arrange its affairs to prevent occasional access to confidential information. It found the oath of office sufficient to guard against disclosure. At paragraphs 40 and 41 the PSSRB essentially held that not just any conflict of interest but real and likelihood of conflict of interest situations are required. At paragraph 42 in interpreting *Sisson* the PSSRB held that some involvement with the management team is not enough even if it gives some access to confidential information but not substantial enough to provide a conflict.

The third case cited is *Chambers et al* (Board file 173-2-550) between CAPRO and Treasury Board. This case deals with management type information and how management ought to organize or reorganize its shop. The employees were not excluded because primarily they acted as technical advisors to management. All of the employees in *Chambers* were responsible for evaluating the operations of stations; the internal audit function included adequacy of staffing levels; evaluations also covered whether they conformed to the terms of the collective agreement although in bargaining units of flight specialists. These employees report to senior management and their recommendations are taken seriously; they did not make the final decision but had influence. The PSSRB found that they were not part of the management team in spite of high involvement. Professional technical staff who advise management are different from management itself. The PSSRB found, where the involvement is part of the provision of advice, there was not really a likelihood of conflict of interest.

The final case relied upon by counsel for the bargaining agent is *Andres and Webb* (Board files 172-2884A and 172-2-886A). Counsel stated that he would go carefully through their duties and contrast them with the managers, and the two positions identified by the employer in the instant case ought not to be excluded. These two employees like Mr. Keagan and Ms. Jessen were Chief or at a managerial level of an operation with three levels of management above them. It is noted at paragraph 2 that their boss, the Superintendent, reported to the Regional Director who reported to the Regional Executive Director. The persons considered in *Andres and Webb* had more substantive management authority than Mr. Keagan and Ms. Jessen. At paragraph 13, both were responsible for adjusting the workforce; they would plan



reduction of staff. At paragraph 5, both were part of their management team, met weekly, and the management team as a team decided on major strategy for their parks, hours of operation where budget was allocated and where major expenditures would be made. In the instant case, the incumbents sometimes act for their superior; Messrs. Andres and Webb replaced the superintendent, paragraph 5, on numerous vacations of two weeks but one of them once was acting for five weeks. At paragraph 6, in addition to vacation replacement there were other replacements for absence from the office and they did it frequently. Also at paragraph 6, the management team made a collective decision where to cut staff and budget when such came up. A clerk was required to leave the room but Messrs. Andres and Webb remained and participated in the decision. At paragraph 7, this management team decided on staff performance and discipline matters; they had been involved in discussing contingency plans in case of a strike. In addition to attributes in common, other duties put them closer to exclusion than our incumbents. Dealing with Mr. Webb, Chief, Visitor Activities, he had significant authority over his own staff and a number of determinate employees and during six months full authority over many summer students, term employees and volunteers with supervisory latitude. Recorded at page 4 of the decision, excerpts of authority, the overall direction of the visitors program in a period of six months when there was no superintendent, Mr. Webb had to deal with senior management. He had authority to allocate where resources went and where to cut. He was responsible for evaluations of performance of all staff under him and he made effective termination recommendations to let two employees go.

At page 8 of the decision, Mr. Webb saw himself as part of management. Like one of the incumbents, he felt there was a conflict of interest between his duties and membership in the bargaining unit. Also on page 8, there is reference to the fact that he made security arrangements during a strike and in fact was acting superintendent during a lunch time “picketing” incident. There is nothing like that in our case. Ultimately, the PSSRB found that Mr. Webb’s duties were not substantial enough to justify exclusion.

As for Mr. Andres, the General Works Manager, he had a staff of indeterminate and term employees and students like Mr. Webb. At pages 3 and 5 there is reference to the fact that a maintenance supervisor supervised three crew members and Mr. Andres supervised that supervisor similar to the occupant of the Atlantic position

who has three employees under him while the other in Ontario has 13 under her. Another fact about Mr. Andres, he was giving the superintendent ideas on where to cut costs. At page 4 it is mentioned that he had authority to decide each season to contract out work or give it to employees. On page 5 the fact that he had been given and had exercised the authority to release summer students is recorded. On pages 7 and 8, Mr. Andres was a member of the Employer Takeover Committee which was a committee studying where contracts were going to be offered. Mr. Andres and supervisors decided where he had no authority to make decisions by himself. At page 6, Mr. Andres could himself decide whether full-time staff or a contractor would be hired for the work. He was responsible for security in the event of a strike. In our case, one of the incumbents had some involvement to decide how to get cheques to Indian Bands in case of a strike; this is less involvement than Andres.

At pages 9, 10 and 11, are the arguments. Mr. Hupé suggested, on page 9, and the bargaining agent agreed, on page 10, that the old concept under the catch-all under paragraph 5.1(1)(b) of the PSSRA be defined. On page 13, the useful management team concepts under the old catch-all are used as a way of determining management responsibility under paragraph 5.1(1)(b). Chairperson Tarte's decision starts out with consideration of the language of paragraphs 5.1(1)(b) and 5.1(1)(d) and it is necessary to read carefully the English and French versions of the legislation.

On page 13, neither Mr. Andres nor Mr. Webb possessed enough authority over other employees to qualify for exclusion under paragraph 5.1(1)(b) of the PSSRA. On page 13, the PSSRB found that the right to membership in a bargaining unit should not be removed lightly and that the employer must arrange its affairs so as to minimize the need for exclusion. On page 14, the PSSRB found that allegations of conflict of interest must be supported by cogent evidence of potential conflict or association with management. There was a finding that the incumbents were involved in the management process as supervisors not as an integral part of the management team. It is common sense that someone with management authority would consult with supervisors. The same flows here as in *Andres and Webb*.

Finally, in the third last paragraph, it was noted some period of time had elapsed before management prepared their exclusion. If real, the potential for conflict of interest would have come out in the two years both positions have had their duties in place.

Mr. Waller referred to *Ontario Labour Relations Board Law and Practice*, Third Edition, Volume 1, by Sack and Mitchell, pages 2.95 to 2.102, and stated that the Ontario Board follows the principle that it is substantial and regular access to confidential material that justifies exclusion.

Mr. Waller submitted excerpts from case summaries from the Canada Labour Relations Board, Release No. 13, May 1998, published by Canada Law Book, which describe overall the same principles to be used sparingly only to very senior management or for persons who have, as a core part of their duties, the authority over employees or access to confidential material.

The fourth part is the review of the evidence; counsel directed me to Exhibit 1, the job description with an effective date of October 1, 1994 and the recorded proposed exclusion in February 1997. In two years of experience in this particular position with those duties, the evidence is of a lack of conflict.

The reporting relationship is at paragraph 8 of Exhibit 2. Mr. Keagan is one of four managers sitting on Regional Committee as an FI-3. The incumbents provide professional and technical advice on budgeting matters in their regions to two real managers: the Director who reports to the Director General, see organizational chart, Exhibit 2. Mr. Keagan as manager is a supervisor. He has a small staff with a reasonable amount of authority over that staff and how they work. He has typical supervisory responsibility for changing the organization of work: his and those below him. At paragraph 11, the examiner's report describes the process by which the organization can be changed: it requires the approval of both his Director and of Human Resources. At paragraph 14, it is the Director, not this incumbent, who retains authority to approve staffing and classification matters. At paragraph 15, in relationship to reorganization, he was involved in discussions but no decisions had yet been made and any decisions would have to be approved by the Regional Director, his supervisor's supervisor. He is two steps removed from decision-makers.

With respect to access to confidential matters, paragraph 16 deals with that and the alleged confidential information is restricted to two types of information: salary forecast, which counsel submitted is not confidential labour relations information and to which at least one other employee also has access, and a second type has to do with reorganization which is described as almost an annual event, stated as a possibility, and to which the same non-excluded bargaining unit member has access. The bargaining agent submitted that this manager has access to information which is confidential in an every day sense but it is not core information as it is already known to others in the unit and the access to this type of information is not a regular part of the functions of this incumbent. Some access to this information is consistent with the role of a technical and professional advisor to management.

This person's core functions are found on page 1 of the job description in Exhibit 1. It lists responsibility under five headings. Only the first one deals with accountability but it is for processes related to regional financial planning. The next four are all related to being a resource to senior management but not a part of management. His is a monitoring function, not a deciding function.

The whole core of the job is to provide advice but not of managerial competence. Paragraphs 17 to 19 of the report make this clear. In paragraph 17, the previous incumbent summarized his main duties and again those consisted of providing technical and professional advice to management.

In paragraph 19, this incumbent monitors budgets of other managers to see if they comply with standards set by others. Where the incumbent finds anomalies, he must report to the other people who must decide. His role is to make recommendations.

With regard to acting in place of the Director at paragraph 22, this incumbent shares the duty of replacing with two or three other managers, one of whom, the Manager, Accounting Operations, is not excluded nor proposed for exclusion. Somewhere it is recorded at one time the Director was replaced for two months. This was done through formal assignment. Unlike the situation in *Sisson*, it is not a daily, weekly or monthly filling-in, and when done it is by formal assignment. When acting is done by formal assignment, then the person is the Director. It is not a requirement

of that position. It would be a departure from the PSSRB and other criteria to exclude for reasons of occasional replacement rather than as part of truly regular and core duties of the position.

The evidence pertaining to the various committees is that, despite the name of one, the Regional Executive Team, the four managers, one of them the non-excluded Manager of Accounting Operations, discuss issues. It is not recorded that they make decisions as a group. The Regional Director consults with them as supervisors and ultimately makes the decision of what goes forward and what gets implemented.

The evidence does not reveal what recommendations are effective even if not making decisions. Paragraphs 32 to 40 deal with the Regional Finance Committee and the Resourcing Our Priorities Committee. There is no evidence of effective recommendations and no record of how often and how regularly these recommendations are implemented by management. At paragraph 34, it is stated that the final decision for the regional plan is made by the Regional Director General on reaching an agreement with each of the Directors. In paragraph 35, where the incumbent did have input, again as part of an advisory role, in that particular instant he was overruled. This is not indicative of effective recommendations. If we look at what the manager does, it falls short of substantial authority over employees or access to labour relations information as part of his job.

With regard to the delegation of authority at Exhibit 3, when compared to the precedent, the only difference is the extent of disciplinary authority. To distinguish from *Andres and Webb*, who had authority to let employees go, they have the power to suspend up to 10 days, as opposed to a written reprimand. That one difference does not justify exclusion. Supervisors can impose discipline short of dismissal. Also, one must take with a grain of salt the delegation of authority; there was no evidence of change having taken place; no examples of having exercised the authorities listed by Mr. Hupé. Counsel submitted that such authority is consistent with a supervisory, not a managerial role. We need only look at what is not delegated and also at numbers higher than 3 or the exhibit. They can't set hours of work, can't approve tele-work; this is reserved for people at level 1. They can require overtime but cannot approve compensation for overtime. They can approve leave when leave is based on factual criteria. This is consistent with a supervisory level. They are not competent to deny

sick leave. The leave is triggered by set factors. When there is truly discretion, there are restrictions. They cannot approve career development leave. Their discretion is up to five days of leave, at item 20. They cannot approve educational leave nor can they approve leave for those who stand for election. There are limits to their discretion and this is consonant with a supervisory level of authority. When you get to security of employment, their authority is severely limited. They cannot recommend that persons be laid off; they cannot terminate or demote for cause; they cannot authorize deployment. They cannot recommend termination let alone terminate for disciplinary reasons.

Counsel also submitted, in dealing with recommendations for exclusion, that delegated authority evidence is that it is used, not that it can be used. The evidence falls short of demonstrating they have used delegation of authority.

The job description, Exhibit 1, for the Ontario position has been in place since January 11 or November 1, 1995. The proposal for exclusion came in March 1997, some two years after the job was created. No cogent evidence of conflict of interest or serious likelihood of conflict of interest was adduced. At paragraph 14, there are three levels of regional management above the incumbent: the Regional Director General, the Associate Regional Director General, and then the Director, Corporate Services, the incumbent's boss. In terms of responsibility, the evidence shows very little authority is exercised over employees. In paragraph 17, reference is made to three supervisors who report to this manager and those handle 10 to 13 employees under them. She in fact supervises three employees. In staffing positions, she must get approval of the Director and of the Human Resources Committee for any staffing action. Again, the incumbent is a senior FI whose core duties are to provide technical and professional advice. The incumbent stated, at paragraph 22, that she "... is more of a technical expert in finance". According to the evidence, she provides advice. At paragraph 20, she accounts for funds that are received under budgets determined by other people. At paragraph 21, she monitors the use of budgets of managers. She does not describe how to spend; she monitors compliance. The substantial management authority is wielded by those who decide to spend. Paragraph 22 shows that it is the levels above her who have to approve requests for extra money. The Financial Management Steering Committee does not even have effective recommendation powers; the decisions are made by the Regional Director General. In

paragraph 26, she described herself as an advisor with no line authority over budgetary matters, making sure proper financial procedures are followed. In paragraph 31, she mentioned she has functional authority over the district officers but on close examination we see she has no authority to transfer funds; she facilitates it. In paragraph 29, she works out deals with directors involved but she does not decide.

In the example used by Mr. Hupé that his manager signed a job description in paragraph 30, this could not go ahead until approved by the Human Resources Committee.

With regard to acting in place of the Director, the evidence here is weaker than with the other position. At paragraph 24, the pool of people to replace the Director includes supervisors, one level below this incumbent. In the same paragraph, the Director expects the person acting in his position to exercise his powers. This conflicts with the principle that employers have a duty to arrange their affairs in such a way as to minimize the use of exclusions. This manager has filled in for the Director fewer times than the Manager of Administration and Information (see Exhibit 5). It is not a fundamental part of her duties to fill in for the Director, far from it. She sits on a number of committees but, on closer examination, most have an informational role not a decision-making role, and hers is as a technical adviser. Many routinely include members from non-excluded positions. The Corporate Services Committee is an information-sharing not a decision-making committee. See paragraph 40, when decisions are required, they are made one-on-one by the Director and the manager concerned and it is not required to be excluded to participate in this Committee. The Regional Management Committee is also an information sharing session (see paragraphs 42 and 43) and the incumbent has never gone to one, and once when acting in the Director's position the opportunity arose but she did not attend because the meeting was changed. The Human Resources Committee was mentioned but she is not a member and the Director said he and the Manager of Financial Services can only recommend to this Committee. The Capital Management Steering Committee reviews funding of a capital nature. Her role is to monitor and challenge the projects with regard to funding. The Aboriginal Employment Steering Committee deals with equity type issues. It is not a decision-making committee and there is no indication of effective decision-making power. The Committee looks at

hiring practices, the composition of boards and providing persons with a list of questions. The Committee falls under the Human Resources umbrella.

Finally, the subject of strike was raised under paragraphs 49 and 50, bearing in mind the *Andres and Webb* decision about cogent evidence of conflict of interest. It is a very speculative approach to try; they don't have any cogent evidence. In the event of a strike this manager would assist the Director. He has a duty not to sprinkle elements of his duties to buttress a weak proposal to exclude a position. If looking for cogent evidence, at paragraph 50 there is no evidence of sensitive issues. Paragraphs 49 and 50 are too vague to support exclusion. It is not a function of a financial administrator to print cheques or mail them out in a strike. It is the clerks' responsibility. If it did take place, Ms. Jessen's looking for ways to continue distribution would not be in conflict with her own bargaining unit. Any member of the Financial Administration Group bargaining unit would have to cross the PSAC picket lines in case of a strike by clerical employees. There is not even a scenario of this manager having to cross her own picket line in evidence. Furthermore, every member of the Financial Administration Group bargaining unit is designated for safety and security of the public for this round of bargaining.

Going back to the duties, they are primarily advisory as opposed to making management decisions on financial matters see Exhibit 1. There is no case made out under paragraph 5.1(1)(b) of the PSSRA for substantial managerial authority. The reliance on the catch-all is a repeat of going back to pre-1993 time. That ground is no longer available under paragraph 5.1(1)(d) as paragraph 5.1(1)(b) is only open here. Under paragraph 5.1(1)(d), the conflict of interest aspect involves only low levels of access. Therefore, the exclusion should be denied.

#### Reply by the Employer

Pursuant to Chairperson Tarte's decision in *Andres and Webb* (supra), all that can be argued under paragraph 5.1(1)(b) of the PSSRA is substantial authority over employees. Under paragraph 5.1(1)(d), according to Mr. Tarte, other matters can be decided. The question of the management team can be decided under paragraph 5.1(1)(d). The intent of the new legislation of 1993 is to have fewer confidential



exclusions but more managerial exclusions which would explain the introduction to paragraph 5.1(1)(b) of the PSSRA to cover such cases as that which we are dealing with today.

Mr. Waller kept referring to confidential information and access to confidential information. We submit that the two functions are managerial proposals not confidential proposals. There are and always have been under the PSSRA criteria that allowed proposal under confidential exclusion. This is not what we are talking about today.

We look at two criteria separately: managing employees and staff and other responsibilities of those employees that in the opinion of the PSSRB would render them ineligible to be members of the bargaining unit. As for the two subject positions, Mr. Hupé would like to add that in both cases there are two levels of management above them; in *Andres and Webb*, there are three levels above. There are only two because the Associate Regional Director is not part of the hierarchy, not part of the instrument of delegation; if one looks at the organizational chart, the Associate Regional Director is not found on the organizational chart per se; no evidence was introduced as to his role. It suffices to say that FI-3's in both regions are level 3 in delegation of authority. That is not disputed anywhere. In addition to that there are two other levels termed as supervisory in the instrument of delegation. There are five levels and the incumbents are level 3. It is important to make a distinction with regard to responsibilities given to the incumbents who are managers which are not given at lower levels; those are supervisors.

The bargaining agent has talked a number of times about these delegations of power and the authority to impose discipline up to 10 days, and the fact that there is no mention anywhere of the delegation being exercised. Mr. Hupé had a few comments to make about this. The fact that a manager with delegated authority does not need to exercise that authority over a period of time does not make that person less of a manager when compared to someone who has the chance to exercise those authorities. To give a few reasons, one could be opportunity, the other could be management style: more problem-solving type than another manager. In the two subject positions, one had been in the job for 13 months and in the other case, it is very unfortunate that the incumbent had left and the new incumbent had just come

in three weeks before. To emphasize why it was not submitted for exclusion before 1997 is irrelevant. It would have been more difficult before 1993 to exclude those jobs. With changes in the PSSRA in 1993 and with increased delegation downward, the Department felt it had good reasons to exclude those positions. This process is a long process. It was discussed at the Department's level; the employer wanted to propose all manager positions be excluded.

Mr. Tarte said he was not convinced of the involvement of Messrs. Andres and Webb in staff decisions. A lot of references were made in the examiner's report to the incumbents' involvement in staff decisions. In commenting as to why Messrs. Andres and Webb were not managerial, Mr. Tarte referred to the fact that they could only reprimand employees; they had no important authority to discipline employees. There is a clear distinction to be made here. Mr. Tarte, under paragraph 5.1(1)(d) of the PSSRA, also commented that he was not convinced that these people were part of the management team. Mr. Hupé submitted that in the examiner's report and the evidence in the present case it is clear that the incumbents are part of that team.

In jurisprudence under the *Canada Labour Code* this notion of bureaucracy is talked about. In government, there are several levels of management. Obviously the Assistant Deputy Minister has less responsibility than the Deputy Minister and the Regional Director less than the Deputy Minister, but that does not detract from the fact that they are managers.

Mr. Waller alluded to the fact that in the Atlantic case only discussions take place at the Regional Executive Team level. This is the management team at the region; decisions are made at that level; there is no management above. The evidence in the two examiner's reports shows major involvement in the downsizing exercise and that the role these people are playing is significant. In some cases, supervisors can impose discipline short of dismissal. In lots of *Canada Labour Code* cases, persons are seen as supervisors who cannot even discipline.

Mr. Hupé agreed that they are technical experts but they are managers in addition to being experts. The Manager of Computer Services, for example, is an expert in computers but he is still managing employees. Because of Mr. Tarte's

decision, we have not pursued that this subject of technical expertise is a managerial function.

### Decision

The employer has proposed that the positions of Manager, Financial Services, Ontario Region and of Manager, Financial Planning and Analysis, Atlantic Region be identified as managerial or confidential positions pursuant to paragraphs 5.1(1)(b) and (d) of the PSSRA.

Those paragraphs read as follows:

#### *Managerial or Confidential Positions*

*5.1 (1) Where, in connection with the application for the certification of an employee organization as a bargaining agent, the Board is satisfied that any position of an employee in the group of employees for which certification is sought meets any of the following criteria, it shall identify the position as a managerial or confidential position:*

*...*

*(b) a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act;*

*...*

*(d) a position the occupant of which has duties and responsibilities not otherwise described in this subsection and who in the opinion of the Board should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer;*

Paragraph 5.1(1)(b) combines what was, prior to 1993, covered under subparagraphs (c)(i) and (iii) of the definition of "person employed in a managerial or confidential capacity" as well as concepts which were covered by the catch-all

provision of subparagraph (c)(v). For ease of reference, I will reproduce here paragraph (c):

*“person employed in a managerial or confidential capacity”  
means any person who*

*...*

*(c) is employed in the Public Service and, in connection with an application for certification of a bargaining agent for a bargaining unit, is designated by the Board, or, in any case where a bargaining agent for a bargaining unit has been certified by the Board, is designated in prescribed manner by the employer or by the Board on objection thereto by the bargaining agent, to be a person*

*(i) who has executive duties and responsibilities in relation to the development and administration of government programs,*

*(ii) whose duties include those of a personnel administrator or who has duties that cause that person to be directly involved in the process of collective bargaining on behalf of the employer,*

*(iii) who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act,*

*(iv) who is employed in a position confidential to any person described in subparagraph (i), (ii) or (iii) or paragraph (b), or*

*(v) who, although not otherwise described in subparagraph (i), (ii), (iii) or (iv), should not, in the opinion of the Board, be included in a bargaining unit by reason of the duties and responsibilities of the person to the employer;*

Some of the concepts, which had evolved through the case law of the PSSRB, have been stated more clearly in section 5.1 and in some modifications to the definition; existing concepts are now clarified where they had shown any ambiguity.

There is no issue here with the incumbents having been given authority to deal with grievances; what needs to be determined is whether they have “substantial management duties, responsibilities and authority over employees”. There is no

doubt the incumbents are supervisors but the issue is whether their authority and responsibilities and the duties they perform are substantially managerial. At what point does an employee cease to be a supervisor and become a manager. The positions identified by the employer are borderline; the employer insists they are managerial on the basis of a definition by which management means: “*planning, providing, coordinating, directing, evaluating and controlling all available efforts and resources of an organization for the accomplishment of the objectives and policies which are designated by and handed down from top executives of organizations*”. This definition, Mr. Hupé said, he gathered from uncited jurisprudence and dictionaries. I have compared that definition to the Financial Management Subgroup Definition attached to the decision (Board file: 141-2-3) of the PSSRB amending the certificate of APSFA which reads:

*The Financial Management Subgroup means positions that are primarily involved in the planning, development, delivery or management of internal financial policies, programs, services or other activities.*

The definition is followed by a list of inclusions:

### ***Inclusions***

*Notwithstanding the generality of the foregoing, for greater certainty, it also includes positions that have, as their primary purpose, responsibility for one or more of the following:*

- the development, delivery, interpretation, recommendation or revision of financial management policies, practices, principles, systems or techniques;*
- the provision of advice on the financial implications of policy and of program proposals and actions;*
- financial planning and analysis;*
- financial operations and services, such as the control of accounting and reporting of expenditures, revenues, assets or liabilities;*
- the provision of advice on the approval of the adequacy of financial safeguards in programs and activities;*
- the conduct of cost accounting and analysis;*

- *the conduct of internal financial audits; or*
- *the provision of services in two or more administrative fields, one of which is financial, when the financial work is, in the opinion of the Employer, of primary importance. In allocating a position to the appropriate subgroup, the purpose of the position must be assessed according to all of the following criteria:*
  - (1) the impact of the financial aspects of the advice and recommendations made on the overall achievement of the organization's programs and objectives;*
  - (2) the degree of responsibility and complexity of the financial work of the position, including the availability or, and the need to provide, financial functional direction; and*
  - (3) the degree of specialized knowledge, skill and experience required in the work.*

If I accept Mr. Hupé's definition, I wonder how many, if any, financial administrators would be included in the bargaining unit. The definition proposed by Mr. Hupé is too vast and cannot be accepted.

Chairperson Tarte in *Andres and Webb* (Board files 172-2-884/886) has interpreted paragraph 5.1(1)(b) in the following manner at page 13:

*With respect to the first ground of paragraph 5.1(1)(b), the language used clearly requires both substantial management responsibilities and authority over employees. In other words, this ground refers to the management of staff or the responsibilities and authority that a manager has over his or her staff. The French version of this portion of paragraph 5.1(1)(b) is much clearer and concise when it states: "leurs occupants exercent, dans une proportion notable, des attributions de gestion à l'égard de fonctionnaires ...".*

*The word substantial is defined in the Concise Oxford Dictionary (Seventh Edition) as "having substance, actually existing, not illusory; of real importance or value, of considerable amount ...". The word "notable" used in the French version of section 5.1 is defined in the Nouveau Petit Robert (1993 Edition) as "qui est digne d'être noté, remarqué". In other words, something that is worth notice.*

Both the employer and Mr. Waller have referred to *Andres and Webb* to justify their position. Chairperson Tarte applied that definition to the specific facts of Messrs. Andres and Webb and rejected the identification. He did not provide us with a review of the principles enunciated in the jurisprudence submitted by the parties but I feel I will have to do so in the present case because the essential distinctions between the present case and *Andres and Webb* are the authority to discipline and the departmental context. Messrs. Andres and Webb were supervisors in Parks Canada with the power only to reprimand employees; their duties were related to the specialized fields of historic sites while the incumbents are supervisors of Indian and Northern Affairs Canada in a regional and financial environment with the power to suspend employees from 5 to 10 days.

The employer in its instrument of delegation, Exhibit 3 in the Atlantic Region case and Exhibit 7 in the Ontario Region case, recognizes five levels of supervision. The positions proposed for identification are located at level 3, but not all level 3 positions are identified and the power to suspend is also given to positions at level 4 which are clearly supervisory levels. The delegation of authority to suspend an employee is associated with conditions: "Mandatory consultation between regional and headquarters staff relations advisor is required". Neither incumbent has ever been called upon to exercise this power and, given the number of employees that are disciplined in the Public Service in proportion to those that never are, it is a power rarely exercised. Should it have to be exercised, would it constitute a substantial managerial duty in the context of those positions? I think not given that the headquarters staff relations advisor would have to be involved; the decision would not rest on the incumbents alone. This raises the appropriateness of the instrument of delegation of personnel authorities in view of the principle that the employer is under the obligation, wherever possible, to arrange its affairs so as to minimize the need for exclusion. There may be other operations where the need to delegate to supervisors the power to suspend employees is justified by the number of infractions occurring or likely to occur but the evidence in those two cases is quite the opposite.

What about the other authorities granted to the two incumbents? They are consistent with a supervisory role not necessarily that of management.

Looking at the cases cited by Mr. Hupé starting with the decision of the Canada Labour Relations Board in *Bank of Nova Scotia Port Dover Branch* (supra) I have noted the following principles at page 536:

*... At the same time employee status is not automatically accompanied by inclusion in a unit with fellow employees. Private constables must not be included (section 125(5)) and professional and supervisory employees may not be included (sections 125(3) and (4)). Many factors must be considered in a judgment to include or exclude supervisory employees with those they supervise. These include whether exclusion would effectively deny bargaining rights to the supervisory employees, the effects of creating a separate supervisory unit, the degree of conflict a single unit would create, the limitations imposed on the employer's ability to operate efficiently and others.*

...

The incumbents are in a group that is likely to supervise because of the administrative role it carries out. Because each of them does in fact supervise members of his or her own classification group, I have looked to the authority they were given and find it not to be substantial enough to warrant an identification under paragraph 5.1(1)(b) of the PSSRA.

The next case cited was *Gestrin and Sunga* (supra) where the catch-all provision that existed previously in the definition of a “person employed in a managerial or confidential capacity” was interpreted. Under the present language of the PSSRA, the positions of Messrs. Gestrin and Sunga would fall squarely under paragraph 5.1(1)(a). It is in this decision that we find the concept of “the management team” at page 9:

*... Without attempting any exhaustive analysis of what we mean by the phrase “the management team”, it is sufficient for the purposes of this case to say that, in our opinion, the Cabinet is in very essence the summit of management, as counsel for the Employer pointed out. Messrs. Gestrin and Sunga not only prepare briefs for Committees of Cabinet and for the Cabinet itself, but they also participate actively in the discussions that take place in the Committees. In a very real sense they may be said to participate in management decisions....*

*... At the same time they would be participating in the formulation of management policies that might, if not directly, certainly indirectly but materially, have a profound*



*effect on the bargaining process. It is inconceivable to us that Parliament intended that a person should be placed in a position where he has his feet under both sides of the bargaining table at the same time.*

Many aspects of the management team concept have been expressed under paragraphs 5.1(1)(a) and (b) of the PSSRA; I will deal later with those which are still to be found under the catch-all paragraph 5.1(1)(d). The notion of “management duties” certainly means being part of the management team.

The third case cited was *O’Connell et al.* (supra). Messrs. O’Connell and McClure were supervisors at the Calgary International Airport. They were excluded under the purview of paragraph (g), the catch-all paragraph at the time. At page 4, paragraph 7, the PSSRB stated:

*The evidence established that each senior manager is responsible to the Airport General Manager for the efficient operation of his department. The General Manager and the three senior managers meet regularly once each week for several hours to discuss all phases of airport operations and to make any necessary decisions in relation thereto.*

The PSSRB commented further at page 8:

*Based on the evidence as to the duties and responsibilities of Messrs. O’Connell, Howell and McClure and set out earlier in this decision, we find that they, together with Mr. W.J. Watts, the General Manager, constitute what might be referred to as “the management team” at the Calgary International Airport. As was noted earlier, even the representative of the Bargaining Agent conceded that this was the case.*

In 1976 there was no equivalent to paragraph 5.1(1)(b) of the PSSRA but had there been that case would have been considered under that paragraph. In that case there was a statement made by the bargaining agent that the three incumbents were part of the management team; there is no such admission here.

In *Larivière and McQuade* (supra) the incumbents were excluded under the catch-all subparagraph (g) when the PSSRB found that they, together with Dr. Robertson, the Regional Director, constituted “the management team” of the Overseas Region.

I think it is important to reproduce here paragraphs 14, 15 and 16 of that decision to illustrate the ingredients that made up the evidence of the management team concept in that particular case:

14. According to Dr. Robertson his duties and responsibilities relating to the management of the Overseas Region are too onerous for him to handle without assistance. For this reason the two positions of Assistant Regional Director were created. Dr. Robertson stated that he, Dr. Larivière and Dr. McQuade operate as a management team in the administration of the Overseas Region with the two Assistant Regional Directors acting as extensions of the Regional Director. Dr. Robertson meets with the Assistant Regional Directors every work day, either separately or together, from five minutes to half a day each time depending on the nature of the problem being considered. These discussions deal with all aspects of regional programs. According to Dr. Robertson, he frequently asks the opinion of his Assistant Regional Directors and often takes their advice.

15. When Dr. Robertson is away he is replaced as Regional Director by one of the Assistant Regional Directors. Normally Dr. McQuade, who has more extensive experience in the Overseas Region, replaces Dr. Robertson but, in the absence of Dr. McQuade, Dr. Larivière will perform this function. During the year prior to October, 1974, Dr. Larivière replaced Dr. Robertson four times for periods of from one to four days. The Assistant Regional Director replacing Dr. Robertson has complete authority to make all necessary decisions relating to the management of the Overseas Region. Similarly, when Dr. Larivière makes an overseas tour, he acts on behalf of Dr. Robertson and makes any decisions on urgent matters unilaterally without communicating beforehand with him. However, decisions on non urgent matters are made by Dr. Robertson in Ottawa after consultation with Dr. Larivière and may or may not be based on the latter's recommendations.

16. Dr. Larivière asserted that, in carrying out his duties and responsibilities as Assistant Regional Director of the Overseas Region, he participates in the planning, formulation and development of government policies. As an example of this participation, he recalled that Dr. Robertson had placed him in charge of a study group on clinical care to be provided abroad. In this capacity, he assisted in the preparation of the first draft of a document submitted to Head Office. The document was subsequently amended without any input from Dr. Robertson or Dr. McQuade who were not familiar with its contents. Dr. Larivière played a role in amending the

*document, particularly its financial aspect. In its amended form, the document has been submitted to the program policy section of the Overseas Region. Dr. Larivière claimed that, in the event of its approval by Treasury Board, he will have participated in the planning, formulation and development of a government policy relating to the provision of clinical care abroad.*

That case differs from the present one in that Dr. Larivière and Dr. McQuade shared with the Director the decision-making process and participated in the planning, formulation and development of government policy relating to the provision of clinical care abroad. They replaced the Director as part of their own duties when making an overseas tour. This was in addition to acting in his job when he was absent. Prior to the changes to the legislation in 1993, the person was excluded; now it is the position that is excluded. The possibility of replacement of someone in an excluded position does not justify in itself the exclusion of another position unless that position entails exercising the power of the excluded position as part of the regular duties of that position such as when Dr. Larivière was doing an overseas tour as the Assistant Regional Director. We have no such responsibilities in the Manager, Financial Planning and Analysis (Atlantic) nor in that of Manager, Financial Services (Ontario).

The PSAC and Treasury Board case in *Sisson* (supra) was relied upon by both parties. That case was also a borderline case where the PSSRB had to determine the dividing line between management and supervision. In that decision the PSSRB reviewed the existing jurisprudence of various labour relations boards and provided guiding principles for the interpretation of the legislation in existence prior to June 1993. The PSSRB found Mr. Sisson, the Senior Security Officer, to be a supervisor in all aspects of his duties and responsibilities except for one, where he was called upon to act as Head of the Institution during nights, mornings, weekends and holiday shifts. This was not occasionally assuming the duties of another position but rather fulfilling those of his own position. In paragraph 72 the PSSRB stated:

*... But when a person is called on to assume responsibility for a maximum security institution entailing, as the evidence clearly shows, control of inmates, some serving penalties for serious crimes, as well as control of correctional officers and recognizing, as the evidence also shows, that that person has been delegated sufficient authority to discipline those who report to him, it becomes difficult, if not impossible, to*

*perceive that person as anything less than an integral part of the "management team". His role is manifestly Superior to that of a supervisor. That responsibility is not diminished by the fact that Mr. McKeen would himself return to the institution as quickly as possible after a "situation" warranting his presence had occurred. It remains Mr. Sisson's entrusted responsibility to try to prevent "situations" and to endeavour to contain those "situations" that do develop.*

At paragraphs 74 and 75 the PSSRB further explains:

*74. What differentiates Mr. Sisson from correctional officers in the bargaining unit who also, it is recognized, are very much responsible for the safe custody of inmates, is his periodic responsibility for the whole institution and for decision-making when Mr. Sisson assumes that responsibility. It is conceivable in tense, perhaps dramatic, situations that his decisions may not be the decisions that some correctional officers would wish to see taken, yet Mr. Sisson must take them. Therein lies a distinct possibility of conflict of interest to which Mr. Sisson should not be exposed.*

*75. To ensure that there is a responsible manager on duty at all times, authorized to make decisions and be responsible for the appropriateness of correctness of such decisions, is a reasonable policy of the Canadian Penitentiary Service. Such a policy does not deny a large number of persons the freedom and rights to collective bargaining which they may hitherto have enjoyed. Moreover, a fundamental part of sound staff relations, which is surely an objective of collective bargaining, is a managerial presence capable of conferring with union representatives and of dealing promptly with staff matters which, if neglected, could conceivably have unfortunate consequences in a maximum security institution, where the atmosphere perhaps already somewhat tense, could become explosive.*

The financial administrators in the positions of the present case are not called upon to exercise the powers or assume the responsibilities of the Directors as an integral part of their position. They are part of a pool of supervisors and/or managers who have the abilities to be called upon to be assigned to replace the Director on an acting basis. When they do so they are not performing the duties of their own position but those of the Director. Furthermore, the evidence reveals that the incumbents are not necessarily the persons most frequently called upon to replace their Director in their region.

The PSAC and Treasury Board case of *Currell* (supra) raised by the bargaining agent, concerned the interpretation of the former paragraphs (f) and (g). Former paragraph (f) is now replaced by paragraph 5.1(1)(e) and paragraph (g) is the former catch-all paragraph. The facts of that case would be more relevant if the employer were identifying the positions under paragraph 5.1(1)(e) of the PSSRA which is not the case here.

The CAPRO and Treasury Board case of *Chambers et al.* (supra) was also relied upon by the bargaining agent. This decision is more relevant to the interpretation of paragraph 5.1(1)(d) and I will return to it later.

The bargaining agent submitted various extracts from *Clarke* on the Canada Labour Relations Board decisions published by Canada Law Book. I did not find these particularly helpful in the interpretation of paragraph 5.1(1)(b); I came to the same conclusion in reviewing the extracts of Sack, Mitchel and Price's *Ontario Labour Relations Board Law and Practice*, Third Edition, Volume 1 published by Butterworths.

In summary I find that the employer did not demonstrate that the occupants of the positions of Manager, Financial Services, Ontario Region and of Manager, Financial Planning and Analysis, Atlantic Region have substantial management duties, responsibilities and authority over employees; their responsibilities are more in line with their role as supervisors and the identification of the positions under paragraph 5.1(1)(b) of the PSSRA must be rejected.

Now turning my mind to paragraph 5.1(1)(d), it obviously looks at something different than paragraph 5.1(1)(b) and duties that would not justify exclusion under 5.1(1)(b) would not do so under paragraph 5.1(1)(d) unless a clear and inescapable conflict of interest was created by some of them.

As the PSSRB stated in *Andres and Webb* (supra) at page 13:

*Under paragraph 5.1(1)(d), the Board has some discretion in determining whether the duties and responsibilities of a position so closely associate the incumbent of that position with the employer as to warrant exclusion or whether there is likelihood of serious conflict of interest between the duties of the position and membership in the bargaining unit. It is under this heading that the*

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*“management team” concept developed by the Board over the years has some application.*

Paragraph 5.1(1)(d) of the PSSRA exists to deal with those unusual situations of a position where an employee finds himself/herself in a conflict of interest because of the duties of his/her position even though the position could not meet the criteria to be excluded under paragraphs 5.1(1)(a), (b), (c) or (e).

Can we say here that the incumbents find themselves with a foot in both camps by the nature of their duties? I think not. In the Ontario Region three situations were described as potential conflicts of interest. The first dealt with acting in the Director's position, if a grievance was presented. That conflict of interest is not inherent to the position of Manager, Financial Services, but to that of Director, Corporate Services, which is already identified. As mentioned earlier this is not a criterion which justifies identification. The second potential conflict raised was in the event of a strike, the Manager of Financial Services would assist the Director of Corporate Services to develop a strike contingency plan of financial matters for the delivery of cheques to First Nations which could turn out to be a health and safety issue on the reserve. There are two reasons why the above scenario would not be a conflict to someone included in the Financial Management Subgroup bargaining unit; the first, is that other provisions of the PSSRA, in particular section 78 dealing with the designation of positions and paragraph 102(1)(c), provide the appropriate mechanism to prevent or correct such a situation. The second reason is that the issuance of cheques is the responsibility of another bargaining unit; again paragraph 102(1)(a) of the PSSRA protects against this eventuality as a member of the Financial Management Subgroup cannot participate in a General Services Subgroup strike.

The third scenario was mentioned by Ms. Jessen when she was in a position to recommend the collapsing of two CR positions which are part of the General Services Subgroup, eliminating one in her own area. Again this situation involves a supervisory responsibility over another bargaining unit, somewhat inherent to the Financial Management Subgroup and certainly not substantial enough to exclude her position. In fact the greatest conflict she faced was between her role as a supervisor and her responsibilities on the Aboriginal Employment Steering Committee.

Both incumbents are involved with committees and teams. The evidence did not reveal any decision-making or effective recommendation role for either of the positions that would warrant an exclusion. Several of the committees were information sharing forums; others were attended by managers and non-excluded personnel; the power to make decisions was either reserved to the Director or the Human Resource Management Committee. As was stated in *Clarke* in Canada Labour Relations Board Annotated Guide published by Canada Law Books at 1/22 re: *British Columbia Telephone Co. (1976)*:

*To determine whether someone performs management functions, the Board will consider the importance of a person's functions as well as the intensity and frequency with which they are performed. No one should be deprived of the right to bargain collectively merely because he occasionally performs a management function.*

*The power to "effectively recommend" does not amount to a power to decide. A recommendation, even an effective recommendation, does not amount to a decision.*

The information provided by the incumbents relating to financial administration is technical but as long as there are, on the management team, persons who can comprehend that information, as would be the case for the incumbents of the positions of Director, Corporate Services (FI 4 level), their advisory role would not be such that their recommendations would have to be accepted without question, thus making them de facto the author of the decisions taken by the management team.

The PSSRB considered in *Chambers* (supra) the concept of technical advice. It did require concrete evidence that such technical advice would have created a conflict with inclusion in that particular bargaining unit; as none was submitted, the exclusion was denied.

In the case at hand no cogent evidence was submitted to demonstrate that the positions of Manager, Financial Planning & Analysis, Atlantic Region and Manager, Financial Services, Ontario Region created a conflict with inclusion in the Financial Management Subgroup bargaining unit. The objections of the bargaining agent against the identification under paragraph 5.1(1)(d) of the PSSRA are upheld.

In summary, therefore, the employer's identification of the two positions in question is rejected.

**Evelyne Henry,  
Deputy Chairperson.**

OTTAWA, December 2, 1998.