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File: 147-2-111

Citation: 2002 PSSRB 31

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant/Bargaining Agent

and

TREASURY BOARD
(Indian and Northern Affairs Canada)

Respondent/Employer

RE: Application under Section 34 of the Public Service Staff Relations Act

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Applicant/Bargaining Agent: Andrew Raven, Counsel

For the Respondent/Employer: Michel LeFrançois, Counsel

Heard at Ottawa, Ontario,
February 27 and 28, June 4 to 8 and September 25 to 28, 2001.

[1] This decision follows a hearing held by the Public Service Staff Relations Board (Board) under section 34 of the *Public Service Staff Relations Act* (PSSRA).

[2] Section 34 reads as follows:

> ***34.*** *Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.*

[3] The application under this section was presented by the Public Service Alliance of Canada (Alliance).

[4] The Alliance requests that the Board determine the inclusion or not, within the Education and Library Science (EB) bargaining unit, of all employees (approximately 30 in five schools) performing duties as native language teachers, classroom assistants, education assistants and tutor escorts, and of all employees performing duties as administrative assistants within the Program and Administrative Services (PA) bargaining unit. Both bargaining units are already represented by the Alliance.

[5] The Treasury Board (Indian and Northern Affairs Canada) (respondent) claims that it is not the employer of these individuals and that it is the Six Nations Band Council which is their employer.

[6] In the past, that is, in 1999, the Alliance presented an application for certification (Exhibit A-1, tab 1) to the Canada Industrial Relations Board (CIRB) in order to represent these individuals. It argued that the Six Nations Band Council was the employer. The Six Nations Band Council denied before the CIRB that it was the employer. In March 2000, the CIRB concluded [Exhibit A-1, tab 7] that the individuals <u>were not employed</u> by the Six Nations Band Council. The position taken by the Six Nations Band Council before the CIRB (Exhibit A-1, tab 2), the CIRB's investigating officer's report (Exhibit A-1, tab 4) and the decision rendered by the CIRB's Vice-Chairperson, Gordon D. Hamilton (Exhibit A-1, tab 7), are reproduced at the end of the present decision.

[7] Following the failure to obtain certification before the CIRB, the Alliance filed the present application before this Board. It alleges that the employees in question are employed by Indian and Northern Affairs Canada (Department), that they are included in the EB and PA bargaining units and that they are subject to the collective agreements applicable to these units.

[8] Both parties made the following opening statements.

[9] The Alliance stated that the facts in the present case were different from those in the Supreme Court case in *Public Service Alliance of Canada v. Canada (Attorney General) and Econosult Inc.,* [1991] 1 S.C.R. 614. In the present case, and contrary to the *Econosult* case, the respondent (through the Department) has held out to the individuals covered by this application that it was the employer. The Department has even signed contracts with these individuals indicating that it was their employer. Yet, the position now taken by the respondent before this Board is that, despite those facts, the individuals are not employees and that, hence, they do not have any rights under the PSSRA. The Alliance differed with this position.

[10] For its part, counsel for the respondent pointed out that, although the CIRB found that the Six Nations Band Council was not the employer of these individuals, the CIRB did not find that the Department, i.e. the respondent, was their employer. The respondent was of the view that, even if this Board found that the respondent was not the employer, these individuals would not be adrift because, contrary to the situation in *Econosult*, and other cases, these individuals had not been hired to do the same work for less pay. They have the same compensation packages as their counterparts in the bargaining units and their terms and conditions of employment match those set out in the collective agreements applicable to the employees in the bargaining units. This being said, counsel for the respondent stated that the respondent is not their employer because they were not appointed under the *Public Service Employment Act*. There is no evidence of position numbers, staffing actions or competitions or letters of appointment, which could equate an appointment to a position. Therefore, according to counsel, although the individuals in question are employees, they are not employees as defined under the PSSRA and therefore the respondent is not their employer. On the other hand, the respondent concedes that the federal Crown has constitutional responsibilities and the Department cannot dissociate itself from these. It is responsible to the First Nations involved in the present case for the education services

provided by these individuals and it must meet these responsibilities by whatever means.

[11] In turn, the Alliance replied that the individuals in question are deprived from the rights enjoyed by those already in the EB and PA bargaining units in that at the present time they do not have access to labour legislation. The Alliance emphasized that these individuals cannot be employees and yet not have an employer. There cannot be gaps or types of employment without protection. The Alliance added that since the respondent now claims it is not the employer, despite the fact that the Department signed as employer the contracts of employment of the individuals in question, it is acting in bad faith and the situation of these individuals should be considered an exception to the requirement of a certificate of appointment. In addition, the powers of the Public Service Commission under section 8 of the *Public Service Employment Act* have been delegated to the departments and their line managers and they have chosen to exercise these by indicating to the individuals that the Department is their employer and by assuming this role.

[12] According to the Alliance, it does not stand to reason, as suggested by the respondent, that a person could be offered employment by a department, that a contract be entered into by the Crown as the employer, that all indicia of an employer-employee relationship be confirmed, that no third party purport to be the employer, that the pay cheques be issued with the standard deductions and that notwithstanding all of these, that there be no employer because there is no certificate of appointment. The respondent should not be allowed to tell these employees, in writing and otherwise, that it is their employer and that they have rights as federal employees and at the same time to hide behind the lack of a certificate of appointment to claim that it is not their employer.

EVIDENCE

[13] An individual of each group which the Alliance is seeking to have included in the corresponding bargaining units testified; that is, an educational assistant (Joy Johnson), a tutor escort (Cathy Smith), a classroom assistant (Betsy Buck), a native language teacher (Thomas Deer Arenhoktha) and an administrative assistant (Tammy Martin).

[14] In addition to their testimony, these individuals produced contracts and other relevant documents from which they conclude that their employer is the respondent.

[15] Joy Johnson produced Exhibits A-5 to A-20; Cathy Smith produced Exhibits A-21 to A-28; Thomas Deer Arenhoktha produced Exhibits A-29 to A-36; Betsy Buck produced Exhibits A-37 to A-39; and Tammy Martin produced Exhibits A-40 to A-46.

[16] In summary, these five persons testified that they were led to believe, both by representatives of the Six Nations Band Council and the Department, orally and in writing, that they were employees of the Department. The various facets of their employment relationship and the conduct of the Department representatives towards them remained the same throughout the period of their employment, with one exception: after some individuals refused to take the oath of allegiance to the Crown, it is the Six Nations Band Council which started handing them their pay cheques instead of the Department. Witnesses for the respondent and the respondent confirmed this assertion as well. Both the former and the latter confirmed that, in view of the fact that some individuals were refusing to take the oath of allegiance, and that, according to the respondent, this oath is, under the *Public Service Employment Act*, a pre-requisite for employment in the Public Service, a "device" (term used by the respondent) was found to ensure that these individuals continue to work in the schools. It was decided that it would be the Six Nations Band Council which would see to the actual remittance of pay cheques to these individuals instead of the Department. These are drawn on accounts containing the funds provided by the Department to the Six Nations Band Council.

[17] During his time as Chief of the Six Nations Band Council (1985-91) (Exhibit E-5), Bill Montour wrote, in March 1988 (Exhibit E-6), to the Minister responsible for the Department and asked that the Six Nations of the Grand River be exempted from signing the oath of allegiance to the Crown. He explained that the native language teachers found the swearing of allegiance to the Crown offensive to their religious and cultural beliefs, which are embodied in their traditional form of government ("the Longhouse"), and that, in addition, the Six Nations viewed themselves as "Allies" of the Crown and not its "Subjects".

[18] In May 1988, the Minister responsible for the Department denied this request (Exhibit E-7) on the basis that it was a statutory requirement under section 23 of the *Public Service Employment Act*.

[19] Bill Montour, who testified for the respondent, alleged that, as a result of dealings with the Department, in order to provide an alternate route to deliver the education program to the Six Nations community, the Six Nations Band Council passed a resolution which expressed the Band Council's intent to hire native language teachers. Such resolution was not produced. Therefore, its existence and, if it exists, its wording and its precise intent remain unproven.

[20] According to Bill Montour, the resolution coincided with the Department's initial efforts to implement devolution of education to the Six Nations Band Council. This being said, in the end, and to this day, devolution of education has never taken place.

[21] Bill Montour pointed to a contract (September 6, 1988 to August 31, 1989) (Exhibit A-30) between a native language teacher and the Six Nations Band Council in which he signed as representative of the employer. This same contract sets out in its preface that "(1) The 'Council' will assume the responsibility for administering the salaries and benefits of the 'teachers'." Up until his departure in 1991, the situation remained unclear. According to Bill Montour, some native language teachers continued to receive pay cheques from the Government of Canada and others from the Band Council.

[22] In cross-examination, Bill Montour acknowledged that subsequent contracts and documents (for instance, Exhibits A-31 to A-33) signed after his departure are inconsistent with the notion that the Band Council was the employer.

[23] Bill Montour also testified that, during his tenure as Chief, the Band Council did not employ classroom assistants, education assistants or tutor escorts. In addition, he stated that he did not dispute any of the facts set out in the Six Nations Band Council's response to the Alliance's application for certification before the CIRB (reproduced at the end of this decision) at pages 5 to 8 of Exhibit A-1, tab 2. These facts point to the exercise of the employer function by the Department and not the Six Nations Band Council. As stated in the beginning, the CIRB found that indeed the Band Council was not the employer of these employees, thus leaving one possibility, which is that the Department (i.e. the respondent) is the employer.

[24] Bill Montour testified that, in accepting to administer the salaries and benefits of all teachers, the Band Council was a flow-through body allowing those individuals who did not sign the oath of allegiance to receive their salary and benefits.

[25] John Donnelly, Ontario Regional Director General at the Department, confirmed that, despite efforts in the 1990's, the process of devolution of education to the Six Nations Band Council has been unsuccessful (Exhibit E-8). One million dollars were transferred to the Six Nations Band Council to explore options and devise a system under which devolution of education could take place. However, it became clear in 1995 that the Department and the Six Nations Band Council would not agree on the terms of devolution and to this day the Department remains responsible for providing education to the Six Nations on the reserve.

[26] John Donnelly, who testified for the respondent, is of the opinion that, despite the CIRB's finding, it is the Six Nations Band Council that is the employer of the individuals covered by this application. However, his personal reason for this view is his personal opinion that, if it were decided that it is the Department which is the employer of these individuals, the addition of these individuals to the federal staff already in place might cause the Department to be insufficiently resourced to pay them since the Department is presently resourced for 80 teachers at Six Nations; that is, a ratio of 18 students to one teacher and the inclusion of these individuals in the EB and PA bargaining units would augment to 120 teachers the complement of federal teaching staff.

[27] John Donnelly was not familiar with the practices surrounding the signing of the employment contracts and was at a loss to explain how it was that Allan Raslack, Manager of Program Services for the Department, and Keith Angel, Assistant Program Services Manager, had signed the contracts as representatives of the employer. He expressed disappointment at the fact that they had done so, and felt that they had demonstrated poor judgement. For his part, he continued to be of the opinion that the Six Nations Band Council was the employer.

[28] In cross-examination, John Donnelly could not explain any better the reason why representatives of the Department had signed contracts for the employer, nor could he explain the various departmental forms used to appraise the performance of the persons who are covered by this application. He was unfamiliar with their actual terms and conditions of employment and he stated that Katherine Knott, Director of Intergovernmental Affairs, Ontario Region South, at the Department, would be in a better position to explain the situation. For his part, he claimed that he had been

unaware that individuals were being informed, orally or in writing, that they were employees of the Department.

[29] Katherine Knott, Director of Intergovernmental Affairs, Ontario Region South, at the Department, is the person who, according to John Donnelly, was best placed to shed light on this entire matter. She testified at length on the negotiations between the Department and the Six Nations Band Council with regards to the administration of elementary education on the reserve (Exhibits E-19, E-20 and E-21). According to Katherine Knott, the Department had been clear (Exhibits E-19, paragraph E, and E-20) that it no longer intended to sign the contracts with the individuals at issue here. (It is worth repeating that both sides agreed that the individuals in question were employed and that the sole disagreement lied with the identity of the employer.)

[30] According to Katherine Knott, although devolution of education from the Department to the Band Council did not take place, the Six Nations Band Council and the Department signed an agreement respecting the administration of components of education within the Six Nations federal school system for the 97-98, 98-99 and 99-00 school years (reproduced in annex - Exhibit E-22). Katherine Knott pointed to paragraph D of said agreement to support her testimony that both parties had agreed that the Six Nations Band Council would sign service contracts with the individuals. Paragraph D reads as follows:

> *D. Six Nations shall sign service contracts with the employees, and through their administration be responsible for the maintenance of personal records, and to issue pay cheques and provide benefits as approved by Six Nations.*

[31] Following the signing of this agreement, the persons continued working but there were no contracts signed with them. To this day (i.e. the day of her testimony), Katherine Knott remains confident that eventually the Six Nations Band Council will accept to sign such contracts as the employer. She believes that paragraph D creates an obligation on the Six Nations Band Council to sign the contracts with the individuals as the employer. (It is to be noted that paragraph D does not create an obligation for Six Nations to sign in the capacity of employer.) Katherine Knott threads a fine line, views her role as one of support and prefers not to revert to the adversarial relationship which existed in the past between the Department and the Six Nations Band Council. As late as February 2001, she reminded Chief Staats, of the Six Nations

Band Council, of the agreement (Exhibits E-22 and E-25) and the Six Nations Band Council's commitment to sign the service contracts.

[32] According to Katherine Knott, although in the past, representatives of the Department, Keith Angel, Assistant Program Services Manager, and Allan Raslack, Manager of Program Services, signed contracts representing that the Department was the employer, they did not have the authority to do so nor did they have delegated authority to staff those positions since such authority had never been delegated below the level of director. Katherine Knott testified that she had been delegated the authority to staff under the *Public Service Employment Act* and that she would produce this delegation at the resumption of the hearing. However, when the hearing reconvened in September, the respondent produced a document (Exhibit A-52) showing that Katherine Knott had not received an "official letter of delegation" and that the authority to staff had been retroactively delegated to her after her testimony in June 2001.

[33] Katherine Knott acknowledged that she had staffed without having received anything in writing authorizing her to do so. She said: "No one told me I was acting outside of my authority throughout the period I was binding the Department."

[34] The Alliance led Katherine Knott through an analysis of the Six Nations Band Council's allegations before the CIRB (Exhibit A-1, tab 2, annexed to this decision). For the most part, she agreed with the content with regard to staffing, hiring, discipline, performance, hours of work, supervision, benefits termination, and that it is the Department which exercises those functions. She also acknowledged that it had been the Department's intention that the individual contracts would state that the Six Nations Band Council was the "administrator only". However, on a few occasions, it appears that the Band Council has also signed contracts (Exhibit A-53) as the "employer only". With regard to "termination" of an employee, she explained that a person could be excluded from the reserve by a Band Council resolution ("B.C.R'.d") but that this exclusion did not mean termination of the individual's employment. In such a case, it is still the Department which assigns the individual elsewhere to an alternative position. She underlined that the Six Nations Band Council was kept informed and consulted on matters such as hiring, staffing, discipline, termination, etc., and that in some cases it participated in the action. For instance, she views the decision of hiring as one of partnership in that on this matter the community's input is

sought. However, she concedes that an individual has never been hired over an objection of the Department. She acknowledged that no individual had ever been dismissed without the Department's assent. A letter addressed to a tutor escort (Exhibit A-49) illustrates how Katherine Knott is kept informed of the decision of a principal of a school (and an employee of the Department) not to renew the person's contract.

[35] She pointed out that the secretaries' (administrative assistants) salaries are derived from the Six Nations Band Council salary grid and not a Department grid as in the other individuals' cases, this "Department grid" being the applicable collective agreements for employees holding positions in the EB and PA bargaining units.

[36] With regard to hiring, Katherine Knott drew a distinction between the process of hiring people in federal teaching positions (i.e. principals and English language teachers) (their inclusion in the bargaining unit is not an issue) and the process of hiring native language teachers (Mohawk and Cayuga). Both groups of teachers work side by side. In the former case, there is a competitive process, a position is identified by a competition number, there is an advertisement in aboriginal and non-aboriginal newspapers, applications are screened by the Department and a statement of qualifications outlines the requirements of the position in terms of experience, education and personal suitability. There is the Six Nations Band Council involvement in the process. Depending on availability, a representative of the Six Nations or the First Nations Home and School Committee and representatives of the Department review applications together; representatives of "Home and School" participate in the development of questions for the interviews and they attend the interviews and assess candidates jointly with the Department.

[37] With regard to hiring of native language teachers, tutor escorts, classroom assistants and administrative assistants, the principal in charge of the school advertises in the local newspapers. However, the position is not given a number. The principal convenes the hiring board. Again, it is constituted of departmental representatives and Band Council representatives and "Home and School" representatives. Interviews are prepared jointly (questions and answers) as well. However, there may not always be a letter of offer. In summary, Katherine Knott disagrees with a finding made in the CIRB's investigator's report (Exhibit A-1, tab 5, page 4) that there are no representatives of Six Nations involved in the hiring process.

She believes that, in the past, letters of offer of employment may not have been sent but rather that those who were hired were simply told to report to work.

[38] Katherine Knott attends Principal Advisory Meetings. The terms and conditions of employment of the individuals who are the subject of this application are discussed occasionally (Exhibit A-48). For example, the need for a child to be linked to a tutor escort has been raised.

[39] Katherine Knott became aware, in 1989, that there were "problems" concerning the signing of native language teachers' contracts. She became aware "at one point" that the Department's Assistant Program Manager was signing contracts as the employer. At one point, she discussed the matter with Chief Staats and explained to him that the Department wanted to maintain the positions occupied by the individuals. She explained to him that one way of getting around the problem (created by the refusal of some to take the oath of allegiance and the Band Council's refusal to sign the contracts as the employer) might be for the Department to continue funding the Band Council and for the Band Council to obtain employees from an employment agency. Apparently, the New Credit First Nation had entertained this possibility. (This possibility was not implemented. In the end, the "device" used was the "administrator only" contracts which were signed for a while, after which no contracts at all were signed.) According to Katherine Knott, one of the reasons the Six Nations Band Council did not wish to sign the contracts as the employer related to liability in matters of termination (Exhibit E-19).

[40] Katherine Knott agreed that it was the principal of the school that terminated the employment of a tutor escort (Exhibit A-49). Also, Katherine Knott has given a direction to the Band Council with regard to the salary of tutor escorts and did instruct it to pay tutor escorts. She explained that she received a request from the Band Council to adjust salaries (Exhibit A-54). Once an increase was agreed to by the Treasury Board following negotiations with the Alliance, Katherine Knott authorized that the salaries of the individuals who are covered by this application be increased accordingly (see Exhibit A-50).

[41] Katherine Knott also agreed that the minutes of the negotiations on elementary education administration (Exhibit E-19) support the conclusion (paragraph L, Exhibit E-19) that both the Department and the Band Council viewed the Six Nations Band Council simply as an administrator and not as the employer of the individuals.

[42] Although contracts with the individuals ought to have been signed, under the education agreements (Exhibits E-22 and E-25), no other education agreement was signed on the "administration of components of education" and no contracts with the individuals were signed either but their positions continued and they remain employed and salaried. They do their work and the children receive their education. In fact, Katherine Knott signed the second education agreement (Exhibit E-25) with the knowledge that contracts with individuals had not been signed under the preceding agreement. To this day, the issue of the signing of the contracts of employment remains unresolved.

[43] Katherine Knott knew that the Band Council's position all along was that it was not the employer, that it had already taken that position publicly before the CIRB and that it had been confirmed in that position by the CIRB, which had agreed that it was not the employer. She herself has given comments and directions (Exhibit E-24) on contract drafts submitted to her.

[44] Katherine Knott also produced an example of the Band Council's application for funding Band Council employee benefits (Exhibit E-15) and its employment policy (Exhibit E-16). (According to her, the Band Council has between 800 to 1200 employees.)

[45] At the request of the Alliance, Katherine Knott produced minutes (Exhibits A-55 to A-72), about which she acknowledged in several instances the existence of indicia, i.e. hiring, staffing, leave, travel claims and reimbursements, which amount to an overall control by the Department over individuals' terms and conditions of employment.

[46] Allan Raslack signed as representative of the employer several contracts under which individuals were hired. He reports to Katherine Knott and has worked in Senior Government Relations, Intergovernmental Affairs, Ontario Region, at the Department. From 1992 to 1996, he was Manager of Program Services for the southern district, which includes the Six Nations.

[47] Allan Raslack testified that it had been a mistake on his part to sign the contracts as a representative of the employer. He explained that he had done so because this had been the Department's past practice. He now knows that he had not been delegated the signing authority. According to Allan Raslack, it had also been a

mistake to send a letter (Exhibit A-16) to Joy Johnson stating that she was a federal employee.

[48] Throughout the years when Allan Raslack was Program Services Manager, he understood that the Department's intent had been to have the Six Nations Band Council perceived as the employer in order to circumvent the consequences which were believed to flow from the fact that some individuals refused to take the oath of allegiance to the Crown.

[49] Allan Raslack's main concern was not the legal niceties but rather to ensure that the children receive a good education and to do so he tried to manage the system co-operatively with the Six Nations Band Council. For a while, he expected that education would be transferred to the Six Nations by September 1994. In the end, devolution of education never took place and remains the Department's responsibility.

[50] Allan Raslack testified at some length on documents (Exhibits E-35 to E-60) which illustrate the relationship that existed between the Six Nations Band Council and the Department. They illustrate the understanding of both parties as to the status of the individuals covered by this application and the obligations of the Department and the Six Nations Band Council.

[51] Allan Raslack met them individually once a month for 15 minutes each. During those meetings, he sought their suggestions to improve the program.

[52] He functioned in a volatile environment, with deep divisions within the Six Nations Community (Confederacy - Longhouse supporters vs. elected chief and Band Council supporters). Allan Raslack tried to keep politics at the front door of the school, which he tried to make inclusive.

[53] In cross-examination, Allan Raslack acknowledged that there existed inconsistencies in the application of the system, one being that the individuals' contracts stated in bold letters not that the Band Council was the employer, but rather that the Six Nations Band Council was "<u>administrator only</u>".

[54] Allan Raslack never told Keith Angel, the Assistant Program Services Manager, that the Department should not sign the contracts as the employer. Both he and Keith Angel signed contracts as representatives of the employer.

[55] However, the practice was to refer to individuals as "Band employees" since, for a while, their leave entitlements were partly different from those set out in the collective agreements and they were not subject to the Work Force Adjustment Directive, nor given surplus notices, nor did they have to wait one and one-half months for their first pay cheque. On the other hand, Allan Raslack acknowledged that attendance, hiring, supervision, discipline, evaluation and termination of these individuals were done by the federal staff at the school and through them by the Department.

[56] Allan Raslack could not explain why, if, as he now believes, these individuals were the Band Council's and not the Department's employees, Katherine Knott's approval was required before they were hired.

[57] Allan Raslack summarized by saying that the genesis of the situation was the oath of allegiance issue. For his part, he decided to live with the ambiguity that flowed from the "hybrid management" (Exhibit E-70) of the situation. He knew that the Six Nations Band Council was of the opinion that the Department was the employer (Exhibit E-53) and although he no longer shares this opinion, he continued signing contracts as the employer because this had been past practice. He pointed out that the conditions of employment and the salaries mirrored those negotiated with the Alliance.

[58] As I stated at the beginning, individuals belonging to each group for which the Alliance is seeking inclusion in the bargaining units testified on their terms and conditions of employment and their reasons for having concluded that the Department was their employer. In summary, they testified to the following.

[59] Joy Johnson works as an educational assistant at J.C. Hill Senior Elementary School. J.C. Hill Senior Elementary School is part of the five elementary schools on the Six Nations Reserve in Ohsweken, Ontario. The five schools are Jamieson Elementary School, J.C. Hill Senior Elementary School, Emily C. General, Ivan L. Thomas Odadrihonyanita and Oliver M. Smith-Kawenni:io. The Reserve has a population of approximately 15,000 persons.

[60] Joy Johnson has worked for the past 11 years at J.C. Hill Senior Elementary School. Within the resource program, she provides assistance to "higher needs" children.

[61] Here are the facts surrounding her employment. She signed contracts of employment (Exhibits A-5, A-7, A-19, A-8, A-9 and A-10) for these periods of employment: September 4, 1990 – March 31, 1991 (Exhibit A-5); April 1, 1992 – March 31, 1993 (Exhibit A-19); September 1, 1992 – March 31, 1993 (Exhibit A-7); April 1, 1993 – March 31, 1994 (Exhibit A-8); April 1 – August 31, 1994 (Exhibit A-9) and September 1 – March 31, 1995 (Exhibit A-10). One contract (Exhibit A-5) has a space reserved for the employer, which is not signed but bears the signature of Mr. Staats, Chief, Six Nations Band Council, as a witness. Other contracts (Exhibits A-7 and A-19) are signed by three parties: Joy Johnson "employee"; a signature of a Department representative as "employer"; and a third signature by a person acting as the "Six Nations Council representative". The contracts (Exhibits A-7, A-8, A-9 and A-10) state, at clause 1 "[T]hat the Six Nations Council will be the ADMINISTRATOR ONLY of the salaries and benefits of the Educational Assistants" and at clause 2 "[T]hat the Educational Assistants will be under the jurisdiction and supervision of the Program Services manager or his Designate" (emphasis added). One contract (Exhibit A-10) is simply signed by Joy Johnson without the employer's signature or the Six Nations Band Council representative's signature despite the fact that a different space has been allotted to each.

[62] The rates of pay are drawn from the Teachers' Aides Subgroup collective agreement, as well as the leave entitlements. The hours of work are consistent with the minimum requirements for teachers (federal employees). The "employer's contribution" to the pension plan is funded by the Department. As for health and life insurance employer-employee contributions, they are made as per "the Six Nations Council arrangements". Travel expenses, other than those resulting from itinerant scheduling of duties, require approval of the Department's Program Services Manager. The school principal certifies the attendance reports (Exhibit A-11) and evaluates the individual's performance (Exhibit A-12); the performance review is done on a standard form of the Department (Exhibits A-13 to A-15).

[63] In addition, in 1995, Joy Johnson received a letter (Exhibit A-16) signed by Allan Raslack informing her that, "as federal employees, a number of processes are available to you for resolving concerns relating to the terms and conditions of your employment." In the same letter, she was also told that her union representative was a source of advice and assistance.

[64] According to Joy Johnson, the Six Nations Band Council is responsible for the issuance of pay cheques (Exhibit A-17), which it draws from an account containing the funds it is given by the Department.

[65] When hired, Joy Johnson sent her application for employment to the Department (L. Staats) and was interviewed by a departmental employee (i.e. a school principal (Yvan Thomas)). The interview was attended by a school committee representative and a third person. She was informed by the school principal that she was successful. Her job description (Exhibit A-6) originated from the Department.

[66] Since her last signed contract in 1995 (Exhibit A-10), Joy Johnson has continued working but did not sign any new contract. She pointed it out and was told to just continue working.

[67] One time, she was disciplined (reprimanded) by the school principal (Louise Hill), who informed her that she was doing so at the request of Katherine Knott.

[68] Joy Johnson agreed with the statements made in the Six Nations Band Council's response to the Alliance's certification application before the CIRB (Exhibit A-1, tab 2, page 6) and confirmed *inter alia* that work assignment, supervision and termination of employment are effected by the Department.

[69] In cross-examination, Joy Johnson confirmed that she had not been informed of a position number nor had she participated in a competition to which would have been assigned a number. At the start of her employment, she did not receive a letter of offer nor did she swear an oath of allegiance.

[70] Rebecca Jamieson was an employee of the Department between 1988 and 1994. The different positions she held (Exhibit A-73) made her familiar with the status of educational assistants. She confirmed, having participated in their training, that they were under the supervision of the principals of the schools and that there was no question of who they worked for: it was the Department through the principals.

[71] According to Rebecca Jamieson, the Six Nations Band Council was only a "pay roll" service, a "cheque writing" service (she had not known that it was paid a 10 percent administrative service fee for this) and the Band Council never asserted that it was the employer.

[72] Rebecca Jamieson confirmed that Allan Raslack (Program Services Manager) and Keith Angel (Assistant Program Services Manager) asserted and signed that it was the Department that was the employer and it is her conclusion that this was done with the knowledge of senior management of the Department.

[73] Cathy Smith occupies a position of tutor escort (Exhibit A-27) since 1994. Her job description was given to her by her school principal. The contracts which she has signed (Exhibits A-21, December 13, 1994 – March 31, 1995, and Exhibit A-22, September 1, 1996 – June 30, 1997) also state that the Six Nations Band Council is the "ADMINISTRATOR ONLY of the salaries and benefits of the tutor escorts and the tutor escorts will be under the jurisdiction and supervision of the Program Services Manager or his designate" [emphasis added]. According to the contracts, the principal of the school (a federal employee) is her overall supervisor. She is also under the guidance of the classroom teacher (who is a federal employee as well). Performance evaluation is conducted by the principal and the classroom teacher. Her contracts (Exhibits A-21 and A-22) were signed by herself and by the Department's Program Services Manager and, on one occasion (Exhibit A-22), by a representative of the Six Nations Band Council as well. Since her last contract, she has continued, without a contract, to be employed and paid.

[74] Marilyn Mt.Pleasant, employed by the Six Nations Band Council (Exhibit A-25), has sought from the school principals the Department's authorization to give tutor escorts (and educational assistants, classroom assistants and administrative assistants, i.e. secretaries) their retroactive pay and pay increase. Their salary grid (Exhibit A-25) is extracted from the relevant collective agreements (Exhibit A-28). Two documents issued by two governmental departments, "Record of Employment" and "Statement of Remuneration Paid" (Exhibits E-1 and E-2), do show the "Six Nations Council" as the employer. (It will be recalled that it is the Six Nations Band Council that remits the pay cheques following the oath of allegiance issue.)

[75] Once hired, the Six Nations Band Council's involvement in Cathy Smith's employment has been limited to the issuance of her pay cheque. She does not receive any benefits and has been asking for them for years. The school principal refers her to the Band Council when it comes to benefits.

[76] Other than her benefits, her terms and conditions of employment are very similar to Joy Johnson's. She would find it odd if she were determined to be a "Band employee" as she works in schools and the Six Nations Band Council employees do not. Her performance is monitored and evaluated by the school principal (Exhibits A-21 and A-22).

[77] Thomas (Deer) Arenhoktha's employment started in 1985. He is a native language teacher at Ivan L. Thomas Odadrihonyanita School (Exhibit E-4). At one point, he has been acting principal. He is familiar with native language teachers' terms and conditions of employment. Beginning in 1985, and for two or three years, he worked as a supply teacher following an offer by the Department's Superintendent of Education, Harry Longboat, who went to Thomas (Deer) Arenhoktha's house and offered him a job.

[78] In 1987, he was offered by the Department (Exhibits E-3 and E-4) a specified-period appointment to a position bearing a position number. His appointment, he was told in the letter of offer, was "in accordance with the Public Service Terms and Conditions of Employment Regulations and the appropriate collective agreement." He became an employee of the Department and also paid union dues. At about the same time, a group of native language teachers, who had been hired by the Department, refused to swear the oath of allegiance and were released from the Department.

[79] Harry Longboat, who, at the time, was District Superintendent of Education and worked for the Department, told Thomas (Deer) Arenhoktha that, since Thomas (Deer) Arenhoktha had not sworn the oath of allegiance, he would "no longer be employed through [the] department" and added "You can still work for us but you will be paid through the Band" and from that point on, he was paid through the Band Council. This is confirmed in writing (Exhibit A-29).

[80] After that, and for a number of years, Thomas (Deer) Arenhoktha signed contracts (Exhibit A-30, September 6, 1988 – August 31, 1989, Exhibit A-31, April 1, 1994 – August 31, 1994, and Exhibit A-32, September 1, 1996 – August 31, 1997) in which it was clearly stated (as in Joy Johnson's and Cathy Smith's case) that the Band Council was the "ADMINISTRATOR ONLY" and that the native language teachers would be "under the jurisdiction and supervision of the Program Services manager or his Designate." Again, spaces were set out for the individual's

signature, the employer's signature and the Six Nations Band Council's signature. Clearly, the latter two were not the same. In one contract (Exhibit A-30), Bill Montour (Band Chief) signed as the employer and Harry Longboat, employed by the Department, signed as a witness. Another one (Exhibit A-31), sent to Thomas (Deer) Arenhoktha by the Department's Assistant Program Services Manager, Keith Angel, is signed by a departmental employee as well as a Six Nations Band Council representative. A third one (Exhibit A-32) was not signed, although, according to Thomas (Deer) Arenhoktha, there exists a signed copy bearing the signature of the Program Services Manager.

[81] As a native language teacher, Thomas (Deer) Arenhoktha is supervised by the principal. His pay is in accordance with the applicable collective agreement: "Education (all employees) – Agreement between the Treasury Board and the Public Service Alliance of Canada - Elementary and Secondary Teaching Sub Group" (paragraph 14 of Exhibit A-31).

[82] His performance is evaluated as other federal teachers. In his performance review (Exhibit A-33), his position is shown as being in the group and level shown as EDEST01. The acting principal (S. Elaine Hickey) has discussed his performance with him. Thomas (Deer) Arenhoktha's performance has never been assessed by the Band Council. The school calendar (Exhibit A-34) is set by the Department. It is the Department's leave and absence reports (Exhibit A-35) which he fills out. He was informed that under the collective agreement, he is entitled to two days' personal leave. In addition to his leave entitlement under the collective agreement, he benefits from three days of cultural leave.

[83] Thomas (Deer) Arenhoktha participates in the different benefits and similar plans. For the last 14 years, the Band Council has never been involved in his terms and conditions of employment other than remitting him his pay cheque.

[84] He has never sworn the oath of allegiance, not even when initially appointed, nor has he been asked to do so. He has decided not to swear this oath if he is ever asked; he has "philosophical problems with taking the oath."

[85] The respondent expressed the view that "it was inconceivable that someone who does not feel bound by the Crown would be employed by the Crown." The respondent attempted to question the soundness of Thomas (Deer) Arenhoktha's personal beliefs relating to the Crown.

[86] I did not allow the respondent to grill any further in depth than it already had Thomas (Deer) Arenhoktha on the philosophical underpinnings of his objections as a member of the First Nations to swear the oath of allegiance to the Crown.

[87] I do not believe that any purpose would have been served in allowing the respondent to try to invalidate Thomas (Deer) Arenhoktha's beliefs and objections, which are steeped in First Nations' history, culture and spiritual beliefs, and to which he is entitled as a member of the First Nations, without having to justify them and defend them before the Board. In doing so, I have tried to strike a balance between the respondent's right to cross-examine and my duty to keep the hearing centred on relevant matters as well as to preserve the decorum and the fairness and appearance of fairness of the process. At one point, cross-examination can become and can be perceived as intimidating and humiliating and demeaning when left unchecked. I believe that this was such an instance. No amount of innuendo and of questioning and prodding by the respondent on Thomas (Deer) Arenhoktha's lack of loyalty to the Crown would convince me that (1) his beliefs as a member of the First Nations are not legitimate; (2) somehow he is obliged to feel loyalty to the Crown; or that (3) he has to pretend publicly to this loyalty; and (4) he has to submit, against his own cultural, historical and spiritual beliefs and conscience, to swearing an oath of allegiance to which he does not really adhere.

[88] I also pointed out to the respondent that local Ottawa newspapers, both French and English (*The Ottawa Citizen*, January 6, 2001; *Le Droit*, January 8, 2001), had carried the news, in the last year, that a French Canadian citizen and a federal Public Service employee, in the western provinces, by the name of Pierre Vincent, had been allowed to keep his employment in the Public Service despite the fact that he too had refused to take the oath of allegiance (see annex to this decision). According to the articles, Mr. Vincent worked at Natural Resources. I expressed my difficulty at reconciling the differing treatments. Counsel replied that he was vaguely aware of the matter, that he was not in a position to comment, that he would look further into the matter with his own client and that he would return with clarifications. In the end, he did not come back with any elucidation.

[89] I believe that just as a judge can take judicial notice of certain facts, without their being proven, I, as a member of an administrative labour tribunal, do not live in a vacuum, read daily the newspapers like other citizens, including judges, and can at the

very least take notice of the fact that newspapers published the story which I have just alluded to. Although newspaper articles are hearsay, hearsay is admissible before this Board. The employer did not dispute the fact that Mr. Vincent had been allowed to keep his position. Since that is the case, I would have liked to have had clarifications and explanations on why the persons involved in the present case were not and are not allowed to enjoy the same dispensation which apparently has been granted Mr. Vincent. Despite my request to counsel and his response that he would return with explanations, none was forthcoming.

[90] Thomas (Deer) Arenhoktha stated that he was shocked when he was told that his employment with the Department would end as a result of his refusal to take the oath of allegiance. Bill Montour said to him: "You will still work for us but you will be paid by the Band." Thomas (Deer) Arenhoktha understood the word "us" to mean the Department.

[91] As stated previously by other witnesses, the "device" of the "Administrator Only" contracts were used to keep Thomas (Deer) Arenboktha's services and he has simply kept on working and been paid ever since. The same working conditions were demonstrated by the production of the relevant documents (Exhibits E-29, E-30, E-31, E-32, E-33 and E-34) in the case of Clara Powless, another native language teacher.

[92] Similar working conditions existed in the case of Betsy Buck (classroom assistant) and Tammy Martin (administrative assistant).

[93] Betsy Buck has worked continually since 1993 in her present position. She signed in 1994 a contract (Exhibit A-37) in which the Six Nations Band Council was defined as the "Administrator Only" and in which it was stated that the teacher assistants were "under the jurisdiction and supervision of the Program Services Manager or his Designate" and which the Department's Assistant Program Services Manager, Keith Angel, signed as the employer. (Previous to this one, she signed a similar contract, "Administrator Only", in 1993. And following this one, she signed a third contract, but could not produce a copy as she believes it was eaten by a mouse!) She obtained her employment in 1993 when the principal of Ivan L. Thomas Odadrihonyanita School phoned her and offered her a position.

[94] The Six Nations Band Council never exercised authority over her. She took her instructions from the federal class teacher. Her work is done in the Cayuga language. She assists the teacher in developing classroom materials. The principal or acting principal assesses her performance (Exhibit A-39). The Six Nations Band Council told her that it was not her employer but simply handled pay cheques.

[95] The pressure over the issue of whether she and her colleagues were "Band employees" or "federal employees" got to her. She left for a year and when she came back, her pension was no longer deducted from her cheque (Exhibit A-38). When she returned after a year, she made an application, sent in her résumé and was interviewed by a committee made up of the principal, a member of the "Home and School Committee" and a member of the Band Council.

[96] Tammy Martin began working in 1993 as an administrative assistant (secretary) at Ivan L. Thomas Odadrihonyanita School after responding to a newspaper advertisement. She was interviewed by the principal, Yvan Thomas, the vice-principal, Larry Lewis, and a Six Nations Band Council personnel administrator, Hazel Johnson. There was no competition, competition number or certificate of appointment. She does not have a contract to produce for that first year.

[97] She reported to the principal and he appraised her performance (Exhibit A-40). In 1994, she was told by Michelle Hill, Chairperson of the since defunct Six Nations Education Board (Exhibit A-41), that hiring and staffing for Six Nations schools rested solely with the Department.

[98] In August 1994, she was informed by the Six Nations Band Council Personnel Administrator (Exhibit A-42), after a period of lay-off, that in order to allow her to collect unemployment insurance, the Six Nations Band Council would continue to administer the payroll and she was informed of the reinstatement of her position and of the rates of pay and benefits attached to her position. She was also told that her terms and conditions of employment would remain the same as per her signed contract of September 1993. Yet, in 1997 (Exhibit A-43), she was told that, at that point in time, school secretaries were under the employment of the Six Nations Band Council. Tammy Martin signed a contract (Exhibit A-43, page 2) to that effect. Despite its terms, she does not receive direct supervision from the Personnel Manager but rather from the school principal, who also appraises her performance (Exhibit A-45). She has not signed a document (Exhibit A-44) purporting to be her job description and

denies receiving supervision from the Six Nations Band Council Personnel Administrator. The Six Nations Band Council's role is limited to remitting her pay cheque to her, which is drawn on the Six Nations Band Council's bank account containing the Department's funding. Whenever she raised issues pertaining to her pay, both the Six Nations Band Council representatives and the Department's employees, i.e., principals Louise Hill and S. Elaine Hickey, have told her that she is a Department employee. Tammy Martin subscribes to the Six Nations pension plan. Louise Hill was supposed to take up to the Principal Advisory Committee the issue of secretaries' rates of pay.

[99] In February 2001, Tammy Martin was told one more time by the Six Nations Band Council that she was not an employee of the Six Nations Band Council and that this had been confirmed by the CIRB (Exhibit A-46). Exhibit A-46 reads as follows:

> *Your Telephone Call re Employer of Education Staff*
>
> *Tammy, your message was delivered to this office by Fran Henry from the Public Works Department at 8:35 a.m. on this date.*
>
> *Please be advised that the issue or question as to who is the employer, has always been clearly understood by the Six Nations Council, that indeed the Department of Indian Affairs is the Employer.*
>
> *The history of Council being the Administrator Only, began in the mid 1980's. The numbers slowly grew to the number of employees this employer administers today. When the Native Language Teachers refused to sign the Federal Oath, INAC approached Council to be the* ***Administrator Only*** *of issuing weekly payroll in order for the program to continue. There were several teachers who did sign the INAC oath and as of this date are paid through Treasury Board. I am not sure if these teachers were hired through a Hiring Process by INAC or if they were hand selected according to their knowledge of speaking the Native Language.*
>
> *INAC always developed the contracts up to a couple years ago, when they suddenly decided that Council should be drawing up the contracts. Since that time there has never been any contracts for the Education staff.*
>
> *Further to the above, we attaching* [*sic*] *a copy of the Canada Industrial Relations Board,* [*sic*] dated *March 9, 2000. Please refer to page 6 that states:*

For all of the above reasons, the preliminary objection raised by the respondent is upheld. The Board hereby determines that the employees covered by the application are not employed by the Six Nations Band Council. The application is therefore dismissed.

[100] S. Elaine Hickey (Acting Principal, Ivan L. Thomas Odadrihonyanita School, 1992-2000) testified that she could not recall (but she did not deny) having told Tammy Martin that she was not a Six Nations Band Council employee and that her employer was the Department. However, she remembered having recommended (Exhibit E-11) to the Six Nations' Band Council an increase in Tammy Martin's pay. She did recall having discussed the secretaries' salary with the Principal Advisory Committee after having received from Tammy Martin a request to do so.

[101] Louise Hill (Principal, Ivan L. Thomas Odadrihonyanita School, and presently Principal at J.C. Hill Senior Elementary School) did not recall (but did not deny) either having told Tammy Martin that she was an employee of the Department. She did recall having discussed her salary with Tammy Martin, and having pointed out the secretaries' salary in the "federal grid" (i.e. collective agreement). She too may have brought the issue of the secretaries' salary before the Principal Advisory Committee.

ARGUMENTS

For the Applicant/Bargaining Agent

[102] The argument of the bargaining agent can be summarized as follows.

[103] The employment relationship created between these employees and the Department is the result of the Department holding out consistently to the employees that it is their employer. The present inquiry exists to determine who should be on the other side of the relationship with the employees: the crux of the matter is "who has the power?"

[104] No labour relations purpose would be achieved by asking the Chief of the Six Nations Band Council to negotiate a collective agreement. It is the reality that counts and not appearances. Who has the fundamental control, that is the question. There is virtually no element of fundamental control over the individuals covered by this application within the Band Council.

[105] This case can be distinguished from *Econosult* (*supra*) in several ways, one of which is the Econosult Inc. consistently held out that it was the employer. In the present case, the Band Council did not do similarly. Rather, the Department held itself out as the employer.

[106] Katherine Knott distances herself from her subordinates, Allan Raslack and Keith Angel, who have consistently held out the Department as the employer. She says that they did not have the authority to do so. Yet, she herself staffed without having any delegated authority, which as we know was given to her only after the respondent cross-examined her on this particular issue (Exhibit A-52). In short, the lack of authority does not erase the commitments made on behalf of the Department.

[107] Allan Raslack is making a *mea culpa* for having held himself out as the representative of the employer. It is clear that he has been asked to "take the rap". Having said this, it is also clear from his testimony, Katherine Knott's testimony, minutes, contracts and the rest of the evidence that the Department held itself out as the employer. In fact, Allan Raslack simply acted in accordance with what Harry Longboat had told him all along. No one accepts responsibility for the present situation except Allan Raslack.

[108] There does seem to exist differences between categories of employees; that is, between the first three groups and the secretaries. Indeed, there are contracts signed by Tammy Martin and the Band Council and according to these, the Band Council held itself out as the employer (Exhibits A-40 to A-46). On the other hand, there is also Exhibit A-53. If one examines the situation of the other three categories of employees, it is clear that the overwhelming weight of indicia is that the Department held itself out as the employer.

[109] The Alliance reviewed the evidence pertaining to each employee and underlined that none of these employees signed contracts with the Band Council as their employer. All contracts said that the Band Council was the "Administrator Only".

[110] Katherine Knott acknowledged that even from her point of view it was not clear who the employer was and that the draft contracts could at least be said to be ambiguous. It is worth underlining that there were no contracts for the year 2001-2002. The Department realized in 1997 that there was a problem and that employees perceived the Department as their employer. Katherine Knott tried to do

something about this by trying to enter into education agreements but in the end nothing changed because of the unwillingness on the part of the Department to settle the issue meaningfully.

[111] Bill Montour agreed that it was inconsistent to say that the Band Council was the employer. John Donnelley himself did not do anything when he learned that the Band Council was saying before the CIRB that the Band Council was not the employer. Katherine Knott herself instructed staff from the four groups in question here to report to work during the strike (Exhibit A-51) and the Department, through her, exercised all fundamental elements of the attributes of an employer (Exhibit A-48).

[112] Despite Allan Raslack's claim that he had held the Department as the employer, the pattern was set before Allan Raslack's arrival and continued afterwards: the Department held itself as the employer.

[113] In fact, there was no real debate; people accepted on both sides that the Department was the employer. With devolution of education on the front burner, they all thought that the issue of the identity of the employer would go away. Allan Raslack just kept on signing contracts as the employer.

[114] The party that holds the cards, makes the decisions, is the Department, is the respondent and not the Band Council.

[115] The precipitating event was the oath of allegiance issue. But for this issue, these employees would still be considered employees of the Department. The oath of allegiance to the Crown demanded of First Nations is offensive of the *Charter*.

[116] The Public Service Commission has delegated its exclusive authority to appoint to the departments. In the instant case, therefore, the Department had the ostensible authority and it chose to exercise it by holding itself out as the employer.

[117] Allan Raslack, Keith Angel and Harry Longboat signed not once but consistently as the employer over a period of years. Therefore, they cannot say that there was no legal effect intended by their consistent behaviour. The individuals covered by this application have become employees as defined in the PSSRA; that is, a "person employed in the Public Service".

[118] The task is easier in the present case, in determining the employer, than it was in the *Econosult* (*supra*) case because in the present case the Band Council never suggested that it was the employer has had Econosult Inc. These employees are not without an employer and it has already been decided by the CIRB that the Band Council is not their employer. Therefore, there remains the Department. The Department has held itself out over a decade as being the employer and cannot and should not be allowed to escape its voluntarily assumed obligations.

[119] The following jurisprudence has been referred to: *Pointe-Claire (City) v. Quebec (Labour Court),* [1997] 1 S.C.R. 1015; *Public Service Alliance of Canada v .Treasury Board* (Board files 147-231 and 169-2-447); *Canada (Attorney General) v. Public Service Alliance of Canada* (1989), 97 N.R. 116 (F.C.A.); *Econosult* (*supra*); *Canada (Attorney General) v. Gaboriault*, [1992] 3 F.C. 566 (C.A.); *Canada (Attorney General) v. Marinos* (2000), 254 N.R. 152 (F.C.A.); *Syndicat général du cinéma et de la télévision v. National Film Board* (1992), 141 N.R. 213 (F.C.A.); *Kelso v. The Queen*, [1981] 1 S.C.R. 199; *Public Service Alliance of Canada v. St. Regis Indian Band Council*, [1982] 2 S.C.R. 72; *Gariépy v. Canada* (1998), 228 N.R. 126 (F.C.A.) and *Aetna Casualty Du Canada Cie D'Assurance v. Canada*, [1987] F.C.J. No. 424 (Q.L.) (T.D.).

For the Respondent/Employer

[120] The respondent's argument can be summarized as follows.

[121] The respondent was of the view that the CIRB's investigating officer's report was unreliable because that officer did not interview witnesses from the Department. Secondly, the respondent was of the view that this Board could not use the classical tests to determine who is the employer. The respondent stated that the only way the individuals covered by this application could become Public Service employees was by appointment under the *Public Service Employment Act*. The respondent reviewed the evidence as had the Alliance. None of these individuals can point to a competition or competition number or an appointment document or a letter of offer of employment.

[122] According to counsel, there is a contradiction between wanting to be an employee of the Crown and refusing to take an oath of allegiance to the Crown, and the respondent should have been allowed to pursue the witnesses' reasons in more depth. The respondent asked: "How can these individuals be allies of the Crown and at the same time be public servants who receive pay equity payments as has been

shown?" Clara Powless refused to take the oath of allegiance and something had to be done in order to ensure the continued teaching of native languages. The Department worked co-operatively with the Band Council to that end. The complicated political structure should be considered. The community wanted language teachers; the Department wanted to ensure that it obtained it but at the same time it could not keep the employees because they refused to swear the oath of allegiance. Therefore, something had to be done.

[123] We were told that the Band Council passed a resolution that made these individuals Band Council employees in the summer of 1998. (The resolution remains unproven.)

[124] What was important was to teach the children in their native language. After the unproduced resolution, the Band did not have time to hire; therefore, it left the task to Department officials. Thereof, it could be said that out of necessity the Department was still present in the relationship.

[125] In any case, one should be careful in reaching a conclusion because it is conceivable that if these employees were said to be public servants, their positions might not be maintained because of the ratio teacher/student on which the Department has decided.

[126] Perhaps Katherine Knott should have been more aggressive with Chief Staats in insisting that the Chief and the Band Council sign the contracts with the employees as the employer. But Katherine Knott was worried with the bigger picture; that is, were the children getting a good education? In addition, she was very cautious of the Department's constitutional responsibility toward First Nations and their education. The fact that devolution of education did not take place made her even more mindful of the bigger picture. She could not very well tell Chief Staats: "If you do not sign the contracts as the employer, our relationship will be over."

[127] In the instant case, one should assume that the primary concern of the Band Council is the financial liability; it does not want to be on the hook.

[128] It must not be forgotten that the Department has a constitutional responsibility in this case.

[129] It is possible to have employees that do not have an employer. The *Econosult* case (*supra*) should not be bent to accommodate the unfortunate situation in the present case. The remedy for these employees is to go back to the CIRB (who has already decided that the Six Nations Band Council is not the employer). These individuals cannot be public servants and they could not be appointed because the condition precedent to appointment, the oath of allegiance, was not met by them. The fact that these individuals do not have an employer can be quickly corrected by having the Alliance return to the CIRB and asking the CIRB to consider new evidence. (The respondent did not set out what that new evidence would be.) It is impossible to have a *de facto* public servant, and it is up to Parliament to solve the problem. If a person is not appointed under the *Public Service Employment Act*, everything comes to a shuddering halt even if other criteria are met.

[130] The following cases were pointed out: *Canada (Attorney General) v. Gaboriault* (*supra*), *Canada (Attorney General) v. P.S.A.C.*, [1989] 2 F.C. 633 (C.A.), *Canada (Attorney General) v. Public Service Alliance of Canada* (*supra*) and *Panagopoulos v. Canada*, [1990] F.C.J. No. 234 (Q.L.) (T.D.).

Rebuttal

[131] In reply, the Alliance added the following points. The *Econosult* case can be distinguished and none of the cases that exist on the present issue involve a holding-out by the Department that it is the employer. The Alliance added that it was not saying that a bargaining unit could have public servants and non-public servants. In addition, the Supreme Court of Canada has not had to consider the fact that it is not the Public Service Commission anymore that necessarily appoints public servants. If the Alliance returns before the CIRB, the CIRB will draw the same conclusion and these employees will remain without an employer. The Band Council here has simply been a financial conduit. A negative inference can be drawn from the fact that Keith Angel, who held out the Department as an employer, was not called to testify.

[132] The Board should ask itself the following question: who really has the most control and responsibility for this sad situation? The employees, the Band Council or the Department? This mess is the result of years of inaction by the Department. However you slice it, employees have been horribly treated and this case cries out for a remedy from this Board.

REASONS FOR DECISION

Preliminary Considerations

[133] This case is difficult to resolve and has elicited my sympathy for all parties. They find themselves in a quandary created by their unique situation. The different judgements rendered on the definition of "employee", in particular the *Econosult* decision (*supra*), have not considered, as in the present case, the special relationship that exists between the Department, the First Nations and the native language teachers[1] working on the Six Nations Reserve.

[134] In order to appreciate the parties' situation, I have endeavoured to be sensitive to the context in which these parties interact and the history of this relationship as it emerged from the different testimonies.

[135] My objective is to render a decision that respects the confines of the law and at the same time can be helpful to all parties and that, at the very least, will not relegate their concerns to the *status quo* by concluding that there exists a legal vacuum which, in all likelihood, might only be filled in many years to come.

[136] The "big picture", to use a colloquial English expression, is the education of the children of First Nations. This value is of paramount importance to the survival of First Nations. The transmission of the different languages of First Nations is the basis upon which rests the transmission of First Nations' cultures. Hence, the importance to First Nations of native language teachers cannot be overstated. The environment in which native language teachers operate must be supportive of their mission. I will not list all of the conditions required to achieve this goal. I will limit myself to one of these conditions: the status of native language teachers has to be held in high regard and has to be seen to be held in high regard. One of the ways of demonstrating this is to value the labour of native language teachers. The value accorded to their labour is directly reflected in their terms and conditions of employment.

[137] Unclear and insecure terms and conditions of employment flowing from muddled labour relations and a confused legal context only serve to devalue their work and to jeopardize the harmonious teaching of native languages. In the end, who risk

[1] Native language teachers include, for purposes of these reasons, the classroom assistants, education assistants, tutor escorts and administrative assistants.

being the biggest losers? In my view, it is the First Nations' children. For their own self-esteem, they need to learn that their own native language is important and they need to perceive that their native language teachers are held in high regard and are happy with their conditions of employment.

[138] Having heard and observed the respondent's and the Alliance's witnesses, I believe that the individuals on both sides want to do what is best to foster an environment conducive to the preservation of First Nations' cultures through the teaching of First Nations' languages. They differ as to the means and the power they hold to achieve their common goal. They share a common desire to sort out their labour relations, but they are uncertain as to the manner in which this can be achieved.

[139] The Department has been operating under the assumption that the *Econosult* decision (*supra*), as well as the refusal by some native language teachers to take the oath of allegiance to the Crown, are inescapable impediments preventing native language teachers from being considered "employees" as defined in the PSSRA.

[140] I believe that the Department as an institution is just as eager as the individuals involved to regularize the status of native language teachers (I will have more to say on this later), but that it feels prevented from so doing by the legal assumption under which it has conducted its business.

[141] Despite the best intentions of all of the actors involved in the present situation, the labour relations and the terms and conditions of employment of native language teachers remain uncertain and will remain uncertain until the legal Gordian knot is cut.

[142] The particular circumstances of this case involve a tripartite relationship: the employees, the Department and the Six Nations Band Council. All three parties participate directly (the Department and the employees) or indirectly (the Six Nations Band Council) in the provision of education to children on the Six Nations Reserve.

[143] Neither the Department nor the Six Nations Band Council wants to be the employer of these employees. Both deny being their employer. The Six Nations Band Council issues pay cheques; the Department hires the employees, supervises them, evaluates them, controls their working conditions, disciplines them and the Department's representatives tell them that the Department is their employer. Yet, the respondent denies that it is their employer.

[144] There are three federal labour boards (the Canada Industrial Relations Board, the Public Service Staff Relations Board and the Canadian Artists and Professional Producers Relations Tribunal). The CIRB and this Board (PSSRB) have both been asked to consider this matter.

[145] The CIRB has already decided that the Six Nations Band Council is not the employer. Now, the respondent claims before this Board that it is not the employer either. Do the employees fall between the legislative cracks? Are they employees without an employer?

[146] The CIRB has decided that the Six Nations Band Council is right and that the Six Nations Band Council is not their employer. It has stopped short of making a pronouncement on whether the Department is the employer. That jurisdiction lies with this Board. Without usurping the CIRB's jurisdiction, which in any case it has already exercised, I simply want to state that the evidence placed before me has confirmed in my mind the decision rendered by the CIRB that the Six Nations Band Council is not the employer. The evidence points overwhelmingly to the Department as being the employer. The only function of an employer which the Department does not effectively exercise is the issuance and remittance of the pay cheques, which is the Six Nations Band Council's responsibility. But even in this instance, it is the Department which controls the money supporting the pay cheques, the salaries and the amount of money which is deposited in the Six Nations Band Council's bank account. It is important to recall that the reason the Six Nations Band Council was given this limited task of handing over the employees their pay cheques is, as was admitted by counsel for the respondent and the respondent's witnesses, as a "device" which, it was believed, would allow keeping the employees on strength and paying them, despite the fact that some of them had refused to take the oath of allegiance to the Crown which, according to the *Public Service Employment Act*, must be sworn and which, according to the respondent, if not sworn, prevents the employees from being appointed under the *Public Service Employment Act*.

[147] Since the Department did not and could not relinquish its responsibility in matters of First Nations' education, and since it needed <u>those</u> employees (Cayuga and Mohawk languages teachers are presumably relatively rare) in order to fulfil this responsibility, it entered into contracts with the Six Nations Band Council, which clearly stated that the Six Nations Band Council was the "<u>Administrator Only</u>" and

under which the Six Nations Band Council agreed, for a 10-percent fee, to be the administrator and to issue the pay cheques. In my view, the words "Administrator Only" are clear; they are set out at the beginning of the agreements and characterize the Six Nations Band Council's intended role, which by necessary implication excludes that of employer and even more so when all surrounding circumstances are considered.

The Respondent is the Factual Employer

[148] Leaving the legal question aside for a moment, there is no doubt that the respondent is in fact the employer of the native language teachers (as well as their colleagues which hold the positions enumerated at the beginning of this decision).

[149] The federal government has constitutional responsibilities and the respondent acknowledges them. The Department is legally responsible for providing education on the reserve. The Department acknowledges it. The Department has hired English language teachers and native language teachers. Their students are the same, i.e. First Nations' children. With minor differences, both groups of teachers are employees involved in the same employment relationship with the Department.

[150] Just as with English language teachers, the Department hires native language teachers, supervises their work, appraises their performance, disciplines them when necessary, sets their rates of pay and leave entitlements and, when appropriate, terminates their employment.

[151] The fact that the Band Council has accepted to hand over their pay cheques to native language teachers and that First Nations Home and School Committee representatives are consulted at certain stages of the relationship between native language teachers and the Department (for instance, hiring), does not alter the fact that it is the Department which exercises all of the functions and attributes of an employer.

[152] The Department assumes its legal responsibilities in matters of education and of native language teaching and there is no doubt that the Department has not relinquished its control either over education or over native language teachers.

[153] Furthermore, not only have departmental representatives informed native language teachers, both orally and in writing, that it is the Department which is their employer, but also the Department has made its intentions very clear that it did not intend the Band Council to be the employer. It did so by drafting native language teachers' contracts, which set out in bold letters that the Six Nations Band Council is the "ADMINISRATOR ONLY of the salaries and benefits of the native language teachers" and that the teachers are "under the jurisdiction and supervision of the Program Services Manager or his Designate", both of whom represent the Department.

[154] The contract wording chosen by the Department corroborates the witnesses' testimony that they were consistently told that the Department was their employer. Furthermore, the fact that Allan Raslack himself, the Department's Program Services Manager, (as well as Keith Angel, Assistant Program Services Manager) signed several contracts as the representative of the employer also corroborates the witnesses' testimony. Despite the regrets expressed by Allan Raslack during his testimony for having signed the contracts as a representative of the employer, I have concluded from the various testimonies that he did so with the knowledge of his superiors and in keeping with the existing practice as well as the shared understanding amongst the Department's managers that the Department was the employer.

[155] Further corroborative indicia of the Department's intent to be the employer and to be perceived as the employer can be gleaned, for instance, from the letter (Exhibit A-16) addressed to Joy Johnson by Allan Raslack in which the latter informs Joy Johnson that "as federal employees, a number of processes are available to you…" and in which Allan Raslack refers her to her union representative. In short, both the facts and the expressed intent of the Department establish that the Department is the employer.

[156] The present situation is different from the situation considered in the *Econosult* case (*supra*). In the *Econosult* case, the department (Solicitor General) had decided to privatize its educational programs. No such decision has been made in the instant case. The Department retains the responsibility and the control of the education program.

[157] In the *Econosult* case, the department entered into a contract with a first company, Seradep Inc., and then a second company, Econosult Inc., for the supply of teachers. In the instant case, no such contract has been entered into, there is no

private company in the picture and it is the Department that supplies the teachers by hiring them.

[158] In the *Econosult* case (*supra*), the supervisors of the teachers were employed by the company. In the instant case, the supervisors of the teachers are employed by the Department.

[159] In the *Econosult* case, the contracts contained a clause stating expressly that the teachers were not hired as employees of the Crown. In the instant case, there is no similar stipulation either in the Memorandum of Understanding under which the Band Council agrees, for a fee of 10 percent, to remit employees their pay cheques, nor in the individual employment contracts signed with the employees. In addition, there is a clear stipulation that the Band Council is the "**Administrator Only**". In addition, the Department has signed regularly, if not always, individual contracts as the employer. (For example, Exhibits A-7, A-8, A-9, A-19, A-20 and others enumerated in the body of this decision.)

[160] In the *Econosult* case, the department did not represent itself as the employer. In the instant case, the Department repeatedly, orally and in writing, represented itself as the employer.

[161] In the *Econosult* case, there was no evidence of a "device" having been used to retain the same employees and to circumvent the presumed consequences of their refusal to take the oath of allegiance.

[162] In the *Econosult* case, the department involved did not have the constitutional and legal obligations which the Department has in this case

[163] In short, in the *Econosult* case, both the Federal Court and the Supreme Court of Canada had to consider a different set of facts than those which are before me and, in a nutshell, it is clear that in the present case, the intent was and is to retain the individuals covered by this application as employees and that the respondent be their employer.

Are the Individuals Covered by this Application "Employees" as Defined by the PSSRA?

[164] I believe the individuals covered by this application are employees for the purpose of the PSSRA for the reasons that follow.

[165] First, an "employee" means "a person employed in the Public Service" (subsection 2(1) of the PSSRA). These teachers are "persons employed in the Public Service". Even counsel for the respondent did not dispute the fact that they were employees, the main thrust of his argument being that the respondent was not their employer and could not be because their refusal to take the oath of allegiance precluded their appointment under the *Public Service Employment Act*.

[166] For my part, I am of the view that they hold positions in the Department and that they work in the "Public Service" as it is defined at subsection 2(1) of the PSSRA. They hold their positions as a result of the Department's expressed intent to employ them as native language teachers (and assistants and escorts). The formalities of their appointment to these positions are somewhat irregular but these technical irregularities are not fatal.

[167] No, they cannot produce formal letters of appointment nor give out the number of their position. However, their appointment to their position is real and confirmed by the fact that the Department has hired them to hold that position and has remunerated them and continues to do so. The managers from the Department to whom the power to appoint has been delegated, and more particularly Katherine Knott and her predecessors, were fully aware that these persons were being hired to their position year after year. Their hiring and appointment was done with the knowledge and consent of both Allan Raslack, Keith Angel and Katherine Knott, who, according to her testimony, has the authority to appoint.

[168] I should add that the individuals covered by this application are and were hired and continue to be hired with the knowledge and approval of Katherine Knott (and her predecessors), who has the delegated authority to appoint and that, having heard her testimony, I am confident that she endeavoured to respect if not the letter at least the spirit of the *Public Service Employment Act* and that she paid "particular attention to the values and principles underlying selection according to merit…with emphasis on Aboriginal representation" as she was reminded in the letter confirming her sub-delegated staffing authority (Exhibit A-52). In the absence of evidence to the contrary, I understand that the hiring of these persons involved in the transmission of Mohawk and Cayuga languages was done within the confines of section 10 of the *Public Service Employment Act*, which leaves the door open to appointments by more than one

process of personnel selection. Indeed, subsections 10(1) and (2) of the *Public Service Employment Act* read as follows:

> *Appointments*
>
> ***10.*** *(1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the* [Public Service] *Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.*
>
> *(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the* [Public Service] *Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.*
>
> [Emphasis added]

[169] Katherine Knott's description of the processes followed to hire English language teachers and native language teachers revealed that, in the end, there are few differences between the processes, save and except that the native language teachers' positions are not given numbers nor are there necessarily letters of offer sent out.

[170] What should I conclude from the fact that the employees cannot point to position numbers and formal letters of appointment following the usual competitions held to fill positions within the Public Service? I conclude that the present situation is exceptional. It was not necessarily contemplated at the time of the drafting of the PSSRA and the *Public Service Employment Act* nor were its circumstances considered by the Supreme Court in the *Econosult* decision (*supra*).

[171] I conclude that the Department and not the Six Nations Band Council has hired these employees through representatives purporting to act under the authority of the *Public Service Employment Act*, that rightly or wrongly the Department has consistently held out to the employees that they were its employees, that it was their employer and that this constant representation cannot be without effect. I agree with the Alliance that the single overriding consideration in this case is that through the years the

Department has consistently held itself out to be the employer and has acted accordingly by exercising all manners of control typical of any employer (i.e. hiring, supervision, appraisals, termination). Therefore, through its own conduct, it has been the employer and continues to be the employer. If, as a result of an erroneous interpretation of a provision of the *Public Service Employment Act,* the Department has contravened the *Public Service Employment Act*, and I have not been given evidence that it did, the employees that it has hired should not have to suffer for it. After all, the setting up of competitions and the issuance of letters of appointment is not within the employees' control but within their employer's control. It is their employer which has decided the manner in which it wanted to exercise its discretion to appoint and to resort to a "device" to keep them employed. The employees should not be deprived of their status of "employee" and their rights under the PSSRA and which flow from their having the respondent as their employer for the sole reason that the Department did not give numbers to their positions as a result of its opinion that they could not be employed under the *Public Service Employment Act* because some of them refused to take the oath of allegiance.

[172] After having employed these employees through the years, the Department became aware that some of them were refusing to take the oath of allegiance. The matter of the oath should have been addressed when they were first employed. In addition, I believe that the fact that these employees were kept on strength is indicative of the employer's own belief that the absence of this oath of allegiance was a technicality which did not prevent them from rendering loyal services to their employer.

[173] Inasmuch as the refusal to take this oath of allegiance is related to their identity and beliefs as First Nations, it seems likely that the insistence on the oath of allegiance to the Crown as a condition of employment in the Public Service for First Nations offends their right to freedom of thought, belief, opinion and expression set out in the *Charter*, as well as their "rights of aboriginal peoples" under section 35 of the *Constitution Act, 1982*. (It is worth noting that the oath of office commits them to their employer and ensures their loyalty without encroaching on their beliefs as First Nations.)

[174] It could also be argued that sections 7 to 10 of the *Canadian Human Rights Act* may as well be contravened by insisting on the oath of allegiance by First Nations individuals as a condition of their employment in the Public Service.

[175] A closer reading of the *Public Service Employment Act* reveals that the oath of allegiance is a formality "on appointment" (section 23). It does not precede an appointment and therefore an argument can be made that a person is already appointed, and therefore an employee, at the time when the oath of allegiance is taken. In addition, that Act is silent on the failure to take the oath of allegiance. Both of these observations suggest that the absence of the oath of allegiance is not fatal to an appointment. The exact wording of the oath of allegiance is set out at section 2 of the *Oaths of Allegiance Act*. Subsection 2(1) reads as follows:

OATH OF ALLEGIANCE

> ***2.*** *(1) Every person who, either of his own accord or in compliance with any lawful requirement made of the person, or in obedience to the directions of any Act or law in force in Canada, except the* Constitution Act, 1867 *and the* Citizenship Act, *desires to take an oath of allegiance shall have administered and take the oath in the following form, and no other:*
>
> *I,…….., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors. So help me God.*

[176] It is interesting to note that the sanction for not taking the oath of allegiance is left to the wording of the particular Act requiring the oath. Section 6 of the *Oaths of Allegiance Act* reads as follows:

> ***6.*** *The oath of allegiance set out in section 2, together with the oath of office or oath for the due exercise of any profession or calling, shall be taken within the period and in the manner, and subject to the disabilities and penalties for the omission thereof, provided by law with respect to such oaths.*

[177] It is worth noting that section 23 of the *Public Service Employment Act* neither provides for the period and manner in which the oath of allegiance must be taken nor any disabilities or penalties for the omission. Therefore, one could reasonably argue that in the absence of clear language in the *Public Service Employment Act* stating that

a person cannot be appointed unless that person takes the oath of allegiance, that person retains his or her appointment.

[178] Put otherwise, in view of the silence of the *Public Service Employment Act*, and the particular constitutional relationship of First Nations, I see no inescapable argument compelling me to resolve the silence of that Act to the detriment of First Nations and their exclusion from the Public Service for the only reason that some of them do not want to take this particular oath.

[179] Although the following comment on my part is not part of my reasons, I feel compelled to remark that there is an anomaly in the fact that Mr. Vincent (see appendix) was allowed to remain on strength and keep his status as an "employee of the Public Service" despite his refusal to take the oath of allegiance to the Crown and the fact that there is now an attempt to negate the First Nations members their status of employees of the Public Service because some of them did exactly as Mr. Vincent did and refused to take the oath of allegiance to the Crown.

[180] In any case, in the present special circumstances, and for the reasons I have just set out, I do not believe that it is a factor that deprives them of their status of employees of the Public Service. Although the Department has camouflaged their appointment by resorting to a "device", as the term was used by counsel for the respondent, (i.e. the "Administrator Only" contracts) and by withholding to give numbers to their positions and sending them formal letters of appointment, their appointment is authentic and the respondent remains their employer.

[181] The result of the Department's decision to pretend that these persons are not employees is to effectively (if not intentionally) discriminate against them. English language teachers receive the rights and benefits that flow from the PSSRA and the *Public Service Employment Act* but native language teachers are denied those same rights. Indeed, by depriving native language teachers of the same labour relations status as their English language counterparts, they are given a second class status.

[182] I find it particularly offensive that, on the one hand, these persons are not deemed worthy of being considered employees of the Public Service but on the other hand, they are kept employed through a "device" and the Department continues, thanks to their services, to fulfil its legal obligations in matters of education. The existing state of affairs devalues their status and their contribution and can only cease

by acknowledging that, in this case, there is no legal consequence for not taking the oath of allegiance to the Crown.

[183] In conclusion, and for all of these reasons, this application is granted and I hereby determine that the individuals it covers are "employees" as defined in section 2 of the PSSRA and that those performing duties as native language teachers, classroom assistants, education assistants and tutor escorts are included in the EB bargaining unit and that the administrative assistants are employees included in the PA bargaining unit.

Marguerite-Marie Galipeau,
Deputy Chairperson

OTTAWA, March 18, 2002.