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Citation: 2009 PSLRB 176

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

MARK ANTHONY HUBLEY, ANTHONY KILEY AND KANDRA SURETTE-AUCOIN

Grievors

and

PARKS CANADA AGENCY

Respondent and Employer

and

HALIFAX CITADEL REGIMENTAL ASSOCIATION

Intervenor

Indexed as
Public Service Alliance of Canada v. Parks Canada Agency

In the matter of an application, under section 58 of the *Public Service Labour Relations Act*, for a determination of membership of an employee or a class of employees in a bargaining unit and in the matter of grievances referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson and adjudicator

For the Applicant and Grievors: Andrew Raven, counsel

For the Respondent/Employer: Caroline Engmann, counsel

For the Intervenor: Noella Martin, counsel

Decided on the basis of written submissions
filed December 19, 2008, and January 14 and 29,
February 6 and 20, March 31, April 30, and May 7, 2009.

I. Application before the Board

[1] The Public Service Alliance of Canada (PSAC or "the applicant"), as the bargaining agent for employees at the Parks Canada Agency (PCA or "the respondent"), filed an application under section 58 of the *Public Service Labour Relations Act, S.C. 2003, c.22* (*PSLRA*). Section 58 states that, on application, the Public Service Labour Relations Board (PSLRB) must determine whether any ". . . employee or class of employees . . ." is included in a bargaining unit. The applicant is seeking the inclusion of the following class of employees in the bargaining unit: "[a]ll full-time and seasonal employees working at the Halifax Citadel National Historic Site that are paid through the Halifax Citadel Regimental Association (HCRA)." The applicant estimated that 10 employees were included in the class.

[2] The applicant also alleges the following:

. . .

> *(d) While the employees now performing this work are nominally paid by the HCRA, fundamental control over their employment remains with Parks. There is no significant separation between the operation of the HCRA and Parks Canada Agency. Both entities are fully integrated and share the same location, uniforms and equipment. . . .*

. . .

[3] The PCA objected to the jurisdiction of the PSLRB to hear this application on the basis that the individuals in question were not employed in the public service. The PCA's position is that the HCRA is the employer. The HCRA is an intervenor to the application and has objected to the jurisdiction of the PSLRB on the same basis as the PCA.

[4] The Chairperson of the PSLRB determined that the issue of jurisdiction would be addressed through written submissions of the parties. Those written submissions are on file with the PSLRB and are summarized later in this decision. Before making their submissions, the parties provided letters to the PSLRB summarizing their positions, and those letters have also been considered.

II. Grievances before an adjudicator

[5] In addition, the PSAC referred five grievances to adjudication from three individuals who allege that they are or were employees of the PCA. The PCA and the

HCRA objected to those references to adjudication on the basis that the individuals were not employees within the meaning of the *PSLRA*. In the alternative, the HRCA objected to the grievances on the basis that the individuals were no longer employed at the time the grievances were filed and on the basis of timeliness. They also argued the absence of common employer legislation and the failure to meet the common law test.

A. Background

[6] The Halifax Citadel is a national historic site in downtown Halifax.

[7] The Tax Court of Canada issued a consent judgment on September 12, 2008 (Docket No. 2007-1505(EI)) that found that three HCRA employees were employed in insurable employment by the PCA from January 1 to October 26, 2005. The respondent in that case was the Minister of National Revenue.

[8] The PCA is a separate employer created by the *Parks Canada Agency Act*, S.C. 1998, c.31 (*PCAA*). It is listed as a separate employer under Schedule V of the *Financial Administration Act*, R.S.C. 1985, c.F-11 (*FAA*). The PSAC was certified as the bargaining agent for a single bargaining unit composed of all PCA employees in May 2001 (see *Parks Canada Agency v. Professional Institute of the Public Service of Canada and Public Service Alliance of Canada,* 2001 PSSRB 39).

[9] The HCRA is a society registered with the Nova Scotia Registry of Joint Stock Companies. The HCRA was established in 1993. It has had a number of contracts with the PCA since that time to provide some services at the Citadel. The HCRA also provides services elsewhere in Nova Scotia. According to the HCRA, the number of its employees working at the Citadel varies throughout the year, including more than 100 during the peak season. On December 2, 2008, the HCRA reported that it had 30 employees on staff. The PSAC's application estimates that there are 10 alleged employees. The individuals who are the subjects of this application receive their pay from the HCRA.

[10] Mark Anthony Hubley, Kandra Surette-Aucoin and Anthony Kiley filed grievances with the PCA on October 31, 2008. Those five grievances were referred to adjudication on January 9, 2009. The three individuals grieved that they had not been paid in accordance with the pay administration article of the collective agreement between the PCA and the PSAC. In the grievances, the individuals all stated the following: "While I was paid through a third party, I was always a Parks Canada employee." Mr. Hubley

stated in his grievance that he was employed from April 1992 until December 2006. Mr. Kiley stated in his grievance that he was employed between 1997 and May 29, 2006. Ms. Surette-Aucoin stated in her grievance that she was employed between 1997 and September 2007. Both Ms. Surette-Aucoin and Mr. Kiley filed grievances alleging disciplinary terminations. Mr. Kiley stated that he was terminated on May 29, 2006, and Ms. Surette-Aucoin stated that she was terminated in September 2007. They both allege that they were terminated for engaging in bargaining agent activities.

B. Jurisdictional issues to be determined

[11] Does the PSLRB have the jurisdiction to determine whether a person not appointed by the PCA is an employee? In other words, does the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 (commonly referred to as *Econosult*), apply to the PCA as a separate employer?

[12] Are the grievors "employees" within the meaning of the *PSLRA*?

C. Applicable legislative provisions

[13] The *PCAA* sets out the authority of the PCA over appointments and human resources. The *PCAA* defines an employee as ". . . an employee appointed under subsection 13(1)." Section 13 reads as follows:

> ***13.*** *(1) The Chief Executive Officer has exclusive authority to*
>
> *(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).*
>
> *(3) . . . the Chief Executive Officer may*
>
> *(*a*) determine the organization of and classify the positions in the Agency;*

> *(*b*) set the terms and conditions of employment, including termination of employment for cause, for employees and assign duties to them; and*
>
> *(*c*) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management in the Agency.*

[14] "Employee," "employee organization" and "employer" are defined in subsection 2(1) of the *PSLRA* as follows:

> *"employee" . . . means a person employed in the public service . . . .*
>
> *. . .*
>
> *"employee organization" means an organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2, and includes, unless the context otherwise requires, a council of employee organizations.*
>
> *"employer" means Her Majesty in right of Canada as represented by*
>
> > *(*a*) the Treasury Board, in the case of a department named in Schedule I to the* Financial Administration Act *or another portion of the federal public administration named in Schedule IV to that Act; and*
> >
> > *(*b*) the separate agency, in the case of a portion of the federal public administration named in Schedule V to the* Financial Administration Act.

III. Summary of the arguments

A. Submissions of the PCA

[15] The PSLRB has no jurisdiction over this application and these grievances because they refer to individuals who are not "employees" within the meaning of the *PSLRA*. The Supreme Court established in *Econosult* that one cannot become an employee of the federal public service without a position being created and without an appointment. Every appointment to the public service must be made pursuant to a delegated staffing authority — appointments cannot occur by inference or by mistake. The persons in respect of whom this application was made were not appointed under any relevant statutory regime. Therefore, they are not "employees" within the meaning of the *PSLRA*, and the PSLRB is without jurisdiction to hear the application and grievances.

[16] The employees of the HCRA who are the subjects of the application and grievances were not appointed to the PCA in accordance with subsection 13(1) of the *PCAA*, and therefore, are not "employees" within the meaning of subsection 2(1) and section 58 of the *PSLRA*.

[17] The PSAC is in essence seeking a "common employer designation," which is not available under the *PSLRA* and is not within the scope of its section 58. In addition, the PSAC has not met the following necessary precondition for the PSLRB to consider the application or the grievances: the application and grievances were not made and filed for an "employee" or a "class of employees" within the meaning of the *PSLRA*.

[18] The PSLRB is a statutory tribunal, and its jurisdiction must be found in statute. The PSLRB has jurisdiction only if an application is made in respect of an employee or a class of employees as those terms are defined in the *PSLRA*. Similarly, an adjudicator's jurisdiction over grievances filed under the *PSLRA* is engaged only if the references to adjudication are made by an employee as defined in the *PSLRA*.

[19] In this case, the application was made for individuals who are employed by the HCRA. The HCRA is not an employer within the meaning of the *PSLRA,* and therefore, its employees are outside the *PSLRA* labour relations regime and are not "employees" within the meaning of its subsection 2(1). Accordingly, neither the PSLRB nor an adjudicator have jurisdiction over the application and the references to adjudication.

[20] In addition, the *PCAA* specifically and exclusively provides for staffing by the PCA. There is no authority in or under any other Act of Parliament for appointing individuals to the PCA, except as provided for in subsection 13(1) of the *PCAA*. The exclusive authority for appointments rests with the Chief Executive Officer (CEO) of the PCA. In conferring exclusive appointing authority on the CEO of the PCA, Parliament sought to avoid the creation of an employer-employee relationship without the exercise of valid authority under the *PCAA*.

[21] The PSLRB should also consider the situation as it existed before April 1, 1999 (before the coming into force of the *PCAA*), particularly with respect to the grievances. Under that regime, a person had to have been appointed by the Public Service Commission (PSC) under the predecessor of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12 and 13 (*PSEA)*. None of the individuals who are grieving was appointed by the PSC.

[22] For the period after April 1, 1999, an "employee" means a person appointed by the CEO pursuant to subsection 13(1) of the *PCAA*. Before April 1, 1999, one must have been appointed by the PSC under the predecessor of the *PSEA*. The employees of the HCRA were appointed neither by the PSC (before April 1, 1999) nor by the CEO of the PCA (after April 1, 1999), and therefore, are not employees within the meaning of the *PSLRA*.

[23] The proper interpretative approach is the following as set out by the Supreme Court in *Rizzo and Rizzo Shoes,* [1998], 1 S.C.R. 27: "The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. . . ." The important role that context plays when interpreting statutory language has also been emphasized by the Supreme Court in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42.

[24] The word "employee" in section 58 of the *PSLRA* must be given a meaning that is consistent with the definition of employee contained in that *Act*, namely, ". . . a person employed in the public service . . . ." Similarly, the word "employee" in sections 208 and 209 must be given a meaning that is consistent with the definition in section 206(1) and, in turn, in subsection 2(1).

[25] The decision of the Supreme Court in *Econosult* clearly applies to this application. The principles established in *Econosult* apply as well to the *PCAA*. The relevant provisions of the *PSEA* and the *PCAA* must be interpreted *in pari materia*. This principle of statutory interpretation states that statutes that relate to the same subject matter are to be read, construed and applied in a similar fashion. The legislative scheme of the *PCAA* deals with the same subject matter as the *PSEA* and, to this extent must be considered in the same light. Ruth Sullivan expressed that principle in *Sullivan and Driedger on the Construction of Statutes*, 4th edition, at page 324, as follows:

. . .

> *. . . statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. . . .*

. . .

[26] The jurisprudence is clear that, in the context of the federal public service, a person can be an "employee" for one purpose but not for another. With the complex legislative scheme that governs employment in the federal public service, "employee" is a defined term. It is that defined term that must be interpreted and applied in its proper statutory context in accordance with the principles of statutory interpretation discussed earlier in this decision.

[27] The term "employee" is unambiguously defined by both the *PSLRA* and the *PCAA*. Therefore there is no need to engage in a common law analysis.

[28] The Supreme Court has concluded that Parliament did not confer jurisdiction (see *Econosult*) on the Public Service Staff Relations Board (PSSRB) over the labour relations of employees who are not members of the public service. The law is now well settled that an individual cannot be an employee in the public service without first having been "appointed" to a position in accordance with the relevant legislation. That principle applies in this case, because the PCA's constituting statute clearly specified the "appointment" requirement. In addition, the Supreme Court has clearly indicated that the common-law test is not relevant to the determination of employment status when an express statutory definition of the term "employee" exists. In this case, both the *PCAA* and the *PSLRA* contain express statutory definitions of the term "employee."

[29] In *Public Service Alliance of Canada v. Canada (Attorney General)*, 2009 FCA 6, the Federal Court of Appeal confirmed that an appointment is a statutory prerequisite that cannot be dispensed with or replaced by a ruling of a tribunal. I was also referred to *Syndicat général du cinema et de la télévision v. Canada (National Film Board-NFB),* [1992] F.C.J. No. 125 (QL) (*SGCT No. 2"*).

[30] In its earlier submissions, the PSAC relied on the Federal Court decision in *Syndicat général du cinema et de la television (SGCT) v. Canada (National Film Board)* [1978], 1 F.C. 346 (C.A.) ("*SGCT No. 1*"), to support its argument that a common-law test applies. In *Econosult,* that approach was clearly rejected. It was also rejected by the Federal Court of Appeal in *SGCT No. 2*.

[31] I was also referred to *Farrell v. Canada*, 2002 FCT 1271; *Panagopoulos v. Canada,* [1990] F.C.J. No. 234 (QL); *Gariépy v. Canada* [1996] F.C.J. No. 191 (QL), (upheld in [1998] F.C.J. No. 698 (QL)); *Professional Association of Foreign Service Officers v. Treasury Board (Department of Foreign Affairs and International Trade),* 2001 PSSRB

132 (upheld in 2003 FCA 162) (*PAFSO*); and *Rostrust Investments Inc. v. Canadian Union of Public Employees, Local 4266-05, Public Service Alliance of Canada and Treasury Board (Public Works and Government Services Canada),* 2005 PSSRB 1.

[32] In the review of *Estwick and Quintilio v. Treasury Board (Correctional Service of Canada)* 2006 PSLRB 14 (upheld in 2007 FC 894), the Federal Court found that a ruling of the Canada Revenue Agency (CRA) that the applicants were employees under the *PSEA* was not determinative of their employment status under that legislation and did not replace the requirement for a formal appointment. In *Public Service Alliance of Canada v. Canada (Attorney General),* the Federal Court of Appeal affirmed that the term "employee" can have different meanings for different purposes in the context of employment in the federal pubic service. The requirement for an appointment under subsection 13(1) of the *PCAA* to become an employee cannot be dispensed with nor can it be replaced by a common-law analysis.

[33] The consent judgment of the Tax Court is neither relevant nor probative in this case. Persons deemed to be employees for purposes of the Canada Pension Plan and Employment Insurance (EI) do not thus become employees for all purposes. The PCA and the HCRA were not parties to the proceeding before the Tax Court, nor were they parties to the consent judgement. The consent judgement relates to a specific period of time (10 months in 2005) whereas this application relates to the present and to the future. In addition, this consent judgment was limited to three individuals, whereas the application applies to all individuals employed by the HCRA.

[34] In conclusion, the PCA submits that the PSLRB should decline to take jurisdiction over the application and the references to adjudication.

B. <u>Submissions of the HCRA</u>

[35] The PSLRB does not have jurisdiction to hear and determine the application because of the following:

- The individuals are not employees, and the HCRA is not an employer as defined in the *PSLRA.*
- The Supreme Court decision in *Econosult* clarifies how the definition of "employee" in the *PSLRA* is to be interpreted, and that definition is not met in this case.

- Parliament affirmed the definitions of "employee" and "employer" in the 2005 amendments to the public service labour legislation.

[36] The *PSLRA* in section 2 defines "employer" as ". . . Her Majesty in right of Canada . . ." as represented by either the Treasury Board or a separate agency named in Schedule V to the *FAA*. Therefore, the HCRA is not an employer under the *PSLRA*.

[37] The employees of the HCRA do not meet the definition of "employee" in the *PSLRA*, which is defined as a ". . . person employed in the public service . . . ." Since the HCRA is not part of the public service, its employees are not "employed in the public service." Furthermore, as stated in the submissions of the PCA, none of the employees has been appointed to the public service.

[38] Nor could the employees of the HCRA be considered employees of the PCA through a common-law test. The PSLRB is governed by a plain reading of the definitions in the *PSLRA*, not by common-law principles.

[39] The *Econosult* decision held that an individual had to be appointed to the public service in order to fit the definition of "employee" set out in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 *(PSSRA)*. The decision also reinforces the point that the PSLRB must apply the definition of "employee" set out in the legislation and that it cannot apply a common-law analysis of "employee" or "employer."

[40] The *Public Service Modernization Act*, S.C. 2003, c. 22, brought about many changes to the federal labour relations regime. However, it is still the case that an individual must be appointed to a position with Her Majesty to be considered an employee. The new legislation did not alter the analysis in *Econosult*. Parliament maintained the definitions of "employee" and "employer," which demonstrate its clear intention that an "employee" is appointed to the public service.

C. <u>Submissions of the PSAC</u>

[41] The PSAC is not seeking a common employer designation, as alleged by the PCA. It is the PSAC's position that all the employees in question are solely employees of the PCA.

[42] The PCA relied on jurisprudence, which is dependent on a statutory regime in which the *PSEA* vests a third-party agency, the PSC, with the exclusive power of

appointment (hiring) to positions in the public service. This regime applies only to employees and employers as defined in the *PSEA,* that is, the Treasury Board and separate agencies over which the PSC is granted the exclusive authority to make appointments. The PCA falls outside that statutory regime. Under the *PCAA,* hiring authority falls under the administrative authority of PCA management where the power is given to the CEO. No specific staffing process is set out under the *PCAA*, and there is no third-party staffing agency and no specified steps, formalities or prerequisites of appointment. Accordingly, individuals who have not undergone a particular hiring process or who do not possess a specific instrument of appointment may nonetheless be employees of the PCA under the *PCAA*.

[43] In these circumstances, the employee status of the grievors and the PSLRB's jurisdiction to deal with these proceedings is not dependent on formal certificates of appointment duly executed under the signature of the PCA's CEO. Indeed, the PCA's hiring practices are inconsistent with that requirement. Accordingly, the PSLRB must apply the governing legal principles on employee status and examine relevant factual evidence, which has always been the PSLRB's practice in similar circumstances. Its jurisdiction to do so has been affirmed by the Federal Court of Appeal and the Supreme Court.

[44] In virtually all the cases relied on by the PCA, evidence was tendered before the decision maker to establish necessary "jurisdictional facts." As the issues before the PSLRB in these cases are to be addressed via written submissions, the facts asserted by the applicant must be taken as established.

[45] This application concerns certain employees who are retained to work for the PCA at the Halifax Citadel National Historic Site but who are paid through the HCRA. The three individuals whose grievances were referred to adjudication were employed in that way. The grievors maintain that they were terminated for asserting their rights under the collective agreement as PCA employees. While they were each paid through the HCRA, the funds that were provided to support their wages were provided by the PCA. There is no dispute that the grievors were retained to provide their duties for the PCA's benefit through an agreement between the PCA and the HCRA. Moreover, every element of their employment was directly controlled by the PCA as follows: they were supervised by a PCA manager, they used PCA equipment and they were required to wear PCA uniforms. The employees worked in Visitor Services, a portion of the

administration of a national historic site that is commonly staffed by other PCA employees. In 2005, the grievors requested a ruling from the CRA in order to legally identify their actual employer, which ultimately led to a judgment from the Tax Court confirming that each grievor was an employee of the PCA.

[46] While some restructuring may have occurred at the Halifax Citadel National Historic Site since the grievors were terminated, the PSAC maintains that all persons currently paid through the HCRA are likewise employees of the PCA and that, accordingly, they are properly members of the bargaining unit certified by the PSLRB.

[47] The essential factual issues in this matter must be proven in the normal course by way of evidence tendered to the PSLRB at a hearing. However, for purposes of this jurisdictional objection, and given that this matter will be disposed of by way of written submissions, the facts asserted herein must be presumed to be true; see *Addison & Leyen Ltd. v. Canada,* 2006 FCA 107, at para 6, and reviewed on other grounds, *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33.

[48] The PCA asserts that, as an undisputed "material fact," the employees in question were not appointed pursuant to section 13 of the *PCAA*. The respondent and the intervener assert that the individuals are, or were, employees of the HCRA. As noted earlier in this decision, that assertion is wholly disputed. In fact and in law, the employees in question were appointed pursuant to the broad authority of section 13 of the *PCAA*. Insofar as the respondent asserts a factual basis to the contrary, it must be supported by evidence at a hearing. Moreover, these issues are not questions of fact but mixed questions of fact and law. Before the existence of an "appointment" can be established, the PSLRB must determine the legal parameters of an appointment under section 13 of the *PCAA*. It must make findings of fact as to how the employees in question were engaged and apply those factual circumstances to the legal requirements of an "appointment" pursuant to section 13.

[49] The result of that analysis will reveal no formal instrument or consistent process of appointment from which the employees have been excluded. In any event, it is clear from the relevant statutory framework and judicial interpretations that, for such an instrument or process to deprive the PSLRB of jurisdiction, it would need to be clearly established in the *PCAA* or some other relevant statute. Since that is not the case, the PSLRB retains the jurisdiction to apply governing legal principles to the evidence and determine whether the employees in question are employees of the PCA.

[50] A necessary threshold to the PSLRB's jurisdiction under sections 58 and 209 of the *PSLRA* is whether the employees in question fall within the definition of "employee" under section 2. In this regard, it is notable that the *PSLRA* defines "employee" by explicit reference to the employer as follows:

. . .

> *"employee", except in Part 2, means a person employed in the public service, other than*
>
> [Exclusions omitted]
>
> . . .
>
> *"public service", except in Part 3, means the several positions in or under*
>
> (a) *the departments named in Schedule I to the* Financial Administration Act*;*
>
> (b) *the other portions of the federal public administration named in Schedule IV to that Act; and*
>
> (c) *the separate agencies named in Schedule V to that Act.*
>
> . . .

[51] The PCA is a separate agency listed in Schedule V of the *FAA.* Under the *PSEA,* the PSC has the exclusive authority to make appointments to or from within the public service unless another Act of Parliament grants that authority to some other body (see the definition of "employee" in section 2 and also see section 29 of the *PSEA*). The *PSEA* contains a number of express provisions setting out formal prerequisites governing appointments to the public service within the PSC's authority. While the most significant is the use of the PSC as a third-party appointing agency, other formalities are expressly stated, such as the requirement that all appointees take an oath or affirmation. Similar provisions appear in the enabling statutes of some separate agencies (e.g., *Statistics Act*, R.S.C. 1985, c. S-19, s. 6; and *Canadian Security Intelligence Service Act,* R.S.C. 1985, c. C-23, s. 10).

[52] Section 13 of the *PCAA* makes it clear that the CEO of the PCA exercises the authority to appoint employees to positions at the PCA. As a result, the *PSEA* and the

PSC have no application or authority over hiring activities at the PCA. Section 13 of the *PCAA* confirms Parliament's intent to vest hiring authority squarely within PCA management. As a consequence, the legal regime governing appointments and promotions at the PCA is substantively different from that in place at departments in the core public administration. Unlike the appointment procedures under the *PSEA*, section 13 of the *PCAA* gives the CEO broad administrative authority over hiring practices and, therefore, opens the door to the application of common-law tests.

[53] It is trite law that the existence of a contract for services or an employer-employee relationship is not determined on the basis of the "form" of contract or the manner of remuneration. A number of factors and tests have emerged in common-law jurisprudence to assist decision makers in determining whether an individual is an "employee" as opposed to an independent contractor or to determine the identity of the employee's actual employer in law; see *Pointe-Claire (City) v. Quebec (Labour Court),* [1997] 1 S.C.R. 1015; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* 2001 SCC 59 at para 34-48; and *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.),* [1986] 3 F.C. 553 (C.A.) at para 2 to 18. While such tests are often used in common-law contexts such as wrongful dismissal and vicarious liability cases, they are also frequently applied to determine the identity of the "true" employer for statutory purposes; see *Pointe-Claire* at para 34-36; *Public Service Alliance of Canada v. Royal Canadian Mint,* [2003] CIRB No. 229 at para 13-15, and *Wiebe Door Services Ltd.*, at para 2 to 18.

[54] In *Econosult,* the majority of the Supreme Court held that, in the core federal public service, the common-law tests had been superseded by the statutory hiring regime specified in the *PSEA*. The respondent relies on *Econosult* in support of its position that the tests are similarly displaced by section 13 of the *PCAA*. However, *Econosult* fully recognizes that, in circumstances such as in this case, the PSLRB has ample jurisdiction to apply the common-law tests to determine employment status under its own statute. This exception is well recognized in the jurisprudence and legal commentary; see *Econosult*; *SGCT No. 1*; *Catlos v. Treasury Board (Statistics Canada),* PSSRB File Nos. 166-02-27473 and 149-02-162 (19980707)) ("*Catlos*"); Renée Caron, *Employment in the Federal Public Service* (Aurora: Canada Law Book, 2006), at 2:20-2:120, 7:320-7:360; and Christopher Rootham, *Labour and Employment Law in the Federal Public Service* (Toronto: Irwin Law, 2007), at pages 63-68.

[55] The majority of the Supreme Court interpreted both the definition of "employee" and the meaning of "employed in the public service" in *Econosult*. It found that, under the *PSSRA*, status as a public service employee was governed by the interaction of the following three statutes: the *PSSRA*, the *FAA* and the *PSEA*. The majority held that there was no place in that legal structure for a public service employee ". . . without a position created by the Treasury Board and without an appointment made by the Public Service Commission." The reasoning behind the finding concerns the statutory prerequisites contained in the *PSEA*, which the PSSRB had no authority to avoid in applying the *PSSRA*.

[56] The hiring of PCA employees is not subject to the prerequisites contained in the *PSEA*, and the positions are not created by the Treasury Board. The PCA is a separate employer, and the appointment of its employees is governed only by the *PCAA*. Parliament chose not to incorporate the *PSEA* by reference with respect to appointments or to include any similar prerequisites or formalities of appointment in the *PCAA* that might have precluded the application of the common-law tests for employment status. Indeed, that freedom of action, in comparison to the core public service, constitutes an essential element of the PCA's "separate employer" status.

[57] PCA employees continue to be employed in the public service within the meaning of the *PSLRA*. However, its employees do not possess formal instruments of appointment or any other requisite statutory *indicia* that they are employed in a portion of the federal public administration as identified in section 2 of the *PSLRA*. It is for this reason that recourse to common law is necessary and appropriate to determine disputes surrounding employment status. In *Econosult*, the Supreme Court addressed this very circumstance by approving the Federal Court of Appeal's reasoning in *SGCT No. 1*. That case dealt with persons hired by the National Film Board as independent contactors pursuant to three provisions of the *National Film Act* R.S.C. 1985, c. N-8 (*NFA).* The PSSRB dismissed the bargaining agent's application to declare the individuals as included in the bargaining unit on the grounds that none of them could be "employees" as defined in the *PSSRA*. The Federal Court of Appeal allowed the bargaining agent's application for judicial review as follows on the basis that many of the individuals had been engaged under a section of the *NFA* that contained no formalities (at paragraph 14):

. . .

> *A person who must be considered to be an employee of the Board on the general tests for distinguishing between an employee and an independent contractor must be deemed, in my opinion, to occupy a position within the meaning of section 14. There is no special formality required for employing a person in a position other than a continuing position… notwithstanding the form which such an engagement takes it may be open in a particular case to show on all the circumstances that the relationship is in fact one of employment. . . .*
>
> . . .

[58] When the *SGCT No. 1* case was referred back to the PSSRB, it applied the common-law tests for employment status, and the majority held that many of the individuals were *de facto* public service employees to be included in the bargaining units; see *Le Syndicat général du cinéma et de la télévision v. Canada (National Film Board) (Technical Category)*, PSSRB File No. 143-08-160 (19790117).

[59] In *Econosult*, the Supreme Court had no difficulty accepting the underlying holding of the Federal Court of Appeal in *SGCT No. 1.* Notably, in *SGCT No. 1*, the hiring authority, unlike the PSC, was not an entity distinct from the employer itself. In the absence of express statutory formalities, the Supreme Court approved of the process adopted in *SGCT No. 1* and the finding of employee status in that case. This distinction was also observed by Renee Caron in *Employment in the Federal Public Service* (at 7:320-7:360) as follows:

> . . .
>
> *As a result of this decision [Econosult], it is clear that an employee of a subcontractor cannot be a* de facto *employee in those parts of the public service to which the Public Service Commission has the exclusive authority to appoint. Consequently, such persons cannot have any right to grieve pursuant to s. 208 of* the Public Service Labour Relations Act.
>
> *The situation is different in respect of those parts of the public service which are not under the jurisdiction of the Public Service Commission (i.e. most separate agencies).*
>
> . . .
>
> *Thus, the question of whether a person may be a* de facto *employee of a separate agency must be approached on the basis of the separate agency's enabling legislation. Where such legislation allows for employment to occur with few or*

> *no formalities,* de facto *employment relationships may arise. Where they do,* de facto *employees could have access to the grievance procedures of the* Act.
>
> [Emphasis added]

. . .

[60] The situation of the employees in this case is exactly the same as that of the non-continuing employees in *SGCT No. 1*. Both section 15 of the *NFA* and section 13 of the *PCAA* grant the employer the power to hire employees and set terms and conditions for their employment. Neither provision contains any express prerequisites or formalities of appointment. A high degree of statutory formality is required to establish the "legal public servant" alluded to in *Econosult* and to preclude the common-law analysis. In the review of *Estwick and Quintilio,* the Federal Court held as follows that, regardless of whether the substance of the *PSEA* processes had been followed, in the core public service a ". . . formal instrument of appointment . . ." is required:

> *[86] I agree with the submissions of the Respondent that there was no evidence that the positions for the Applicants were created and defined in accordance with the PSEA, the relevant jurisprudence, and the degree of formality expected for an appointment to the public service.*
>
> [Emphasis added]

. . .

[61] In addition to the *SGCT No. 1* case, the PSSRB has held that adjudicators possess the jurisdiction to apply the common-law analysis to determine employee status in circumstances such as in this case. In *Catlos,* the adjudicator considered *Econosult* in a similar context (at para 47-51) as follows:

. . .

> *The Supreme Court of Canada was referring in the* Econosult *decision (supra) to the majority of the Public Service when it said one could not be an "employee" under the PSSRA unless one is appointed under the provisions of the* Public Service Employment Act *(PSEA). Section 8 of the PSEA specifically recognizes the possibility of appointments under other statutes when it states that the Public Service Commission "has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose*

> *appointment there is no authority in or under any other Act of Parliament."*
>
> *The authority for the appointment of employees to many separate employers, is found in their respective constituting statute. The National Research Council is an example of such a separate employer.*
>
> *Therefore, the argument of counsel for the employer that the grievor cannot be an "employee" under the PSSRA because he was not appointed under the PSEA does not stand up. This is particularly true in light of Order-in-Council SOR/87-644 which added a new separate employer to Part II of Schedule I to the PSSRA: Statistics Survey Operations. . . .*
>
> *I therefore have two issues to deal with: first: is the grievor an employee at common law as opposed to an independent contractor? There is insufficient evidence available for me to determine this issue. . . .*
>
> *Second, if the grievor is an employee under the PSSRA, then who is his employer? . . .*
>
> . . .
>
> [Emphasis added]

[62] In this case, there is no dispute that the individuals in question are "employees" as opposed to "independent contractors." Only the second stage of the analysis described in *Catlos* is required, namely, a determination of the legal identity of the actual employer for the purposes of labour relations under the *PSLRA*. On that aspect, the test identified by the Supreme Court in *Pointe-Claire* is called for. That case deals specifically with determining the actual employer for the purposes of labour relations in situations where employees are nominally paid through a third party. The Supreme Court identified as follows a non-exhaustive list of factors specifically pertinent to determining the actual employer for labour relations purposes:

> 48. *. . .Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.*

[63] *Pointe-Claire* was relied on by the Canada Industrial Relations Board (CIRB) in the case of *PSAC v. Royal Canadian Mint* to determine the actual employer of a number of employees who were being paid by a private third party. The application of the

Pointe-Claire criteria in that case led the CIRB to rule that in fact and in law the employees in question were not independent contractors employed by the "contractor" but were, at all times, working under such a level of control that they were, in fact and in law, employees of the Royal Canadian Mint.

[64] The PCA has offered nothing in its submissions that points to express statutory formalities in place at the PCA that place its hiring practices within the dicta in *Econosult*. Indeed, to the extent that such formalities form part of the PCA's normal practice, convincing evidence of that practice must be tendered by the respondent before the PSLRB via the normal course. The manner in which the grievors and the employees affected by this application were engaged falls squarely within the parameters of an appointment pursuant to section 13 of the *PCAA*.

[65] The applicant filed three sample offers of employment made to employees by PCA management. The applicant submitted that, on their faces, the letters do not suggest any consistent "formality" in the hiring process. Indeed, there is no reference at all to section 13 of the *PCAA*. The sample letters of offer confirm that the PCA's practice in engaging staff is inconsistent with the proposition that all employees are engaged by way of some form of certificate of appointment signed by the CEO. Like most organizations, the hiring process is implemented through the broad delegation of authority from senior management representatives down to those responsible for the day-to-day administration of the hiring process.

[66] The applicant also provided a copy of the meeting minutes of the Mountain Parks Executive Board in April 2008. The minutes show as follows that, while formal recruitment procedures such as the Federal Student Work Experience Program (FSWEP) may sometimes be used at the PCA, they may be disposed of on a case-by-case basis.

. . .

> *Field units that have been unsuccessful recruiting students via FSWEP can now seek, on a case by case basis, authorization from Merilee Davies to recruit and hire locally.*
>
> [Emphasis added]

. . .

[67] The evidence in this case will confirm that, by the contractual relationship between the HCRA and the PCA, approved by the CEO of the PCA, persons are engaged to perform duties for the benefit of the PCA as employees at law. On that basis, and consistent with the *Pointe-Claire* and *PSAC v. Royal Canadian Mint* cases, the PSLRB will be required to closely examine the contractual arrangements between the PCA and the HCRA and the PCA's role supervising those contracts and managing the work performed by the employees engaged under them.

[68] For example, one of the grievors, Mr. Kiley, maintains that he was actually hired by a PCA manager with the understanding that he would be an official PCA employee. A CRA investigator examined this allegation along with the entirety of the circumstances of his employment. The investigator's report found that there was no separation between his employment and that of PCA employees, concluding that his actual employer was the PCA. Although the CRA later revised the report to reach the opposite conclusion, when an appeal was made to the Tax Court, the CRA consented to the judgment that he was employed by the PCA.

[69] The Federal Court of Appeal decision in *Public Service Alliance of Canada v. Canada (Attorney General)* relied on by the PCA was a separate but related proceeding to the CIRB decision *PSAC v. Royal Canadian Mint*. It concerned the decision of an officer of Public Works and Government Services Canada denying employees the option of buying back pensionable service for the period before they were formally included in the bargaining unit. The Federal Court of Appeal did not quash the officer's decision and found that there was an evidentiary basis for her determination that the employees had been independent contractors for pension purposes before being placed in the bargaining unit. This had no effect on the CIRB's finding that, for labour relations purposes, the individuals were employees as defined in the *Royal Canadian Mint Act, R.S.C. 1985, c. R-9,* and the *Canada Labour Code, R.S.C. 1985, c. L-2.*

[70] *SGCT No. 2* confirms that, once again, the PSLRB does indeed possess the jurisdiction to determine the employment status of persons working at separate agencies. The case dealt with a claim that the employer had purposefully limited contracts to less than six months to prevent the employees from being included in the bargaining unit pursuant to the exclusion in paragraph 2(*g*) of the *PSSRA*. When the matter was heard, evidence was tendered and the PSSRB found that none of the employees had been employed for more than six months. However, that did not end the

matter. The PSSRB proceeded to apply governing common-law principles and considered whether the contracts in question might be "void" or just "voidable." Finding the latter, the PSSRB dismissed the application.

[71] On judicial review, the Federal Court of Appeal declined to set aside the PSSRB's decision. There is no finding in *SGCT No. 2* that the PSSRB exceeded its jurisdiction by considering common law in the context of exclusion under paragraph 2(*g*) of the *PSSRA*. Moreover, nowhere in *SGCT No. 2* does the Federal Court of Appeal deviate from its separate 1978 decision in *SGCT No. 1* that the common-law analysis was within the PSSRB's jurisdiction and that the PSSRB was required to resolve disputes over employee status at separate employers such as the National Film Board.

[72] The PCA's reliance on *PAFSO, Rostrust Investments Inc., Panagopoulos,* and *Estwick and Quintilio* is unclear. Those cases are non-responsive to the essential position advanced by the applicant. All the departments in those cases form part of the core public service for which the Treasury Board is the employer. Accordingly, the hiring process was transferred by the operation of the *PSEA* to the exclusive jurisdiction of the PSC. In each of those cases, employee status was denied because no "formal instrument of appointment" had been issued or because the relevant statutory processes of appointment had not been followed. Therefore, those cases are of limited assistance in this case.

[73] In the review of *PAFSO,* the Federal Court of Appeal held that, until the formal instrument of appointment was executed, persons on language training could not be employees under the *PSSRA*.

[74] In *Panagopoulos,* the Federal Court described some of the formal statutory prerequisites of appointment mandated by the *PSEA* in effect at that time that ousted the common-law analysis for determining employee status in the core public service but that were inapplicable to the PCA. Unlike this case, employee status was not possible without the involvement of the PSC.

[75] *Farrell* concerns a motion in Federal Court by the Canadian Security Intelligence Service (CSIS) for summary judgment to dismiss a wrongful dismissal action. The circumstances of that case were unique. Mr. Farrell claimed that his clandestine contract with CSIS was terminated while he was employed at Canada Post. There is no indication in *Farrell* that the plaintiff took the position that CSIS fell within the above-

noted exception to *Econosult* or that the common-law tests favoured a finding that CSIS was his actual employer. He simply asserted a breach of his contract with CSIS while he was working at Canada Post. In any event, the Federal Court held that, like the core public service, appointments at CSIS were subject to the *PSEA* in effect at that time.

[76] It is trite law that, while a person can be an employee for the purposes of one statute and not for another, at the end of the day, the differences in the language of the respective legislative schemes must be considered to reach such a conclusion. In this case, the Tax Court has ruled that the grievors were employees of the PCA for EI purposes. There are no material differences between the test for employment status under the *PSLRA/PCAA* and the test under the *Employment Insurance Act,* S.C. 1996, c. 23. And, as a matter of substance, it makes no labour relations sense to suggest otherwise. The Tax Court has ruled that, during the relevant period, the grievors were employed by the PCA, and as a result, EI contributions were required on the basis of that status. The respondent has offered no compelling arguments as to why the result before the PSLRB should be any different from the result before the Tax Court. In any case, the PSAC and the grievors repeat that, if there are differences in terms of applicable statutes and evidence, those differences should be addressed in the normal course with a formal hearing. At a minimum, the existence of those judgments is a relevant consideration in determining whether these grievances and this application should be peremptorily dismissed on the basis of written submissions without, as formally requested by the applicant, a full hearing with the right to call evidence.

[77] In conclusion, the challenge to the PSLRB's jurisdiction advanced by the respondent should be dismissed, and the cases should proceed to a full hearing in accordance with the *PSLRA*.

D. <u>Reply of the PCA</u>

[78] It does not appear to be in dispute that the PSLRB is without jurisdiction to hear the section 58 application unless the 10 unnamed employees of the HCRA fall under the definition of "employee" in the *PSLRA*. It does not appear to be in dispute that the PSLRB is without jurisdiction over the individual grievances referred to adjudication unless the grievors fall under that same definition. "Employee" in the *PSLRA* means, ". . . a person employed in the public service . . . ." This, too, is not in dispute.

[79] The distinguishing feature of the PSAC's submissions is the acknowledgement that an appointment under paragraph 13(1)(*a*) of the *PCAA* is a prerequisite to a finding of employment at the PCA. It is not in dispute that absent such an appointment the PSLRB is without jurisdiction.

[80] It now appears that the dispute is whether such an appointment has actually occurred. The PSAC argues that an appointment to the PCA can occur by application of the common-law tests, without any other conditions. In other words, an appointment to the PCA can occur unintentionally, by accident or by mistake. If the PSLRB disagrees with the PSAC and finds that "appoint" under paragraph 13(1)(*a*) of the *PCAA* connotes something more than happenstance or the mere application of the common-law tests, the PSLRB is left without jurisdiction. The PSLRB need only find that "appoint" under paragraph 13(1)(*a*) of the *PCAA* connotes something more than the mere application of the common-law tests. The PSLRB does not need to determine what more is required. The PSAC has only the common-law tests on which to make its case, nothing more.

[81] Another important feature of the PSAC's submissions is that it does not challenge the continuing validity of the *Econosult* decision. Rather, the PSAC says that the decision is inapplicable because the employer in that case was in the core public administration whereas the PCA is a separate agency.

[82] As a simple question of law on the routine exercise of statutory interpretation, "appoint" under paragraph 13(1)(*a*) of the *PCAA* connotes something more than the mere application of the common-law tests. None of the 10 HCRA employees, whoever they may be, and none of the purported individual grievors have been appointed, and therefore, the PSLRB is without jurisdiction.

[83] As a simple question of law on the routine application of a binding case precedent to the known facts, *Econosult* is determinative of the preliminary jurisdictional question under consideration. *Econosult* is indistinguishable, and it applies equally to separate agencies with appointing authorities, such as the PCA.

[84] Alternatively, even if the PSLRB were to accept that *Econosult* is valid and binding only for employers in the core public administration, it applies at least to the three purported individual grievors who worked before 1999 (the establishment of the PCA) with the result that an adjudicator is without jurisdiction over the grievances referred to adjudication.

[85] It comes down to a simple question of law. All that is required is a routine exercise of statutory interpretation. What is meant by paragraph 13(1)(*a*) of the *PCAA*, particularly the word "appoint"? The PSAC contends that it is more complicated and that what is entailed is a mixed question of law and fact necessary to go to a full-blown hearing on the evidence. That is not so.

[86] Paragraph 13(1)(*a*) of the *PCAA* states the following: "The Chief Executive Officer has exclusive authority to . . . appoint . . . the employees of the Agency . . . ." "Appoint" is not defined in the *PCAA*, and there is no judicial consideration of "appoint" as used in paragraph 13(1)(*a*) or elsewhere in the *PCAA*. Some guidance is offered by the Federal Court of Appeal in *Lucas v. Canada (Public Service Commission Appeal Board)*, [1987] 3 F.C. 354 (C.A.). The ultimate conclusion in that case was that the term "appointment" as used in what was then the *Public Service Employment Act*, R.S.C. 1970, c. P-32, was interchangeable with the word "assignment." Although that ultimate finding is not very relevant in this case, the approach to statutory interpretation recommended and followed by the Federal Court of Appeal and some of the dictionary meanings of "appoint" that were cited with approval by that court are both useful.

[87] The Federal Court of Appeal stated in *Lucas* that words are to be interpreted in their ordinary grammatical sense unless there is something in the context or purpose of the statute in which the words occur or in the circumstances with reference to which the words are used that shows that the words were used in a special sense different from their ordinary grammatical sense. This foreshadowed the approach to statutory interpretation accepted and commended by the Supreme Court in *Rizzo and Rizzo Shoes*. The starting point is to examine the ordinary grammatical meaning of what in that case was "appointment" and here is "appoint." That inquiry led the Federal Court of Appeal to cite and accept the following dictionary definitions of "appoint" (at paragraph 6):

> . . .
>
> *"To assign authoritatively to a particular use, task or office";*
>
> *"To assign authority to a particular use, task, position or office."*
>
> . . .

[88] Cambridge Dictionaries Online defines "appoint" as "to choose someone officially for a job or responsibility" and provides the following two relevant examples:

"We've appointed three new teachers this year" and: "He's just been appointed (as) director of the publishing division." Merriam-Webster OnLine defines "appoint" in part as "to fix or set officially" and "to name officially" as in "will appoint her director of the program."

[89] The French version of paragraph 13(1)(*a*) of the *PCAA* uses the word *nommer*, which carries precisely the same meaning as "appoint" as described above. *Le Petit Robert* defines *nommer* as "*désigner, choisir (une personne) de sa propre autorité, pour remplir une fonction, une charge, être élevé à une dignité (opposé à élire).*" Parliament's choices of the words "appoint" and *nommer* were obviously deliberate.

[90] "Appoint," as used in paragraph 13(1)(*a*) of the *PCAA* and as defined earlier in this decision, is a verb. It connotes action, a positive step knowingly or intentionally taken, and the "doing of something" as opposed to something done impassively and unintentionally that ends in a result. The action is described as "official" or "authoritative." Those words capture the essence of "appoint" and distinguish it from "hire" or "employ," words that Parliament could have used and that might have led to a mere application of the common-law tests. An employee is not appointed under paragraph 13(1)(*a*) unless the CEO or his or her authorized delegate, as a function of his or her office or authority, has acted purposefully, knowingly, intentionally or deliberately in an official or authoritative manner. Paragraph 13(1)(*a*) precludes the unintentional, accidental or *de facto* employee, which results from applying the common-law tests.

[91] That the word "appoint" should be given its ordinary meaning in paragraph 13(1)(*a*) of the *PCAA* is buttressed by a review of the legislative scheme applicable to the PCA, beginning with the *PCAA*. Subsection 5(2) of the *PCAA* confers on officers or employees of the PCA the authority to exercise the powers and perform the duties and functions of the Minister of the Environment provided such officers or employees are "appointed" in a capacity appropriate to the exercise of the power or the performance of the duty or function. Parliament intended by the word "appointed" to limit and control which persons could exercise the powers or perform the duties or functions of a minister. Parliament cannot be taken to have intended that the class of persons who could exercise a minister's powers and perform his or her duties and functions would be open-ended under common-law tests and include unintentional, accidental or *de facto* employees.

[92] Subsection 10(1) of the *PCAA* authorizes and in fact compels the Governor in council to "appoint" the CEO of the PCA. Similarly, section 11 gives the Minister the authority to temporarily "appoint" a person as the CEO in the event of a vacancy in the CEO's office. "Appoint" in the context of subsection 10(1) and section 11 obviously must have been intended to mean something intentional and official or authoritative, meaning something more than an application of the common-law tests. It is a rule of statutory interpretation to give a word the same meaning throughout a statute. If, in the context of subsection 10(1) and section 11, "appoint" means something more than an application of the common-law tests and a resulting finding of unintentional employment or employment by accident or mistake, then it must mean the same thing in paragraph 13(1)(*a*) of the *PCAA*.

[93] The *Canada National Parks Act*, S.C. 2000, c. 32 (*CNPA*), and its regulations are replete with discretionary authority given to superintendents. To be a superintendent under section 2 of the *CNPA,* one must be "appointed." The definition of "superintendent" in section 2 of the *CNPA* specifically requires it. Moreover, the definition of "superintendent" includes any other person "appointed" under the *PCAA* and authorized by the superintendent to act on his or her behalf. The superintendent and those authorized by the superintendent to act on his or her behalf have broad authority to do many things significantly affecting the lives of members of the public. It is for that reason that Parliament limited this class of persons to those "appointed." It could not have been intended by Parliament that the class of persons who could exercise the wide and affecting powers would be open-ended under common-law tests and include unintentional, accidental or *de facto* employees.

[94] However one might precisely define "appoint" in paragraph 13(1)(*a*) of the *PCAA*, it precludes the unintentional, accidental or *de facto* hiring of an employee that is the result of an application of the common-law tests and would be the result in this case with these employees or former employees of the HCRA if the PSAC's position were to prevail. Something more is required, something official or authoritative by the CEO of the PCA or his authorized delegate. A letter of offer from the CEO or his authorized delegate would be the minimum. In all the evidence that they have improperly tendered (discussed below), these employees or former employees of the HCRA have not put forward so much as a scrap of paper evidencing any intention of the CEO or his authorized delegate to appoint them.

[95] To accept the PSAC's submission that an appointment to the PCA under paragraph 13(1)(*a*) of the *PCAA* can occur by applying the common-law tests, without more, is to disregard an ordinary meaning of "appoint" as used and understood in the *PCAA*. Moreover, it would potentially result in the extension of wide powers and authorities, including ministerial powers and authorities, to those who were never intended by Parliament to have such powers and authorities. It is not necessary for the PSLRB in these circumstances to precisely define "appoint" under paragraph 13(1)(*a*). It is sufficient for the PSLRB to find that something more than a mere application of the common-law tests is required. If the PSLRB so finds, then the result is necessarily a finding that none of the persons subject to these proceedings is an "employee" under the *PSLRA* and that the PSLRB is therefore without jurisdiction.

[96] In its submissions, the PSAC does not challenge the continuing validity of *Econosult*. Rather, the PSAC states that the decision is inapplicable because the employer in that case was in the core public administration whereas the PCA is a separate agency. *Econosult* applies equally to separate agencies with appointing authorities, such as the PCA. The Supreme Court described as "practically decisive" the wording of section 33 of the *PSSRA* and the definition of "employee" in section 2 of the *PSSRA*. In other words, these two sections of the *PSSRA* alone, and no other statutes, practically decided the *Econosult* case. Section 33 of the *PSSRA* continues in section 58 of the *PSLRA*, the section under which the PSAC is proceeding, and the definition of "employee" in the *PSSRA* is continued in the *PSLRA*. Just as section 33 and the definition of "employee" in the *PSSRA* were "practically decisive" in *Econosult*, so too are section 58 and the definition of "employee" in the *PSLRA* practically decisive in this case, even before resorting to other statutes, such as the *PCAA*. The Supreme Court identified a "number of problems" with a finding that a person could be an employee in the federal public service by application of the common-law tests. The "number of problems" that were identified and that motivated the Supreme Court at least in part to arrive at its determination in the *Econosult* case would exist in this case if these employees or former employees of the HCRA were considered employees of the PCA under common law tests.

[97] It would be wrong to distinguish *Econosult* on the footing that the appointing authority and employer were separate in that case. That is a distinction without a difference. A close reading of the *Econosult* case reveals that the Treasury Board was the employer and that the PSC was the appointing, authority and the fact that they were

different had no bearing on the outcome. The PSAC says that the *PSEA* contained certain formalities of appointment, which distinguishes *Econosult* from applying to the PCA. That is a red herring. Whether or not the *PSEA* as it read at the time contained formalities of appointment had no bearing on the outcome of *Econosult*.

[98] Even if it were relevant to the outcome in *Econosult* that the *PSEA* as it read at the time contained certain formalities of appointment, *Econosult* could not be distinguished from the situation at the PCA on that basis. Paragraph 13(1)(*b*) of the *PCAA* sanctions the establishment of standards, procedures and processes governing appointments, among other things, and assigns that function exclusively to the CEO. Despite what the PSAC says repeatedly and mistakenly in its submissions, such standards, procedures and processes exist at the PCA. In *Farrell*, the Court held that it was ". . . well settled that an individual cannot become an employee of Her Majesty in Right of Canada without a specific appointment made in accord with procedures established in accord with these statutes . . ." (at paragraph 9).

[99] Cases subsequent to *Econosult* have applied it to separate agencies with statutory appointing authorities, such as the PCA. The PSAC's argument disregards those established authorities. One example is *Farrell.* That case was in the context of the *Canadian Security Intelligence Service Act*, which, at subsection 8(1), gave the director of the CSIS an appointing authority in substance identical to the appointing authority given to the PCA's CEO in paragraph 13(1)(*a*) of the *PCAA*.

[100] As a simple question of law on the routine application of a binding case authority on the known facts, the PSLRB may correctly find that *Econosult* applies equally to the PCA and that it is determinative of the preliminary jurisdictional question under consideration.

[101] In the alternative, *Econosult* is at least binding and determinative of the preliminary jurisdictional question in respect of the purported individual grievors. The grievors are or were employees of the HCRA. The PCA, not being their employer, does not know their employment history. However, for these purposes, if one accepts at face value what they say in their purported individual grievances, Mr. Hubley's employment commenced in April 1992, and Mr. Kiley's and Ms. Surette-Aucoin's employment commenced in 1997. Until April 1999, the PCA was not a separate agency but was in the core public administration.

[102] Even if it is accepted that *Econosult* is confined to the core public administration as the PSAC would have it, it is valid and binding in respect of at least the three purported individual grievors with the result that they are not "employees" under the *PSLRA,* and the PSLRB is without jurisdiction over their individual grievances referred to adjudication.

[103] There is a proper method by which to put evidence before the PSLRB. It is improper, as the PSAC has done, to tender evidence in written submissions. The PSAC's submissions are replete with evidence. Not only does the PSAC improperly tender evidence, it also takes things a step further and states that the PSLRB must presume that the evidence is true. In reliance, the PSAC points to *Addison & Leyen Ltd. v. Canada.* That case does not stand for that bold proposition. The PSAC is taking *Addison & Leyen Ltd. v. Canada* out of context. It was a civil procedure case, not a labour case, involving a motion to strike a statement of claim.

[104] Although it is not open to the PSLRB to accept as true the evidence improperly tendered by the PSAC, the preliminary jurisdictional issue under consideration turns on simple and narrow questions of law, as discussed earlier in this decision, as follows: the statutory interpretation of paragraph 13(1)(*a*) of the *PCAA* or the application of the binding and established case precedent, *Econosult*. The PSLRB may safely disregard the evidence of the PSAC in correctly disposing of the section 58 of the *PSLRA* application and the purported individual grievances referred to adjudication. Therefore, it is not necessary for the PCA to counter the evidence of the PSAC with evidence of its own but the PCA would not wish for its silence to be taken as acquiescence in the correctness or completeness of the evidence and evidentiary record improperly tendered by the PSAC.

[105] In its written submissions, the PSAC relies to a great extent on *SGCT No. 1*. A close review of that decision reveals that it actually supports the PCA's and the HCRA's position and that it does not support the PSAC's position. The *NFA* authorized the National Film Board (NFB), at paragraph 10(1)(*d*), to enter into contracts for personal services. The NFB did enter into contracts for personal services with several persons. The bargaining agent applied under the precursor to section 58 of the *PSLRA* for a determination that those persons were employees under the *PSSRA* and that they should be included in the bargaining unit. Like the PCA, the NFB was a separate employer. Employment at the PCA is by appointment pursuant to a statutory appointing authority, paragraph 13(1)(*a*) of the *PCAA*. Employment at the NFB was by

appointment under a statutory appointing authority (section 13 of the *NFA*). Just as paragraph 13(1)(*a*) of the *PCAA* uses the word "appoint," so too did section 13 of the *NFA*. Specifically, subsection 13(3) of the *NFA* stated that, ". . . the Board may appoint persons. . . ." Subsection 13(4) of the *NFA* stated the following: "The appointment of a person by the Board to a continuing position . . . ." An appointment to the NFB under section 13 of the *NFA* came to be known as an appointment to a "continuing position."

[106] A "continuing position" was not the only kind of position at the NFB. There were two. Section 14 of the *NFA* gave the NFB another distinct authority, an authority that the PCA does not have. Section 14 of the *NFA* stated as follows: "The Board may employ such persons in positions other than in continuing positions in the plan approved under section 13 as may be required from time to time . . . ." In other words, employment in a "continuing position" was by appointment under section 13 of the *NFA*. Employment under section 14 of the *NFA* to a different position did not require an appointment. The Federal Court of Appeal ruled that persons under contracts of personal services could be considered employees of the NFB under the common-law tests, but they could only be considered to occupy positions under section 14 of the *NFA*. They could not be considered to occupy positions under section 13 of the *NFA*.

[107] Where the PSAC goes astray is in likening paragraph 13(1)(*a*) of the *PCAA* to section 14 of the *NFA*. Paragraph 13(1)(*a*) of the *PCAA* is not identical to what was then section 13 of the *NFA* but the two sections are identical in at least one important aspect, as follows: employment is by appointment and the word "appoint" is specifically used. An appointment as a statutory prerequisite precludes the operation of the common-law tests. Paragraph 13(1)(*a*) of the *PCAA* is distinct from section 14 of the *NFA* in at least one important aspect: whereas appointment is a prerequisite to employment at the PCA under paragraph 13(1)(*a*) of the *PCAA*, there was no such prerequisite to the positions at the NFB under section 14 of the *NFA*, and therefore, the door was opened to the common-law tests.

[108] The other case on which the PSAC placed great reliance is *Catlos*. That decision does not support the PSAC's position. All that can be taken from *Catlos* is the recognition that, in the federal public service, there are employers other than the Treasury Board and appointing authorities other than the PSC. *Catlos* was ultimately decided on the basis that the grievor had submitted his grievance to the wrong employer.

[109] If anything, *Catlos* supports the PCA's and the HCRA's position. The statutory authority in question was subsection 5(1) of the *Statistics Act*, R.S.C. 1985, c. S-19, which states as follows: "The Minister may employ, in the manner authorized by law, such commissioners, enumerators, agents or other persons . . . ." In its use of the word "employ," subsection 5(1) of the *Statistics Act* is like section 14 of the *NFA* and is unlike paragraph 13(1)(*a*) of the *PCAA* and its use of the word "appoint."

[110] *Catlos* supports the PCA's position in another important aspect. Whereas the PSAC maintains that this preliminary jurisdictional question is so complex as to necessitate a hearing with witnesses and evidence, the same preliminary jurisdictional question (Is the grievor an "employee" as defined by what is now the *PSLRA*?) and a second jurisdictional question on timeliness were together dealt with in that case in only a half-day and with the tendering of only four exhibits.

[111] The PSAC attempts to marginalize several relevant, established and applicable cases put forward by the PCA, which does not propose to address case by case the PSAC's comments. The cases speak for themselves and are relevant and applicable for the reasons discussed by the PCA in its written submissions.

E. Reply of the HCRA

[112] In its response, the PSAC provided and relied on several pieces of unproven documentary evidence. The PSAC also made several statements throughout the brief that purport to be factual evidence but are not. For instance, it made several statements about the "grievors" that purport to be facts. Placing that evidence before the PSLRB is inappropriate, and the PSLRB should not consider any of the evidence.

[113] This placement of evidence before the PSLRB is inappropriate for two reasons. First, there was an understanding that evidence was not necessary to determine this matter. In fact, counsel for the PSAC had expressly indicated that it was not necessary to tender evidence to determine the jurisdictional issue. By letter dated February 25, 2009 to the PSLRB, counsel for the PSAC requested that the PSLRB conduct a one-day hearing confined to the issue of its jurisdiction. The PSAC's counsel expressly stated that the hearing would not require tendering evidence. The PSLRB subsequently confirmed that the issue of jurisdiction would be dealt with by written submissions. The HCRA sees no difference between dealing with the jurisdictional point in person or through written submissions. It would be inappropriate to allow the PSAC to place

evidence before the PSLRB when it had indicated that it was not necessary to do so and when the PSLRB had that statement before it when confirming the process.

[114] Second, the law is clear that 1) an issue of a board's jurisdiction is a question of law and 2) that evidence is therefore not admissible in determining the issue. In *Matear v. Treasury Board (Department of Industry)*, 2008 PSLRB 11, the PSLRB considered a preliminary objection on jurisdiction about an individual grievance referred to adjudication. The parties recognized that the issue of the jurisdiction of an adjudicator under the *PSLRA* was a question of law, and the PSLRB accepted that characterization. Many courts have determined that a question of jurisdiction is a question of law (see *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board),* 2008 NSCA 123, and *Davies v. Canada (Attorney General)*, 2005 FCA 41). Based on those authorities, it is clear that a question about the jurisdiction of an administrative tribunal is a question of law.

[115] Further, it has been held that evidence is inadmissible when determining a question of law; see *Bank of Nova Scotia v. Ryan*, [1992] A.J. No. 526 (Alberta Master). The *Rules of the Ontario Court* even codifies the principle that evidence is not admissible except with the leave of a judge or on consent; see *Sievert & Sawrantschuk LLP v. Hommel*, [2008] O.J. No. 5477 (Ont. S.C.J.). As evidence must not be admitted when dealing with questions of law, we respectfully request that the PSLRB disregard the evidence submitted by the PSAC.

[116] In addition to tendering new evidence, the PSAC has asserted that the facts alleged in the brief and application must be presumed true. There is no authority for making that assertion. The PSAC cited *Addison & Leyen Ltd.* as authority for that assertion, but that case involved a motion to strike an application for judicial review. In a motion to strike, courts have recognized that the facts alleged in certain documents such as a statement of claim can be presumed true for the purpose of determining whether the matter should be allowed to continue. There is no issue of the court's jurisdiction, *per se,* in an application to strike; rather, the issue is whether the plaintiff has properly framed a case for adjudication. This case raises the following fundamentally different issue: Does the PSLRB have jurisdiction to determine an issue involving people who are not employees defined by its governing legislation? We say that it does not.

[117] If the PSLRB were to accept the PSAC's approach, it would, in essence, shift the onus to the respondent to disprove evidence in order to succeed with the preliminary objection. In the absence of language shifting the onus, the standard approach to evidence applies, so there is no basis for assuming that the asserted facts are true.

[118] In the alternative, even if the PSLRB determines that the evidence submitted by the PSAC is admissible, at any rate that evidence does not support the PSAC's claims. The evidence either reinforces that the individuals at issue are not employees or is absolutely irrelevant.

[119] The offers of employment filed by the applicant are letters from the PCA. Contrary to the argument of the PSAC, those offers actually confirm that the PCA has a process by which it conducts its hiring. Significantly, there is no evidence that the three individual grievors or any other individuals who are the subject of this application were hired by the PCA in a manner similar to that contemplated in the letters of offer. Further, one of the letters of offer dates from 1999, well before this proceeding. The other offers were for locations other than the Halifax Citadel.

[120] The minutes of a meeting of the Mountain Parks Executive Board have no relevance to this proceeding, so they do not support the PSAC's claims.

[121] The CRA report filed by the applicant is not relevant either. In addition, it is fraught with so many deficiencies that the PSLRB simply cannot consider it; it is not a document that was previously shared with the HCRA; it is clearly marked "draft copy" on the first page; the form is neither dated nor signed by the person who prepared it; it indicates throughout that there are tabs attached to it, but none are provided; and, as the HCRA stated earlier (and repeats below), issues of status for purposes of Employment Insurance and Canada Pension have been acknowledged to be different from and non-determinative of issues before the PSLRB.

[122] The consent to judgment from the Tax Court relating to three former employees of the HCRA is similarly irrelevant for the following reasons:

a) Neither the PCA nor the HCRA was a party to that matter or played any role in it.

b) The consent to judgment dealt with the following very narrow issue: whether certain individuals were ". . . employed in insurable employment by the PCA in the period from January 1, 2005, to October 26, 2005." That issue is not the same as the one that the PSAC has tried to put before the PSLRB.

c) None of the individuals involved in the Tax Court matter who were employed with the HCRA were employees of the HCRA as of December 2, 2008.

d) There is good law that a determination from the Tax Court on this point is limited to the specified purpose and does not have any impact on whether an individual is an employee under the *PSLRA* (*Estwick and Quintilio*).

[123] The burden of proof in a section 58 of the *PSLRA* application lies with the applicant. Among the many things that must be in place before an application can succeed is that there must be employees as defined by the *PSLRA*. There are none in this case. Furthermore, none of the cases cited by the PSAC changes that reality. *SGCT No. 1* deals with a fundamentally different issue. It addresses whether individuals who had personal contracts with the NFB were "employees." In this case, there is no evidence that the individuals at issue had contracts of any nature with the PCA. Accordingly, that case is not meaningful to the analysis. The PSAC suggests that the decision in *Point-Claire* is an authority for determining the identity of the "true" employer for statutory purposes. However, that decision is not a precedent on which the PSLRB can rely. The Supreme Court was careful to limit its analysis to that case. The decision is extremely specific and is not any authority for determining that the true employer in this case is any other than the HCRA.

[124] The decision in *Sagaz Industries* is not even about an employment matter. The case only touches on employment law principles to determine whether the company was vicariously liable for the wrongful conduct of a consultant retained to assist in obtaining business.

[125] The analysis in *Wiebe Door Services Ltd.* is also not applicable. That decision relates only to an assessment for the payment of EI and Canada Pension Plan premiums. The Federal Court's decision in *Estwick and Quintilio* makes it clear that a ruling for such a purpose is not determinative of the status of individuals under the *PSLRA*.

IV. Reasons

A. Evidence and assumptions of truth

[126] The applicant has maintained that an oral hearing is required to determine this jurisdictional question. The Chairperson of the PSLRB has already determined that the jurisdictional question is to be determined by way of written submissions. It is not open to the applicant to make any further submissions on that point. In its correspondence

to the PSLRB on February 25, 2009, counsel for the bargaining agent stated that the ". . . Board and all parties would benefit from a thorough review of all the jurisprudence and that such a hearing would not require the tendering of evidence." I agree that evidence is not required to rule on the narrow jurisdictional objection before me.

[127] In the absence of an oral hearing, the applicant maintains that the alleged facts in its submissions must be taken as true, for the purposes of the application. In my view, there is no need to make any assumptions to answer the jurisdictional question.

B. Decision of the Tax Court

[128] The decision of the Tax Court relating to some employees of the HCRA is not relevant for this application, as the consent judgement related to the definition of "employee" under legislation other than the *PSLRA*. I agree with the conclusion in *Estwick and Quintilio* on this point (also see *Public Service Alliance of Canada v. Canada (Attorney General)*).

C. Jurisdiction of the PSLRB and an adjudicator

[129] This decision addresses the jurisdiction of the PSLRB over this section 58 application as well as the jurisdiction of an adjudicator to hear the five grievances referred to adjudication. The submissions of the parties focused primarily on the section 58 application. It is clear that, for an adjudicator to have jurisdiction over the grievances, the individuals must be employees within the meaning of the *PSLRA*.

[130] It is common ground among the parties to this application that in the core public service an individual must be appointed under the *PSEA* to meet the definition of "employee" under the *PSLRA*, in accordance with the decision in *Econosult* and a number of subsequent decisions of the Federal Court and Federal Court of Appeal. This application raises the question of whether the same result applies to a separate employer not subject to the *PSEA*. For the reasons set out below, I have concluded that the *Econosult* analysis applies equally to the PCA.

[131] Decisions interpreting *Econosult* have focused on the interplay between the *PSSRA* and the *PSEA*, as it read at the time. However, the Supreme Court, at paragraph 21 of the *Econosult* decision, initially looked at the *PSSRA* alone and concluded that the wording of the bargaining unit determination section (section 33 of the *PSSRA*), aided by the definition of "employee" in section 2, was "practically decisive":

> *. . . Section 33 is intended to enable the Board to resolve any question as to whether an employee or class of employees is or is not included in a bargaining unit. In the absence of a definition of "employee", it could be argued that the Board could determine who is an employee on the basis of tests that are generally employed in labour matters. These tests are customarily employed to resolve a dispute as to whether a person is an employee or an independent contractor. The express definition of "employee", however, shows a clear intention by Parliament that it has decided the category of employee over which the Board is to have jurisdiction. It is restricted to persons employed in the Public Service and who are not covered by the* Canada Labour Code. *The Board's function by the very words of s. 33 is not to determine who is an employee but rather whether employees who come within the definition provided, are included in a particular bargaining unit.*

[132] The Supreme Court concluded, at paragraph 22, that no provision in the *PSSRA* gave the PSSRB, ". . . exclusive jurisdiction to determine who is an employee on the basis of the Board's expertise" while noting that such provisions are not uncommon in other labour relations statutes.

[133] The applicant also relied on *SGCT No. 1*, a decision of the Federal Court of Appeal that pre-dates the *Econosult* decision. The enabling legislation for the NFB had one section for "continuing positions" that specifically referred to the power of the NFB to "appoint" persons and that included other statutory formalities (section 13). Section 14 of the *NFA* gave the NFB a general authority to "employ" persons in positions other than "continuing positions." The Federal Court of Appeal, in *SGCT No. 1,* concluded that there was no special formality required for employing a person in a position other than a continuing position.

[134] In *Econosult*, the Supreme Court accepted the reasoning in *SGCT No. 1*. It noted the finding of the Federal Court of Appeal that there was "no special formality" required for employing a person in a position other than a continuing position. The Supreme Court stated that *SGCT No. 1* does not stand for the proposition that ". . . the Board can treat persons as members of the Public Service in disregard of statutory formalities on the basis of conduct which falls short of meeting the statutory prerequisites."

[135] I agree with the statement by Ms. Caron in paragraph 7:360 of her text that the question of whether a person may be a *de facto* employee of a separate employer ". . . must be approached on the basis of the separate employer's enabling legislation."

[136] The relevant section of the *PCAA* reads as follows:

. . .

> ***13.*** *(1) The Chief Executive Officer has exclusive authority to*
>
> *(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and*
>
> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.*
>
> *Right of employer*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).*

. . .

[137] Subsection 2(1) of the *PCAA* defines "employee" as ". . . an employee appointed under subsection 13(1)."

[138] Although the "statutory formalities" for the appointment of PCA employees are not as onerous as those contained in either the *PSEA* or the *NFA*, statutory requirements must still be met in order to be considered an employee. The exclusive authority to appoint rests with the CEO of the PCA. The CEO also has the exclusive authority to establish "standards, procedures and processes" for appointments. The *PCAA* also clearly provides that the *PSLRA* shall not be interpreted in a way that affects the authority of the CEO to "deal with" those standards, procedures and processes. Therefore, the statute requires that to be an employee an individual must be appointed by the CEO of the PCA, in accordance with any established standards, procedures or processes.

[139] It is also important to examine analogous federal statutes for guidance on the interpretation of the statutory provisions in the *PSLRA*. In statutory interpretation,

there is a presumption that the legislature intended to deal with the matters in question in an analogous fashion; see *Sullivan on the Construction of Statutes*, 5th edition, 2008, at page 416. For example, the Supreme Court relied on a departure from the pattern in similar legislation to support its interpretation of the power of tribunals to find parties in contempt; see *Chrysler Canada Ltd. v. Canada (Competition Tribunal),* [1992] 2 S.C.R. 394.

[140] The *Canada Labour Code* ("the *Code*") is analogous legislation to the *PSLRA*. In subsection 3(1), the *Code* defines an employee as ". . . any person employed by an employer and includes a dependent contractor . . . ." Paragraph 16(p) of the *Code* also gives the CIRB the power to decide any question of whether a person is an employee. There is no similar provision in the *PSLRA*. The fact that the CIRB was given the statutory power to decide whether someone is an employee leads to the implication that the PSLRB does not have such a power.

[141] In *Farrell*, the Federal Court addressed the issue of whether an individual could be a *de facto* employee of a separate employer. The *Canadian Security Intelligence Services Act* provides that the director has the exclusive authority to exercise the powers and perform the functions of the PSC under the *PSEA*, a different statutory framework than the *PCAA*. The Federal Court concluded that an appointment to employment in the public service must be made in accordance with statutory authority and that it cannot arise by other means.

[142] In *Catlos* (a case involving the application of the *Statistics Act*), the adjudicator concluded that he could address whether the grievor was an employee at common law or an independent contractor. There is little analysis in the decision. As noted by Mr. Rootham in his text, appointments under the *Statistics Act* require no formalities of appointment (see page 68). The *PCAA* does have statutory formalities of appointment.

[143] In its application, the bargaining agent described the class of employees subject to the application as ". . . all full-time and seasonal employees working at the Halifax Citadel National Historic Site that are paid through the Halifax Citadel Regimental Association." In the absence of appointments made to the PCA in accordance with the statutory formalities of the *PCAA*, the PSLRB is without jurisdiction to consider the application.

[144] The grievances referred to adjudication will also be outside the jurisdiction of the Board if the individuals were not appointed in accordance with the statutory requirements. Accordingly, the grievances of Ms. Surette-Aucoin and Mr. Hubley are dismissed. Mr. Kiley alleges that he was "actually hired by a PCA manager with the understanding that he would be an official PCA employee" (see bargaining agent submissions above). This is a different allegation than that of the other grievors. However, Mr. Kiley commenced employment in 1997, when Parks Canada was governed by the *PSEA*. In the absence of an appointment certificate, Mr. Kiley cannot therefore be considered an employee. His grievance is also dismissed.

[145] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[146] The objection to the jurisdiction of the PSLRB to hear this application and the grievances is allowed.

[147] The application is dismissed.

[148] The grievances of Mr. Kiley, Ms. Surette-Aucoin and Mr. Hubley are dismissed.

December 16, 1009.

Ian R. Mackenzie,
Vice-Chairperson and
Adjudicator