



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**BRIAN A. CATLOS**

Grievor

and

**TREASURY BOARD  
(Statistics Canada)**

Employer

*Before:* J. Barry Turner, Board Member

*For the Grievor:* Darren Hogan, Student-at-law

*For the Employer:* Robert Jaworski, Counsel

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Heard at Toronto, Ontario,  
January 20, 1998

## DECISION

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Brian Catlos, a former Census Commissioner, Statistics Canada, Toronto, Ontario, is grieving the termination of his employment. His grievance dated July 14, 1996 reads:

*IN BRIEF: I WAS DISMISSED FROM MY POSITION AS CENSUS COMMISSIONER ON 16 APRIL 1996 WITHOUT DUE CAUSE, WITHOUT ANY PREVIOUS WRITTEN NOTICE OF ANY INFRACTION, AND DESPITE MY COMMITMENT TO PERFORM MY DUTIES AS MY SUPERVISORS REQUESTED.*

*PLEASE SEE ATTACHED ADDENDA SHEET FOR DETAILS.*

The employer's letter of termination dated April 16, 1996 by Douglas Newson, Director, Statistics Canada - Census, Ontario Region reads:

*Statistics Canada requires that Census Commissioners work on a full time basis to complete their assignment accurately and within the prescribed schedules as directed by their supervisor. Census Commissioner job requirements were covered with you at the time of hiring and agreed to, by you, in signing the Terms and Conditions of Employment on February 29, 1996.*

*Your inappropriate behaviour, poor judgment and difficulty in following your supervisor's directions have contravened the Terms and Conditions of your Employment. As a result, I have authorized your dismissal effective today, April 16, 1996.*

*All of the maps, manuals, training materials, identification card and supplies which you were issued must be returned immediately. Any monies owing will be authorized for payment once all materials have been recovered.*

*Thank you in advance for your co-operation.*

Mr. Catlos is requesting the following corrective action:

*I SEEK PAYMENT OF THE BALANCE OF MY CONTRACT (INCLUDING RENTAL OF OFFICE) OF \$5893.75. I ALSO SEEK A LETTER ADMITTING I WAS DISMISSED WITHOUT DUE CAUSE AND PROCESS, AND THAT THIS BE NOTED IN MY PERSONNEL FILE.*

Mr. Catlos is also requesting the Public Service Staff Relations Board (PSSRB) to extend the time allowed to submit a grievance as may be permitted under section 63 of the *PSSRB Regulations and Rules of Procedure*, 1993. Section 63 reads:

*63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times*

*(a) by agreement between the parties; or*

*(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

I am being asked to decide three issues: whether I have jurisdiction to hear the merits of the grievance; whether or not the grievance is timely; and lastly, based on the merits, should the grievor's requested corrective action be granted. I agreed to first hear arguments on jurisdiction and timeliness.

The hearing lasted one-half day with no witnesses testifying and four exhibits submitted into evidence on consent of the parties.

#### Argument on Jurisdiction for the Employer

Mr. Jaworski argued the grievor was employed by the Minister responsible for Statistics Canada to work on the 1996 Census of Canada as a Census Commissioner under the *Statistics Act* and under certain Terms and Conditions of Employment (Exhibit E-2) that the grievor signed. The following are relevant extracts from that document:

#### **APPLICATION**

*You are employed by the Minister responsible for Statistics Canada for the 1996 Census of Canada under subsection 5(1) of the Statistics Act, R.S.C. 1985, c. S19. For the purpose of these terms and conditions of employment, any reference to "employee" means an employee hired under the provisions of Section 5(1) of the Statistics Act.*

...

### **MANAGERIAL RESPONSIBILITIES**

*Supervisors and managers from Statistics Canada shall not be restricted by these terms and conditions from exercising control over the quality and quantity of work being performed for Statistics Canada during the 1996 Census of Canada.*

### **AVAILABILITY FOR WORK**

*An employee is required to work the necessary hours to complete the assignment accurately and within the prescribed schedules as outlined by the supervisor. Working evenings and Saturdays is frequently necessary.*

...

### **SUPPLEMENTARY ACTIVITIES**

*An employee shall not engage in any supplementary activities, such as selling or soliciting, during any periods for which he/she is employed by Statistics Canada, unless otherwise agreed to by Statistics Canada.*

*An employee shall not enter into any discussions about politics or other controversial topics with respondents/members of the public, or involve themselves in debates with the media about the work.*

### **RESIGNATIONS**

*When an employee resigns before completing the assignment, the employee will be paid for the work performed, and for approved expenses incurred up to the date of resignation.*

### **DISMISSALS**

*In consultation with their manager, a supervisor may dismiss an employee for failure to perform duties or misconduct in the performance of duties. The employee will be paid for work performed, and for approved expenses up to the date of dismissal.*

...

### **RATE OF PAY**

*Census commissioners will be paid \$8,000 less **applicable deductions** for the performance of duties in the 1996 Census*

of Canada. This rate of pay is subject to Treasury Board approval.

...

### **PERIOD OF EMPLOYMENT AND AVAILABILITY FOR WORK**

Census commissioners are required to:

- begin work on a full time basis on the 1996 Census of Canada immediately after completing the first training session and remain involved with the census until the completion of duties, which should terminate on or about **June 28, 1996**; and
- work evenings and Saturdays, as necessary.

### **DUTIES AND REQUIREMENTS**

The Minister has prescribed the following duties and requirements for a census commissioner:

- to attend census commissioner training sessions given by Statistics Canada;
- to gain a thorough knowledge of the Census Commissioner District including a detailed description of the boundaries of each enumeration area by reviewing the maps provided and by travelling and becoming familiar with the actual communities and towns;
- to receive, check and distribute supplies;
- to take reasonable care of all documents, maps and supplies furnished by Statistics Canada and to return them immediately upon request;
- to distribute local publicity material designed to encourage goodwill and co-operation from the public;
- to recruit census representative candidates, test their abilities and recommend the most competent as census representatives in accordance with the guidelines provided;
- to conduct prescribed training courses to instruct census representatives in the performance of their duties;
- to check if Address Register procedures have been followed correctly;
- to recruit, test and train an administrative assistant;
- to establish contact with hotels, motels, institutions as well as some apartment building administration in preparation for the census;
- to supervise each census representative to ensure that the work is being done accurately and completely;
- to follow up cases of late mail returns (no questionnaire received), and non-cooperation (refusals) on the part of the public;

- to follow up on cases where the respondent does not wish to mail his/her questionnaire to the address on the mail return envelope;
- to submit reports to the Census Area Manager on scheduled dates;
- to check the assignment returned by each census representative to ensure that it is completed and accurate;
- to ensure that assignments which are rejected by the Census Commissioner's Quality Check or by Quality Control are followed up, complete and accurate;
- to send completed materials as authorized to the Regional Census Office of Statistics Canada;
- to have the full time use of a motor vehicle and a valid driver's license;
- to have reached the provincial or territorial age of majority or older prior to signing Terms and Conditions of Employment - Census Commissioner (Form 24B) and the start of duties;
- to fulfil the requirements of the job to its completion; and
- to perform other related duties.

Mr. Catlos signed an Oath or Affirmation of Office and Secrecy also in conformity with the *Statistics Act* on February 29, 1996 (Exhibit E-1). The grievor accepted a position of Census Commissioner for Rosedale Electoral District on March 5, 1996 (Exhibit E-3), even though his first day of work was actually March 4, 1996.

Mr. Jaworski argued that there is no reference to the Public Service Commission (PSC), to the *Public Service Employment Act* (PSEA), to the *Public Service Staff Relations Act* (PSSRA), or to a classification level in the Public Service in any of the documents before me; Mr. Catlos was simply not an employee of the Public Service, and by definition under the law has no recourse before the PSSRB.

He concluded that the grievor was hired by the Minister responsible for Statistics Canada under the *Statistics Act* to do a specific job for a short period of time. The position was to have lasted approximately four months but was terminated after approximately one and one-half months.

Mr. Jaworski referred me to the following definitions in the interpretation section 2 of the PSSRA:

*"employee" means a person employed in the Public Service, other than*

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,

(b) a person locally engaged outside Canada,

(c) a person whose compensation for the performance of the regular duties of the position or office of the person consists of fees of office, or is related to the revenue of the office in which the person is employed,

(d) a person not ordinarily required to work more than one third of the normal period for persons doing similar work,

(e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,

(f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,

(g) a person employed on a casual basis,

(h) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more,

(i) a person employed by or under the Board,

(j) a person who occupies a managerial or confidential position, or

(k) a person who is employed in a portion of the public service of Canada specified in Part I of Schedule I under a program designated by the Treasury Board as a student employment program,

and, for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only that the person ceases to work as a result of a strike or by reason only of the termination of employment of that person contrary to this Act or any other Act of Parliament;

“Public Service” means the several positions in or under any department or other portion of the public service of Canada specified in Schedule I,

*“grievance” means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees, except that*

*(a) for the purposes of any of the provisions of this Act respecting grievances, a reference to an “employee” includes a person who would be an employee but for the fact that the person is a person described in paragraph (f) or (j) of the definition “employee”, and*

*(b) for the purposes of any of the provisions of this Act respecting grievances with respect to termination of employment pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act or disciplinary action resulting in suspension, a reference to an “employee” includes a former employee or a person who would be a former employee but for the fact that at the time of the termination of employment or suspension of that person the person was a person described in paragraph (f) or (j) of the definition “employee”;*

Schedule I, Part I of the PSSRA lists Statistics Canada as a department in respect of which Her Majesty as represented by the Treasury Board is the employer.

In support of his argument, Mr. Jaworski referred me to the decision of the Supreme Court of Canada in *Canada (Attorney-General) v. Public Service Alliance of Canada* (1991), 80 D.L.R. (4th) 520 (“Econosult”) wherein Sopinka J. for the majority stated at page 530:

*... I have come to the conclusion that Parliament did not intend to confer jurisdiction on the Board (PSSRB) with respect to the labour relations of employees who are not members of the public service.*

Mr. Jaworski pointed out that Sopinka J. went on to say at page 532:

*... The positions in the public service are determined by the Treasury Board and appointments to the public service are within the exclusive right and authority of the Public Service Commission. Exceptions are carefully spelled out in the Employment Act*

*...*

*In the scheme of labour relations which I have outlined above there is just no place for a species of de facto public servant who is neither fish nor fowl. The introduction of this*



*special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.*

Counsel concluded this argument by referring again to Sopinka J. at page 533:

...

*In short, the situation is aptly summed up by Marceau J.A. speaking for the majority of the Federal Court of Appeal when he states (at p. 643):*

*There is quite simply no place in this legal structure for a public servant (that is, an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.*

He argued Mr. Catlos was not appointed by the Public Service Commission, but was appointed under subsection 5(1) of the *Statistics Act* which states:

*5. (1) The Minister may employ, in the manner authorized by law, such commissioners, enumerators, agents or other persons as are necessary to collect for Statistics Canada such statistics and information as the Minister deems useful and in the public interest relating to such commercial, industrial, financial, social, economic and other activities as the Minister may determine, and the duties of the commissioners, enumerators, agents or other persons shall be those duties prescribed by the Minister.*

*(2) The Minister may, for such periods as the Minister may determine, use the services of any employee of the public service of Canada in the exercise or performance of any duty, power or function of Statistics Canada or an officer of Statistics Canada under this Act or any other Act, and any person whose services are so used shall, for the purposes of this Act, be deemed to be a person employed under this Act.*

*(3) Any persons retained under contract to perform special services for the Minister pursuant to this Act and the employees and agents of those persons shall, for the purposes of this Act, be deemed to be persons employed under this Act while performing those services.*

He argued subsection 5 (2) allows for the use of public servants for statistics work, and thereby clearly differentiates between members of the Public Service and persons employed under subsection 5 (1) who are not appointed to the Public Service.

Mr. Jaworski concluded that Mr. Catlos is not an employee of the Public Service and therefore does not have access to the grievance procedure under the PSSRA.

With respect to PSSRB decision issued on May 1, 1985 (Board files 144-2-240 and 144-2-241) between the Public Service Alliance of Canada and Treasury Board, relating to an application for certification for senior interviewers and interviewers, Ministry of Supply and Services, Mr. Jaworski argued that even though the Board at the time found these persons were “employees” within the meaning of the PSSRA, the *Econosult* decision (supra) in 1991 held that the meaning of “employee” is a jurisdiction-conferring provision which has been set by Parliament at page 530:

*... 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.*

He reminded me that my authority to adjudicate a grievance under subsection 92 (1) of the PSSRA refers to “... where an employee has presented a grievance ...”, and argued that, in the matter before me, Mr. Catlos is not an employee and I have no jurisdiction in this matter.

#### Argument on Jurisdiction for the Grievor

Mr. Hogan on the other hand argued Mr. Catlos is an employee under the PSSRA and that the *Econosult* decision (supra) is to be distinguished from the grievance before me since *Econosult* (supra) is a standard of review as to who is an employee, not whether or not the Board can decide who is an employee. He argued only Parts I, II and III of the PSEA applied in the *Econosult* decision (supra) but Mr. Catlos' situation is under Part IV. He added that the reference by Sopinka J. to “the scheme of labour relations” is not relevant, since *Econosult* is a private sector company that hired

teachers, whereas Mr. Catlos was hired by a government department, Statistics Canada. He entered a T4 - 1996 slip for the grievor (Exhibit G-1) that refers to the word employee, that is Mr. Catlos, and to employer, that is Statistics Canada.

He argued that in the *Econosult* decision (supra), Sopinka J. stated at page 524:

*The Board acknowledged at the outset that if it were to be limited by what it considered to be mere “form”, there would be no controversy that the teachers in question were employees of Econosult. ...*

The Supreme Court of Canada found the teachers did not fit the definition of employee and that the Board was wrong in its determination since it cannot apply a broad definition of employee. He said Mr. Catlos is not like an employee; he is an employee and there is no legal definition that excludes him (emphasis mine).

Mr. Hogan argued that I must look at the definition of “employee” under the PSSRA, then the definition of “Public Service”, and then Schedule I, Part I, and deal with it all together to determine Mr. Catlos is indeed an employee.

He referred to Exhibit E-2, page 1, under Application, that refers to the words 'Statistics Canada' that are listed in Schedule 1, Part I of the PSSRA, and Rate of Pay on page 3 of Exhibit E-2 that refers to 'Treasury Board' also referred to in Schedule I, Part I of the PSSRA. He concluded Mr. Catlos must be considered an employee.

Mr. Hogan argued subsection 5 (2) of the *Statistics Act* merely makes it clear that persons already in the Public Service can assist the Minister if necessary. He argued paragraph 17 (1) (a) of the *Statistics Act* does not differentiate between a public servant referred to in subsection 5 (2), or a temporary employee described in subsection 5 (1) of the *Statistics Act*. Paragraph 17(1)(a) of the *Statistics Act* reads:

*17. (1) Except for the purpose of communicating information in accordance with any conditions of an agreement made under section 11 or 12 and except for the purposes of a prosecution under this Act but subject to this section,*

*(a) no person, other than a person employed or deemed to be employed under this Act, and sworn under section 6, shall be permitted to examine any identifiable individual return made for the purposes of this Act;*

Mr. Hogan argued that in *Econosult* (supra), the Supreme Court said the PSSRA, the PSEA and the *Financial Administration Act* (FAA) all determine who is a public servant. Mr. Hogan argued subsection 2 (1) of the PSEA, the definition of Public Service, “has the same meaning as in the Public Service Staff Relations Act”, as does the FAA in subsection 11 (1), and schedule 1.1 of the FAA also refers to Statistics Canada.

Mr. Hogan referred me to section 8 of the PSEA that reads:

*8. Except as provided in this Act, the 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.*

He argued the *Econosult* decision (supra) relied on section 8 in its reasoning, but said Mr. Catlos was indeed hired under another Act of Parliament, namely the *Statistics Act*, and I must look at his hiring under this Act and relate it to the PSSRA, where there is nothing to exclude Mr. Catlos from being an employee for our purposes.

He went on to say that, even though the application for certification for senior interviewers and interviewers employed by the Minister of Supply and Services at the time responsible for Statistics Canada, was not proceeded with (supra), the PSSRB’s conclusion at the time, that the persons referred to in this decision who were ultimately deemed by the PSSRB to be employees of Her Majesty in right of Canada as represented by the Treasury Board still stands, in spite of the *Econosult* decision (supra).

With reference to the *Cowalchuk* decision (Board file 166-2-26780), Mr. Hogan argued that even though Mr. Cowalchuk was specifically excluded from being able to present his grievance by virtue of paragraph 2 (1) (e) of the PSSRA, he was nevertheless included in Schedule I, Part I of the PSSRA as an employee just as Mr. Catlos should be.

Paragraph 2 (1) (e) of the PSSRA reads:

*“employee” means a person employed in the Public Service, other than*

...

*(e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,*

### Rebuttal argument for the Employer

In rebuttal argument, Mr. Jaworski argued that in Exhibit E-2, an employee is defined differently under the *Statistics Act*, since Statistics Canada is carving out someone else other than a public servant.

There is no reference in the *Statistics Act* to the PSEA or the PSSRA, since a hired individual has a personal contract between himself and the Minister and not between himself and the Treasury Board. He reminded me that even the Minister cannot appoint someone to the Public Service since this is the “exclusive right” of the PSC under section 8 of the PSEA. This was clearly articulated in *Econosult* (supra) by the Supreme Court of Canada where Sopinka J. said, at page 532 of the decision:

*... The positions in the public service are determined by the Treasury Board and appointments to the public service are within the exclusive right and authority of the Public Service Commission. Exceptions are carefully spelled out in the Employment Act.*

Sopinka J. went on to say:

*... A finding that they are employees of the Government of Canada simpliciter would clearly exceed the authority conferred by s. 33 and would fly in the face of s. 8 of the Employment Act which expressly reserves this power to the Public Service Commission.*

He argued, Mr. Catlos was only hired specifically for the census and did not get an appointment from the PSC, and that a rate of pay reference in Exhibit E-2 is only an administrative point of reference. Counsel reminded me that the Oath of Office (Exhibit E-1) refers to the *Statistics Act* only.

He concluded that Mr. Catlos was simply not employed in the Public Service; hence, I have no jurisdiction.

Argument for the Grievor on Timeliness - (Board file: 149-2-162)

Mr. Hogan agreed that the formal grievance was filed beyond the time frame prescribed in the *PSSRB Regulations and Rules of Procedure*, 1993, subsection 71 (3) that reads:

*(3) An employee shall present a grievance no later than on the twenty-fifth day after the day on which the employee first had knowledge of any act, omission or other matter giving rise to the grievance or the employee was notified of the act, omission or other matter, whichever is the earlier.*

He argued however that Mr. Catlos was not informed by the employer that he could do this until sometime around June 11 or 12, 1996. Mr. Catlos' employment was terminated on April 16, 1996 and he should have filed a grievance by May 11, 1996. The grievor received the grievance form on July 9, 1996 and grieved on July 14, 1996. The employer received his grievance on July 18, 1996. Under the circumstances, Mr. Hogan asked me to exercise my discretion under section 63 of the *Rules of Procedure* and grant an extension of time.

Mr. Hogan referred me to: *Quigley* (Board file 166-2-27258), *Wilson* (Board files 166-2-27330 and 149-2-165), *Creamer* (Board file 166-2-27300).

Argument for the Employer on Timeliness

Mr. Jaworski argued it is fair to say the delay was inadvertent, but I must first find whether or not Mr. Catlos is an employee under the PSSRA, since the reason the employer did not tell him he could grieve, is because it believed he was not an employee. He also argued that I should not exercise my discretion lightly since the *Rules of Procedure* should be followed and respected. Counsel advised me that Mr. Catlos has a claim against Statistics Canada in the Ontario Court (General Division - Small Claims) that is in abeyance pending my decision.

In rebuttal, Mr. Hogan argued it is not for the employer to decide if and when the law applies but it should have told Mr. Catlos about the grievance process when he was terminated.

I advised the parties that I would issue my decision regarding jurisdiction and timeliness before proceeding on the merits.

Subsequently, the following matters came to my attention. By Order-in-Council SOR/87-644 dated November 6, 1987, the Statistics Survey Operations had been added to Part II of Schedule I to the PSSRA, thereby becoming a new separate employer. The Regulatory Impact Analysis Statement of SOR/87-644 states the following under the sub-heading Anticipated Impact:

*The change regularizes the employment status of some 1400 enumerators employed across the country. A negotiation process will take place with the bargaining agent representing employees hired under section 5(1) of the Statistics Act. ...*

On June 27, 1988, the Board certified the Public Service Alliance of Canada as bargaining agent for a bargaining unit comprised of all employees of the Statistics Survey Operations “who are engaged in the carrying out of business surveys”: Public Service Alliance of Canada and Statistical Survey Operations (Board file 144-24-282). Essentially, this application for certification dealt with the same persons whom the Board had on May 1, 1985 found to be employees under the relevant provisions of the PSSRA with the Treasury Board as their employer, notwithstanding the fact that they had been employed under section 5 of the *Statistics Act*.

At my request, the Assistant Secretary of the Board sent the following letter dated February 17, 1998 to counsel for the employer:

*In relation to your preliminary objection to his entertaining Mr. Catlos' grievance on the ground that Mr. Catlos was not an employee within the meaning of the Public Service Staff Relations Act (PSSRA) because he was engaged under subsection 5(1) of the Statistics Act, Mr. Turner has asked me to refer you to SOR/87-644 of November 6, 1987 which added the Statistics Survey Operations as a separate employer under Part II of Schedule I to the PSSRA. In particular, Mr. Turner refers you to the Regulatory Impact Analysis Statement which immediately follows the amendment to Schedule I. In addition, Mr. Turner wishes to draw your attention to the Board's decision in Public Service Alliance of Canada and Statistical Survey Operations issued on June 27, 1988: Board file 144-24-282.*

*Mr. Turner would appreciate receiving your views regarding what effect, if any, SOR/87-644 and the Board's decision of June 27, 1988 would have on his disposition of your preliminary objection. If you have any submissions to make on this matter for Mr. Turner's consideration, please forward*

them to the Board by no later than March 3, 1998. The grievor will, of course, be afforded an opportunity to respond to your submissions and you will be given an opportunity to reply. We are also bringing this matter to the attention of the Public Service Alliance of Canada and the Statistics Survey Operations to enable them to determine whether they have any interest in it.

A copy was sent to the grievor's representative, the Statistics Survey Operations and the Public Service Alliance of Canada.

The written submissions of the parties are set out in full as follows:

Submissions of counsel for the employer:

*Statistics Canada and Treasury Board maintain that census commissioners hired under the Statistics Act are not "employees" within the meaning of the Public Service Staff Relations Act, R.S.C. 1985, c. P-35 and that the PSSR Board has no jurisdiction to hear this grievance.*

*Brian Catlos was employed under a short-term contract with Statistics Canada (the Minister of Industry) as a census commissioner specifically for the 1996 Census of Canada (see Exhibit E-1 at page 1 - General Clauses - Application; and page 3 - Specific Clauses - Rate of Pay). This was not a classified position in the Department, but merely an appointment under the Statistics Act.*

*SOR/87-644 and PSAC and SSO (PSSRB File No. 144-24-282) concern the certification of interviewers/enumerators for collective bargaining purposes, who conducted business surveys on an ongoing basis for Statistics Canada. Unlike Mr. Catlos, I am advised that the interviewers/enumerators were classified employees who enjoyed a continuous, long-term relationship with Statistics Canada. They relate exclusively to 1400 interviewers/enumerators, rather than (sic) the approximately 35,000 people contracted for the 1996 Census of Canada. The latter, including Mr. Catlos, are hired once every five years for periods ranging from a few weeks to a maximum of four months.*

*The interviewers/enumerators were tasked with carrying out business surveys, rather than census operations. Their duties are described in detail in PSSRB File No. 144-24-282. Yet, nowhere is there any reference to the conduct of a census. Unlike Mr. Catlos, they became subject to a collective agreement and would pay union dues. Mr. Catlos was not*



*subject to any such agreement and did not pay dues (see Exhibit E-1 at page 3 - Specific Clauses - Deductions).*

*Please note that the preamble to SOR/87-644 states "... on the recommendation of ... and the Treasury Board ...". It also indicates that the amendment to Part II of Schedule I to the PSSRA was discussed and agreed to by Statistics Canada and the Treasury Board Secretariat. Here we have Statistics Canada and Treasury Board opposing the matter.*

*Consequently, we submit that neither the Order-In-Council nor the Board's earlier decision bear upon on the issue at hand.*

*For these additional reasons, the grievance should be dismissed.*

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

*Dated at Toronto, this 2nd day of March, 1998.*

Submissions of the representative of the grievor:

*Brian Catlos maintains that census commissioners hired under the Statistics Act are "employees" within the meaning of the Public Service Staff Relations Act, R.S.C. 1985, c. P-35 and that the PSSR Board therefore has jurisdiction to hear his grievance.*

*It is conceded by the Grievor that SOR/87-644 and Public Service Alliance of Canada and Statistical Survey Operations (PSSRB File no. 144-24-282) deal primarily with the certification of interviewers/enumerators for collective bargaining purposes. However, the Grievor submits that both the statutory amendment and this decision of the PSSRB serve to clarify certain issues raised at the hearing of the jurisdictional element of this grievance.*

*It was the submission of the Respondent (and it appears to remain their claim) that individuals employed under s. 5(1) of the Statistics Act are excluded from the possibility of being "employees" as that term is defined in the PSSRA. To rebut this claim the Grievor relied in part on Public Service Alliance of Canada and Treasury Board, (PSSRB File No. 144-2-240, and 241). This case is essentially a prelude to PSAC and SSO, wherein the Board decided that interviewers, and enumerators hired pursuant to s. 5(1) of the Statistics Act were "employees" as that term is defined in the PSSRA and therefore were eligible for the collective bargaining scheme detailed in the PSSRA.*

*At the hearing of the jurisdictional element of this grievance, Mr. Turner pointed out to both parties that the PSAC had abandoned their certification attempt subsequent to the decision in PSAC and Treasury Board. It was the Respondent's submission that this should have some effect on the deference to be paid to the original decision (in addition to the submission that this case had been decided wrongly). The Grievor's submission was that this subsequent abandonment by the PSAC did not affect the merits of the original decision.*

*It appears from the statement of facts in PSAC and SSO that the abandonment of their certification attempt by the PSSRA was the result of the statutory amendment which changed the respondent of the individuals involved, and a decision by the PSAC to seek the certification of only a segment of the originally proposed bargaining unit, the Business Surveys Group. This case clearly relies upon and adopts the findings in PSAC and Treasury Board, and the grievor again submits that the reasoning of the Board in that case is correct and ought to be followed here.*

*Further, it is clear that the statutory amendment found in SOR/87-644 is founded upon the position that those who are employed pursuant to s. 5(1) of the Statistics Act are employees, and are eligible for collective bargaining. The amendment is a response to this change in the labour relations situation between Statistics Canada and its employees.*

*To distinguish PSAC and SSO, the respondent points out the difference between the number of interviewers/enumerators, and the length of their employment. The Grievor respectfully submits that neither factor has any impact on the outcome of this case. The difference in numbers is nothing more than a function of the fact that the PSAC chose this particular group of individuals to seek certification for; it bears no relevance to the status of either those individuals, or of others in the same position for whom the PSAC was not, or has not yet sought certification to serve as their bargaining agent. Further, the term of employment of Census Commissioners does not serve to distinguish them from those found to be employees in PSAC and Treasury Board or PSAC and SSO. The PSSRA contains exclusions under s. 2, the interpretation section of the Act. The definition of employee contained therein excludes only those whose term of employment is for less than (sic) 3 months. Brian Catlos' term of employment was to run for a period of four months. It is respectfully submitted that the Respondent can not set out its own criteria for what an appropriate period of employment is to allow recognition as*

*an employee; such exclusions are specified by the applicable legislation, in this case the PSSRA.*

*The Respondent also seeks to distinguish Mr. Catlos' employment on the basis that he was not subject to a collective agreement and did not pay union dues. With respect, this argument is based on reasoning which attempts to put the cart before the horse. Prior to the decision in PSAC and Treasury Board and PSAC and SSO, Statistics Canada did not consider the individuals involved in these cases to be employees, the same position Mr. Catlos is now in. It was the decisions of the Board in these cases which put these employees in the position where they were eligible for access to a collective agreement, and it is only as a result of any such agreement that they would be required to pay union dues. The Respondents argument would appear to require that Mr. Catlos become a member of a bargaining unit, and pay union dues (both of which are impossible as long as he is not considered an employee) before the Respondent will accept his status as an employee. The grievor respectfully submits that this argument has no merit.*

*Finally, the Respondent submits that the fact that Statistics Canada and the Treasury Board oppose the adoption of the position submitted by the grievor should have some bearing on the outcome of the board's decision. To support this position, the Respondent relies upon the fact that the wording of the preamble to SOR/87-644 appears to indicate that the amendment was discussed with and agreed upon by Statistics Canada and the Treasury Board. With respect, this amendment deals not with the legal position/classification of the employees, but with the creation of a new respondent to deal with the newly defined employees after the decision in PSAC and Treasury Board.*

*The decision of the Board that the individuals affected by SOR/87-644 were employees under the PSSRA was already at that point a fait accompli, despite the opposition of Statistics Canada and the Treasury Board. The amendment was introduced as a means of regularizing the newly accepted status of these employees, and clearly the input of both Statistics Canada and the Treasury Board was solicited in order to determine how they could most effectively deal with this new situation. With respect, the adoption of the position which the grievor submits to be the correct one based on the applicable legislation, is not dependent upon the 'consent' of the Respondent. The statutory scheme which regulates the Respondent and its relationship with its employees is not one which the respondent can choose to or refuse to recognize, or which requires its approval.*

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*Consequently, the Grievor submits that the Order-In-Council and the Board's earlier decision serve to both clarify and support the submissions originally presented.*

*For these additional reasons, the respondent's jurisdictional objections should be dismissed.*

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Dated at Toronto this 18<sup>th</sup> day of March, 1998.*

It should be noted that neither the Public Service Alliance of Canada nor the Statistics Survey Operations responded to the Board's letter of February 17, 1998.

### Decision

Mr. Catlos was employed as a temporary employee, for what was to be a period of approximately four months and \$8,000. according to his rate of pay (Exhibit E-2), for a specific purpose of being a Census Commissioner for the 1996 Canadian census. He worked in fact from February 29, 1996 until April 16, 1996, a period of less than three months.

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." (underlining mine)

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. According to the Regulatory Impact Analysis Statement of SOR/87-644,

which can be used as an aid to interpretation since the words “Statistics Survey Operations” provide no guidance as to who the employees of this employer would be, this regulatory amendment was designed to regularize “the employment status of some 1400 enumerators employed across the country”.

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. Unlike the employees in the Business Surveys bargaining unit, Mr. Catlos was required to work off the employer’s premises, and I do not have much indication as to how much control he was subjected to by Statistics Canada. However, I do not believe it is necessary for me to resolve this matter in light of my conclusion on the second issue.

Second, if the grievor is an employee under the PSSRA, then who is his employer? It is either Treasury Board or the Statistics Survey Operations. According to the Regulatory Impact Analysis Statement of SOR/87-644, the Statistics Survey Operations was added to Part II of Schedule I to the PSSRA to regularize “the employment status of some 1400 enumerators employed across the country.” According to the Concise Oxford Dictionary “enumerate” means: “*v.t. count; specify, mention one by one, (items) ... enumerator n. (esp. person employed in census-taking)*”.

Clearly, the grievor as a Census Commissioner was engaged in census-taking. Therefore, if he is an employee, his employer is the Statistics Survey Operations rather than the Treasury Board.

Accordingly, the grievor has submitted his grievance to the wrong employer. Therefore, as an adjudicator appointed under the PSSRA, I have no jurisdiction to entertain this grievance.

On the question of timeliness, albeit now a moot point, I would have considered extending the time as requested.

For all these reasons, this grievance is denied.

**J. Barry Turner,  
Board Member.**

OTTAWA, July 7, 1998.