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Parliamentary Employment
and Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

HOUSE OF COMMONS SECURITY SERVICES EMPLOYEES ASSOCIATION

Applicant/Bargaining Agent

and

HOUSE OF COMMONS OF CANADA

Respondent/Employer

RE: Application under Section 24 and
Reference under Section 70 of the
Parliamentary Employment and Staff Relations Act

Before: M. Korngold Wexler, Deputy Chairperson

For the Applicant/Bargaining Agent: Steve Waller, Counsel

For the Respondent/Employer: Stephen Bird, Counsel

Heard at Ottawa, Ontario,
April 3 and 19, 1996.

On September 20, 1995, the House of Commons Security Services Employees Association (the Association) filed an application under section 24 and a reference under section 70 of the Parliamentary Employment and Staff Relations Act (the PESRA).

The Association applied to the Public Service Staff Relations Board under section 24 for a determination as to whether nine persons employed by the House of Commons of Canada are employees in the bargaining unit for which the Association was certified as bargaining agent by the Board on March 24, 1987 (Board file 442-H-7). By virtue of the reference under section 70 of the PESRA, the Association requests the Board to enforce the employer's obligation under clauses 2.01(b) and 3.01 to apply the provisions of the collective agreement to the nine employees in question and to recognize the Association under clause 6.01 as the exclusive bargaining agent of all employees in the bargaining unit. The collective agreement in question is between the House of Commons and the Association covering employees in the protective services group bargaining unit; it was signed by the parties thereto on December 14, 1990.

THE EVIDENCE

On March 24, 1987, the Board issued a certificate recognizing the Association as bargaining agent for all employees of the employer (House of Commons) in the protective services group.

The Association called Messrs. Gilles Despaties and Michael Hodgins to testify. The employer called Mr. Brion Brandt and, in addition, the parties submitted 10 exhibits.

These proceedings raise the question of the status of nine constables employed at the House of Commons. The employer alleges that these nine constables are hired for a specified period of less than six months and are therefore not employees under the PESRA and not covered by the collective agreement. The Association, on the other hand, submits that these nine persons have worked as constables since the fall of 1993 or 1994 and their employment has been arranged through a series of term contracts for a period of less than six months, with breaks in between. The Association claims that the employer's pattern of behaviour is designed to avoid terms of six months or more. However, in the Association's view, paragraph (c) of the

exclusion to the definition of employee in section 3 of the PESRA ("*a person employed on a casual or temporary basis, unless the person has been so employed for a period of six months or more*") does not apply because these nine constables are not employed on a casual or temporary basis. The nine constables in question are: D. Cardinal, P. Gendron, R. Goulet, M.A. Healey, Y. Huppé, J.Y. Kenney, R.O.J. Limoges, S.G. Picard and Y.E. Renaud (Exhibit 2).

Mr. Gilles Despaties testified that he has been employed in the Security Services at the House of Commons since March 1981. He explained that the bargaining unit is comprised of constables, corporals and sergeants; however, the Security Services also include staff sergeants, Group Commander, the Deputy Director and Director who are all excluded from the bargaining unit.

Mr. Despaties stated that he started his employment in March 1981 as a constable. He was promoted to corporal in 1990 and to sergeant in April 1995. Since April 10, 1995, his job title is Operations Data Specialist. However, he has been performing the duties of that position since early 1994. As an Operations Data Specialist, he is responsible for the scheduling of work. He ensures that the operational requirements are met and that the required posts are properly staffed. He is the Data Base Administrator and, as such, he inputs into the system who is going to work which platoon and on what date. He inputs also the master pattern of shifts that must be followed. He produces the monthly platoon report. Mr. Despaties added that his scheduling responsibilities cover both indeterminate and temporary constables hired on contract. Mr. Despaties schedules the temporary constables during the period they are employed.

Mr. Despaties added that the House of Commons does provide training to new recruits who are going to be working as constables. Mr. Despaties inputs in his scheduling data the training period for new constables which is anywhere between eight to 10 weeks. Since 1994, there has been no difference in the training of indeterminate and temporary constables.

Mr. Despaties submitted in evidence the "New January 2nd, 1995 Uniform Unit Platoon Schedule Master Rotation" (Exhibit 3) showing that 15 employees constitute a platoon and there are 10 platoons to a shift. Exhibit 3 covers a 10-week period. The

employees who work shift work are organized into platoons. Mr. Despaties does not work shift work; his hours of work are 8:30 to 4:30, Monday to Friday.

A platoon provides security to employees, Members of Parliament and the buildings of the House of Commons. The platoons control access to entry points (posts) to those buildings; they ensure security, e.g. within the Galleries of the House of Commons and they also do patrols. There is one platoon per week dedicated to the Galleries. Certain posts are manned seven days a week, e.g. the main entrances of the buildings and the constable on patrol. Some posts are manned five days a week, e.g. the freight entrances and mostly secondary entrances. Some posts are manned 24 hours a day. Moreover, in cases of emergency, there are additional services required such as in cases of first aid, evacuation, armed intrusion, fire, etc. Sometimes, although not often, Mr. Despaties may be called upon to provide security outside his normal hours of work.

Mr. Despaties explained that sometimes the House of Commons is in session and sometimes it is in recess. Mr. Despaties knows at the beginning of the year of certain recesses which recur every year, such as the Easter break, the summer and Christmas recesses, etc. Some non-recurring recesses are the referendum and election period. When the House of Commons is in recess, the work of the 10 platoons is affected. The one platoon per week dedicated to the Galleries would not be required when the House of Commons is in recess. Thus, some posts are redundant and those scheduled on the redundant posts become leave relief. In summer and during Christmas, the House of Commons recesses and employees are granted leave. The leave relief fills those absences. Mr. Despaties is informed when a member of a platoon is going to be away or is absent for any reason. Exhibit 4 is the 1996 forecast of the scheduled recess periods of the House of Commons. There are 135 projected sitting days for 1996. When Mr. Despaties does the scheduling, he knows in advance who has applied for leave. Mr. Despaties produced Exhibit 5, the nine temporary constables' assignment history. Mr. Despaties pointed out that the nine temporary constables were always struck off strength during a recess period. Moreover, every time they return to work, they return to the same position and the same platoon. In general, Mr. Despaties is informed orally or by Electronic Mail (E-Mail) that a particular constable is struck off strength because "his contract is completed or terminated". Mr. Despaties is informed of this up to two weeks in advance. In addition,

Mr. Despaties also knows well in advance when the temporary constable will return to work. He is also informed of his return verbally or by E-Mail by Ms. Jocelyne Laporte, the Personnel Liaison Officer, in general two weeks ahead of time. Mr. Despaties added that sometimes he already knows at the time of the temporary constable's departure the exact date when he will be coming back to work.

In late 1994, there was a buy out of indeterminate employees in the security services. Sixteen employees accepted the buy out and left the service. Since this buy out, and sometime in February 1996, Mr. Despaties has added three indeterminate constables to the schedule. These three new indeterminate constables had already been employed at the House of Commons. They applied in response to a competition and went through the recruit training. They first started as acting constables and they later were confirmed in their positions.

Mr. Despaties submitted in evidence organizational charts covering the period March to September 1995 (Exhibit 6). These charts show that all nine temporary employees have been assigned to their respective platoons all throughout the year. Furthermore, five indeterminate constables have been on long-term disability and another five indeterminate employees of the bargaining unit have been on leave without pay. Mr. Despaties explained further that he prepared the schedules for the period June 1994 to September 1995 for each of the 10 platoons and the nine temporary constables are shown on these schedules (Exhibit 7). Mr. Despaties prepared these schedules, including the temporary constables as part of his personnel. In the interests of continuity and supervision, Mr. Despaties keeps the same staff, employees, on each platoon and, in this regard, he includes the temporary constables. There are 13 constable positions to be filled on each platoon and, as of September 1, 1995, Mr. Despaties was not able to fill all these 13 positions on each of the 10 platoons without using the nine temporary constables. He did not have enough indeterminate constables to fill the full complement of constables on each of the 10 platoons. When Mr. Despaties prepares the schedules, he assumes that all nine temporary constables will resume work. This is an assumption he made for the session starting April 15, 1996.

The employer has a minimum manning policy and each post must be covered. If a constable is absent, a non-assigned leave relief is used to cover the absence. The leave relief can cover an absence on any platoon. Mr. Despaties declared that, if the 10 employees on leave without pay or long-term disability returned to work, there would be too many constables to be assigned. Thus, the indeterminates would displace the temporary constables because of lack of work. The temporary constables would be surplus to requirements. However, Mr. Despaties added that as of April 3, 1996, of the 10 constables absent:

– Brebanov is no longer employed on a platoon; he is presently in administration support;

– Hogue is still on long-term disability;

– Clohosy returned to work for a short period and he is again on long-term disability;

– Charron and Dériger have since retired;

– Elie is still on leave without pay;

– Power is back at work on the platoons;

– Bois has since left the service;

– Houle is back on platoon #1; and

– Racine has since retired.

Mr. Michael Hodgins has been with the House of Commons since November 1979, first with the Parliamentary Restaurant Services and then, since October 1982, with Security Services. Mr. Hodgins started as a constable and was promoted to corporal in the fall of 1986 and to sergeant on December 15, 1993. He is responsible for platoon #3. He has under his supervision on platoon #3, three of the temporary constables in question. The three temporary constables in question are Messrs. Cardinal, Healey and Huppé. They started to be assigned regularly to platoon #3 as of January 1995. They replaced indeterminate constables who had retired - Messrs. Robert Cameron, André Charette and Robert Dériger. As a platoon

sergeant, Mr. Hodgins is responsible for the monitoring and evaluation of the performance of the 14 employees who fall under his supervision. He coaches them and administers their requests for leave. Mr. Hodgins does not man a post. He has a corporal to assist him in his supervisory duties and, in case of emergency, he or the corporal can respond as "the commander-in-charge".

In general, the duties of the constables assigned to platoons relate to the protection of persons and property in the House of Commons. They may render first aid and they are the first response in any emergency situation. As of January 1995, the number of constables on each platoon has been reduced to 13. In 1994, there used to be 14 and at one time, there were 15 constables on each platoon. Thus, there have been systematic closings and reductions in posts. Mr. Hodgins described the changes that have occurred. The East Entrance West Block has been closed; the Library of Parliament is no longer a post and there is no longer a 24-hour presence. The relief personnel on the 12-hour night and day shifts have been dropped and there is no longer a three to 11-hour relief in the Centre Block. Moreover, the team that worked the main door has been reduced by one person; the hours of certain operations were shortened on certain posts and the amount of work to be done was reduced. In general, on any given shift they used to have three reliefs on the 12-hour shift and that has been reduced by one since 1994. Post Relief #3, which provided relief during supper, rest breaks and to cover short notice leaves on 12-hour shifts, has been removed.

At present, there are 136 indeterminate constables, sergeants and corporals on strength with the service. Mr. Hodgins was told by the Group Commander, Mr. Robert Buss, that this number will change. The plan is to reduce this number further to 130 employees and fill the vacant positions with temporary "employees" (employed for less than six months).

Mr. Hodgins declared that the three temporary constables assigned to his platoon have always returned to his platoon. When one of these temporary constables is approaching the end of his "contract", he receives a termination letter. These letters give notice of the termination of the "contract". However, the temporary constables know when they will be coming back to work. Mr. Hodgins elaborated further that when on March 27, 1996, Messrs. Huppé, Healey and Cardinal received the written

notice of the termination of their current "contract", they opened their respective letters in from of him. They told Mr. Hodgins that they would be returning to work on April 15, 1996. It was Mr. Hodgins who asked the three of them when they would be returning to work because "this is the way it has always been". These three temporary constables have "always" returned to Mr. Hodgins. Mr. Hodgins has never received anything in writing notifying him when the temporary constables would be struck off strength or returning to work. If the temporary constables do not return to work, someone else's name will appear on the weekly change of duties roster. However, since 1994, these three temporary constables have always returned to platoon #3. The procedure has always been the same. They receive their notification of the termination of their "contract" in writing and they inform Mr. Hodgins of this and their date of return to work. Mr. Hodgins added that, even when the House of Commons is in recess during the summer period, he needs these three temporary constables. He requires the full complement of 13 constables at all times. Mr. Hodgins explained further that, if he did not have these three temporary constables, his platoon would not be able to do its job.

The temporary and indeterminate constables receive the same training and attend the same training course which lasts eight to 10 weeks. There are no differences in their duties and responsibilities. Moreover, there are no differences in the posts and assignments given to the temporary and indeterminates. There are no differences in the way these constables relate to another platoon or Members of Parliament. They work the same hours of work. However, there are differences concerning their participation in the Public Service superannuation plan; they lose their sick leave credits at the end of each "contract" and they are not entitled to be paid annual leave credits (they receive 4% pay in lieu of vacation leave). The temporary constables are considered members of the platoon; they are part of the 15-member (platoon) family. The fact that the temporary constables are on a different legal "contract" has an adverse impact on the morale of the platoon. Mr. Hodgins prefers having these three temporary constables return to his platoon because of continuity. The members of his platoon know what to expect and they work as a team. As a supervisor, it is easier for Mr. Hodgins to supervise the same temporary constables because he already knows their shortfalls and strengths. Mr. Hodgins prepares their performance appraisal reports; he evaluates their performance.

Mr. Brion Brandt has been the Deputy Director, Security Services, House of Commons, for over four years. He is responsible for special functions including the Human Resources functions such as Human Resources Planning, Finance, Policy and Development of Training. He is a member of the Management Committee in charge of the determination of the resource level for platoons. Mr. Brandt assumes responsibility for the management of the overall service when the Director is absent.

Mr. Brandt declared that there are 230 full-time "equivalents" (P/Y) and 151 of these are uniformed people assigned to platoons. He explained the reason why the employer uses a temporary workforce. The House of Commons operates on sessional and non-sessional periods. During recesses, fewer people are required to staff certain posts and, in this regard, Mr. Brandt submitted in evidence a projected calendar of sitting days for the period 1992 to 1996 which had been prepared in 1992 (Exhibit 8). The relief requirements occur on a planned basis and replacements are therefore needed. The employer determines when they think they will need temporary employees and a letter offering these "term contracts" is given out to the temporary constables. This letter indicates the period covered by these terms (Exhibit 10). None of these temporary constables are offered contracts for a period in excess of six months. When consecutive contracts are offered to the nine temporary constables, the employer calls these "extensions" (Exhibit 9). At the end of these less than six months contracts, the nine constables in question receive a letter advising them that their services are no longer required and a termination date is provided. Then, they receive a further letter offering them another term of less than six months. The employer gives them a two-week notice in this regard and attached to the offer is an annex where the temporary "employee" can indicate whether or not he accepts this offer. Mr. Brandt added that the nine temporary constables have always returned to work on the same platoons. The reason for this is the maintenance of continuity of personalities, evaluations, etc. This continuity is beneficial to the employer and the temporary constables.

Mr. Brandt added that the nine temporary constables are not entitled to the same terms and conditions of employment as the indeterminate employees. Both types of "employees" work side by side and do the same work. However, the temporary constables are not entitled to pay increments whereas the indeterminate employees are so entitled. They are not covered under the medical (health) and dental

plans; they do not participate in the superannuation plan; they receive no paid vacation leave, etc. Mr. Brandt recognized that in some instances, the House of Commons saves money when it uses temporary instead of indeterminate employees.

The temporary employees are used for relief purposes during the recesses and long-term absences of indeterminate employees. The employer encourages its security staff to take their leave during the non-sessional periods.

The employer has an ongoing plan to meet operational requirements and the number of employees on long-term absences may vary from year to year. Mr. Brandt added that, when the employer needs new recruits, a competition for constable positions is held. A poster is issued and interested persons apply. The results of these competitions are sometimes used to fill indeterminate positions. The interested candidates go through testing and training and, if successful, the new recruits are found pre-qualified to be assigned to a platoon. They are then sent for training and placed on an eligibility list. In the case of the nine temporary constables in question, they did start by applying for indeterminate positions. Their rank on the competition they applied for is kept on record and could be used to offer them indeterminate employment. Normally, the employer would consider these nine temporary constables first and offer them indeterminate employment.

Mr. Brandt explained that in the case of Mr. Picard and others, they worked for a continuous period in excess of six months in 1994. These temporary constables were kept for more than six months because of operational requirements and their contracts were "extended". Moreover, as an example, Mr. Picard was given an offer for a new contract on September 5, 1995 with a starting date of September 18, 1995 (Exhibit 10). Mr. Brandt knew in advance that he needed Mr. Picard as of September 18 because recess was to end September 17. These dates had been planned in advance. Thus, Mr. Brandt knew he would need the temporary constables to fill various posts. The breaks between contracts for all nine temporary constables seem to come up during the same periods (Exhibit 9). The need for the temporary employees does not change; it is constant.

ARGUMENTS

Mr. Steve Waller, counsel for the Association, submitted that the primary issue in this case is whether the nine constables in question fall under the exclusion contained in paragraph (c) of the definition of employee provided in section 3 of the PESRA. The Association is seeking a declaration that these nine constables are included in the bargaining unit. Therefore, the question is whether they are employees under the PESRA and, if they are, the second question is whether they are also entitled to benefits under the collective agreement. Mr. Waller added that he was not basing his argument on equity but the equities were strongly in favour of finding that these nine persons fall under the definition of employee. Mr. Waller argued that it is unfair that these nine persons, who are part of the platoons and are working the same hours as the indeterminate constables, are not afforded the same salary and benefits as those in the bargaining unit.

Mr. Waller referred to the definition of employee under the PESRA. He pointed out that the nine constables are employed by the employer and the question is whether the employer has arranged its affairs in such a way that they fall under the exception provided in paragraph (c) of the definition of employee in section 3 of the PESRA. For these nine persons to be excluded from the definition of employee, we must find that they are employed on a casual or temporary basis for a period of less than six months. Mr. Waller submitted that the evidence established clearly that they are not excluded from the definition and the six-month employment period is totally irrelevant. In this regard, Mr. Waller cited the decision of Deputy Chairperson P. Chodos in the Canadian Air Traffic Control Association (CATCA) rendered on June 24, 1991 (Board file 169-2-499) where he found that a person employed for a three-year term was an employee under the pre-1993 version of the Public Service Staff Relations Act (PSSRA) (which at the time contained the identical definition as the one under the PESRA; the definition of employee under the PSSRA was amended in 1993). Mr. Chodos decided that this three-year term was not a transient relationship and that it had not been made to supply a passing need. Therefore, the person in question could not be considered to be employed on a temporary basis and he fell within the definition of employee in the PSSRA from the first day of his employment. Mr. Waller explained that in the case of the nine constables in question, there is a history of employment and employer's staffing requirements. According to

Mr. Waller, it is clear that the employer is using these nine "temporary" persons to try to escape the application of the PESRA and the reasoning in the CATCA decision should be applied to the evidence in this case. Mr. Waller referred also to the dictionary definition of term and temporary. The nine constables do not have a transient relationship with the employer. It is important to consider the role these nine persons play for the employer and it is definitely not temporary. The length of the period of the term is irrelevant. What must be looked at is the character of the employment and whether it fills a need of the employer which is not a transient one. Mr. Waller pointed out that since the CATCA decision, Parliament has amended the PSSRA so that the distinction between casual and term (for a period of less than three months) is now clear.

Mr. Waller referred also to the following decisions:

Canada (Attorney General) v. Alliance of Canadian Cinema, Television and Radio Artists (1991), 135 N.R. 70 (F.C.A.);

Milne (Board file 166-2-18376);

Rooney (Board file 166-2-21306);

Canada (Attorney General) v. Degaris [1994] 1 F.C. 374 (F.C.T.D.)
and Board files 166-2-22490 and 22491;

Wenthworth County Board of Education and Canadian Union of Public Employees, Local 1572 (1984), 14 L.A.C. (3d) 310;

Ault Foods Ltd. and Retail, Wholesale, Dairy and General Workers' Union, Local 440 (1994), 42 L.A.C. (4th) 289

Mr. Waller reviewed the evidence. He concluded that in no way are these nine constables temporary or casual employees. The most compelling evidence is the employment history and the employer's use of them. The employer has on an ongoing basis a need for them and this need is for an indeterminate period. In this regard, Mr. Waller relies on Exhibit 5 which is the "Term Employees Assignment History" covering the period 1993 to April 1996. These nine persons have become regular members of the 10 platoons. They are needed and this is particularly true since the employer has reduced the number of constables per platoon from 15 to 14 to 13 and 16 indeterminate employees took buy outs. Mr. Despaties declared that he

needs these nine constables to fill ongoing needs. Moreover, Messrs. Cardinal, Healey and Huppé are replacing three indeterminate constables who have retired. The "terms" are filling the same indeterminate need. Even though they may be struck off strength for a couple of weeks, the need remains. The pattern is that they are off intermittently for two or three weeks, two or three times a year, so as not to meet the six-month threshold under the definition of “employee” in the PESRA and at the same time the need remains. Mr. Waller pointed out that the provisions of the collective agreement do entitle employees to vacation leave of between three and five weeks a year and this seems to correspond with the "periods of absence" the nine constables are placed on. The fact remains that the nine "terms" fill the same need as the indeterminate constables and do perform the same work. The employer considers the nine constables members of the platoons and this is demonstrated in Exhibit 6, the Security Services organizational charts covering the period March 7, 1995 to September 11, 1995.

In addition, the operational requirements remain constant and these nine constables are needed. Moreover, Mr. Hodgins testified that the current complement of 136 indeterminate employees will be reduced by six without reducing the workload. The nine constables know when they will be returning to work following their short absence. They also know to which platoon they will be returning. The employer wants to keep a consistent membership on the platoons. Furthermore, their periods of absence coincide with the House of Commons' recess periods which is the logical time for employees to take their leave. When Mr. Despaties (and the employer) prepare the duties, training and monthly schedules, the nine constables are treated the same way as the indeterminate employees. The only difference between these two groups is the pay and benefits.

Concerning the second issue, Mr. Waller asked whether these nine constables are covered by the collective agreement even if I was to find that they are employees under the PESRA. Mr. Waller submitted that if they are employees under the PESRA, then they are automatically covered by the collective agreement. Moreover, clause 3.04 of the collective agreement does not exclude them from its application.

Mr. Waller read clause 3.04:

> *3.04 All full-time and part-time indeterminate employees shall:*
>
> *(a) be members of the bargaining unit;*
>
> *(b) benefit from all rights and privileges provided by this Collective Agreement from the first day of appointment;*
>
> *and*
>
> *(c) be eligible to fully participate in the internal staffing process.*

He added that it is illegal under the PESRA to negotiate reductions in the bargaining unit.

Mr. Waller argued that the nine "terms" are included in the bargaining unit and covered by the certificate. In this regard, Mr. Waller read clauses 3.01 and 6.01 of the collective agreement. Thus, it would require very clear language to exclude these nine constables from the bargaining unit and clause 3.04 cannot be interpreted to exclude them.

Moreover, it is not within the parties' power to alter the scope of the bargaining unit. The PESRA does not provide for such a situation. The only definition of bargaining unit under the PESRA is the one granted by the Board in the certificate. Mr. Waller referred to sections 3, 37, 39, 42, 44 and 45 of the PESRA. The PESRA provides that the collective agreement is binding on the parties and it covers all the employees in the bargaining unit.

Mr. Waller concluded that the Association is seeking a declaration under section 24 of the PESRA that these nine persons are employees under the PESRA and fall within the bargaining unit for which the Association was certified. Furthermore, the Association seeks a finding under section 70 of the PESRA that the employer has violated its obligation under clause 6.01 of the collective agreement. This clause obliges the employer to recognize the Association as the certified bargaining agent for these nine employees.

Mr. Stephen Bird, counsel for the House of Commons, referred to the jurisprudence which sets out the basic principle of law. The basic principle is that unless the person is employed for a period of six months or more, he/she is not an employee under the PESRA and therefore does not come within the bargaining unit. In this regard, Mr. Bird cited Lessard (Board file 166-2-10531); Sheppard-Wells (Board file 166-2-17461); Gosselin (Board file 166-2-14374) and Syndicat général du cinéma et de la télévision (Board file 169-8-419).

Mr. Bird pointed out that Mr. Waller relied on the CATCA decision (supra) rendered by Mr. Chodos which involved a very different case on the facts. In CATCA, the issue was whether Mr. Paquin, who had been hired for a term of three years, was an employee from day one. Mr. Bird suggested that the Board consider what constitutes a term or temporary basis as well as "indeterminate". These three expressions have different meanings. An employer who hires a term knows the period during which this person will be employed; it is for a specific time and purpose. In addition, it is logical for the employer to require term employees to qualify for the job they have been hired for. Mr. Bird reviewed the facts of this case and explained that the nine temporary constables have been hired for a specific term. All the contracts are for a period not exceeding six months. Thus, *prima facie*, they are temporary or term employees who do not fall under the definition of employee as provided by the PESRA. The only reason the employer hires these nine "terms" is to replace employees on long-term disability and leave without pay. When these employees on leave return to work, the "term" employees will no longer be required. The same occurs during the period Parliament recesses and the terms are no longer needed.

Mr. Bird reviewed the CATCA decision (supra) rendered by Mr. Chodos and concluded that the nine "terms" are only needed during the period the House of Commons is in session. The nine "terms" are not transient but their employment is temporary, fixed for a determined period. In this regard, Mr. Bird also cited the ACTRA decision (supra) rendered by the Federal Court of Appeal on September 13, 1991 where it is stated that the purpose of the exception provided in the definition "*is to ensure that persons who have very little attachment to the bargaining unit, and no community of interest with more permanent employees in that*

unit will not have an undue influence on the outcome of collective bargaining decisions" (page 74).

Mr. Bird submitted that the nine "terms" in question are not persons fulfilling an ongoing need. They are hired to replace employees on long-term leave and when these employees return to work, the need is gone and the "terms" would be surplus to requirements. Mr. Bird added that the evidence does not show ongoing needs. It just shows that the employer is treating these nine "terms" as temporary employees. Moreover, Exhibit 6 (the organizational charts) shows that the nine "terms" are replacing nine employees on leave. The fact that the witnesses knew that the nine temporary constables would be coming back after their break between contracts only demonstrates that it makes sense for the employer for operational purposes to keep the same constables on the same platoons. They are temporary in nature and they are let go when they are not needed. An indeterminate employee means a continuing employee. A term or temporary employee is a very different concept. The temporary employee is hired for a specific purpose and the law and jurisprudence are clear in this respect. Moreover, there is no *mala fides* on the part of the employer in this case.

Concerning the application of the provisions of the collective agreement to the nine constables in question, Mr. Bird argued that if I find that they fall under the definition of employee as provided by the PESRA, then there is no issue as to the application of the collective agreement. The issue to be decided is really whether the nine "term" persons are employees under the PESRA and members of the bargaining unit. The parties have not carved them out of the bargaining unit and not all of the provisions of the collective agreement need to apply to them. In this regard, Mr. Bird cited Health Labour Relations Association (Cancer Control Agency of B.C.) and B.C.N.U. (1988), 3 L.A.C. (4th) 35 and John Biggins v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.), Local 673, [1982] 1 Can LRBR 388.

Mr. Waller replied that the employer did not deal with the issue of the difference between a term and a temporary person.

DETERMINATION

The main issue I have to decide is whether nine persons employed as constables by the House of Commons on continuing contracts of less than six months are employees under the PESRA. If the answer to this question is in the affirmative, then it follows that these nine constables are members of the bargaining unit and subject to the terms and conditions provided under the relevant collective agreement. In other words, the provisions of the collective agreement would apply to them as members of the bargaining unit covered by this collective agreement.

The original version of the PSSRA (prior to 1993) provided under section 2 that:

> *"employee" means a person employed in the Public Service, other than*
>
> *...*
>
> *(g) a person employed on a casual or temporary basis, unless the person has been so employed for a period of six months or more,*

This is the definition the Federal Court of Appeal and Mr. Chodos had to consider in the ACTRA (supra) and CATCA (supra) decisions.

Section 3 of the PESRA provides an almost identical definition:

> *"employee" means a person employed by an employer, other than*
>
> *...*
>
> *(c) a person employed on a casual or temporary basis, unless the person has been so employed for a period of six months or more,*

The PSSRA was amended in 1993 with respect to this definition. At present, it reads as follows:

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

The relevant decisions to be considered here deal with the then section 33 of the PSSRA. The former section 33 of the PSSRA (section 34 of the current PSSRA) is identical to section 24 of the PESRA. Section 24 reads as follows:

> *24. Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.*

The Federal Court of Appeal and the Supreme Court of Canada have rendered decisions touching on this Board's jurisdiction under section 33 (now section 34) of the PSSRA.

In the case of the Public Service Alliance of Canada v. The Public Service Staff Relations Board (PSSRB) [(1979] 2 F.C. 599, the Federal Court of Appeal found at page 615 that all that section 33 (our section 24) "authorizes the Board to decide is whether an 'employee' is or is not included in a bargaining unit (not whether a person is or is not included an 'employee')". In that case, the Board had to determine whether persons who had been excluded from the definition of employee under the Act, had lost their "excluded" status and became employees. The PSSRA and PESRA provide for statutory exclusions and in that PSAC v. PSSRB case, the PSAC and the employer had agreed to the exclusion of certain persons. Thus, on July 24, 1968, as part of the decision certifying the PSAC as bargaining agent for all employees in the programme administration group the Board designated the persons who had been listed in a schedule as persons employed in a managerial or confidential capacity and therefore, excluded from the bargaining unit.

On March 31, 1978, the employer unilaterally removed some 157 positions of those that had been designated from the programme administration group and allocated them to a new occupational group named the "Postal Management Group". The PSAC, then, presented an application under section 33 requesting the Board to decide whether these persons were now included in the bargaining unit as a result of

the deletion of their designated positions. The Board took jurisdiction and determined that in the absence of any evidence of any change in the duties and responsibilities of any of the 157 persons they retained the status of persons excluded from the bargaining unit. The Board found that it had the authority under section 33 to decide the question as to whether any employee or class of employees is or not included in an appropriate bargaining unit or is included in any other unit. The Board added that under this section it had only authority to decide an issue involving employees and not one involving excluded persons. The Federal Court of Appeal decided that, even if the Board had the authority to determine the matter under section 33 of the PSSRA (a matter on which the Court expressed no final opinion), the Board rightly refused to make the determination because there was no material before the Board on the basis of which it could have determined that the 157 persons in question had ceased to be excluded.

Thus, the PSAC v. PSSRB decision dealt with a different issue to the one I have to decide. In PSAC v. PSSRB, the 157 persons were excluded from the bargaining unit by a decision of this Board. In the instant case, the determination I have to make concerns persons who are working for the House of Commons and who have not been excluded by this Board. It is the employer who unilaterally decided that they do not fall under the definition of employee under this Act. However, it is the role of this Board to decide whether the persons in question are or are not included in the bargaining unit. The Board has the jurisdiction to determine whether these constables are employees and therefore included in the protective services group bargaining unit.

In Canada (Attorney General) v. Public Service Alliance of Canada (Econosult) the Supreme Court of Canada was asked to determine whether the PSSRB had jurisdiction to decide that teachers working in the Cowansville Penitentiary pursuant to a contract were employees in the Public Service within the meaning of the PSSRA: (1991), 123 N.R. 161. The issue was whether the teachers were employees of the Government of Canada or employees of Econosult Inc. The PSSRB decided that the true employer of these teachers was the Government of Canada. The Federal Court of Appeal found that the PSSRB did not have jurisdiction to determine who is a member of the Public Service.

The Supreme Court of Canada found that the wording of section 33 (read section 24) itself is intended to enable the Board to resolve any question as to whether an employee or class of employees is or not included in a bargaining unit. The Board's function is to determine whether employees who come under the definition provided are included in a particular bargaining unit.

Thus, the case decided by the Supreme Court of Canada is distinguishable from the one here. The issue decided by the Supreme Court of Canada was who was the employer of the teachers in question. In the instant case, the issue is whether the constables are or not included in the protective services group bargaining unit. This question falls squarely within the jurisdiction of this Board under section 24 of the PESRA and the PSSRB has certified the Association for all employees of the protective services bargaining unit.

In Syndicat général du cinéma et de la télévision and National Film Board (Board File 147-8-30), the then Deputy Chairperson, Michael Bendel, found that he did not have the authority to prevent the employer from creating artificial breaks in service so as to prevent a term employee from acquiring six months of continuous service and, thereby, employee status. Here again, the case is distinguishable in that the bargaining agent was asking the Board to provide a remedy for the employer's improper exercise of its hiring powers. The bargaining agent wanted the Board to invalidate decisions taken by the employer. Mr. Bendel found that section 33 (read section 24) confers a declaratory power on the Board and not a remedial power.

I disagree with Mr. Bendel's opinion of this Board's jurisdiction and authority under section 33 of the PSSRA. It is worthy of note that section 10 of PESRA provides:

> *10. The Board shall administer this Part and shall exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the purposes of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Part, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*

Thus, in my view, in light of section 10 of PESRA, the Board has the authority to review the employer's actions such as the one we are concerned here. On March 24, 1987, the Board certified the Association as bargaining agent for all employees in the protective services group bargaining unit (supra). It is incidental to the attainment of the purposes of the PESRA that the Board be able to review the employer's unilateral action designed to prevent the constables from acquiring employee status and therefore from falling within the bargaining unit. Moreover, section 70 of the PESRA reads:

> *70. (1) Where an employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the agreement or award, and the obligation, if any, is not one the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies, either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board.*
>
> *(2) Where a matter is referred to the Board pursuant to subsection (1), the Board shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.*
>
> *(3) The Board shall hear and determine any matter referred to it pursuant to subsection (1) as though the matter were a grievance, and subsection 67(2) and sections 68 and 69 apply to the hearing and determination of that matter.*

Thus, the issue in dispute here is also properly before me under section 70 of the PESRA. The Association requests that the provisions of the collective agreement be applied to the constables. To do so, I have to decide first whether the constables in question are members of the protective services group bargaining unit.

I concur with Mr. Chodos' views expressed in the CATCA (supra) decision. Mr. Bendel did not address his mind to the question of the interpretation of the phrase "employed on a casual or temporary basis". However, Mr. Chodos did so. Mr. Chodos found that he was entitled to look to the meaning of this phrase and in particular the term "temporary" because it was in keeping with the purpose and intent of the provision and has regard for its context.

Mr. Chodos' reference in the CATCA decision to the comments to the Special Joint Committee of the Senate and House concerning the Public Service which reviewed Bill C-71, the Bill enacting the 1967 Public Service Staff Relations Act, is relevant here. At pages 15 to 18 of the CATCA decision, Mr. Chodos reproduces the comments to the Committee made by Dr. George Davidson, the then Secretary of the Treasury Board. Dr. Davidson indicated that:

> *... The real problem is how far you can go in recognizing the attachment of employees who are short term, casual or temporary employees as permanent employees who are potentially permanent members of a bargaining unit, whose votes may determine who is recognized and who is not recognized as the bargaining agent for the bargaining unit; whose votes may or may not determine whether or not the option is going to be for the arbitration or conciliation board approach; whose votes may determine whether or not a proposal which is put forward on the negotiating table and agreed to is or is not going to be acceptable to the majority of the membership of the bargaining unit.*
>
> *It seems to us, if I may say so, that there are real dangers both from the point of view of the bargaining unit and its continuity and the status of the bargaining agent and the extent to which he can accept and discharge a mandate for his constituency. There are very real problems here from the point of view of both the staff associations, or the bargaining units, and the employer.*
>
> *All I can say is that while we recognize that there is a problem here, we think we have gone about as far as it is practicable to go; we think we are aware of the fact that there are these theoretical problems which will arise; for example, what about the employer who deliberately employs people for 5 1/2 months and then lays them off, or discontinues their employment, and then a month later employs them again for another 5 1/2 months.*
>
> *Theoretically there is this technical possibility open, but it is, in the final analysis, the Public Service Staff Relations Board which is going to determine whether an individual is or is not an employee for purposes of membership in this bargaining unit, and the interpretations of the Public Service Staff Relations Board in this situation, if I understand correctly, can be made a reference to the courts. Consequently, we feel that there is protection against flagrant attempts to abuse this provision in the bill, and that the best we can do is to prescribe a term shorter than which persons employed in a casual or temporary capacity are not to be recognized as*

> *employees and potential members of a bargaining unit, and beyond which they can be so recognized. It could be five months; it could be four months; it could be ten months. Six months, it seems to us, was the practical period. I should add that I am told that it is linked with the six months' probation in the Superannuation Act, as well. I do not know that that is a very weighty argument, but it is a consideration.*
>
> *(Emphasis added)*

Mr. Davidson added:

> *...Temporary or casual employees are employed for a limited period to cope with the seasonal or some other fluctuation in the workload that cannot be economically handled by permanent employees.*

Therefore, it is the Public Service Staff Relations Board which is going to decide whether a person is or not an employee under the PSSRA or the PESRA. The status of an individual as an employee or as an exclusion from the definition of employee under the PESRA is not solely determined by the employer's action to hire this individual for a period of less than six months. This Board has the jurisdiction and duty to examine the employment relationship between this individual and his employer to determine whether regardless of this temporary contract of less than six months this individual's attachment is not short-term, casual or temporary and therefore does not fall within the exclusion to the definition of employee contained in paragraph (c) thereof.

The dictionaries define temporary as meaning lasting for a limited time, transient made to supply a passing need (the Shorter Oxford English Dictionary).

In light of Dr. Davidson's comments and the ACTRA Federal Court of Appeal decision (supra), it is clear that it was intended to empower this Board with the authority to decide which persons are to be excluded from the bargaining unit because they do not fall within the definition of "employee" in the statute. This interpretation of the Board's authority under section 33 (now section 34) of the PSSRA (or the identical section 24 of the PESRA) was also recognized by Sopinka, J., for the majority of the Supreme Court of Canada in Attorney General (Canada) v. Public Service Alliance of Canada (Econosult) (supra).

In Canada v. ACTRA, MacGuigan, J.A. had to deal with a section 28 of the Federal Court Act application for review of a certification decision rendered by this Board. MacGuigan, J.A. decided at paragraph 13 of page 75:

> *The determination of which persons are to be excluded from the category of "employees" appears to be one which Parliament intended to be left to the Board and in no way intended as a provision limiting jurisdiction. As Sopinka, J., said for the majority of the Supreme Court in commenting on section 33 of the Act in Canada (Attorney General) v. Public Service Alliance of Canada (Econosult) (supra).*
>
> *"If ... the meaning of the term 'employees' ... was intended to be left to the Board, then its decision is not reviewable unless the interpretation placed upon those provisions is patently unreasonable and the Board thereby exceeded its jurisdiction."*

Furthermore, in S.G.C.T. v. The Queen (1978) 1 F.C. 346, Le Dain J.J., allowed an application under section 28 of the Federal Court Act to review and set aside a decision of this Board dismissing an application for certification on the ground that persons employed by the National Film Board under contracts for personal services were not employees under the Act.

Le Dain, J.J. concluded that:

> *... the Public Service Staff Relations Board should have determined whether the persons for whom certification is sought are employees rather than independent contractors although their services were engaged under a form of contract purporting to have been made pursuant to the authority conferred by paragraph 10(1)(d) of the National Film Act. In failing to do so the Board erred in law and refused to exercise its jurisdiction.*
>
> (at page 354)

In a decision concerning a complaint under section 20 of the PSSRA, Churchill and National Film Board (Board file 161-8-320) the then Vice-Chairperson, J.-Maurice Cantin, Q.C., found at pages 8 and 9 that:

> *If the employer's motive in entering into these contracts was to prevent the complainant from acquiring the status of*

> *"employee" under the Act, thereby depriving her of the collective bargaining rights granted therein to employees, then that in my opinion would constitute a violation of paragraph 8 (2) (b) of the Act.*
>
> *... in a situation similar to the one that we have here where the employee complains of artificial breaks between contracts, she has to make first a prima facie case against the employer. For example, evidence of a series of contracts falling just short of six months and following closely upon one another might establish such a prima facie case. If the complainant is successful in establishing a prima facie case, then the employer has an obligation to provide a satisfactory explanation as to why such breaks have occurred. In effect, the burden of proof shifts to the employer to establish what its motive was in entering into these contracts as this is a matter which falls within the employer's particular knowledge.*

Mr. Cantin, therefore, considered the Board's authority to examine the employer's actions. In Churchill, the Board was seized of this issue by way of a complaint under section 20 of the PSSRA. The complainant alleged that she had worked continuously and the employer had created two artificial breaks in her contract so as to render her employment temporary for a period of less than six months. Mr. Cantin found that there was no pattern which could lead him to conclude prima facie that the breaks were artificial.

The question I have to decide depends on the facts of this case. Under section 24 of the PESRA, I have the authority to examine the facts and employment relationship of the nine temporary constables to determine whether the evidence demonstrates that the series of employment contracts falling short of six months and following closely upon one another have the effect of preventing these nine constables from acquiring the status of employee under the PESRA.

In Pioneer Grain Co. Ltd. V. Kraus [1981] 2 F.C. 815, one of the questions the Federal Court of Appeal was asked to decide was whether the employment of Mr. Kraus who was "temporarily laid-off" for a brief period each winter, was or not continuous within the meaning of subsections 61.5 (1) (the right to file a complaint in case of a dismissal) of the Canada Labour Code.

In that case, the employer alleged that because Mr. Kraus had been "temporarily laid-off" between December 15 and 21, 1979 and between December 21, 1979 and January 7, 1980, his employment had not been continuous for twelve consecutive months. The evidence disclosed that Mr. Kraus' employment during 6 1/2 years was as follows. He ended his year around mid-December and received his holiday pay. He was then called back early the following year. The adjudicator under the Canada Labour Code found that the employment of Mr. Kraus had to be regarded as continuous within the meaning of the legislation. The Federal Court of Appeal agreed with the adjudicator's views. The Court found that the employment arrangement was that work was to be resumed when the "break" period came to an end.

I find that the facts of that case are comparable to the one of the constables in question here. The "breaks" in service seem artificial. The constables are expected to return to their platoons and are treated as if their employment is of a continuous nature.

I am of the view that the evidence does demonstrate that Messrs. Serge Picard, Patrick Gendron and Jean-Yves Kenney have been employed since September 20, 1993 on various “contracts” interrupted during very short periods corresponding to the recesses by the House of Commons. Most of these breaks are for periods of two or three weeks. Messrs. Yvon Renaud, Yvon Huppé, Michael Healey and Richard Limoges have also been so employed as of September 19, 1994.

The evidence disclosed that these nine constables have received the same training as the indeterminate constables with whom they work side by side, the same hours of work, the same duties and as a team on the platoons.

Messrs. Gilles Despaties and Michael Hodgins have testified that these nine constables are placed on the schedule which is prepared a year in advance. Mr. Despaties' scheduling responsibilities cover both the indeterminate and the constables on contract. It is worthy of note that the breaks in the contracts coincide with the House of Commons recesses. Messrs. Despaties and Hodgins know in advance when the temporary constables will resume work. All witnesses testified that the employer counts on these nine constables. The shift schedules are prepared taking into account these nine constables. The employer and Mr. Despaties assume that these nine constables will be at work when the schedules are prepared. The

nine constables are included as members of the platoons. They are always assigned to the same platoons unless they work as leave relief. The evidence also disclosed that the employer does not have enough constables to fill each of the 13 positions on each of the 10 platoons without using these nine constables. Furthermore, five indeterminate constables who had been on long-term disability or leave without pay have retired and four still remain on long-term disability. The evidence did demonstrate that Messrs. Cardinal, Healey and Huppé have been replacing on platoon #3 three indeterminate constables (Cameron, Charette and Dériger) who have retired.

It is therefore my finding, on the basis of the evidence adduced, that the nine "temporary" constables are not supplying a passing need. They do not have a transient relationship with the employer. Their employment relationship is not temporary or for a limited period to cope with some fluctuation in the workload. They do have the same community of interest as the indeterminate constables. The evidence is to the effect that these temporary constables have a long-term commitment and the employer does see this since it prepares the schedules well in advance, assigning these nine constables to their platoons without taking into consideration their contracts. No distinction is made between temporary and indeterminate constables. Thus, the nine constables are employees as envisaged by the PESRA.

In conclusion, it seems that the purpose of the employer's actions in organizing their employment as it did was to avoid having the provisions of the PESRA and the collective agreement apply to them. The constables in question are employees under the PESRA as they do not fall within the exclusion in paragraph (c) of the definition. These constables have a continuing rather than a transient attachment to the work place. Furthermore, in view of the fact that they fall within the definition of employee in the PESRA and therefore come within the protective services group bargaining unit, the provisions of the relevant collective agreement apply to them by virtue of clause 3.01.

Therefore, I direct the employer to apply the relevant provisions of the PESRA and of the relevant collective agreement to these constables.

For these reasons, the application under section 24 and the reference under section 70 of the PESRA are hereby granted.

Muriel Korngold Wexler,
Deputy Chairperson

OTTAWA, July 8, 1996