



June 30, 2009

Laurent Quintal
Director, Strategic Policy
Labour Program
Place du Portage, Phase II
Mailstop L805
Gatineau, Québec K1A 0J2

Dear Mr. Quintal:

Re: Review of Labour Standards in Part III of the *Canada Labour Code*

I write on behalf of the National Labour and Employment Law Section of the Canadian Bar Association (CBA Section) to comment on HRSDC's February 2009 Discussion Paper on the Review of Labour Standards in the *Canada Labour Code*.

The CBA is a national association of 37,000 lawyers, notaries, law professors and students. The Association's primary objectives include improvement in the law and in the administration of justice. It is in this light that we make our submissions on the Discussion Paper. The CBA Section has close to 2,000 members nationwide, including lawyers representing employers or unions, corporate counsel, arbitrators, and lawyers who have a special interest in employment and labour law matters.

Our comments are confined to the structure proposed for the adjudication process. We commented on this issue in our letter to the Arthurs Commission dated October 21, 2005.

Given the important issues at stake, in particular, the protection of the rights of the parties and the broad powers conferred to adjudicators by the *Canada Labour Code*, it is imperative that those decision-makers possess the requisite experience, knowledge, independence, impartiality and responsibility. In short, they must meet basic standards of acceptability within the labour relations community. These criteria are identified by the Supreme Court for the selection of arbitrators in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539. The current appointment system too often fails to satisfy these criteria, which is why we suggested amendments to the system. There are currently no specific requirements for appointment as an adjudicator, and there is neither a list of adjudicators nor an evaluation system for determining whether an adjudicator has the qualifications to perform the function.

In our view, the Arthurs Commission proposal for the establishment of a new adjudication structure also fails to ensure that adjudicators meet the standards of experience, knowledge, independence, impartiality and responsibility.

The Arthurs Commission recommended a new adjudication system to be overseen by a Director of Adjudication Services.¹ The Director's powers would include the capacity to dismiss patently frivolous or vexatious claims or claims that fall under another body's jurisdiction, and to take measures required to ensure the proper functioning of the adjudication system. These powers would enable the Director to make decisions that could deprive an employee of relief without having been heard.

The proposed structure invites criticism about the Director's impartiality. One role entrusted to this new adjudication structure would be to hear appeals of inspectors' recovery of wage decisions. Both the Director and the inspectors would be Labour Program officials. The Director would therefore determine whether appeals of decisions by the Director's own work colleagues were frivolous or vexatious. In this context, a reasonably informed person could have a perception of bias, thus failing the test for impartiality.

The proposal suggests that full- or part-time hearing officers be hired to discharge duties currently handled by independent, external referees and adjudicators. The hearing officers would hear and decide matters involving wrongful dismissal and appeals for recovery of wages. These decisions directly affect the rights of employees governed by the *Code*, underscoring the importance of impartiality and independence.

The fact that these quasi-judicial functions would be performed by Labour Program employees could call their independence into question. For instance, they could be obliged to follow policies adopted for budgetary reasons that would result in limitations on the number of hearings, the number of days for a hearing, possibly even the number of basic complaints — in short, they could be obliged to restrict either accessibility or the rights of litigants for reasons totally extraneous to the dispute. As in the case of the Director, hearing officers would be called upon to rule on appeals of decisions rendered by their inspector colleagues. Individuals fulfilling quasi-judicial functions must be sufficiently independent and impartial to preclude a reasonable apprehension of bias.

Moreover, how can one be certain that hearing officers would possess the characteristics of experience, knowledge and, especially, acceptability? Although the proposal indicates that they would be paid at a level commensurate with their responsibilities, properly trained, and hired in sufficient numbers to be able to efficiently discharge their duties, we question the lack of selection and recruiting criteria. Indeed, the proposal indicates that the guidelines could be based on Part II of the *Canada Labour Code*. Section 145.1 of the *Code* stipulates that the Minister may designate as an appeals officer "any person who is qualified to perform the duties of such an officer." This is similar to the discretion governing appointments under section 251.12 and subsection 242(1) of the *Code*. It is exactly this type of discretion that would make it possible for persons to be appointed without meeting the standards of acceptability.

¹ See Part III, point 3 of the Discussion Paper

We cannot support this reform. The fundamental right of equal justice for all is at stake.

We believe that the following amendments to the existing adjudication system should be preferred over the structure proposed by the Arthurs Commission:

1. Parties should be allowed to decide on a consensual basis which adjudicator will be appointed to decide the dispute. The Minister should exercise authority to appoint the adjudicator only when they cannot agree.
2. An appointment mechanism that is both transparent and uniformly applied should be created. We recommend the creation of a list of qualified and experienced adjudicators. This list and its updates should be accessible to the public and posted permanently on the web site of Human Resources and Skills Development Canada. Criteria should be established for appointing and keeping adjudicators on the list. A committee should be set up to develop suitable criteria and considerations to be taken into account when establishing the list of arbitrators. The Minister should establish the list of adjudicators after consulting this committee.
3. The fees paid to adjudicators should be revisited to reflect market rates, to attract experienced and recognized adjudicators who are generally accepted within the labour relations community.

We hope you will find these comments helpful, and we remain at your disposal to meet with you to discuss our recommendations.

Yours very truly,

(Original signed by Kerri Froc for Pierre Moreau)

Pierre Moreau, Chair
National Labour and Employment Law Section