THE CANADIAN BAR ASSOCIATION
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Via E-mail (info@fls-ntf.gc.ca)

Mr. Harry W. Arthurs
Commissionner
Federal Labour Standards Review
165 Hotel De Ville
Phase II, Place du Portage
Gatineau, Quebec K1A 0J2

Dear Commissioner Arthurs:

Re: Review of Federal Labour Standards

I am writing as Chair of the National Labour and Employment Law Section of the Canadian Bar Association (CBA Section) in response to an invitation for submissions by the Minister of Labour's Commission on the Review of Federal Labour Standards, pertaining to Part III of the *Canada Labour Code*. The CBA is a national association of 36,000 lawyers, notaries, law teachers and students. The CBA's mandate includes seeking improvements in the law and the administration of justice, and that aspect of our mandate guides the comments in this letter. The CBA Section's almost 2000 members across the country include management lawyers, union lawyers, in-house counsel, arbitrators and lawyers with an interest in labour and employment issues. We appreciate the opportunity to contribute to the Commission's review of Part III of the *Code*. Our comments in this letter focus on one important aspect of Part III, namely, the appointment of adjudicators. We are considering a more comprehensive response to the Commission's interim report.

Under the current provisions of the *Code*, an adjudicator may be appointed by the Minister in three situations:

1. Group Termination of Employment (Division IX)

Section 224 says that the Minister may appoint an arbitrator to "assist the joint planning committee in the development of an adjustment program and to resolve any matter in dispute respecting the adjustment program."

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According to section 224(6), an adjudicator in this situation has the power to determine procedure, administer oaths, receive evidence and determine its admissibility, examine documents with respect to redundant employees, make any necessary inquiries and require the employer to post notices.

2. Unjust Dismissal (Division XIV)

Pursuant to section 242(1), the Minister may appoint "any person that the Minister considers appropriate" to hear an unjust dismissal complaint once an inspector files a report.

The adjudicator has the power to determine the procedure of the hearing but must give the parties full opportunity to present evidence and make submissions. The adjudicator also has the same powers as the Canada Industrial Relations Board in sections 16 (a), (b) and (c) of the *Code*.

3. Recovery of Wages (Division XVI)

Under section 251.11, a party may appeal a decision with respect to the recovery of wages and the Minister, pursuant to section 251.12, "shall appoint any person that the Minister considers appropriate as referee" to hear the appeal.

The referee has the power to summon witnesses, compel evidence, administer oaths, receive evidence, determine procedure and add parties to the appeal (section 251.12(2)).

Given the interests at stake and the powers of adjudicators outlined above, it is critical that adjudicators be experienced, knowledgeable, independent, impartial and accountable. In contrast, the current system of appointing adjudicators by the Minister too often fails to meet those criteria. There are no specific requirements for becoming an adjudicator, no established roster of adjudicators, nor any review of adjudicators to determine if they continue to be suitable to remain on the roster. As a result, some adjudicators handling important matters under the *Code* do not have the appropriate experience with either employment matters or handling a hearing, which includes deciding issues of admissibility of evidence.

In the labour grievance arbitrations system, parties often agree on an arbitrator to adjudicate their differences. If they are unable to agree, either party can request that the Minister appoint an arbitrator. In a number of jurisdictions, the Department of Labour maintains a roster of qualified arbitrators to hear grievance arbitrations under a collective agreement. To be placed on the roster, a candidate must demonstrate sufficient knowledge and experience in both labour arbitration and the conduct of hearings. In addition, the list is periodically reviewed to ensure that those on it continue to be appropriate. This review can include considerations as to whether the arbitrator has received consensual appointments (an indication that the arbitrator is neutral and impartial) or the overall reputation of the arbitrator within the legal profession. This system helps to ensure that arbitrators are qualified, unbiased and possess sufficient ability to conduct hearings and provide well-reasoned decisions.

The CBA Section believes that a similar system should be developed for adjudicators under Part III of the *Code*. Allowing consensual adjudicators would give the parties more control over the procedure and matters could be resolved to the mutual satisfaction of both parties without

involving the Minister. In addition, following the grievance arbitration model to establish a roster of adjudicators would assist in ensuring that only competent, experienced adjudicators hear employment-related issues. The provinces of British Columbia, Ontario, New Brunswick, Nova Scotia and Prince Edward Island maintain rosters of arbitrators, and those systems could be instructive in developing a roster system under Part III of the *Code*. For individual employees who are unrepresented and unfamiliar with local adjudicators, a database could be established to allow them to review a list of adjudicators, their CVs, schedules, representative cases and even links to recent decisions. Again, either party would retain the option of asking the Minister to appoint an adjudicator.

Finally, the CBA Section notes that the *per diem* rate for adjudicators under Part III of the *Code* has remained the same for several years. As a result, the rates are out of step with "market rates" of arbitrators and adjudicators across the country. To attract well-qualified candidates, it is important for compensation rates to be kept up-to-date and reflective of the current market.

To summarize, the CBA Section recommends the following changes with respect to the appointment in adjudicators under Part III of the *Code*:

1. Provisions should be added to allow the parties to agree to a consensual adjudicator. Only in cases where the parties cannot agree on an adjudicator should the Minister exercise authority to appoint an adjudicator.
2. A more transparent and consistent system should be developed for the appointment of adjudicators. Specifically, a roster of competent, experienced adjudicators is recommended. Criteria should be set out for an adjudicator's name to be placed and maintained on the roster. A consultation or advising committee should be created to develop appropriate criteria and considerations for establishing and maintaining a roster of adjudicators.
3. The existing *per diem* rates should be reviewed to ensure that they reflect appropriate market rates so that the roster attracts experienced and knowledgeable candidates.

I trust that these comments will be helpful, and would be pleased to discuss our recommendations with you further at your convenience.

Yours truly,

(*Original signed by Gaylene Schellenberg on behalf of Malcom Boyle*)

Malcolm Boyle
Chair, National Labour and Employment Law Section