Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No. 2005-37

Interlocutory decision
Decision No. OHSTC-08-014 (I)

Canada Labour Code
Part II
Occupational Health and Safety

Katie Bartakovic
and
Public Service Alliance of Canada
appellants

and

Treasury Board
(Canada Border Services Agency)
respondent

June 27, 2008

The present decision follows the hearing held on the preliminary objection raised relatively to the above mentioned appeal. The said hearing was held by Appeals Officer Pierre Guénette, in Ottawa, Ontario, on January 15, 29, 30 and 31, 2007, February 1, 14 and 15, 2007, April 11 and 12, 2007, December 5, 2007 and February 14, 2008.

Appearances

For the appellants
Andrew Raven, Counsel for Katie Bartakovic and the Public Service Alliance of Canada (PSAC)

For the respondent
Richard Fader, Counsel for Treasury Board (Canada Border Services Agency)

[1] On August 31, 2005, Katie Bartakovic, a Customs Inspector working at Rainbow Bridge in Niagara Falls, Ontario, refused to work under section 128 of the *Canada Labour Code*, Part II (the *Code*). On September 1, 2005, K. Bartakovic appealed the decision of absence of danger rendered by health and safety officer Rod Noel following his investigation of the employee's refusal to work.

[2] Prior to the hearing on K. Bartakovic's appeal, the appellants raised a preliminary objection with respect to the institutional independence of the Canada Appeals Office on Occupational Health and Safety (the Appeals Office)[1].

[3] The Director of the Appeals Office, Pierre Rousseau, made an application to obtain intervener status with respect to the preliminary objection raised by the appellants. Following a hearing on this status matter held on October 2, 2006, a written decision was rendered on December 7, 2006 granting an intervener status with limitations to the said Director. On the first day of the hearing (December 11, 2006) on the preliminary objection, the Director of the Appeals Office renounced his intervener status.

[4] The preliminary objection raised by the appellants was heard by the undersigned Appeals Officer between January 15, 2007 and April 12, 2007 in Ottawa, Ontario. In total, 9 days were taken up to hear evidence from 4 witnesses and over 51 documents were entered as exhibits. Final arguments were heard in April 2007. However, the hearing was reconvened to let the appellants introduced a new piece of evidence. This was heard on December 5, 2007 and February 14, 2008.

Appellants' Witnesses

Testimony of Jeff Bennie

[5] Jeff Bennie stated that he was the National Union Representative for the Canadian Union of Postal Workers (CUPW) from 1990 to 2002 during which his responsibilities included worker health and safety. During the period from 1990 to 1996, he also represented CUPW at national meetings with Canada Post Corporation. He was appointed National Safety Officer with the Public Service Alliance of Canada (PSAC) in 2002 and remained in the post at the time of his testimony at this hearing.

[6] Mr. Bennie testified that he was involved in the legislative amendment process conducted at Human Resources and Development Canada[2] (HRDC) which culminated in amendments to the *Canada Labour Code*, Part II (*Code*), in year 2000. He summarized his involvement as follows.

[7] J. Bennie explained he was involved in the preparation of a Labour[3] document that proposed to HRDC changes to the *Code*. Representatives of employers subject to federal jurisdiction and the *Code* also submitted change proposals to the *Code*.

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[1] Following a decision made by Treasury Board on February 6, 2008, the Canada Appeals Office on Occupational Health and Safety became officially designated as the Occupational Health and Safety Tribunal Canada. In order to avoid any misunderstanding given that the parties to the present case submitted documents and arguments that reference the Tribunal's former designation, I have elected to keep the Tribunal's former designation throughout the present decision.

[2] Human Resources Development Canada is currently designated as Human Resources and Social Development (HRSDC).

[3] "Labour", a term used to identify trade unions representing employees subject to the Federal Jurisdiction, and thus the CLC Part II

[8] He stated that a Review Committee headed by the Senior Assistant Deputy Minister (ADM) was struck by HRDC and it included approximately 25 members who were representatives of Labour, Employers and members of the legislative policy division at HRDC. J. Bennie stated that he was a member of the Review Committee.

[9] According to the witness, the approximate 207 proposals for amendments to the *Code* by all three parties were too numerous to be dealt with by the Review Committee and so a Legislative Review Subcommittee was struck to review the proposals and to attempt to arrive at consensus. J. Bennie confirmed that the Legislative Review Subcommittee was composed of three representatives from Labour, including himself, three from employers and two from the legislative policy division from HRDC.

[10] Document, E-1, Tab 2, entitled *Process and Terms of Reference of Sub-committee for Review of Code Part II* was submitted at the hearing and J. Bennie confirmed that this was the process and terms of review for the Legislative Review Subcommittee of which he was a member. J. Bennie referred specifically to Step Four in the document which reads as follows:

> March 29, 1994
> PROCESS AND TERMS OF REFERENCE
> OF SUB-COMMITEE FOR *REVIEW OF CODE PART II*
>
> **STEP 1:**
>
> 1.1 All 207 proposals will be dealt with by the sub-committee.
>
> 1.2 Only complete packages will be presented to the Legislative Review Committee (e.g. all of the proposals dealing with the Health and Safety Committees).
>
> 1.3 The sub-committee will discuss each of the issues for however long It takes.
>
> 1.4 The sub-committee will discuss the proposals, share concerns and Issues, and come up with tentative consensus wherever possible. Fewer issues will be submitted to the Legislative Review Committee for review than were included in the original package of proposals.
>
> 1.5 Where there is no consensus, HRDC will act to facilitate achieving consensus wherever possible.
>
> **STEP 2:**
>
> 2.1 Parties will review the complete packages with their respective caucus.
>
> **STEP 3:**
>
> 3.1 Parties will return to sub-committee to discuss any new concerns, problems and issues and finalize the packages.

STEP 4:

4.1 The complete package will be submitted to the Legislative Review Committee for discussion of non-consensus items. Consensus items will only be reopened at the Legislative Review Committee stage, if important concerns have been overlooked at the sub-committee level and if the Senior ADM concurs.

[my underline]

STEP 5

5.1 Non-consensus items will be referred to the Senior ADM. After reviewing the positions of both employers and employees, the Senior ADM will report his decision and rationale for each non-consensus item at the following Legislative Review Committee meeting.

TIME REQUIREMENT:

It is estimated that this approach (Legislative Review Committee plus sub-committee) will represent a minimum of 40 days of meetings for the sub-committee, in addition to a reduced number of meeting days for the Legislative Review Committee.

[11] Mr. Bennie stated that the second sentence in item 4.1 was to ensure that once consensus items had been reached, the agreements were not going to be reopened at the Legislative Review Committee without some serious concerns and the senior ADM agreed to reopen an issue. He expressed the opinion that the Legislative Review Committee would simply "rubber stamp" the consensus agreements.

[12] He confirmed that the Legislative Review Subcommittee and Legislative Review Committee deliberated from 1993 to 1995. He continued to be involved in the process through to the Parliamentary hearings and Senate hearings that took place on the Bill C-12 which eventually passed and amended the *Code* in year 2000, following its revival followings its initial dying on the Order Paper with the calling of a Federal election in 1997.

[13] A copy of the *Code* in force at the time of the deliberations and until the *Code* was amended in year 2000 was tabled (E-1, Tab 1). J. Bennie referred particularly to sections 130.1 and 146.1 which specified the appeal process relative to health and safety officer decisions in respect of employee refusals to work and health and safety officer directions in respect of contraventions. Sections 130.1 and 146.1 read as follows:

> 130(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefore and may
>
> (a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).

146.1 any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued.

[14] With regard to the above, I take judicial notice of section 122.1 in the above noted *Code* relative to the definition of "Board". Section 122.1 reads:

122.1 "Board" means the Canada Labour Relations Board continued by section 9.

Section 9 reads:

Establishment of Board
9. (1) a board is established, to be known as the Canada Industrial Relations Board.

Composition of Board
(2) The Board is composed of

(*a*) a Chairperson, to hold office on a full-time basis;

(*b*) two or more Vice-Chairpersons, to hold office on a full-time basis, and any other Vice-Chairpersons, to hold office on a part-time basis, that the Governor in Council considers necessary to discharge the responsibilities of the Board;

(*c*) not more than six other members, of which not more than three represent employees, and of which not more than three represent employers, to hold office on a full-time basis;

(*d*) any other part-time members, representing, in equal numbers, employees and employers, that the Governor in Council considers necessary to discharge the responsibilities of the Board; and

(*e*) any other part-time members that the Governor in Council considers necessary to assist the Board in carrying out its functions under Part II.

R.S., 1985, c. L-2, s. 9; 1998, c. 26, s. 2.

[15] In this regard, J. Bennie confirmed that decisions of health and safety officers referenced in section 130(1) and commonly referred to as decisions of no-danger were appealed either to the Canada Labour Relations Board (CLRB) or the Public Service Staff Relations Board (PSSRB). J. Bennie also confirmed that appeals pursuant to section 146.1 directions issued by health and safety officers were appealed to the Regional Safety Officer (RSO).

[16] Document, E-1, Tab 3,entitled *Review of the Canada Labour Code*, Part II was tabled and J. Bennie identified the document as listing the proposed amendments to the *Code* submitted to HRDC by the trade unions.

[17] He referred to the proposal presented by Labour relative to section 146.1 of the *Code* and stated that the proposal suggested a new level of appeal which would consist of a federal tripartite tribunal consisting of a neutral chair and part-time members drawn from a list of candidates submitted by both Labour and employer associations. J. Bennie stated that, with a new federal tripartite tribunal, an appellants could take their appeal to the second level tribunal if he or she did not like the decision rendered by the RSO.

[18] J. Bennie stated that the appeal to the new level tripartite tribunal would ensure fairness by allowing for an opinion outside of the RSO who is an employee of HRDC, the regulating agency. J. Bennie clarified that the Labour proposal would have the new level tripartite tribunal be housed in the CLRB and the PSSRB, but the new tribunal would assume the duties of the aforementioned Boards such that they would no longer have an appeal role relative to Part II of the *Code*. He added that an appellant could appeal to the Federal Court on questions of law as a last step.

[19] J. Bennie confirmed that the employer representatives in the Legislative Review Subcommittee were only "somewhat" in agreement with the Labour proposal in this regard, but were prepared to consider it.

[20] A memorandum, E-1, Tab 4, dated December 29, 1994 and signed by H. Brennan, a Program Consultant with the Legislative Development and Liaison Occupational Health and Safety Branch of HRDC and was tabled at the hearing on the subject of *Column Document – [~~August~~] sic December 1994 Subcommittee Meeting*. J. Bennie referred to *Appendix A* (in draft) of the document and stated that *Appendix A* confirmed the details of the appeals process and structure that was currently under discussion by the Legislative Review Subcommittee. J. Bennie stated that item 1. of the draft document confirmed that all appeals would first go to an RSO appointed by the Minister exclusively for the purposes of receiving and deciding appeals and that such RSOs would be referred to as "Appeals Officers." Thus appeals for the review of directions, the review of non-issuance of a direction by a health and safety officer (if Labour's proposal on this was adopted) and the review of health and safety officer decisions of absence of danger in cases of refusal to work would continue to go to a RSO/Appeals Officer. The draft document further indicated that appeals that previously went to the CLRB or PSSRB, where an employee alleged that an employer had discriminated against him or her, for having acted in accordance with the right to refuse dangerous work provisions in the *Code*, would be forwarded to an Appeals Officer (AO). J. Bennie summarized that the proposed amendments would eliminate appeals to the CLRB or the PSSRB so that all appeals would be directed to an Appeals Officer.

[21] J. Bennie stated that item 2 of draft *Appendix A* confirmed that Appeal Officers would be required to have a level of expertise in occupational health and safety and would constitute the first level of appeal of a two level appeal process. Item 2 further stated that

the role of the AO would be to dispose of matters in a summary way. Where this was not possible, the matter would be referred to a tribunal to be established.

[22] According to item 3 of the draft *Appendix A*, the new tribunal or board that was to be established would consist of a neutral chair appointed permanently to the new tribunal and part-time members drawn from lists submitted by employer associations and trade unions. Tribunals to hear second level appeals would therefore consist of a neutral chair and one part-time board member from the employers list and one part-time board member from the trade union's list. It was noted that Paragraph 9(2)(a) of Part I of the *Canada Labour Code* [in effect at the time] made provision for the appointment of part-time members and for remuneration and other matters related to the operation of tribunals.

[23] J. Bennie confirmed that item 4 of the document stated that part-time members of the newly established Board would have expertise in occupational heath and safety and would be nominated by the employer and trade union representatives on a proposed committed referred to in the document as the *Technical Revision of the Canada Occupational Safety and Health Regulations*.

[24] Items 5 and 6 confirmed that appeals could always be made to the Federal Court on points of law and that consideration had to be given to the possibility of rolling up matters related to the Public Service of Canada and appeals by public servants which were going to the PSSRB into the proposed second level appeal tribunal established under the CLRB. Such rolling up of process would require discussion with representative of both Boards and it would also be necessary to verify this shift with overall government policy.

[25] J. Bennie commented on a further attached six column table document entitled *Review Canada Labour Code* Part II, *Section 5, Appeal/Review Procedure*. The column document had headings as follows: provision in the *Code* being considered at the time; page number; original proposal for amendment; agreement-in-principle amendment proposal; issues/explanations related to agreement-in-principle proposals and the status of the agreement-in-principle proposals. J. Bennie referred to proposal item 30 entitled *Review by the National Appeals Officer for Safety and Health* where it confirms that the status of the agreement-in-principle is unresolved. J. Bennie confirmed that HRDC still had some concerns with the proposal of Employer and Labour members of the Legislative Review Subcommittee.

[26] Document, E-1, Tab 5, was tabled at the hearing which J. Bennie confirmed was his summary notes of Legislative Review Subcommittee meetings. J. Bennie confirmed that he had noted the position of employer representations on the Legislative Review Subcommittee that the CLRB second level appeal tribunal be empowered in the *Code* to screen and disallow appeals at this level. J. Bennie confirmed that it was proposed that the new tribunal could decide not to hear an appeal.

[27] Document E-1, Tab 7 was tabled at the hearing which J. Bennie confirmed was a letter from Horace Brennan dated March 16, 1995, to Legislative Review Subcommittee

members James Lawson and Al Munholland. J. Bennie stated that the letter included summary notes for the last Legislative Review Subcommittee meeting and the draft final reports on the refusal to work/review process and advising on the next meeting. J. Bennie pointed to minutes which confirmed that discussions on the Appeal/Review procedure section of the package were completed and there were no areas of non-consensus.

[28] J. Bennie further confirmed that there had not been any representatives of the CLRB or PSSRB on the Legislative Review Subcommittee so there was no confirmation if they were in agreement with the proposal.

[29] Document E-1, Tab 8 was tabled at the hearing which J. Bennie confirmed was the "*Final Report of the Legislative Subcommittee to the Legislative Committee for the Review of Part II of the Canada Labour Code On Recommended Changes to Appeals/Review Process*" dated April, 1995. J. Bennie pointed out that the "*Executive Summary"* section confirms in the second paragraph that the key principle is that the employee and employer have the right to access to an unbiased appeal/review process. It also states that a key element is an appeal mechanism that has been enhanced through a two-tier structure.

[30] J. Bennie then summarized the conclusions regarding the proposed structure of the appeals process confirmed in the Report.

> **APPEALS/REVIEW PROCESS**
>
> Proposed Structure of Appeals Process
>
> The following details the new appeals process and structure that has been developed to address various concerns. It provides an additional level of appeal compared, with the current system. Cost increases will be minimized in view of the additional power being given to health and safety officers to vary or rescind their own directions after consultation with the employer and employee(s) concerned (e.g. to correct errors in the direction, to extend a compliance date or to rescind a direction that the officer later determined to have been incorrect) and by permitting the Board to decline to inquire into appeals or requests for reviews that do not meet certain criteria.
>
> 1. All appeals or requests for review of directions plus all matters dealing with review of a health and safety officer's decision in refusal-to-work cases would be sent to an Appeals Officer. All cases involving complaints of reprisals by an employer against an employee for acting in accordance with refusal-to-work provisions (and any other provisions of Part II) would also go to an Appeals Officer.
> 2. The Appeals Officer, who would also be a health and safety officer and thus have a certain level of expertise in OSH, would constitute the first level of a two-level review process. The role of the Appeals Officer would be to dispose of matters in a summary way. Where this is not possible or where there is a further appeal of a decision or a direction of the Appeals

Officer, the matter would be referred to a Board Tribunal. The Appeals Officer would also have the power to extend compliance dates for directions that are eligible, pending the completion of a review by the Appeals Officer or pending consideration by the Tribunal, as the case may be.

3. Tribunals would constitute the second level of review in a two-tier process. Tribunals are proposed to be set up under the auspices of the Canada Labour Relations Board. The Chair of each Tribunal would be a permanent member of the Board (i.e., a neutral chair). The other two members of the Tribunal would be part-.time members of the Board, one drawn from a list of Board members recommended for appointment by management representatives, and the other drawn from a list of Board members recommended for appointment by employee representatives. Paragraph 9(2) (a) of Part I of the *Canada Labour Code* 'already makes provision for the appointment of part-time members of the Board to assist the Board in carrying out its functions, under Part II. Part I already contains provision for appointment and tenure of office for part-time members, and for remuneration and other matters relevant to operation of Tribunals.
4. It is proposed that these part-time members of the Board would have expertise in occupational safety and health, and would be nominated by the management and labour caucuses of the Review Committee for the Technical Revision of the Canada Occupational Safety and Health Regulations.
5. Further appeals could always be made to the Federal Court on points of law.
6. Consideration also needs to be given to the possibility of rolling up into the above process the Part II matters related to the Public Service of Canada which currently go to the Public Service Staff Relations Board, thus creating a more efficient and uniform treatment of employers and employees under federal jurisdiction. This would require further discussions with representatives of both Boards and also verification of overall government policy with regard to such a potential shift.

[31] J. Bennie was asked to comment on the statement in paragraph two of the *Executive Summary* that the consensus proposals met the various objectives of management, Labour and government and that parties had made compromises on their original proposals and positions in order to achieve this optimal set of proposed changes relative to consensus on the appeal/review proposal. J. Bennie stated that management had not opposed Labour's concern for fairness in the appeal/review process and appeared to have, for the most part, been fairly supportive of the structure that was finally proposed.

[32] Document E-1, Tab 9 was tabled at the hearing which J. Bennie confirmed was the agenda for the fourth meeting of the Legislative Committee on the subject of the review of Part II of the *Code* and subsequent meeting minutes. J. Bennie noted that the Chair of the meeting was the ADM of HRDC, James Lahey. He pointed out that the minutes

confirm the consensus of the Legislative Review Subcommittee on the subject of the Appeal/Review Process.

[33] Document E-1, Tab 10 was tabled at the hearing which J. Bennie confirmed were meeting notes for a meeting that ADM J. Lahey distributed at his meeting held on June 15, 1995 with both the Legislative Review Committees of Parts II and III of the *Code* to share information on a review of the HRDC Labour Program that had been carried out in the Department in 1994 and the future changes implicated. J. Bennie stated that J. Lahey indicated that the Labour Program in HRDC was required to reduce its budget by $10.3 million dollars and reduce full time equivalent employee position by 100 by the end of 1997-98 on the base budget of $64 million dollars and 750 full time equivalents. In other words, a reduction in the order of 15 to 20 percent.

[34] J. Bennie confirmed that the Legislative Review Subcommittee members were aware that a program review was occurring in HRDC and member had, at the time, concerns about what impact this might have on their agreements.

[35] Document E-1, Tab 11 was tabled at the hearing which J. Bennie confirmed was originated with Mr. Malanka, Project Leader, Code Review Project on July 12, 1995 on the subject of *Tasks Related to CLC-II Review Project*. J. Bennie commented on a section of the document entitled *Final Level Safety and Health Review Board*. J. Bennie stated that it appeared to be referring back to the original proposals that had been submitted by employer and Labour groups prior to the consensus agreements by the Legislative Review Subcommittee.

[36] The witness referred to an excerpt from E-1 Tab 11, an unidentified document in terms of author or date, entitled *Status Report*. J. Bennie noted a section headed *Issue* which states that the Legislative Review Committee meeting of October 31 will be the first time that HRDC has returned to committee members with a proposal that changes the consensus agreement of the Legislative Review Subcommittee that were initially accepted by the Legislative Review Committee. It states that reaction is expected to vary among committee members and so the issue is how HRDC is to conduct the Legislative Review Committee scheduled of October 31.

[37] J. Bennie commented on the section of the document entitled *Reaction* and subtitled *Labour*. J. Bennie stated that the document indicates that meetings were held with individuals from the Canadian Labour Congress and separately with the PSAC. J. Bennie confirmed that Labour specified, among other things, that it did not like the concept of the RSO and did not want to model the review and appeal process on that approach.

[38] J. Bennie referred to an excerpt from E-1, Tab 11, an unsigned and undated HRDC document entitled *Review and Appeals*. The document reads:

Reviews and Appeals

- Parties want an appeal/review system that is procedurally fair, expedient, cost effective, administratively simple, representative, and with OHS expertise

Committee

- Committee recommended two-tier system where:
  - first level of appeal is the Appeals Office who could hear all requests for appeals respecting directions, decisions and discipline
  - second level of appeal, either the CLRB or the PSSRB depending on the circumstances, could also hear requests for appeals respecting directions, decisions and discipline

Proposal

- *HRDC prefers a single-tier appeals approach to achieve the goals. Appeals would be handled as follows:*
  - *appeals officer would hear all requests for reviews respecting decisions and directions*
  - *existing Boards would hear all requests for review of complaints concerning disciplinary action*
  - *decisions of the 2 separate appeal bodies would be appealable directly to the Federal Court, if consistent with a proposed privative clause*
- *HRDC concerns with the Committee's proposed model:*
  - *HSOs concerned with process of varying or rescinding their own directions*
  - *appeals will be longer and more numerous because, in practice, almost everything could be appealable to the second level*
  - *appeals officer would not have industrial relations expertise*
  - *cost of operating "tribunal" reviews*

[39] J. Bennie commented regarding "HRDC Concern with the Committee's proposed model" that it was never the intention of the Committee that the new Tribunal housed at the CLRB would take all appeals. He stated that the intention was that the tribunal established at the CLRB would have the power to accept or reject appeals based on criteria that was not fully developed beyond what appeared in the Legislative Review Subcommittee consensus recommendations.

[40] J. Bennie stated that he could not recall HRDC expressing concern over the cost of a tripartite tribunal but did recall that HRDC had not mentioned cost estimates for the tripartite tribunal proposed as a consensus item of the Legislative Review Subcommittee.

[41] Document E-1 Tab 12 was tabled at the hearing which J. Bennie confirmed was a letter dated October 26, 1995, from D. Rguem to Legislative Review Committee Members and Alternates on the subject of the *Legislative Review Committee meeting scheduled (OCT. 31 –NOV. 1)*. J. Bennie stated that the document included a discussion paper entitled *Future Directions* which was to form the basis for discussion at the meeting. Mr. Bennie testified that the letter pointed out that the department was to consider the agreements and non-consensus in terms of program review, regional staff involvement and role, and government priorities. Mr. Bennie stated that the letter further stated that HRDC has reconsidered some of the consensus agreement. He noted that the *Future Directions* document stated that some of the consensus agreements needed to be reviewed and possible approaches would be proposed at the meeting.

[42] J. Bennie further testified that the letter outlined the principles that guided HRDC's review of the proposed changes. According to the letter, changes must:

- reflect the changing role of the federal government, fiscal restraint, program review;
- modernize the *Code*: performance based, less prescriptive, reflect current technology;
- streamline the *Code*: reduce unnecessary costs for all parties, strengthen internal responsibility, increase administrative efficiency;
- advance partnerships/harmonization with other jurisdictions: provide required regulation making authority to facilitate harmonized regulations;
- promote workplace responsibility: joint responsibility by workplace partners to monitor and deal with workplace health and safety issues;
- establish a continuum of measures to gain and enforce compliance.

[43] J. Bennie referred to a portion of document E-1 Tab 13 under the heading, *What Does This Mean – Recommendations Modified* that states that HRDC prefers a single-tier appeal process that is effective, fair and fast. J. Bennie stated that HRDC's reversal of the Legislative Review Subcommittee consensus agreement was a midstream betrayal of the consensus agreements made at the Subcommittee and Legislative Review Committee.

[44] Document E-1 Tab 15 was tabled at the hearing which J. Bennie confirmed was a letter from D. Rguem to Legislative Committee Members and Alternatives dated May 10, 1996, on the subject of *Summary Notes of the April 26, 1996 Legislative Committee Meeting* chaired by Nicole Senécal, ADM, Labour, HRDC who had succeeded ADM Lahey. J. Bennie stated that the government position was presented with regard to a single-level review appeal process, perhaps housed at the CLRB whose structure itself was under review. J. Bennie confirmed that Labour had no objection to a single-level review appeal process but preferred that the single-level reviews be conducted by a tripartite tribunal similar to their original position to achieve a process

independent of HRDC. J. Bennie testified that HRDC confirmed that appeals would be dealt with by the Appeals Officer. J. Bennie confirmed that there was no consensus on this decision.

[45] Document E-1 Tab 16 was tabled at the hearing which J. Bennie confirmed was a letter dated June 5, 1996, from Dick Martin, Secretary-Treasurer, Canadian Labour Congress to N. Senécal, ADM Labour component HRDC. J. Bennie stated that the letter indicated Labour's position on non-consensus items including the appeals/review process. J. Bennie testified that Labour confirmed that its position on the appeal/review process was their original proposal for a tripartite tribunal set up under the auspices of the CLRB. J. Bennie explained that Labour objects to appeals going to an Appeals Officer, because such officers are not at arms length from HRDC, the regulatory agency and because AOs are bound by Departmental policies. J. Bennie confirmed that the Labour position remained non-consensus with HRDC's position on the appeal/review process.

[46] Document E-1 Tab 17 was tabled at the hearing which J. Bennie confirmed was a letter from N. Senécal, ADM Labour Branch, HRDC, dated July 12, 1996, to Louise Hall, PSAC, and Harry Phillips, Director, Industrial Safety, Canada Post Corporation, copied to D. Martin, Canadian Labour Congress regarding recommendations that she would be making to the Minister regarding non-consensus issues evolving from the final Legislative Review Committee meeting held on April 26, 1996. J. Bennie stated that ADM N. Senécal advises on page three of the letter that she will be recommending one level of appeal because of its greater simplicity and timeliness.

[47] J. Bennie testified that the letter, E-3, confirms that the one level of appeal will be the Appeals Officer for the appeal of directions and decision in the case of refusal to work. The letter further stated that industrial relations matters related to alleged discrimination by an employee will continue to be heard by the CLRB or its successor. In addition, the letter states that the *Code* will be silent on the organizational home of the Appeals Officer, as this is an administrative matter whose resolution must await decisions on the future of the CLRB. J. Bennie noted that ADM N. Senécal indicated that it was her intent to move the Appeals Officer function to a reformed CLRB as soon as that proves appropriate. The letter reads:

> Dear Ms. Hall and Mr. Phillips:
>
> The purpose of this letter is to inform you of the recommendations that I will be making to the Minister regarding the non-consensus issues evolving from the final discussions at the April 26, 1996 Legislative Committee meeting.
>
> At the onset, let me express my appreciation for the open and informative dialogue that transpired at the April Legislative Committee meeting. Also, I wish to thank you for your prompt response with rationale to your positions with regard to the non-consensus items.
>
> My recommendations to the Minister regarding the ten outstanding non-consensus items are as follows:

> …Appeals/Review Process
>
> I will recommend one level of appeal because of its greater simplicity and timeliness. An Appeals Officer will deal with all appeals of directions and right to refuse cases. Industrial relations (discipline) cases will continue to be heard by the Canada Labour Relations Board (CLRB) or its successor. The *Code* will be silent on the organizational "home" of the Appeals Officer, as this is an administrative matter whose resolution must await decisions on the future of the CLRB. However, it is our intention to move the Appeals Officer function to a reformed CLRB as soon as that proves appropriate.
>
> Original sign par
> Nicole Senécal
> Assistant Deputy Minister
> Labour Branch
> cc: Legislative Committee Members
> Dick Martin, CLC
> Peter Harrison

[48] Mr. Bennie confirmed that moving the AO function to the CLRB might not satisfy Labour's expectation for fairness depending on how it was structured. He reiterated that Labour preferred a tripartite appeal process with a neutral full time chair one part-time member selected from a list recommended by management and one from a list recommended by Labour.

[49] J. Bennie referred to a letter, E-1 Tab 18, which RSO Serge Cadieux sent to R. Seaman, Manager, Part II Task Force dated September 25, 1996 on the subject of *Part II Revisions to the Code respecting the RSO*. J. Bennie stated that RSO Cadieux proposed in the letter that the revised *Code* authorize the Appeals Officer to obtain resources of legal counsel and other experts to assist the AO in an advisory capacity. RSO Cadieux also proposed that the *Code* enable the Minister to provide the Appeals Officer with quarters, staff and means necessary for Appeals Officers to carry out the functions.

[50] Document E-1 Tab 20 was tabled at the hearing which J. Bennie confirmed was a memorandum from D. Head to Michael McDermott, Warren Edmondson, Gerry Blanchard, Rob Cook, and J.P. Aubre dated January 22, 1997 on the subject of the *Part II Appeals Function*. J. Bennie noted that the Background section of the document stated that there might be a perception of lack of neutrality of the appeals function in that both AOs and HSOs report to the same ADM within the HRDC structure. At issue in the memorandum was what arrangements could be established to enhance the perception of neutrality and provide for an independent, effective AO review. J. Bennie confirmed that the action recommended was what eventually occurred in the revised *Code*. The *Code* remains silent on the organizational home of the AO.

[51] A transcript from the *Standing Committee on Natural Resource and Government Operations*, E-1 Tab 21, was tabled at the hearing and J. Bennie confirmed that the

minutes were from the parliamentary committee on May 9, 2000 that had the mandate to discuss Bill C-12, amendments to the *Canada Labour Code*, Part II. J. Bennie reiterated that the Labour position was that the CIRB be substituted for the AO in section 145.1 and to establish a two-tier appeal system. J. Bennie confirmed that Labour still sought its initial proposal at HRDC.

[52] J. Bennie referred to minutes of the above parliamentary committee meeting that continued its meeting on Bill C-12 on May 11, 2000. J. Bennie noted that ADM W. Edmondson responded to a question from Dale Johnston, a member of parliament regarding the selection, appointment and employment status of AOs. W. Edmondson stated that AOs are public servants and appointed in accordance with the Public Service Employment Act. W. Edmondson confirmed that the amendments were to redefine and enlarge the role of RSOs to review decision of no-danger by HSOs. The quasi-judicial function performed by RSOs would continue as AOs.

[53] J. Bennie noted a question from D. Johnston regarding Labour's concern with the proposed appeals process. J. Bennie stated that W. Edmondson replied that HRDC had some concerns with Labour's suggestion for a two-tier process where the AO would represent a first tier of appeal and the Labour board would be the second review process. J. Bennie noted that HRDC had problems with Labour's proposal because the appeal process was determined in the late 1980 to be a quasi-judicial review and since the CIRB is a quasi-judicial board, HRDC could not see that advantage of a second level quasi-judicial board reviewing the decision of the first level quasi-judicial board. Secondly, HRDC saw a two-tier appeal process to be relatively inefficient and could result in delays.

[54] Document E-1 Tab 23 was tabled at the hearing which J. Bennie confirmed was a copy of an e-mail that he received on June 2, 2000 from Kathie Steinhoff a CUPW researcher on the subject of the third reading of Bill C-12 on May 31, 2000 to amend the *Code*, Part II. J. Bennie stated that the e-mail summarized what occurred that day. J. Bennie testified that Labour continued to oppose the single-level appeal process conducted by AOs who were employees of HRDC the regulatory agency.

[55] Document E-1 Tab 24 was tabled at the hearing which J. Bennie confirmed was the Canadian Labour Congress submission to the Standing Senate Committee on Social Affairs, Science and Technologist on Bill C-12, an Act to amend Part II of the *Code* (Health and Safety). J. Bennie stated that the submission reiterated Labour's position and referred to page two where the Canadian Labour Congress wrote that their proposal was for a first tier of appeal to an AO which would not be quasi-judicial in nature. The second tier appeal at a body external to HRDC would ensure that all issues could be dealt with impartially and effectively. Cases would be handled at the second tier with two part-time "wing people" to hear cases or a series of cases.

[56] J. Bennie referred to the view of the Canadian Labour Congress that "without an external appeal mechanism, HRDC (Labour, OSH) would be reviewing its own decisions".

[57] J. Bennie referred to E-1 Tabs 26-30, minutes of the Regulatory Review Committee Meeting held on February 13, 2001, November 14, 2001, May 22, 2002, November 21, 2002, April 30, 2003, and November 5, 2003 and May 5, 2004. J. Bennie stated that the Regulatory Review Committee is established to review regulations under Part II and is chaired by the Director of the HRDC Labour Branch and members include representatives from Labour and various employer groups all under federal jurisdiction. J. Bennie testified that Bill Chedore spoke at the February 13, 2001 meeting for the Canadian Labour Congress and reminded Mr. Blanchard that he and W. Edmondson had agreed that HRDC would look at the appeal process after the amendments to Part II of the *Code* were passed. J. Bennie noted that G. Blanchard stated that he would raise the matter with the ADM and the Minister.

[58] Mr. Bennie testified that: minutes of the November 14, 2001 indicate there was no progress to report on this issue. The minutes of the May 22, 2002 meeting confirmed that the Chair had met with ADM W. Edmondson on the issue and the ADM would meet with spokespersons. The minutes of the November 21, 2002 meeting confirmed that the ADM met with officials of the Canadian Labour Congress and Federally Regulated Employers-Transport and Communications Organization (FETCO) on September 13, 2002 to discuss the issue and it was agreed that discussions were to continue. The minutes of the April 30, 2003 meeting state that the possibility of contracting independent outside adjudicators could be explored. The minutes of the November 5, 2003 meeting stated that the Director of the Appeals Office was retiring and consideration was being given to a replacement. The minutes of the May 5, 2004 meeting states that parties expressed concern that the Labour Program at HRDC was not fulfilling its commitment to re-examine the appeals process. The chair stated that he would discuss the matter with the ADM of Labour.

Testimony of Pierre Rousseau

[59] P. Rousseau provided the following summary of his curriculum vitae which is summarized as follows:

> In July 2004, Mr. Rousseau was appointed Director of the Occupational Health and Safety Tribunal Canada* (OHSTC). From 1996 to 2004, he was Director of the Investigation Division of the Labour Program, Quebec Region, Human Resources and Skills Development Canada (HRSDC)*.
>
> From 1984 to 1996, Mr. Rousseau was the Quebec Regional Safety Officer and Technical Advisor in occupational health and safety for Labour Canada. Mr. Rousseau was one of the first Regional Safety Officers to conduct hearings under the *Canada Labour Code*, Part II. In 1990, he contributed to the establishment of the CAOOHS.
>
> Mr. Rousseau holds a degree as a Public Hygiene Technologist from the Institut de technologie agroalimentaire du Québec and is a Certified Public Health Inspector of Canada. He also received a graduate diploma in public

administration from the École nationale d'administration publique of the Université du Québec.

* Following the amendments to the *Canada Labour Code*, Part II, in September 2000, the Regional Safety Officer became an Appeals Officer for the purpose of hearing appeals made under Part II of the *Code*. This will be reflected throughout the text.

* In 1993, the Department of Labour Canada was amalgamated into what is now known as the Department of Human Resources and Skills Development Canada (HRSDC) and became the Labour Program. This will be reflected throughout the text.

[60] P. Rousseau testified that during the period from 1984 to 1996 he had played an active role in the development of Part IX of the Canada Occupational Health and Safety Regulations (COHSRs) and participated in the development of policies in connection with the aforementioned regulation. He was also consulted as a regional official on the proposals of the Legislative Review Subcommittee and asked to provide information regarding the tripartite appeal tribunals that operated in the province of Quebec under the Commission de la Santé et Sécurité au Travail (CSST). P. Rousseau clarified that he had not sat on any amendment committee and noted that in Québec the CSST no longer uses tripartite tribunals under the CSST.

[61] P. Rousseau testified that he had participated in the initial establishment of the Canada Appeals Office. He explained that the Federal Court of Appeal decision in the case of *Canada (Attorney-General) v. Bonfa (F.C.A) [1989] F.C.J. No. 1062* and the Department of Immigration had commented that it was inappropriate for the same RSO in the field who advised and counselled HSOs in their health and safety assignments to subsequently review appeals of the same HSO directions. HRDC decided in response to that comment to designate Regional Safety Officer (RSO) or Officers who, unlike RSOs in the field appointed for the purposes of the COSHRs, would be dedicated solely and uniquely to receiving and deciding on appeals of HSO directions. P. Rousseau stated that in 1991 he was selected to establish an Office of the RSO for receiving and deciding on appeals of HSO directions based on his experience in hearing appeals of directions of HSOs. P. Rousseau established an Office of the RSO consisting of one RSO to hear appeals and one support staff. He also trained RSO Cadieux as an Appeals Officer and then returned to his job in the regions as Technical Advisor. P. Rousseau confirmed that RSO Cadieux became the first Director of the Office of the RSO.

[62] Document E-2 Tab C was tabled at the hearing which P. Rousseau confirmed was an excerpt from the Canada Appeals Office website. P. Rousseau testified that its purpose was to correct a previous publication that existed when he was appointed as Director and clarify that the Statute does not authorize the establishment of an office tribunal rather the *Code* only provides for the designation of individual Appeals Officers for the purpose of receiving and deciding on appeals of HSO decisions and directions. The website clarifies that the office to which he has been appointed Director exists only for the administrative support of AOs who are designated for the purpose of receiving and deciding such

appeals. P. Rousseau confirmed that this has been the case since the first RSO, Serge Cadieux, was designated to present time.

[63] P. Rousseau stated that when RSO Cadieux was designated there was only one support staff member. P. Rousseau testified that the number of AOs and support staff members has grown since then and this motivated his decision to include the clarification in the CAO website. P. Rousseau confirmed that the clarification did not actually get included in the CAO website until shortly after he had received the summons to appear and provide documents at this hearing. P. Rousseau testified that he was motivated to have the text added to the website thereafter because the summons referred to the CAO as a tribunal.

[64] P. Rousseau testified that he advised Assistant Deputy Minister McKennirey, that he had received a subpoena in this case but he had not discussed the subpoena with him. P. Rousseau added that he had not discussed the subpoena with any AO.

[65] P. Rousseau confirmed that the Assistant Deputy Minister approved his request to be represented by a lawyer and provided funds for that purpose. P. Rousseau clarified that his contract with Mr. Grammond named HRDC in the agreement because HRDC is the administrator of his funds, but the contract was, in fact, between the CAO and Mr. Grammond. P. Rousseau pointed out that the contract number on the contract is the cost responsibility number for the CAO.

[66] P. Rousseau testified that currently there is no contract in place in his office, the CAO, for the services of legal counsel for AOs. He explained that he has approval for funds to engage a lawyer for AOs but it is difficult to find suitable counsel because counsel normally supplied by Justice Canada cannot be assigned to the CAO because Justice lawyers often represent Federal departments who appear before AOs. P. Rousseau stated that such a contract existed before he was appointed as Director, but he did not continue with the contract in 2004.

[67] P. Rousseau stated that the law firm named in that contract had recently merged with another office who handled federal and provincial Labour law cases and he was concerned that a conflict of interest could arise leading to the appearance of bias. P. Rousseau confirmed that he is currently creating a position called *Technical Advisor* and a lawyer will be hired under that title so that the person is not attached to Justice Canada. Once a job description is completed for the *Technical Advisor* he will be able to proceed with filling the post through a staffing action governed by the *Public Service Employment Act*.

[68] P. Rousseau confirmed that J.P. Aubre, an Appeals Officer formerly employed as Legal Counsel with Justice Canada and assigned to Labour Canada, HRDC, had never provided legal counsel or advice to an AO or the CAO before he was engaged by the CAO and designated as an AO.

[69] Mr. Rousseau testified that the decision to seek party status in this case was to ensure that all relevant facts and legal arguments were put before the decision-maker and that the

present structure of the Appeals Office be preserved. He further testified that this was entirely his decision without any consultation with ADM McKennirey.

[70] He clarified that he was appointed as a RSO between 1996 and 2004 for the purposes of the COHSRs but not for receiving appeals of directions and decisions of HSOs. In December of 2003 or January 2004, after he was appointed of Director of the CAO, he was designated as an Appeals Officer. He further testified that his current AO designation was solely for administrative purposes, eg. signing summons when an AO may not be available. He confirmed that he has never held a hearing and has only rendered a decision in the case of appeal withdrawals or where the appeal was not receivable.

[71] P. Rousseau testified that he did not know if a job description existed for his position as Director of the CAO and, if it did, he had never read it. He stated that with the appointment as Director of CAO he was made a member of the executive level of government and his financial authority and accountability is established through Treasury Board via the deputy minister who sub-delegates authority to managers. P. Rousseau referred to a *Service Canada Financial Management Framework 2004 Update* which had been adopted by HRDC as its financial policy. He stated that this defines a manager's financial authority, duties and limits.

[72] P. Rousseau testified that his appointment as Director of CAO followed an interview under the auspices of the *Public Service Employment Act*. He was subjected to a selection Board with included ADM McKennirey. R. Cook, Counsel, CIRB, and G. Blanchard, General Director, Labour Program HRDC.

[73] P. Rousseau confirmed that he is signatory to a *2006 Performance Agreement for the Executive Group, Human Resources and Skills Development Canada (HRSDC)* in place for fiscal year 06-07. Mr. Rousseau stated that the performance agreement is in place for performance pay for him. However, it is him who informs ADM McKennirey of what he expects to achieve for the fiscal year.

[74] P. Rousseau agreed that part of his responsibility as Director of the Canada Appeals Office was to assist AOs in ensuring that the process of hearing and adjudicating and ultimately disposing of appeals is undertaken in a manner that will ensure public confidence in the appeals process. Mr. Rousseau clarified that he does this without infringing on the appeal process of Appeals Officers and he is only there to assist AOs to achieve their mandate by taking care of administrative matters such as obtaining hearing rooms and obtaining expert witnesses, etc.

[75] P. Rousseau described the process of appointing employees who are subsequently designated by the Minister of Labour as AOs. He stated that he can not hire anyone unless Treasury Board allocates funding for a position. P. Rousseau testified that in 2004 there were only two AOs in place who retired shortly thereafter. As a result, there were two existing AO positions to be filled. To assist in orienting the new AOs, Mr. Rousseau sought and received financial approval from ADM McKennirey in 2004-2005 to retain one of the retired AOs on a term employment basis.

[76] Mr. Rousseau testified that he is able to fill existing positions but it is necessary to justify requiring additional positions based on the number of appeals to be heard. When he was appointed as Director, P. Rousseau stated that there was a backlog of approximately 70 appeals. He wrote a justification memorandum to ADM McKennirey to justify the number of positions needed and subsequently received authorization for an additional AO to be employed on an indeterminate basis. He also received financial approval to engage AOs on contract to deal with the back-log.

[77] P. Rousseau testified that he had completed three hiring boards since being appointed as Director of the CAO and described the typical staffing process. He stated that it begins with a notice of competition to the Public Service Commission. When applications are received at Human Resources division, an agent at Service Canada conducts a preliminary screening to ensure that candidates meet the stated qualifications in the poster. The list of potential candidates is forwarded to him to assess the basic experience requirements before getting into any rated requirements. Out of approximately 80 applications accepted, only six were invited to an interview with a list of set questions which included a written test. P. Rousseau stated that three candidates were finally qualified and so an eligibility list was established which eventually led to the hiring and designation of the current indeterminate AOs.

[78] Mr. Rousseau confirmed that the essential qualifications in the competition poster for the above noted AOs was derived from the *Statement of Qualifications* and from the *Work Description* of the AO. P. Rousseau agreed that the competition poster does not specify terms and conditions of employment other than the location, the fact that it is indeterminate and the salary. P. Rousseau stated that one would have to contact a Human Resources officer at Service Canada to have information regarding the terms and conditions of employment and these would be contained in the collective agreement between PSAC and the Treasury Board.

[79] P. Rousseau confirmed that AOs are appointed as employees at the Program Management (PM) level 6 group and their terms and conditions of work are covered by the collective agreement for program management group employees despite the fact that AOs are not union members as are excluded from collective bargaining and the collective agreement. Mr Rousseau confirmed that he has no direct control over the terms and conditions of employment for AOs. He also confirmed that while he has the power to deploy an AO he has never done so and could not recall any Appeals Officer being deployed in the past.

[80] P. Rousseau testified that he had not participated in a selection committee of any HSO for Labour Operations, HRDC since 2000–2003.

[81] P. Rousseau testified that he must obtain authorization from the ADM to engage AOs on a contract basis for funding purposes. However, when he was appointed as Director, CAO, three AOs were engaged on a contract basis until 2005. The contracts were renewed in May of 2005. Mr. Rousseau stated that the contract process for letting a contract of less than $25,000 involves communicating with Service Canada regarding his needs. He can provide a list of who meets his requirements and a person from the list can be engaged.

[82] P. Rousseau confirmed that there have been 4 contractors engaged while he has been Director of CAO. These include: M. McDermott, former Associate Deputy Minister of Labour Canada during the 1990s; S. Cadieux, former Director of the CAO and former AO; T. Farrell, former Deputy Minister of Labour, Manitoba; and R. Lecourt, formerly of the Québec Department of Labour. Their terms have been fixed for one year and have a limit of $25,000. If the contract had to be extended for the contractor AO to complete a decision on an appeal, P. Rousseau stated that approval would have to come from Service Canada. P. Rousseau held that approval of funds would likely be approved by the ADM to avoid the greater cost of re-hearing an appeal.

[83] P. Rousseau testified that an AO engaged on a contract basis can re-submit their name to him to be put on the list of interested contractors, and if he has sufficient funds, he can indicate his preference to Service Canada. P. Rousseau agreed, hypothetically, that he could decide not to engage a contractor if he was not satisfied with their performance as an AO, but pointed out that the situation has never occurred. Mr. Rousseau stated he now signs the contracts for AOs on behalf of the Minister. P. Rousseau confirmed that currently there are four indeterminate AOs and three AOs engaged on a contract basis.

[84] P. Rousseau added that the central area of competence for an AO is their knowledge of occupational health and safety. Mr. Rousseau testified that the board selection committee of which he was chair found Mr. Lafrance's qualifications met the requirements for designation as an AO. AO Guénette, the undersigned Appeals Officer, questioned and disagreed on the relevance of A. Raven's further questions regarding the qualifications of AO Richard Lafrance.

[85] P. Rousseau stated that part of his mandate is to ensure that there is public confidence in the independence of the appeal process. In this regard Mr. Rousseau testified he has acted and continues to act as a "firewall" between AOs and the Labour Program of HRSDC formerly HRDC. P. Rousseau insisted that there are no communications between AOs and the Labour Program officials and any communications relative to appeals are handled by support staff in his Office. P. Rousseau added that he succeeded in having the CAO and AOs moved to separate buildings so that there could also be no appearance of AOs being in communications with HRSDC employees.

[86] P. Rousseau testified that the job description for the Director of the CAO was that produced for S. Cadieux for the period of 2000-2001 because the job descriptions speaks of two full time equivalent employees and he has eight. Consequently, the document needs to be revised. P. Rousseau added that the out-of-date job description, which he has not signed, states that the Director hears appeals. However, he decided not to get involved with hearing appeals so that he can carry out his mandate of ensuring a firewall between AOs, the Labour Program at HRSDC and parties to an appeal. P. Rousseau stated that he would be revising the Director job description and submit it to his assistant deputy minister supervisor.

[87] P. Rousseau stated that it would not be appropriate for AOs to report to someone in the Labour Program at HRSDC. However, he did not believe that the independence of the

AO review process can be called into question when the Director of the CAO reports to the Labour ADM of the HRSDC.

[88] P. Rousseau confirmed that it was he who had authored the *Canada Appeals Office on Occupational Health and Safety Annual Report for FY 2005-2006*. Mr. Rousseau also confirmed he wrote in the *Annual Report* that reform measures were set in motion over the previous two years raising the appearance of independence of the office. He stated that the independence of the CAO and AOs was one of his priorities after he was appointed Director of the CAO.

[89] P. Rousseau confirmed that he did not include comments of the Federal Court of Appeal in the case of *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada (Parks Canada), Docket (A-491-03)* regarding how AO Cadieux handled the evidence in this decision. P. Rousseau stated that he did not consider those comments appropriate in an annual report. He added that he does not criticize AOs as this is the role of the Federal Court. P. Rousseau testified that the AOs themselves review the decisions of the Federal Court and he does not involve himself. The only thing he does is to ensure AOs have a copy of decisions of the Federal Court.

[90] P. Rousseau stated that when Appeals Officers are designated by the Minister of Labour, whether they are indeterminate employees or engaged on a contract basis, they receive a one week training course given by the *Professional Development Centre for Members of Canadian Administrative Tribunals*. The one exception is Jean-Pierre Aubre who is a Labour lawyer and has experience in a tribunal setting. P. Rousseau confirmed that, except for J.P. Aubre, none of the AO appointments had any formal legal training. However new AOs are mentored by more experienced AOs for a period of up to two years.

[91] P. Rousseau confirmed that due to his numerous duties and preoccupation with hiring new AOs and getting them trained, he had not managed to review and verify the AO indeterminate job description which is generic for all AOs. Mr. Rousseau confirmed for the same reasons that he has not managed to review and verify his own job description.

[92] P. Rousseau stated that AO are instructed, when attending the *Professional Development Centre for Members of Canadian Administrative Tribunals*, as to how the rules of natural justice and fair hearing are to be interpreted and applied. Mr. Rousseau confirmed that the rules of natural justice and fair hearing are also dealt with on the CAO website for clients. AOs are also provided with legal reference books. P. Rousseau responded that the CAO has not prepared a manual or guideline dealing with such issues or how hearings are to be run.

[93] P. Rousseau confirmed that sixty percent of appeals are related to decisions of absence of danger by a HSO in refusal to work cases and forty percent are related to directions issued by HSOs. P. Rousseau agreed that the majority of appeals are made by employees.

[94] P. Rousseau stated that he instituted a policy where appellants and respondents are requested to confirm who will be representing them in their appeal, if anyone. P.

Rousseau stated that it is a policy not yet formally incorporated in the CAO website, but he intends to include it in the CAO website. Mr. Rousseau stated that it is for support staff to ensure that the policy is carried out.

[95] P. Rousseau confirmed that an annual appraisal is carried out for each indeterminate AO. P. Rousseau stated that AOs are not entitled to and do not receive performance pay. P. Rousseau clarified that the purpose of the appraisal is to identify training and development needs for AOs. AOs are also reminded that a target set for AOs is to complete twelve hearings and decisions annually.

[96] P. Rousseau explained that the only role he played in connection with AOs was to read their decisions and advise them if their findings were substantiated by their reasons. He did not, however, attempt to influence AOs in their decisions. P. Rousseau responded hypothetically that he might not want to renew the contract of an AO whose decisions were unsubstantiated and did not make sense, but he confirmed that this situation never arose requiring him to decide if this is what he would finally do. P. Rousseau also conceded that that he does not evaluate the decisions of AOs.

[97] P. Rousseau confirmed that when a decision is quashed by the Federal Court, he highlights any deficiencies noted by the Court in their decision and ensures AOs get a copy. P. Rousseau stated that he does not offer any personal comments.

[98] P. Rousseau reiterated that the job description for AOs was seriously out-of-date and that many of the job responsibilities will no longer be included when the description is updated. For example, the job description will not state that AOs are responsible for the development and production of client information or for providing talks or speeches on the AO appeals process. This is done by the CAO through administrative staff. P. Rousseau confirmed that AOs have been instructed that this is the case.

[99] P. Rousseau confirmed that AOs do not direct the activities of external contractor that provide legal, technical and scientific advice in connection with the review of directions since his appointment as Director of the CAO.

[100] P. Rousseau commented that the AO job description being reviewed in this case was written by Mr. Cadieux when there were only two AOs and one support staff and so the structure and organization was different and consequently the AOs had to do more things that are no longer done by the current AOs. P. Rousseau testified that, unfortunately, he has not yet managed to record on paper the changes to the job description that have already been implemented.

[101] P. Rousseau confirmed that he would authorize the expenditure of money if an AO came to him and stated that it was necessary for him or her to have the immediate assistance from a lawyer or technical expert to make a determination in an appeal case. P. Rousseau testified that he would authorize the expenditure immediately and would not wait for the authorization of the ADM. If necessary, he would justify the expenditure to the Minister. If time permitted he would process the request through to the ADM first.

[102] P. Rousseau testified that he is responsible for establishing his budget for a year and for spending it. He added that for the last two fiscal years he has exceeded his budget and that was accepted by the Assistant Deputy Minister because the overrun was justified and reasonable.

[103] P. Rousseau confirmed that the knowledge requirements specified in the outdated AO job description would be knowledge that AOs bring to the job based on their knowledge, training and experience and, at the time, there is no formal training provided in these areas unless a deficiency is noted in an AOs performance. Then remedial training will be discussed with the AO.

[104] P. Rousseau agreed that the statement in the "intellectual effort" section of the outdated AO job description (E-2 Tab E-R) still applies where it states that:

> Intellectual effort is required to develop cultivate and maintain contacts with government officials to keep abreast of trends, jurisprudence and decisions in occupational health and safety at national, provincial and international levels. The effort is made difficult due to the absence of permanent staff, researchers or legal counsel on the tribunal to assist the incumbent in this work and inability to consult with departmental experts due to the need to guard the independence of the tribunal.

[105] P. Rousseau confirmed that AOs engaged on a contract basis are not supervised by him and they pay their own expenses out of what remuneration they receive in connection for carrying out the work.

[106] P. Rousseau confirmed that it is he who ultimately decides what cases will be assigned to each AO. P. Rousseau stated that he takes the knowledge background of AOs into account when deciding this.

[107] On the subject of AO Lafrance's earlier recusal from this case, P. Rousseau testified that he did not speak to or advise AO Richard Lafrance regarding his decision to do so. He only spoke with AO Lafrance after his decision. Following the incident that brought about AO Lafrance's recusal, Mr. Rousseau stated he instituted a policy that would assure that such a situation would not reoccur.

[108] P. Rousseau confirmed that S. Cadieux made him aware that, for the sake of appearance of independence, it was necessary to move the AO office to remote and separate accommodations. This was because the Labour Program was housed in same building and, while the CAO and Labour Program did not share the same floor, S. Cadieux was concerned that AOs might randomly end up in the same elevator with someone from the Labour Program. He was concerned that this random and accidental meeting in an elevator could be misinterpreted as improper contact with members of the Labour Program should an employer or Labour representative observe this chance meeting while visiting the Labour Program or other government departments housed in the building.

[109] P. Rousseau testified that he prepared a *Code of Conduct* (E-2 Tab D-O) in 2005-06 and AOs subsequently signed the *Code* in May of 2006.

[110] P. Rousseau confirmed that the *Code of Conduct* provides that if there is an apprehension of bias or conflict, the Appeals Officer must disqualify himself or herself immediately. He agreed that AO Lafrance should have advised parties that he had had some involvement in the review process that led to amendments to the *Code* and stated that he had not recalled that when he assigned him to the appeal case. P. Rousseau confirmed that he does not require AOs to confirm in writing that they have no connection with the matter in an appeal before being assigned to it. Mr. Rousseau also confirmed that he does not require AO to swear an oath of office.

[111] P. Rousseau confirmed that he does not have any control over how PM-06 AOs are remunerated.

[112] P. Rousseau confirmed that AO are provided with funds for professional training and development every year.

[113] P. Rousseau also confirmed that AOs and the CAO meet annually to discuss matters of general interest to AOs to discuss general policy regarding interpretations of *Code* provisions; to discuss Federal Court decisions and comments especially where an AO decision has been quashed. Mr. Rousseau testified that minutes are generally not taken, but if the group is reviewing a document, comments will be noted or reflected in/on the document. P. Rousseau stated that AOs and the CAO meet monthly to share information regarding the operation of the CAO, such as budget status, and to review the status of the appeals to an AO that have been received by the CAO. He testified that he does not appraise AOs of his conversations with the ADM regarding budgetary concerns. Mr. Rousseau added that he meets that Labour ADM alone and that he does not attend ADM meetings with other managers that report to the said ADM.

[114] In connection with his meetings with the ADM, P. Rousseau confirmed that they are generally at his request to discuss budgetary pressures and that there are no formal minutes of meetings. P. Rousseau was emphatic that he does not discuss day-to-day issues with the ADM.

[115] P. Rousseau confirmed that any statistics used in CAO publications related to HSO activity are obtained by his Office from Service Canada and are not obtained through communication with anyone at Labour, HRDC.

[116] P. Rousseau confirmed that the Assistant Deputy Minister, Labour, approves his leave requests.

[117] P. Rousseau confirmed that he has revised CAO Website documents after this case began because of errors in the text that suggest something that is not true. For example, AO are not, in fact, required to act in an independent manner “within the confines” of HRDC, whatever that was supposed to mean.

[118] P. Rousseau testified that he has never been pressured of felt pressured by the ADM in respect of any upcoming or on-going appeal review by an AO. He added that, if this were to ever occur, he would inform the ADM or Deputy Minister that this was not proper.

[119] P. Rousseau further testified that none of the AOs have ever advised him that they felt a compulsion to decide one way or the other or that they were being pressured by anyone, including the Director. He added that he has never pressured AOs to decide one way or the other and he has never felt that the ADM was using his budget control over the CAO to pressure a decision one way or the other. P. Rousseau pointed out that for the three years following his appointment as Director of CAO, he has exceeded his budget, and will exceed it this year, and has not had any objections or pressure from the ADM or his office. He added that if the budget item was justified, it has been accepted.

[120] P. Rousseau summarized the history of the Office of the Regional Safety Officer as follows. Following the decision of the Federal Court of Appeal in the case of *Canada (Attourney-General) v. Bonfa* [1989] F.C.J. No. 1062[4], the Minister of Labour decided to designate one or two persons employed in the Department on an intermediate basis as Regional Safety Officers for the purpose of reviewing appeals of directions made by HSOs. There existed in the regional offices of HRDC Directors, or in some cases, Technical Advisors appointed as RSOs under the same authority in the *Code*, but their role was, by policy, for the purpose of interpreting and applying the Canada Occupational Health and Safety Regulations (COHSRs) and did not include adjudicating appeals by employers and employees pursuant to the *Code*. When the *Code* was amended in September 2000 and the title of RSOs who received and dealt with appeals under the *Code* was changed to AO. Now there is no confusion between RSOs and AOs.

[121] P. Rousseau testified that AOs do not share HRDC legal services, are not subject to HRDC operational policy directives and interpretation guides provided to HSO.

[122] P. Rousseau testified that AOs do not deal in any way with prosecutions under the *Code*. P. Rousseau added that neither he nor AOs have any communications with Regional Directors, Division Heads or with HSOs. Mr. Rousseau stated that no health and safety officer has ever acted as an Appeals Officer while remaining as a health and safety officer, nor has the opposite occurred. P. Rousseau stated that the only relationship between HRSDC and AO is pay services and having leave forms processed.

[123] P. Rousseau testified that the term of an AO employed on a casual basis was extended for another term as a term employee in order for the AO to complete his review of an appeal.

[124] P. Rousseau testified that AO D. Malanka continues have a role in mentoring AOs and J.P. Aubre provides legal assistance to AOs until legal counsel is formally hired and, as such, their roles are not limited to adjudicating appeals made pursuant to the *Code*.

[125] P. Rousseau testified that, notwithstanding the activities of AOs engaged on a contract basis or other than an indeterminate basis, AOs who are employed on an indeterminate basis currently conduct the bulk of the adjudicative function.

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[4] Canada (Attourney-General) v. Bonfa [1989] F.C.J. No. 1062 [*Bonfa*]

[126] P. Rousseau testified that an AO has never been deployed to another part of the Department.

[127] P. Rousseau stated that he officially reports to the Deputy Minister but does not receive supervision from the Deputy Minister. P. Rousseau testified that he submits an annual report on the activities of AOs to the Deputy Minister. Mr. Rousseau testified that it was he who requested to meet from time to time with the ADM to keep him apprised of budget pressures and directions.

[128] P. Rousseau characterized the level of expertise held by AOs as follows. AOs have a vast experience in the field of occupational health and safety having worked in industrial settings or as health and safety inspectors.

[129] P. Rousseau confirmed that no AO has ever been removed from office or undesignated except for an AO engaged on contract who subsequently went to Morocco. Other than retirement, no other AO has left the AO position to be deployed in another section or department or to work in another job. P. Rousseau added that no AO has ever been laid off or terminated.

[130] P. Rousseau testified that HRSDC has appeared before AOs as an appellant or respondent and there are no special protocols for this. P. Rousseau stated that the question of institutional independence has never been raised before in such cases.

Respondent's Witnesses

Testimony of Pierrette Lemay

[131] Pierrette Lemay testified that she is a Senior Policy Analyst with the Treasury Board Secretariat and has been employed in the public service for 35 years in the field of compensation. P. Lemay stated that she has worked in various line Departments with the last one being Treasury Board since April 2006. She said that she is responsible of interpreting and writing policies in relationship to pay administration and compensation. P. Lemay testified that her branch is the Office of Primary Interest (OPI) and they are the writers of the policy on terms and conditions of employment adopted pursuant to the *Financial Administration Act*.

[132] P. Lemay testified that she understood that the focus of her evidence was on the terms and conditions of employment for excluded PM-06 employees at HRDC who are designated as AOs.

[133] P. Lemay explained that the Treasury Board is a group of sitting Ministers that has the authority to establish the terms and conditions of employment under the authority of the *Financial Administration Act.*

[134] P. Lemay testified that, prior to the negotiation of collective agreements in the 1950s, the terms and conditions of employment were established by regulation established under the *Civil Service Act.* When the collective agreements specifying terms and conditions of employment for represented employees came into force, Treasury Board's terms and

conditions of employment regulations were amended in 1967 and became Treasury Board's terms and conditions of employment policy.

[135] P. Lemay stated that Treasury Board sets the terms and conditions of employment for employees in its policy, documentE-30, entitled *Terms and Conditions of Employment Policy*. P. Lemay explained that the Treasury Board Secretariat administers Treasury Board's *Terms and Conditions of Employment Policy*.

[136] P. Lemay explained that an *excluded* employee is one who cannot be part of collective bargaining and be represented by a bargaining agent because of managerial or confidential duties attached to the position.

[137] P. Lemay stated that *excluded* employees, such as AOs who are employed at the PM-06 level, are not subject to the collective agreement. However, Treasury Board's terms and conditions of employment policy allows excluded employees to receive the same benefits as are provided in the collective agreement for PM-06 represented employees. P. Lemay clarified, however, that the terms and conditions of employment policy takes precedence for *excluded* employees where the policy differs from the terms and conditions of employment in the collective agreement.

[138] P. Lemay referred to the current collective agreement of the *Program and Administrative Services* and confirmed that the agreement applied to *excluded* employees through the terms and conditions of employment policy. P. Lemay stated that rates of pay for the excluded PM-06 AOs are those specified in the collective agreement and excluded employees are covered by the *Workforce Adjustment Agreement*.

[139] P. Lemay testified that excluded employees can grieve the terms and conditions of employment that are found in the collective agreement, but *excluded* employees cannot go to third party adjudication on collective agreement issues.

[140] P. Lemay was asked if it would be possible for the Minister or anyone else at HRSDC to single out one of these *excluded* groups, such as the AOs to lower their terms and conditions of employment. P. Lemay replied that neither the Minister nor any other official at HRSDC has the authority to lower the terms and conditions of employment of AOs. P. Lemay added that only the Treasury Board could do so. She opined however, that it would be *ridiculous* to suggest that that Treasury Board would change the terms and conditions of employment for one or two persons alone. P. Lemay stated that the terms and conditions of employment are for all employees in the core public administration.

[141] P. Lemay added she is not aware, in her 35 years of employment in the compensation field, of Treasury Board ever altering the terms and conditions of employment for one or two employees.

[142] P. Lemay referred to a report on the population of employees in the PM group levels 1-7 and noted that of the 1907 PM-06 employees only 445 were excluded and not represented by the Public Service Alliance of Canada Union.

[143] P. Lemay noted that the *Application* section of Treasury Board's terms and conditions of employment policy states that the terms and conditions apply to all employees in organizations listed in the *Public Service Staff Relations Act* (PSSRA), except those classified in the excluded group, and that the PSSRA is no longer in force, having been replaced by the *Public Service Labour Relations Act* (PSLRA). P. Lemay confirmed, however, that the terms and conditions of employment of PM-06 AOs are covered by virtue of *Appendix A , Interim Exceptions to the Public Service Terms and Conditions of Employment Regulations for Certain Unrepresented Employees* which are now policies. P. Lemay added that the terms and conditions of employment policy does not apply to employees in the EX category.

[144] P. Lemay confirmed that excluded PM category employees are covered by the Public Service Superannuation Act and the terms and conditions are established through the legislation.

[145] P. Lemay testified that excluded PM-06 employees are not entitled to overtime pursuant to the annex attached to Treasury Board's terms and conditions of employment regulations entitled, *Exceptions to the Terms and Conditions of Employment Policy*. P. Lemay explained that the appendix works as an exception to the collective agreement. Stated alternatively, if there is no exception noted, the collective agreement applies.

[146] With regard to rates of pay for excluded PM-06 employees, P. Lemay testified that wage rates are negotiated between Treasury Board and the PSAC for the 1462 employees represented in that bargaining unit. Treasury Board *normally* applies the same rates of pay of represented employees to excluded employees. P. Lemay explained that she used the word normally because it is not automatic and the Treasury Board Secretariat has to get approval from the Treasury Board ministers because the increase in salary for *excluded* employees has not been negotiated. P. Lemay added that in her 35 years of experience, Treasury Board has never approved a salary level higher or lower than what is in the collective agreement for employees in a bargaining unit.

[147] P. Lemay responded that she could not answer why the exceptions referred to in the aforementioned *Appendix A* of Treasury Board's terms and conditions of employment policies referred to "interim" exceptions. P. Lemay agreed that employees who are employees for the purpose of the PSLRA are unionizable. She further agreed that the terms and conditions of employment for employees represented by a union are governed by the collective agreement and, if there is a disagreement with the employer, the employee can initiate a grievance. P. Lemay testified that the grievance is processed pursuant to the grievance procedure specified in the collective agreement with the final level being the Deputy Minister. P. Lemay further testified that if the employee still disagrees with the ruling of the Deputy Minister, the employee can go on to a third party independent adjudicator at the PSLRB.

[148] P. Lemay agreed that *excluded* employees who could have the same dispute over the interpretation or application of a provision in the collective agreement can grieve the matter to the level of the Deputy Minister, but they do not have access to independent third party adjudication at the PSLRB.

[149] P. Lemay further agreed that if the Treasury Board decided to exclude or add exceptions to *Appendix A of the Pubic Service Terms and Conditions of Employment Regulations for Certain Unrepresented Employees* it could so without negotiating with anyone. However, P. Lemay stated that Treasury Board does not have the authority to single out a particular section or individual within a department because the terms and conditions of employment are set for specific groups, not specific individuals. P. Lemay added that, even if Treasury Board had the authority to do so, it would be "ridiculous" for them to do so.

[150] P. Lemay testified that she was not familiar with section 326 of the PSLRA which A. Raven interpreted to say that the rights given to employees to grieve under the PSLRA are in lieu of any rights to court proceedings.

> Section 236 The right of an employee to seek redress by way of grievance for any dispute relating to his/her terms and conditions of employment, is in lieu of any right of action that employee may have in relation to any act or omission giving rise to the dispute.

[151] P. Lemay stated that she was not aware of provisions in the new PSEA that give the power to appoint at the lowest level possible in an organization by way of delegation.

[152] P. Lemay testified that contractors do not have access to Treasury Board's terms and conditions of employment policies because they are not employees.

Testimony of Lesley Hulse

[153] Lesley Hulse testified that she is a Senior Policy Analyst working with Executive Management Policies in the Public Service Human Resources Management Agency of Canada (PSHRMAC). She stated that her primary duties and responsibilities relate to policies that govern the management of the Executive Group (EX). She added that she has been in the Public Service for 32 years and four years in her present post.

[154] L. Hulse testified that the terms and conditions of employment for Executive employees at HRSDC are presented to Treasury Board for approval. L. Hulse referred to a Treasury Board document entitled *Terms and Conditions of Employment for Executives* which is currently in force.

[155] L. Hulse stated that Executives can grieve the terms and conditions of employment in the Treasury Board policy under the authority of the *Financial Administration Act*.

[156] L. Hulse testified that for someone at HRSDC, including the Minister, to single out one EX employee and lower or change that person's current terms and conditions of employment it would be necessary to obtain Treasury Board approval. L. Hulse added that there are approximately 4000 EX employees and it was hard to imagine Treasury Board changing the terms and conditions of employment for one person, but they could do it.

[157] L. Hulse referred to the Policy Statement section of the policy and stated that the terms and conditions of employment are limited to elements considered to be non-salary compensation and so do not apply to superannuation for example. L. Hulse testified that the Public Service Superannuation Act applies to Executive where the terms and conditions related to pension are legislated.

[158] L. Hulse testified that the policy spells out the basic terms and conditions of employment as they relate to leave and other related matters.

[159] L. Hulse testified regarding a Treasury Board document entitled *Executive Group and Certain Excluded or Unrepresented Groups and Levels*. He stated that the document was issued last year and it communicates the new rates of pay for the Executive Group that applies universally as of April 1, 2006.

[160] L. Hulse then referred to another Treasury Board document entitled *Salary Administration Policy for the Executive Group* which is currently in force. L. Hulse testified that this document specifies how to determine the salary for an Executive employee newly appointed to a position. The document specifies how to determine the salary within the salary range and how to determine the performance pay for acting position.

[161] L. Hulse described the classification process in the document. She stated that positions are point-rated pursuant to a classification standard pursuant to the Executive Position Evaluation Plan which is a version of the Hay plan. L. Hulse confirmed the EX level is based on an accumulation of points.

[162] L. Hulse stated that, if the government were to decide to eliminate a particular EX position, the incumbent would choose to stay in government and look for further work or to leave government with some pay in lieu of a surplus period that would be worked and various other case disbursements. L. Hulse confirmed that they could not bump out another existing Ex Position.

[163] On the subject of promotions, L. Hulse testified that there are competitions for EX jobs but she was not sure if an EX declared redundant could assert the position.

[164] L. Hulse agreed that the new *PSEA* reduces the scope of appeals such that terms and conditions of employment related to hours of work, including daily commencement and termination time, and vacation leave are fixed by the Deputy Head.

[165] L. Hulse testified that performance pay is not adjudicable if the EX is dissatisfied with what he or she receives.

Appellants' Submissions

[166] On August 31, 2005, Appellant Katie Bartakovic, a Customs Inspector with the Canadian Border Services Agency working at Rainbow Bridge, Niagara Falls, Ontario, invoked her right to refuse unsafe work under section 128 of the *Canada Labour Code*, Part II after receiving notice that two armed and dangerous individuals might attempt to cross the border at her workplace. K. Bartakovic appealed the decision made by the health and safety officer on September 1, 2005, that a danger did not exist for her to an Appeals Officer pursuant to subsection 129(7) of the *Code*. Section 129(7) reads:

> 129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.
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> [my underline]

[167] The Customs Excise Union/Douanes Accise ("CEUDA") is a component of the Public Service Alliance of Canada ("PSAC"), an employee organization within the meaning of the Public Service Labour Relations Act (formerly the Public Service Staff Relations Act), and the certified bargaining agent for employees included in various bargaining units under the health and safety jurisdiction of Part II of the *Code*. As such, PSAC is the certified bargaining agent for the Appellant, Katie Bartakovic, and other Treasury Board employees performing duties for the Canada Border Services Agency ("CBSA") and, on that basis, PSAC was made a party to the appeal by K. Bartakovic.

[168] A. Raven argued that the adjudicative process that is the primary function of the Appeals Office must guarantee a fair hearing in accordance with the principles of natural justice, both at common law and under subsection 2(e) of the Canadian Bill of Rights.

[169] The Appellants, K. Bartakovic and Public Service Alliance of Canada challenged the institutional independence of the Appeals Officer by way of a preliminary objection in this proceeding. The presiding Appeals Officer agreed to make a determination on the preliminary objection before proceeding with the merits of the case.

[170] K. Bartakovic and PSAC held that the issue in this case is whether the Appeals Office, both as constituted under the *Code* and as it is structured and operates in practice, meets the standards for institutional independence applicable to administrative tribunals. K. Bartakovic and PSAC further held that the test is whether a reasonable, well informed person would believe there is a sufficient level of adjudicative independence to ensure the rights and interests of stakeholders are determined in accordance with their right to fundamental justice.

[171] A. Raven stated that J. Bennie, National Safety Officer for PSAC, gave evidence concerning the legislative history of the present Part II of the *Code*. A. Raven stated that the Director of the Appeals Office, Mr Pierre Rousseau also gave evidence concerning

the structure and operation of the CAO, including matters pertaining to the security of tenure, financial security, and administrative autonomy of Appeals Officers.

[172] A. Raven stated that the Appellants' position is that the evidence establishes that the CAO fails to meet the requirements of natural justice and submitted that the Appeals Office must end this hearing until the requisite fundamental safeguards are put into place. A. Raven further stated that, any reference to the Canada Appeals Office on Occupational Health and Safety in the appellants' written submissions includes individual Appeals Officers as designated by the Minister under section 145.1 of the *Canada Labour Code* (*Code*).

[173] A. Raven argued that Part II of the *Canada Labour Code* sets out the legislation governing occupational health and safety standards and that obligations under federal jurisdiction cannot be derogated from. A. Raven added that health and safety legislation is important remedial public welfare legislation which must be interpreted in such a way as to promote its broad purposes.

[174] A. Raven referred to Chief Justice Lamer of the Supreme Court of Canada who stated in *Canadian Pacific Ltd. v. Matsqui Indian Band*,[1995] 1 S.C.R. 3, at para.104 that the function of institutional independence is to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them. A. Raven also referred to Justice Noel of the Federal Court who stated in the case of *Bourbonnais v. Canada (Attorney General)*, [2005] 4 F.C.R. 529 at para. 45 that:

> The principle of judicial independence exists to ensure that there is a clear and exact line of demarcation between the executive and judicial branches. The purpose is to guarantee that, both in personal and institutional terms, there is real independence and a clear appearance of independence, indicating to a reasonable and informed person that the executive can have no direct or indirect influence over the judge or the tribunal as an institution.

[175] A. Raven maintained that the right to a fair hearing in accordance with the principles of fundamental justice in respect of any determination of rights or obligations by a statutory tribunal is confirmed in subsection 2(e) of the *Canadian Bill of Rights*. A. Raven stated that recent jurisprudence of the Supreme Court of Canada in *Matsqui*, supra, at para. 79-80 affirmed that adjudicative independence in the context of administrative tribunals is a fundamental principle of natural justice.

[176] A. Raven stated the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781[5] at para. 20-22 and *Bell Canada v. Canadian Telephone Employees Assn.* [2003] 1 S.C.R. 884[6] at para. 22, confirmed that the guarantee of institutional independence in adjudicative tribunal settings is not a constitutional right, but rather a common law protection. A. Raven noted that, while the government may therefore override the

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[5] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 [*Port*].

[6] *Bell Canada v. Canadian Telephone Employees Assn.* [2003] 1 S.C.R. 884 [*Bell*]

requirements of institutional independence with clear statutory direction, but where the legislation is silent or ambiguous in this regard courts will otherwise infer that Parliament intended the tribunal's process to comport with principles of natural justice.

[177] A. Raven submitted that the *Code* is silence with respect to statutory standards and safeguards of independence, as are sometimes expressly set out in the enabling legislation of quasi-judicial tribunals, cannot be interpreted to mean that Parliament intended the appeals process for matters concerning occupational health and safety to be without the appropriate degree of independence.

[178] A. Raven cited *R. v. Valente*, [1985] 2 S.C.R. 673[7], wherein the Supreme Court of Canada noted that the test for independence in the judicial setting is the one for reasonable apprehension of bias, as adapted to the requirements of independence. That test was set out in the dissenting reasons of Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at p. 394 and stated, "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"

[179] A. Raven referred to: *Valente*, supra, at p. 685; *Bell*, supra, at para. 17-19, 25; *Matsqui*, supra, at para. 67; and *C.U.P.E. v. Ontario* [2003] SCC 29[8], at para.199 and stated that, although both institutional independence and impartiality are components of the rule against bias aimed at upholding public confidence in the fairness of administrative agencies and their decision-making procedures, they are nevertheless separate and distinct values and requirements. He noted that while the legal tests are rooted in the test for reasonable apprehension of bias, the requirements of independence and impartiality are not identical. Impartiality is concerned with the state of mind or attitude of individual decision-makers in relation to the issues and the parties in a particular case (i.e., independence of thought).

[180] A. Raven held that in *Matsqui*, supra, the Supreme Court of Canada confirmed that the test for judicial independence, enunciated in *Valente*, supra, applies to administrative tribunals where the tribunal functions as an adjudicative body settling disputes and determining the rights of parties. A. Raven stated that there are three essential conditions of institutional independence for administrative tribunals. They are: security of tenure; financial security; and administrative independence. A. Raven maintained that an administrative tribunal cannot guarantee the parties coming before it a fair process if its structure or practice is lacking with respect to any of these three requirements and that independence must be both actual and perceived.

[181] A Raven added that, in assessing these factors, the Supreme Court of Canada has stated ((*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9[9] at para. 32; *Hewat v. Ontario* [1998], 37 O.R. (3d) 161 (Ont. C.A.) (QL), at para. 21 and *Valente*, supra at p.689c)) that it is not enough that the judge in fact be independent and impartial; fundamental justice requires that the judge also appear to be independent and impartial.

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[7] *R. v. Valente*, [1985] 2 S.C.R. 673 [*Valente*]
[8] *C.U.P.E. v. Ontario* [2003] SCC 29 [*CUPE*]
[9] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9

This flows from the fact that judicial independence has two facets: actual independence and perceived independence.

[182] A. Raven further noted that the extent of the three essential conditions of institutional independence vary for different tribunals depending on their particular circumstances. He noted that Chief Justice Lamer stated in *Matsqui*, supra, that:

> [85] The Valente principles must be considered in light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment of bylaws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent.

[183] A. Raven referred to: *Bell*, supra, at para. 21, 23-24; *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, [2006] B.C.J. No. 2061 (B.C.S.C.) (QL)[10] , at para. 67; and Sossin Report[11], supra, at 6-7, and argued that administrative tribunals whose primary purpose is to develop or supervise the implementation of particular government policies are akin to the executive branch of government, and thus may call for little in the way of procedural protections. A. Raven held, however, that tribunals, whose primary purpose is adjudicative, and whose powers and procedures are court-like in nature, come closer to the judicial end of the spectrum. He maintained that these tribunals are subject to more stringent requirements of procedural fairness, including higher requirements of independence.

[184] A. Raven submitted that in hearing appeals from decisions of Health and safety officers, the Canada Appeals Office functions in virtually the same manner as a court. Appeals Officers adjudicate disputes between parties having competing interests in the context of a statutory regime, Part II of the *Canada Labour Code*. In addition to having all the powers of Health and safety officers, Appeals Officers have judge-like powers to summon and enforce the attendance of witnesses, administer oaths, and determine the procedure by which parties present evidence and make submissions to the Appeals Officer. Furthermore, Appeals Officers hear evidence within the context of court-like proceedings at which parties are frequently represented by counsel. Appeals Officers are called upon to make findings of fact and apply the provisions of the *Code* to these facts in rendering their decisions, which must be given in writing, with reasons.

[185] A. Raven added that *McKenzie*, supra, at paragraph 70 and *Matsqui*, supra, at para. 84 establish that a more stringent application of the *Valente principles* may also be warranted where the decisions of a tribunal could seriously affect a party's fundamental rights or interests, such as security of the person. A. Raven pointed out that the Court in *McKenzie*, supra, held that a residential tenancy arbitrator was clearly at the "high end" of the spectrum of independence, in part due to the great importance of issues respecting the occupancy of residential premises to the parties appearing before the tribunal.

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[10] *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, [2006] B.C.J. No. 2061 (B.C.S.C.) (QL) [*McKenzie*]

[11] Lorne, Sossin, "The Independe Board and the Legislative Process," (Toronto: University of Toronto, 2006)

[186] A. Raven argued that decisions of the Canada Appeals Office are final, subject only to judicial review by the Federal Court, pursuant to section 18.1 of the *Federal Court Act*. However, judicial review is not a de novo hearing, and as such the factual determinations of the Appeals Officer are final, subject to paragraph 18.1(4)(d) of the *Federal Court Act*. As a specialized tribunal, courts are reluctant to interfere in decisions rendered by the CAO. In *Douglas Martin and Public Service Alliance of Canada v. Attorney General of Canada*[12] , the Federal Court of Appeal held that Appeals Officers ought to be afforded substantial deference with respect to standard of review.

[187] A. Raven held that security of the person is a fundamental right that is enshrined in section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*. A. Raven stated that the Supreme Court of Canada has held in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46,at para. 72 that when government action gives rise to a hearing in which the interests protected by section 7 are engaged, the state is under an obligation to do whatever is required to ensure a fair hearing that conforms with the principles of fundamental justice.

[188] A. Raven added that in *Mohammad v. Canada (Minister of Employment and Immigration*)[13], the Federal Court of Appeal considered a range of operational facts and circumstances concerning the institutional independence of immigration adjudicators. He stated that these included: the chain of command from the Minister to the individual adjudicator, legal direction, monitoring, security of tenure, the collective bargaining unit, transfer arrangements, and scheduling of cases.

[189] A. Raven referred to *Currie v. Alberta (Edmonton Remand Centre)*[14], wherein the Alberta Court of Queen's Bench considered the independence and impartiality of prison disciplinary tribunals. He pointed out that Justice Marceau summarized the jurisprudence concerning evidence of actual practice as establishing the following propositions:

1) in determining whether a tribunal meets the criteria of independence and impartiality the Court should have regard to the historical context; [and]
2) in determining whether the members of the tribunal are appointed in a manner that satisfies the criteria of independence and impartiality a Court may have regard to how the appointment process works in practice.

[190] A. Raven stated the prior to the coming into force of Bill C-12, subsection 129(5) of the *Code* gave employees the right to require safety officers to refer decisions of "no danger" to either the Canada Labour Relations Board ("CLRB", predecessor to the Canada Industrial Relations Board, "CIRB") or, for employees of the federal public service, the Public Service Staff Relations Board (predecessor to the Public Service Labour Relations Board) for an inquiry, pursuant to subsection 130(1) of the *Code*. Pursuant to subsection

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[12] *Douglas Martin and Public Service Alliance of Canada v. Attorney General of Canada* [2005] FCA 155.
[13] Mohammad v. Canada (Minister of Employment and Immigration) [1989] 2 F.C. 363 (C.A.) [at 66-77] [*Mohammad*]
[14] *Currie v. Alberta (Edmonton Remand Centre)[2006]* A.J. No. 1522 (A.B.Q.B.) (QL) at p.14, para. 58.

146(1) of the *Code*, directions issued by safety officers could be reviewed by a Regional Safety Officer ("RSO") upon request of any aggrieved party. There was no further right of appeal from a decision of an RSO.

[191] A. Raven noted that the testimony of J. Bennie was that he participated in the Legislative Review Committee, which was established in 1993 for the review of Part II of the *Code*. According to J. Bennie, he subsequently sat as a Labour representative on the Legislative Review Subcommittee established in 1994 to review amendment proposals by Labour, employer organizations and HRDC for revisions of Part II to the Legislative Review Committee. The Legislative Review Subcommittee was a tripartite body, comprised of representatives from employers, Labour, and HRSDC. The Subcommittee's Terms of Reference were such that consensus items would not be reopened at the Legislative Review Committee stage unless important concerns had been overlooked by the Legislative Review Subcommittee, and if the Senior Assistant Deputy Minister (ADM) concurred.

[192] A. Raven stated that J. Bennie's testified that the Legislative Review Subcommittee considered a proposal by Labour representatives that parties should have access to a second level of review by a federal tripartite health and safety board following review of a direction by a regional safety officer. Hearing by the tripartite board would be carried out by a three member tribunal that consisted of a neutral chair and one labour member and one employer member. For this, employers and labour would each create a list of possible part-time tripartite board members and appoint them as they wished. The rationale for this proposal was to provide for "an opinion outside of the regulating agency to ensure fairness." Specifically, Labour representatives were concerned about the fairness of the final level of review being with RSOs, who were employees in the Labour Program of HRDC.

[193] A. Raven pointed to J. Bennie's testimony that the Subcommittee reached consensus on recommended changes to the appeals process by March 16, 1995 which supported a two-stage appeal structure. First, directions and decisions would be referred to an appeals officer for summary review. Tribunals, set up under the auspices of the CLRB, would constitute a second level of review. The Legislative Review Subcommittee submitted its final report to the Legislative Review Committee in April, 1995.

[194] A. Raven submitted that J. Bennie's testimony was that on June 15, 1995, James Lahey, ADM of the Labour Program, notified the Legislative Review Committee of a process of change resulting from "program review," a government initiative that called for significant staff and budget reductions for the Labour Program.

[195] Following this announcement, Doug Malanka, HRDC's Project Leader for the *Code* Part II Review, articulated HRDC's preference for a single-tier approach to the final-level review of health and safety issues. Under this scheme, access to a second-level of appeal to the Boards was eliminated. Appeals Officers would render final-level decisions for all reviews of decisions and directions, subject only to judicial review by the Federal Court.

[196] A. Raven referred to J. Bennie's testimony that members of the Legislative Review Committee were subsequently advised of changes necessary to address program review noting HRDC's need to cut overall costs noting that HRDC's concerns with the Legislative Review Subcommittee's proposal included that "appeals will be longer and more numerous" and the "cost of operating "tribunal" reviews." Mr Bennie testified that Labour representatives opposed the proposal, as it was counter to their objectives and inconsistent with the Subcommittee's consensus recommendations and the established Committee process more generally.

[197] A. Raven referred to J. Bennie's testimony that David Head presented a revised version of HRDC's proposals to the Legislative Review Committee. HRDC reiterated its preference for a single-level review process, and proposed that the function of the Appeals Officer be moved to the CLRB (or its successor board).

[198] A. Raven recalled that J. Bennie testified that Labour representatives countered and presented a position paper proposing a single-level tripartite appeals process under the auspices of the CLRB.

[199] A. Raven noted J. Bennie's testimony that Bill C-12 received third reading on May 31, 2000 and the Canadian Labour Congress made submissions to the Senate Standing Committee on Social Affairs, Science and Technology, supporting passage of the Bill, but with the recommendation that the Senate substitute the CIRB for "Appeals Officer" in sections 145.(1) to 146.5 of the *Code*, and restore the two tier system by inserting an initial stage of review by the RSO, prior to any appeal to the CIRB.

[200] A. Raven stated that J. Bennie testified that concerns regarding this proposal were raised by himself and Hassan Yussuff of the Canadian Labour Congress before the Standing Committee on Natural Resources and Government Operations in its discussion of Bill C-12, which included the proposed amendments to Part II of the *Code*. J. Bennie's testimony was that Warren Edmondson, ADM of the Labour Program, subsequently testified that the proposals would simply redefine the role of the existing Regional Safety Officer by renaming that person "Appeals Officer," but that they would exercise the same quasi-judicial function. J. Bennie noted that HRDC rejected the two-tier appeals process in part because it would be inappropriate for one quasi-judicial tribunal, the CIRB, to review the Appeals Officer, another quasi-judicial tribunal.

[201] A. Raven submitted that the manner of appointment and terms and conditions of employment for Appeals Officers is dependent on the status of their employment. While some Appeals Officers are indeterminate employees appointed pursuant to the PSEA, others are independent contractors, and some are employed on a casual basis under specified term appointments.

[202] A. Raven noted that indeterminate Appeals Officers are full-time public service employees whose appointments are governed by the procedures set out in the *PSEA*. A. Raven stated, however, that indeterminate Appeals Officers are excluded from the PM-06 bargaining unit, meaning that the terms and conditions of their employment are set by Treasury Board policy at the prerogative of the employer, pursuant to its authority

under the Financial Administration Act. A. Raven concluded that Appeals Officers may be deployed from one position to another by the Director of the Appeals Office or the Deputy Head pursuant to Part 3 of the *PSEA*,

[203] A. Raven further noted that indeterminate Appeals Officers have access to a grievance process in respect of disputes arising from the terms and conditions of their employment, such as treatment they may receive due to the manner in which they perform their duties. However, A. Raven pointed out that excluded employees must accept as final the determination of their grievances by the Deputy Minister of HRSDC, as they do not have access to independent third-party adjudication before the PSLRB. A. Raven added that section 236 of the *PSLRA* provides that rights to grieve are in lieu of any rights to court proceedings whatsoever. A. Raven held that under this regime, the grievance rights of indeterminate Appeals Officers end with the determination of the Deputy Minister, who also oversees the Health and safety officers whose decisions the Appeals Officers are charged with reviewing. A. Raven stated that it is the Appellants' submission that these limited rights of redress constitute inadequate safeguards for the terms and conditions of employment of indeterminate Appeals Officers.

[204] A. Raven pointed to the evidence that approximately half of the CAO's Appeals Officers are employed under contracts for a maximum of one year. Contract Appeals Officers are hired from a list of candidates jointly prepared by the Director and the ADM of the Labour Program, without any assessment of their qualifications by a selection board. A. Raven stated that there is no assurance that contracts will be renewed in subsequent years, as decisions regarding such "base B" spending are contingent on approval of the ADM.

[205] A. Raven recalled that the Director testified that he would not renew an Appeals Officer's contract if they failed to follow tribunal procedures, or if their decisions did not make sense or failed to respect the principles of natural justice. A. Raven stated that there was no evidence to indicate that contract Appeals Officers receive any training concerning tribunal procedures or legal principles. A. Raven noted the evidence that contract Appeals Officers are not invited to participate in meetings at which indeterminate Appeals Officers discuss hearing procedures and the impact of recent Federal Court judgments due to financial considerations. A. Raven held that the exclusion of contract Appeals Officers from recognition as Treasury Board employees denies them access to the policies and mechanisms which are available to indeterminately-appointed public service employees, and which are crucial to ensuring they are fairly treated in respect of the terms and conditions of their employment.

[206] A. Raven further submitted that contract Appeals Officers lack adequate security of tenure. A. Raven held that the absence of any scrutiny of their qualifications, lack of training, and exclusion from crucial meetings concerning the policies and procedures of the CAO leave contract Appeals Officers vulnerable to committing errors that will not only affect the rights and interests of the parties appearing before them, but could likely spell the end of their tenure as Appeals Officers. A. Raven added that there is clearly no access to third-party adjudication over decisions not to offer a new contract to a contract Appeals Officer.

[207] A. Raven finally submitted that casually-appointed Appeals Officers have even less security of tenure than their contract-appointed colleagues. A. Raven held that the evidence is that a single casually-appointed Appeals Officer had at least seven consecutive specified-period appointments, ranging in duration from eight days to six months, over a span of less than three years. A. Raven submitted that Appeals Officers whose employment is dependent on consecutive appointments of drastically variable, and sometimes extremely brief, duration cannot be said to enjoy the requisite security of tenure to fulfil their function with an adequate degree of independence.

[208] A. Raven held that, while tribunals comprised exclusively of indeterminately-appointed public service employees with full access to the protections afforded pursuant to the PSEA and grievance procedures have been deemed to enjoy security of tenure sufficient to ensure their independence, this is not the operational reality within the Canada Appeals Office. A. Raven pointed out that only three of the seven Appeals Officers enjoy the protections and security accorded to indeterminate employees, while the remaining four Appeals Officers enjoy limited protections and terms of employment that can be of extremely short duration. Moreover, funding for contract and casual Appeals Officers comes from outside the control of the Director, and is contingent on approval of the ADM on a year-to-year basis.

[209] A. Raven stated that, in light of all the evidence, the Appellants' submit that the operational reality of the Canada Appeals Office is that Appeals Officers do not enjoy the degree of security of tenure required of a tribunal for which a high degree of independence is required.

[210] A. Raven held that Tribunal members must also enjoy security of remuneration. A. Raven submitted that the terms and conditions of employment should be established by law, and not be subject to arbitrary interference which could affect their independence. A. Raven noted that all terms and conditions of employment for excluded Appeals Officers, including rates of pay and other benefits, are determined from outside the confines of the Canada Appeals Office by Treasury Board.

[211] A. Raven noted the testimony of P. Lemay that the terms and conditions of employment for excluded public service employees are at the prerogative of Treasury Board, as employer, pursuant to its authority under section 7 and 11.1 of the *Financial Administration Act*. A. Raven held that it is clear that Treasury Board, as employer of the excluded Appeals Officers, retains discretionary authority to alter the terms and conditions of their employment. A. Raven maintained that the fact that it is unlikely that Treasury Board would do so does not resolve the institutional independence concerns this arrangement creates. A. Raven referred to Chief Justice Lamer who wrote in *Matsqui,* supra,:

> …The function of institutional independence is to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them. My colleague Sopinka J. appears to be of the view that it is possible for the appellant bands to exercise their discretion under the by-laws with respect to financial and tenure matters in such a way that the fundamental

> inadequacies of the by-laws will be cured. With respect, it is always possible for discretion to be exercised consistent with natural justice. The problem is the discretion itself, since the point of the institutional independence doctrine is to ensure that tribunal independence is not left to the discretion of those who appoint the tribunals. […] Institutional independence and the discretion to provide for institutional independence (or not to so provide) are very different things. Independence premised on discretion is illusory.

[212] A. Raven stated that, given the prerogative discretion retained by Treasury Board with respect to the terms and conditions of employment of excluded Appeals Officers, the Appellants submit that excluded Appeals Officers lack the security of remuneration called for under the second *Valente*, supra requirement. A. Raven held that this is particularly the case given that Appeals Officers with grievance rights under the *PSLRA* have no access to bring their grievances to the Public Service Labour Relations Board and must accept as "final and binding" the decision of the Deputy Head of the Department. A. Raven added that access to courts for relief in this area is similarly denied by operation of section 236 of the *PSLRA*.

[213] A. Raven argued that, for the same reasons underlying the need for security of remuneration, the finances of the Appeals Office as an institution must be sufficiently independent of government influence as to ensure that budgetary requirements or limitations do not affect the manner in which the tribunal conducts its proceedings or renders its decisions.

[214] A. Raven noted that the Director of the Appeals Office reports to and works under the close supervision of the ADM, Labour on a wide range of matters, from providing annual reports and budget proposals to monthly statistical reports and personal leave requests. A. Raven also noted that P. Rousseau testified that he considers himself to be a "firewall" between the ADM and the Appeals Officers. A. Raven expressed concern that P. Rousseau reports to Appeals Officers on what is discussed at virtually every meeting he has with the ADM. A. Raven held that the nature and extent of the information passing between the ADM and the Appeals Officers via the Director remains unclear as minutes are not taken at these meetings.

[215] A. Raven stated that, in light of this extensive reporting relationship between the Director and the ADM, and Mr Rousseau's apparent role as a conduit of information to and/or from Appeals Officers, the Appellants submit that the operational reality indicates that the requirements of administrative independence are not met in respect of the operations of the Appeals Office.

[216] A. Raven noted that the Director has authority to fill vacancies in existing positions within the CAO, but the creation and staffing of new positions requires approval by the ADM. A. Raven maintained that it is clear in this area that the CAO does not retain or exercise control over its own administration. A. Raven recalled that the Director testified that he must make a formal request to the ADM for additional staff if he believes the CAO's workload requires creation of a new indeterminate position. A. Raven maintained that the Director identified numerous incidents in which his requests concerning staffing

at the CAO were not acted upon, or subject to considerable changes or cuts by the ADM, including: unsuccessful efforts to have an Appeals Officer position excluded from the bargaining unit, funding for additional contract Appeals Officers, and classification of the new Technical Advisor position. A. Raven noted the evidence that the Director must report the situation to the ADM and await his approval for creation of a new position and funding to staff it even when the Appeals Office is understaffed to the point of being "barely able to register incoming appeals.

[217] A. Raven submitted that the Appeals Office lacks control over administrative decisions bearing directly and immediately on the exercise of its adjudicative functions.

[218] A. Raven held that the Director maintains only partial authority over the Appeals Office's budget, including funding to hire Appeals Officers on contract. A. Raven maintained that, despite Mr. Rousseau's testimony that the ADM generally approves his proposals; the Director identified several instances in which important proposals were denied or significantly reduced. A. Raven noted evidence that the ADM most significantly recently reduced the Director's budget for contract Appeals Officers by half. A. Raven also noted there is evidence that training for Appeals Officers had to be postponed due to budgetary constraints.

[219] A. Raven held that it is also significant that the budget of the Canada Appeals Office is treated merely as that of another "group" within the Labour Program. A. Raven noted the evidence that financial data concerning the administration of the Appeals Office is shared throughout the Labour program, and budgeting decisions are directly affected by the finances of other sections. A. Raven argued that this demonstrates that the CAO's funding is not determined independently from that of other branches of the Labour Program.

[220] A. Raven referred to the evidence where the Director stated that "[p]resently we don't meet the appearance of bias rule and as an administrative tribunal we must ensure that we do all what is necessary to comply with that rule." A. Raven held that the evidence indicates that the ADM requested the relocation to HRDC, and HRDC staff subsequently had to wait for his approval before going ahead with the move. A. Raven submitted that this demonstrates the inability of the Appeals Office to function independently from the executive branch of government, in this case HRDC.

[221] A. Raven submitted that, given these constraints, the CAO is neither structurally nor operationally independent from the Labour Program of HRSDC in the exercise of its adjudicative functions. A. Raven further submitted that, given the foregoing, the Canada Appeals Office fails to meet the requirements for institutional independence as set out in *Valente*, supra, particularly in light of the high standard of independence demanded by the nature of the tribunal and the nature of the interests at stake.

[222] A. Raven stated that Courts have held that evidence of the actual practice of a tribunal is one of the factors to consider in determining whether the necessary degree of independence is present to avoid giving rise to a reasonable apprehension of bias. A. Raven submitted that significant evidence challenging the independence and

impartiality emerged in the course of the within appeal giving rise to a genuine apprehension of bias.

[223] A. Raven stated that the within appeal was originally assigned to Appeals Officer Richard Lafrance. A. Raven noted the evidence that, despite having recently signed the *Code* of Conduct for Appeals Officers which expressly states that Appeals Officers shall decline to hear a case in the event of any actual or potential bias or conflict of interest, Mr. Lafrance neither disqualified himself nor notified the parties of his prior participation on HRDC's *Code* Review Team dealing with revisions to Part II of the *Code* respecting the appeals process, even after hearing a full day of evidence on this issue.

[224] A. Raven noted further in the evidence that P. Rousseau later testified that he had been aware of Mr. Lafrance's involvement on the *Code* Review team when he was assigned to the case. A. Raven noted P. Rousseau's testimony that Mr. Lafrance's past involvement did not give rise to a reasonable apprehension of bias, even though his failure to advise the parties of his past involvement was inconsistent with the *Code* of Conduct and it was not appropriate for him to hear the appeal.

[225] A. Raven referred to the evidence that R. Lafrance was subsequently observed reviewing a package of solicitor-client notes which were left on a counsel table at the end of the first day of hearing. A. Raven stated that, when the parties raised the issue and requested that Mr. Lafrance recuse himself, he initially maintained that there was no need to do so, as he had merely been tidying the hearing room.

[226] A. Raven noted that P. Rousseau's response to these events was to advise Appeals Officers not to concern themselves with tidying the hearing rooms. A. Raven referred to P. Rousseau's testimony that he felt the incident was a "low blow," and that counsel for the Appellants had "schemed to remove Mr. Lafrance." A. Raven added that P. Rousseau stated that "if that's how you want to play, we'll play the same."

[227] A. Raven held that this was the reason that the Director sought intervener status in the present hearing, even though he acknowledged that appearing as a party before one of his subordinates could place the Appeals Officer in a very difficult position.

[228] A. Raven argued that the Supreme Court of Canada has held in *CUPE*, supra, at para. 189 that "the purpose of the independence requirement is to establish a protected platform for impartial decision making." A. Raven submitted that the foregoing examples of conduct by the CAO are indicative of bias and lack of impartiality arising from the absence of adequate safeguards for institutional independence. A. Raven maintained that, where tribunals conduct quasi-judicial adjudications respecting fundamental individual rights in the absence of requisite safeguards of institutional independence, including security of tenure, security of remuneration and financial independence, and administrative independence, they become vulnerable to bias and partiality.

[229] A. Raven argued that, even on a standard of patent unreasonableness, the Federal Court has frequently seen fit to intervene in decisions of the Canada Appeals Office on judicial review. A. Raven observed that the Federal Court has identified serious errors by Appeals

Officers, including: relying on irrelevant provisions to misplace the burden of proof; making findings of fact without regard to the evidence; failing to take account of relevant evidence; and failing to provide an opportunity for parties to make submissions.

[230] A. Raven noted the evidence that, despite the serious nature of the Federal Court's findings, it has been the Director's practice to recommend to the Minister the designation of individuals who are qualified in matters of health and safety, but who lack the legal training and experience described as key activities in their work description. A. Raven argued that the evidence is clear that the Director made no effort to seek legal advice on the legal implications of these decisions, to provide training for Appeals Officers, or to ensure they had access to any expert assistance on points of law. Indeed, the creation of the National Appeals Office was itself the product of a misunderstanding of proceedings before the Federal Court.

[231] A. Raven held that without adequate standards of institutional independence, and given the structure and practice of the CAO as seen in the evidence, parties coming before the Appeals Office cannot be confident of either the process or result of their health and safety appeals. Indeed, the examples cited above support the view that parties coming before the Appeals Office are likely to have a reasonable apprehension of bias, as their rights to procedural fairness and natural justice may be denied due to the structural and operational problems of the Canada Appeals Office.

[232] A. Raven submitted that the Appellant, Ms Bartakovic, and her co-workers are entitled to be confident that their health and safety appeals will be disposed of in a manner consistent with the principles of natural justice and procedural fairness. A. Raven argued that the nature of the interests at stake, the appeals process under Part II of the *Canada Labour Code* must meet a high standard of institutional independence. Accordingly, the Canada Appeals Office on Occupational Health and Safety must exhibit a high degree of security of tenure, financial security, and administrative independence in its operational reality.

[233] A. Raven held that no member of the public being aware of the evidence tendered in this hearing, would believe that the appeals process, as administered by the Canada Appeals Office, is sufficiently independent from the government to ensure that the rights of the Appellant will be heard in a fair and independent manner.

[234] A. Raven stated that, for the foregoing reasons, the Appellants respectfully request that this hearing be brought to an end until the requisite fundamental safeguards for the institutional independence of the Canada Appeals Office on Occupational Health and Safety are put into place.

Respondent Submissions

[235] R. Fader held that section 145.1 of the *Canada Labour Code* (*Code*) (R.S.C), 1985, c. L-2, as amended) provides the Minister of Labour wide discretionary authority to designate individuals as Appeals Officers. He submitted that this grant of authority prevails over common law principles requiring institutional independence from the executive. R. Fader

maintained that, in light of the clear direction from the Supreme Court of Canada in the case of *Ocean Port Hotel Ltd. v. British Columbia* [2001] SCC 52[15], at para. 20-22, the will of Parliament prevails over the common law and, as a result, the appellants' position concerning institutional independence is without foundation.

[236] R. Fader submitted in the alternative that, should the intent of Parliament not prevail, the appellants' submission that the level of institutional independence required of an Appeals Officer is that of judicial independence fails to appreciate the development of the law in this area.

[237] R. Fader referred to Jones, David and de Villars, Anne, *Principles of Administrative Law*, 4 ed. (Toronto: 2004 Carswell), at p. 400 and noted that the authors stated, "This line of reasoning represents another example of the Supreme Court of Canada's shift away from the view found in Régie des permis d'alcool[16] that in institutional bias cases it is sufficient to raise the mere possibility that a reasonable apprehension of bias could be demonstrated in a substantial number of cases." R. Fader also referred to the authors statement, "…the courts are more reluctant to entertain institutional bias arguments that are excessively abstract than might have been the case even a few years ago."

[238] R. Fader held that in *Sam Lévy & Associés Inc. v. Canada* [2006] F.C.A. 2005[17], the Federal Court recently dealt with the principles of institutional independence and impartiality in a case dealing with decisions of Pre-Removal Assessment Officers under the Immigration Act. R. Fader noted that the case addressed where Charter principles were engaged and where the "adjudicative function" was performed by public servants within a government department.

[239] R. Fader submitted that in *Lévy,* supra, the Federal Court confirmed that, even in cases where the *Charter* is engaged, independence and impartiality should "...not (be) viewed through the eyes of a of 'very sensitive or scrupulous conscience', but rather...that grounds for a reasonable apprehension of bias or perception of a lack of institutional independence and impartiality must be "substantial."

[240] R. Fader pointed out that in determining there to be no lack of institutional independence, Justice Gibson rejected the "anecdotal" evidence presented by the applicant and focused on actual operation of the Office of the Pre-Removal Assessment Officers and was satisfied that there was a system in place within this office that provided the necessary firewalls between those charged with the adjudicative function and those whose functions were directly related to enforcement and removal.

[241] R. Fader held that, regardless of the level of institutional independence applied, it is clear that the structure of the Office of the Appeals Officer guarantees a high degree of institutional independence from the executive and a high degree of institutional impartiality.

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[15] *Ocean Port Hotel Ltd. v. British Columbia* [2001] SCC 52 [*Ocean Port*].
[16] 2747-3174 Québec Inc. v. Québec (Régie de permis d'alcool) [1996] S.C.J. No. 112 [Régie].
[17] *Sam Lévy & Associés Inc. v. Canada* [2006] F.C.A. 2005 [*Lévy*].

[242] R. Fader maintained that it is well established in *Régie*, supra, that institutional independence and impartiality are components of the common law rules of procedural fairness.

[243] R. Fader noted that the appellants raise a number of constitutional arguments, but held that the starting point for the analysis is the common law.

[244] R. Fader stated the rules of procedural fairness we are concerned with in this case are institutional independence and impartiality. R. Fader referred to *Ocean Port, supra, at para. 20-22* and maintained that, like all common law rules the rules of procedural fairness operate subject to legislation.

[245] R. Fader stated that common law is judge made law or law that derives its authority through judicial pronouncements rather than legislative enactments.

[246] Referring to *Ocean Port*, supra, Mr. Fader argued that as a corollary to Parliamentary supremacy the common law must give way to clear legislative direction. R. Fader argued that the Supreme Court has established in para. 20 of *Ocean Port*, supra, that it is up to Parliament to determine the nature of a tribunal's relationship with the executive (i.e., the degree of institutional independence):

> (20) This conclusion, in my view, in inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members.

[247] R. Fader submitted that legislation prevails over the common law to the extent that it provides for the relationship between the administrative decision maker and the executive. R. Fader stated that the common law principles apply in cases where a statute is silent.

[248] R. Fader maintained that it is important to note that the *Code* is not silent on the level of institutional independence required of Appeals Officers. R. Fader held that Parliament has cast its' mind to this issue and given the Minister of Labour wide discretionary authority to designate Appeals Officers. He points out that section 122 of the *Code* defines "Appeals Officer" as follows:

> "Appeals Officer" means a person who is designated as an Appeals Officer under section 145.1.

[249] R. Fader pointed to section 145.1 of the *Code* as providing the Minister of Labour with the wide discretionary authority to designate Appeals Officers. Section 145.1 reads:

> 145.1 (1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.

[250] R. Fader pointed out that the statute allows for the designation of any person who is qualified and held that it is important that Parliament used the word "designate" rather than appoint.

[251] R. Fader maintained that, given the legislative history, Parliament's intent is clear. He held that the intent was to use departmental employees, who would already be appointed as public servants pursuant to the *Public Service Employment Act* (the "*PSEA*").

[252] R. Fader noted that the Supreme Court of Canada has endorsed the use of legislative history in the construction of statutory provisions in *Castillo v. Castillo* [2005] SCC 83[18] at para. 22-25, and specifically *CUPE* at para. 54 where it is stated that "Evidence of a statute's history, including excerpts from the legislative record, is admissible as relevant to the background and purpose of the legislation."

[253] R. Fader asserted that the Court also established that "Parliamentary debates and similar material" are the preferred source of such history.

[254] R. Fader argued that the bulk of the evidence from Jeff Bennie's testimony focused on the period between 1993 and 1997. R. Fader noted, however, that, as Mr. Bennie testified, Bill C-97 died on the order paper in 1998 when an election was called. R. Fader held that there was little evidence from Mr. Bennie of what prevailed after that election other than the fact there was a new Minister of Labour.

[255] R. Fader held that the best evidence of Parliament's intent with section 145.1 of the *Code* is from the committee hearings that led to the amendments in 2000.

[256] R. Fader referred to exhibit 1 tab 22, at page 11 and pointed to the fact that, at the Standing Committee on May 11, 2000, Warren Edmondson (ADM, Labour) speaking on behalf of the Minister and speaking to the proposed amendments to the *Code*, indicated that: "The appeals officers are public servants and are appointed in accordance with the Public Service Employment Act." R. Fader referred to exhibit 1, tab 22 at p.13 and noted that Mr. Edmondson indicated that the function would continue to be housed within the Department.

[257] R. Fader referred to exhibit 1, tab 23 at p. 20 and stated that it is clear that throughout the legislative process, the intent of Parliament was that Appeals Officers would be employees of the Department. R. Fader referred to exhibit 1, tab 24, at p. 2, para. 2 and stated that this point is confirmed in correspondence from the Canada Labour Congress to the Senate Standing Committee where it complained that the government rejected this procedure in favour of a single appeal to an Appeals Officer within HRDC.

[258] R. Fader submitted that the intent of Parliament is clear that Appeals Officers were to be employees of the Department performing the adjudicative function assigned to them under Part II of the *Code*.

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[18] *Castillo v. Castillo* [2005] SCC 83 [*Castillo*].

[259] R. Fader further argued that the use of the word "designate" in section 145.1 of the *Code* is consistent with Parliament's objective of allowing the Minister to choose from the most qualified and experienced pool of candidates, i.e., HRSDC employees, who are already appointed pursuant to the PSEA.

[260] R. Fader stated that the *Code* does not create a separate employer tribunal. He added that if this were the case, the statute would provide for such an entity as it has, for example, with the Public Service Labour Relations Board in the *Public Service Labour Relations Act*. R. Fader maintained that clearly Parliament's intent was not to create the type of separate employer tribunal the appellants are advocating.

[261] R. Fader maintained that this case is on all fours with the Supreme Court of Canada's decision in *CUPE*, supra. This is a case where the union challenged the Ontario Minister of Labour's appointment of retired judges as arbitrators pursuant to section 6(5) of the *Hospital Labour Disputes Act (HLDAA)*.

[262] R. Fader pointed out that it is interesting to note that the language of section 6(5) of that Act is almost identical to section 145.1 of the *Code*.

[263] R. Fader pointed out that the Supreme Court noted that: "The Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power."[19]

[264] R. Fader stated that the Supreme Court, in response to the union's argument that retired judges lacked the traditional indicia of judicial independence, held: "However, as explained above, the Court cannot substitute a different tribunal for the one designated by the legislature."[20] R. Fader maintained that once again the Supreme Court indicated that it is the intent of the legislature that prevails.

[265] R. Fader argued that what is important from the perspective of the present case is that the language granting the Ontario Minister of Labour wide discretionary authority in *CUPE* is nearly the same language as in section 145.1 of the *Code*.

[266] R. Fader held that, divorced from the appellants' constitutional arguments, we are bound by the very clear intent of Parliament in section 145.1 of the *Code* that allows the Minister of Labour to designate Appeals Officers who are employees of the Department.

[267] R. Fader concluded that section 145.1 of the *Code*, like section 6(5) of the *Hospital Labour Disputes Arbitration Act* allows for the designation of decision makers at the discretion of the Minister. He further concluded that, given the legislative history, the clear intent was that Departmental employees would continue to be used to perform the adjudicative functions under Part II of the *Code*.

[268] R. Fader argued that it is not open to the appellants, on a procedural fairness argument, to substitute the tribunal its wishes was available for the statutory decision makers provided

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[19] C.U.P.E. v. Ontario [2003] SCC 29, at para. 49. [CUPE}
[20] CUPE, *supra*, note 19, at para. 190.

by Parliament. He held that the intent of Parliament is clear, that what the appellants are advocating is inconsistent with this intention and, as a result, this preliminary motion should be denied.

[269] In the alternative, R. Fader submitted that the first question to be addressed in the analysis of section 7 of the *Canadian Charter of Rights and Freedoms* is whether the provisions of section 7 are engaged.

[270] R. Fader noted that section 7 of the *Charter* is as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[271] R. Fader referred to paragraph 26 in *Pearlman v. Manitoba Law Society Judicial Committee*[21], [1991] 2 S.C.R. 869 which states that:

> 26. It is helpful at the outset to remember the appropriate approach for an analysis of legislation that is said to violate s.7 of the Charter. LaForest J. noted in R. v. Beare, (1988) 2 S.C.R. 387, at p. 401, that:
>
> The analysis of s.7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.[22]

[272] R. Fader maintained that the Supreme Court of Canada in *Ocean Port*, has created a presumption against applying the Charter to decisions of administrative decision makers:

> While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.[23]

[273] R. Fader submitted that it is also well established that the *Charter* does not guarantee property rights or a right to employment.[24]

[274] R. Fader held that, as a corollary, the *Charter* is not engaged in cases where the fundamental interest at stake is that of employment.

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[21] *Pearlman v. Manitoba Law Society Judicial Committee*, (1991) S.C.J. No. 66, [*Pearlman*].
[22] Pearlman, *supra*, note 20, at para. 26.
[23] Ocean Port, *supra*, note 14, at para. 24.
[24] Reference re ss, 193 and 195.1(1)(c) of Me Criminal Code, (1990) S.C.J. No. 52; Mussani v. College of Physicians and Surgeons of Ontario, (2004) O.J. No. 5176 (C.A.); and Walker v. Prince Edward Island, (1993) P.E.I.J. No. 111 (C.A.), aff'd 124 D.L.R. (4th)(127 (S.C.C,).

[275] R. Fader maintained that, unlike true section 7 cases, an employee ultimately controls his or her choice to remain employed by an employer. This is the intervening choice that distinguishes the appellants' argument from criminal law cases or cases dealing with immigration where those effected have no element of free choice to remove themselves from the alleged harm.[25]

[276] R. Fader maintained that while employees benefit from the vast protections afforded under occupational health and safety legislation, the right to maintain employment does not engage the protections of section 7 of the *Charter*.[26]

[277] R. Fader argued in the alternative that, if section 7 is engaged, it does not have the effect of elevating the level of institutional independence to that of judicial independence.[27]

[278] R. Fader held that the institutional independence analysis continues to be applied flexibly to administrative decision makers even in cases where the *Charter* applies.[28]

[279] R. Fader pointed out that as recently noted by the Federal Court, and affirmed by the Federal Court of Appeal, in a case where section 7 was engaged and the issue of institutional independence was before the Court:

> …I am further satisfied that substantial deference is owed to Government decisions that relate to the appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.[29]

[280] R. Fader submitted that it is also well established[30] that even in cases where section 7 of the *Charter* is engaged that the courts will not look exclusively to the criteria for judicial independence (derived from *Valente* supra, note 7)) but also to the "operational reality" of the administrative decision maker and will, furthermore, require "substantial" evidence indicating a lack of institutional independence and impartiality.

[281] R. Fader argued that, simply put, section 7 of the *Charter* does not stand for the proposition advanced by the appellants. In any event, even if section 7 is engaged and there is found to be a violation of fundamental justice, the Respondent takes the position that section 145.1 granting the Minister wide discretionary authority is a reasonable limit prescribed by law within the meaning of section 1 of the *Charter*[31].

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[25] Blenco v. British Columbia 2000 SCC 44.

[26] *Health Employers Assn. 0f British Columbia v. British Columbia Nurses' Union*, [2006] B.C.C.A.A.A. No. 167; *British Columbia Teachers' Federation v. Vancouver School District No. 39* [2003] BCCA 100, leave to appeal to the SCC refused [2003] S.C.C.A No. 156; and *Vancouver School District No. 39 v. British Columbia Teachers' Federation*, [2001] B.C.C.A.A.A. No. 208.

[27] *Ruffo v. Conseil de la magistrature*, [1995] S.C.J. No. 100. [Ruffo]

[28] Régie, *supra*, note 15, at para. 39; also see specifically Pearlman, *supra*, note 20, at para. 31, 35 and 4l.

[29] *Say v. Canada (Solicitor General)* 2005 FC 739 at para.22; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs [2006] S.C.C.A. No. 49

[30] Say, *supra*, note 28; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs [2006] S.C.C.A. No. 49; *Mohammad v. Canada*, [1988] F.C.J. No.1141 (C.A.)

[31] *R. v. Oakes*, [1986] S.C.J, No. 7. and in *Walker v. Prince Edward Island*, [1993] P.E.1.J. No 111 (C.A.), affirmed 124 D.L.R. (4") 127 (S.C.C.)

[282] R. Fader conceded that the *Bill of Rights*[32] as federal legislation, applies to the within analysis on institutional independence.[33]

[283] R. Fader held that the question is: what impact does section 2(e) of the *Bill of Rights* have? R. Fader held that in guaranteeing the right to "fundamental justice" section 2(e) does not prevent Parliament from determining the relationship between a statutory decision maker and the executive.

[284] R. Fader referred to section 2(e) of the *Bill of Rights* which reads as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to:
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[285] R. Fader pointed out that despite being passed in 1960 there is very little jurisprudence formed under the *Bill of Rights*. He held that what appears from a plain reading of the *Bill of Rights* is that it was not intended to do what is suggested by the appellants. It is a basic tenant of statutory interpretation that different words in a statute are to be given a different meaning.

[286] R. Fader suggested that Parliament would have used the same language in section 2(e) as is used in section 2(f), in passing the *Bill of Rights* had it intended to limit itself with respect to the structure and relationship of all administrative tribunals on an institutional independence and impartiality analysis. Section 2(f) is as follow:

> (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.

[287] R. Fader concluded that there is a requirement under section 2(f) for an independent and impartial tribunal when an individual is charged with an offence.

[288] R. Fader pointed out that this is not the same language for administrative decisions that do not involve the charging of a criminal offence.

[289] R. Fader submitted that clearly the intent in section 2(e) was to provide individuals with the protections afforded under the term fundamental justice but allowing Parliament the

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[32] Canadian Bill of Rights, S.C. 1960, c.44.
[33] MacBain, supra.

flexibility to determine the structure and relationship to the executive of such administrative decision makers.

[290] R. Fader pointed out that the Régie, supra, case on which the appellants rely is based on section 23 of the *Québec Charter of Human Rights and Freedoms*. R. Fader held that section 23 does not resemble section 2(e) of the *Bill of Rights* but does mirror section 2(f).

[291] R. Fader argued that the recent comments by the Supreme Court of Canada on section 23 in the case of *Ocean Port, supra,* is critical of this analysis. The Court noted:

> This overlooks the fact that the requirements of independence in Régie emanated from the Quebec Charter of Human Rights and Freedoms, a quasi-constitutional statute. Section 23 of the Quebec Charter entrenches the right to a "full and equal, public and fair hearing by an independent and impartial tribunal." No equivalent guarantee of independence constrains the legislature of British Columbia.[34]

[292] R. Fader held that, likewise, there is no equivalent guarantee of independence constraining Parliament in section 2(e). Such a constraint only applies to cases where an individual is charged with a criminal offence.

[293] R. Fader argued that, had the intent been to force Parliament to have an independent and impartial tribunal for all matters embraced by section 2(e), the *Bill* would have used wording identical to section 2(f). R. Fader concluded that, since this was not the case, the *Bill* allows Parliament to structure the relationship between the decision maker and the executive while, at the same time, guaranteeing the other protections afforded by the guarantee of natural justice.

[294] R. Fader held that, as a result of this, the *Bill of Rights* does not alter the principle established in *Ocean Port*, supra, and the appellants' motion should be dismissed as a result of the wide discretionary authority granted the Minister of Labour in section 145.1 of the *Code*.

[295] R. Fader argued in the alternative that, if section 2(e) displaces the *Ocean Port*, supra, principle, it does not have the impact of elevating the level of institutional independence required to that of judicial independence.[35]

[296] R. Fader held that the institutional independence analysis continues to be applied flexibly to administrative decision makers even in cases where constitutional (or quasi constitutional) provisions apply.[36]

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[34] Ocean Port, supra, note 20, at para 28.
[35] Ruffo v. Conseil de la magistrature [1995] S.C.J. No. 100.
[36] Régie, *supra*, note 47, at para. 39 and 44-45; also see specifically Pearlman, *supra*, note 20 at para. 31, 35 and 41; and *Bell Canada v. Canadian Telephone Employees Assn.* [2003] SCC 36 at para. 28.

[297] R. Fader pointed out that as recently noted by the Federal Court, and affirmed by the Federal Court of Appeal, in *Say* [37] where the protections of section 7 of the *Charter* were engaged and the issue of institutional independence was before the Court:

> …I am further satisfied that substantial deference is owed to Government decisions that relate to the appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.[38]

[298] R. Fader submitted that it is also well established[39] that even in cases where constitutional (or quasi constitutional) principles are "…engaged, that the courts will not look exclusively to the criteria for judicial independence (*Valante[sic]* criteria - infra) but also to the "operational reality" of the administrative decision maker and will, furthermore, require "substantial" evidence indicating a lack of institutional independence and impartiality."[40]

[299] R. Fader concluded that, simply put, section 2(e) of the *Bill of Rights* does not stand for the proposition advanced by the appellants.

[300] On the subject of unwritten Constitutional Principles, R. Fader maintained that it is well established that unwritten constitutional principles have no application to the analysis of institutional independence and impartiality of administrative decision makers.

[301] R. Fader noted the Supreme Court of Canada in *Ocean Port*, supra, noted quite clearly that the unwritten constitutional principles that apply to judicial decision-making do not extend to administrative decision-making.[41]

[302] R. Fader stated that it is also important to note that Appeals Officers hear appeals from findings of no danger (section 129(7)) and appeals from Directions issued by health and safety officers (section 146). He further pointed out that Appeals Officers have no role to play with respect to the prosecution for violations of the *Code* (sections 148-154) nor do they hear complaints of retaliation (sections 133 & 147).

[303] R. Fader submitted that the Appeals Officer plays an important but limited role under Part II of the *Code*. He maintained that neither section 129(7) appeals nor section 146 appeals are the preferred way to promote a healthy and safe work environment.[42] Appeals Officers only stand in review of decisions of health and safety officers.

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[37] Say, *supra*, note 42.
[38] Say, *supra*, note 42, at para. 22; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs [2006] S.C.C.A. No. 49
[39] Say, supra, note 42; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs [2006] S.C.C.A. No. 49; Mohammad v. Canada, [1988] F.C.J. No.1141 (C.A.)
[40] E-47 at para 57.
[41] *Ocean Port Hotel Ltd. v. British Columbia* [2001] SCC 52 at para. 29-3 3; also see *Bell Canada v. Canadian Telephone Employees Assn*. [2003] SCC 36 at para. 29-31.
[42] *Fletcher v. Canada (Treasury Board)* 2002 FCA 424.

[304] R. Fader argued that, despite the appellants' position that appeals are essentially "trials" the *Code* provides that appeals are to be dealt with "in a summary way and without delay" (section 146.1). He noted that the *Code* also allows an Appeals Officer to "receive and accept any evidence … whether or not admissible in a court of law", "determine the procedure to be followed", and "decide any matter without an oral hearing"(section 146.2).

[305] R. Fader held that it is also important to keep in mind that decisions of Appeals Officers are subject to judicial review under the *Federal Court Act.*[43]

[306] R. Fader argued that even if the intent of Parliament does not prevail, as a result of the application of constitutional principles, the appellants' suggestion that the level of institutional independence required is similar to judicial independence is without foundation.

[307] R. Fader argued that, even in cases where section 7 of the *Charter* is engaged and the adjudicative function is being performed by public servants within a government department, deference is owed to how the Government establishes the relationship between the statutory decision maker and the executive.[44]

[308] R. Fader maintained that what is required to satisfy a finding of lack of institutional independence is not anecdotal evidence but actual evidence that the operation of the Office of the Appeals Officer does not have sufficient firewalls in place to guarantee the independence of the Appeals Officers in the performance of their adjudicative function.[45]

[309] R. Fader referred *to Principles of Administrative Law* which states that: "This line of reasoning represents another example of the Supreme Court of Canada's shift away from the view found in *Régie*[46] that in institutional bias cases, it is sufficient to raise the mere possibility that a reasonable apprehension of bias could be demonstrated in a substantial number of cases." The authors note: "... the courts are more reluctant to entertain institutional bias arguments that are excessively abstract than might have been the case even a few years ago."[47]

[310] R. Fader submitted that even if the *Ocean Port principle* does not apply, because of the application of constitutional principles, the level of institutional independence suggested by the appellants is inconsistent with the jurisprudence in the area.

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[43] Federal Courts Act, R.S.C. 1985, e. F-7, as amended, sections 18 & 18.1. Also see specifically: *Mohammad v. Canada*, [1988] F.C.J. 1141 (C.A.) at p. 19.

[44] *Say v. Canada (Solicitor General) 2005 FC 739*; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs (2006) S.C.C.A. No. 49 at para. 22.

[45] *Say v. Canada (Solicitor General) 2005 FC 739*; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs (2006) S.C.C.A. No. 49 at para. 34; also ace specifically *Bell Canada v. Canadian Telephone Employees Assn*. [2003] SCC 36 at para. 45.

[46] *2747-3147 Québec Inc. v. Régie des permis d"alcool*, [1996)] S.C.J. No. 112 [Régie].

[47] « Jones, David and de Villars, Arme, Principles of Administrative Law, 4 ed. (Toronto: 2004 Carswell, at p. 400).

[311] R. Fader further submitted that, regardless of the level of institutional independence required, no reasonable person considering the evidence would conclude that there is a lack of institutional independence in the Office of the Appeals Officer.

[312] R. Fader maintained that, while the Federal Court is clear that the analysis for institutional independence should be flexible and not limited to a rigid application of the *Valente*[48] criteria. The analysis of these three criteria will show that even on this highest standard, the protections are met.

[313] R. Fader pointed out that the Federal Court noted that what is important in questions of institutional independence is not a person-by-person analysis. The focus is on the office or tribunal as a whole and whether the "vast majority" of the adjudicative function is performed by individuals with a sufficient guarantee of independence.[49]

[314] R. Fader recalled the testimony of Pierre Rousseau (Director of the Office of the Appeals Officer) that the "bulk" or "vast majority" majority of the adjudicative function of Appeals Officers is performed by full time indeterminate employees of HRSDC.[50]

[315] R. Fader submitted that, as a result, the analysis will focus on the Appeals Officers who are full time indeterminate employees.

[316] R. Fader held that it is well established that "…a certain degree of flexibility is appropriate where administrative agencies are concerned" when applying the following three *Valente criteria.*[51]

[317] R. Fader stated that security of tenure refers to the terms upon which a decision-maker is appointed. He maintained that Appeals officers have all the protections afforded under the *Financial Administration Act*[52]. Specifically, an Appeals Officer can only be disciplined, demoted or terminated "for cause".

[318] It is important to recall the testimony of Pierre Rousseau in which he indicated that no Appeals Officer has been disciplined, demoted or terminated.

[319] R. Fader held that any attempt to discipline, demote or terminate an Appeals Officer, whether directly or disguised as an administrative action, is grievable under the *Public Service Labour Relations Act* and an Appeals Officer can have such a grievance heard by independent third party adjudication.[53] He further held that, if an Appeals Officer is

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[48] *R. v. Valente*, [1985] S.C.J. No. 77; also sec 2747-3174 *Québec Inc. v. Quebec Régie des permis d"alcool*, [1996] S.C.J. No. 112 at para. 61-62.

[49] *Say v. Canada (Solicitor General) 2005 FC 739*; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs (2006) S.C.C.A. No. 49 at para. 35.

[50] Exhibit E-45.

[51] *2747-3147 Québec Inc. v. Régie des permis d"alcool*, [1996] S.C.J. No. 112 at para. 62; also see specifically: Katz v. Vancouver Stock Exchange, [1995] B.C.J. No. 2018 (C.A.) at para.24.

[52] *Financial Administration Act*, R.S., c F-10, as amended, section 12(3*)*

[53] *Public Service Labour Relations Act*, S.C. [2003], e. 22 at sections 208 and 209. See specifically: *Gannon v. Canada (Treasury Board)* [2004] FCA 424 at para. 27; Canada (A,G.) v. Penner, [1989] F.C.J. No. 461 (C.A.) at

terminated, suspended, or demoted in an attempt to influence their decision-making, they have the full protection of third party adjudication.

[320] R. Fader noted that according to the testimony of Pierrette Lemay, Appeals officers have their terms and conditions set by employer policy (Terms and Conditions of Employment Policy)[54]. He stated that this policy is adopted by the Treasury Board and would require a decision of the Treasury Board for it to be altered. R. Fader maintained that neither the Director of the Office of the Appeals Officer nor anyone at HRSDC has the authority to alter the terms and conditions of employment of Appeals Officers.

[321] R. Fader stated that the Terms and Conditions of Employment Policy substantially incorporates the terms and conditions negotiated in the PM (Program and Administrative Services) collective agreement. He submitted that, as a result of the incorporation of the terms and conditions of this collective agreement, Appeals Officers have the full protection of the Workforce Adjustment Directive,[55] which affords employees protections in workforce adjustment situations (i.e., downsizing).

[322] R. Fader pointed out that Appeals Officers are employees appointed pursuant to the *Public Service Employment Act* and are designated as Appeals Officers pursuant to section 145.1 of the *Code*. R. Fader held that security of tenure means tenure as an employee and it is clear that Appeals Officers have guaranteed tenure as indeterminate employees.

[323] In the alternative, R. Fader held that, if security of tenure means security in the position of Appeals Officers as "designated" by the Minister, there is protection against improper influence. He noted that designation as an Appeals Officer is done on an indeterminate basis.[56]

[324] R. Fader argued that the law is clear that the authority to strip such designation must be exercised in a manner "consistent with the purpose and objects of the statute"[57]. He maintained that such a decision would be subject to judicial review and would not stand scrutiny if the decision was made for an arbitrary or an improper purpose.[58]

[325] R. Fader stated that it is important to recall the testimony of P. Rousseau that no Appeals Officer has ever been stripped of this designation nor has any Appeals Officer been assigned to different duties.

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page 6; *Dhaliwal v. Treasury Board* (C.S.C.) [2004] PSSRB 109 at para. 77,78, 93 & 94; and *Peters v. Treasury Board* 2007 PSLRB 7.

[54] Exhibit E-30 — Terms and Conditions of Employment Policy.

[55] Exhibit 31 at page 103 of 176. Also see sections 57 and 65 of the *Public Service Employment Act*, S.C. 2003, c. 22, Part 3. As noted in the testimony of Pierre Rousseau, no appeals officer has ever been laid off.

[56] Exhibit E-2, tab E-Q, at pages 16 1-162.

[57] CUPE v. Ontario 2003 SCC 29 at para. 49.

[58] CUPE v. Ontario 2003 SCC 29 at para.106-112.

[326] R. Fader submitted, therefore, that Appeals Officers have greater security of tenure than most separate employer tribunals:

- Appeals Officers are appointed on a full time basis and are not engaged on a per diem basis;
- Appeals Officers are appointed on an indeterminate basis and not on short terms, i.e., 2-5 years.[59]
- Appeals Officers cannot be fired, suspended or disciplined without cause.
- Appeals Officers can not be removed as appeals officers except in accordance with the spirit and intent of the *Code*, i.e., the Minister can't remove them arbitrarily or for improper purposes.[60]

[327] R. Fader submitted that Appeals Officers have the ultimate security of tenure as full time indeterminate employees.

[328] R. Fader stated that financial security refers to a guarantee that financial remuneration will not be used as a tool for controlling the decision-maker in his or her performance of the adjudicative function. He maintained that the evidence is clear that as employees in the PM group (Programme Administration) Appeals Officers are part of a larger pool of excluded PMs[61] who benefit from substantially the same terms and conditions of employment as those negotiated for non-excluded PMs, i.e., in the PM collective agreement.

[329] R. Fader referred to the testimony of Pierrette Lemay wherein she testified that the terms and conditions of employment for Appeals Officers are set in the Terms and Conditions of Employment Policy, which, for the most part, incorporate the provisions of the PM collective agreement. This includes such things as rates of pay and vacation leave entitlements. If an Appeals Officer has a dispute over these terms and conditions of employment, he or she can grieve pursuant to the *Public Service Labour Relations Act*[62] and have the final level decision in the grievance process reviewed on judicial review.[63]

[330] R. Fader concluded that clearly Appeals Officers have financial security. Any change to their terms and conditions of employment would require a decision of the Treasury Board. When asked about the possibility of the Treasury Board singling out a particular Appeals Officer for different treatment, Pierrette Lemay said such a proposition was

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[59] Also see specifically PSLRA section 22 and PSEA section 89.

[60] *CUPE v. Ontario* [2003] SCC 29 at paragraph 49. The appellant notes at paragraph 58 of her memorandum of fact and law that the Director has the authority in deploy appeals officers to different positions. The inference being invited is that he has the authority to do this without their consent. This suggestion is without foundation, see specifically section See exhibit E-3251 PSEA.

[61] See exhibit E-3251 PSEA.

[62] *Public Service Labour Relations Act*, S.C, 2003, c. 22, Part 1, section 208. Also see specifically *Vaughan* v, Canada 2005 SCC 11.

[63] *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, sections 18 & 18.1. Contrary to the argument made by the appellant, the Federal Court is clear that the availability of judicial review from the final level in the grievance procedure is "not an illusionary remedy" — see specifically: *Marshall* v. *Canada* 2006 FC 51 at para. 25; also sec: *Canada* (A. G.) v. *Assn* 2006 FCA 358.

"ridiculous". He added that it has to be kept in mind that the Treasury Board policy applies to all excluded employees. R. Fader held that no reasonable person would conclude that the Treasury Board would lower the terms and conditions of such a wide group of employees (1, 536 for the excluded PM group alone)[64] simply to influence the decision making of a handful of Appeals Officers.

[331] R. Fader added that the pensions of Appeals Officers are provided for in the *Public Service Superannuation Act*.[65] He held that changes to the pension of an Appeals Officer would require legislative change.

[332] R. Fader concluded, therefore, that it is clear from the evidence that Appeals Officers enjoy the ultimate in financial security.

[333] R. Fader stated that administrative control refers to freedom from external influence with respect to matters of administration that relate directly to the decision-making function, such as the assignment of cases. He held that the evidence is overwhelming that controls against external influence are in place. As noted by Pierre Rousseau:

- Appeals officers have no direct contact, outside of the appeal hearing itself, with: (a) health and safety officers (whose decisions are under review), (b) anyone outside of the Office of the Appeals Officer at HRSDC or in the Government, and (c) the parties to the appeal itself.
- The Director of the Office acts as a firewall for the Appeals Officers so that they are not improperly influenced in their decision-making.
- The Office of the Appeals Officer assigns cases and makes arrangements for hearing rooms in a very collegial and open manner, without external input. The Director has the final say when it comes to the assignment of cases.
- Appeals Officers do not share administrative resources with the rest of HRSDC.
- Appeals Officers do not share legal services with the rest of HRSDC.

[334] R. Fader submitted that there is nothing on the record to demonstrate that there is external influence in the administrative control of the Office of the Appeals Officer. He maintained that no reasonable person would conclude that Appeals Officers lack the freedom from external influence with respect to matters of administration that relate directly to the decision-making function.

[335] R. Fader held that under the modern approach to institutional independence, the jurisprudence is clear that the evidence supporting an institutional independence argument must be substantial. He maintained that 'the case law is also clear that the analysis is not limited to a rigid application of the *Valante[sic]* criteria (above)". He further held that "[t]he courts will also look at the "operational reality" of the tribunal or decision maker at issue".[66]

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[64] Exhibit E-32.

[65] *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, as amended.

[66] Sam Lévy & Associés Inc. v. Canada 2006 FCA 205 at paragraph 20; and see *Sheriff* v. *Canada* 2006 FCA 139.

[336] R. Fader maintained that in *Say*, supra, the Federal Court looked not only to the *Valente* (*sic*) criteria but also to the following factors in deciding that the applicant's anecdotal evidence fell far short of the threshold of "substantial":

- Training;
- Efforts to maintaining the perception and the reality of independence and impartiality in decision-making;
- Separation in supervision between decision makers and those whose decisions were being reviewed;
- The existence of firewalls around decision makers.[67]

[337] R. Fader argued that *Say*, supra, stands for the proposition that public service employees charged with a largely adjudicative function even that which engages the protections of the Charter, can perform that role within a department so long as there is within their office a structure that guarantees the independence of their decision-making process.[68]

[338] R. Fader referred to the *Principles of Administrative Law* wherein it was stated that: "This line of reasoning represents another example of the Supreme Court of Canada's shift away from the view found in *Régie*, supra, that in institutional bias cases it is sufficient to raise the mere possibility that a reasonable apprehension of bias could be demonstrated in a substantial number of cases." The authors note: "... the courts are more reluctant to entertain institutional bias arguments that are excessively abstract than might have been the case even a few years ago."[69]

[339] R. Fader pointed out that, in *Katz* v. *Vancouver* Stock Exchange, [1996] S.C.J. No. 95 the Supreme Court of Canada noted its agreement with the decision of the British Columbia Court of Appeal.[70] The British Columbia Court of Appeal indicated the importance of looking at the "actual practice" of a tribunal in addressing the issue of institutional independence.[71]

[340] R. Fader maintained that the Court clearly was not interested in hypothetical or speculative propositions but was looking for actual evidence of interference in the decision making process.[72] He held that the Court analysed the past practice of the tribunal and concluded that there was no such interference. As a result, the Court concluded that there was sufficient institutional independence.

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[67] *Say v. Canada (Solicitor General)* 2005 FC 739; affirmed 2005 FCA 422; leave to appeal to the Supreme Court of Canada dismissed with costs (2006) S.C.C.A. No. 49 at para. 35; also see specifically: *PLPSC. v. Canada* 2004 FC 507.

[68] *Say v. Canada (Solicitor General)* 2005 FC 739; affirmed 2005 FCA 422; leave to. appeal to the Supreme Court of Canada dismissed with costs [2006] S.C.C.A. No. 49 at para. 38-42.

[69] Jones, David and de Villars, Anne, Principles of Administrative Law, 416 cd. (Toronto: 2004 Carswell, at p.400).

[70] *Katz* v. *Vancouver Stock Exchange*, [1996] S.C.J. No. 95; [1995] B.C.J No. 2018 (C.A).

[71] *Katz* v. *Vancouver Stock Exchange*, [1995] B.C.J. No. 2018; affirmed [1996] S.C.J. No. 95, at para. 24 and 25.

[72] *Katz* v. *Vancouver Stock Exchange*, [1995] B.C.J. No. 2018; affirmed [1996] S.C.J. No. 95, at para. 34-36.

[341] R. Fader stated that one case cited with approval by the British Columbia Court of Appeal was *Mohammad*, supra, which engaged the protections of section 7 of the *Charter*. R. Fader pointed out that in that case the Federal Court of Appeal noted:

> Dealing initially with the Commission's structure and organization, I conclude from the evidence that while the Case Presenting Officers and Adjudicators are both civil servants under the direction of the same Minister, they operate in separate and distinct divisions of the Commission. Case Presenting Officers have no supervisory role vis-à-vis Adjudicators. They do not report to a common supervisor and it is only at the apex of the organization chart that their respective hierarchies merge.
>
> …On the subject of monitoring, there is evidence that the monitoring practice focuses primarily on how hearings are conducted. There is also the clear and unequivocal evidence of former Adjudicator Scott *supra* that while performing his duties as an Adjudicator, he always felt that the final decision on a case was his, and his alone to make. He also made it clear that he felt no compulsion to take direction from his superior officers. I think it is fair to assume, in the absence of evidence to the contrary, that other Adjudicators are also well aware of their responsibilities as quasi-judicial officers.
>
> With respect to security of tenure, Adjudicators, like other civil servants, have the protection afforded pursuant to section 31 of the *Public Service Employment Act*. Additionally, they have the protection of a three stage grievance procedure.
>
> Insofar as the practice of appointing Adjudicators to other positions on an acting basis is concerned, I fail to see how this practice, *per se*, could possibly give rise to a reasonable apprehension of lack of independence. Again there is not a shred of evidence on this record in support of this submission. Such an argument ignores the oath of office taken by all Adjudicators. It also ignores the uncontradicted evidence of Mr. Scott to the effect that the decisions made by him were made independently and without direction from anyone else...."[73]

[342] R. Fader stated that the Federal Court of Appeal went on to note; in the same decision:

> I think it apparent that the circumstances at bar are completely different from those in MacBain. In MacBain the prosecutor appointed the Judge. That is certainly not the case with the scheme relative to Adjudicators under the *Immigration Act*. Adjudicators, as noted, supra, are full time civil servants whose employment is governed by the provisions of the *Public Service Employment Act* and the Immigration Act. They are completely separated from the Enforcement Division of the Commission which Division has no control or supervision over the work of Adjudicators. Likewise, there is no influence or control by the Enforcement Division over the assignment of cases to

[73] *Mohammad* v. *Canada*, [1988] F.C.J. No. 1141 (C.A.) at page 19

> Adjudicators. This duty is performed by the Adjudication Directorate on a rational basis. In sum, it is my view that the facts, the circumstances and the legislative scheme in MacBain are so vastly different from the case at bar as to render the rationale of that decision completely inapplicable to this case.[74]

[343] R. Fader held that the Federal Court of Appeal's decision in Mohammad is consistent with the reasons adopted more recently in the Say decision. He maintained that the key is that the Federal Court of Appeal will look to the actual operation of a tribunal or decision maker and absent substantial evidence to the contrary will not presume a lack of institutional independence.

[344] R. Fader submitted that when one looks to the operational reality of the Office of the Appeals Officer, in addition to the *Valente criteria* noted above, it is clear that:

- There isn't a shred of evidence suggesting external influence over the decisions of Appeals Officers. The Director testified that he has never felt compelled to influence the adjudicative process. He testified that he has never felt any pressure from anywhere in Government to do so. He testified that he has never heard any complaints from Appeals Officers that they have experienced any such pressure.
- The Director testified that if he became aware that someone was trying to influence the decision making process of his Appeals Officers he would tell them to stay out of it, even if it were the Deputy Minister or the Minister.
- There isn't a shred of evidence to suggest that the Appeals Officer are in any way constrained in their decision making, it is clear that their decision is theirs alone.
- It is clear that the Director of the Office of the Appeals Officer[75] has effectively established himself as a firewall to the appeals officers:

  (a) The Office of the Appeals Officers has been moved away from HRSDC headquarters in order to remain insulated from the rest of the Department[76],

  (b) The Director has eliminated communication (outside of the appeals hearing itself) between appeals officers and HRSDC, safety officers and the parties[77],

  (c) The Director has created a mandatory *Code* of Conduct for Appeals Officers that includes an affirmation of office[78] stressing the importance of independence and impartiality. The *Code* reads in part:[79]

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[74] *Mohammad* v. *Canada*, [1988] F.C.J. No. 1141 (C.A.) at p. 20.

[75] Exhibit E-3, the Director is an individual with over 35 years in occupational health and safety. In fact, the Director was the first person to conduct hearings under Part-II of the Code. The Director further testified that he no longer hears cases so that he can dedicate himself full time to the administrative demands in his role as Director and that he is staffing a technical advisor position so that he can further distance himself and ovoid overlap with the appeals process.

[76] Exhibit E-2, tabs I & J.

[77] Exhibit E-2, tab A, page 1 and tab C, page 1.

[78] It is well established that an oath of office is an indicia of independence: *2747-3147 Québec Inc. v. Régie des permis d"alcool*, [1996] S.C.J. No. 112 at para. 62.

[79] Exhibit E-2, at Tab D-O, at pages 129-132.

> Appeals Officers shall participate in establishing, maintaining, and enforcing high standards of conduct and act to promote and preserve their integrity and independence.
>
> Decisions shall be independent, impartial, and objective, and made without regard to partisan or special interests, or fear of criticism.
>
> Likewise, the Director has overall responsibility for relations with the government. All inquiries from Members of Parliament, Ministers, and political staff on any matters relating to the work of Appeals Officers should be referred to the Director.
>
> I recognize that I have read this *Code* of Conduct for Appeals Officers and I solemnly affirm that I will respect it;[80]

(d) The Director has established a climate within the Office that emphasizes the fact that Appeals Officers are independent and impartial in the decision making process. He testified that he does not interfere in the appeal process, he is there to provide resources to the Appeals Officers but he does not interfere with their decision making process. When asked about supervision he noted that they are not supervised with respect to their decision making process, he stated "it is their decision"; and

(e) The Director has established a Practice Guide for the Hearing of Appeals, which like the *Code* of Conduct stresses the importance of independence and impartiality.[81]

- There is clear evidence that the appeals officers are experts in occupational health and safety. This point was conceded by Jeff Bennie and affirmed by Pierre Rousseau.
- The appeals officers receive significant intake training when they first come on the job[82], which is followed up by two years of on the job training with an experienced appeals officer before they take on the responsibility of hearing cases on their own. The Director also testified that training is continually available on an "as needed" basis and that training is addressed for each appeals officer in their yearly performance review.[83]
- The evidence is clear that the Appeals Officers have no overlap in function with safety officers or anyone outside of the Office of the Appeals Officer. It is trite law that overlap of functions by an agency is does not violate the rules of procedural fairness so long as the same people are not involved at different stages of the process[84]

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[80] Exhibit E-2, tab D-0, pages 129-132. The Director testified that this affirmation is mandatory for both full time indeterminate appeals officers as well as appeals officers engaged on a contractual basis.

[81] Exhibit E-26.

[82] Exhibit E-27 (A)(B)(C).

[83] Pierre Rousseau testified that appeals officers do not receive performance pay and that the appraisal is done to identify any need for training or development.

[84] *2747-3174 Québec Inc. v. Régie des permis d'alcool*, [1996] S.C.J. No. 112 at para. 60; and see: *Sam Lévy & Associés Inc. v. Canada* [2006] FCA 205 at paragraph 13; and *Sheriff* v. *Canada* 2006 FCA 139 at para. 48 and 49.

- Appeals Officers exclusively perform their adjudicative function. They are not assigned to other duties even on a temporary basis.
- Appeals Officers, have no involvement in appeals prior to the appeal hearings themselves.
- Appeals Officers do not share legal services with the rest of the Department. If legal services are required the Director engages the services of private counsel after doing a check for conflict of interest.
- Appeals Officers do not share administrative services with the rest of the Department.
- There is no overlap in supervision of the Appeals Officers and the health and safety officers whose decisions they review on appeal. The only link in terms of a reporting relationship is at the highest levels of the organization, i.e., at the ADM level.
- The Director of the Appeals Office has significantly increased resources for the Office.[85]

[345] R. Fader submitted that based on what precedes; a reasonable person would not conclude that there is a lack of institutional independence with Appeals Officers appointed pursuant to section 145.1 of the *Code*.

[346] R. Fader argued that, as it relates to the question of institutional impartiality, the *Ocean Port*, supra, line of cases is of no application as the intent of Parliament is to provide nothing short of a truly impartial decision making process.

[347] R. Fader held that the question is, however, does the evidence establish a reasonable basis to conclude that HRSDC employees, as a class, would not be impartial? In this regard, he recalled that the test for institutional impartiality is:

> ...whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases.[86]

[348] R. Fader submitted that it is important to point out that concerns over impartiality for an institutional impartiality argument must be addressed to the class of decision makers. He noted that the Supreme Court of Canada stated in *CUPE*, supra:

> There are no "substantial grounds" ... to think that retired superior court judges, who enjoy a federal pension, would do the bidding of the provincial Minister, or make decisions to please the employers so as to improve the prospect of future appointments. Undoubtedly, there have been some judges predisposed toward management in the past, as well as some judges predisposed toward Labour, but I do not think the fully informed, reasonable person would tar the entire class of presently retired judges with the stigma of anti-Labour bias.[87]

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[85] E-20 and E-45.
[86] *CUPE v. Ontario* [2003] SCC 29 at para.195.
[87] *CUPE v. Ontario* [2003] SCC 29 at para. 2; also see specifically: PLPSC v. Canada 2004 FC b 507.

[349] R. Fader held that, for the same reasons as noted above, the appellants have failed to establish a basis for the proposition that the Office of the Appeals Officer lacks institutional impartiality.

[350] R. Fader submitted that there is no evidence to suggest that Appeals Officers, as a class, would not be impartial in their decision-making.

[351] R. Fader submitted that there is no basis for the argument that Appeals Officers are not institutionally independent or that they lack institutional impartiality.

[352] As a result, R. Fader asked that the objection be dismissed.

Appellants' Submissions in reply

[353] Mr. Raven referred to *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 20-22, and to *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 1 S.C.R 539 at para.117 and agreed that common law principles of natural justice, including the requirements of institutional independence, must give way in the face of clear and unequivocal legislative direction. He submitted, however, that the *Code* provision granting the Minister authority to designate Appeals Officers does not clearly and unequivocally express a Parliamentary intent to limit the Institutional independence of the health and safety appeals process set out in Part II of the *Canada Labour Code*.

[354] A. Raven maintained that as established in *Castillo*, supra at para. 26, citing *Parry Sound (District) Social Services Administration Board v. Q. P. S. E. U., Local 324*, 2 S.C.R. 157 at para 39 and *Slaight Communications Inc. v. Davidson*, 1 S.C.R. 1038 at p. 1077 as well *Ocean Port*, supra at para. 21 that, absent clear statutory provisions to the contrary, "the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law," Specifically, courts should not "lightly assume" that legislators intended to enact procedures that are contrary to the fundamental principles of natural justice. Rather, courts will infer that Parliament intended the tribunal's process to comport with natural justice unless this is ousted by express statutory language.

[355] A. Raven maintained that, in the context of institutional independence and impartiality, the Supreme Court of Canada in *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 1 S.C.R 539 [C.U.P.E], supra at para 99, 121 has held that "it is presumed that the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law." A. Raven noted that Justice Binnie stated that:

> In the case of tribunals established […] to adjudicate "Interest" disputes between parties, It is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartially either expressly or by necessary implication.

[356] A. Raven held that the Respondent's submissions concerning the legislative history of Part II of the *Code* fail to accurately represent the ongoing efforts of union and

management representatives to ensure that a fully independent appeals process would be included in the amendments which were eventually enacted in 2000. A. Raven pointed out that, although Bill C-97 died on the order paper in 1997, the amendments were subsequently reintroduced as Bill C-12 and Labour representatives continued before the Standing Committee on Natural Resources and Government Operations and the Standing Senate Committee on Social Affairs, Science and Technology.

[357] A. Raven submitted that the mere observation that the Canada Appeals Office is not akin to tribunals established pursuant to other legislation cannot support an inference of Parliamentary intent to oust the principles of natural justice with respect to Part II of the *Canada Labour Code*. A. Raven submitted that all that can be inferred from section 145.1 of the *Code* is that Parliament intended to give the Minister authority to designate qualified individuals as Appeals Officers.

[358] A. Raven stated that the Respondent relies on the Supreme Court of Canada's decision in *C.U.P.E*, supra to support the assertion that authority to appoint Appeals Officers granted under section 145.1 of the *Code* ousts principles of natural justice with respect to institutional independence.

[359] A. Raven submitted that *C.U.P.E,* supra, does not support the proposition that a statutory grant of discretionary authority limits the requisite independence of administrative tribunal because the matter at issue in *C.U.P.E,* supra, was whether the specific approach adopted by the Minister in making appointments under his discretionary authority caused the resultant arbitration boards to lack the requisite institutional independence and impartiality.

[360] A. Raven held that at no time did the Court suggest that the discretion granted under subsection 6(5) of the *HLDAA* circumscribed the requirement that arbitration boards appointed under *HLDAA* be independent and impartial tribunals. Far from limiting the parties' common law rights under the *HLDAA*, the effect of the decision in *C.U.P.E.*, supra at paragraphs 183-184 was to limit the Minister's discretion under subsection 6(5) to approaches that would ensure the appointment system would be perceived as neutral and credible.

[361] A. Raven insisted that the decision in *C.U.P.E*, supra, is not "on all fours" with the present case for a number of reasons. First, sections 145.1 of the *Code* differ significantly from subsection 6(5) of *HLDAA*, in respect of the precise nature of the Minister's power. A. Raven added that the arbitration boards at issue in *C.U.P.E.*, supra, differ substantially from the appeals process under Part II of the *Code* in respect of both their form and function. He held that, for these reasons, the *C.U.P.E.*, supra decision does not support the position taken by the Respondent in this matter.

[362] A. Raven stated that subsection 6(5) of the *HLDAA* grants the Minister power to appoint arbitration boards. By contrast, section 145.1 of the *Code* gives the Minister of Labour power to designate qualified individuals as Appeals Officers. A. Raven held that this distinction is significant as the former provision grants the Minister discretion to staff the arbitration board. However, in the latter case, the Minister designates as Appeals Officers

individuals who have already been appointed to positions as appeals officers for employment purposes.

[363] A. Raven argued that Parliament's intent was clearly to use departmental employees already appointed pursuant to the *PSEA* as Appeals Officers, but the operational reality suggests otherwise. A. Raven stated that fewer than half of the Appeals Officers designated by the Minister are public service employees appointed to indeterminate positions under the *PSEA*. The majority of appeals officers are hired by the Director, with approval of the ADM, either as casual employees or on contract.

[364] A. Raven further submitted that Ministerial designation pursuant to section 145.1 of the *Code* occurs by request of the ADM of the Labour Program, after an indeterminate, casual, or contract Appeals Officer position has been staffed. A. Raven held that the ministerial designation under section 145.1 of the *Code* is a mere formality subsequent to staffing of the position by the Director and the ADM of the Labour Program.

[365] A. Raven submitted that in these circumstances, the operational reality under section 145.1 of the *Code* affords the Minister significantly less discretion than was granted to the Minister in *C.U.P.E.*, supra.

[366] A. Raven maintained that the nature and function of the CAO also differs significantly from the arbitration boards at issue in *C.U.P.E.*, supra at para. 53. A. Raven held that the ad hoc arbitration boards established under *HLDAA* deal with "interest arbitration" the determination of the terms and conditions of collective agreements.

[367] A. Raven stated that Justice Binnie noted that, while grievance arbitration is adjudicative, interest arbitration is "more or less legislative." A. Raven held that, while the arbitration boards under HLDAA may not attract the procedural protections at the judicial end of the spectrum described in *Bell*, supra, at para. 21, 23-24, the appeals process under Part II of the *Canada Labour Code* adjudicates disputes in a court like manner, thereby attracting the requirements of independence at the high end of the spectrum described in Bell.

[368] A. Raven stated finally that *C.U.P.E.*, supra, at para. 190 dealt with a statutory regime for the establishment of ad hoc administrative boards. A. Raven maintained that such tribunals by necessity cannot be subject to the standard requirements of institutional independence set out in Valente, as they are by definition constituted on a case-by-case basis. A. Raven held that, accordingly, the requirements of security of tenure and financial independence are completely circumscribed by the very nature of these tribunals, while administrative independence can have little formal protection.

[369] A. Raven submitted that it is because of the ad hoc nature of the tribunal at issue, not the Minister's discretion over the appointment of tribunal members, that the Valente factors were not applicable in the *C.U.P.E.*, supra, case. A. Raven held that the Court's approach in *C.U.P.E.*, supra, cannot be applied in the present case as Appeals Officers are not designated by the Minister on an ad hoc, case-by-case basis. A. Raven added, that in any event, there is no clear and unequivocal expression of Parliamentary intent as is required

to oust the principles of natural justice and displace the common law requirement of institutional independence.

[370] A. Raven held that contrary to the Respondent's submissions, the *Code* is silent on each of the *Valente factors* and the legislative history clearly indicates that HRDC officials deliberately kept the *Code* silent on matters related to the administrative structure and independence of the health and safety appeals process. Given this, A. Raven concluded that the provisions of Part II do not clearly and unequivocally express the Parliamentary intent required to oust the principles of natural justice and displace the common law requirement of institutional independence.

[371] A. Raven noted the Respondent asserts that section 7 of the *Charter* is not engaged where matters relating to the health and safety of employees are adjudicated by an administrative tribunal, on the basis that workers remain free to leave their employment should they feel their health and safety is threatened. A. Raven submitted that this reflects an impoverished and inaccurate view of the *Charter* and of Labour relations jurisprudence in general and fails to recognize the underlying purpose of Part II of the *Canada Labour Code*.

[372] A. Raven held that the Supreme Court of Canada has long held that various aspects of employment, including matters related to occupational health and safety, are fundamental to the dignity and personal liberty of employees, sufficient to come within the scope of constitutional protection. A. Raven referred to the statement by Chief Justice Dickson in *Public Service Employee Relations Act* (Alberta), 1 S.C.R. 313 at 334-335, 367-368 that:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

[373] A. Raven cited: *Singh y. Canada*, [1985] 1 S.C.R. 177,at 201-202; *New Brunswick (Minister of Health and Community Services)* v. *G. (.1.)*, [1999] 3 S.C.R. 46 at paragraph 72; *Chaoulli v. Quebec (Attorney General)*, [1 S.C.R. 791 at paragraphs. 123-124, 132-134; Charkaoui v. Canada (Citizenship and Immigration), [S.C.J. No. 9 [at paragraphs. 18-19, 32] and submitted that the fundamental rights to life and security of the person under section 7 of the Charter are engaged in respect of the interests at stake in heath and safety appeals under Part II of the *Canada Labour Code*.

[374] A. Raven maintained that a higher level of independence is required where a tribunal's decisions could seriously affect a party's fundamental rights or interests, such as their rights to life and security of the person under section 7 of the Charter. Indeed, the Supreme Court of Canada held in *Matsqui* [88] that "where the decisions of a tribunal affect

[88] *Matsqui*, supra, note 4.

the security of the person of a party [a more strict application of the Valente principles may be warranted." Accordingly, A. Raven submitted that the engagement of section 7 by virtue of the interests at stake in health and safety appeals under Part II of the *Canada Labour Code* will move the requisite standard of institutional Independence for the CAO closer to the high end of the spectrum described in Bell.

[375] A. Raven held that the Respondent's assertion that the right to a fair hearing guaranteed under subsection 2(e) of the *Bill of Rights* was not intended to include the right to independence and impartially is not supported by any authority. A. Raven maintained that, despite the Respondent's distinction between subsections 2(e) and 2(f) of the *Bill of Rights*, the jurisprudence of the Supreme Court of Canada holds that the right to a fair hearing in accordance with the principles of fundamental justice accorded under subsection 2(e) does in fact include a guarantee of independence and impartiality.

[376] A. Raven added that the Supreme Court of Canada in Bell unanimously held that subsection, 2(e) of the *Bill of Rights* applies to an administrative tribunal established under the *Canadian Human Rights Act.* A. Raven argued that the Court held in Bell supra at paragraph 28 that the content of the "principles of fundamental justice" guaranteed under subsection 2(e) is "established by reference to common law principles of natural justice," and accepted that the guarantees of independence and impartiality under subsection 2(e) would not differ from the common law requirements of procedural fairness.

[377] A. Raven maintained that it is well-established law that "fundamental justice" includes the concept of a fair hearing before an independent and impartial decision-maker. In Charkaoui (supra), Chief Justice McLachlin stated that "[it] is not enough that the judge in fact be independent and impartial; fundamental justice requires that the judge also appear to be independent and impartial." In Pearlman (supra), a case dealing specifically with impartiality, Justice Iacobucci held that "in the administrative law context, principles of fundamental justice include natural justice rules which in turn require that the members of the tribunal be impartial and disinterested."

[378] A. Raven submitted that, given the jurisprudence of the Supreme Court of Canada, which clearly affirms that fundamental justice includes the concept of a fair hearing before an independent and impartial decision-maker, the Appellants submit that the subsection 2(e) of the Bill of Rights must be interpreted to include the requirement of institutional independence.

[379] A. Raven provided the following additional submission in support of the Appellants' contention that the appeals process under Part II of the *Canada Labour Code* must meet the high standard of independence described in Bell.

[380] A. Raven held that the Respondent's position that the appeals process under Part II of the *Code* is the preferred way of promoting workplace health and safety does not affect the standard to which the process for adjudicating health and safety appeals must be held. Instead, A. Raven submitted that matters which cannot be resolved between the parties in the "preferred" manner must be adjudicated by a process that ensures the high degree of

independence and impartiality necessary to maintain public confidence in the occupational health and safety regime of Part II of the *Canada Labour Code*.

[381] A. Raven maintained that Appeals Officers conduct de novo reviews of health and safety issues (Martin v. Canada (Attorney General), [2005] 4 F.C.R. 637 (F.C.A.) at paragraph 28) and their decisions are protected by strong privative clauses, namely sections 146.3 and 146.4 of the *Code*. A. Raven submitted that both these facts support a standard of independence at the judicial or high end of the spectrum described in Bell (supra).

[382] A. Raven argued that, although courts must defer to clear statutory direction in assessing the degree of independence required of the tribunal in question, there is no authority for the assertion that deference is likewise owed to the manner in which government establishes the relationship between the statutory decision-maker and the executive.

[383] A. Raven argued that there is no authority to support the Respondent's assertion that courts will require "substantial" evidence indicating a tack of institutional independence and impartiality.

[384] A. Raven held that there is no requirement that challenges to institutional independence must be supported by actual evidence that the tribunal lacks sufficient "firewalls" for the independent performance of its adjudicative function. A. Raven maintained that the Federal Court in *Say*[89] held that "evidence of institutional bias or lack of independence or impartiality is not the test. A. Raven reiterated that the test is the perception in the mind of a reasonably informed observer."

[385] A. Raven further argued that, in any event, the only evidence of a "firewall" between the Appeals Officers and the ADM of the Labour Program was Mr. Rousseau's testimony that it is his role as Director to act as such a firewall". However, in actual practice the extent of this separation is minimal. A. Raven pointed out that the Director testified that he informs appeals officers of what is discussed at virtually every one of his meetings with the ADM.

[386] Finally, A. Raven held that, regardless of whether the trend noted by the Respondent is supported by the jurisprudence, it is irrelevant to the present case, as the evidence concerning the structure and operational reality of the CAO goes well beyond the "excessively abstract." A. Raven submitted that the Appellants have identified numerous instances of actual bias arising from the lack of institutional independence accorded to Appeals Officers.

[387] With regard to the elements of institutional independence specified in *Valente*[90], A. Raven referred to *Say*[91], and *Blake* (supra) at paragraph 103 and argued that there is no authority for the proposition that analysis of a tribunal's institutional independence

[89] Say, *supra*, note, at para. 34.
[90] Valente, supra, note,
[91] Say, supra, note, at para. 34.

with respect to the *Valente* requirements should be focussed on the independence enjoyed by the "vast majority" of decision-makers.

[388] A. Raven held that only three of the seven currently-sitting Appeals Officers are indeterminately-appointed HRSDC employees and, while the Director testified that the "bulk" of appeals are heard by indeterminate Appeals Officers, the fact is that a substantial percentage of the reported decisions of the CAO from 2004 to the present were rendered by casual or contract Appeals Officers.

[389] A. Raven submitted that an analysis of the *Valente* factors that only considers the independence of the three indeterminately-appointed Appeals Officers fails to consider the operational reality of the CAO. A. Raven held that a thorough analysis of the institutional independence of the appeals process under Part II of the *Canada Labour Code* must consider the complete structure of the Canada Appeals Office, having regard to the various employment and other circumstances of all the Appeals Officers.

[390] A. Raven stated that, given the foregoing, the Appellants rely on the application of the Valente requirements, including the historical context and evidence of actual practice, at paragraphs 168-214 of the Appellants' Written Submissions.

[391] A. Raven submitted that the operational reality of the CAO is that Appeals Officers do not enjoy security of tenure sufficient to meet the requisite degree of institutional independence. A. Raven held that only indeterminate Appeals Officers have access to the protections afforded under the *Financial Administration Act* and the grievance procedure under the *Public Service Labour Relations Act*. Appeals Officers employed on contract are not considered Treasury Board employees, and as such do not have access to any of the protections identified by the Respondent.

[392] A. Raven also noted that the Director retains authority to deploy Appeals Officers to other positions, as indeterminately appointed Appeals Officers are appointed to a job, not a specific position.

[393] A. Raven submitted that no evidence was led regarding protections that exist against improper influence over the Ministerial designation process. A. Raven held that the evidence indicates only that Appeals Officers are designated by the Minister at the request of the ADM of the Labour Program.

[394] A. Raven reiterated that four of the seven currently sitting Appeals Officers are not appointed on a full-time basis, and are engaged on a per diem or fixed-rate basis. A. Raven submitted that the evidence indicates that contract and casual Appeals Officers are appointed for terms ranging from eight days to one year. A. Raven also pointed to the fact that the Director testified that he would not renew the contract of an Appeals Officer if he felt they rendered a "stupid" decision.

[395] A. Raven argued that the Respondent's submissions on security of remuneration apply only to those Appeals Officers who are indeterminate employees of HRSDC appointed pursuant to the *PSEA*. A. Raven reiterated that since more than half the current

complement of Appeals Officers are employed on a casual or contract basis, these Appeals Officers are not considered Treasury Board employees. A. Raven maintained that such AOs enjoy neither the terms and conditions of employment set out under Treasury Board policy, the benefits accorded by the *Public Service Superannuation Act*, or access to recourse in respect of the terms and conditions of their employment under the *Public Service Labour Relations Act*.

[396] A. Raven further noted that the Director, who is the immediate supervisor of the Appeals Officers, is subject to a substantial degree of discretion by the Deputy Head, including performance pay that is based in part on the CAO's efficiency in disposing of appeals.

[397] A. Raven submitted that the present structure and actual operation of the CAO fails to meet the requirements of administrative independence for a number of reasons, including: the nature of the CAO's relationship with the ADM, Labour Program, and the absence of an adequate "firewall" between them; staffing practices; authority over the CAO's budget; and issues concerning the physical relocation of the Canada Appeals Office.

[398] A. Raven held that the test for institutional independence reflects the principle that independence must be both actual and perceived, asking whether or not an informed observer would have a reasonable apprehension of bias in a substantial number of cases heard by the tribunal in question.

[399] A. Raven noted that the Respondent asserts a legal requirement for "substantial evidence" of a lack of institutional independence, and contends that no evidence has been adduced to establish any external influence or constraints on the decisions of Appeals Officers. A. Raven submitted that the Respondent has articulated an incorrect legal test for which there is no support in the jurisprudence, and has failed to acknowledge important evidence concerning the structure and operation of the Appeals Office.

[400] A. Raven noted that the complete passage from text cited by the Respondent in Jones, supra at 399-400 [added] states that:

> In the absence of evidence of actual abuse of the Commission's authority to issue guidelines], the Court concluded that the mere existence of the possibility of abuse was an insufficient basis for a reasonable observer to conclude that there was a real likelihood of bias. This line of reasoning represents another example of the Supreme Court of Canada's shift away from the view found in *Régie des permis d'alcool* that in institutional bias cases it is sufficient to raise the mere possibility that a reasonable apprehension of bias could be demonstrated in a substantial number of cases. This does not mean that a party alleging institutional bias needs to show evidence of actual bias but it does suggest that the courts are more reluctant to entertain institutional bias arguments that are excessively abstract than might have been the case a few years ago.

[401] A. Raven cited *Say*[92], *Bell*[93] supra at paragraphs 18-20 and Blake, supra at 101-103 and held that the law is clear that evidence of actual bias is not required to demonstrate a lack of institutional independence, although both the statutory framework and the actual practices of the tribunal are relevant to the analysis.

[402] A. Raven held that a proper analysis must focus on whether or not the tribunal's structure leaves it vulnerable to influence or interference giving rise to a reasonable apprehension of bias, rather than on actual instances where the tribunal's independence has been compromised by such influences.

[403] In this regard, A. Raven submitted that evidence was tendered of instances of influence and constraint in addition to structural vulnerability to such influence and constraint. A. Raven cited the Director's practice of relaying information from his meetings with the ADM to Appeals Officers, his review of draft decisions, and his application for intervener status for the purpose of making submissions to the Appeals Officer in this matter all give rise to a reasonable apprehension of bias given their potentially significant impact on Appeals Officers' independence of thought.

[404] A. Raven stated that the Appellants reiterate that proper application of the governing legal principles on institutional independence established by the Supreme Court of Canada necessarily leads to the conclusion that the Appellants' preliminary objection should be sustained, and that the remedy requested at paragraph 217 of the Appellants' Written Submissions should therefore be granted.

Analysis and Decision

[405] The Appellants noted in their submissions that the term institutional independence is addressed in *Matsqui,* supra at para. 62, where Justice Lamer quotes Justice Le Dain in *Valente,* supra, for distinguishing between the concepts of independence and impartiality. Justice Le Dain clarified that the concepts of independence and impartiality found in para. 11(*d*) of the *Canadian Charter of Rights and Freedoms* are related but separate and distinct values or requirements. As referred to by Justice Lamer, Justice Le Dain wrote:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case….
>
> The word `independent' in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

[92] Say, *supra*, note, at para. 34
[93] Bell, *supra*, note, at para. 18-20

[406] The Appellants confirmed that they were challenging institutional independence of Appeals Officers and the Appeals Office.

[407] The applicable test that will be used in the present case was set out by the Supreme Court of Canada in *Committee for Justice v. National Energy Board*[94] and was also applied by the Court in *Valente*[95]. Justice de Grandpré, who wrote the *Committee for Justice* decision, said at p. 394:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through – conclude.

[408] Using this test in the context of the present case, I have to decide whether or not a reasonable and right minded person, having informed himself or herself of the statutory scheme contained in the *Code*, whereby the Minister of Labour designates Appeals Officers pursuant to section 145.1 for the purposes of subsection 145.1(1) [appointment for Part II purposes], subsection 146.1(1) [inquiry into appeals brought under subsection 129(7) or section 146] and section 122.1 [purpose of Part II], would likely conclude, having viewed the matter realistically and practically in a substantial number of cases[96] and having thought the matter through, that Appeals Officers are structured in statute and operate in practice at a level of institutional independence that meets applicable legal standards and ensures a fair hearing to stakeholders. The aforementioned sections read:

> 145.1(1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.
>
> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

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[94] *Committee for Justice v. National Energy Board*, [1978] 1 S.C.R. 369

[95] The Supreme Court confirmed in *Valente* that the test for institutional independence for the purposes of s. 11(*d*) of the Charter should be the same as that for institutional impartiality:

> The test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent…

[96] Justice Gonthier wrote in para. 44 of decision *2447-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, that, for cases related to institutional bias, the apprehension of bias test in *Committee for Justice and Liberty v. National Energy Board* must exist in a substantial number of cases. Given the confirmation in *Valente* that the test for institutional bias is the same as for institutional independence, I find that the determination of institutional independence in this case requires that the apprehension of bias occurs in a substantial number of cases. Paragraph 44 reads:

> [44] As a result of *Lippé, supra,* and *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, *inter alia*, the test for institutional impartiality is well established. It is clear that the governing factors are those put forward by de Granpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias in a substantial number of cases.

> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
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> *(a)* vary, rescind or confirm the decision or direction; and
>
> *(b)* issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[409] A secondary issue relates to the apparent position of the Appellants in paragraph 4 of their submission, to the effect that the Appeals Office created by the department to provide administrative support to Appeals Officers and the Appeals Officers themselves are one and the same, such that the requirements for institutional independence apply equally to both. Paragraph 4 reads:

> 4. For the purposes of these written submissions, any reference to the Canada Appeals Office on Occupational Health and Safety includes individual Appeals Officers as designated by the Minister under section 145.1 of the *Canada Labour Code* ("*Code*").

[410] Parties opined that I should definitely make a determination in this case, as opposed to simply relying on the matter being referred to the Federal Court for resolution. It would appear that they agreed that my determination could be useful if the matter is indeed subsequently referred to the Federal Court by either party.

[411] On behalf of the Appellants, A. Raven essentially challenged the institutional independence of Appeals Officers and the Appeals Office for the following reasons:

- historical evidence adduced at the hearing established that Labour was concerned about the fairness of a single tier appeal process that included an adjudicator that was an employee of HRDC, the regulatory agency. Labour further alleged that the RSO adjudicator had to follow HRDC operational policies and interpretation guidelines that interpreted and applied the legislation for health and safety officers;
- occupational health and safety legislation must be interpreted so as to promote its important public welfare objectives. As such, the appeal process that is the primary function of the Appeals Office must be one that guarantees a fair hearing in accordance with the principles of natural justice, both at common law and under subsection 2(e) of the Canadian Bill of Rights;
- unlike the situation in *Ocean Port*, supra, there is nothing in the *Code* to suggest that Parliament intended anything less than a high degree of independence for Appeals Officers. In these circumstances, the Appellants submit that the requirements of independence for the Canada Appeals Office must be at the high end of the spectrum described in Bell supra;
- given the nature of the interests at stake in matters concerning occupational health and safety under Part II of the *Canada Labour Code*, the fundamental right to security of the person under section 7 of the Charter is engaged. Accordingly, the Appellants

submit that the government of Canada is under an obligation to ensure that hearings before Appeals Officers of the Canada Appeals Office on Occupational Health and Safety conform to the principles of fundamental justice;

- the Supreme Court of Canada confirmed in Matsqui supra that the test for judicial independence, enunciated in *Valente*, supra, applies to administrative tribunals where the tribunal functions as an adjudicative body settling disputes and determining the rights of parties;
- the Canada Appeals Office fails to meet the three elements for institutional independence set out in *Valente* supra, particularly in light of the high standard of independence demanded by the nature of the tribunal and the nature of the interests at stake;
- given the structure and practice of the CAO as seen in the evidence, parties coming before the Appeals Office cannot be confident of either the process or result of their health and safety appeals.

[412] Jeff Bennie, National Safety Officer for the PSAC, gave evidence on the legislative historical context of the present Part II of the *Code* provisions regarding the designation and functions of Appeals Officers.

[413] According to Jeff Bennie's testimony, the Department of Labour[97] established a Legislative Review Committee in 1994 to recommend amendments to Part II of the *Canada Labour Code*. The Legislative Review Committee was made up of representatives of labour and employers under federal jurisdiction, as well as departmental representatives, and charged with proposing consensus amendments for the Minister's consideration.

[414] The *Terms of Reference* of the Legislative Review Committee were such that no consensus items would be reopened at the committee's level if, among other conditions, the Assistant Deputy Minister concurred with them.

[415] Labour representatives proposed at the committee level that parties have access to an additional level of appeal against a direction following the regional safety officer's level. They held that the establishment of a federal tri-partite health and safety board to provide "an opinion outside of the regulating agency would ensure fairness" and constitute a prior step to a referral to the Federal Court.

[416] On June 15, 1995, James Lahey, ADM of the Labour Program, notified the Legislative Review Committee of a change in the process that resulted from "program review", a government initiative that called for significant staff and budget reductions for the Labour Program. The terms of reference for the Legislative Review Subcommittee confirm that consensus items agreed to by the Subcommittee would not be altered by the Legislative Review Committee unless <u>important concerns had been overlooked at the sub-committee level and if the Senior ADM of Labour concurred</u>.[my underline].

[97] The Department of Labour had not yet become part of HRSDC

[417] Jim Lahey indicat0065d to members of the Legislative Review Subcommittee and Committee members that the Labour Program in HRDC was required to reduce its budget by 10.3 million dollars and reduce full time equivalent employee positions by 100 by the end of 1997-98 on the base budget of 64 millions of dollars and 750 full-time equivalents. Consequently, not all of the consensus proposals would be recommended to the Minister of Labour.

[418] ADM Lahey told members that the following criteria would guide HRDC in its program review exercises. The criteria included:

- reflect the changing role of the federal government, fiscal restraint, program review;
- modernize the *Code*: performance based, less prescriptive, reflect current technology;
- streamline the *Code*: reduce unnecessary costs for all parties, strengthen internal responsibility, increase administrative efficiency;
- advance partnerships/harmonization with other jurisdictions: provide required regulation making authority to facilitate harmonized regulations;
- promote workplace responsibility: joint responsibility by workplace partners to monitor and deal with workplace health and safety issues;
- establish a continuum of measures to gain and enforce compliance.

[419] Contrary to the view expressed by Jeff Bennie in his testimony, the above noted criteria establish that the reduction of cost was neither the principal nor solitary objective for HRDC's program review.

[420] Moreover, Jeff Bennie confirmed that the Legislative Review Subcommittee members were aware that a program review was occurring in HRDC and members had, at the time, concerns about what impact this might have on their agreements. There was no evidence that the Legislative Review Subcommittee addressed this concern and ADM Lahey was simply exercising item 4.1 of the terms of reference for the Legislative Review Subcommittee.

[421] HRDC later made its preference known for a single-tier approach as the one and only final level of appeal of health and safety issues. This single-tier approach eliminated the second appeal level represented by the CIRB or PSLRB and gave the proposed Appeals Officers the power to render final decisions following their inquiry into all health and safety officers' directions and no danger decisions, subject only to the judicial review of the Federal Court.

[422] On July 12, 1996, Nicole Senécal, ADM of the Labour Program, advised members of the Legislative Review Committee that she would recommend a single-level appeal process. She further informed parties that the *Code* would be silent on the organizational home of the Appeals Officers, as this was an administrative matter whose resolution had to await decisions on the future of the CIRB.

[423] HRSDC and the Minister of Labour opted to amend the *Code* as per the department's current plan of action to enable the Minister to designate a person as an Appeals Officer. The powers, functions and duties of the Appeals Officer would also be detailed in the *Code*. Under this option, the *Code* would remain silent on the organizational home of the Appeals Officers, leaving this decision to administrative choice.

[424] A Bill to amend the *Code* was introduced into the House by the Minister of Labour in 1997, but it died on the order paper when the House prorogued due to the calling of an election. It is significant that the Minister and Department opted for the same approach in the new Bill C-12 that was subsequently advanced with regard to the appeal review process.

[425] The Canadian Labour Congress expressed its concerns regarding this single-tier option before the Standing Committee on Natural Resources and Government Operations reviewing Bill C-12 on the proposed amendments to Part II of the *Code*.

[426] Warren Edmondson, who had become the Labour Program ADM, subsequently testified before the Standing Committee that the proposals were simply to redefine the role of the existing Regional Safety Officer by changing that person's designation to that of Appeals Officer (AO) and that this new designation would not affect the Appeals Officer's previous quasi-judicial function. He further stated that the department had rejected the two-tier appeal process in part because it would have been inappropriate for one quasi-judicial tribunal, the CIRB, to review another quasi-judicial tribunal, *i.e.* the Appeals Officer.

[427] Following the amendments to Part II of the *Code*, labour representatives reiterated to the department's Legislative Review Committee their concerns regarding the appeal process provided by Appeals Officers. A meeting was held on September 13, 2002, between employee and employer spokespersons and the ADM regarding this matter but no further action in response to these concerns was reported.

[428] I find that the above evidence confirms that successive ADMs of the Labour Program, *i.e.* James Lahey, Nicole Senécal and Warren Edmondson, appointed during the period of 1996 to 2000 when Part II amendments were being discussed and submitted to Parliament, did not concur with the Legislative Review Committee's proposal regarding the need or the desirability of establishing an additional level of appeal to a federal tri-partite health and safety board, following the initial Regional Safety Officer's review of a direction.

[429] Jeff Bennie testified that labour continued to raise with HRSDC its preference in having a federal tri-partite health and safety board following the September 2000 *Code* amendments. However, the fact remains that after more than seven years since the enactment of Part II amendments, the concerns expressed by labour that the *Code* does not provide guarantees of fairness did not convince the Labour Program senior officials of the need to amend the Appeals Officer process in the *Code* to add another partite level of appeal.

[430] Based on all this, I conclude that the historical evidence given by Jeff Bennie confirms that Parliament was well informed of labour's concerns regarding the institutional independence of the proposed structure for the Appeals Officer's inquiry process and opted, in an informed and deliberate manner to retain the single level appeal process where adjudicators, referred to as Appeals Officers, receive and deal with appeals of health and safety officer directions and decisions of absence of danger.

[431] A. Raven next argued on behalf of the Appellants that the primary function of the Appeals Office must be one that guarantees a fair and independent hearing in accordance with the principles of natural justice, both at common law and under subsection 2(e) of the *Canadian Bill of Rights*.

[432] Essentially, I have no disagreement with this statement of Mr. Raven. Subsection 146.1(1) of the *Code* requires AOs to inquire in a summary way into the circumstances of the decision or direction of a health and safety officer and the reasons for it. Subsection 146.1(2) of the *Code* requires AOs to provide a written decision with reasons. Paragraph 146.2(h) requires AOs to give an opportunity to the parties to present evidence and make submissions and to consider the information relating to the matter. Subsection 146.1(1) and (2) and Paragraph 146.2(h) read:

> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> (*a*) vary, rescind or confirm the decision or direction; and
>
> (*b*) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
>
> (2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.
>
> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
>
> (*h*) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

[433] Based on the above, I am of the opinion that there can be no question that AOs have a duty to guarantee a fair hearing. What the Courts have struggled with, and what I must now address, is the level of institutional independence that is appropriate in respect of AOs.

[434] In this regard, the Supreme Court of Canada stated in para. 20 of *Ocean Port* , supra, that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. Given this, the statute must be construed as a whole to determine the degree of independence intended by the legislature. Para. 20 reads:

> 20 It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
>
> [my underline]

[435] The Supreme Court of Canada added in para. 22 that the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. Para. 22 reads:

> 22 However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta*), [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.
>
> [my underline]

[436] I note that in *Ocean Port,* supra, the Supreme Court of Canada determined that there is a fundamental difference between administrative tribunals and courts. The Court remarked that administrative tribunals are created expressly for the purpose of implementing government policy and, consequently, they lack the constitutional distinction between courts and the Executive. The Court further stated that it is the proper role and responsibility of Parliament and the legislators to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. The degree of independence required of a tribunal is a matter of discerning Parliament's intention. Paragraphs 23 and 24 of *Ocean Port,* supra, reads:

> 23 This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same

> constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.
>
> 24 Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[437] I would summarize what I interpret from *Ocean Port* ,supra, that is relevant to the case before me is the following:

- there is a fundamental difference between administrative tribunals and courts. Administrative tribunals are created expressly for the purpose of implementing government policy and, consequently lack the constitutional distinction between courts and the Executive;
- it is the proper role and responsibility of Parliament and the legislators to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. The degree of independence required of a tribunal is a matter of discerning Parliament's intention;
- the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute;
- the degree of independence required of tribunal members may be ousted by express statutory language or <u>necessary implication</u>;
- While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. <u>Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected</u>.

[my underline]

[438] A. Raven held that there is no clear unequivocal statutory language in the *Code* that ousts the degree institutional independence with respect to the Appeals Officer process. He pointed out that the Supreme Court of Canada clarified in paragraph 21 of the *Ocean Port* (supra) decision that courts confronted with silent or ambiguous legislation generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. The Court further stated that courts will not lightly assume that legislators intended to enact procedures that run contrary to the principles of natural justice, but that the precise standard of independence required will depend on all the circumstances. The Court declared that it will also depend, in particular, on the language of the statute under which the tribunal acts, the nature of its tasks and the type of decision it is required to make. Paragraph 21 reads:

> 21 Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.); *Régie*, *supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.

[439] R. Fader argued in accordance with the Court's finding in *Ocean Port*, , supra, that the principles of natural justice related to institutional independence are ousted by necessary implication of the *Code* provisions related to the Appeals Officer's designation process in subsection 145.1(1).

[440] As evidenced by subsections 122(1) and 145.1(1) of the current *Code*, when Part II of the *Code* was last amended in September 2000, it appears to me that Parliament and the legislature clearly opted in an informed and deliberate manner to retain the single level appeal process where adjudicators, referred to as Appeals Officers designated by the Minister of Labour, receive and deal with appeals of health and safety officer directions and decisions of absence of danger in appeals as opposed to establishing a separate tribunal or board. Subsections 122(1) and 145.1(1) read:

> 122.(1) In this Part,
> "appeals officer" means a person who is <u>designated</u> as an appeals officer under section 145.1; [my underline]
>
> 145.1(1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.

[441] The only express requirement of subsection 145.1(1) is that the Minister appoint as an Appeals Officer a person who is qualified to perform the required duties. The term "qualified person" is not defined in the *Code*. However, Part I, section 1.2, of the *Canada Occupational Health and Safety Regulations* (COHSRs) made in application of Part II of the *Code* defines a qualified person as someone who, by virtue of knowledge, training and experience, is capable or competent to perform the duty safely and properly. [my underline] Part I, section 1.2, of the COHSRs reads:

> "qualified person" means, in respect of a specified duty, a person who, because of his knowledge, training and experience, is qualified to perform that duty safely and properly[.]

[442] In my view, without wanting to add to the statute through regulation, it is reasonable by analogy to derive sense from that definition in the context of the designation of Appeals Officers in subsection 145.1(1) of the *Code*. Regardless, the Legislative Review Subcommittee agreed that the primary focus when designating Appeals Officers be on their technical specialization in the field of occupational health and safety.

[443] I note that the AO designation by the Minister of Labour does not incorporate a time limit nor is it at the Minister's pleasure. Also, the designation is made for the purpose of Part II. as provided by section 122.1:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[444] In my opinion, Parliament and the legislators exercised their proper role and responsibilities by consulting with affected parties and, notwithstanding the fact that the *preferences* of Labour relative to the appeal process deferred, exercised their proper role and responsibility of Parliament and the legislators and decided to retain the single level appeal process that had been in place for approximately ten years without serious problem.

[445] Thus I interpret from the Supreme Court of Canada's decision in *Ocean Port*, supra, that the will of Parliament and legislature in respect of Appeals Officers can oust the principles of natural justice related to institutional independence to the extent necessary to accommodate composition and structure of the single level tribunal created. In other words, the single tier tribunal created does not in principle violate the principles of natural justice related to institutional independence.

[446] The next position of the Appellants was that the impact on the personal safety and security of affected employees requires that the appeal process for the adjudication of health and safety issues be one that guarantees a fair hearing, in accordance with the principles of natural justice and paragraph 2(e) of the *Canadian Bill of Rights*, which provides:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations[.]

[447] R. Fader conceded that, as a federal legislation, the *Canadian Bill of Rights* applies to the within analysis on institutional independence. However, he doubted that paragraph 2(*e*) had any impact on the issue before me. He held that paragraph 2(*e*) does not prevent Parliament from determining the relationship between a statutory decision maker and the Executive in guaranteeing the right to "fundamental justice", as addressed previously.

[448] In this regard, R. Fader argued that, if Parliament had intended the *Canadian Bill of Rights* to limit itself when specifying the composition, structure and relationship of administrative tribunals to the legislature to an institutional independence and impartiality analysis, it would have used the same language in para. 2(*e*) as in para. 2(*f*). Para. 2(*f*) requires a tribunal to be independent and fair where an individual is charged with a criminal offence. It provides:

> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause[.]

[449] R. Fader opined that the language in paragraphs 2 (*e*) and (*f*) of the *Canadian Bill of Rights* is not the same. He held that paragraph 2(*e*) was to provide individuals with the protections afforded under the term fundamental justice but allowing Parliament the flexibility to determine the structure and relationship to the Executive of such administrative decision makers not involved in criminal offences issues.

[450] R. Fader argued that the *Régie* case, supra, on which the Appellants rely, is based on section 23 of the Québec *Charter of Human Rights and Freedoms*. He maintained, however, that section 23 differs from paragraph 2(*e*) of the *Canadian Bill of Rights*, but does mirror paragraph 2(*f*).

[451] R. Fader referred to the recent comments on section 23 of the Québec Charter made by the Supreme Court of Canada in *Ocean Port* ,supra. The Court noted:

> 28 … This overlooks the fact that the requirements of independence in Régie emanated from the Quebec *Charter of Human Rights and Freedoms*, a quasi-constitutional statute. Section 23 of the Quebec *Charter* entrenches the right to a "full and equal, public and fair hearing by an <u>independent and impartial</u>

> tribunal" (emphasis added). No equivalent guarantee of independence constrains the legislature of British Columbia.

[452] R. Fader argued that in the alternative, if paragraph 2(*e*) displaces the *Ocean Port*, supra, principle related to the qualifying of the level of independence required for a tribunal, it does not have the impact of elevating the level of institutional independence required to that of judicial independence. R. Fader maintained that institutional independence continues to be applied flexibly to administrative decision makers even in cases where constitutional (or quasi constitutional) provisions apply.

[453] R. Fader held that it was also established in the above noted citations that even in cases where constitutional (or quasi constitutional) principles are engaged, the courts will not look exclusively to the criteria for judicial independence (*Valente* criteria - *infra*) but also to the "operational reality" of the administrative decision maker and, furthermore, will require "substantial" evidence indicating a lack of institutional independence and impartiality.

[454] A. Raven replied that, despite what he described as the respondent's novel distinction between paragraph 2(*e*) and 2(*f*) of the *Canadian Bill of Rights*, the Supreme Court of Canada unanimously held in *Bell*, supra, that the content of the "principles of fundamental justice" guaranteed under para. 2(*e*) is "established by reference to common law principles of natural justice" and accepted that the guarantees of independence and impartiality under para. 2(*e*) would not differ from the common law requirements of procedural fairness.

[455] According to Jones' and de Villars' *Principles of Administrative Law*, (supra) Canadian courts have not been prepared to accept that administrative tribunals performing purely adjudicative functions are the equivalent of courts regarding the level of independence. The authors further stated that the decisions discussing the constitutional or quasi-constitutional concept of tribunal independence indicate in *Bell Canada* (supra) and *Régie*, supra, that even if the principles governing judicial independence represent the model of tribunal independence guarantees, these guarantees must be applied flexibly in light of the functions and characteristics of a particular tribunal where the tribunal is not a court, even if vested with some judicial like authority.

[456] Having considered the arguments, I share R. Fader's opinion that para. 2(*e*) of the *Canadian Bill of Rights* does not alter the *Ocean Port*, supra principle in this case, given the wide discretionary authority granted to the Minister of Labour in section 145.1 of the *Canada Labour Code* and the requirement for courts to be flexible.

[457] The Appellants' next argument was that, given the nature of the interests at stake in matters concerning occupational health and safety under Part II of the *Canada Labour Code*, the fundamental right to security of the person under section 7 of the *Charter of Rights and Freedoms* is engaged.

[458] Section 7 of the *Charter of Rights and Freedoms* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[459] A. Raven argued that the Supreme Court of Canada stated in *Singh v. Minister of Employment and Immigration* [1995] 1 S.C.R. 177 at p. 201-202 that section 7 of the Charter applies when any government legislation or the administration thereof, has the effect of depriving a person of life, liberty or security. The guarantee of security of the person encompasses a broad range of meaning, including both the physical and psychological integrity of the individual.

[460] Mr. Raven submitted that in hearing appeals against decisions of health and safety officers, Appeals Officers adjudicate disputes between parties having competing interests in the context of a statutory regime, Part II of the *Canada Labour Code*. Furthermore, in addition to having all the powers of health and safety officers, Appeals Officers have judge-like powers to summon and enforce the attendance of witnesses, administer oaths and determine the procedure by which parties present evidence and submissions. Moreover, Appeals Officers hear evidence within the context of court-like proceedings at which parties are frequently represented by counsel. The Appellants held that Appeals Officers are called upon to make findings of facts and apply the provisions of the *Code* to these facts in rendering their decisions, which must be in writing and with reasons.

[461] R. Fader held that to trigger the operation of s. 7 of the *Charter* there must first be a finding that there has been a deprivation or the right to security of the person and secondly, that the deprivation is contrary to the principles of fundamental justice. He noted that in paragraph 26 of Pearlman it is stated:

> 26. It is helpful at the outset to remember the appropriate approach for an analysis of legislation that is said to violate s.7 of the Charter. LaForest J. noted in R. y. Beare, (1988) 2 S.C.R. 387, at p-401, that:
>
> The analysis of s.7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.

[462] R. Fader argued that the Supreme Court of Canada in para. 24 of *Ocean Port* ,supra, has created a presumption against applying the Charter to decisions of administrative decision makers:

> While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a mater of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[463] R. Fader held that it is also established in *Mussani v. College of Physicians and Surgeons of Ontario,* [2004] O.J. No. 5176 (C.A.); and *Walker*, that the Charter does not guarantee property rights or a right to employment.

[464] R. Fader held that, as a corollary, the *Charter* is not engaged in cases where the fundamental interest at stake is that of employment. He stated that *Blenco*, supra, establishes that, unlike true section 7 cases, an employee ultimately controls his or her choice to remain employed by an employer.

[465] R. Fader submitted that this is the intervening choice that distinguishes the Appellants' argument from criminal law cases or cases dealing with immigration where those effected have no element of free choice to remove themselves from the alleged harm. He cited *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, [2006] B.C.C.A.A.A. No. 167*; British Columbia Teachers' Federation v. Vancouver School District No. 39 2003* BCCA 100*, leave to appeal to the* SCC refused (2003) S.C.C.A No. 156; and *Vancouver School District No. 39 v. British Columbia Teachers' Federation*, [2001] B.C.C.A.A.A. No. 208 in connection with this.

[466] R. Fader added that, while employees benefit from the vast protections afforded under occupational health and safety legislation, the right to maintain employment does not engage the protections of section 7 of the Charter. In this regard, he referred to subsections*, 193 and 195.1(1)(c) of the Criminal Code, (1990) S.C.J. No. 52; Mussani,* supra, and *Walker*

[467] R. Fader cited *Ruffo*, supra, and held, in the alternative, that if section 7 is engaged, it does not have the effect of elevating the level of institutional independence to that of judicial independence.

[468] A. Raven replied that not only does this reflect an impoverished and inaccurate view of the Charter and of labour relations jurisprudence in general, but it fails to recognize the underlying purpose of Part II of the *Canada Labour Code* in particular. He stated that the Appellants are disturbed that, in the face of the Important health and safety objectives enshrined in Part II of the *Code*, that the Respondent would suggest that the proper recourse for employees who are threatened with an unsafe work environment would be for them to leave their jobs. In this regard, he cited Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791 at para. 123-124, 132-134 and Charkaoui v. Canada (Citizenship and Immigration), [2007] S.C.J. No. 9, at para. 18-19, 32.

[469] I must point out however, that pursuant to subsection 128.(2) of the *Code*, an employee is not permitted to refuse to work where the danger is a normal condition of work. In such circumstances, the only recourse that the employee might have is to decide whether or not to remain employed in that work or not. As impoverished as R. Fader's view might appear to the Appellants, it is not with foundation. Subsection 128(2) reads:

> (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

> (*a*) the refusal puts the life, health or safety of another person directly in danger; or
>
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.

[470] R. Fader added that, in *Régie*, supra, at para. 39 and *Pearlman*, supra, at para. 31, 35 and 41, the institutional independence analysis continues to be applied flexibly to administrative decision makers even in cases where the *Charter* applies.

[471] R. Fader referred to paragraph 22 in *Say*, supra, and noted that the Federal Court, affirmed by the Federal Court of Appeal, stated that, in a case where section 7 was engaged and the issue of institutional independence was before the Court, a substantial deference is owed to Government decisions that relate to the appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.

[472] R. Fader submitted that it is also well established in *Say*, supra, and *Mohammed*, supra, that even in cases where section 7 of the *Charter* is engaged, the courts will not look exclusively to the criteria for judicial independence (Valante (*sic*) criteria - infra), but also to the "operational reality" of the administrative decision maker and will, furthermore, require "substantial" evidence indicating a lack of institutional independence and impartiality.

[473] R. Fader pointed out that the *Code* provides in subsection 146.1(1) that appeals are to be dealt with "in a summary way and without delay". Section 146.2 allows an Appeals Officer to "determine the procedure to be followed" and "decide any matter without an oral hearing". In fact, that section allows Appeals Officers to conduct an inquiry by way of written submissions. These provisions read:

> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it…
>
> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
>
> (*h*) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;
>
> (*i*) decide any matter without holding an oral hearing; and
>
> (*j*) order the use of a means of telecommunication that permits the parties and the officer to communicate with each other simultaneously.

[474] I would add that, pursuant to paragraph (c) of that same provision, AOs hearing and deciding appeals can also receive any evidence whether or not it is permissible in formal or traditional court of law. Para. 146.2(c) of the *Code* reads:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
> …
> (*c*) receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law;

[475] R. Fader stated that it is important to keep in mind that Appeals Officers' decisions are nonetheless subject to judicial review of the Federal Court of Canada under the *Federal Court Act*. He noted that the Federal Court declared in *Say*, supra, at para 22, and this was affirmed by the Federal Court of Appeal in 2005[98], that substantial deference is owed to Government decisions related to the appropriate organization of public servants who administer governmental responsibilities where the protections of section 7 of the Charter were engaged and the issue of institutional independence was before the Court. The Court said:

> I am further satisfied that substantial deference is owed to Government decisions that relate to the appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.

[476] After reviewing the arguments of both parties, I share R. Fader's view that section 7 of the *Charter* does not stand for the proposition advanced by the Appellants. I further share his view that even where section 7 of the *Charter* is engaged and the adjudicative function is being performed by public servants within a government department and pursuant to a statute, deference is owed to how the Government establishes the relationship between the statutory decision maker and the executive.

[477] For dealing with the remaining three reasons cited by the Appellants for challenging the institutional independence of the AO review process, I will be guided by para.22 in *Say*, supra. *Say*, supra, does not invalidate precedents such as, supra, *Valente*, supra, *Matsqui*, supra, and others, but presents a modern interpretation in tune with the realities of present day tribunals devoted to the administration of responsibilities of the Government of Canada. Para. 22 reads:

> 22 Against the foregoing, I will approach the allegations now before the Court of lack of independence and impartiality, or institutional bias, on a standard of reasonable apprehension of bias or lack of independence or impartiality, not viewed through the eyes of a person of "very sensitive or scrupulous conscience,, but rather taking into account guidance from the Supreme Court of Canada as quoted above {Bell}. That guidance tells me to bear in mind that grounds for a reasonable apprehension of bias or perception of lack of institutional independence and impartiality must be *substantial*. I am satisfied that this is particularly true on the facts of the matter where I am further satisfied that substantial deference is owed to Government decisions that relate to appropriate organization of public servants devoted to the

[98] *Say v. Canada (Solicitor General)*, 2005 FCA 422

> administration of the vast range of responsibilities of the Government of Canada.
>
> [my underline]

[478] The Appellants held that in paragraph 83 of *Matsqui,* supra the Supreme Court of Canada confirmed that the test for judicial independence set in *Valente*, supra, also applies to administrative tribunals acting as an adjudicative body settling disputes and determining the rights of parties. Mr. Raven held that an administrative tribunal cannot guarantee a fair hearing if its structure or practice is lacking with respect to the three applicable essential conditions of institutional independence, *i.e.* security of tenure, financial security and administrative independence.

[479] To assess the essential elements of judicial institutional independence, the parties commented on the importance of the following considerations.

[480] Mr. Raven argued that one must keep in mind that independence must be both actual and perceived, as indicated by the Supreme Court of Canada in *Charkaoui v. Canada (Citizenship and Immigration)*[99], supra at para. 32.

[481] A. Raven also referred to the position of Sopinka J. in *Matsqui* ,supra, and held that the analysis of the criteria should be based on knowledge of the tribunal's operational reality; if not, the administrative law hypothetical "right-minded person" will be right-minded indeed, but uninformed.

[482] Mr. Raven maintained that administrative tribunals, whose primary purpose is adjudicative and whose powers and procedures are court-like in nature, come closer to the judicial end of the spectrum. He held that these tribunals are subject to more stringent requirements of procedural fairness, including higher requirements of independence. In this regard, he referenced *Bell* (SCC),supra, at para 21, 23 and 24; *McKenzie*, supra, at paragraph 67; and the *Sossin Report*[100], (supra) at pps. 6-7.

[483] As to whether or not Appeal Officers perform a purely adjudicative role, I note that the Federal Court of Appeal confirmed, in *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*[101], that the Appeals Officer's inquiries are *de novo* in nature and that, given subsection 145.1(2) of the *Code,* Appeals Officers have, as set in subsection 145.1(2), the same investigative powers and responsibilities as health and safety officers, who are also designated by the Minister based on qualification (see ss 140(1)s. In addition, the Court confirmed that Appeals Officers are empowered to issue directions for any contravention or danger established during their inquiry that relates to the matter before them. Subsection 145.1(2) reads:

> 145.1(2) For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.

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99 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1S.C.R. 350, 2007 SCC 9, in reference to *Valente* at p. 689

100 *Sossin Report*, commissioned by the Alberta Federation of Labour and published in April 2007

101 *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*, [2005] FCA 155

[484] While this investigative role is incidental to the adjudicative role of Appeals Officers, it can lead them into exchanges with parties that are not normally encountered in a purely adjudicative function.

[485] R. Fader argued that what is required to establish a lack of institutional independence is not anecdotal evidence but actual evidence that, *operationally*, the Appeals Office does not have sufficient firewalls in place to guarantee the independence of the Appeals Officers in the performance of their adjudicative duty. Operationally, I take this to mean all aspects of its functioning and not only in the case of one officer dealing with one case. R. Fader cited *Say*, supra at para.34; and, more specifically, *Bell*, supra, at para. 45 in this regard.

[486] R. Fader noted that the focus is on the office or tribunal as a whole and on whether the "vast majority" of the adjudicative function is performed by individuals with a sufficient guarantee of independence and, in matters of institutional independence, the important thing is not to perform a person-by-person analysis. In this regard, he referenced again the Federal Court in *Say*, supra. at para. 35.

[487] R. Fader noted that Jones and de Villars declared in *Principles of Administrative Law*, at p. 400: "This line of reasoning represents another example of the Supreme Court of Canada's shift away from the view found in *Régie*, supra that in institutional bias cases it is sufficient to raise the mere possibility that a reasonable apprehension of bias could be demonstrated in a substantial number of cases." He pointed out that the authors note that "the courts are more reluctant to entertain institutional bias arguments that are excessively abstract than might have been the case even a few years ago."

[488] With the above considerations in mind, the following assessment is made relatively to the three essential conditions of institutional independence required by the Supreme Court of Canada for administrative tribunals like Appeals Officers. A separate assessment will be made in respect of the Appeals Office itself.

Appeals Officers' Security of Tenure

[489] According to *Valente*, supra, the essential elements of security of tenure are that a judge be removable only for cause and that such cause be subject to independent review and determination. The Court stated the following in *Valente*, supra, regarding indices of security of tenure:

> Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, <u>for a fixed term</u>, or for a <u>*specific adjudicative task*</u>, that is secure against interference by the Executive or other appointing authority in a <u>discretionary</u> or <u>arbitrary manner</u>.
>
> [my underline]

[490] The above underlined phrases: *fixed term; specific adjudicative task; discretionary; arbitrary manner*, are, in my opinion, equally applicable to contractors and casual employees. It must be kept in mind that even for supernumerary judges, part-time tribunal members appointed by Governor-in-Council orders or otherwise, the security of tenure can only be interpreted relative to the type of appointment. The security of the tenure only applies in the context as to how the appointment is formulated and does not guarantee renewal or continuation when the term, which can be related to task or period of time, expires.

[491] The Appellants accepted that tribunals comprised exclusively of indeterminately appointed public servants with full access to the protections afforded pursuant to the *Public Service Employment Act* and grievance procedure have been deemed to enjoy a sufficient security of tenure.

[492] However, the Appellants argued that only one AO is an indeterminate represented employee while the rest are excluded and thus not represented by the Union. The Appellants further argued that AOs employed on an indeterminate basis who are excluded from the bargaining unit, are not afforded the same protection under the *Public Service Labour Relations Act* because their terms and conditions of employment could be arbitrarily amended by Treasury Board. The Appellants held the security of tenure of excluded AOs is diminished because excluded employees do not have access to independent third party adjudication over the interpretation and application of the collective agreement as represented employees do. In the case where an excluded employee wishes to grieve a provision in the Treasury Boards terms and condition policy, which mirrors the collective agreement, the final level of grievance for the excluded employee is the Deputy Minister whereas represented employees have the right to have their grievances heard by a third party independent arbitrator.

[493] The Appellants are correct that the Deputy Minister is the last grievance level for excluded employees for matters related to their terms and conditions of employment. However, there is a distinction needs to be made regarding *terms and conditions of work* that could be found in a collective agreement and the actual maintenance of the *employment* relationship. According to paragraph 209.1(b) of the PSLSRA which reads: *209.1 An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to (b) disciplinary action resulting in termination, demotion, suspension or financial penalty.*

[494] R. Fader added that, pursuant to section 12(3) of the *Financial Administration Act*, an Appeals Officer can only be disciplined, demoted or terminated for cause. R. Fader added that any attempt to disguise it as an administrative action is grievable, as noted above, under the PSLRA and the appeals officer could have such grievance heard by a third party adjudication. In addition, there is no evidence that an Appeals Officer has ever been removed or coerced by the Deputy Minister or that there has ever been any attempt or action of this nature.

[495] What Appellants failed to address is the fact that Appeals Officers frequently find themselves adjudicating appeals involving federal departments and the very union that would be representing them if they were not excluded employees, in this case the actual Appellant's Union. This, of course, would be untenable.

[496] With regard to security of tenure, the Appellants also expressed concerns that an Appeals Officer could be coerced by the department to avoid being deployed out of their position as Appeals Officer, or to seek a favourable deployment in the department. The evidence was that no Appeals Officer has ever been deployed, voluntarily or not, for any reason in this regard.

[497] In my opinion, these alleged concerns fall in the category of mere speculation or hypothesis and they are not supported by a shred of evidence. In fact, I believe that these hypothetical concerns arise out of Parliament's decision, when the *Code* was amended in 2000, to allow for the designation of any person, thus including indeterminate employees as Appeals Officers, as opposed to establishing a separate tribunal.

[498] With regard to the Appellants' allegation that a half of the Appeals Officers are engaged under contract for a maximum of one year or on a casual term employment basis, P. Rousseau testified that the bulk of the adjudicative work is carried out by the indeterminate employee AOs. Also, the Appellants did not adduce evidence that an AO engaged as a contractor or casual employee is guaranteed or has the right to demand to be assigned any appeal cases.

[499] R. Fader argued that the evidence of the Director of the Appeals Office was that the bulk or vast majority of the adjudicative function of Appeals Officers is performed by full time indeterminate employees of HRSDC (Exhibit E 45). He believed that, as a result, the analysis should focus on Appeals Officers who are full time indeterminate employees. I am inclined to agree with him, but I will nonetheless deal with the issue of Appeals Officers hired on a casual or contractual basis.

[500] The Appellants held that Appeals Officers hired on a contract basis lack security of tenure because they are not covered by the policies and resources enjoyed by indeterminately appointed employees as to their terms and conditions of employment. Consequently, these contractual Appeals Officers might not be assigned cases if, in the mind of the Director, they render inappropriate decisions.

[501] However I recall and agree with R. Fader's position that it was also established in the above noted citations that even in cases where constitutional (or quasi constitutional) principles are engaged, the courts will not look exclusively to the criteria for judicial independence (*Valente* criteria - *infra*) but also to the "operational reality" of the administrative decision maker and, furthermore, will require "substantial" evidence indicating a lack of institutional independence and impartiality.

[502] By way of analogy, the Appellants' allegation begs the question as to what is to be made of part-time tribunal members under various federal legislation who sit on an as-needed basis and are paid a fee when they sit.

[503] Given that the Supreme Court of Canada confirmed in *C.U.P.E.*, supra, that in general, contractual adjudicators do not pose a problem when it comes to security of tenure, I fail to see why this issue would be problematic in the case of Appeals Officers hired on a contract basis.

[504] The Appellants also complained that the moneys used to hire casual and contractual Appeals Officers are not under the control of the Appeals Office Director and are contingent on the ADM's approval on a yearly basis.

[505] Mr. Raven is correct in saying that casual employment is for a fixed period of time and can be renewed under policy limitations established under the PSE Act. I will however refer to *C.U.P.E.*, supra, to address the question of the *ad hoc* appointment of adjudicators and the ability of the Minister to extend a term of appointment in order that the adjudicator finish hearing a case. The Supreme Court of Canada concluded that the use of retired judges as Chairs of arbitration boards did not violate the principle of independence. It also concluded that the re-appointment of a tribunal member subject to a fixed term in order to complete a hearing would not be considered as evidence of an absence of institutional independence.

[506] It is worth noting that the use of casual and contractual Appeals Officers is a recent and temporary measure implemented in order to address the existing backlog of cases brought under the *Code* before the Appeals Officers. It also results from the fact that all the indeterminate employees who were designated as Appeals Officers when the *Code* was amended in September 2000 retired in the years that followed, leaving a void that needed to be filled adequately.

[507] Finally, Pierre Rousseau testified that in addition to being the Director of the Appeals Office, he is also designated as an Appeals Officer. He declared that he never holds inquiries under section 146.1 and acts in the capacity of an Appeals Officer only for the purpose of issuing summons to request the attendance of witnesses or the production of documents in the absence of the Appeals Officer assigned to a case. Thus, I was not overly preoccupied by Ms. Hulse's testimony that the Minister of Labour enjoys a fair degree of discretion over the terms and conditions of employment of the Director, such as hours of work, vacation leave or special leave. The operational and practical fact that the courts stated must be considered when examining questions of institutional independence is that Mr. Rousseau does not act as an Appeals Officer for the purpose of conducting inquiries pursuant to section 146.1 following appeals brought under section 146 or subsection 129(7) of Part II of the *Code*.

[508] Given all of the above I conclude that a reasonable person, having examined the facts and thought the matter through after being informed of the facts, would agree that Appeals Officers enjoy security of tenure consistent with the "operational reality" of the administrative tribunal and are able to perform their duties in total independence from the Minister of Labour and the department. All AOs are designated by the Minister of Labour, but the employment relationship, in any form, is not within the authority of that Minister.

Appeals Officers' Security of Remuneration

[509] The Supreme Court of Canada stated in *Valente*, supra, that the second criteria of judicial independence are security of remuneration, or financial security. This refers to the right to financial security, *i.e. a* security of salary, of pension and of other remuneration established by law that is not subject to arbitrary interference by the Executive in a manner that could affect judicial independence. The Court stated:

> The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is financial security-security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive.

[510] Mr. Raven held that the terms and conditions of employment should be established by law and not subject to an arbitrary interference that could affect the Appeals Officers' independence. He also held that excluded Appeals Officers lack the security of remuneration called for under the second *Valente,* supra, criteria.

[511] It has already been stated that, under Treasury Board policy, excluded employees enjoy the same terms and conditions of employment as provided in the collective agreement applicable to unionized employees. Ms. Lemay stated that only the Ministers who form Treasury Board have the authority to modify the terms and conditions of employment of excluded employees contained in the policy. She also said that Treasury Board has given raises to groups of employees, but she thought it highly unlikely, if not ridiculous, to suggest that it would alter the terms and conditions of employment of a group of only a few individuals.

[512] Ms. Lemay confirmed that the rates of remuneration applicable to excluded employees are those found in the PM Collective Agreement. Furthermore, excluded employees are covered by the *Public Service Superannuation Act* and that the terms and conditions of their pension are established through legislation.

[513] Since the designation of AOs is not restricted to indeterminate public servants, the security of tenure for casuals is assured by the fact that they are hired and appointed pursuant to the PSEA and so, through the statute, enjoy the right to remuneration at the rate commensurate to the level and classification at which they are hired and set in accordance with the same terms and conditions of employment policy, regardless of whether they sit or not. For contractors, financial security means getting remunerated when they sit and according to the terms of the contract. One wonders how significant is the difference between AOs engage as casual employees or contractors relative to remuneration.

[514] Given all of the above I find that a reasonable person, having examined the facts and thought the matter through after being informed of the facts, would agree that Appeals Officers enjoy the right to financial security of salary, of pension and of other remuneration established by law and that that their financial security is consistent with the "operational reality" of the administrative tribunal and are not subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

Appeals Officer's Institutional Independence

[515] Regarding the third essential criteria of institutional independence, the Supreme Court of Canada declared in V*alente*, supra,:

> The third essential condition of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desirable it cannot be regarded as essential for purposes of s. 11(*d*) of the *Charter*.
>
> (My underline)

[516] The third element of judicial independence brings me squarely to the point where I must differentiate between Appeals Officers and the Canada Appeals Office on Occupational Health and Safety for deciding the issue in question. Mr. Raven clarified in paragraph 4 of the appellants' submissions that they applied equally to Appeals Officers and the Appeals Office:

> 4. For the purposes of these written submissions, any reference to the Canada Appeals Office on Occupational Health and Safety includes individual Appeals Officers as designated by the Minister under section 145.1 of the *Canada Labour Code*.

[517] As previously noted, when Part II of the *Code* was last amended in 2000, Parliament and the legislators clearly opted by subsections 122(1) and 145.1(1) to designate Appeals Officers, as opposed to establishing a separate tribunal or board. There is, in fact, no statutory authorization in Part II of the *Code* for the establishment of a tribunal office, let alone a separate tribunal office.

[518] The testimony of Mr. Rousseau confirmed that the Appeals Office was created to provide administrative support to Appeals Officers. The evidence showed that the only purpose of the Appeals Office is not adjudicative, but, rather, as an administrative support to the function of Appeals Officers, the true holders of the adjudicative authority.

[519] The evidence confirms the statutory reality that Appeals Officers are appointed as decision makers for the purpose of section 146.1 of the *Code* and it is left to the department to assign departmental personnel to provide the necessary administrative

support to Appeals Officers. Moreover, the *Code* contains no statutory obligation for Appeals Officers to report to anyone regarding their decision making process.

[520] The Minister of Labour and the department appear to fully appreciate the necessity of ensuring a fair hearing, in fact and appearance, beyond the prerogative given specifically to the Minister of Labour to designate Appeals Officers as opposed to establishing a separate tribunal. To this end, the department has provided the Appeals Office with a Director and personnel to do just that. To further this requirement that the Appeals Officer's process be not only fair but appear to be fair, the department has acceded to the need to move Appeals Officers and their administrative home office, *i.e*. the Appeals Office, to a separate location from the department.

[521] The Appellants expressed concern that the Director of the Appeals Office reports to and works under the supervision of the ADM of the Labour Program. They noted that Mr. Rousseau reports to the ADM on a wide range of issues, from providing annual reports and budget proposals to monthly statistical reports and submitting personal leave requests for himself but not that of AOs.

[522] Regarding the relationship between the Minister of Labour and Appeals Officers, the unchallenged evidence of Pierre Rousseau was that Appeals Officers do not communicate with any official in the department, including members of the departmental legal services, health and safety officers or policy employees, outside of a hearing setting. There was no evidence of any attempt on the part of the department to inappropriately influence Appeals Officers. Notwithstanding the fact that the Director informed Appeals Officers of his discussions on the operation of the Appeals Office with the ADM, there was no evidence that the Director and the ADM ever discussed any pending or on-going appeal cases before an Appeals Officer nor attempted to influence an Appeals Officer. On the contrary, the evidence was that the Director considered that one of his principal responsibilities is to represent and make sure that there was a firewall between the department and Appeals Officers.

[523] The Appellants also expressed concern that the Director cannot open new positions at his own discretion. They referred to a number of occasions where requests for staffing were not acted upon or were subject to change or cuts. They also made reference to unsuccessful efforts to have additional contractual Appeals Officers and to staff a new position for a Technical Advisor. Nonetheless, the Appellants were unable to provide evidence that any of the requests made by the Director were denied in an effort to inappropriately influence Appeals Officers in their decision making process.

[524] The Appellants also expressed concern that the budget of the Appeals Office comes from the department's own budget instead of being provided as to an independent agency. The Appellants submitted that this is a clear indication that the Appeals Office lacks control over its administrative decisions bearing directly and immediately on the exercise of its adjudicative functions.

[525] The arrangement appears to be a logic outcome of Parliament's and the legislators' decision to designate individual Appeals Officers as opposed to creating a separate

tribunal. This I interpret from the Supreme Court of Canada's decision in *Ocean Port*, supra, that the will of Parliament and legislature can oust the principles of natural justice such that their desire regarding the composition and structure of the tribunal they are creating must be respected or accommodated relative to the level of institutional independence required in respect of AOs. Moreover, one is tempted to comment that for any tribunal, board, office or other, whether constituted by law or through administrative action, their operations and functioning will always be linked in some fashion to the discretionary authority to allocate funds, be it by Parliament or a department itself.

[526] Finally, there was not one shred of evidence that the department took advantage of this situation to inappropriately influence Appeals Officers in their decision making process or ever an acted in a manner that would impede the proper functioning of the AOs individually or as a group..

[527] On the subject of budget authority, the Appellants expressed concern that the Director maintains only partial authority over the Appeals Office's budget. While Mr. Rousseau testified that the ADM generally approves his proposals, the Appellants held that important proposals were denied, such as his proposals on needed Appeals Officers' training and to hire legal counsel on a contract basis to provide Appeals Officers with legal advice.

[528] The *Valente,* supra, decision establishes that the criteria of institutional independence deals with the tribunal's independence with respect to matters of administration bearing directly on the exercise of its judicial function. I received no evidence in the present case that any of the requests made by the Director were denied by the department in an effort to inappropriately and directly influence Appeals Officers in their decision making process.

[529] The Supreme Court of Canada stated in *Valente, supra,* that judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. The evidence here is that the Director of the Appeals Office controls the assignment of Appeals Officers, the sittings of the Appeals Officers and the tribunal lists and does not interfere or get involved in the actual operation of individual cases and hearings once a case has been assigned to an AO.

[530] In *Say,* supra, the Federal Court stated that substantial deference was owed to decisions relating to the particular public service organization devoted to administering the vast range of governmental responsibilities. This was affirmed by the Federal Court of Appeal. More precisely, the Federal Court wrote at para.22:

> 22. I am further satisfied that substantial deference is owed to Government decisions that relate to the appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.

[531] In my opinion, the record neither offers nor presents any evidence that would cause a reasonable and right-minded person to conclude, after applying him or herself to the question, obtaining the required information on it, viewing the matter realistically and practically and having thought the matter through, that Appeals Officers and the Appeals Office lack institutional independence.

[532] I must now examine the question as to whether or not the Director of the Appeals Office can inappropriately influence an Appeals Officer's decision.

[533] In this regard, the Appellants cited the within appeal as evidence of lack of independence in actual practice. They held that the fact that Appeals Officer Lafrance did not decline to hear this case given his past involvement with the *Code* amendments when he was working as a departmental program consultant and Mr. Rousseau's error in assigning Appeals Officer Lafrance to the case, was evidence of the lack of institutional judicial independence.

[534] As a minimum, I would agree that the Appeals Officer may have had, in all fairness, a duty to inform parties of his previous involvement, as an employee of the department, in the review of the *Code*. The parties may then have been satisfied that because of his involvement, it was acceptable or not that he proceed with the case especially given the nature of involvement and the passage of time.

[535] However, I am unconvinced that a single error in judgment on the part of one Appeals Officer would be justification enough for a reasonable person knowing the facts of the matter to conclude that there appeared to be an absence of independence. On the contrary, Mr. Rousseau's testimony that he would not have interfered demonstrates the extent of his determination to ensure that Appeals Officers are independent from the department and from himself as the Director of the Appeals Office.

[536] It has to be recalled here that AO Lafrance's involvement in the review of the *Code* was around 10 years ago. This may explain AO Lafrance decision not to raise his past *Code* review involvement.

[537] Moreover, the Federal Court stated in *Say*, supra, that what is important in questions of institutional independence is not to perform a person-by-person analysis. The focus is on AOs collectively and whether the "vast majority" of the adjudicative function is performed by individuals with a sufficient guarantee of independence. This was affirmed by the Federal Court of Appeal.

[538] As I stated earlier in the decision, I am guided by paragraph 22 in *Say*, supra,

> 22 Against the foregoing, I will approach the allegations now before the Court of lack of independence and impartiality, or institutional bias, on a standard of reasonable apprehension of bias or lack of independence or impartiality, <u>not viewed through the eyes of a person of "very sensitive or scrupulous conscience</u>,, but rather taking into account guidance from the Supreme Court of Canada as quoted above {Bell}. That guidance tells me to bear in mind that

> grounds for a reasonable apprehension of bias or perception of lack of institutional independence and impartiality must be *substantial*. I am satisfied that this is particularly true on the facts of the matter where I am further satisfied that substantial deference is owed to Government decisions that relate to appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.
>
> [my underline]

[539] Mr. Raven stated that Mr. Rousseau testified that he sought third party intervener status at the hearing in this appeal because the Appellants had planned to remove Appeals Officer Lafrance and he felt that "if that was how the Appellants wished to play, he would do the same." He further stated that the Supreme Court of Canada held that "the purpose of the independence requirement is to establish a protected platform for impartial decision making." He stated that the foregoing examples of the Director's conduct were indicative of bias and lack of impartiality arising from the absence of adequate safeguards for institutional independence.

[540] It would appear that the Director's reason to seek intervenor status and his choice of figure of speech may have been some measure of the extent to which he wants to protect the independence, both institutional and operational, of an Appeals Officer.

[541] Regardless, counsel for Mr. Rousseau stated in his submission that the Director was seeking intervenor status in his capacity as Director of the Appeals Office, in order to ensure that all relevant facts and legal arguments were put before the decision maker and that the actual structure of the Appeals Office was preserved. In fact, Mr. Rousseau testified that the present structure of the Appeals Office should be preserved, as its institutional independence was well maintained. It should be noted however, that Mr. Rousseau withdrew his application for intervenor status prior to the actual commencement of the hearing on the present preliminary objection. Furthermore, Mr. Rousseau testified at the hearing on the present preliminary objection not in the capacity of intervenor but as a witness summoned to appear at the behest of the Appellants.

[542] Finally, Mr. Raven noted that, even on a standard of patent unreasonableness, the Federal Court has frequently seen fit to intervene in decisions of Appeals Officers submitted to judicial review. The Federal Court has identified serious errors made by Appeals Officers, including: relying on irrelevant provisions to misplace the burden of proof; making findings of facts without regard to the evidence; failing to take account of relevant evidence; and failing to provide an opportunity for parties to make submissions. He held that despite the serious nature of the Federal Court's findings, it has been the Director's tendency to recommend to the Minister that he designate as Appeals Officers individuals who are qualified in matters of health and safety but who lack the legal training and experience described as key activities in their work description.

[543] P. Rousseau testified that only approximately ten percent of AO decisions have been quashed by the Federal Court and I do not regard this as constituting a substantial number

of cases given the technical complexity of cases heard by Appeals Officers and given that appellants still represent themselves from time to time.

[544] Mr. Raven stated that the evidence is clear that the Director made no effort to seek legal advice on the legal implications of these decisions, to provide training to Appeals Officers or to ensure that they had access to expert assistance on points of law.

[545] However the evidence demonstrates clearly that when P. Rousseau was appointed as Director to the Canada Appeals Office on Occupational Health and safety in 2004, one of the existing AOs had just retired and the two remaining AOs were about to retire. As a result, he was left to focus on engaging replacement AOs, develop and implement a training program for AOs, hiring support staff and ensuring their training, developing policies and Codes of Conduct. The evidence shows that the CAO is a work in progress and that P. Rousseau is addressing these types of issues. One of the measures he has taken is to hire a lawyer who recently retired and a former indeterminate AO to mentor and assist AO in their development. In addition, the testimony from P. Rousseau is that he is in the process of hiring a lawyer to assist AOs.

[546] In my opinion, the absence of a developed CAO at the time of his appointment only confirms that AOs have historically operated independently and continue to expect to do so.

[547] I also find a certain lack of legitimacy with regard to the shortcomings of Appeals Officers and the Appeals Office alleged by the Appellants, in that these shortcomings are not put into statistical perspective.

[548] Mr. Raven's submissions make much of the Director's tendency to recommend to the Minister of Labour that he designate individuals who are qualified in matters of occupational health and safety but lack legal training. It seems to me that recommending such persons to the Minister is consistent with section 145.1 of the *Code*, which specifies that the Minister may designate a qualified person for the purposes of the *Code*.

[549] Moreover, when Labour consulted with HRDC on the Legislative Review Subcommittee and Committee on amendments to the *Code*, the evidence shows that the Labour proposals do not indicate any desire that the AO, or members of the proposed second level tripartite board have formal legal training. However, Labour was insistent that AOs be occupational health and safety specialists for designation.

[550] As Mr. Fader pointed out, Mr. Raven's position on this disregards the fact that Courts are responsible for overseeing and monitoring decisions of tribunals to ensure fairness, absence of bias, correctness regarding the interpretation of the legislation and facts. Thus, it is not a fatal flaw that Appeals Officers who are occupational health and safety specialists have not received formal legal training.

[551] To substantiate his allegation that Appeals Officers and the Appeals Office lack institutional independence, it appears that Mr. Raven has chosen to focus on what he considers deficiencies on the part of Appeals Officers and the Appeals Office. However,

to attribute these deficiencies solely to a lack of institutional independence has not been established by the evidence.

[552] A. Raven stated in para. 173 of his submission that the Appellants hold that the tribunal that ultimately became the Appeals Office was not intended to be a final level of appeal, and this forms part of the concerns on which the Appellants' objection is based. Paragraph 173 reads:

> The Subcommittee charged with achieving consensus on an appropriate appeals process ultimately proposed a two-tier structure in which an appeals officer would first conduct a summary review, with a right of subsequent appeal to more formal adjudication by the CLRB or PSLRB. Under this system, the tribunal that ultimately became the CAO was not intended to be a final level of appeal, in part due to concerns which now form the basis of the Appellants' objection.

[553] In his submission, Mr. Fader observed that the Appellants cannot, on a procedural fairness argument, substitute the tribunal they wish was available for the statutory decision makers provided by Parliament. His contention that the Appellants are attempting on a procedural fairness complaint to substitute the tribunal they wish for the tribunal specified by Parliament is compelling in this case. As in the past, the Appellants are able to take their suggestions for a different appeals process to the Minister and have changes addressed through Parliament.

[554] Notwithstanding Labour's concerns with the single level appeals process that Parliament and the Legislature reaffirmed when the *Code* was amended in September of 2000, I note in passing that Labour proposed a federal tripartite tribunal that would appoint three person tribunal boards consisting of a neutral chair and part-time members drawn from a list of candidates submitted by both Labour and employer associations to hear appeals. Albeit the Labour model would no doubt have been developed further, if accepted, I still have difficulty seeing how their proposed Labour model improves the current single level tribunal arrangement relative to appearance of bias and independence, security of tenure, financial security or administrative independence. It only addresses Labour concern that AOs are employees of HRDC and report to the same ADM as the inspectorate.

[555] In conclusion, I concur that the Appeals Officers designated by the Minister of Labour pursuant to subsection 145.1(1) of the *Canada Labour Code*, Part II, and the administrative structure known as the Canada Appeals Office on Occupational Health and Safety (recently renamed that Occupational Health and Safety Tribunal Canada) within which they operate, are to be held to and must satisfy a higher standard or degree of institutional independence. By a higher degree of institutional independence, however, I do not mean, as proposed by the Appellants in this case, one that would approach or be contiguous to the standard applicable to traditional courts of law and described all through this decision as judicial independence, even though the indices of independence (security of tenure, financial security and administrative independence) that serve as bench marks are the same. Were I to conclude otherwise, it is my considered opinion that neither this tribunal nor any other tribunal operating similarly in comparative conditions,

whatever its composition, structure or statutory basis, could ever satisfy the higher degree of institutional independence as proposed by the Appellants in this case.

[556] Consequently, my conclusion after having thought the matter through is that Appeals Officers are structured in statute and administratively and operate in practice at a high level of institutional independence that meets applicable legal standards such that a reasonable and right minded person having informed himself or herself of the legislative regime whereby the Minister of Labour designates Appeals Officers pursuant to section 145.1 of Part II of the *Canada Labour Code*, for the purposes of section 122.1 and subsections 145.1(1) and 146.1(1) of the *Code*, would likely conclude, having viewed the matter realistically and practically in a substantial number of cases and having thought the matter through, that Appeals Officers inclusive of the structure within which they operate are structured in statute and operate in practice at a level of institutional independence that meets applicable legal standards and ensures a fair hearing to stakeholders.

[557] The objection is therefore dismissed and this matter can now proceed to be heard on the merits.

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Pierre Guénette
Appeals Officer

This being decided, and by way of obiter, as not part of my conclusion, the following precisions and comments are warranted.

Among the many points raised by the Appellants regarding the functioning and organization of the Canada Appeals Office, the question of independent legal advice available to the Canada Appeals Office and the Appeals Officers was mentioned numerous times during the hearing by the Appellants as an indication of the Appeal Office lacking some of the obviously required element of a truly independent organization. While the evidence was to the effect that the services of outside legal firms could be obtained, and indeed were obtained, and that in more recent times, an experienced lawyer was hired as an Appeals Officer with the intent of making use of his experience to mentor and advise or support other Appeals Officers, the Appellants still maintained that the absence of an in-house legal advisor position was indicative of the insufficient independence of the Appeals Office.

Considerable amount of time has passed between the last sitting in this case and the issuance of the present decision and I believe it important to point out as indication of the fact that the Appeals Office is an organizational structure in evolution, that in-house permanent, independent, exclusive and full-time legal counsel has since been hired for the sole use of its Appeals Officers.

In the evidence it was confirmed that, at the time of the hearing in this case, one of the AOs employed on an indeterminate basis was represented by the union unlike the other AOs employed on an indeterminate basis who were excluded and not represented by the union. That AO is presently excluded.

In addition, the Appellants commented repeatedly on the reporting relationship of the Director and the Assistant Deputy Minister of the Labour Program. While the evidence has been established that the Director's reporting line is to the Deputy Minister of HRSDC, it has also shown that from a functional perspective, the Director reports to the Assistant Deputy Minister of the Labour Program.

Prior to the 1993 amalgamation of what used to be the Department of Labour into the Department of Human Resources Development Canada (HRDC), what is now identified generally as the Labour Program would essentially have been the Department of Labour and while the amalgamation resulted in all employees of the former Department of Labour becoming employees of HRDC, the Department of Human Resources and Skills Development Act (2005 c.34) maintained the existence of the separate authorities and the role of the Minister of Labour

Moreover, while the evidence of the Director of the Appeals Office establishes the fact that the Appeals Office is administratively independent from the Department, the more important test is always whether or not there can be an apprehension of lack of independence. The evidence confirms that both the Department and the Director of the Appeals Office are cognizant of this necessity and remain vigilant to it. Notwithstanding this, and given the concern of the Appellants regarding the reporting relationship of the Director to the Assistant Deputy Minister, perception relative to administrative independence might be further enhanced if the Director were to be reporting to someone in the Department that is not directly connected or involved with the Labour Program.

Finally, during the Director's testimony that lasted for some five days, at a moment of what can only be interpreted as frustration or fatigue, the Director made comments regarding the fact that an Appeals Officer had to recuse himself from the appeal, to the effect that "…if that's the way you want to play the game, we'll play the same" and "…low blow". It is necessary that I comment and assure parties that that Appeals Officers do not share or subscribe to the sentiment expressed and I can only conclude that the comment was made in a momentary lapse of composure on the witness stand.

Statutes Cited by the Appellants

1. *Canada Labour Code*, R.S.C., 1985, c. L-2, as am.
2. *Canadian Bill of Rights*, 1960, c.44.
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
4. *Federal Courts Act*, R.S. 1985, c. F-7, as am.
5. *Financial Administration Act*, R.S., 1985, c. F-11.
6. *Public Service Labour Relations Act*, 2003, c.22.

Case Law Cited by the Appellants

1. *Alex Couture Inc. v. Canada (Attorney General)* [1991], 83 D.L.R. (4th) 577 (Que. C.A.) (QL); leave to appeal refused, [1992] 2 S.C.R.
2. *Bell Canada v. Canadian Telephone Employees Assn.* [2003]1 S.C.R. 884.
3. *Bourbonnais v. Canada (Attorney General)*, [2005] 4 F.C.R. 529.
4. *Canadian Freightways v. Canada (Attorney General)*, [2003] F.C.J. No. 552 (T.D.) (QL).
5. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.
6. *Canadian Pacific Railway Co. v. Woollard*, [2006] F.C.J. No. 1673 (T.D.) (QL).
7. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.
8. *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.
9. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S. C. J. No. 9.
10. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.
11. *Currie v. Alberta (Edmonton Remand Centre)*, [2006] A.J. No. 1522 (A.B.Q.B.) (QL).
12. *De Wolfe v. Canada (Correctional Service)* [2003] F.C.J. No. 1475 (T.D.) (QL).
13. *Hewat v. Ontario* [1998], 37 O.R. (3d) 161 (Ont. C.A.) (QL).
14. *Katz v. Vancouver Stock Exchange* [1996], 128 D.L.R. (4th) 424 (B.C.C.A.) (QL); aff'd [1996] 3 S.C.R. 405.
15. *Martin v. Canada (Attorney General)*, [2005] 4 F.C.R. 637 (F.C.A.).
16. *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, [2006] B.C.J. No. 2061 (B.C.S.C.) (QL).
17. *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.).
18. *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R. 46.
19. *Ocean Port Hotel Ltd. V. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.
20. *Ontario (Ministry of Labour) v. Hamilton (City)* [2002], 58 O.R. (3d) 37 (QL).
21. *R. v. Valente* [1985] 2 S.C.R. 673.
22. *Singh v. Canada*, [1985] 1 S.C.R. 177.

Statutes Cited by the Respondent

1. *Canadian Bill of Rights*, 1960, c.44.
2. *Constitution Act*, 1982, (being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11).
3. *Public Service Employment Act*, S.C. 2003, c. 22, Part 3.
4. *Canadian Charter of Rights and Freedoms,* Schedule B to the *Canada Act* 1982.
5. *Financial Administration Act*, R.S., 1985, c. F-10, as amended.
6. *Public Service Labour Relations Act*, S.C. 2003, c. 22.
7. *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.
8. *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, as amended.

Case Law Cited by the Respondent

1. *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool),* [1996] S.C.J. No. 112.
2. *Bell Canada v. Canadian Telephone Employees Assn. 2003 SCC 36.*
3. *Blencoe v. British Columbia (Human Rights Commission),* [2000] S.C.J. No. 43.
4. *British Columbia Teachers' Federation v. Vancouver School District No. 39,* [2003] B.C.J. No. 366; [2003] S.C.C.A. No. 156 (SCC).
5. *Canada (A.G.) v. Penner,* [1989] F.C.J. No. 461 (C.A.).
6. *Canada (Attorney General) v. Assh,* [2006] F.C.J. No. 1656.
7. *Canada (P.W.G.S.C.) v. P.S.A.C.*, [1999] C.L.C.R.S.O.D. No. 18.
8. *Castillio v. Castillio* 2005 SCC 83.
9. *C.U.P.E. v. Ontario* 2003 SCC 29.
10. *Dhaliwal v. Treasury Board (C.S.C.),* 2004 PSSRB 109.
11. *Ferrussi & Giornofelice*, 2007 PSLRB 1.
12. *Fletcher v. Canada (Treasury Board)* 2002 FCA 424.
13. *Gannon v. Canada (Treasury Board)* 2004 FCA 417.
14. *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union* [2006] B.C.C.A.A.A. No. 167
15. *Katz v. Vancouver Stock Exchange,* [1996] S.C.J. No. 95; [1995] B.C.J. No. 2018 (C.A.).
16. *Marshall v. Canada* [2006] F.C.J. No. 171
17. *Mohammad v. Canada*, [1988] F.C.J. No. 1141 (C.A.).
18. *Mussani v. College of Physicians and Surgeons of Ontario* [2004] O.J. No. 5176.
19. *Ocean Port Hotel Ltd. V. British Columbia* 2001 SCC 52.
20. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.
21. *Peters v. Treasury Board*, 2007 PSLRB 7.
22. *Professional Institute of the Public Service of Canada v. Canada (Customs and Revenue Agency),* [2004] F.C.J. No. 649.
23. *R. v. Oakes,* [1986] S.C.J. No. 7.
24. *R. v. Valente,* [1985] S.C.J. No. 77.

25. *Ruffo v. Conseil de la magistrature* [1995] S.C.J. No. 100.
26. *Sam Lévy & Associés Inc. v. Canada* 2006 FCA 205.
27. *Say v. Canada*, 2005 FC 739; 2005 FCA 422; [2006] S.C.C.A. No. 49.
28. *Sheriff v. Canada (A.G.)* 2006 FCA 139.
29. *Vancouver School District No. 39 v. British Columbia Teachers' Federation* [2001] B.C.C.A.A.A. No. 208.
30. *Vaughan v. Canada*, 2005 SCC 11.
31. *Walker v. Prince Edward Island (P.E.I.C.A.)* [1993] P.E.I.J. No. 111.