Occupational Health and Safety Tribunal Canada

Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-03-14
Case No.: 2016-40

Between:

Natural Resources Canada, Appellant

and

Professional Institute of the Public Service of Canada, Respondent

Indexed as: *Natural Resources Canada v. Professional Institute of the Public Service of Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is varied.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Richard E. Fader, Labour and Employment Law Group, Department of Justice
For the respondent:	Mr. Peter Engelmann, Goldblatt Partners LLP
Citation:	2018 OHSTC 1

REASONS

[1] This concerns an appeal brought pursuant to section 146 of the *Canada Labour Code* (the *Code*) against a direction issued by an official delegated by the Minister of Labour (ministerial delegate), Ms. Nicole Dubé, on November 17, 2016. The said direction, issued under subsection 145(1) of the *Code* following an investigation by Ministerial Delegate Dubé, concluded that the appellant had contravened paragraph 125(1)(*z.16*) of the *Code* and subsection 20.9(3) of the *Canada Occupational Health and Safety Regulations* (the *Regulations*).

[2] More specifically, Ministerial Delegate Dubé had concluded that the appellant (employer) had failed to appoint a person(s) meeting the definition of "competent person" as prescribed and defined by paragraph 20.9(1)(a) of the *Regulations* requiring that the person(s) "is impartial and is seen by the parties to be impartial" to investigate a complaint of work place violence alleged to have occurred between two employees of the appellant between August 2013 and July 2014.

[3] For the sake of clarity for what follows, I quote here the more germane segments of section 20.9 of the *Regulations* that are at the center of this case:

> **20.9 (1)** In this section, ***competent person*** means a person who
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> > **(a)** is impartial and is seen by the parties to be impartial;
> >
> > **(b)** has knowledge, training and experience in issues relating to work place violence; and
> >
> > **(c)** has knowledge of relevant legislation.
>
> **(2)** If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.
>
> **(3)** If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.
>
> **(4)** The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.
>
> […]

[4] The direction issued by Ministerial Delegate Dubé ordered the appellant to cease the contravention mentioned above. When one considers the ministerial delegate's investigation report, which is part of the evidence, that direction was clearly based on the latter's conclusion that while the person against whom allegations of work place violence were made may have initially "seen" the person(s) appointed by the appellant to investigate the alleged work place violence situation "to be impartial", information subsequently obtained at investigation indicated that such impartiality required of the investigating competent person(s) was not maintained throughout the investigative process. In plain language, the direction thus resulted in ordering

that a competent person be appointed anew by the appellant to conduct the investigation into the said alleged work place violence complaint and consequently that the investigation itself be redone.

[5] It needs to be noted at this early juncture that throughout her examination of this matter, an examination that led Ministerial Delegate Dubé to amass a voluminous amount of documents (over 1400 pages), she never formulated any conclusion as to whether violence had occurred in the work place involving the person on whose behalf the respondent is acting in this matter and another protagonist, always referring to "alleged" violence where reference to this issue needed to be made, thus not invading the field of jurisdiction of the "competent person(s)" consisting of gathering information to determine whether work place violence had occurred.

[6] The provisions of the *Regulations* noted above define "competent person" as "a" person in the singular and specify that the obligation of the employer is to appoint "a" competent person, singular, to investigate a work place violence complaint, wording that does appear to indicate that the role of "competent person" articulated in the *Regulations* is to be filled by a single person.

[7] In the case at hand however, the ministerial delegate's report shows that the appellant employer chose to appoint three persons from its personnel to act as "a" competent person in the investigative process, a questionable decision in my opinion given work place proximity of protagonists and investigators. This fact, however, does not of itself represent a failure to abide by the obligations under the *Regulations*, as pointed out by the appellant at the outset of the hearing and not contested by the respondent. Indeed, subsection 33(2) of the *Interpretation Act*, RSC 1985, c. I-21, states that "words in the singular include the plural, and words in the plural include the singular."

[8] This however does not alter the obligation, where more than one person is appointed to act as the competent person group, that, by necessary implication, all such persons individually satisfy the requirements of what constitutes a competent person under the *Regulations*. The parties did not argue otherwise.

Background

[9] The sole witness heard in these proceedings was Ministerial Delegate Dubé and thus the description of the facts and circumstances around the present case has been drawn from the latter's investigation report filed in evidence as well as her testimony.

[10] The initial element of this case arose on May 8, 2014, where an incident occurred between Person A (alleged victim) and Person B (supervisor of the alleged victim and individual represented by the respondent union in this appeal), which was followed by a work place violence complaint being filed by the alleged victim (Person A) against her supervisor (Person B) with the departmental occupational health and safety (OHS) advisor (Brian Murphy) on July 8, 2014.

[11] Documents collected by Ministerial Delegate Dubé show that on the same day,

Mr. Murphy sought the convening of the work place violence prevention team to conduct an investigation into the unresolved complaint in the following terms: “As this issue is unresolved and the bullying is still ongoing with the claimant and other parties within the team, I am asking that the [Violence in the Work Place Prevention (VWP)] team be assembled in conducting the investigation”. Notification was given by the latter to Person B and her union representative on September 9, 2014, that a work place violence investigation pursuant to the *Regulations* would be taking place following an allegation of bullying in the work place having allegedly occurred from August 2013 to July 2014.

[12] On that same date, Person B and her union representative requested details in writing of the bullying incident and while no written response was received as the complaint had been made verbally, ensuing telephone communication (September 11) between the latter and eventual member of the investigative team (“competent person”), Brian Murphy, informed the union representative that (a) yelling and bullying occurred within the group supervised by Person B, (b) three individuals would be acting as an investigative team/“competent person”, those being occupational health and safety representative Brian Murphy, labour relations representative D. D. and security representative Alain Joanisse, and (c) no blame was to be made and the purpose of the investigation was to resolve the problem.

[13] One should note here that on September 4, 2014, Person B had been informed in an e-mail from the same Brian Murphy about the allegation and of the identity of the members of the investigating team with a request that she acknowledge receiving said information and indicate whether she agreed or disagreed with the composition of said team. That communication did not specifically ask whether said team was “seen” to be impartial by the respondent, nor did it provide any information as to the team members’ experience, training or background in dealing with such matters. At that time, the respondent replied having “no issues with the [investigating] team” and, as to her request for details regarding the allegation, was only informed that it concerned “bullying in the work place” without any specifics.

[14] Between September and November 2014, the investigative team interviewed five employees. Of those, three had worked with or under Person B, but prior to the period under review, and provided information related to allegations made against Person B relative to incidents that occurred prior to the period under review. While the investigators indicated to the respondent's union representative that yelling occurred amongst the group under the supervision of Person B, only one active member of that group was interviewed.

[15] Last to be interviewed by the investigating team on December 10, 2014, Person B, who up to that point had not been provided with details regarding the complaint against her nor any specific allegations or asked about specific incidents, individuals, dates or times except for being asked whether she had ever bullied or yelled at individuals at work, identified a number of witnesses (two) who she believed had direct knowledge of a particular incident with the person she surmised as the complainant and also identified other members of her team that could be interviewed by the investigators. None of these persons were interviewed by the investigating team.

[16] Of these two witnesses identified by Person B, Ministerial Delegate Dubé's report

indicates that one was contacted by the alleged victim/complainant seeking the former's corroboration of her allegations about the incident under investigation, with that person having instead stated not recalling having heard any yelling and remembering that Person B had spoken "professionally".

[17] Through Access to Information and Privacy (ATIP) requests as well as upon receiving on May 25, 2015, a draft copy of the investigators' report which had been signed on March 9 or 10, 2015, Person B became aware of not having been informed of all the information in the possession of the investigators, in particular the allegations originating with the three witnesses mentioned above and therefore did not have the opportunity to respond to these allegations that did not relate directly to the incident under investigation.

[18] As a result of what precedes, Person B ceased to believe that the investigators were impartial or had the necessary competence and requisite training and experience and knowledge to conduct the investigation and thus ceased to recognize them as the "competent person(s)" defined at paragraph 20.9(1)(a) of the *Regulations*. The investigation report of the "competent person(s)" concluded that one act of work place violence had occurred between Person B and Person A in the form of yelling. It appears that Person B was given no opportunity to make submissions on the draft report which, in its final version, showed several amendments that were to her detriment.

[19] Furthermore, on June 3, 2015, on the occasion of a meeting with Person B's director also attended by her union representative and one member of the investigating team (D. D.), errors in the account of the director's testimony (incorrect statements) to the investigators in the report were acknowledged and eventually never corrected, and D. D., who was one of the individuals making up the "competent person(s)", took an active part by recommending that Person B engage in coaching or training, with failure to do so potentially leading to a finding of insubordination, and thus disciplinary action.

[20] On July 12, 2015, Person B filed a complaint with the Labour Program, claiming her employer had not complied with subsection 20.9(3) of the *Regulations*, by failing to appoint a "competent person" meeting the definition contained in paragraph 20.9(1)(a) of same, to investigate an unresolved complaint of work place violence of which she was the subject. The complaint registration form filed by Person B contained the following statement:

> The report is filled with contradictory, inaccurate and bias statements including unsubstantiated claims. Bias statements should not be made by an impartial competent person.
>
> I agreed to the selection of investigation team members at the onset in good faith in September 2014. However, upon reading the draft report (received only on May 2015 and then the final report received only on June 3, 2015) inappropriate, bias and judgmental statements made by the competent person's investigation report justify my real apprehension of bias on the part of the competent person/investigation team.
>
> I made my employer and [Labour Relations (LR)] aware of my concerns with the final report on June 3, 2015 when the final report was presented to me for the first time. LR Advisor, [D. D.] was present who was also one of

> the investigation team members [competent person] heard when one witness in the investigation and whose statements are reflected in the report, i.e. the "employer" - Mr. Phil Jago confirmed, to me and my union representative that the report contained allegations made against me by Mr. Jago during the investigation that Mr. Jago said "he did not make".

[21] The complaint was originally handled by Ministerial Delegate MacNeil who, having confirmed that the respondent had initially agreed to the competent person(s), thus that the "employer [had] complied with the requirements of the Act", concluded that there was nothing more the Labour Program could do for the respondent, as "there is no appeal process for the *findings* of the report once it is completed" [emphasis added].

[22] Upon being informed of the conclusion arrived at by Ministerial Delegate MacNeil, Person B contacted the latter's superior by telephone and by email, stating "sufficient information was not provided to me regarding the competent person when I agreed to the investigation members", and further commented in added communication as follows:

> I also reviewed Part XX of the Canada Occupational Health and Safety Regulations. It states that as a party, the competent [person] must be seen by myself to be impartial. The verb seen in the regulations denotes a continuous action and does not indicate a time frame for this action. As I mentioned, at the onset, when first contacted, I would have had no reason not to believe that the individuals listed in the investigation team would be impartial and that they would have had the knowledge, training and experience in issues relating to work place violence as per section 20.9[(1)(b)]. It was not until I saw the draft report that I questioned their impartiality and their skills and background regarding this investigation. It is my belief that the regulation is clear in that the competent person must be impartial and must be seen, regarded at all times by the parties as impartial.

[23] Ministerial Delegate Dubé was thus tasked with essentially examining the investigation into the complaint, and in February 2016, advised the employer that documents obtained through ATIP by Person B suggested that the competent person/investigation team had not maintained impartiality throughout its investigation. Ministerial Delegate Dubé emphasized to the employer that to counter this claim, she required documentation to demonstrate that Person B had been made aware of all the allegations previously made against her and in the possession of the investigation team, and that she had been given the opportunity to respond to these allegations.

[24] On April 7, 2016, the employer's OHS Departmental Manager responded to Ministerial Delegate Dubé by letter stating that in their opinion the competent person's investigation team had conducted a fair and impartial investigation, and had respected the principles of natural justice.

[25] On July 5, 2016, the acting director of workplace services submitted a second letter to the ministerial delegate restating the employer's position that it considered that the investigation team had maintained impartiality. However neither letter contained any documentary evidence to support the employer's position, or demonstrate that Person B had been given the opportunity to respond to all allegations made against her.

[26] On the basis of the information available to the ministerial delegate, she concurred with Person B and found that the employer had failed to comply with subsection 20.9(3) of the

Regulations, in that although Person B had initially agreed to the selected competent person(s), the information obtained subsequently indicated that impartiality had not been maintained during the investigative process.

Issues

[27] Defining the issue to be determined through the present appeal necessitates first to properly understand the decision arrived at by the ministerial delegate that has given rise to the appeal. The direction being appealed derives from the conclusion formulated by Ministerial Delegate Dubé that "the employer failed to appoint a person(s) meeting the definition of a 'competent person'" as prescribed by the *Regulations* "to investigate a complaint of work place violence *alleged* to have occurred between two employees" [emphasis added] over a certain period of time. I have put emphasis on the word "alleged" because clearly from the phraseology of the direction, the ministerial delegate has not gone beyond the threshold of allegation as regards the claim of work place violence, or stated differently, has not, in fashioning the direction, purported to decide whether there is merit to the complaint.

[28] This conclusion/direction by the ministerial delegate followed an initial conclusion arrived at by another ministerial delegate (MacNeil) relative to the same complaint, to the effect that once an employer has purported to comply with the requirements of the *Regulations* relative to the appointment of a "competent person(s)" and a person, in the present case Person B, has agreed to the selection of the person(s) making up that competent person(s) at the onset of the investigation to be conducted into the complaint, there is no possible further intervention by the regulator/minister (ministerial delegate), and eventually an appeals officer, since "there is no appeal process for the *findings* of the report once it is completed" [emphasis added], that report being fashioned or destined to deal with the substance of the complaint. Again, emphasis is put on the word "findings" to put in perspective Ministerial Delegate MacNeil's rationale, where Person B's complaint was denied in view of the investigative process having purportedly been completed, thus findings arrived at.

[29] This being said, in the case of the direction under appeal, Ministerial Delegate Dubé's rationale relative to the investigation in what she describes as the *alleged* work place violence complaint clearly does not concern the so-called findings of the investigation report, but the manner in which the investigation may have been conducted, as appears from the following excerpt from her report:

> Having reviewed the available information, the undersigned [ministerial delegate] concurs with [the respondent], and finds that the employer has failed to comply with subsection 20.9(3) of the [*Regulations*]. In this case, although [the respondent] initially agreed to the selected competent persons, information was subsequently obtained that indicates impartiality, was not maintained during the investigative process.

[30] It needs to be noted that this conclusion was arrived at after the initial investigation was ordered re-opened.

[31] The parties clearly hold differing views regarding the issue that I must determine. In the case of the appellant, its position is that the appointment process of the so-called "competent person", which under the *Regulations* must satisfy a number of conditions, must be separated from the actual investigation and thus, in this respect, that there is no jurisdiction for a ministerial delegate to consider procedural fairness relative to the competent person's actual investigation once said investigation has begun. According to the appellant, Ministerial Delegate Dubé lacked the jurisdiction to issue a direction against an employer for failure to appoint a "competent person" on the basis of concerns that relate to the competent person's actions during the investigation, and the direction should therefore be rescinded.

[32] For its part, the respondent's view is that a ministerial delegate has jurisdiction to determine employer non-compliance with any part of Part II of the *Code* and thus Part XX of the *Regulations*, including the issue of "competent person" and that this jurisdiction is not lost upon a person's, in this case Person B, initial agreement that the competent person is impartial and the investigation having begun and even been completed.

[33] In view of the foregoing, the issue to be determined is essentially whether Ministerial Delegate Dubé had jurisdiction, pursuant to the general compliance supervision and enforcement authority of the Minister delegated to the ministerial delegate, to examine at the time she did whether those persons appointed to fulfill the role of "competent person" satisfied and continued to satisfy the conditions set by the *Regulations* for such appointment during the actual investigation.

Submissions of the Parties

A) Appellant's Submissions

[34] The position taken by the appellant is essentially of a legal nature and does not challenge the exactness of the factual circumstances of the case. Stated summarily, the appellant takes the position that the work place investigation process established at section 20.9 of the *Regulations* comprises three parts or stages to wit, the "competent person" selection, the investigation by the latter and the conclusion (report) of said investigation, and that there is jurisdiction vested in a ministerial delegate to issue a direction solely as regards the first and last stages, signifying that a direction can be issued against an employer at the outset and thus until the parties agree on a competent person, and then once the "competent person" has issued its investigation report when, pursuant to paragraph 20.9(5)(c) of the *Regulations*, there is an obligation on the employer to implement the corrective action, if any, determined in the report with failure to do so potentially attracting the issuance of a direction by a ministerial delegate.

[35] According to the appellant, at the middle stage, where the "competent person" commences its investigation, that investigation is to be conducted at arm's length from the employer as it is not an employer investigation and a ministerial delegate has no jurisdiction to issue a direction concerning procedural fairness as this relates to the competent person's investigation. The appellant argues that the wording of section 20.9 of the *Regulations* clearly distinguishes between the employer and the "competent person" and thus that the obligation to investigate is that of the latter, not of the former, with there being nothing in section 20.9 that would suggest that the employer retains control or oversight over the investigation.

[36] The appellant finds support for this in what it describes as the modern principle of statutory interpretation, namely that the words of an Act are to be read "in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (Elmer Driedger, *The Construction of Statutes*), said "ordinary sense" or meaning referring "to the reader's first impression, the understanding that spontaneously comes to mind when records are read in their immediate context" or "the natural meaning which appears when the provision is simply read through" (Ruth Sullivan, *Sullivan on the Construction of Statutes*).

[37] Resorting to the "natural meaning" of section 20.9, pursuant to subsection 20.9(3), the employer must "appoint" a competent person, to wit one who will investigate the work place violence, while pursuant to subsection 20.9(4), there is a distinct step in the process which is the actual investigation where the provision does not speak of the employer, but only of the competent person himself or herself.

[38] In essence, the position put forth by the appellant is that section 20.9 presents sequential roles, that of the employer and that of the competent person/investigator, where once one body has performed its assigned role, the next one is seized of the matter, signifying that the first body has no continuing role and cannot again act in relation to the matter. In brief according to the appellant, the first body or actor in the sequence is in effect *functus officio*. The appellant thus puts forth the position that the investigation by a competent person is not an employer investigation and that it would be inconsistent with the *Code* and its regulations to allow interference in the investigation. The latter finds support for this position in the recent Federal Court of Appeal decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273, [2016] 3 FCR 33 (*A.G. Canada v. PSAC*) where, in the words of the Court:

> [31] […] allowing the employers to conduct their own investigations into complaints of work place violence and to reach their own determination as to whether such complaints deserve to be investigated by a competent person would make a mockery of the regulatory scheme and effectively nullify the employees' right to an impartial investigation of their complaints with a view to preventing further instances of violence.

[39] According to the appellant, additional support for this can be found in a decision by the Supreme Court of the Northwest Territories in the case of *Camillus Engineering v. Association of Professional Engineers*, 2000 NWTSC 70, dealing with the relationship between a discipline committee and the council of the association, where the Court stated:

> [29] [...] The important point is that the complaint is in the hands, or jurisdiction, of the Council. The statute does not give the Discipline Committee any further role to play where it has discharged its functions and made the decision to refer the complaint to Council. Nor, in my view, is there anything in the statute that would indicate that the Discipline Committee should play a further role or have the ability to reconsider its earlier decision.

[40] Along the same line, the Federal Court of Appeal in *El-Helou v. Courts Administration Service*, 2016 FCA 273, found that, having referred a reprisal complaint to the Public Servants Disclosure Protection Tribunal under the *Public Servants Disclosure Protection Act*, the

commissioner had correctly concluded that he was *functus officio* and could not withdraw his referral, even though evidence originating from other cases had the latter believe that said referral had not been warranted.

[41] The appellant thus argues that once the parties agree on the competent person, that competent person conducts the investigation at arm's length from the employer as it is not an employer investigation. Furthermore, a ministerial delegate such as Ministerial Delegate Dubé has no authority under section 145 of the *Code* to issue a direction against the competent person and Part XX of the *Regulations* does not provide any oversight or appellate role for a ministerial delegate with respect to the competent person's investigation. Any concerns over the investigation, including concerns over procedural fairness, can only be addressed in the Federal Court on judicial review, and a ministerial delegate cannot circumvent such lack of jurisdiction by issuing a direction against the employer for an investigation that is not an employer investigation. For this reason alone, the appellant submits that the direction should be rescinded.

[42] Taking the question of the ministerial delegate's authority a step further, the appellant submits that the ministerial delegate has no authority to quash the "competent person's" report, pointing to the language of subsection 20.9(5) of the *Regulations* which makes it mandatory ("shall") for the employer to implement the corrective actions enunciated in the report. Noting that there is nothing in the *Code* or the *Regulations* that could be considered authority for the ministerial delegate to order an employer to ignore this obligation, the appellant however argues that authority resides in the Federal Court under sections 18 and 18.1 of the *Federal Courts Act* to quash the report and its recommendations.

[43] Given that 26 months have passed since the parties agreed to the appointment of the "competent person(s)" and 20 months since the latter delivered its report, finding that the employer failed to appoint a "competent person" constitutes an absurd result. The appellant's view in this regard is that if 20 months after the report being delivered, there can be a finding of failure to "appoint" an impartial competent person, this constitutes a lack of finality where the parties need to have some certainty and the employer needs to be able to get on with implementing the competent person's report, as required by the *Regulations*.

[44] Furthermore, such approach affects impartiality itself since if the employer can be found in violation of the *Code* and the *Regulations* because of the "competent person's" manner of conducting the investigation, then one may consider that the employer is, in essence, directed to interfere with the process despite the fact that the investigation is not an employer investigation according to the Federal Court. In the present case, Ministerial Delegate Dubé concluded that the "competent person" lacked impartiality because the latter (1) did not interview relevant witnesses and (2) did not share relevant documents with Person B, who therefore did not know the case made out against her and did not have an opportunity to respond.

[45] It is the appellant's argument that these issues relate to the body of administrative law that deals with participatory rights, more particularly in this case the principle of *audi alteram partem* which requires that a person must know the case being made against him or her and be given the opportunity to respond before the body vested with authority to decide. According to the appellant, such area that forms part of judicial review is the exclusive jurisdiction of the Federal

Court under sections 18 and 18.1 of its governing legislation.

[46] Closer to this particular question however is the "granular" detail Ministerial Delegate Dubé dealt with in finding a violation of the *Code* by the employer. It is the submission of the appellant in this regard that if employers are going to be found in breach of the *Code* and the *Regulations*, and thus be potentially subject to prosecution under the legislation, because the independent investigation did not interview the right witnesses or did not disclose the right documents, then an employer is going to be required to interfere and micro-manage a process that is supposed to be independent of the employer, thus by itself potentially raising issues of lack of impartiality in the investigative process. As framed, Ministerial Delegate Dubé's direction satisfies neither the spirit nor the intent of Part XX of the *Regulations* and thus should be rescinded.

[47] On the question of where lies the authority or jurisdiction to review the investigative process of the "competent person", the appellant submits that this is a question of legislative intent and jurisdiction. In this regard, the fact that the ministerial delegate does not have appellate review authority over the "competent person" does not create a gap in the legislated scheme because there is availability of judicial review in the Federal Court, under sections 18 and 18.1 of the *Federal Courts Act*.

[48] The appellant finds support for this in a number of Federal Court decisions, those being *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, [2003] 1 F.C. 541, *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] 4 F.C. 624, *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2004 FC 85 and *Dhillon v. Canada (Attorney General)*, 2016 FC 456. Said decisions generally hold that section 18 of the *Federal Courts Act* "must be given a broad and liberal interpretation, as a result of which a wide range of administrative actions will fall within the Court's judicial review mandate", it is also clear that "judicial review is no longer restricted to decisions or orders that a decision maker was expressly charged to make under the enabling legislation" and the review role of the Federal Court extends beyond formal decisions and thus includes review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme" as long as the administrative action sought to be reviewed flows from a statutory power.

[49] It is thus the position put forth by the appellant that a "competent person" is a "federal board, commission or other tribunal" as defined at section 2 of the *Federal Courts Act*, since it has jurisdiction and powers conferred under an act of Parliament (the *Code*) and the *Regulations* made thereunder. Those powers and jurisdiction are to investigate allegations of work place violence and to provide the employer with conclusions and recommendations that must be followed under the legislation by certain prescribed actions by the employer.

[50] The report of the competent person is thus made pursuant to statutory powers and affects legal rights, imposes legal obligations or causes prejudicial effects. The appellant thus refers to the recent Federal Court of Appeal decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273, which described section 20.9 of the *Regulations*

as being “remedial” and being “meant to offer an avenue of redress for employees who have experienced work place violence, with a view to having the situation dealt with appropriately by their employer.”

[51] Finally, the appellant notes that the Tribunal has also recently decided along the same lines in *Canadian Food Inspection Agency v. Public Service Alliance of Canada*, 2015 OHSTC 1 (*CFIA v. PSAC*), where the appeals officer commented on the conclusions and recommendations that may be made by a “competent person” under section 20.9 of the *Regulations*, namely that they

> [36] […] may be directed at the particular situation under investigation, they may provide some form of redress to the employee who may be found to have been the victim of violence, but they can also address questions of a more systemic nature. (...) In that respect, the outcome of the competent person's investigation may go beyond the individual circumstances of the employee and may touch on measures of general application to the work place, with an objective of prevention, a paramount consideration underlying the Code.

[52] Drawing from all that precedes, the appellant submits that the availability of judicial review is clearly provided for in the *Federal Courts Act*, while the *Regulations* under the *Code* provide no appellate role to a ministerial delegate in terms of reviewing the process of the competent person.

[53] Furthermore, the appellant argues that there is a fundamental distinction between a finding that an employer violated the *Code*, which can bring about prosecution, and a finding by a court on judicial review that a decision of a competent person needs to be quashed because it violated procedural fairness. The appellant thus concludes that there is no “gap” in the legislative scheme whereby the competent person's investigation would avoid judicial scrutiny. The review conducted by Ministerial Delegate Dubé in the case at hand was thus beyond her jurisdiction and, properly, the subject matter of an application for judicial review before the Federal Court. The direction should thus be rescinded and the appeal granted.

B) Respondent’s Submissions

[54] It is the general position of the respondent that this appeal concerns the jurisdiction of the ministerial delegate pursuant to section 127.1 and section 145 of the *Code* to make a determination that appellant, Natural Resources Canada, failed to appoint a “competent person” within the meaning of subsections 20.9(1) and (3) of the *Regulations* and to issue directions for non-compliance as a result.

[55] On this, the respondent submits that the ministerial delegate has general and overall jurisdiction to investigate and determine whether an employer has contravened any provision of the *Code* and its regulations, including whether or not a “competent person” has been appointed within the meaning of Part XX of the *Regulations*. It is the respondent's position that such general jurisdiction is in no way extinguished when the employee against whom a complaint such as the one central to the present case is made agrees at the outset of the investigation that the person proposed by the employer is impartial pursuant to subsection 20.9(4) of the

Regulations.

[56] The respondent submits that its position vis-à-vis the jurisdiction of the ministerial delegate is supported by a number of elements. First, support is found in the general statutory scheme established in the *Code* that grants a ministerial delegate broad and unrestricted powers to investigate any contravention of Part II of the *Code*, and thus the regulations made pursuant to the legislation, and to issue directions to the employer or employee (section 145) to terminate the contravention and take steps to prevent reoccurrence.

[57] Second, such position is consistent with the Tribunal's jurisprudence which has previously accepted that a ministerial delegate has jurisdiction to investigate issues regarding the "competent person" within the meaning of Part XX of the *Regulations*.

[58] Third, the respondent's position is reinforced by the courts' approach to issues of bias in administrative law generally requiring that allegations of bias be raised as soon as the facts that give rise to a complaint are learned by a party, with no artificial time restrictions set that would limit bias arguments to the outset of a proceeding.

[59] Fourth, such position enables efficient and timely access to the statutory enforcement mechanism in the *Code* which, as remedial legislation, should be interpreted generously in favour of individual employees. The respondent thus submits that, contrary to the appellant's position, the proper forum for an individual employee to complain about an alleged violation of Part II of the *Code* and its regulations, including that a "competent person" be appointed, is not through a costly and time-consuming judicial review to Federal Court, a position that flies in the face of the statutory enforcement mechanism that has been expressly created by Parliament to provide an efficient and cost-effective means for employees to address employer non-compliance. It is the position of the respondent that there is no reason to treat an alleged violation of subsection 20.9(1) of the *Regulations* differently than any other alleged violation.

[60] As an alternative argument, should the appellant's jurisdiction argument with respect to the effect of the respondent's initial acceptance of the competent person's impartiality under paragraph 20.9(1)(a) be accepted, the respondent submits that the ministerial delegate still retains jurisdiction to investigate allegations of non-compliance with paragraphs 20.9(1)(b) and (c) which deal with knowledge, experience and training of the person(s) presented as representing the "competent person". Substantively, the respondent submits that there is ample evidence supporting the conclusion that investigators making up what is identified as the "competent person" were neither impartial nor competent within the meaning of the *Regulations*.

[61] As stated above**,** the submissions made by the appellant do not offer a challenge of the factual circumstances of the case, as they are recounted at length in the ministerial delegate's report. For the respondent however, their submissions cannot be dissociated from a description of those factual circumstances of the case. Thus, on the facts, the respondent submits that Ministerial Delegate Dubé's correspondence with the employer as well as her testimony at the hearing shows that the latter had concerns with the impartiality of the "competent person" before, during and after the latter's investigation.

[62] For instance, prior to the start of the investigation by the "competent person(s)", Brian Murphy, who was the departmental OHS Program Advisor, demonstrated an already formed opinion about bullying, stating in an email that "the bullying is still ongoing with the claimant and other parties within the team". The same person, in one of the initial emails to Person B (September 9, 2014), exhibited the same opinion, stating: "It was brought to our attention that bullying in the workplace has occurred in your work group. This is deemed to be workplace violence". When the latter contacted Person B on September 4, 2014, to inform her of a reported incident and of the employer's decision to investigate a work place violence situation, the same Brian Murphy named the three individuals that would make up the investigatory team "competent person", one of those being himself, and sought Person B's agreement to the three while offering no additional information about the alleged incident and the credentials of the investigatory team nor did he ask whether she viewed those individuals as "impartial".

[63] Furthermore, when answering Mr. Murphy to the effect that she had no issues with the three individuals, on September 9, 2014, Person B knew nothing about the individuals named nor did she have any knowledge of their experience, training or backgrounds and the simple answer to her seeking details regarding the allegation was that it concerned "bullying in the work place".

[64] Ministerial Delegate Dubé indicated in testimony that requests by Person B's union representative to said Murphy for information regarding the identity of the complainant, the nature, date and details of the alleged incident, as well as a proposal that the union co-chair of the local OHS Committee form part of the investigating "competent person" went unanswered; however, it had been indicated that this was required so that Person B could respond to the allegations against her and that she, as the person against whom allegations were made, had the right to know the details of the accusation. In a later telephone conversation with the union representative, it was explained that the matter concerned bullying throughout Person B's group, but no details of the complaint leading to the investigation were disclosed.

[65] On December 10, 2014, Person B was interviewed by the investigating "competent person(s)". Up to that point, no one had disclosed details regarding the complaint to her and during the interview, no specific allegations were put to her nor was she asked about specific incidents, individuals, dates or times, the only question being whether she ever bullied or yelled at individuals in the office, which she flatly denied.

[66] At the same interview, Person B proposed a number of witnesses whom she believed could provide insight into her relationship with the person she surmised as being the complainant and suggested a number of individuals in her team that the investigators could talk to. None were ever contacted. In addition, at no point during the investigation did the "competent person(s)" or any employer representative ever confirm the details, including date and location, concerning the complaint(s) for which an investigation was being conducted.

[67] On May 25, 2015, Person B received the "competent person(s)" draft report which had been signed more than two months earlier on March 9 or 10, 2015. Upon review of such, Person B began to become aware of the lack of the necessary competence, including impartiality, and requisite knowledge, training and experience to conduct such investigation by the individuals making up the "competent person".

[68] Person B was given no opportunity to make submissions on the said draft report and in point of fact, between the draft version of the report received on May 25, 2015, and its final version, several amendments to the detriment of Person B were made, such as the removal of a paragraph regarding witness collusion that had been present in the draft report, and the singling out of Person B in a recommendation for training and the mention of inappropriate behaviours, where the draft report had noted the same but for all persons involved, namely Person B, the claimant as well as the team members.

[69] Following receipt of the investigation report, a meeting occurred between Person B and her union representative and director, as well as a member (D. D.) of the investigative team that constituted the "competent person". At that meeting, obvious errors in the account of the testimony that appeared in the report were acknowledged by Person B's director and member D. D. indicated needed corrections could be made by another member of the investigative team (Murphy), corrections that Person B asserts were never made.

[70] At that meeting, member D. D. recommended that Person B engage in coaching and training, noting that failure to do so could lead to a finding of insubordination. Person B considered that in acting in this manner, member D. D. overstepped his role as an investigator and blatantly violated the impartiality required of an investigator/"competent person" under the *Regulations*.

[71] Noting the above, Person B filed her complaint on June 12, 2015, specifically claiming that the "employer had failed to appoint a competent person who meets the criteria of being 'seen as impartial' ", as per the *Regulations*. Furthermore, Person B alleged that the so-called "competent person(s)" did not "have the knowledge, training and experience in issues relating to work place violence needed to qualify as 'competent person(s)' ".

[72] As the record shows, Person B's complaint was initially referred to Ministerial Delegate Dave MacNeil who spoke to her and to her director and, having confirmed Person B had initially agreed to the individuals making up the "competent person(s)" tasked to investigate such, determined that because of such initial agreement, he, on behalf of the Labour Program, could do nothing more for Person B.

[73] This response to her complaint caused Person B to communicate with Ministerial Delegate MacNeil's manager to explain that insufficient information had been provided to her regarding the so-called "competent person" team when she had formulated her agreement. In Person B's opinion, a ministerial delegate acting within the scope of the Labour Program had jurisdiction to intervene particularly since, when referring to the language of the *Regulations*, "the competent person must be seen by myself to be impartial. The verb 'seen' in the regulations denotes a continuous action... It was not until I saw the draft report that I questioned their impartiality and their skills and background regarding this investigation."

[74] It is as a result of said communication that the Labour Program opted to look anew at the matter and assigned Ministerial Delegate Dubé to the task. In the course of that further examination, Person B informed the ministerial delegate of additional information she had obtained demonstrating improper behaviour by the "competent person(s)" team in the nature of their outreach to individuals with grievances against Person B from years before, with the latter

not being afforded the opportunity to respond to their allegations.

[75] In the end, Ministerial Delegate Dubé determined on November 17, 2016, that the appellant employer had failed in its duty to appoint an "impartial competent person" in the course of the work place violence investigation and accordingly directed that the employer terminate the contravention, for all intents and purposes therefore, that another "competent person" be appointed.

[76] As stated above, the position argued by the respondent is based firstly on the general statutory scheme established by the *Code* that creates a general supervisory and enforcement scheme regarding compliance with statutorily imposed obligations under the *Code*. In that respect, and contrarily to the position taken by the appellant in the present case, the respondent is of the view that the issue of an investigator's competency (i.e., "competent person(s)" in this case) within the meaning of the *Regulations* can properly be the subject of a ministerial delegate's statutory enforcement powers in Part II of the *Code* and should not be restricted to being challenged via a costly and time-consuming judicial review proceeding before the Federal Court.

[77] It is the view put forth by the respondent, essentially based on the language of the *Code* and more specifically subsection 145(1) of such, that there is no reason to treat and thus examine and investigate an alleged violation of subsections 20.9(1) and (3) of the *Regulations* differently than any other alleged violation of the *Code* and the *Regulations*. Under the *Code*, a ministerial delegate has broad power to investigate any contravention of Part II of the *Code*, including the *Regulations* made therein, and to issue directions to an employer or an employee to terminate such contravention and take steps to prevent reoccurrence.

[78] Quoting from the decisions of the Federal Court in *CUPE v. Air Canada*, 2010 FC 103 and of the Tribunal in *Canadian National Railway Company v. Teamsters Canada Rail Conference*, 2013 OHSTC 29, according to which the *Code* empowers health and safety officers (now the minister through ministerial delegates) with extensive investigating powers and broad discretion with regard to determining the action to be taken and provides the latter with wide remedial powers to address *Code* violations, the respondent refers to the authority under subsection 145(1) of the legislation to direct the termination of contraventions and the taking of appropriate steps to ensure that contraventions do not continue or re-occur.

[79] In this respect, it is the submission of the respondent that potential contraventions of the *Code* include failure to abide by the specific obligations imposed on the employer at subsection 125(1) of the legislation to take the prescribed steps to protect and prevent violence in the work place, said prescribed steps being found at Part XX of the *Regulations* and including the obligation at subsection 20.9(3) of such to appoint a competent person "to investigate allegations of work place violence". It is thus the position put forth by the respondent that the language of the *Code* clearly gives a ministerial delegate the power to investigate when there is a complaint that the employer has failed to appoint a competent person.

[80] As to the term "competent person", defined at subsection 20.9(1) of the *Regulations*

as a person who *is* impartial and *is seen* by the parties to be impartial, has knowledge, training and experience in issues relating to work place violence and has knowledge of relevant legislation, the respondent notes that the person against whom a complaint is made needs only, under such scheme, to be consulted on the issue of "impartiality" and not on the broader notion of competency, and that this requirement that the "competent person" be "seen" to be impartial by the parties is in no way time-limited or fixed in time when one considers the wording of the *Regulations*.

[81] Referring to the position put forth by the appellant to the effect that as soon as a party to a complaint has agreed, at the very outset of an investigation, that he or she accepts that the named person(s) is "impartial" ("is seen to be impartial"), a ministerial delegate immediately loses "full stop" the jurisdiction to investigate the issue of "competent person", regardless of what may come to light subsequently about such person's bias, partiality, knowledge, experience or training, the respondent argues that such an interpretation would lead to irrational results.

[82] What would be irrational is that the ministerial delegate would have authority to investigate non-compliance with the requirement to appoint a competent person one minute, but suddenly lose jurisdiction the next and thus be unduly limited to investigate and issue directions in a manner not seen with respect to any other provision of the *Code*. It is the opinion of respondent's counsel that despite the fact that Person B in this case agreed at the very outset of the investigation to the appellant's choice of "competent person(s)", counsel pointing out in this respect that notably the appellant did not even bother to ask Person B if she viewed the selected individuals as "impartial", this in no way restricted or limited her right to complain upon subsequently learning things that put these individuals competency into question, and to access the statutory enforcement mechanism in the *Code* in the same manner as applies for any other allegation of violation of the *Code* and its regulations.

[83] Thus, on the plain language of the statutory provisions, a ministerial delegate has the jurisdiction to investigate alleged non-compliance with subsections 20.9(1) and (3) of the *Regulations* in a situation where information subsequently comes to light that an individual appointed as a competent person no longer is seen to be impartial or competent over the course of the investigation.

[84] The respondent finds support for its position regarding the ministerial delegate's jurisdiction relative to the circumstances of this case in the case law of the Tribunal and that of the Federal Court of Appeal where it has been accepted that a ministerial delegate has jurisdiction to investigate allegations that the employer failed to appoint a "competent person" within the meaning of section 20.9 of the *Regulations*.

[85] More specifically, in *Maritime Employers Association v. Longshoremen's Union, CUPE, Local 375*, 2016 OHSTC 14, where a respondent to a complaint had not agreed at the outset to the proposed "competent person", the Tribunal found that the legislation is "clear and not open to interpretation or limitation" and that it is "sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed under" section 20.9 of the *Regulations*. According to the respondent, this case also serves to confirm that a ministerial

delegate has the jurisdiction to investigate complaints of non-compliance with respect to the impartiality of a "competent person".

[86] In *Canadian Food Inspection Agency v. Public Service Alliance of Canada*, 2015 OHSTC 1, failure by an employer to appoint a "competent person" to investigate a complaint gave rise to a direction by a ministerial delegate to do so, a result with which the appeals officer did not take issue.

[87] Similarly, in *A.G. Canada v. PSAC*, the Federal Court of Appeal confirmed the obligation to appoint a "competent person" to investigate a work place violence complaint in all but the most obvious cases not within the scope of the definition of work place violence, thereby discrediting the position that a preliminary examination by an employer could be conducted.

[88] The submission by the respondent is that in none of these cases was there a finding that a ministerial delegate lacked jurisdiction to issue directions regarding non-compliance with section 20.9 of the *Regulations*, or that concerns regarding the issue of "competent person" could only be the subject of judicial review.

[89] Furthermore, in the respondent's opinion, there is no reason to distinguish the present case from the cases dealt with in the precedingly mentioned case law. In point of fact, the submission is to the effect that the fact that some of the complaints in those cases were made at the outset of the investigation rather than later on in the process, as in the present case, is irrelevant to the issue of the ministerial delegate's jurisdiction, particularly since in this instance, it was only through the process of the investigation and the receipt by the respondent of the draft report that the respondent effectively learned that the "competent person(s)" lacked the impartiality as well as the requisite training and knowledge to satisfy the requirements of the *Regulations* and thus gave rise to her complaint.

[90] In addition, the respondent submits that one can associate its position that the issue of lack of impartiality of the "competent person" can be raised after the outset of the investigation, so long as this is raised without delay after such information comes to light, with the approach as to when allegations of bias must be raised in administrative law generally, to wit at the first opportunity, as formulated in *Bassila v. Canada*, 2003 FCA 276 where Pelletier J.A. stated:

> [10] In any event, the law is clear that bias must be raised at the first opportunity. A party who believes that the presiding judge has created a reasonable apprehension of bias must make that position known at the first opportunity. One cannot secretly nurse a reasonable apprehension of bias for the purpose of raising it in the event of an adverse result. […]

[91] It is the position of the respondent in this regard that there is no basis for taking a different approach in the present context. In this case, Person B formulated her complaint to the Labour Program as soon as she received evidence of partiality and incompetency in the form of the investigation report wherein four allegations were made against her for which she never received any information regarding the complaint nor was provided any meaningful opportunity to respond, and where her concerns were subsequently further confirmed through a personal information request.

[92] It is thus submitted by the respondent that to impose an artificial time limit requirement that would see the ministerial delegate lose jurisdiction regarding allegations of partiality raised after the outset of the process for things that were learned subsequently does not make sense nor is it consistent with when allegations of bias must be raised in the broader administrative law context.

[93] In a final argument in support of the ministerial delegate's jurisdiction in this case, the respondent points to what it describes as the efficient and cost-effective statutory enforcement mechanism created under the *Code*, a statute designed to protect preventatively employees which should be interpreted broadly, purposively and generously in favour of employees and access to which should be encouraged.

[94] It is the respondent's view in this regard that to restrict the jurisdiction of the ministerial delegate, as suggested by the appellant, would seriously undermine the efficacy of the entire enforcement statutory scheme, to the prejudice of those seeking fair resolution of disputes involving work place violence, leaving them with the only remedial avenue of going through the costly process of judicial review.

[95] The respondent thus draws attention to the conduct of the appellant through the lengthy investigation by Ministerial Delegate Dubé where at no point did it see fit to object to the latter's jurisdiction, actually initially accepting her findings, and finally challenging her jurisdiction only at the time it agreed to appoint a qualified external investigator as a new "competent person". The respondent sees as ironic the appellant employer's delay in raising its jurisdictional argument given the argument it is at the same time putting forth that Person B should be estopped based on her initial acquiescence to the "competent person(s)".

[96] As an alternative to its jurisdictional argument relative to the required impartiality under paragraph 20.9(1)(a) of the *Regulations*, the respondent submits that the ministerial delegate also has jurisdiction to investigate allegations of non-compliance relative to paragraphs 20.9(1)(b) and (c) dealing with the requisite knowledge, training and experience of the "competent person" in addition to the requirement of impartiality at paragraph (a).

[97] While Person B may only have input on the issue of impartiality ("seen by the parties"), and thus have no say into whether the investigating "competent person" has the necessary knowledge, experience and training, as required at paragraphs (b) and (c), her complaint form clearly claimed violations of paragraphs (a) and (b).The respondent thus opines that even if the Tribunal forms the opinion that the ministerial delegate had no jurisdiction to investigate relative to paragraph (a) of subsection 20.9(1), Ministerial Delegate Dubé clearly had jurisdiction to investigate the other contravention raised in the present case.

[98] Noting that the appellant has solely raised the issue of jurisdiction of Ministerial Delegate Dubé under section 145 of the *Code* to issue a direction based on concerns over procedural fairness during a "competent person's" investigation, and thus does not appear to be taking issue with the actual findings of the ministerial delegate that the investigating team was not impartial and therefore not competent within the meaning of subsections 20.9(1) and (3) of the *Regulations*, the respondent nonetheless argues, to the extent that such findings are at issue, that there is ample evidence that the investigating team making up the so-called "competent

person(s)" was neither impartial nor had the requisite knowledge, training and experience to be considered competent within the meaning of the *Regulations*.

[99] The respondent bases the above claim on examples drawn from the ministerial delegate's narrative report, final report and direction:

> - D. D., one of the three named competent persons, after completing the investigation, went on to advise the director to accept the investigation findings and further recommended corrective steps and discipline if Person B failed to comply with the corrective steps, thus acting as police, judge and jury and being the opposite of impartial;
>
> - Person B was never asked specific questions (dates, names, locations) about individual findings later made against her, the sole questions being of a general nature about bullying;
>
> - No witness to the incident complained of were interviewed, notwithstanding that multiple witness names had been offered;
>
> - The investigators relied upon clearly solicited witness statements that concerned events that were well beyond the time frame of the incident(s) being investigated and that Person B could have had no idea were in issue. The respondent claims in this regard that the so-called witnesses copied each other on their statements to the investigators;
>
> - Errors in the draft report that had been identified by the employer were not corrected by the investigators;
>
> - One of the members of the investigation team that made up the "competent person(s)", Mr. Murphy, had not been trained on work place violence until January 2015, after all the interviews had been completed;
>
> - More than one person was appointed to the role of "competent person" although it is clearly articulated in the *Regulations* that this role is to be filled by a single person; and
>
> - The flagrant breaches of procedural fairness throughout the investigation demonstrate the lack of impartiality, knowledge and experience of the "competent person(s)".

[100] Consequently, the respondent submits that the investigatory team had lost any semblance of impartiality over the course of the investigation and the ministerial delegate was correct in finding that the employer had failed to appoint a "competent person" within the meaning of the *Regulations*.

[101] On the argument presented by the appellant that the ministerial delegate was *functus officio* to investigate because of the original ministerial delegate (MacNeil) determining that he would take no action, the respondent submits that the concept of *functus officio* has no application to investigations under Part II of the *Code* and argues that there is nothing in the statutory scheme that would preclude the Minister of Labour from reopening an investigation where there is new information or arguments meriting consideration.

[102] The respondent further submits that in the alternative, to the extent that *functus officio* would have any application, the case law is clear that an administrative tribunal may reopen a proceeding for a denial of natural justice, a jurisdictional error or a failure to address an issue fairly raised by the proceedings. Given that Person B had clearly raised issues of natural justice and fairness in its correspondence with the Labour Program, it was fully within the ministry's authority to reopen the investigation.

[103] The respondent thus concludes that the appeal of the appellant should be dismissed for the following reasons:

> -the ministerial delegate had jurisdiction to determine employer non-compliance with the *Code* and its regulations, including the issue of "competent person", such jurisdiction not being lost upon Person B's initial agreement that the "competent person(s)" was impartial at the outset of the investigation; and
>
> -there is ample evidence that the investigatory team making up the so-called "competent person(s)" was neither impartial nor had the requisite knowledge, training and experience to make them "competent" within the meaning of the *Regulations*.

Analysis

[104] Before proceeding to the issue *proper*, I find it appropriate to reiterate that in my capacity as appeals officer, I have authority to inquire into all the circumstances and reasons of the decision or direction, in the present case a direction, of which I am seized through the appeal process and that in doing so, I act in a *de novo* fashion, which means that I can consider all the evidence that is part of the initial investigator (ministerial delegate) report, receive additional evidence as long as it is relevant to the issue, entertain any argument, position or submission provided by or derived from the parties to the case, and decide on the basis of any issue that the facts, circumstances and elements of the case can bring to the fore.

[105] In this regard, one must note that the appellant in the present case has formulated a single question of law relating to the jurisdiction of the Minister through a ministerial delegate, or rather the extent of such relative to the investigation into a work place violence complaint, as basis for its appeal and that there has been no contestation or challenge relative to the facts and circumstances stated in the report by Ministerial Delegate Dubé, thereby making it possible for the undersigned to base the decision that follows on any of those.

[106] Through the exercise of its regulation-making authority in May 2008, the Governor in Council enacted Part XX of the *Regulations* which put in place a work place violence prevention regime that, for all intents and purposes, was intended to span all aspects of the work place violence prevention issue, ranging from policy to factors identification, assessment, controls, prevention measures review, response procedures, training and finally, notification and investigation of violence complaints, this last element referring to section 20.9 at the center of this case.

[107] That provision establishes a three part procedure/process for an employer to deal with a situation or an alleged situation of work place violence, each part representing a step that an

employer is under obligation ("shall") to follow, circumstances dictating.

[108] The first, established at subsection 20.9(2) of the *Regulations*, makes it mandatory ("shall") for an employer who is apprised of an existing or an alleged work place violence situation to try to resolve the matter with *the* employee as soon as possible. While the provision does not specify how the employer is to "try" to achieve this, nor which employee is meant by "*the* employee" (singular), one would surmise that for all intents and purposes, this would entail at least the victim(s) or alleged victim(s) as well as the originator(s) or alleged such of the violence or alleged violence, since pursuant to the *Interpretation Act*, the singular includes the plural and vice versa.

[109] The second step, which is the crux of the present case, comes into play when the first step of the process has not led to a resolution of the matter. In that instance, subsection 20.9(3) of the *Regulations* makes it mandatory (shall) for the employer to appoint a "competent person" (as defined at subsection 20.9(1)) to investigate the work place violence.

[110] It also makes it mandatory on the said employer to provide the competent person "with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent." One must note here that this subsection provides no indication as to how such investigation is to be conducted, apart from the fact that it must be conducted by a person that is competent at the time of appointment.

[111] The obligation is thus on the employer, therefore not a party to the complaint, to appoint a person that is competent, as defined in the *Regulations*, at the time of appointment. The legal issue that has given rise to this appeal is Ministerial Delegate Dubé's finding that one of the characteristics of competency, as defined in subsection 20.9(1) of the *Regulations*, namely, impartiality, required for a valid appointment to be made by the employer under subsection 20.9(3), must be maintained all through the process of investigation.

[112] For an employer, the third step in the process arises upon completion of the investigation by the so-called "competent person" into the work place violence. At this stage, it becomes mandatory for the employer concerned to keep a "record of the report from the competent person", provide a copy of such to the work place committee or the health and safety representative under certain conditions and to adapt or implement controls referred to in 20.6(1) of the *Regulations*, those being systematic controls of a general nature that the employer is under obligation to develop and implement once it has carried out a general assessment of the potential for work place violence at a given work place.

[113] As such therefore, with the exception of recording the report of the "competent person" and passing it on to the work place committee or health and safety representative, there is no direct obligation set in the *Regulations* for an employer to adopt or implement specifically any recommendation that a "competent person" may have formulated in its investigation report; rather, the employer's obligation is limited to the adaptation or implementation of the controls that it had to put into place "not later than 90 days after the day on which the risk of work place violence has been assessed" under its work place violence prevention policy after having identified all contributing factors to violence and using those to assess the general potential for work place violence.

[114] In this regard, it is worth noting that the Federal Court of Appeal in *A.G. Canada v. PSAC*, in commenting that section 20.9, although being "remedial" in essence and destined to "offer an avenue of redress", would not go beyond the very general descriptive that the provision is meant to have a situation of work place violence "dealt with appropriately", words that are certainly a long way from meaning that the actual investigation report is enforceable, judicially reviewable or its application mandatory.

[115] I thus find myself of the same thinking as my colleague Appeals Officer P. Hamel in *CFIA v. PSAC* that it is solely from the overall context of Part XX of the *Regulations*, instead of solely section 20.9, that one can say "that the report will serve a remedial purpose", given the absence of specificity in the *Regulations* as to the nature of the conclusions and recommendations that may be included in the report of the "competent person" and the silence of the *Regulations* as to what the employer may do with those, save for recording and passing on to the local committee.

[116] Turning to the issue of the extent of the jurisdiction of the Minister, through his or her delegate, to investigate alleged contraventions to section 20.9 of the *Regulations*, it is clear that a ministerial delegate, who possesses broad powers to investigate any contravention of Part II of the *Code*, including the regulations issued thereunder, has jurisdiction to examine whether an employer complied with the prescribed obligations described above. This power includes examining whether an employer proceeded to appoint a competent person to investigate the work place violence if the matter is unresolved, as is mandated by subsection 20.9(3) of the *Regulations*. Indeed, as argued by the respondent, the Tribunal's jurisprudence confirms that a ministerial delegate has the jurisdiction to investigate issues regarding whether an employer has failed to appoint a "competent person" within the meaning of Part XX of the *Regulations*.

[117] My understanding is that the appellant does not disagree with this general statement about the extent of a ministerial delegate's jurisdiction under the *Code*. The appellant's jurisdictional argument is more specific. Its position is that there is no jurisdiction for a ministerial delegate to issue a direction concerning procedural fairness as it relates to issues that arose *during* the competent person's investigation. According to the appellant, once the parties jointly agree on the competent person and the investigation commences, the employer's obligation under subsection 20.9(3) to "appoint a competent person" is met.

[118] By implication, the appellant's argument means that a direction for failure to appoint a competent person could only be issued against an employer at the outset of the process set out in section 20.9 and only until the parties agree on a competent person. According to the appellant, once the investigation is underway, an employer has complied with its obligation and, consequently, a ministerial delegate does not have the power to review how the appointed competent person(s) performed their duties and issue a direction against an employer should issues, such as failure to adhere to basic procedural fairness principles during the competent person's investigation, be uncovered.

[119] Thus, the essence of the appellant's position in the present case has to do not with the

partiality or impartiality of the “competent person(s)”, which, it is important to note, is not really discussed in the latter's submissions, although the direction is developed solely around the required impartiality of the “competent person(s)”, but rather with the extent of the compliance enforcement jurisdiction of the Minister through its delegate, which is enunciated at subsection 145(1) of the *Code* as follows: “If the Minister is of the opinion that a provision of this Part is being contravened or has recently been contravened, the Minister may direct the employer or employee concerned, or both, to” terminate the contravention and take specified steps, all within the time specified to put an end to the contravention.

[120] The appellant claims that the use of the words “employer” and “employee” in the *Code* signifies that enforcement action in the form of a direction cannot be directed at a party other than “employer” and/or “employee”, and that considering that a “competent person”, once designated as such and proceeding to investigate a complaint such at the one central to this case, is acting in a capacity that is neither that of an employer or employee, in other words is neither one or the other, and conducting an investigation that is the competent person's investigation and not that of the employer, a direction cannot be directed at the employer for a shortcoming that attaches to the “competent person” and is revealed, learned or occurs within and in the course of the investigation.

[121] Vis-à-vis this, the respondent has taken the position that accepting such interpretation based on a before/after time separation would lead to irrational results where a ministerial delegate could investigate non-compliance with the requirement to appoint a competent person one minute, but suddenly lose jurisdiction to examine the same question the next minute where information subsequently comes to light raising questions as to whether the person satisfies the requirements of competency.

[122] In this regard, I do share the opinion expressed by the respondent that the authority derived from section 145 of the *Code* is general, overall and not time-sensitive, and that accepting the position formulated by the appellant would create an artificial time limit requirement that would deprive a ministerial delegate of jurisdiction to consider allegations that could not have been known prior to the initiation of the investigation but that would be or have been brought to the fore at the earliest opportunity. Moreover, contrary to the appellant’s contention, the direction is not directed at the competent person, but at the employer for failing to appoint such competent person.

[123] This brings the undersigned to comment on the conditions, set out at subsection 20.9(1) of the *Regulations*, that must be satisfied for a person to be capable of conducting an investigation into a complaint of work place violence as an appointed “competent person(s)”.

[124] Pursuant to this provision, in order to act as a competent person, a person must satisfy three conditions. First, the person appointed by the employer must be someone who “is impartial and seen by the parties to be impartial” (paragraph 20.9(1)(a)). Second, the person must have “knowledge, training and experience in issues relating to work place violence” (paragraph 20.9(1)(b)). Third, the person must have knowledge “of relevant legislation” (paragraph 20.9(1)(c)).

[125] Leaving aside the issue of whether the appointed persons must continue to satisfy these conditions throughout their investigation for now, it cannot, in my view, be seriously disputed that, in order to have standing to act and, therefore, for the employer to comply with its obligation to appoint a competent person under subsection 20.9(3), the appointed individuals must satisfy these three conditions at the time of appointment. After all, the criteria set out at subsection 20.9(1) of the *Regulations* need to be satisfied for the appointment to be validly made and take effect. This much is clear from the wording of the provision, which states that the competent person "is" and not only "is seen" as impartial.

[126] Accordingly, I find that it is entirely within the jurisdiction of a ministerial delegate to examine whether an employer complied with this obligation, that is, whether it appointed persons that met the definition of "competent person(s)" at the time of appointment. In this regard, I see nothing in the text, context and purpose of the *Code* and the *Regulations* that would limit a ministerial delegate's jurisdiction to examine this question.

[127] While it is possible that a work place party objects to the appointment of certain persons at the outset of the process (i.e., before the commencement of an investigation) which may lead to the intervention of a ministerial delegate before the parties actually agree on the competent person(s), there can also be situations where facts that call into question a competent person's standing to act are only discovered after the investigation has begun. In that event, it is my view that nothing prevents a ministerial delegate from conducting an investigation to determine whether an employer appointed a person who is competent, as this term is defined in subsection 20.9(1) of the *Regulations*. As discussed above, the *Code* empowers a ministerial delegate to investigate any alleged contravention to Part II of the *Code* and the regulations enacted thereunder and there is no temporal restrictions that constrain the ministerial delegate's jurisdiction in this regard.

[128] I would note that while the performance of the investigation into work place violence is strictly within the province of the competent person, the latter's capacity to act as such is clearly contingent upon the requirements of subsection 20.9(1) being satisfied, which imposes on the employer the obligation to ensure that the person it appoints meets the definition of "competent person" at least at the time of appointment. There are not many ways in which a ministerial delegate can be brought to examine a situation, unless the official is informed, made aware of such, mostly through complaint or such action, and it is my opinion that nowhere in the *Code* is there any expressed time limitation as to when this can be done. This being the case and given the extent of the authority of the Minister and its delegate to act where contravention is claimed, again, I have seen no time limitation in the *Code* as to when such examination by a ministerial delegate can proceed.

[129] *In order to fully address the appellant's arguments, I would further note that up to this* point, I have knowingly avoided referring to subsection 20.9(4) of the *Regulations*, and this for the following reason. In all of the foregoing subsections that I have commented upon, all concern an obligation or function of the employer, which is not the case with subsection (4), this one having to do with the role of the so-called "competent person" in dealing with a work place violence complaint by way of an investigation, and the wording of which is central to the position taken by the employer in the present case that a ministerial delegate

lacks review jurisdiction.

[130] The wording of subsection (4) is very clear. It excludes an employer from the actual execution of the investigation into the complaint, making it mandatory (shall) for the "competent person" appointed by the employer to "investigate" the work place violence and, once the investigation is completed, to "provide the employer with conclusions and recommendations" that the employer will only need to record and pass on to the work place committee or OHS representative, as I stated above.

[131] The appellant has described such investigation as being at "arm's length" from the employer, and I agree that this is the case for the investigation itself, that is, the actual gathering of information towards the purpose of arriving at a conclusion relative to the presence or not of work place violence and the formulation of a report. As seen above, however, a competent person is required to be appointed as such by the employer, and such appointment is dependent upon the person or persons satisfying a number of qualifying criteria, those being enunciated at subsection 20.9(1) of the same provision, and a ministerial delegate is entitled to examine if an employer complied with this obligation.

[132] To repeat what the undersigned stated at the outset, the fact that the employer in this instance opted to appoint three individuals to act as one "competent person" does not alter the fact that all three needed to satisfy all the said qualifying criteria at least at the time of appointment for the investigation to validly take place. Otherwise, it could not be said that the work place violence issue was investigated and conclusions and recommendations provided by a "competent person" under subsection 20.9(4) of the *Regulations*.

[133] I share the view expressed by the appellant that the investigation conducted by the "competent person" is not the employer's investigation. However, agreeing to this does not mean that I am of the opinion that a ministerial delegate cannot look at the competency of investigators, quite the contrary.

[134] I am of the opinion that there is a line to be drawn between the persons who investigate and the investigation proper, granted a very thin line but one that separates the investigation, that is the field and object of such and the investigators themselves, who are there through an employer abiding by its statutory obligation under the *Code*.

[135] That is exactly what Ministerial Delegate Dubé did. She did not formulate any comment as to the substance of the investigation nor the conclusions of such. She solely looked at the conduct and demeanour of the investigators to ascertain whether they satisfied and continued to satisfy the criteria through which the employer appointed them. As such her examination was for the purpose of examining whether the employer had satisfied its obligation and did not, in my opinion, transgress into the actual investigation of the allegations.

[136] In other words, in the present case, it is not at the investigation proper that the ministerial delegate looked, that is its findings, but at employer compliance. In my opinion, this was entirely within her jurisdiction.

[137] For these reasons, I am unable to accept the appellant's argument that once the parties jointly agree on the competent person and the investigation commences the employer's obligation under subsection 20.9(3) of the *Regulations* is met. To the contrary, I find that a ministerial delegate has jurisdiction to investigate allegations of non-compliance with subsection 20.9(3), including allegations of having failed to appoint a person that satisfies the requirements of subsection 20.9(1) even after the investigation has begun or taken place.

[138] Having found that Ministerial Delegate Dubé had jurisdiction to investigate the issue of whether the employer in this case complied with its obligation to appoint a competent person under subsection 20.9(3) of the *Regulations*, the issue becomes whether her conclusion that the appellant failed to appoint a person(s) meeting the definition of a "competent person", as prescribed by the *Regulations*, is correct.

[139] On this issue, the appellant correctly points out that the primary basis of the direction is Ministerial Delegate Dubé's conclusion that the investigative team did not in fact maintain impartiality or exhibit behaviours that would be expected from an impartial decision-maker during the investigation. Stated differently, her finding that the employer failed to appoint a competent person that "is impartial and is seen by the parties to be impartial" as is mandated by paragraph 20.9(1)(a) of the *Regulations* stems from her view that the appointed competent person(s) did not act with impartiality while conducting the investigation.

[140] However, as noted by the respondent, in correspondence to the employer and in her testimony at the hearing, Ministerial Delegate Dubé indicated that she had concerns about the impartiality of the "competent person(s)" before, during and after the investigation. Determining whether she correctly found that the employer failed to appoint a person who is impartial and is seen by the parties to be impartial on the facts of this case requires the undersigned to interpret the meaning of the terms of paragraph 20.9(1)(a) of the *Regulations*.

[141] In this regard, I am mindful of the interpretation of Appels Officer Hamel in *Maritime Employers Association* v. *Longshoremen's Union, CUPE, Local 375,* 2016 OHSTC 14, a decision in which he stated the following at para. 53: "Impartiality is a state of mind and is difficult to measure, unlike knowledge and past experience." Appeals Officer Hamel then went on to explain the consensual approach, which, in his view, the legislator chose in order to ensure the credibility of the investigation and ensure its acceptance by the parties involved:

> [54] […] It seems to me indisputable that the test of impartiality set out in paragraph (*a*) evokes a subjective notion of impartiality and relies on the perception of the parties involved. The text is clear and is not open to interpretation, especially when compared to the wording of the requirements for experience, training and knowledge.
>
> [55] The legislator clearly preferred a consensual approach to the issue of impartiality. By including the words *and is seen by the parties to be impartial* after the word *impartial*, the legislator clearly requires the parties to agree on whether the person proposed by the employer is impartial. The French version of this same paragraph is equally clear […*est impartial*[*e*] <u>*et est considérée comme telle par les parties*</u>] and also

> requires that the parties consider the person to be impartial, without limitation or exception. If an agreement is not reached, the proposed person simply cannot be appointed.
>
> [56] From this it can be inferred that the legislator considered it vital that the parties agree on the impartiality of the person designated to conduct the investigation whose objectives are described in subsection 20.9(3) and et seq. of the *Regulations*. There is no doubt that the objective sought by the legislator is to ensure the credibility of the recommendations that this person must provide at the end of the investigation and to promote their acceptance by all of the parties involved.

[142] I agree with the fundamental importance of the subjective notion of impartiality included in paragraph 20.9(1)(a) and that this requires the parties (that is, the work place parties concerned by the allegations of work place violence) to agree on the impartiality of the person proposed by the employer. However, with respect, I am of the view that this interpretation fails to take into account the objective notion of impartiality which is also embedded in this provision.

[143] It warrants noting that paragraph 20.9(1)(a) includes two components. It refers to a person who *is* impartial and *is seen* to be impartial. In my opinion, this provision therefore sets out a two-part criterion comprising an objective and a subjective component that premise the appointment. In fact, in *Maritime Employers Association* v. *Longshoremen's Union*, Appeals Officer Hamel alluded to the objective component in stating at para. 58 that "[…] it is up to the employer to appoint a 'competent person', but that person's impartiality *must be genuin*e and seen as such by the parties involved" [emphasis added].

[144] The conjunction of "is" and "is seen" expressed in the present tense signifies, in the undersigned's opinion, that while the so-called parties to a complaint of work place violence destined to be investigated need to perceive ("is seen") as impartial the appointed person, perception being a concept entirely subjective thus meaning that different individuals may understand "impartial" in differing ways, the person or persons offered for appointment to investigate by a party (employer) that is not a party to the complaint, that party (employer) is held to a stricter criterion, that of offering for appointment a person (or persons) that effectively "is" impartial, thus objectively.

[145] One needs to point out as regards this criterion that the appellant dealt with the subject solely from the stand point of the subjective aspect, to wit from the stand point of the "competent person(s)" being seen or rather no longer being seen as impartial by the respondent, and not from the standpoint of said person being actually impartial at the time of appointment. In that sense, it is not surprising that, in the appellant's view, Ministerial Delegate Dubé lacked the jurisdiction to issue a direction to the employer for having failed to appoint an impartial investigator. Indeed, if one considers that paragraph 20.9(1)(a) refers only to a subjective notion of impartiality, then mutual agreement by all parties on the impartiality of a person offered for appointment would seem to resolve the matter once and for all.

[146] In this scenario, the question of the impartiality of the person appointed by an employer

would be settled through an agreement on that standing or quality by the parties involved. Accepting this interpretation could arguably entail that the parties, having accepted the competent person's impartiality, would be barred from calling it into question later in the process. Following this interpretation, a ministerial delegate would also never have to rule on the issue of the impartiality of the competent person, as it would be a question addressed strictly through mutual agreement by the parties.

[147] However, as discussed above, I am unable to accept this interpretation. In my view, to comply with its obligations under subsections 20.9(1) and (3) of the *Regulations*, an employer must appoint a person that *is* objectively impartial at the time of appointment, a phase of the process over which no party has questioned the jurisdiction of a ministerial delegate.

[148] In summary, I find that a ministerial delegate had the jurisdiction to investigate allegations of non-compliance with subsection 20.9(1)(a) at the time of appointment, in the same way as he or she may investigate allegations of non-compliance with subsections 20.9(1)(b) and (c), which deal with knowledge, experience and training.

[149] It is true that in this case, Ministerial Delegate Dubé focused on the issue of whether the appointed persons acted with impartiality while conducting their investigation and, therefore, went beyond the consideration of whether the competent persons were impartial at the time of appointment. That being said, her report and testimony at the hearing included uncontroverted evidence that one of the competent persons appointed by the employer was not acting at arm's length from the employer and the employee who raised the work place violence issue. There is also evidence that he approached the investigation with a closed mind. Accordingly, there is evidence that the ministerial delegate also questioned the impartiality of the competent person at the outset of the process, before the beginning of the investigation. Since this appeal is a *de novo* proceeding, I can consider this evidence to arrive at a conclusion on the correctness of the ministerial delegate's direction.

[150] In particular, I note that this individual, Mr. Brian Murphy, the employer's departmental occupational health and safety program advisor, was notified on July 8, 2014 by Person A (the complainant) that Person B was bullying her by screaming and yelling, using physical intimidation and using her authority to intimidate her and her colleague. He was thus already involved in the situation as the employer's representative who initially dealt with Person A's complaint, before the appointment of the competent person(s).

[151] According to the evidence, Mr. Murphy then coordinated the employer's response to the work place violence allegations. Along with the so-called departmental Work Place Violence Investigation Team (WPVIT), which included himself, he met with Person B's director to seek approval on the employer's response plan, including the launch of an investigation, as prescribed by section 20.9 of the *Regulations*. From the evidence, it can be inferred that Person B's director simply approved the response plan proposed by Mr. Murphy and the composition of the team that would act as the competent person(s). This is the process that led to the appointment of Mr. Murphy as one of the competent persons.

[152] In these circumstances, one would be tempted to speak of self-appointment and, at the

very least of the appointment of a person who had already discussed the situation with the complainant and was therefore not approaching the issue with a fresh eye, which, in itself, calls into question Mr. Murphy's impartiality. Moreover, the whole process was spearheaded by Mr. Murphy, who was an employee of the appellant. Incidentally, the other two members of the investigating team also appear to be employees of the appellant. I find that this suggests that, as a matter of fact, the investigation in this case resembled an investigation by the employer and did not look like an investigation by an impartial third party.

[153] These facts undermine Mr. Murphy's standing to act as the competent person given his prior dealings with the complainant (Person A) and the position that he held with the appellant at the time. In my view, they support Person B's position that she was deprived of her right to an investigation by an impartial investigator. It should also be noted that while she agreed to the selection of the investigative team, the employer never brought to her attention that, as a work place party involved in the alleged workplace violence incident, as a matter of law, the persons appointed to investigate the matter had to be "seen" by her to be impartial.

[154] In this respect, Mr. Murphy's September 4, 2014 email to Person B merely asked her to acknowledge that she had been made aware of the name of the team members and that she was in agreement. This correspondence also indicated to her that, if she disagreed with the identified team members, she had to provide a valid reason. Never was she asked whether she viewed the named individuals as impartial. In my opinion, a disinterested, unbiased and fair investigator would have informed Person B that she could have refused to agree with the appointment of any member of the team on the grounds of perceived lack of impartiality.

[155] What is more, on July 8, 2014, in internal correspondence mentioning the protagonists to the claim of work place violence by name, and clearly directed at the constitution of the "competent person" trio, the same person (Mr. Murphy) that would become a member of said trio clearly evidenced a lack of understanding of impartiality and training in presuming the allegation of bullying to be true, stating: "As this issue is unresolved and the bullying is still ongoing with the claimant and other parties within the team, I am asking that the [Work Place Violence] team be assembled in conducting the investigation".

[156] In one of his initial emails to Person B, at the outset of the investigation on September 9, 2014, he also indicated that he had already formed an opinion about the merits of the complaint when he wrote the following: "It was brought to our attention that bullying in the workplace has occurred in your work group. This is deemed to be workplace violence (WPV)." In my opinion, this is compelling evidence that Mr. Murphy approached the case with a closed mind or, at the very least, that Mr. Murphy did not abide by any reasonable standard of open-mindedness that should be expected from an impartial investigator.

[157] On that basis alone, I find that the preponderant evidence indicates that Mr. Murphy was not an impartial person at the time of appointment and that, therefore, the appellant failed to comply with its obligation to appoint a person meeting the definition of a competent person, as prescribed by paragraph 20.9(1)(a) of the *Regulations*. Accordingly, there is sufficient evidence to confirm the direction as drafted.

[158] For these reasons, it is not necessary in order to dispose of this appeal to rule on the issue of whether Ministerial Delegate Dubé was correct in finding that there is a requirement for an appointment of the "competent person" to be validly made under paragraph 20.9(1)(a) of the *Regulations* that the appointed person(s) maintain impartiality throughout the process. I will therefore refrain from making definitive findings on a ministerial delegate's power to examine the conduct of the investigators during the investigation and issue a direction to an employer as a result of concerns over procedural fairness arising during the course of the competent person's investigation.

[159] I will however make the following comments given that this issue was central to the appellant's position. As I understand it, the appellant has essentially constructed its position in this case on a single argument, that of the lack of jurisdiction of the ministerial delegate under section 145 of the *Code* to look at the conduct and progress of the investigation by the "competent person", the latter not being employer or employee, by reason of the authority under section 145 being restricted to application to employer and/or employee.

[160] Accepting this position would mean that a protagonist to a complaint having, *ab initio*, accepted (seen) as impartial a person presented as "competent" could not later, having come to know of reasons to no longer "see" as impartial that person and having acted with haste, hope to obtain redress through intervention by a ministerial delegate capable of gathering or receiving information under its general enforcement authority but deprived of jurisdiction to act on the information by directing corrective action; the only avenue of remedy for the said protagonist would therefore be the judicial review of an investigation report formulating recommendations that an employer is only under obligation to record.

[161] The respondent has clearly objected to this approach, and has argued that Parliament had created a comprehensive scheme in the *Code* which includes an enforcement mechanism designed to provide individual employees with access to a cost-effective and efficient means of ensuring compliance with the *Code*. In this regard, to restrict the jurisdiction of the ministerial delegate in the manner suggested by the appellant would undermine the efficacy of the said statutory enforcement scheme to the prejudice of those seeking fair resolution of disputes involving work place violence and forcing them to instead go through the costly process of judicially reviewing these issues.

[162] While I do not have to resolve this issue to dispose of this appeal, I tend to share the respondent's view. I see nothing in the wording of the *Regulations* that would lead to thinking that the qualities required for appointment by the employer do not need to be maintained all through the process of investigation. In my view, the use of the present tense (*is* impartial) suggests a continuous obligation.

[163] Also, considering the role or function of the so-called "competent person", which is to proceed with an impartial investigation of the work place violence allegation(s) (as opposed to the employer's own investigation into the complaint), I have difficulty to accept that satisfying the qualifying criteria of appointment as such should be considered as being merely for the purpose of appointment. In my view, and one could say primarily, the qualifying criteria to act as a competent person have been included for the purpose of ensuring that the competent person

properly fulfills its investigative role and formulates credible and informed conclusions and recommendations. These contextual points tend to support the view that a ministerial delegate should have the power to assess whether a competent person acted with impartiality while conducting an investigation into work place violence.

[164] Finally, I deem it necessary to address the respondent's arguments with respect to the employer's non-compliance with paragraphs 20.9(1)(b) of the *Regulations*. The second and third criteria of subsection 20.9(1) are both formulated in the present tense and, when read together with the appointment authority of the employer at subsection (3), must be interpreted as representing objective requirements that need to be satisfied at the time of appointment for such to be validated as properly constituting a "competent person". Those require that at the time of appointment, the person(s) destined to become the "competent person(s)" have ("has") knowledge, training and experience in issues relating to work place violence and have ("has") knowledge of relevant legislation.

[165] One needs to point out regarding those that differently from the first criteria, there is no indication that the parties to the complaint be consulted as to whether those criteria are met. In short, either the person proposed has the knowledge, training and experience to be appointed or he or she does not. If the person does, he or she can be validly appointed and if not, he or she cannot be validly appointed and cannot achieve the status of "competent" person by correcting those shortcomings in the course or at the conclusion of the investigation.

[166] The respondent submitted that other evidence supports a conclusion that the "competent person" or at least some of the members of this trio, did not satisfy the criteria needing to be met and maintained under paragraph 20.9(1)(b) of the *Regulations* relative to knowledge, experience and training, elements which must precede the appointment of the competent person and over which it argued there is clear authority for a ministerial delegate to investigate.

[167] I find myself in agreement with the respondent generally and with this last argument in particular. While the respondent has referred the undersigned to numerous elements that would support its position, I have retained some that in my opinion are clearly indicative of *ab initio* lack of compliance with the requirements for appointment at the level of training, experience and knowledge.

[168] While the actual investigation by the "competent person(s)" was initiated in September 2014 after appointment of said "person", one member (Mr. Murphy) of the trio had not even received basic work place violence training and would only receive such in January 2015, once all interviews had been completed and on the eve of the draft investigation report being signed on March 9 or 10 prior to being communicated to the respondent on May 25, 2015. This is when the respondent started to become aware of the shortcomings affecting the "competent person(s)" trio as well as the investigation they conducted. Undeniably, one member of the investigating team did not have the required training and knowledge at the outset of the investigation.

[169] Those elements, as well as others that were noted above in the summary of the respondent's position, are sufficient for me to conclude that the persons appointed by the

employer to conduct the investigation did not satisfy the criteria set out at paragraph 20.9(1)(b) at the time of appointment. Consequently, as I stated earlier that all three members of the "competent person" trio needed to satisfy all elements of the appointment criteria, this is thus sufficient for the undersigned to conclude that the employer did fail to appoint a competent person to conduct the investigation.

[170] Accordingly, I find that the employer also failed to appoint a person meeting the definition of a competent person as prescribed by paragraph 20.9(1)(b) of the *Regulations*, such that the direction should be varied to reflect that the employer failed to comply with the requirements of both paragraphs 20.9(1)(a) and (b).

Decision

[171] For these reasons, I vary the direction issued by Ministerial Delegate Dubé. The substance of the direction should have read as follows: The employer has failed to appoint a person meeting the definition of a "competent person" as prescribed by subsection 20.9(1) of the *Canada Occupational Health & Safety Regulations* to investigate a complaint of work place violence alleged to have occurred between two employees between August 2013 and July 2014.

Jean-Pierre Aubre
Appeals Officer

Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

APPENDIX

IN THE MATTER OF THE CANADA LABOUR CODE PART II - OCCUPATIONAL HEALTH AND SAFETY

VARIED DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

Between July 2015 and November 2016, Official Delegated by the Minister of Labour Nicole Dubé conducted an investigation in the work place operated by Natural Resources Canada, being an employer subject to the *Canada Labour Code*, Part II, at 580 Booth Street, Ottawa, Ontario, K1A 0E4.

The said official delegated by the Minister of Labour was of the opinion that paragraph 125(l)(*z.16*) of the *Canada Labour Code* and section 20.9(3) of the *Canada Occupational Health & Safety Regulations* had been contravened because the employer had failed to appoint a person(s) meeting the definition of a "competent person" as prescribed by paragraph 20.9(1)(a) of the *Canada Occupational Health & Safety Regulations* to investigate a complaint of work place violence alleged to have occurred between two employees between August 2013 and July 2014.

Following an appeal brought under section 146 of the *Canada Labour Code*, the undersigned appeals officer conducted an inquiry pursuant to section 146.1 with respect to the direction issued by the official delegated by the Minister of Labour.

As a result of his inquiry, the undersigned appeals officer is of the opinion that the following provision has been contravened and the direction issued by the official delegated by the Minister of Labour is varied accordingly:

Paragraph 125(l)(*z.16*) of the *Canada Labour Code*
Section 20.9(3) of the *Canada Occupational Health & Safety Regulations*

The employer has failed to appoint a person meeting the definition of a "competent person" as prescribed by subsection 20.9(1) of the *Canada Occupational Health & Safety Regulations* to investigate a complaint of work place violence alleged to have occurred between two employees between August 2013 and July 2014.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 16 of December, 2016.

Varied at Ottawa, this 14th day of March, 2018.

Jean-Pierre Aubre
Appeals Officer