Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-09-21
Case No.: 2018-38

Between:

Canadian National Railway Company, Appellant

and

United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, Respondent

Indexed as: *Canadian National Railway Company v. United Steelworkers*

Matter:	Appeal under subsection 146(1) of the Canada Labour Code of a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is confirmed.
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Andy Pushalik, Dentons Canada LLP
For the respondent:	Mr. Robert Healey and Ms. Cathy Braker, United Steelworkers Legal Department
Citation:	2020 OHSTC 6

REASONS FOR DECISION

[1] These reasons concern an appeal brought by Canadian National Railway Company (CNR or CN or the employer) under subsection 146(1) of the *Canada Labour Code* (the *Code*) of a direction issued on October 19, 2018, by Ms. Michelle Sterling, an official delegated by the Minister of Labour (ministerial delegate) from Employment and Social Development Canada (ESDC). The direction was issued under subsection 141(1) of the *Code*, following an investigation by the ministerial delegate into a complaint regarding workplace violence.

[2] The complainant was an employee of the appellant, CNR, a company within federal jurisdiction with respect to occupational health and safety. She alleged that a co-employee had engaged in violent behaviour towards her in the workplace. Under the *Canada Occupational Health and Safety Regulations* (the *Regulations*) made pursuant to the *Code*, the employer must appoint an investigator to look into the allegation. The investigator must be "competent" to do the investigation. As part of "competency," as defined in the *Regulations*, the investigator must be impartial, and be seen to be impartial, by the workplace parties.

[3] The complainant rejected 13 investigators proposed by the employer. All of the 13 were employees of the employer. The ministerial delegate issued a direction that the employer produce a list of potential investigators from outside the employer's organization.

[4] The employer is appealing that direction, taking the position that rejecting all proposed investigators was an abuse of rights by the complainant and that the ministerial delegate erred in her decision to issue the direction. The respondent believes that the direction should be confirmed. The case is not whether, or how, the complainant was subject to workplace violence. The parties believe that the case is a procedural one. It is focused on the requirement of "competency" for a workplace investigator, and more specifically on the necessary impartiality of the investigator.

[5] The appellant requested that the specifics of the workplace violence complaint as well as the name of the alleged violence offender remain confidential. According to the appellant, the allegations could significantly harm the alleged violence offender who is not party to this appeal and did not have an opportunity to dispute the complainant's version of the events.

[6] The appellant submits that the open court principle would not be harmed by keeping the alleged violence offender's name confidential because the specifics of the allegations are not relevant since the present appeal is about procedure, and not whether violence occurred.

[7] The respondent does not object to the alleged violence offender's name being kept confidential but insists that the complainant's name should also remain confidential, on the basis that research shows that women who come forward in the workplace with allegations of harassment or violence often suffer significant repercussions for doing so. The respondent notes that the complainant has already experienced such repercussions.

[8] Regarding the employer's request that the specifics of the allegations of workplace violence remain confidential, the respondent states that if the concern is for the employer's reputation, such a concern is not a legitimate basis upon which to grant a confidentiality order.

[9] While appeal hearings are open to the public in the normal course, it is possible for an appeals officer to issue a confidentiality or sealing order. The test for confidentiality known as the Dagenais/Mentuck is set out by the Supreme Court of Canada in *Toronto Star Newspapers Ltd.* v. *Ontario*, 2005 SCC 41, at paragraph 26. A limitation on the open court principle should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[10] This is not an issue which can be decided by the agreement of the parties since it involves the public's interest in the administration of justice.

[11] I find that it is appropriate in the circumstances of this case to anonymize the names of the two employees involved in the complaint. Accordingly, the complainant will be referred to as Ms. Y and the alleged violence offender will be referred to as Mr. X.

[12] Regarding the specifics of the complainant's allegations, I find that the concerns raised by the appellant do not outweigh the public interest in an open process. One of the many functions of caselaw in a legal system is educational. Workplace violence was not seen as an occupational health and safety (OHS) concern decades ago. Times change. But there is likely still a lot of misunderstanding about the nature and importance of workplace violence. It is important that observers have an opportunity to appreciate what might constitute workplace violence and understand how serious a hazard that workplace violence can be. I am therefore not convinced that a confidentiality order is necessary with respect to the details of the complainant's allegations.

Background

[13] Ms. Y began employment with CNR in early 2016. Ms. Y and Mr. X were both members of the same union, and both worked at CNR's Brantford Tool House in Ontario. They were welders. While Mr. X was not a member of management, Ms. Y did report to him in his role as a foreperson.

[14] In addition to negative and belittling comments, and swearing, Mr. X is alleged to have thrown tools and slammed truck doors. This was said to have created an unsafe work environment for Ms. Y. A report of such alleged behaviour would, on its face, appear to fit within the definition of workplace violence, and thus trigger a response from the employer.

[15] On April 19, 2018, Ms. Y called Ms. Jessica-Anne Smith (Ms. J-A Smith), a human resources manager for CNR, intending to report Mr. X's conduct. Ms. J-A Smith was not available, and Ms. Y left a message.

[16] The next day, Ms. Y complained to her supervisor, Mr. Lawrence Clark about Mr. X's behaviour. Later that day, she met with Mr. Clark and Senior Manager, Mr. Ben McRae, to discuss her complaint. Ms. Y's testimony was that she left that meeting with the feeling that neither Mr. Clark nor Mr. McRae took her complaint seriously. She felt they were questioning her integrity and she felt that she had done "something wrong" by complaining.

[17] Also on April 20, 2018, Ms. J-A Smith returned her call of April 19th. Ms. Y described Mr. X's behaviour. Ms. J-A Smith asked her to put her complaint in writing and send it to her.

[18] On April 23, 2018, Ms. Y emailed her complaint to Ms. J-A Smith stating that she had been the subject of an incident involving workplace violence. She indicated that she felt Mr. Clark and Mr. McRae had not taken her complaint seriously and that they had made her feel she had "done something wrong by raising the issue" with them.

[19] Also on April 23, 2018, Ms. Y asked Mr. Clark that she be removed from the Brantford workplace, and assigned elsewhere, as she did not want to work with Mr. X. Her request was denied and Ms. Y returned to the Brantford workplace.

[20] Ms. J-A Smith appointed Mr. McRae to investigate the matter. On April 27, 2018, Ms. Y was called to a meeting with Mr. Clark and Mr. X, with Mr. McRae participating by telephone. Ms. Y was advised by Mr. McRae that: 1) Mr. X denied being aggressive with her; 2) Mr. McRae did not believe Mr. X's behaviour was workplace violence; 3) Ms. Y would have to continue to work with Mr. X; and 4) Ms. Y should "move on" in the sense of making a fresh start. Ultimately, Mr. McRae was unable to complete the investigation because he could not meet further with Ms. Y as she had commenced a medical leave of absence.

[21] On April 30, 2018, Ms. Y contacted Labour Relations representative, Ms. Shelly Smith, and at the latter's request, sent a copy of the email she had earlier sent to Ms. J-A Smith.

[22] On May 2, 2018, Ms. Y received a "notice to appear" from Mr. Clark for May 4th. A "notice to appear" is part of CNR's disciplinary process. It indicates that the employer will be holding an investigatory meeting. The notice went to Ms. Y, Mr. X and two of Ms. Y's co-workers. The next day, the May 4, 2018 meeting was cancelled by the employer.

[23] On May 10, 2018, Ms. Y was assigned to work alone in a certain area of the Brantford workplace because it appeared to her that no one wanted to work with her because of her complaint. She felt isolated and ostracized by her co-workers. She was upset and called CNR's Employee Family Assistance Program. She spoke with a crisis counselor. She met with the counselor the next day. She was advised to go to the hospital. The emergency doctor at the hospital told her she was experiencing psychiatric trauma due to workplace harassment. The

doctor told Ms. Y to take two weeks off work. She was referred to a psychiatrist. Ms. Y remained off work with short-term disability benefits until October 2, 2018.

[24] On July 15, 2018, Ms. Y filed a complaint with ESDC alleging that she had been the victim of workplace violence and that her employer had failed to address her complaint.

[25] On August 1, 2018, ministerial delegate Sterling informed the appellant that Ms. Y did not view Mr. McRae as impartial, and therefore rejected him as a competent person for the purposes of investigating her complaint. Ministerial delegate Sterling directed the appellant to provide additional names of possible investigators.

[26] On August 31, 2018, the appellant proposed two new persons it believed could be competent investigators, Mr. John Abernot and Mr. Eric Laframboise. Both of these two individuals are supervisors at other CNR locations in Ontario.

[27] On September 6, 2018, the complainant informed ministerial delegate Sterling that she rejected the two proposed individuals as competent persons to investigate. The complainant did not believe that CNR employees could be impartial investigators.

[28] On September 12, 2018, the complainant asked the ministerial delegate that a person external to CNR be appointed as investigator. On September 13, 2018, the ministerial delegate informed Ms. J-A Smith that Ms. Y had rejected Mr. Abernot and Mr. Laframboise because she did not believe they were impartial.

[29] The appellant then proposed 10 additional persons, all of whom were CNR employees, and all of whom appeared to be in a managerial or supervisory position. However, none of them worked with Ms. Y or Mr. X. Four of the 10 were located in Nova Scotia or British Columbia.

[30] Ministerial delegate Sterling provided the appellant's list to Ms. Y on October 1, 2018. Within three hours Ms. Y informed ministerial delegate Sterling that she rejected the 10 individuals on the basis that she believed they would not be impartial investigators. Ms. Y indicated to ministerial delegate Sterling that she wanted an investigator who was external to CNR.

[31] On October 5, 2018, ministerial delegate Sterling requested that the appellant provide the names of proposed investigators external to CNR. Ministerial delegate Sterling gave the appellant a deadline of October 12, 2018. CNR did not provide any names in response.

[32] On October 19, 2018, ministerial delegate Sterling issued a direction pursuant to paragraph 141(1)(a) of the *Code* requiring the appellant to propose investigators who were not employees of CNR.

[33] The relevant portion of ministerial delegate Sterling's direction is as follows:

> ....conduct an enquiry into potential competent persons who are not employees of Canadian National Railway Company, and who meet the requirements of paragraphs 20.9(1)(b) and (c) of the Canada Occupational Health and Safety Regulations, and to provide a list of these potential competent persons to the complainant, no later than November 19, 2018.

[34] On November 19, 2018, the appellant filed an appeal of the direction with the Occupational Health and Safety Tribunal Canada (the Tribunal). The hearing was held before me in June 2019 in Toronto.

Issues

[35] According to the parties, the appeal raises the following issues:

1. Should the direction be rescinded because the complainant abused the process by rejecting all of the employer's proposed investigators?

2. Did the ministerial delegate err in issuing the direction to provide candidates from outside CNR's organization and thus failed to give CNR the option of proposing other internal candidates?

[36] As will be discussed, a direction issued under subsection 141(1) of the *Code* is not what is commonly referred to as a contravention direction. Ministerial delegate Sterling's direction of October 19, 2018, was not an express requirement that appellant bring itself into compliance with the *Regulations*. Therefore, in my view, this appeal raises an additional issue that must first be addressed. That issue relates to the nature of a subsection 141(1) direction and can be summarized as follows: Whether the direction was within the authority granted by subsection 141(1) of the *Code* and whether there was anything improper or erroneous about it.

Submissions of the Parties

Appellant's Submissions

[37] The appellant's position is that ministerial delegate Sterling's direction should be rescinded because it was:

1. the result of an abuse of rights by Ms. Y; or
2. the result of an error on the part on the ministerial delegate in that the ministerial delegate did not give the employer the option of appointing internal investigators.

[38] In support of its abuse of rights argument, the appellant relies on the decision of Appeals Officer Hamel in *Maritime Employers Association* v. *Longshoremen's Union (CUPE, Local 375)*, 2016 OHSTC 14 (*Maritime*). Although the appeals officer in *Maritime* articulated an "abuse of rights" test for section 20.9 of the *Regulations*, the appeals officer did not find a systematic refusal or a refusal based on abusive factors. It was found that the employee in *Maritime* had some reason to be wary of management and so was not abusing his rights under

subsection 20.9(3) of the *Regulations* by rejecting two proposed investigators as competent persons on the basis that they were management employees.

[39] In the current case, the appellant's position is that Ms. Y's rejection of the proposed competent persons is "precisely the kind of abuse of process which Appeals Officer Hamel had warned about". The complainant "systematically refuse[d] to accept CN's proposed investigators simply because they worked for CN."

[40] The appellant made the following points to distinguish the case at hand from the facts in the *Maritime* decision, and to thus establish that there was an abuse of rights on the part of Ms. Y:

- CNR put forward a total of 13 candidates, which were all rejected (there were only two candidates in the *Maritime* case).
- With the exception of Mr. McRae, none of CNR's proposed competent persons knew Ms. Y, or Mr. X, or had any prior knowledge of the case.
- For the list of 10 candidates, Ms. Y took less than 3 hours to decide that they were all unacceptable; the lack of consideration being a sign of systematic abuse of rights.
- Unlike the *Maritime* case, the alleged perpetrator of violence, Mr. X, was not a management employee. As a dispute between two union employees, Ms. Y had no reason to believe that any candidate proposed by the employer would be biased in favour of one or the other.
- Unlike the *Maritime* case, there was no history of disputes between the employee and the employer. There was no reason for Ms. Y to be wary of management.
- There was no indication that any of the proposed competent persons were biased or had pre-judged the case.
- There was no basis for rejecting the candidates other than that they were employees of CNR, and that basis for rejection is not reasonable.

[41] In summary, it is the appellant's view that the case at hand is different in many respects from the *Maritime* case, where abuse of rights was not found, but the facts of the current case do fit the "abuse of rights" test Appeals Officer Hamel set out in *Maritime*.

[42] The appellant also argues that requiring employers to appoint external investigators rather than their own employees would have serious detrimental effects on employers:

- Permitting an employee to reject candidates solely because they are employees would allow complainants to "hold employers hostage with the threat of unreasonable and substantial costs."
- CNR has a "robust system of policies" regarding the investigation process, which provides a "coaching opportunity" where human resources and labour relations professionals work closely with managers on sensitive issues. This process, and CNR's ability to manage, would be undermined if "external investigators were required in every instance."
- Trust between CNR and its employees would be eroded "[i]f every investigation was

required to be out-sourced."

- CNR's business is unique and complicated. External investigators would have to learn CNR's business. Investigations by internal investigators would be "quicker, more efficient and more effective."
- CNR "deals with thousands of investigations each year". To "require CN to use an external investigator for each of those investigations" would be prohibitive from a cost perspective.

[43] The appellant objects to Ms. Y's position that, since all the proposed candidates received the same training as Mr. McRae, and as she felt Mr. McRae did not handle her complaint well, she believed all the candidates were incapable of performing an impartial investigation. The appellant's objection is based on the following grounds:

- The complainant raised the issue of training for the first time at the hearing.
- The complainant had no information about the training of investigators until she heard a witness at the hearing give evidence about training.
- There is no indication that the complainant ever raised the issue of training of investigators with ministerial delegate Sterling or anyone else involved.

[44] As an alternative to arguments about the complainant's alleged abuse of rights, the appellant argues that ministerial delegate Sterling made an error when issuing the direction. Since the appeal of a direction is an appeal *de novo,* it is open to the Tribunal to vary or rescind a direction based on the ministerial delegate's error.

[45] The alleged error by ministerial delegate Sterling is that she directed the appellant to propose only external investigators and did not provide any other option to the appellant. At the hearing, Ms. Y stated that she might have accepted members of CNR's labour relations or human rights team as an investigator, or perhaps a fellow bargaining unit member. CNR made it clear to ministerial delegate Sterling prior to the direction that it objected to an external investigator but the ministerial delegate never gave CNR the option of proposing some other type of internal investigator.

[46] According to the appellant, the direction should be rescinded or amended because it is unreasonable to require "employers [to] incur the significant cost of an external investigator when the parties agree that an internal employee could be a competent person." The appellant was concerned for "the future application of this legislation."

[47] In summary, the appellant requests that the direction be rescinded or, in the alternative, be varied "to reflect the fact that [Ms. Y] would have accepted an internal investigator and thus the appointment of an external investigator was unnecessary."

Respondent's Submissions

[48] The respondent's position is that ministerial delegate Sterling's direction should be upheld because it is consistent with the requirements of subsection 20.9(1) of the *Regulations*.

Further, Ms. Y's rejection of CNR's proposed candidates was reasonable given the manner in which the employer's supervisors and managers handled her initial complaint.

[49] The respondent emphasizes that Ms. Y felt that she had been badly treated by Mr. Clark and Mr. McRae in her initial meetings. In particular, Mr. McRae's conduct indicated to her that he could not be impartial in an investigation. Her reasoning was that if Mr. McRae was an example of how managers at CNR were trained to handle harassment issues, then she did not believe that other CNR investigators could be impartial either.

[50] At the hearing, Ms. Y testified that she would not necessarily have rejected all internal CNR candidates. She stated she might have considered a candidate from CNR's labour relations or human resources departments. She was rejecting CNR supervisors and managers on the basis of Mr. McRae's performance.

[51] The respondent's position is that ministerial delegate Sterling correctly assessed the situation and cited her analysis in her letter of October 5, 2018 to CNR:

> During our call, I advised that internal parties from CN may be rejected by the complainant as not meeting the criteria for being impartial. Although the legislation does not require a competent person be from an external source, I advised that the complainant has the right to determine whether or not she believes that the proposed party is impartial and that the complainant may believe that any internal party is not seen to be impartial. It was at that time that I provided you with a copy of the Labour Program *Internal Policy Guideline 943-1-IPG-081 entitled Violence Prevention in the Work Place*. Section 11.1 of the IPG states:
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> > Any objection by a party regarding the CP's [Competent Person's] impartiality is sufficient to disqualify the CP. In these cases, the employer cannot question the party's objection, and instead must propose alternate CPs until one acceptable to all parties is found. Failure to do so would contravene 20.9(1)(a) and 20.9(3) of the COSHR.
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> At no time did I state, as is written in your letter dated September 27, 2018, that "only an external third party would qualify as a competent person" as it is not for me to determine who a party to the complaint would see as impartial but rather only the parties involved in the complaint would be able to make that determination. I was merely attempting to advise that if the complainant did not believe internal parties to be impartial then an outside source should be proposed.

[52] The respondent contends that paragraph 20.9(1)(a) contains both an objective and a subjective element. Objectively, a competent person must actually be impartial. In addition, subjectively, a competent person must be seen by the parties to be impartial. In the respondent's view, the subjective component means that any party can reject a candidate as not being impartial for any reason.

[53] The respondent relies on the *Maritime* decision, wherein Appeals Officer Hamel stated that paragraph 20.9(1)(a) has a subjective component, and that this subjective requirement for impartiality leads to the conclusion that the parties must agree on the impartiality of the proposed competent person.

[54] The complainant also referenced Appeals Officer Hamel's decision in *Canada Post Corporation* v. *Canadian Union of Postal Workers*, 2019 OHSTC 5 (*Canada Post*), first, for the overall importance of the competent person selection process and then on the existence of both an objective and subjective element to impartiality:

> [88] The outcome of the competent person investigation is an important part of the employer's obligations to maintain and review the effectiveness of the controls and prevention measures on an ongoing basis, as required by the *Regulations*. The competent person's report, which is to contain conclusions and recommendations further to a "full-fledge" and "formal" investigation of the employee's complaint, is designed to be instrumental to the employer in meeting that obligation, in addition to providing an avenue of redress to the complainant, as the Court puts it. The importance of the competent person process and its outcome in the overall work place prevention scheme must not be minimized and should be in the forefront when interpreting and applying the language of paragraph 20.9(1)(a).
>
> [89] That provision refers to the requirement of impartiality. It sets out two dimensions under which that concept must be examined: an objective and a subjective one. As the appeals officer pointed out in *Natural Resources Canada*, the person to be appointed must satisfy both dimensions in order to be appointed. As I stated in *Maritime Employers Association*, the first dimension may be difficult to establish at the appointment stage since the concept of impartiality is an attitude of mind of the person, involving a capacity to proceed with the investigation with an open mind, with neutrality and in a disinterested way. It implies an inclination to weigh the facts and opinions equally and without favouritism or prejudice towards one of the parties... Such disposition of the mind may not be readily ascertainable at the time of appointment. This, in my view, explains why the legislator has added a subjective dimension to ensure the impartiality of the process. I stated as follows in *Maritime Employers Association*, at paragraphs 54 to 56...
>
> [90] Appeals officers and the Courts have therefore used words such as "acceptance" and "agreed to" in relation to the appointment of the proposed person insofar as that person's impartiality is concerned. The need for impartiality is such an important feature of the scheme that the acceptance must, in my view, be clear, unequivocal, informed and without reserve in order to attain the objective sought by the legislator. My interpretation of this requirement is supported by reference to the Labour Program's IPG, Appendix C (Competent Person Report Template), which provides at item 6 details on the "competent person", including the following sentence: "Complainant **accepts** selected competent person (Yes – No)" [emphasis added]. IPGs are not binding on the appeals officer, but may provide useful guidance on the interpretation and understanding of the statutory framework under the *Code (Attorney*

> *General of Canada v. Public Service Alliance of Canada*, 2015 FCA 273).
>
> [91] I will therefore first focus to the subjective element of impartiality, which is "to **be seen** by the parties to be impartial" [emphasis added], which in my view is determinative of the appeal. Has Mr. King expressed clearly and unequivocally that he accepted Mr. Stienke as being impartial?
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> [92] The respondents argue that the onus is on the employer to establish such acceptance. In my opinion, the question is not on which party rests the onus of proof, as it has been stated in a number of appeal decisions since *Canadian Freightways Ltd v. Canada (Attorney General)*, 2003 FCT 391. Rather, I must be satisfied, on a balance of probabilities after inquiring into the circumstances of the direction and the reasons for it (subsection 146.1(1) of the *Code*), that the appointment of Mr. Stienke was acceptable to all parties.

[55] In the respondent's view, the question then is whether or not the persons proposed by the appellant were "acceptable to all the parties" in this case. It is clear that Ms. Y did not find the proposed candidates acceptable and, in the words of the respondent, "that should be the end of the matter"–the direction should be confirmed.

[56] The respondent disagrees with the appellant's position that ministerial delegate Sterling should have evaluated the *bona fides* of Ms. Y's subjective opinion. In particular, the respondent does not agree that ministerial delegate Sterling should have concluded that Ms. Y's rejection of the internal candidates was an abuse of rights. While the appeals officer in the *Maritime* decision may have described the possibility of abuse of rights, the appeals officer in *Maritime* was of the view that a complainant does not have to justify their rejection of a candidate:

> [59] Therefore, I agree with Ms. Perreault's interpretation of the requirement of paragraph (a): it is sufficient that a party does not consider the proposed investigator impartial for the person to be unable to proceed under this section. This does not mean that I accept the claim that Ms. Charbonneau and Mr. Pratt are not impartial: it is not up to me to rule on this issue, since the Regulations require mutual agreement by the parties on that standing. Thus, I do not agree with the appellant's contention that a refusal to consider a person impartial must be substantiated and justified: I am of the opinion that such an approach adds a substantive condition to the legislation, which I consider clear and not open to interpretation or limitation. There is no such agreement in this case, as the evidence shows. It follows therefore that the employer failed to appoint a "competent person" as required by subsection 20.9(3).

[57] The respondent also cited the case of *Employment and Social Development Canada* v. *Canada Employment and Immigration Union*, 2018 OHSTC 11 (the *ESDC* decision) in which Appeals Officer Néron confirmed a direction that an investigator be appointed from outside of the Government of Canada on the grounds that the complainant believed that no Government employee could be an impartial investigator.

[58] The respondent is of the view that since it has been held in previous tribunal decisions that objections based on criteria such as in the *ESDC* decision are reasonable, then such objections cannot *per se* be abusive.

[59] The respondent notes that while the appellant argued that Ms. Y was unreasonable because her complaint did not involve a member of management, that she had no history of disputes with management and that the proposed management candidates did not know her or Mr. X, they point out that the appellants have failed to address Ms. Y's explanation for rejecting CNR's proposed candidates, which had to do with her negative experience with Mr. Clark and Mr. McRae when she initially made her complaint. It was reasonable for Ms. Y to conclude that CNR's supervisors and managers in general could not be impartial since they would have the same training to conduct such investigations as Mr. McRae.

[60] The respondent does not agree that Ms. Y's concerns about the training and knowledge of proposed investigators was raised for the first time at the hearing as there was some documentary evidence of her concerns at an earlier time.

[61] As for the appellant's argument that directing the employer to engage external investigators would be cost prohibitive as CNR conducts "thousands" of such investigations every year, the respondent suggests that CNR might consider being more proactive in dealing with the problems of workplace violence. The respondent had some other helpful suggestions for the employer to ensure its costs of investigating do not get out of hand.

[62] On the question of varying the direction so that the employer could have an opportunity to propose an internal candidate, the respondent objects on the basis that the employer could have proposed, early on, other types of internal investigators, such as a labour relations or human resources employee, but choose not to do so. In any event, the employer, at the time of submissions, had, in the respondent's view, still not adequately dealt with Ms. Y's concerns.

[63] The respondent submits that ministerial delegate Sterling's direction should be confirmed.

Reply

[64] The appellant, in its reply, takes issue with the suggestions in the respondent's submissions that the employer has been delaying the completion of the investigation or that it has not been in compliance with the direction. Some details concerning the engagement of an external investigator were provided.

[65] The appellant maintains its position that the training of the proposed competent persons is irrelevant. The appellant states that the record does not show that Ms. Y ever raised the issue of training prior to the issuance of the direction.

[66] The appellant points out that at the hearing, the issue of further evidence concerning training was dealt with by me in my determination that the hearing was concerned with paragraph 20.9(1)(a) regarding impartiality and not with paragraphs (b) and (c) which are concerned with the training aspects of competency. I indicated that evidence regarding training could be relevant only on the issue of impartiality.

[67] The appellant also takes issue with the respondent's interpretation of section 20.9 of the *Regulations*. In short, allowing a complainant to reject candidates without having to provide an explanation would lead to an unworkable and unfair process.

[68] The appellant emphasized the dilemma which could be created if all the parties had a veto, using as an example: "... a complainant who has committed violence in the workplace would be able to delay and prevent investigations into their conduct simply by stating that they do not see any proposed competent person as impartial." The appellants say an interpretation of subsection 20.9(1) that results in a veto for all parties could lead to an impasse, which "would not promote the aims of the *Regulations.*"

[69] In addition, the appellant argues that the respondent's interpretation of section 20.9 does not treat all parties equally. The employer believes that the employer loses its right to veto the competent person.

[70] The main thrust of the appellant's argument is that the parties must provide some rational basis for their position that any proposed competent person is not "seen to be impartial."

[71] The appellant did not address directly the position taken in previous Tribunal cases that there is an objective and a subjective aspect to paragraph 20.9(1)(a). The appellant's position appears to be that subsection 20.9(1) is a completely objective test for competent persons.

[72] The appellant reiterated its position that ministerial delegate Sterling was in error in issuing a direction requiring that an external person be appointed.

Analysis

[73] This an unusual case in that it concerns an appeal of a direction made under paragraph 141(1)(a) of the *Code* and is not the usual contravention direction under subsection 145(1), nor is it a danger direction under subsection 145(2).

[74] Paragraph 141(1)(a) of the *Code* reads as follows:

> **Accessory powers**
> **141 (1)** Subject to section 143.2, the Minister may, in carrying out the Minister's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may
>
> (a) conduct examinations, tests, inquiries, investigations and

> inspections or direct the employer to conduct them;
>
> [Emphasis added]

[75] The relevant portion of the ministerial delegate's direction under the authority of subsection 141(1) is as follows:

> ...conduct an enquiry into potential competent persons who are not employees of Canadian National Railway Company, and who meet the requirements of paragraphs 20.9(1)(b) and (c) of the Canada Occupational Health and Safety Regulations, and to provide a list of these potential competent persons to the complainant, no later than November 19, 2018.
>
> [Emphasis added]

[76] The purpose of Part II of the *Code* is set out in section 122.1:

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

[77] In accordance with section 12 of the *Interpretation Act*, RSC 1985, c. I-21, questions of interpretation should be guided by the purpose of the legislation. The *Code* Part II (and its *Regulations*) should be interpreted liberally so as to further the prevention of (in this case) injury to health with respect to the workplace. The meaning of a particular provision should not be considered in isolation, but in the context of the whole of the *Code* Part II (and its *Regulations*).

[78] Subsection 141(1) of the *Code* contains a long list of "powers", similar to those of other types of regulatory inspectors or officers. The subsection is "regulation independent" in the sense that the powers of the Minister are not tied to the *Regulations*. It is not necessary to look for a prescription in the *Regulations* as to the details of when and how the Minister is to exercise the powers in subsection 141(1).

[79] The overall scheme of the *Code* Part II is reliant on what in OHS practice is called "the internal responsibility system" (IRS)–the philosophy of internal consensual resolution of OHS issues by all workplace parties. The IRS consists of: 1) duties, for the employer and for all employees as individuals; 2) employee rights (such as the right to refuse dangerous work) and; 3) the involvement of workplace committees and representatives. The purpose of the *Code* (section 122.1) is to be carried out primarily through the IRS. If the IRS is working well then risk is reduced and employees are protected. If the IRS fails or isn't working well, then that is when the external authority, the ministerial delegate, plays a critical role.

[80] In light of this IRS perspective, the purpose of subsection 141(1) becomes clear. If the IRS were working properly then concerns, complaints and suggestions would be encouraged and problems would be identified by the workplace parties and appropriate action would be taken by

the workplace parties. But if the IRS is not working well, then there would be potential problems that are not addressed. This is when the external authority, the ministerial delegate, is needed.

[81] Under the IRS, every employee has duties as well as rights. Subsection 126(1) of the *Code* contains a general duty for employees in paragraph (c) and a duty to report hazards in paragraph (g):

> **126 (1)** While at work, every employee shall
> [...]
> (c) take all reasonable and necessary precautions to ensure the health and safety of the employee,
> [...]
> (g) report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, ...

[82] When an employee becomes aware of a potential problem regarding workplace violence, the employee has a duty to take action and, specifically, a duty to report the circumstances to the employer. The making of a report triggers both the employer's general duty under section 124 and the more specific and relevant duties in section 125.

[83] Express provisions regarding workplace violence have been added to the *Code* and its *Regulations*. Paragraph 125(1)(z.16) of the *Code* is a regulation-dependent duty. The prescriptions are found in Part XX of the *Regulations*. Paragraph 125(1)(z.16) of the *Code* reads as follows:

> **Specific duties of employer**
> **125 (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> [...]
>
> **(z.16)** take the prescribed steps to prevent and protect against violence in the work place;

[84] If the workplace parties follow the steps in the *Regulations*, the problem will likely be resolved. If the IRS is not working well, particularly if there is an impasse, then the external authority, the ministerial delegate, is needed. A direction may be necessary.

[85] Returning to subsection 141(1), does the word "direct" in paragraph 141(1)(a) mean the power to issue a direction? The answer must be "yes" since subsection 141(2) refers to "directions" made under subsection 141(1):

> **Directions whether or not in work place**
> 141(2) The Minister may issue a direction under subsection (1) whether or not the Minister is in the work place at the time the direction is issued.
>
> [Emphasis added]

[86] While unusual, it is not unknown for a ministerial delegate to issue a subsection 141(1) direction. In *Monam Industries Inc.*, 2010 OHSTC 14, Appeals Officer Néron confirmed a subsection 141(1) direction that required the employer to have a qualified person inspect the tires of a lift truck in order to ensure that a hazard did not exist. There was no mention of a contravention of the *Regulations* or the existence of an actual danger. Appeals Officer Néron simply satisfied herself that there was a potential problem that needed an inspection.

[87] In *Andre Schauz* v. *Tudhope Cartage Ltd.*, 2012 OHSTC 32, the Health and Safety Officer (HSO), as the *Code* referred to them at the time, issued a direction under paragraphs 141(1)(h) and (i) requiring the employer to provide documentation concerning an internal dispute process. Appeals Officer Wiwchar upheld the direction stating:

> [18] [These] powers ... are discretionary powers of a HSO. In other words, these powers arise not out of the finding of a contravention of the *Code*, but pursuant to the discretionary authority of an HSO to determine what is needed to conduct their investigation into an occupational health and safety matter that has arisen under Part II of the *Code*.

[88] Subsection 146(1) of the *Code* states that a person aggrieved by a direction has the right to appeal the direction:

> **Appeal of direction**
> **146 (1)** An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction to the Board, in writing, within 30 days after the day on which the direction was issued or confirmed in writing.
>
> [Emphasis added]

[89] The right of an aggrieved person to appeal a direction in subsection 146(1) is not specific to section 145 contravention directions and danger directions, but merely says "a direction," meaning a direction of any type, including a subsection 141(1) direction.

[90] In subsection 146.1(1), the duty of the appeals officer to hold an inquiry upon an appeal refers to section 146, and, as just seen, section 146 implicitly includes a subsection 141(1) direction.

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

[91] The appeals officer can vary, rescind or confirm a subsection 141(1) direction, but the appeals officer can only (expressly) issue a new direction for a danger direction and not (expressly) for a contravention direction or any other type of direction. A party does not have to request that a new direction be made; it is at the discretion of the appeals officer. For the case at hand, I do not see any reason to consider a new direction, and so do not have to decide if there is an implicit power to issue a new direction.

[92] A variation of the ministerial delegate's direction, however, is at issue since the appellant has put forth an alternative argument that the direction should be varied to allow it to propose internal competent persons.

[93] Directions issued under subsections 145(1) and (2) have as preconditions that a ministerial delegate find a contravention or that something is a danger. The only relevant, express precondition for a subsection 141(1) investigation direction is that the ministerial delegate be "carrying out the Minister's duties." There is no question that the ministerial delegate was carrying out the Minister's duties by attending to a complaint by an employee about how a workplace violence investigation was being done.

[94] In the normal case, the ministerial delegate directing an employer to "conduct examinations, tests, inquiries, investigations and inspections" under subsection 141(1) could have an immediate result of discovering that there exists a contravention or not, or a danger or not. It is a completely separate action for the ministerial delegate to subsequently decide to issue a subsection 145(1) or (2) direction.

[95] Putting it another way, a subsection 141(1) direction, in its immediate effect, is a relatively low impact direction compared to a subsection 145(1) or (2) direction. For the latter, the employer would normally have to expend some time, money and energy to correct the contravention or eliminate the danger. The immediate impact on the employer of a subsection 141(1) direction is the time, money and energy to do the examination, test, inquiry, investigation or inspection. It is true that often such activities can be expensive, but usually not as expensive as fixing any problems discovered. It is possible that there could be no further expense at all after conducting any of the above if it turned out that there was not a problem to be fixed. Much may be at stake on an appeal of a subsection 145 (1) or (2) direction. Less so, normally, for an appeal of a subsection 141(1) direction.

[96] It can be said that subsection 141(1) has as its purpose the need to find out if there is a problem, while subsections 145(1) and (2) have as their purposes the correction of a contravention or the elimination of a danger. The power of the ministerial delegate under paragraph 141(1)(a) does not rest on a pre-condition that there actually be a problem. For example, a ministerial delegate has the power to randomly attend at workplaces to do inspections under subsection 141(1)–to see how things are going–without having to articulate any suspicions as a pre-condition to doing the inspection.

[97] If the ministerial delegate can exercise its power under paragraph 141(1)(a) without satisfying any pre-condition (other than being on the Minister's business and attending the workplace during a reasonable time), then it could be said that the ministerial delegate has the power to direct the employer to conduct examinations, tests, inquiries, investigations or inspections without satisfying any significant pre-condition.

[98] The reason why subsection 141(1) is worded the way it is, empowering the ministerial delegate to direct an employer to conduct examinations, is because the ministerial delegate has expertise in the *Code* and its *Regulations* and has a very broad knowledge of hazards and controls in the field of OHS. But the ministerial delegate is not normally an expert in some of the OHS sub-fields. The ministerial delegate is not normally an ergonomist, an occupational hygienist, a safety engineer or an occupational physician or nurse. Yet the ministerial delegate should be able to see that something may present an ergonomic, occupational hygiene, engineering, etc. problem and that a specialist is necessary to determine if there really is a problem, how serious it is, and what to do about it, if at all. The ESDC can hire a stable of expert employees to be on hand, or can pay for consultants, or the ministerial delegate can direct the employer to retain and pay for any needed expertise. All three are possible, but it is subsection 141(1) that empowers the ministerial delegate to take the latter option.

[99] Specifically, on the question of outside consultants, most employers likely do not have a full array of OHS specialists on staff. If an employer did employ a specialist the ministerial delegate may simply direct that a certain type of test or investigation, etc. be conducted, and the employer would use its own staff to do so. But very often the ministerial delegate will direct that a study be done by a specific kind of specialist–an engineer, ergonomist, etc.–who is not employed by the employer. The employer would then have to retain and pay for an external consultant.

[100] If a ministerial delegate on a routine visit, or a visit to a workplace on another matter, happened to observe yelling, swearing, bullying, shoving and so on and, without any complainant at all, raised the issue of workplace violence with the employer, this would trigger the beginning of the section 20.9 investigation process under the *Regulations*, starting with an initial attempt to resolve the matter under subsection 20.9(2):

> **20.9(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.

[101] Subsection 20.9(2) doesn't require that there be a complainant. The very important point is that the ministerial delegate has the power under subsection 141(1) to immediately direct the employer to retain expertise to inquire into or investigate the possibility of workplace violence. Subsection 141(1) is in the *Code*, not the *Regulations* and it is not part of, or referenced in, section 20.9 of the *Regulations*. Nothing in subsection 141(1) of the *Code* is contingent on anything in the *Regulations*. Nothing in section 20.9 of the *Regulations* can restrain the ministerial delegate's authority under subsection 141(1) of the *Code*.

[102] The situation is no different than if the ministerial delegate had directed the employer to retain a Certified Industrial Hygienist to investigate exposure to a chemical, or to noise, or to heat stress or if the ministerial delegate had directed the employer to retain a professional structural engineer to examine a building or a mechanical engineer to examine or test certain machinery.

[103] Are there substantive limits to the ministerial delegate's authority under subsection 141(1)? Are there any potential grounds for appeal? There could possibly be bad faith (*mala fides*) on the part of the ministerial delegate, using his or her authority for a purpose other than the purposes for which it was granted (e.g. directing the employer to retain a friend of the ministerial delegate as an expert, or receiving a "kickback" from an expert consultant). No such thing was alleged or exists in the case at hand.

[104] Another possible ground of appeal for a subsection 141(1) direction is that there is no rational connection between the direction and anything going on in the workplace; that no reasonable person in the shoes of the ministerial delegate would think there was any reason to look further upon the bare hint of a problem, or no hint at all.

[105] An indication of how little the ministerial delegate needs to issue a subsection 141(1) direction is that, according to subsection 141(2), the ministerial delegate need not be in the workplace when the direction is issued. Presumably this is for emergencies or for other practical concerns. The ministerial delegate does not have to take the weekly airplane up to Resolute Bay in the high arctic in order to direct an investigation of some problem in the airport hangar.

[106] Another possible ground of appeal for a subsection 141(1) direction is that what the employer is being directed to do is not rationally related to the type of potential problem initially identified. For example, the ministerial delegate might reasonably believe there is a potential problem with exposure to noise, either because there has been a complaint, or because the ministerial delegate has personally experienced the noise. But then, instead of directing tests for noise, the ministerial delegate directs the employer to do a violence in the workplace investigation. That would be an improper direction. In the case at hand, there was a complaint about violence in the workplace and ministerial delegate Sterling's direction was about an investigation into violence in the workplace.

[107] It might be argued that the cost implications of the direction make it improper on the basis that the costs are unreasonably high. This is a variation on the claim that the substance of the direction is not sufficiently tied to the nature of the potential problem. A ministerial delegate might direct a party to engage in such an extensive testing program that its scope in terms of time, money and energy is unreasonable relative to scope of the potential problem. For example, it might be unreasonable to direct an employer to do extensive air quality testing at all its numerous locations across Canada when it is quite clear that there is a potential problem at only one unique location.

[108] To summarize, the more obvious grounds of appeal of a subsection 141(1) direction are:

1. Bad faith on the part of the ministerial delegate;
2. The lack of a rational connection between the direction and what exists or is happening in the workplace (there is no reason to believe a problem might exist);
3. There is a reason to believe a problem might exist, but there is a lack of a rational connection between what the recipient of the direction is being asked to do and the type of potential problem initially identified.

[109] It should be noted that subsection 141(1) authorizes the ministerial delegate to enter workplaces to do inspections. The ministerial delegate does not need to have a reason to believe a problem might exist in order to do an inspection. Inspections are normally proactive activities to see if potential problems exist. Activities such as "testing" or "investigating" are normally reactive activities; they are triggered by a particular concern. A ministerial delegate would have to have a reason to direct the employer to do expensive testing for an airborne contaminant (a suspicion would do, but there would have to be a reason for the suspicion), but nothing in what has been said above should interfere with the power of the ministerial delegate to enter a workplace to do inspections (even a suspicion of a problem is not necessary).

[110] It is at this point that we come to a difficult question. If there had been no mention of a potential contravention of the *Regulations*, then we would need to consider the three grounds above. None would apply and confirmation of the ministerial delegate's direction would follow.

[111] While the subsection 141(1) direction is not a contravention direction, its appropriateness is tied to whether there appears to be a problem with compliance with Part XX of the *Regulations*. If the employer had proposed competent persons and the complainant had engaged in an abuse of rights by rejecting all proposed candidates, then there would be no basis for a direction requiring the employer to propose further candidates with certain characteristics acceptable to the complainant (a candidate from outside the employer organization).

[112] Ministerial delegate Sterling's direction was for an "enquiry," not an "investigation." It was not an enquiry to determine if there was a contravention or a danger. It was not an enquiry "to see if we have a problem here." It was an enquiry to find potential competent persons who were impartial, trained and experienced. As such it was within the broad scope of the authority of subsection 141(1), but only marginally so. It is fair to say that in circumstances that the ministerial delegate found herself in, it may have been more appropriate to issue a subsection 145(1) contravention direction. That the latter direction would have been more appropriate does not invalidate the subsection 141(1) direction that was issued.

[113] Nevertheless, as the direction was issued in the context of a dispute about compliance with the *Regulations*, the question arises whether there were sufficient grounds to believe that inquiry into potential investigators was necessary.

[114] I will now address the issues raised by the parties in their written submissions: 1) Was it abusive of the complainant to reject 13candidates for competent person on the basis that they were not persons external to the employer's organization and therefore not impartial? 2) Did the

ministerial delegate err in directing the employer to propose candidates from outside the organization without giving the employer the opportunity to propose internal candidates?

[115] The definition of "work place violence" in section 20.2 of the *Regulations* is very broad. The focus is on harm, injury or illness to an employee:

> **20.2** In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.

[116] Violence in the workplace is unlike other hazards such as unguarded machinery or a flammable liquid, in that violence involves people and it can be subtle and engaged in deceptively. It can be difficult to determine matters one way or the other. This aspect of work place violence is noted here because an investigation into workplace violence will focus on testimony, credibility, bias and other "people factors." Because people in the workplace may know each other, have relationships, have a history, have different perspectives, and so on, it becomes important exactly who an investigator is in a particular case. By way of comparison, when OHS committee members are selected to do workplace inspections under paragraph 135(7)(k) of the *Code*, there is no express concern or process in the *Code* to ensure that the workplace inspectors are "impartial." We do not worry as much about the impartiality of people who are examining unguarded machinery or flammable liquids as we are about the impartiality of people investigating who said and did what at particular times and places.

[117] Having set out all of the above, this case is not about whether Mr. X's alleged actions constituted violence or whether violence occurred or the nature of the alleged harm to Ms. Y. The case is concerned with the procedural issue of how an investigation into an allegation of violence is to be conducted.

[118] The issue at this point is who is a "competent person" to investigate an allegation of work place violence. More narrowly, the question is who is impartial and seen to be impartial when conducting an investigation.

[119] Subsection 20.9(1) of the *Regulations* defines a "competent person" as follows:

> 20.9 (1) In this section, **competent person** means a person who
>
> (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.
>
> [Emphasis added]

[120] It seems clear from previous Tribunal decisions regarding section 20.9, that there are two different tests for the impartiality of a competent person–"is impartial" is an objective test and

"is seen by the parties to be impartial" is a subjective test. The two are linked conjunctively, so if impartiality fails for either test, there is a lack of impartiality.

[121] In the *Maritime* decision, Appeals Officer Hamel provided the following interpretation of paragraph 20.9(1)(a) of the *Regulations*:

> [54] The wording of paragraph (a), however, leads us in a completely different direction. 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 et est considérée comme telle par les parties] 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.
>
> [Emphasis added.]

[122] What the case at hand is concerned with primarily is the subjective test. In a nutshell, it might be said that the respondent believes that the subjective test has no limits. A complainant can reject a candidate and "that is the end of it." The appellant, on the other hand, does not agree that the subjective test has no limits. It is not even clear that the appellant accepts that there is a dichotomy of tests in paragraph 20.9(1)(a) of the *Regulations*.

[123] As for many other dualities and dichotomies, the reality is more of a gradient. At one end of the gradient is a pure objective test. Would the reasonable person in the circumstances believe that a proposed investigator was impartial? Only if the complainant's position coincided with what a reasonable person would do could the complainant have a successful rejection of a candidate. At the other end of the gradient, there is no concern about what is reasonable. The complainant has an absolute veto. The complainant need not have a reason for rejecting a candidate, but if the complainant did have a reason, that reason could be whimsical, unreasonable or even malicious. The complainant's rejection could not be contested.

[124] In my view the correct position on the gradient between objectivity and subjectivity is closer to the subjective in the phrase "seen to be impartial by the parties." But it is not absolute.

[125] I do not believe the complainant has to provide reasons for rejecting a proposed candidate. If the complainant does provide reasons, then those reasons could be used as the basis for limiting the complainant's veto. As in Appeals Officer Hamel's example in *Maritime*, the complainant could reveal that the basis for rejection was discriminatory. Individuals in the workplace have to comply with human rights legislation and a discriminatory basis for rejection would not be a legitimate subjective belief. A complainant could show by the pattern of their rejections that they were being subjectively discriminatory.

[126] In another scenario, a complainant could reject large numbers of proposed candidates with the only reason being given that, since they have a veto, they were going to be a trouble maker and delay proceedings indefinitely. A complainant might be less likely to do this than the alleged harasser or violence offender. Both the complainant and alleged violence offender may be the parties who have the right to reject candidates. A declared malicious intent would not be a legitimate subjective belief. If the complainant rejected large numbers of candidates without giving a reason, a suspicion would be aroused that the complainant was doing so for malicious subjective reasons that were not legitimate. The complainant could show by the pattern of their rejections (a large number of diverse candidates) that they were being malicious.

[127] Appeals Officer Hamel's discussion of abuse of rights in *Maritime* is central. He stated as follows at paragraphs 60 and 61 of the decision:

> [60] It was alluded that this so-called literal application of [section 20.9] could lead to abuse. The refusal to agree to the appointment of an individual without having to show cause or justify the reasons could, as properly noted by the appellant's counsel, be motivated by discriminatory, sexist or arbitrary considerations. Or an employee – I am thinking in particular of an employee who is added as an alleged abuser, for example – could systematically refuse anyone proposed by the employer, in a capricious or arbitrary manner.
>
> [61]It is a principle of law that no person can abuse his or her rights. Such an abuse or discriminatory approach certainly has no place and could, in my view be punished through disciplinary action or interpreted as a waiver of the rights conferred on the parties by subsection 20.9(3) of the *Regulations*.

[128] The respondent suggests that Appeal Officer Hamel's comments can be safely ignored as they are *obiter*. The appellant says his comments were vital to the case even though in the end he did not find abuse of rights. I believe that when Appeals Officer Hamel commented on potential abuse of rights he was expressing his concern with an absolute, unrestrained subjective test. He indicated there could be circumstances where a complainant's rejection of candidates could be abusive.

[129] Ms. Y's agreement was necessary. She did not have to give any reasons for rejecting the employer's proposed candidates. She did not give any reasons that would suggest a discriminatory or malicious subjective motivation for her rejections–Appeals Officer Hamel's dicta regarding "abuse of rights." Further, was there a pattern of behaviour, in the absence of inappropriate stated reasons, that revealed an inappropriate subjective motivation?

[130] The appellant emphasized the number of proposed candidates–13 in all–that the complainant rejected. For 10 of them, the complainant took only 3 hours in total to decide to reject all 10. On the face of it, rejecting 13 candidates might seem like an abuse of rights, as the appellant alleges. If it was not an abuse to reject 13 candidates, one might ask "how many rejections would be an abuse of rights?" 20? 100? It should be noted that at the point of considering the list of 10 candidates, the complainant had made it clear that she wanted an external investigator and the employer had made it clear that it wanted an internal investigator. The appellant has alleged that in rejecting so many candidates, and in the way she did, Ms. Y was engaged in an abuse of rights. But while the complainants didn't use that language, it might be alleged that to propose a list of 10 people who were all internal supervisors and managers after the complainant had stated that was not what she wanted, was an abuse of rights.

[131] In a large organization there are many options for types of investigators. It happens to be the appellant's policy to use internal supervisors and managers to do investigations. In subsection 20.9(1), it says that the employer must appoint a competent, and therefore impartial, investigator, but it does not state expressly that persons proposed by the employer must be management, or employees, or anyone in particular (aside from their training and experience).

[132] Subsection 33(2) of the *Interpretation Act* states that "words in the singular include the plural, and words in the plural include the singular." Thus, "person" in subsection 20.9(1) could mean "persons." And so a committee could be appointed as a "competent person." That being the case, an employer can propose:

- a line supervisor or manager
- a staff person, such as a specialist in labour relations, human resources or OHS (or other)
- a non-management employee (a senior, experienced individual trusted by all)
- a labour-management pair or subcommittee approved by the workplace OHS committee
- a management selected pair or committee
- a pair or committee mutually approved by the parties
- an outside investigator (of various types)

[133] All individuals would have to be competent persons due to their impartiality, training and experience–objectively, and as seen by all parties subjectively.

[134] Subsection 20.9(1) does not specify whether the employer can propose managers or employees. It is silent in that regard. But, as section 20.1 sets out, the employer shall carry out its obligations in consultation with and the participation of the OHS policy committee or the workplace committee or a health and safety representative:

> **Interpretation**
> **20.1** The employer shall carry out its obligations under this Part in consultation with and the participation of the policy committee or, if there is no policy committee, the work place committee or the health and safety representative.

[135] There was little to no involvement of a committee or representative in this case. While subsection 20.9(1) does not indicate expressly a role for committees or representatives in selecting candidates, or even functioning as candidates, involving the committee in some capacity would be in harmony with the intent of section 20.1.

[136] The reason for listing above the types of people who could be investigators is not to give advice to the parties for future cases, but to illustrate what is required to establish an abuse of rights in the context of the *Regulations*. It has to do with how many rejections there have to be for an abuse of rights to exist. If a party were given a list of diverse entities and rejected them all without due consideration, that would be an indication of abuse of rights. In the case at hand, Ms. Y was given 13 candidates who were all of the same type (roughly); supervisors and managers. If the employer proposed 100 people who were all of the same type, the number rejected (all 100) would not necessarily be abusive. It is particularly unhelpful to provide a list of candidates who are all of the same type that the complainant has made clear she does not want.

[137] It is quite possible that there could be a "trouble-maker" scenario, particularly where the alleged abuser is one of the parties in whose eyes the investigator should be impartial. Presumably, in the vast majority of cases the complainant wants the matter to move forward, for an investigation to commence. The alleged abuser, however, may have no interest in an investigation and would be quite happy to avoid one by simply rejecting a 100 or more proposed candidates. Even if the alleged abuser never gave a reason for his or her rejections, if there was sufficient diversity in the proposed candidates, it would become apparent that the alleged abuser was acting in bad faith in rejecting all candidates.

[138] In the current matter, Ms. Y rejected 13 candidates proposed by the employer. They were all employees of CNR. They all appeared to be supervisors and managers, if not line supervisors and managers. Although one can never be sure from names alone, they all appeared to be male. It was a very homogeneous group on its face.

[139] There was no history of a bad relationship between Ms. Y and management, other than her poor interaction with a couple of managers at the outset of her complaint. Given the latter interaction, however, it was not unreasonable for Ms. Y to be leery generally of other CNR supervisors and managers. This is true without delving into what Ms. Y knew or did not know about the training of supervisors and managers. I take notice that people in organizations tend to be in steady communication with others in the organization via email. The fact that many of the proposed supervisors and managers were geographically remote from the Brantford workplace does not necessarily mean they were not in communication with other supervisors and managers, and specifically with people at the Brantford location – and thus potentially becoming prejudiced. There was no evidence of such communication or prejudice. The point is that it is not unreasonable for Ms. Y to be suspicious of the impartiality of supervisors and managers.

[140] But to be clear, Ms. Y was entitled to her subjective belief that only a non-CNR investigator would be impartial. And to be blunt, Ms. Y's rejection of the 13 candidates could be objectively unreasonable but still be appropriate. It was not an abuse of rights to reject 13

candidates who, on the face of it, were a pretty homogeneous group. There was no indication of a discriminatory or "trouble-maker" motive that would be subjectively improper.

[141] It should be noted further that the appellant's argument about abuse of rights leading to a waiver or loss of the complainant's rights does not really lead anywhere. Given the purpose of the *Code* Part II (section 122.1), we ought to be cautious about the idea that an employee can "lose their rights." An employee may, regrettably, abuse their various statutory rights in a number of ways, but that does not necessarily mean they lose their rights, particularly where there is no statutory process for "losing rights." Rights under OHS legislation are meant to be used to reduce risk and prevent death, injury and illness. Taking away rights of an OHS nature would not reduce risk; it may increase risk.

[142] By analogy, an employee who engages repeatedly in the same frivolous work refusal could at the end of the day be disciplined, but would not lose their right to refuse some other perceived instance of danger. Even a person with a string of frivolous and vexatious work refusals might eventually face a high probability, high severity danger. It would not further the purpose of the *Code* to remove an employee's right to refuse dangerous work because doing so would mean the employee could be required to do all manner of high risk tasks, with their only hope being to quit their job.

[143] In the case of a complaint about workplace violence, surely an employee doesn't "lose their rights" even if they have abused their right to reject candidates. It could be said that they lose their right to reject further candidates, but only because a ministerial delegate is going to decide on behalf of all parties how to do an investigation under the authority of section 141 of the *Code*. The substantive issue from a risk point of view is whether the complainant's complaint gets investigated by a competent investigator. An employee who has abused their right of rejection of candidates still has the right to have the matter investigated. To say that there would be no investigation because of abuse of rights could put the complainant at high risk. If it had been determined that Ms. Y had abused the process, there would still have to be an investigation. The investigator would still have to be competent and impartial from an objective point of view (the first part of paragraph 20.9(1)(a)). At this point, if the employer proposed an objectively non-impartial investigator, the complainant would not have lost the right to complain to the ministerial delegate on the first part of paragraph 20.9(1)(a) even if they were no longer being heard on their subjective "veto right" under the second part of paragraph 20.9(1)(a).

[144] The main point of the above is that even if there were an abuse of rights there would still be an investigation and it would still be an issue whether the ministerial delegate could require that the employer propose an external candidate. I have already noted that the ministerial delegate's authority under section 141 to require employers to engage external experts is very broad, with a relatively low level of pre-conditions.

[145] In its Reply submissions, the appellant emphasized the dilemma which could be created if all the parties had a veto, using as an example: an employee " [...] who has committed violence in the workplace would be able to delay and prevent investigations into their conduct simply by

stating that they do not see any proposed competent person as impartial." The appellants say an interpretation of subsection 20.9(1) that results in a veto for all parties could lead to an impasse, which "would not promote the aims of the *Regulations*."

[146] There would not be an impasse. Provided the employer has proposed a range of potential investigators–different types–at some point the ministerial delegate could issue a direction setting out how an investigation would proceed, and it wouldn't necessarily have anything to do with an external investigator. The ministerial delegate has the authority to direct how an investigation is to be done. This authority is in the *Code* in subsection 141(1) and the *Code* takes priority over whatever is in the *Regulations* if there is a conflict.

[147] It is not clear what the nature of the business or the complexity of the workplace has to do with impartiality, as argued by the appellant. Impartiality is about bias and pre-judgment and whether there is an interest in the outcome on the part of the individual being examined. The appellant is referring to a separate problem. It is true that external persons may lack knowledge of the business and its complexities, but this is true of almost all external persons. It is true of the ministerial delegate. It is true of other types of inspectors, officers and regulators in other regimes. It is true of appeals officers. In over 30 years of OHS practice I have heard people from oil and gas companies, hospitals, manufacturers, and many others say their workplaces are unique and complex and largely unknowable to outsiders. There is some merit to this concern, but it is a problem that cannot be resolved generally in a workplace embedded in multiple regulatory regimes.

[148] The argument can be turned around. Section 20.9 of the *Regulations* is about workplace violence. This is a unique and complex set of issues. An external person who specializes in cases involving workplace violence has expertise that a manager who occasionally handles a workplace violence incident likely does not have. There is no doubt that managers can be trained to be competent persons when investigating workplace violence incidents. But it is also possible that in many cases a specialist in workplace violence cases would be better. Taking the employer's expertise argument a little further would suggest that an appeals officer could not be an effective adjudicator unless he or she had extensive knowledge of every kind of workplace that gave rise to a case.

[149] While there is no doubt the appellant is concerned with Ms. Y's situation, it is clear that the appellant is also very concerned about the broader economic and organizational effects of a determination that a complainant can reject numerous proposed investigators, holding out for an external investigator. To put it baldly, in its Reply submissions, the appellant stated the appeal of the direction is to "clarify… CN's obligations pursuant to [section 20.9] for <u>future matters</u>" [emphasis added].

[150] It is important to emphasize that an appeals officer's jurisdiction centers on the correctness of a ministerial delegate's direction. An appeals officer does not clarify the meaning of legislation in order to assist workplace parties in their future endeavours. An appeals officer interprets the legislation to the extent necessary to resolve a particular case. To some extent the

impact of a particular interpretation can be considered by an appeals officer but only to the reasonableness of the interpretation and even then subject to the overall purpose of the legislation.

[151] Nowhere in the *Code* Part II are appeals officers expressly authorized to balance risk with other interests of an economic or organizational efficiency nature. For better or worse, Part II of the *Code* is about OHS; nothing else appears in section 122.1.

[152] Having said that, some of the appellant's concerns may be alleviated by noting that this decision is about Ms. Y's situation and ministerial delegate Sterling's direction. If it is decided that the ministerial delegate's direction should be confirmed – the employer should propose candidates external to the employer's organization – that does not mean "always" or "every time." The employer is perfectly free to propose internal candidates it believes are competent in future cases.

[153] The appellant was concerned with the impact of a decision because it has "thousands of investigations" every year. I am sure that the appellant does not mean that it has thousands of investigations into workplace violence. It likely has many other types of investigations pursuant to other legislation or necessitated by common law disputes. One can appreciate the concern if the employer has decided to have a single process of investigation for all types of investigations, and therefore a decision under the *Code* affects the process of other types of investigations, but that is just the way the employer may have organized things, and is not relevant to the case at hand as a factor to consider. A decision here has no bearing on how other types of investigations are done.

[154] The appellant states that it has been complying with ministerial delegate Sterling's direction and an external investigator has been engaged. In its Reply submissions, the appellant made it clear that the appeal was not to "restart or stop [the external] investigation but instead to clarify CN's obligations pursuant to Section 20.9 for future matters." Its request to vary the direction would be for the benefit of future cases, not the one at hand. That is not a proper reason to vary the direction. It might be a good reason if ministerial delegate Sterling's direction could be taken to mean that the appellant must <u>always</u> propose an external investigator on an on-going basis. But that is not the case. It has already been stated that there is no necessary or mandatory connection between a determination in this case and whether an external investigator should be appointed in future workplace violence cases or in other types of investigations. It is up to the future workplace parties. Perhaps the majority of future complainants, should there be any, would find internal investigators acceptable.

[155] Based on all of the above, I conclude that ministerial delegate Sterling's decision met the requirements of subsection 141(1) of the *Code*. There was nothing improper, erroneous or unreasonable about her direction.

Decision

[156] For these reasons, I confirm the direction issued by ministerial delegate Sterling on October 19, 2018.

Peter Strahlendorf
Appeals Officer