

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-11

2008-12

Decision No.: OHSTC-10-001

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Public Works and Government Services
Canada and Indian Affairs and Northern
Development Canada

Appellants

February 3, 2010

This appeal is decided by appeals officer Richard Lafrance.

For the appellants

Heather Frederick, legal counsel, Justice Canada,
Northwest Territories Regional Office

Canada 

APPEAL

- [1] This decision deals with two appeals filed by two separate federal departments.
- [2] One appeal was filed by the Department of Public Works and Government Services Canada (PWGSC) pursuant to subsection 146(1) of the *Canada Labour Code*, Part II (*Code*) against a direction issued by health and safety officer (HSO) Tony Clarke on April 1, 2008.
- [3] The other appeal was brought by the Department of Indian and Northern Affairs Canada (INAC) pursuant to subsection 146(1) of the *Code* against a direction issued by the same health and safety officer on March 26, 2008.

BACKGROUND

- [4] The following is drawn from the report and documents presented in evidence by health and safety officer Clarke.
- [5] The issues raised in these appeals stem from an accident that happened on March 18, 2008, at the Colomac Mine site. Colomac, located some 220 kilometres north of Yellowknife, in the Northwest Territories, was a gold mine operated from 1990 to 1997 by Royal Oak Inc. (Royal Oak) on land that had been leased to Royal Oak by the federal government. When Royal Oak went bankrupt, the lease reverted to the federal government and since then, INAC manages and controls the site.
- [6] A site remediation program was initiated and PWGSC provides professional/technical and procurement resources to INAC as part of the said Colomac remediation program.
- [7] PWGSC is responsible for management of the remediation program and, as such, is the contracting authority where the program is concerned. It entered into contract with Tli-Cho Logistics (Tli-Cho) to manage the Colomac site remediation, including coordination of health and safety. According to this agreement Tli-Cho is the prime contractor on the site.¹
- [8] On August 31, 2007, INAC², as custodian of the site, entered into an Asset Purchase Agreement, on behalf of the Government of Canada, with Del Norte Company Ltd., a subsidiary of A.M. King Industries Inc. (A.M. King). This agreement provided for the purchase and removal of certain mill assets.
- [9] It is in the context of the removal of those assets that the accident occurred at approximately 17:30, on March 18, 2008.
- [10] M. Anders Magnusson, an employee of A.M. King, was cutting a suspended agitator shaft assembly away from the agitator drive at the top of a process leach tank. While doing that, Mr. Magnusson was sitting on scaffolding approximately

¹ Care & Maintenance – Colomac Mine contract (page 28 of 63)

² Roles and description of PWGSC and INAC, throughout the decision, are those used in Ms. Frederick's submission document.

13 meters above the tank floor. The tank floor was covered with snow. At the time of the accident, Mr. Magnusson was not wearing a fall arrest harness. Moreover, the scaffolding boards were not lashed properly.

- [11] As he completed cutting off the agitator shaft assembly, it dropped to the bottom of the tank and Mr. Magnusson fell from the scaffolding. Mr. Magnusson was injured when he fell on one of the agitator blades before landing in the snow.
- [12] On the day following the accident, HSO Clarke visited the Colomac mine site for the purpose of investigating the occurrence. On that occasion, the officer issued a verbal direction to both Ron Breadmore, Project Manager – Tli Cho Region, Contaminants & Remediation Directorate, INAC, and Giselle Cotta, PWGSC project manager, Senior Environmental Engineer, Northern Contaminated Sites Program.
- [13] Subsequently, written confirmation of these directions was provided by way of letters dated March 26, 2008 for INAC and April 1, 2008 for PWGSC.
- [14] The directions to INAC and PWGSC are nearly identical, except for identification of the recipient and the date of issue. Hereunder is the direction issued to INAC:

On March 19, 2008, the undersigned health and safety officer conducted an investigation CONCERNING THE FALL FROM HEIGHT OF Mr. Anders Magnusson, in the work place operated by Indian and Northern Affairs of Canada, being an employer subject to the *Canada Labour Code*, Part II, at Colomac Mine located approx. 200 Kms. North of Yellowknife, North West Territories, the said work place being known as INAC – Colomac Mine.

The said health and safety officer considers that a condition in a place constitutes a danger to any person while at work:

“The activity of working in this segment of the Colomac site (referred to as the Mill) without an adequate hazard prevention program, (elements of which include Hazard Identification and assessment and preventive measures), constitutes a danger to any person who may be at the site.”

Canada Labour Code, Part II 145.(2)(a)(ii).

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.

- [15] HSO Becker, who had accompanied HSO Clarke during his investigation, wrote the employer on April 16, 2008, to clarify the intent of the direction issued by HSO Clarke. HSO Becker indicated in the letter that the direction was to clearly identify that a methodology process needed to be followed when work was being performed in this remote location. The HSO also pointed out that there were a number of Employer duties in the Code that related to INAC and PWGSC, which he considered as “prime contactors”, dealing with “persons” granted access to a work place.

- [16] Both departments appealed the directions.
- [17] On December 18, 2008, the undersigned sent a letter to all four potential parties, the departments of Public Works and Government Services, Indian Affairs and Northern Development, Tli Cho Logistics Inc. and A.M. King Industries Inc.. This was done to inform them of the appeals as well as to request that they inform the undersigned of their intentions relative to participating in the hearing of the appeals. They were invited to take part in a teleconference to, as explained in the letter, clarify the issues since they could eventually be directly affected by the decision to be rendered in the case.
- [18] The two federal departments and Tli Cho took part in a first teleconference, while A.M. King declined. At this first teleconference, counsel for the two federal departments agreed to join the two appeals as they dealt with the same issue, similar directions and involved both federal departments. They agreed to make joint submissions. They further agreed to proceed by way of a paper hearing and designated H. Frederick, Justice Canada, as the lead counsel to make and present said joint submissions.
- [19] On the occasion of a second teleconference, arranged to clarify procedural issues, to which all four parties participated, G. Malakoe, counsel for Tli Cho Logistics, sought to reserve his client's decision on its participation and involvement, if at all, in the appeal until after the federal government had made its submission.
- [20] D. Woolley, counsel for A.M. King, made a similar request regarding his client's involvement, if any, in the appeal. H. Frederick did not object to the requests and proposed to provide both parties with a copy of her submission. Given the appellants' consent, I granted the requests.
- [21] On April 08, 2009, G. Malakoe informed the undersigned that having reviewed the joint submission by PWGCS and INAC, Tli Cho Logistics had decided not to seek standing as a party to the appeal. As well, on the same day, D. Woolley advised the Tribunal that having as well reviewed the submission, A.M. King would not be taking part in the appeal.

ISSUE

- [22] The issue raised by these appeals is whether HSO Clarke erred in issuing his directions to INAC and PWGSC pursuant to subsection 145(2) of the *Code*.

EVIDENCE

- [23] The health and safety officer presented in evidence his report as well as a large amount of documents he had consulted during his investigation. From those, I retained in particular:
- AM King, Asset Purchase agreement
 - Colomac Remediation Project: Environment, Health and Safety Management System (EHSMS)

- Contract for the Care and Maintenance of the Colomac Mine Site
- Environmental Health and Safety Management Plan (Tli Cho Logistics Inc.)
- Job Hazard Analysis (Tli Cho Logistics Inc.)

SUBMISSIONS OF THE APPELLANTS

- [24] As already stated, INAC and PWGSC made joint submissions for the purpose of this appeal. In the absence of respondents, no formal hearing was held and appellants submissions were presented in writing.
- [25] The Appellants fashioned their arguments on four points.
1. Factual findings.
 2. Interpretation and application of ss. 145(2) of the *Code*.
 3. The reference to ss. 125(1) of the *Code* in the Clarification Letter.
 4. Application of the *Code* to A.M. King.

1) Factual findings

- [26] The Appellants contend that HSO Clarke failed to make the factual findings necessary to determine what, if any, direction should be issued pursuant to ss. 145(2) of the *Code*.
- [27] More specifically, they argue that the HSO did not understand the roles and the responsibilities of the various parties on the site, including the nature of the contracts and service agreements which dictate the relationships of the parties on site and the existing hazard prevention program.
- [28] The HSO received a copy of the Site Specific Health and Safety Plan only on April 7, 2008, and a copy of the Colomac Environment, Health and Safety Management System on April 22, 2008, thus only after having issued the directions.
- [29] On April 8, 2008, PWGSC provided the Labour Program of Human Resources and Skills Development Canada (HRSDC) with the specific service agreement between INAC and PWGSC for the Colomac project, and a copy of the contract between PWGSC and Tli Cho.
- [30] On April 10, 2008, the Regional Director of INAC formulated a written response to HSO Clarke's direction in which INAC confirmed that it had taken corrective actions to comply with the direction issued by the HSO.
- [31] INAC also indicated in this letter that Tli-Cho was the health and safety authority on site, according to the Asset Purchase Agreement, and that A.M. King, which was not an employee of INAC, was to communicate with Tli-Cho daily on work activities to be undertaken.

- [32] The Appellants argue that the clarification letter issued by HSO Becker on April 16, 2008, demonstrates that even at that time, there remained an inadequate understanding of the contracts and service agreements in place and of the roles and responsibilities of the various parties.
- [33] The Appellants explained in their submissions that the Asset Purchase Agreement was between A.M. King and INAC. This Agreement did not restrict Tli Cho to the role of emergency response team in the event of an accident. Their role was to have prime responsibility for health and safety at the Colomac site.
- [34] The Asset Purchase Agreement required A.M. King's site supervisor to report to Tli-Cho, the site manager, prior to commencement of each day's work.
- [35] This was not done on the day of the accident. Therefore, A.M. King was in the Mill without authorization.
- [36] The Asset Purchase Agreement also imposed on A.M. King full responsibility to ensure compliance by its employees with the Occupational Health and Safety Act and the Mine Health and Safety Act of the Northwest Territories, as well as with the Colomac Mine Environmental Health and Safety Management System.
- [37] The Agreement further specified that Tli Cho, as the site manager, had the authority to stop all work in the event that the applicable safety laws, regulations or protocols were being breached or violated.
- [38] Finally, the Appellants refer in their submissions to correspondence exchanged after the issuance of HSO Clarke's directions. In said correspondence, the Appellants further attempted to explain the nature of the relationships existing between the parties at the Colomac site.

2) Interpretation and application of ss. 145(2) of the Code

- [39] The Appellants argue that failure by the HSO to properly assess the factual circumstances and determine the scope of his jurisdiction led to an incorrect interpretation and application of subsection 145(2) of the *Code*.
- [40] As such, they claim that the danger identified in the directions did not constitute a danger as defined by the *Code*.
- [41] In their opinion, HSO Clarke did not engage in a factual analysis sufficient to support the finding that the existing hazard prevention program was inadequate, and that as such, it could not be said that it constituted a danger as defined by ss. 122(1) of the *Code*.
- [42] Documents that were, according to the Appellants, critical to understanding the existing hazard prevention program and assessing its adequacy were only acquired after the directions had been issued.
- [43] Had HSO Clarke made the proper inquiry into this program, he would have determined that it was adequate.

- [44] The Appellants reiterated that A.M. King lacked the authorization to operate in the Mill area on the day of the accident, and that the area was entered without the knowledge of Tli-Cho, INAC and PWGSC.
- [45] The mere fact that A.M. King was able to enter this area and conduct unauthorized work was not sufficient, according to the Appellants, to find that the hazard prevention system was inadequate.
- [46] Therefore, the Appellants submitted that the directions regarding this point were based on speculation or hypothesis.
- [47] Furthermore, they submitted that INAC and PWGSC were not the proper employers to receive directions in those circumstances.
- [48] They interpret subsection 145(2) of the *Code* as requiring an HSO to “determine if there is in fact a danger at issue in the circumstances as defined by subsection 122(1) of the [*Code*] and if so, to which employee that danger is posed while at work”.³
- [49] Only this analysis can lead the health and safety officer to determine which employer should receive the notification of danger and the direction.
- [50] It is the Appellants contention that subsection 145(2) requires an HSO to first find that a condition in a place or performance of an activity constitutes a danger to an employee while at work before taking steps to protect any person from the danger.
- [51] In his directions, HSO Clarke referred to “a danger to any person while at work”, and not to “a danger to an employee while at work”. This, and the language used in the clarification letter, indicates to the Appellants that HSO Clarke was focused on duties owed by employers under the *Code* to “persons directly, instead of via the employer-employee nexus required by s. 145(2)”.⁴
- [52] The Appellants further asserted that there is nothing in the subsection to indicate that there was a proper assessment and identification of a federal employee being exposed to the danger identified by HSO Clarke, thus preventing the application of subsection 145(2) of the *Code*.
- [53] The only danger that could have been identified in the circumstances would have been posed to an employee of A.M. King. Any finding of danger to an employee of the federal public service would be speculative or hypothetical.

3) The reference to subsection 125(1) of the Code in the Clarification Letter

- [54] The Appellants submit that reference, in the clarification letter, to subsection 125(1) of the *Code* does not cure the failure by the HSO to adequately assess the factual circumstances in applying subsection 145(2).

³ Appellant’s submission, par. 59.

⁴ Appellant’s submission, par. 62.

[55] While not denying that they bear certain responsibilities under the *Code*, as employers⁵, the Appellants submit that in the circumstances of this case, the HSO specifically and solely invoked subsection 145(2) of the *Code* as the basis of his directions.

4) Application of the Code to A.M. King

[56] Finally, the Appellants ask that the appeals officer declare that the *Code* does not apply to A.M. King.

[57] In point of fact, the Appellants recognize that the *Code* applies to them by way of subsection 123(2) of the *Code*.

[58] They also recognize that the *Code* applies to Tli-Cho, in accordance with the ruling of the Northwest Territories Supreme Court in Northern Territories and Nunavut (Workers' Compensation Board) v. Canada (Attorney General)⁶.

[59] According to the Appellants, A.M. King is not involved in the remediation project. The sole purpose of their presence on the Colomac site is to remove certain assets purchased pursuant to the above-mentioned Asset Purchase Agreement. They were not contracted by INAC or PWGSC to perform work.

[60] Therefore, A.M. King's work on the Colomac site cannot be said to be integrally connected to the federal undertaking and A.M. King's activities remain subject to provincial legislation.

[61] Hence, the Appellants maintain that a direction could not have been issued to A.M. King under the *Code* and ask the undersigned to confirm that point.

ANALYSIS

[62] The issue submitted to the undersigned for determination in this case is whether HSO Clarke erred in issuing his directions to INAC and PWGSC pursuant to subsection 145(2) of the *Code*.

Subsection 145(2) states:

145. (2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

(i) correct the hazard or condition or alter the activity that constitutes the danger, or

(ii) protect any person from the danger; and

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in

⁵ Appellant's submission, par. 74

⁶ 2007 NWTSC 109.

writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

- [63] Subsection 145(2) reflects the concern of the legislator for the immediate protection of employees that might be exposed to danger while at work.
- [64] This provision allows an HSO, upon finding such a danger, to either direct the employer to correct the hazard, condition or activity that constitutes the danger, to protect any person from it or to forbid access to the source of this danger.
- [65] I find, however, that this section is not an adequate vehicle for an HSO to issue a direction to an employer because of a contravention to Part II of the *Code*.
- [66] HSO Clarke found in his directions to INAC and PWGSC that the lack of an adequate hazard prevention program in the Mill sector of the Colomac Mine Site constituted "a danger to any person who may be on that site".
- [67] Although issued under subsection 145 (2), the language used by HSO Clarke in his directions is normally found in the case of a direction issued under subsection 145(1), which reads as follows:
145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to
- (a) terminate the contravention within the time that the officer may specify; and
- (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.
- [68] In the clarification letter issued by HSO Derek Becker to INAC on April 16, 2008, it was specified that this "direction of danger was to clearly identify that a methodological process needs to be followed when work is performed at this remote location".
- [69] HSO Becker went on by citing, in support of HSO Clarke's conclusions, paragraphs 125(1)(l), (w), (y) and (z. 14) of the *Code*. These provisions all relate to the employer's duties to protect employees and "every person granted access to the work place" or "all of the persons granted access to the work place".
- [70] I infer from HSO Becker's letter that the directions were not issued in order to protect employees from an immediate danger, which is a condition precedent to the application of subsection 145(2), but rather to protect employees and every person granted access to the work place from a health and safety hazard resulting from a contravention to the *Code*.
- [71] For the above reasons, I find that HSO Clarke erred in issuing his directions to INAC and PWGSC under subsection 145(2).
- [72] Having decided that subsection 145(2) should not have been invoked by HSO Clarke at the conclusion of his investigation, I will analyse the facts as presented

in the documents offered in evidence by HSO Becker to determine whether the directions would be warranted under subsection 145(1) of the *Code*.

- [73] The *Code* contains provisions that impose specific duties on employers. With regard to the implementation of hazard prevention programs, the relevant provisions of the *Code* are paragraphs 125(1) (z.03) and (z.04). These provisions state:

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.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.

- [74] Paragraphs 125(1)(z.03) and (z.04) both refer to a “prescribed program” for the prevention of hazards. In order to understand what such a program may be, one has to look at subsection 122(1) where definitions relevant to Part II of the *Code* can be found.
- [75] Subsection 122(1) defines the term “prescribed” as meaning “prescribe by regulation of the Governor in Council or determine in accordance with rules prescribed by regulation of the Governor in Council”.
- [76] In the present case, it is in the *Canada Occupational Health and Safety Regulations* (Regulations) that the nature of a “prescribed program” is to be found.
- [77] Part XIX of the Regulations lays out the elements that hazard prevention programs must contain in order to be in compliance with the *Code*.

19.1 (1) The employer shall, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards, including ergonomics-related hazards, in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components:

- (a) an implementation plan;
- (b) a hazard identification and assessment methodology;
- (c) hazard identification and assessment;
- (d) preventive measures;

- (e) employee education; and
- (f) a program evaluation

[78] I have reviewed in detail the documents filed by HSO Becker. As part of those documents, I find the Environment, Health and Safety Management System (EHSMS) document to be of particular interest in dealing with this issue. I have compared this document with Part XIX of the Regulations. My findings are as follows:

- a) The requirements of the Regulations are clear regarding the involvement of the policy and/or the local health and safety committee for the development of the implementation plan of the hazard prevention program. In the document, I found no indication that the policy or local committee were involved in any way with the development, implementation or monitoring of the program. However, in light of the evidence presented, I cannot arrive at a conclusion as to whether this represents reality or not.
- b) Regarding the hazard identification and assessment methodology, the Regulations are also very clear in what needs to be taken into account. In the EHSMS document, I found no assessment methodology for assessing any hazard at the Colomac site.
- c) On the subject of the hazard identification and assessment that is meant to be conducted in accordance with the methodology mentioned above, I found no indication in the EHSMS that hazards specific to the work site had been identified, let alone assessed. What I did find however is that it was left to the employees to identify, assess and take necessary precautions as they saw fit.
- d) On the subject of preventive measures, this was wanting. Again the Regulations are quite clear on what needs to be done regarding preventive measures, such as elimination of hazards, reduction of hazards and finally administrative procedures. Nowhere in the EHSMS did I find any mention of what had been done to eliminate or reduce hazards or procedures established to protect the employees from the danger.
- e) Concerning employee education, the Regulations formulate a long list of requirements for their health and safety education. In the EHSMS document, other than for vague mentions that the employees are to be trained, there is no mention of any of the required specific issues included in the Regulations. However, since no training records were provided and no other evidence was filed concerning this matter, I cannot determine whether this is factual.
- f) Finally, concerning program evaluation, the Regulations require the employer to evaluate the effectiveness of the hazard prevention program on a regular basis. I found no indication in the EHSMS document that this had even been considered at any time.

- [79] In addition to the gaps found in the EHSMS, as indicated above, I understand from the facts outlined in the HSO report and the Appellant's submissions concerning the AM King employee who was injured, that this employee entered the work place without the knowledge of anyone (PWGSC, INAC or Tli-Cho) responsible for the site. I find that this says a lot regarding the poor implementation of the EHSMS at the Colomac site
- [80] Consequently, having carefully considered the (EHSMS) environment, health and safety management system program said to be in place in light of the requirements contained in Part XIX of the Regulations, I find that there was a contravention to the Code. I find that the health and safety management plans, although fairly well developed, do not meet all the requirements set out in Part XIX of the Regulations as indicated above.
- [81] Having concluded that subsection 145(2) was not the right vehicle in the circumstances, I find however that because certain provisions of Part XIX of the Regulations were not adhered to, a direction under subsection 145(1) is required.
- [82] The next step is to look at the relationship between the parties at the Colomac mine site in order to determine to which employer the directions ought to be issued.
- [83] HSO Clarke issued his directions to INAC and PWGSC. The Appellants, in their written submissions at paragraphs 9 to 12, clearly state that:
- INAC has custody of the land, and "manages and controls the site".
 - PWGSC provides professional/technical and procurement resources and,
 - i. in the context of Colomac, is responsible for site management and has contracting authority with respect to the site.
 - ii. to this effect, PWGSC entered into a contract with Tli-Cho Logistics to manage and to coordinate health and safety on the Colomac site.
- [84] Moreover, there is recognition by the Appellants in their submissions that they are both employers subject to the *Canada Labour Code*. As such, I find that they are both fully accountable for the obligations imposed on employers by the *Code*. Considering the fact that PWGSC and INAC are both employers under Part II of the *Canada Labour Code*, I find that they are both responsible for occupational health and safety as employers at the Colomac Mine site.
- [85] The Ontario Court of Appeal in *R. v. Whyssen*⁷ reiterated an important principle to wit, that an employer's statutory obligations "cannot be evaded by contracting out performance of their responsibilities to an independent contractor."

⁷ R. v. Whyssen; [1992] 58 O.A.C. 67. par 15

- [86] The fact that PWGSC asked by way of a contract for Tli-Cho to coordinate health and safety at the Colomac mine site does not, ultimately, relieve either PWGSC or INAC of their obligations under the *Code*.
- [87] Consequently, even if Tli-Cho is contractually responsible to organize health and safety at the Colomac site, PWGSC and INAC remain fully accountable for seeing that this is carried out in proper fashion.
- [88] The Federal Court of Appeal held in Martin⁸ that since an appeals officer has all the powers of a health and safety officer, he or she may vary a direction issued by a health and safety officer to provide for what he or she considers the HSO should have directed.
- [89] At paragraph 28 of its decision, the Court stated that:
- there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).
- [90] Hence, despite the fact that HSO Clarke erred in issuing his directions under subsection 145(2), my assessment of the facts brings me to the conclusion that the directions should have been issued under subsection 145(1). Moreover, my varying the decision under subsection 145(1), while specifically identifying the contravention that needs to be corrected, preserves the essence of the HSOs original direction.
- [91] Consequently, I will not quash HSO Clarke's directions, as sought by the Appellants, but rather will vary them in order that they become issued under subsection 145(1) and, for the reasons stated above, are issued to INAC and PWGSC as employers under the *Code*.

Application of the *Canada Labour Code* to A.M. King

- [92] As previously stated, the Appellants have sought a finding that the *Canada Labour Code* does not apply to A.M. King.
- [93] However, the issue that is before me in this appeal concerns only the directions issued by HSO Clarke to PWGSC and INAC. Furthermore, considering my decision to vary the directions issued by HSO Clarke and the fact that no direction was issued to A.M. King which is not a party to these proceedings, I find that it is not necessary for me to decide whether or not the *Code* applies to A.M. King in order to resolve this matter.

DECISION

⁸ *Martin v. Canada (Attorney General)* [2005] FCA 156

For these reasons, I vary the directions issued on March 26 and April 1, 2008, by HSO Clarke as per the attached Appendices I and II to the present decision.

Richard Lafrance
Appeals Officer

APPENDIX – I

Case No: 2008-11
Decision No: OHSTC10-001

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On March 19, 2008, health and safety officer Tony Clarke conducted an investigation CONCERNING THE FALL FROM HEIGHT OF Mr. Anders Magnusson, in the work place managed by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at Colomac Mine located approximately 200 Kms. North of Yellowknife, North West Territories, the said work place being known as Colomac Mine.

Following an appeal brought under section 146 of the *Canada Labour Code*, Part II, the undersigned appeals officer conducted an inquiry, pursuant to section 146.1 with respect to the direction issued by health and safety officer Clarke, on April 1, 2008.

As a result of the inquiry based on the written submissions and documents presented, the undersigned appeals officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened and the direction issued by health and safety officer Clarke on April 1, 2008, is varied accordingly:

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.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards;

Canada Occupational Health and Safety Regulations (SOR/86-304)

PART XIX

HAZARD PREVENTION PROGRAM

19.1 (1) The employer shall, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards, including ergonomics-related hazards, in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components:

- (a) an implementation plan;
- (b) a hazard identification and assessment methodology;
- (c) hazard identification and assessment;
- (d) preventive measures;
- (e) employee education; and
- (f) a program evaluation.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 30 days from the issuance of this decision and to ensure that the contravention does not reoccur. You are to report compliance with the direction to a HRSDC health and safety officer of your region.

Varied in Ottawa, this 3rd day of February 2010.

Richard Lafrance
appeals officer

To: Cheryl G Bartell
Regional Director General
Public Works and Government Services Canada
Western Region
Telus Plaza North - Floor: 5
10025 Jasper Avenue
Edmonton, Alberta
T5J 1S6

APPENDIX – II

Case No: 2008-12
Decision No: OHSTC10-001

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On March 19, 2008, health and safety officer Tony Clarke conducted an investigation CONCERNING THE FALL FROM HEIGHT OF Mr. Anders Magnusson, in the work place operated by Indian and Northern Affairs Canada, being an employer subject to the *Canada Labour Code*, Part II, at Colomac Mine located approximately 200 Kms. North of Yellowknife, North West Territories, the said work place being known as INAC – Colomac Mine.

Following an appeal brought under section 146 of the *Canada Labour Code*, Part II, the undersigned appeals officer conducted an inquiry, pursuant to section 146.1, with respect to the direction issued by health and safety officer Clarke, on March 26, 2008.

As a result of the inquiry based on the written submissions and documents presented, the undersigned appeals officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened and the direction issued by health and safety officer Clarke on March 26, 2008 is varied accordingly:

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.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards;

Canada Occupational Health and Safety Regulations (SOR/86-304)

PART XIX

HAZARD PREVENTION PROGRAM

19.1 (1) The employer shall, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards, including ergonomics-related hazards, in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components:

- (a) an implementation plan;
- (b) a hazard identification and assessment methodology;
- (c) hazard identification and assessment;
- (d) preventive measures;
- (e) employee education; and
- (f) a program evaluation.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145.(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 30 days from the issuance of this decision and to ensure that the contravention does not reoccur. You are to report compliance with the direction to a HRSDC health and safety officer of your region.

Varied in Ottawa, this 3rd day of February 2010.

Richard Lafrance
appeals officer

To: Trish Merrithew-Mercredi
Regional Director-General
Indian and Northern Affairs
PO BOX 1500
Yellowknife, Northwest Territories
Canada
X1A 2R3