

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Parks Canada and Public Works and Government Services Canada, 2012 OHSTC 9

**Date:** 2012-03-09  
**Case No.:** 2009-33 &  
2010-37  
**Rendered at:** Ottawa

**Between:**

Parks Canada and Public Works and Government Services Canada, Appellants

**Matter:** Appeal under subsection 146(1) of the *Canada Labour Code* of 3 directions issued by health and safety officers.

**Decision:** The directions are rescinded

**Decision rendered by:** Mr. Richard Lafrance, Appeals Officer

**Language of decision:** English

**For the appellants:** Mr. Richard Fader, Counsel, Justice Canada

Canada

## REASONS

- [1] This decision deals with two appeals brought under subsection 146(1) of the *Canada Labour Code* (the Code). Two health and safety officers (HSO) were involved with an investigation concerning a fatal accident that occurred at Dam #1 on the Trent-Severn Waterway.
- [2] Further to his investigation, HSO Lewis A. Jenkins issued two directions to Parks Canada. Later HSO Francesco Misuraca issued one direction to Public Works and Government Services Canada (PWGSC).
- [3] At the request of the appellants, as both appeals dealt with the same circumstances, the two appeals were joined to be heard concurrently. A hearing was held in Ottawa, Ontario July 4, 5 and 6, 2011, and final submissions were received on August 8, 2011.
- [4] The victim was an employee of an employer under provincial jurisdiction; consequently, the Ontario Ministry of Labour investigated this employer. As no employees under federal jurisdiction were involved, there was no respondent in this case.

### Background

- [5] On October 6, 2009, a specialized diving company, ODS Marine, was conducting an underwater engineering inspection of Dam #1 on the Trent-Severn Waterway. The dam belongs to Parks Canada.
- [6] While inspecting Bay 6 of the dam, the diver's umbilical cord was caught by a pressure differential caused by a gap in the stop logs, thereby pulling the diver into the stop logs and fatally injuring him.
- [7] Human Resources and Skills Development Canada's Labour Program instigated an investigation of the accident and the HSO determined that a bag test conducted by the diving company was not done close enough to the stop logs, and was therefore ineffective in pointing to a pressure differential that existed at this part of the dam. In addition, the HSO determined that Parks Canada had no emergency procedures in place to protect persons granted access to the work place, such as the diving company.
- [8] Two directions were issued to Parks Canada with a total of six infractions noted. The first direction reads:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On, October 6, 2009, the undersigned health and safety officer commenced an investigation into the fatal accident of an employee of ODS Marine, a sub-contractor granted access to the work place operated

by PARKS CANADA AGENCY, being an employer subject to the *Canada Labour Code*, Part II at 2155 Ashburnham Drive, Peterborough, Ontario, K9J 6Z6, said the work place being sometimes known as Parks Canada - Trent-Severn Waterway – Trenton Sector.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have recently been contravened:

No./ No: 1

125.(1)(o) – Canada Labour Code Part II,  
12.11(2)(a) – Canada Occupational Health & Safety Regulation.

Parks Canada Agency , The owner of Dam #1 on the Trent-Severn Waterway System, Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to a hazard of drowning, failed to ensure all appropriate emergency equipment was provided and held in readiness.

No. / No: 2

125.(1)(o) – Canada Labour Code Part II,  
12.11(2)(b) – Canada Occupational Health & Safety Regulation.

Parks Canada Agency, the owner of Dam #1 on the Trent-Severn Waterway System, Trenton, Ontario, Where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to a hazard of drowning, failed to ensure a person who is qualified to operate all the emergency equipment provided was available.

No. / No: 3

125.(1)(o) – Canada Labour Code Part II,  
12.11 (2)(d)(i) – Canada Occupational Health & Safety Regulation.

Parks Canada Agency, the owner of Dam #1 on the Trent-Severn Waterway, System, Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to a hazard of drowning, failed to ensure emergency procedures contained a full description of the procedures to be followed and the responsibilities of all persons granted access to the work place.

No. / No: 4

125.(1)(o) – Canada Labour Code Part II,  
12.11 (2)(d) (ii) – Canada Occupational Health and Safety Regulation.

Parks Canada Agency, the owner of Dam #1 on the Trent-Severn Waterway System, - Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to a hazard of drowning, failed to ensure emergency procedures contained the location of any emergency equipment.

No. / No: 5

125.(1)(z.14) – Canada Labour Code Part II  
12.15(3) – Canada Occupational Health & Safety Regulation.

Parks Canada Agency, the owner of Dam #1 on the Trent-Severn Waterway System, Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine Employee was exposed to a hazard of drowning, failed to ensure every person granted access to the workplace was instructed in written emergency procedures.

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

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Toronto, this 10<sup>th</sup> day of November 2009.

Lewis A Jenkins  
Health and Safety Officer  
Certificate Number: ON2098

[9] The second direction issued to Parks Canada reads:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 6, 2009, the undersigned health and safety officer commenced an investigation into the fatal accident of an employee of ODS Marine, a sub-contractor granted access to the work place operated by PARKS CANADA AGENCY, being an employer subject to the *CANADA LABOUR CODE*, Part II, at 2155 Ashburnham Drive, Peterborough, Ontario, K9J 6Z6, the said work place being sometimes known as Parks Canada-Trent –Severn Waterway- Trenton Sector.

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has recently been contravened:

No. / No: 1

125. (1) (z.14) –Canada Labour Code Part II

Parks Canada Agency, the owner of Dam #1 on the Trent –Severn Waterway System, Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to water

pressure differentials , failed to take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, were informed of every known or foreseeable health or safety hazard to which they were likely to be exposed in the work place;

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Toronto, this 10th day of November, 2009.

LEWIS A JENKINS  
Health and Safety Officer  
Certificate Number: ON2098

[10] HSO Misuraca, assisted by HSO Robert Maklan, initiated a supplementary investigation around November 27, 2009. The HSOs did not visit the accident scene, but interviewed various parties and reviewed numerous documents. On August 30, 2010, on completion of the investigation, HSO Misuraca issued a direction to PWGSC citing one violation to paragraph 125(1)(z.14) of the Code:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On November 27, 2009, the undersigned health and safety officer conducted an investigation in the work place controlled at the time by Public Works and Government Services Canada (PWGSC), being an employer subject to the *Canada Labour Code*, Part II, at Dam #1, Trent-Severn Waterway, 118 Chester Road in Trenton, Ontario.

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has recently been contravened:

No. / No: 1

Subparagraph 125.(1)(z.14) – *Canada Labour Code* Part II

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, take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place.

PWGSC, via its senior project manager, failed to ensure that a site specific health and safety hazard assessment had been conducted by the contractor prior to the commencement of work at the site by O.D.S. Marine employees to whom PWGSC had granted access to perform diving activities under the standing offer contract signed on September 9, 2009 with O.D.S. Marine for the purpose of performing an inspection of Dam #1 at the Trent-Severn Waterway.

In addition, PWGSC failed to receive, prior to the commencement of work a written confirmation from the aforementioned contractor stating that its employees had been informed, based on the aforementioned health and safety assessment, of every known or foreseeable health and safety hazard to which they were likely to be exposed while performing the dam inspection at the said work site.

This had the result of not ensuring that the contractor's employees had been informed of the aforementioned hazards before starting work.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

Further, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Toronto, this 30th day of August, 2010.

Francesco Misuraca  
Health and Safety Officer  
Certificate Number: GE1109

## **Hearing**

### **Health and Safety Officers testimony**

[11] Both health and safety officers introduced in evidence detailed reports of their findings and conclusion of their investigations. These reports are therefore part of the record and will not be repeated here. As well, they both testified at the hearing and were cross-examined by counsel for the appellants.

[12] In his testimony, HSO Jenkins confirmed his findings that led to the issuance of the directions. He concluded that Parks Canada had contravened the Code and issued directions accordingly.

[13] Under cross-examination, HSO Jenkins confirmed that neither the diving contractor (ODS Marine) nor its employees were employees of either Parks Canada or PWGSC. The relationship was through a work contract for the inspection of the dam.

[14] He agreed as well that there were no violations of Part XVIII (Diving Operations) of the *Canada Occupational Health and Safety Regulations* (the Regulations). He further concurred that any diving violation that may have occurred would have been under the Ontario provincial legislation, as the diving company is provincially regulated.

[15] He conceded that the diving company had a dive and emergency plan as well as emergency equipment and boat on site. He further agreed that the divers were trained on emergency procedures as well as on the use of their emergency equipment. He commented however that he did not concern himself with this as the diving activity under the circumstances, was provincially regulated.

[16] HSO Jenkins agreed that his findings indicated that PWGSC had reviewed the diving company's emergency plan.

[17] He agreed that there was no requirement in the Regulations for receiving written confirmation that employees had been informed about present and foreseeable hazards in the work place.

[18] HSO Jenkins agreed that the divers had all signed on the diving plan. He further agreed that the bag test was done, although incorrectly. He acknowledged that the employees of Parks Canada were present at the dive site as they operated the equipment to change the configuration of the dam to accommodate the dive team. He also recognized that there was a line of communication between the employees of Parks Canada and the diving team.

[19] HSO Jenkins acknowledged as well that it was not really the lack of emergency equipment that was the problem in saving the diver, but rather the length of time it took (two hours) to lower the water at the dam to try to rescue the trapped diver.

[20] The HSO agreed that his findings indicated that there were discussions between the two parties about the dive and emergency plan prior to the dive taking place. As well, he acknowledged that other documents in his report indicate that the diving company was informed about the hazards and that a diving and emergency plan was prepared in accordance with those hazards in mind. HSO Jenkins conceded that in retrospect, the requirements of paragraph 125(1)(z.14) seem to have been met prior to the accident.

[21] HSO Misuraca testified that his investigation concentrated on the fact that the work place was controlled by PWGSC through their contract with the diving company.

[22] HSO Misuraca testified that his department hired Mr. Geddes as an expert in the area of diving. He further agreed with counsel during cross-examination that the report and testimony of Mr. Geddes indicates that the diving company met the industry standard regarding their emergency plan.

[23] HSO Misuraca stated that his investigation did not bring him to the actual site of the accident but rather consisted of interviews with the various people involved and a paper review of documents that HSO Jenkins had gathered.

[24] He agreed that Part XII (Safety Materials, Equipment, Devices and Clothing) of the Regulations did not really apply to diving operations as it dealt more with accidental fall in the water. He noted however, that the hazard specified in his direction was meant to deal with the hazard of water pressure differential. HSO Misuraca recognized that all the divers were certified and that they had signed the emergency plan to indicate they were aware of the potential hazards.

[25] He recognized that the dive plan indicated that in cases where there could be stronger current, or water differential, the dive team was to use a camera mounted on a pole instead of having a diver in the water.

[26] HSO Misuraca stated that he now believes that the divers knew about the potential water pressure differential because it seems, based on the documentation provided, that they were informed by PWGSC. He agreed that it was the responsibility of the diving company/team to conduct the bag test properly. He disagreed however that the intent of his direction, regarding the full information on the hazard had been met. He maintained that PWGSC could have included other options to deal with the said hazard.

[27] The appellant called eight witnesses:

- i. Mr. Jack Alexander, Special Adviser on real Property. At the time of the accident, he was Director of the Canal Operations.
- ii. Mr. Dave Lawrence, Project Manager for PWGSC. At the time of the accident, he was Senior Engineer Parks Canada, for the Trent Severn Water Way.
- iii. Mr. John Mazhar, Professional Engineer (retired). At the time of the accident, he had been hired by PWGSC as a project manager for the repairs of all dams on the Trent Severn Waterway.
- iv. Mr. Brad Graham, Lock Master at Lock #1 of the Trent Severn Water Way.
- v. Mr. Jacques Béland, Professional Engineer, Project Manager for PWGSC.
- vi. Mr. Dave Geddes, Professor Commercial Diving (retired), Consultant, Marine Field Diving.
- vii. Mr. Cam Holliday, Regional Manager Occupational health and safety (PWGSC).
- viii. Mr. Luc Beriault, Civil Engineer for PWGSC for Marine structures.

### **Issue**

[28] The issue to be resolved in this matter is whether health and safety officers Jenkins and Misuraca erred in issuing the above-noted directions, respectively, to Parks Canada and to PWGSC.

[29] The first part of this decision will deal with the issue of hazard information, as it pertains to the infractions specified under paragraph 125(1)(z.14) of the Code, and which were contained in the directions issued to both Parks Canada and PWGSC.



[30] The second part of this decision will deal with the issue of compliance with prescribed standards relating to fire safety and emergency measures, as it pertains to the five infractions specified under Part XII of the Regulations, which were contained in the direction issued to Parks Canada.

## **Part 1 - Infractions under paragraph 125(1)(z.14)**

### **Appellant's Submissions**

#### **Failure to inform of all known or foreseeable hazards**

[31] Mr. Richard Fader, counsel for the appellant, submitted that HSO Misuraca fundamentally misconstrued the facts and misapplied the statutory provision cited. He argues that what the Code required was for PWGSC to inform ODS Marine of "every known or foreseeable health and safety hazard to which they are likely to be exposed in the work place." Mr. Fader asserts that the evidence is overwhelming that PWGSC met these obligations.

[32] Mr. Fader argued that in crafting his direction, the HSO added the following elements to the requirements of paragraph 125(1)(z.14):

(PWGSC, via its senior project manager) failed to ensure that a site specific health and safety hazard assessment had been conducted by the contractor prior to the commencement of work [...].

(In addition, PWGSC) failed to receive, prior to the commencement of work, a written confirmation from the aforementioned contractor stating that its employees had been informed, based on the aforementioned health and safety assessment, of every known or foreseeable health and safety hazard assessment, of every known or foreseeable health and safety hazard to which they were likely to be exposed while performing the dam inspection at the said work site [emphasis added by Mr. Fader].

[33] Mr. Fader affirms that the Code does not require PWGSC or Parks Canada to ensure that a contractor conducts a site specific health and safety assessment prior to the commencement of work. The Code requires that PWGSC and Parks Canada "take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place". The evidence, in his opinion, is overwhelming that both Parks Canada and PWGSC met this obligation.

[34] He believes that the HSO's requirement creates a technical requirement that is not contemplated by the legislation and has no practical import to the case at hand, because ODS Marine and its divers were aware of all known and foreseeable health and safety hazards in the work place. He submitted that the HSO's direction is inconsistent with the specific provisions of the Code and should, therefore be rescinded.

[35] Furthermore, he urges that there is no requirement in the Code or the Regulations to have to inform every person granted access "in writing" of every known and

foreseeable health or safety hazard in the work place. The HSO further held that the employer has to obtain a "written confirmation" from the contractor that employees have been made aware of such hazards. By doing so, Mr. Fader contends that the HSO has added language to paragraph 125(1)(z.14). He argues that, had Parliament intended such a requirement, it would have provided for such in the legislation. He submits that as a result, the HSO's direction is inconsistent with the specific provisions of the Code and should, therefore be rescinded.

[36] Mr. Fader maintains that the HSO continued to assert that paragraph 125(1)(z.14) required PWGSC to not only identify the hazard of water pressure differential but to inform ODS Marine of proper techniques on how to manage the hazard. He states that the position of the appellants is that this is not a requirement of the Code. Had Parliament intended to include the identification of techniques to manage the identified hazard, it would have done so specifically in paragraph 125(1)(z.14). However, he maintains that the Code simply requires every person to be "informed" of every known and foreseeable hazard in the work place. The HSO added to the requirements of the Code and his direction should, therefore, be rescinded.

[37] Mr. Fader noted that in his direction, HSO Jenkins did not cite the same requirements as HSO Misuraca. In fact, during cross examination HSO Jenkins admitted that there was no requirement that the process of informing had to be conducted in writing.

[38] He asserts that the evidence establishes clearly that all persons granted access to the work place were informed of every known or foreseeable health and safety hazard to which they would likely be exposed, including the hazards of water pressure differentials.

[39] Mr. Fader argued that it is clear from the directions and the testimony of both HSOs that the health and safety hazard at issue was water pressure differential. It is this issue alone that forms the basis of the two directions and it is in the context of this hazard that the analysis under paragraph 125(1)(z.14) must occur. The question is whether PWGSC and Parks Canada took all reasonable care to ensure that all of the persons who were granted access to the work place were informed of the potential for water pressure differential when conducting diving operations at Dam #1.

[40] Mr. Fader indicates that evidence showed that as part of the tendering process, PWGSC issued a Statement of Work. The document has three elements that are relevant to this appeal:

- "Owner (Parks Canada) will move the stop logs for the diving work as required". A common theme throughout the testimony was that Parks employees were available to ODS as required.
- "Diving must be carried out by a competent industrial diving firm experienced in working around dams". Evidence has showed that this was met.
- Finally, the Statement of Work also calls for a site specific health and safety plan. As well, the evidence is clear that such a plan was in place at the time of the accident.

[41] Mr. Fader points out that HSO Misuraca confirmed that the Request for Proposal was sent to ODS Marine via e-mail from PWGSC and that testimonies indicated that an Amended Request for Proposal was specifically e-mailed to ODS Marine with the following amendment:

Q4: What if there is too much leakage from the stop logs to safely inspect?

A4: In locations where leakage through the stop logs is unsafe for divers, the contractor will be required to use an underwater camera on an extension pole to inspect such areas.

[42] Mr. Fader noted that testimonies confirm that there were discussions with ODS Marine about general safety issues. As well, testimonies of Luc Beriault (PWGSC) confirmed that a meeting was held with ODS Marine where they were told that there were gaps between the logs due to debris and deterioration and that this results in a degree of flow.

[43] He noted as well that documents introduced in evidence show that the diving company did a job hazard analysis and properly identified the hazard at issue in this appeal. This document was shared with PWGSC prior to the dive and would have given the reasonable impression that the company and its divers were well aware of the potential hazard of negative water pressure differential.

[44] Mr. Fader indicated as well that the company's emergency plan, introduced in evidence and shared with PWGSC prior to the dive was read and signed by every member of the dive team. The plan indicated that the dive supervisor was Mike Chard and that Luc Beriault was simply the customer representative. The plan clearly provides the option of terminating the dive. The plan also specifically stated the following: "SPECIAL HAZARDS: Water Control Structure - Ensure bag to bag test work area prior to diver entering the water".

[45] Mr. Fader affirms that even if this was the only document in evidence, it shows that every person granted access to the work place was aware of the hazard identified in the Health and Safety Officers' directions. The document also reads "Worker Protection Required: Yes", and "Contact: Brad Graham (sluice way/water level)". Clearly, this indicates that the requirement for the dive team to have a line of communication open with Brad Graham (Parks Canada) in order for any work to be done on the sluice ways or the water level to ensure diver safety had been established.

[46] He notes that attached to this plan is a Rescue and Emergency Plan, where once again, Mike Chard, ODS Marine representative, is listed as the supervisor and Luc Beriault is listed as the customer's representative.

[47] Mr. Fader points out that the document is signed by every member of the dive team. It is again clear that every person granted access to the work place was aware of the

hazard at issue in these appeals, i.e., differential water pressure. It is also clear that the dive team was aware of the line of communication with Brad Graham at all times.

[48] In addition, Mr. Fader indicates that the Rescue and Emergency Plan also contained the required notification to the Ontario Ministry of Labour and a notice to the Quinte West Fire Department. This Rescue and Emergency Plan gives the reasonable impression that every person granted access to the work place was aware of all known or foreseeable hazards.

[49] According to him, the ODS Marine Policy and Procedures Manual would give any reasonable person the impression that this is a sophisticated diving operation fully prepared to safely perform the work that was to be done at Dam #1. Mr. Fader finds it interesting to note that “supervisor” is defined as the person in charge of the work place and having authority over the workers. The Policy has special procedures on “Water Flow Hazards” indicating that “no dive shall be conducted in hazardous water flow” and:

A bag test must be performed to identify “Delta P” [Differential Pressure] hazards prior to diver or divers entering the water where there is a potential water flow hazard to a diver such as water control structures, intake pipes, etc.

[50] Mr. Fader mentions that the accident report produced by ODS Marine confirms the fact that the dive crew was aware of the specific leakage coming out of Bay 6 where the accident occurred:

The diver and surface crew had been previously made aware that there was a lot of flow coming out of Bay 6 because they could see the water coming out of the downstream side of the stop logs.

[The diver] confirmed that there was a lot of water flow by extending his meter stick with small rope attached which was a tool that he carried for this purpose. The diver discussed the flow conditions with the surface crew, he said the flow was too fast to work safely and so they agreed to skip the bay.

[51] Mr. Fader noted from the incident statement that ODS Marine Operations Manager Ken Rule indicated that on September 24, 2009 he met with Jacques Béland and Luc Beriault (PWGSC) and they discussed job safety. The report indicates:

Discussed potential leakage at dam...I addressed this with our dive team and we would assess the site conditions, perform a bag test and define a safe work area prior to entering the water.

It is clear that well in advance of the dive ODS and the dive crew were aware of the hazard of negative water pressure. It is also clear from this document that PWGSC reviewed the ODS Marine Health and Safety Plans and that the Parks Canada Lock Master and his crew “were very helpful in ensuring the stop logs were moved to ensure we could keep (two) bay clearances as per plan”.

[52] Mr. Fader states that in fact, HSOs Jenkins and Misuraca confirmed in their testimony that it was their understanding that the crew was aware of the hazard and had decided to skip Bay 6.

[53] Mr. Fader highlights the testimony of Mr. Geddes who testified that the chain of command in a dive operation is critical and that it was clear that Mike Chard of ODS Marine was the dive supervisor for the operation in question. Mr. Geddes confirmed in testimony the following conclusions found in his report:

In regard to the above, it is my opinion that Parks Canada and Public Works Government Services followed current industry standards in the identification and notification of hazards to the employer ODS Marine. In addition, Parks Canada and Public Works and Government Services also followed current industry practices in ensuring that the dive crew was trained and competent to do the work.

[54] Mr. Fader insists that it is important to point out that Mr. Geddes produced his report, not for PWGSC nor Parks Canada, but for health and safety Officer Misuraca. The health and safety officer's own expert contradicts his direction. It is clear from the expert report that both PWSC and Parks Canada met industry standards in terms of notifying ODS Marine of the hazards.

[55] Mr. Fader concluded that based on the specific requirements of the Code, with respect to the two directions at issue, the question to be asked is whether PWGSC and Parks Canada took all reasonable care to ensure that all of the persons granted access to the work place were informed of the potential for water pressure differential when conducting diving operations at Dam #1.

[56] Mr. Fader asserts that during his cross examination and having been taken through the overwhelming evidence described above, HSO Jenkins conceded that PWGSC and Parks Canada "appear to have met their obligations".

[57] The appellants therefore request that the two directions be rescinded in their entirety.

### **Analysis**

[58] The direction issued by HSO Jenkins to Parks Canada on November 10, 2009, under paragraph 125(1)(z.14) of the Code, reads in part:

Parks Canada Agency, the owner of Dam #1 on the Trent-Severn Waterway System, Trenton, Ontario, where ODS Marine employees have been granted access to the work place by Parks Canada Agency, and where subsequently an ODS Marine employee was exposed to water pressure differentials, failed to take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, were informed of every known or foreseeable health or safety hazard to which they were likely to be exposed in the work place

[59] The direction issued by HSO Misuraca to PWGSC on August 30, 2010, under paragraph 125(l)(z.14) of the Code, reads in part:

PWGSC, via its senior project manager, failed to ensure that a site specific health and safety hazard assessment had been conducted by the contractor prior to the commencement of work at the site by O.D.S. Marine employees to whom PWGSC had granted access to perform diving activities under the standing offer contract signed on September 9, 2009 with O.D.S. Marine for the purpose of performing an inspection of Dam #1 at the Trent-Severn Waterway.

In addition, PWGSC failed to receive, prior to the commencement of work a written confirmation from the aforementioned contractor stating that its employees had been informed, based on the aforementioned health and safety assessment, of every known or foreseeable health and safety hazard assessment, of every known or foreseeable health and safety hazard to which they were likely to be exposed while performing the dam inspection at the said work site.

This had the result of not ensuring that the contractor's employees had been informed of the aforementioned hazards before starting work. [Emphasis added]

[60] What I retain with regard to this issue is the following:

- There was a Statement of Work<sup>1</sup> that outlined:
  - i. Parks Canada employees would be available at all time to reconfigure the dam as required;
  - ii. Diving had to be conducted by a competent industrial diving firm;
  - iii. The contractor would have to provide a site specific health and safety plan.
- An Amended Request for Proposal<sup>2</sup> was specifically e-mailed to ODS Marine with the following amendment:

Q4: What if there is too much leakage from the stop logs to safely inspect?

A4: In locations where leakage through the stop logs is unsafe for divers, the contractor will be required to use an underwater camera on an extension pole to inspect such areas.
- Testimonies<sup>3</sup> confirmed that there were discussions with ODS Marine representatives regarding general safety issues, including the potential for pressure differential, a potent hazard in diving.

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<sup>1</sup> Health and Safety Officer Misuraca's Report to PWGSC, Tab 18.

<sup>2</sup> Health and Safety Officer Misuraca's Report to PWGSC, Tab 20.

<sup>3</sup> Testimonies: J. Belland and L. Beriault (PWGSC).

- Testimonies and evidence<sup>4</sup> also confirmed that ODS Marine had conducted a job hazard analysis and had properly identified the hazard (water pressure differential) at issue in this case.
- ODS Marine provided a Rescue and Emergency Plan<sup>5</sup>, which had been signed by all the divers present on site. This plan specifically addressed the water structure hazard creating potential water pressure differential. Such hazard was addressed at length indicating that a bag test was required before any diving was to be done.
- The expert<sup>6</sup> in commercial diving, hired by the HSO, indicated in his report that PWGSC had followed current industry standard in the identification and notification of the hazards in the work place to ODS Marine. He added that Parks Canada and PWGSC had also followed current industry practices in ensuring that the dive crew was trained and competent to do the work.
- Health and Safety Officers Jenkins and Misuraca confirmed in their testimony that it was their understanding that the crew was aware of the hazard and had decided to skip Bay 6.

[61] Based on the above, I conclude that Parks Canada had met the requirement of the Code in informing those persons present (ODS Marine) of all known and foreseeable health and safety hazards before the start of the diving contract. Therefore, I am rescinding the direction issued under paragraph 125(1)(z.14) by HSO Jenkins to Parks Canada on November 10, 2009.

[62] As well, I conclude, based on the above, that PWGSC has also met the requirement of the Code in informing those persons present (ODS Marine) of all present and foreseeable hazards before the start of the diving contract. Therefore, I am rescinding as well the direction issued under paragraph 125(1)(z.14) by HSO Misuraca to PWGSC on August 30, 2010.

[63] Regarding the two additional requirements contained in the direction issued by HSO Misuraca to PWGSC, that is:

- PWGSC had failed to ensure that a site specific health and safety assessment had been conducted by the contractor prior to the commencement of the work;
- and that PWGSC had failed to receive, prior to the commencement of the work, written confirmation from the contractor (ODS Marine), that its

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<sup>4</sup> Health and Safety Officer Misuraca's Report to PWGSC, Tab 1.

<sup>5</sup> Health and Safety Officer Misuraca's Report to PWGSC, Tab 2.

<sup>6</sup> Mr. Dave Geddes, Professor Commercial Diving (retired), Consultant, Marine Field Diving.

employees had been informed of every known and foreseeable hazards to which they were likely to be exposed while working at Dam #1.

[64] I agree with Mr. Fader that these are not required specifically by the Code. The Code states that the employer has to take all reasonable care to ensure that all persons granted access to the work place are informed of every known and foreseeable hazard. There are no requirements for all persons (in this case, ODS Marine employees) to conduct a hazard assessment. My opinion is that this duty to conduct a hazard assessment lies with the employers (Parks Canada and PWGSC) to make sure that they can identify all present and foreseeable hazards present in the work place and consequently be able to inform all persons granted access.

[65] Furthermore, I find it is not required in the Code for the employer to receive a written confirmation from the persons present in the work place that they have been informed of every known and foreseeable hazard.

**Part 2 - Infractions specified under paragraphs 125(1)(o), 125(1)(z.14) and Part XII of the Regulations, as contained in the direction issued to Parks Canada**

**Appellant's Submissions**

[66] Mr. Fader argues that paragraph 125(1)(o) of the Code and the sections of the Regulations invoked by the HSO apply in respect of an employer and its employees. He highlights that there was no employer/employee relationship between Parks Canada and ODS Marine employees. As such, in his view, these sections have no application in this case.

[67] Furthermore Mr. Fader argues that section 12.11 of the Regulations does not apply to the hazard of drowning from diving. Part XVIII applies and is a complete code on diving. In his view, it would serve no purpose if section 12.11 were interpreted to apply to the hazard of drowning from diving. Mr. Fader refers to the following passage in a recent Federal Court of Appeal decision, which emphasizes that legislation must be interpreted in its entire context and words must not be read in isolation:

[...] As pointed out by Sullivan, "before interpreters can pronounce on the clarity of the words to be interpreted, they must look at the entire context in which the words appear" [...]. Justice Bastarache also wrote in *ATCO Gas and Pipeline Ltd. v. Alberta (Energy and Utility Board)*, [2006] 1 S.C.R. 140 at paragraph 48:

This Court has stated on numerous occasions that the grammatical and ordinary essence of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provision to be interpreted, no matter how plain the disposition may seem upon initial reading. [Emphasis added.]



Every statute should be interpreted liberally in such a manner as to best ensure the attainment of its objects.<sup>7</sup>

[68] Mr. Fader states that section 12.11 of the Regulations falls under the heading "Protection Against Drowning". He points out that subsection 12.11(1) requires employers to provide life jackets and safety nets. Clearly, these items have no application in a diving operation. He opines that this reflects the fact that all of section 12.11 is aimed at accidental drowning and has no application in the context of a diving operation. For this reason, he submits that the direction should be rescinded in its entirety. He noted that it is important to point out that under cross-examination, HSO Jenkins conceded that section 12.11 of the Regulations did not apply to diving operations.

[69] He informs the Tribunal that while it is not at issue in this appeal it is important to point out that Parks Canada does have equipment and procedures in place to deal with accidental fall-in. The testimony of Jack Alexander established that Parks Canada has emergency equipment to deal with accidental fall-in. Parks Canada has a flotation device, attached to a rope that can be thrown to assist in rescue. There is a cable upstream of the dam to prevent boats from getting to the dam. Parks Canada has a policy entitled "Precautions Against Drowning".

### **Analysis**

[70] The applicable section of the Code for contraventions No. 1 to 4 of the first direction issued to Parks Canada is as follows:

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,

- (o) comply with prescribed standards relating to fire safety and emergency measures;

[71] The applicable section of the Code for contravention No. 5 of the first direction issued to Parks Canada is as follows:

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.14) take all reasonable care to ensure that all persons granted access to the workplace, other than the employer's employees, are informed of every known or foreseeable health and safety hazard to which they are likely to be exposed in the workplace;

The applicable parts of Part XII of the Regulations relied upon by the HSO in issuing his direction to Parks Canada read as follows:

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<sup>7</sup> *Andrew Donnie Amos v. Canada (Attorney General)*, 2011 FCA 38, at paragraphs 43-44.

- Paragraphs 12.11(2)(a) and (b) of the Regulations:

- 12.11(2) Where, in a work place, there is a hazard of drowning
- (a) emergency equipment shall be provided and held in readiness;
  - (b) a person who is qualified to operate all the emergency equipment provided shall be available

- Subparagraphs 12.11 (2)(d)(i) and (ii) of the Regulations:

- 12.11(2) Where, in a work place, there is a hazard of drowning,
- (d) written emergency procedures shall be prepared by the employer containing
    - (i) a full description of the procedures to be followed and the responsibilities of all persons granted access to the work place, and
    - (ii) the location of any emergency equipment

- Subsection 12.15(3) of the Regulations:

- 12.15(3) Every person granted access to the work place shall be instructed in respect of the written emergency procedures referred to in paragraph 12.11(2)(d)

With respect to Mr. Fader's argument about 125(1)(o) not applying here, I note that ODS Marine's divers were not Parks Canada employees. However, that being said, when read as a whole, I find that Part XII of the Regulations applies not only to the protection of employees, but also to that of every person granted access to the work place as stated in section 12.1 of the Regulations:

- 12.1 Where
- (a) It is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits, and
  - (b) The use of protection equipment may prevent or reduce injury from that hazard,
- every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part.  
[Emphasis added]

[72] It is clear, on a reading of various provisions contained in it, that Part XII of the Regulations applies to protect employees and persons with equipment against hazards in the workplace where it is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits. The regulation provides for the use of protective headwear, safety boots, skin protection, and protection against drowning. Generally speaking, this applies to all kinds of protective equipment against health and safety hazards in the work place where they exist.

[73] However, even if Part XII of the Regulations can be said to confer obligations on Parks Canada with regard to individuals other than its own employees, I agree with the Appellant that the HSO's choice of Part XII in this case to pursue contraventions against Parks Canada was problematic. The specific provisions cited by the HSO, under sections

12.11 and 12.15 of the Regulations, deal with the hazard of accidental drowning. Subsection 12.11(2), for instance, is immediately preceded by subsection 12.11(1) which requires an employer to grant every person with a life jacket where there is a drowning hazard. Yet, what the HSO really took issue with here, as evidenced in his testimony was the existence of a water pressure differential, rather than a general obligation to protect against a drowning hazard attributable, for instance, to an accidental fall-in by any person present at the site.

[74] In that regard, it is clear that Part XVIII of the Regulations is a complete framework with respect to the hazards attributable to a diving operation. Specifically, Part XVIII refers to employers and employees involved in diving operations. It is a comprehensive regulation which applies to the type of activity which is central to this case. Part XVIII looks at all aspect of safe diving, such as written procedures, instruction and training, dive plan hazards (section 18.21) to diving equipment and other such issues as termination of dive or even flying after a dive. For example, Part XVIII deals explicitly with:

- the requirement for an employer to establish written procedures and requirements to be followed and met by employees involved in diving operations to be implemented to counter any known hazards, including hazardous water flow conditions (paragraph 18.4(1)(b)) and to deal with emergency situations and the evacuation of dive team members (paragraph 18.4(1)(c));
- the requirement to develop a dive plan that identifies surface and underwater conditions and hazards including those arising from underwater pressure differentials, and that specifies the duties of each dive team member, the emergency procedures to be followed and the circumstances in which a dive must be terminated (paragraph 18.9(1));
- the necessity for a dive supervisor to ensure all members of a dive team are familiar with the dive plan and understand their duties, including emergency procedures to be followed (sections 18.19 and 18.20).

[75] In other words, Part XVIII of the Regulations specifically addresses diving activity and everything it entails. But it is important to note that Part XVIII was not invoked against Parks Canada, and also that with respect to the incident which led to the issuance of the present directions, the record reveals it is ODS Marine that was, as an employer under provincial jurisdiction, subject to proceedings under diving provisions of provincial occupational health and safety legislation.

[76] As a result, the highly technical manner in which the diving operation was conducted would have been part of a subject area that is encompassed by Part XVIII and which applies to an employer engaged in diving operations. Part XII of the Regulations, the scope of which has no application to a diving operation, was not the proper framework through which to scrutinize any such operation.

[77] That being said, I can accept that a hazard of accidental fall-in may still have existed for ODS Marine employees by reason of their presence at the site generally, and thus conferred an obligation on Parks Canada pursuant to Part XII of the Regulations to ensure that it guarded against that specific hazard. In my view, the testimony of Mr. Alexander, and the record show that Parks Canada met this obligation. Specifically, the record shows that Parks Canada has a policy entitled "Precautions Against Drowning"<sup>8</sup>, which amounted to written emergency procedures containing the following elements:

- the requirement for, and location of, specific emergency equipment , namely life rings equipped with a throwing rope as well as pike poles;
- the requirement for all staff and, for instance, students to be trained in the proper use of all safety equipment and to be aware of required procedures;
- a specific procedure to be followed by staff in the event of a fall-in;
- the requirement for emergency telephone numbers to be displayed prominently;
- a requirement for signs to be installed, when necessary, to help control restricted activities.

[78] However, it is important in this case to note that in addition to the procedures and equipment that Parks Canada had in place as indicated above, ODS Marine also had in place its own Emergency procedures aimed at the hazard of accidental fall-in and drowning, which were provided to PWGSC in advance of the dive on October 1 and 2, 2009.

[79] In this regard, I would note the following in the equipment checklist of ODS Marine's Rescue and Emergency Plan<sup>9</sup>. The areas addressed by ODS Marine were relevant to each contravention identified by the HSO as they pertain to the hazard of drowning in Part XII of the Regulations:

- failure to ensure emergency equipment provided and held in readiness (paragraph 12.11(2)(a) of the Regulations): In addition to the equipment made available by Parks Canada noted above, ODS Marine's Rescue and Emergency Plan identified its safety boat, a throw rope, a ring buoy, and a pike pole. This equipment was identified as being applicable in a "Man Overboard" situation;
- failure to ensure a qualified person available to operate the emergency equipment (paragraph 12.11(2)(b) of the Regulations): Other than the fact that a surface crew was available to operate the emergency equipment if an ODS Marine employee fell into the water, the ODS Marine Rescue and

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<sup>8</sup> Exhibit No: E-7.

<sup>9</sup> Health and Safety Officer Misuraca's Report to PWGSC, Tab 28.

Emergency Plan directed “all personnel to assist in recovery of worker” using the above noted emergency equipment;

- failure to ensure written emergency procedures contain full description of procedures to be followed and responsibilities of all persons granted access to the workplace (subparagraph 12.11(2)(d)(i) of the Regulations): Again, I note that the ODS Marine Rescue & Emergency Plan, in its “Man Overboard” procedure, identified the steps to take if someone fell into the water;
- failure to ensure that the written emergency procedures contained the location of emergency equipment (subparagraph 12.11(2)(d)(ii) of the Regulations): It is apparent from the ODS Marine plan described above that the equipment would have been readily available in case of a drowning hazard materializing;
- failure to ensure that persons granted access to the work place were instructed with respect to emergency procedures (subsection 12.15(3) of the Regulations): The ODS Marine document entitled “Rescue and Emergency Plan” was signed by all four ODS employees taking part in the dive.

[80] It is of course important to note that ultimately, the duties and obligations set out in the Code with respect to employees and other persons remains with the employer and cannot be delegated to a third party. In a previous decision, I wrote that:

[...] 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.

The Ontario Court of Appeal in *R. v. Whyssen* 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.”

The fact that PWSGC asked by way of a contract for Tli-Cho to coordinate health and safety at the Colomac mine site does not, ultimately, relieve either PWSGC or INAC of their obligations under the Code.

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.<sup>10</sup>

[Emphasis added]

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<sup>10</sup> *Public Works and Government Services Canada and Indian Affairs and Northern Development Canada*, 2010 OHSTC 1.

Parks Canada and PWGSC, undertaking a specialized diving operation in which it, by necessity given the specialized nature of the diving operation, had its own set of emergency procedures to guard against the hazard of "accidental fall-in". These had been reviewed and subjected to change by PWGSC prior to the dive. In light of this, I find that the protections against the hazard of drowning, as contemplated by Part XII of the Regulations, with respect to ODS Marine employees attending the site, were met.

[82] Based on the foregoing, I am rescinding the direction issued on November 10, 2009 under paragraphs 125(1)(o) and (z.14) of the Code by HSO Jenkins.

### **Decision**

The appeals of the three directions in this matter are allowed. The two directions issued to Parks Canada on November 10, 2009 by HSO Jenkins are rescinded. As well, the direction issued to PWGSC on August 30, 2010, by HSO Misuraca is rescinded.

Richard Lafrance  
Appeals Officer