

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant: Public Works and Government Services Canada
Saint John, N.B.
Represented by: Ms. Dee A. A. Sabiston
Regional Manager, Safety and Security

Respondent: Public Service Alliance of Canada
Represented by: Mr. Gary Bannister
Regional Representative

Mis en Cause: Luc Sarrazin
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

An oral hearing was held in Saint John, N.B. on June 29, 1999.

Background

Two distinct directions were issued to Public Works and Government Services Canada (PWGSC) by safety officer Luc Sarrazin in respect of work being performed on two separate buildings. The directions will be reviewed concurrently as they were the subject of the same hearing and were addressed by the parties concurrently.

Direction applicable to 189 Prince William Street, Saint John, New Brunswick.

On Monday morning, January 4, 1999, a fire occurred around 4:30 a.m. at this building which is owned by PWGSC. PWGSC had entered into a contract with a provincial firm, Simpson Building Systems Ltd., to carry out exterior wall cladding and roof repairs on the building in question. The fire, which was caused by construction material being blown onto a salamander used within the construction site, caused no damage to the building but did cause minor damage to the scaffolding. At the time of the incident, no one was in the building. However, under normal circumstances, the building is occupied by employees of various federal departments.

Safety officer Luc Sarrazin investigated the incident the following day. He observed that

- no supervision of the equipment was provided and the said equipment was not ensured (sic) so as any contact was to occur to other sources of combustion; and
- in addition, there were numerous employees and persons that were granted access to the workplace who were not provided with or using Personal Safety Equipment, i.e. fall-protection equipment.

The safety officer issued a direction (APPENDIX-A) under subsection 145(1) of the Canada Labour Code, Part II (hereafter the Code) to PWGSC. The direction stipulates that the employer is in contravention of paragraph 125(v) of the Code for not ensuring that employees wear the prescribed personal protective equipment and paragraph 125(k) of the Code and subsection 2.15(1) of the Canada Occupational Safety and Health Regulations (hereafter the Regulations) for leaving the salamander involved in the incident unattended.

Direction applicable to 633 Queen Street, Fredericton, N.B.

On August 25, 1998, PWGSC entered into a contract with Procon Restoration Services Ltd. for the purposes of that firm carrying out exterior stone cleaning of the building. On November 12, 1998, an employee of Procon was climbing the scaffold attached to the building. The employee was wearing a safety harness however, he did not have his safety line attached. As he climbed up the outside portion of the scaffold, the staging, which had been improperly secured, rotated causing the employee to fall 10.7m. to the lawn below. The employee received fractures to both arms.

This incident was reported to and investigated by the New Brunswick Workplace Health, Safety and Compensation Commission. The Commission took remedial steps as a result of their investigation into the accident. The Commission informed the Labour Program of Human Resources Development Canada of the incident and expressed concern by the apparent lack of supervision at this work site.

On December 23, 1998, safety officer Luc Sarrazin conducted an inquiry into the incident. He analysed the circumstances of the incident and noted the unsafe actions and unsafe conditions that contributed to the accident. The safety officer concluded that:

- the employer did not ensure that the persons granted access to the work place were following safety precaution measures, nor that the persons were familiar with all safety equipment; and
- the employer did not inform Labour Services, as per 125(c) and 15.5 of the regulations, of any accident of which he was aware.

A direction (APPENDIX-B) was issued under subsection 145(1) of the Canada Labour Code, Part II (hereafter the Code) to PWGSC to have those situations corrected.

Submission for the Employer

The detailed submission of the employer is on record and will not be repeated here. Also, three Regional Safety Officer decisions were entered into evidence by Ms. Sabiston in support of the argument that the Code only applies where an employer/employee relationship exists, a condition that she argued was absent in the instant case. The salient points of the submission are as follow.

Direction applicable to 189 Prince William Street, Saint John, New Brunswick

In reference to a contravention of paragraph 125(v) of the Code, Ms. Sabiston argues that the work site where the accident occurred was not under the control of PWGSC but was under the control of Simpson Building Systems Ltd. which is under provincial jurisdiction. No employee of PWGSC was involved in any construction work at the building in question. The employees seen by the safety officer during his investigation were employees of Simpson Building Systems Ltd. Furthermore, it is this company who granted and authorized access to the work place.

In reference to a contravention of paragraph 125(k) of the Code and subsection 2.15(1) of the Regulations, Ms. Sabiston makes essentially the same argument as for paragraph 125(v) above i.e.

“... Section 125 applies to “...*every work place controlled by the employer...*” PWGSC was not the employer and did not control the work place where the incident occurred. The work site was under the control of Simpson Building Systems Ltd. which falls under provincial jurisdiction. There was no employer/employee relationship between PWGSC and Simpson Building Systems Ltd.”

Ms. Sabiston added that subsection 2.15(1) of the Regulations makes no reference to the salamander being under supervision during its operation.

Direction applicable to 633 Queen Street, Fredericton, N.B.

The submission of the employer, in this case, is predicated on the assertion that the injured employee was not an employee of PWGSC. He was an employee of Procon Restoration Services Ltd. which falls under provincial jurisdiction.

In reference to paragraph 125(c) of the Code, Ms. Sabiston argues that PWGSC was not the employer, did not control the work place and there was no PWGSC employee on site at the time the incident occurred. The work site was under the control of Procon Restoration Services Ltd. As for the associated contravention to paragraph 15.5 of the Regulations, Ms. Sabiston adds that PWGSC was not the employer, had no control of the work place, thus, had no requirement for reporting to HRDC. The appropriate jurisdictional authority was notified and responded accordingly. Procon Restoration Services Ltd. had this responsibility and fulfilled it.

In reference to paragraph 125(v) of the Code, Ms. Sabiston's argument is essentially the same as the argument for the same contravention in the direction applicable to the building located at 189 Prince William Street, Saint John, New Brunswick. It is that PWGSC was not the employer; the accident victim was not an employee of PWGSC; and PWGSC did not control the work place

where the accident occurred; PWGSC did not grant access to the injured party; his employer Procon Restoration Services Ltd. in fact granted and authorized physical access to the work place.

Submission for the Employee

Mr. Bannister submitted that safety officers cannot be at a work place every day to ensure that safety is maintained. A safety officer may issue a direction for a situation that occurred on another day but this is justified since safety is an ongoing system.

Mr. Bannister argued that the Regional Safety Officer decisions entered into evidence by the employer were not applicable to the case at hand since they dealt with different provisions of the Code and the Regulations. He also introduced *Liaison Bulletin No. 41*, a publication of Human Resources Development Canada (hereafter HRDC) which referred to a case involving PWGSC and a private contractor it hired to perform work at one of its buildings. In that case, an employee of the firm was fatally injured as a result of the work he was performing. The Department of HRDC laid five charges against PWGSC who pleaded guilty to two of the charges. The remaining three charges were dropped. This, according to Mr. Bannister, is proof of the employer's responsibility towards every person to whom it grants access to its work place which is the essence of paragraph 125(v) of the Code.

The issue pertaining to paragraph 125(k) and subsection 2.15(1) of the Regulations is somewhat similar in that PWGSC took steps to ensure that the safety officer's direction was carried out by the contractor. The contractor advised PWGSC that when work crews are on the site, there would be a watchman (sic). As for the contravention to paragraph 125(c) of the Code and section 15.5 of the Regulations, the employer has only submitted a decision of a Regional Safety Officer involving the National Research Council of Canada which deals with a different provision.

Finally, Mr. Bannister commented on the issue of the scaffolding being under the control of the contractor. He asserted that the minute the scaffolding becomes attached to the building, it becomes part of the building. He is of the view that that gives further strength to the argument of the employer controlling access to the workplace by every person.

Decision

There are several issues, each one corresponding to a contravention identified in each direction, to be resolved in this case. I will address each issue in the order it appears in each direction.

Direction applicable to 189 Prince William Street, Saint John, New Brunswick.

This direction (Appendix A) makes reference to two contraventions i.e.

- item #1 - paragraph 125(v) of the Code; and
- item #2 - paragraph 125(k) of the Code and subsection 2.15(1) of the Regulations.

item #1 - paragraph 125(v) of the Code

This provision reads as follows:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

(v) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing;

The arguments of Ms. Sabiston are that PWGSC is not the employer of the employees of Simpson Building Systems Ltd., that the scaffolding was not under the control of PWGSC, that there existed no employer/employee relationship between the injured employee and PWGSC and finally that it is the contracting firm that authorized access to the work place and not PWGSC.

The issue of who is the proper employer in this case, relative to federal department employees occupying the building, was raised by me prior to and at the hearing but received no reply from PWGSC. I indicated at the hearing that I would have to address this question notwithstanding the absence of submissions on this point by PWGSC. No objection was raised by the parties on this point.

There were no PWGSC employees at the work place in question however, many other federal departments occupy this building and therefore, many public servants work in the building. In this case, as in the following case, PWGSC had entered into a contract with a private firm to do work on the building. The contract was to be sent to me but again, I received no response to my request therefore leaving me to speculate on its content. I suspect the contract, like most contracts in the public service, is made between Her Majesty the Queen and the private firm and not with PWGSC. The building is therefore owned by the Crown. PWGSC is acting as an agent of the Crown, a project leader, but is not acting on its own behalf.

The Canada Labour Code, Part II is made applicable to the public service via an amendment to section 11 of the Financial Administration Act (hereafter the FAA). The FAA is the legislation which governs the business of the Government of Canada. Treasury Board is one of the two entities, the other being the Department of Finance, that has been created by the FAA. Section 7 of the FAA makes Treasury Board responsible for the management and working conditions of the employees of the public service. Under section 11 of the FAA, the Treasury Board is considered the employer of the employees of the public service for the purposes of section 11 to 13 of the Public Service Staff Relations Act (PSSRA). Under the PSSRA, the public service includes, as provided in subsection 123(2) of the Code “...a portion of the public service of Canada specified from time to time in Schedule I to the Public Service Staff Relations Act.” The building located at 189 Prince William Street, Saint John, New Brunswick is occupied by employees of many federal Departments. Public Works and Government Services Canada, like other federal Departments, is a portion of the public service specified in Schedule I above. Consequently, Treasury Board is the employer of all public servants working in the building. Regardless that Treasury Board may have delegated to the individual Departments the

responsibility to manage its employees and their working conditions, it can and should be identified as the employer in this case given that PWGSC was only acting as the project leader overseeing work being performed on a building occupied by employees of other federal departments. Any other interpretation would leave these latter employees without the protection afforded by the Code.

Evidently, in some cases, PWGSC, like any other Department, is to be and will be considered an employer when the issue to be resolved is specifically between the employer and his/her employees. Incidentally, none of the Regional Safety Officer decisions submitted by Ms. Sabiston dealt with the application of paragraph 125(v) of the Code. For the purposes of this case, I have decided to identify the employer as Treasury Board (PWGSC) and I will vary the direction accordingly.

The issue of what is and who controls the work place is interesting. The term “work place” is defined at subsection 122(1) of the Code as follows:

“work place” means any place where an employee is engaged in work for the employee’s employer.

The definition of work place must be read in the context of the stated purpose of the Code found at section 122.1. It reads:

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

In my opinion, the work place, in this case, is 189 Prince William Street, Saint John, New Brunswick. It includes the parking lot, the lawn, the surroundings of the building and any attachments to the building where employees are engaged in activities arising out, linked with or occurring in the course of their employment. This work place is under the control of Treasury Board (PWGSC).

By attaching the scaffolding to the building, Treasury Board (PWGSC) acquires responsibility under the Code for the equipment although it is not its owner. It does so to the extent that this equipment, and the people using it, may affect the health and safety of the employees under federal jurisdiction working at that work place. Therefore, the responsibility of the employer, Treasury Board (PWGSC), in this case extends to the scaffolding attached to the building and the actions of the employees working on it notwithstanding that these employees may not be its own employees. Since Treasury Board (PWGSC) controls the work place identified as 189 Prince William Street, Saint John, New Brunswick, it also controls the scaffolding for the purposes of the Code. The employer cannot escape his/her responsibilities under the Code towards his/her employees simply because it entered into a contract with a private firm to carry out work on the building.

I requested, at the hearing, a copy of the contract between the firm and the Crown in order to satisfy myself that, as a minimum, detailed provisions exist in the contract to ensure compliance with the provisions of the Canada Labour Code, Part II and the pursuant Regulations. In the absence of a copy of the said contract, I can only conclude there are no such provisions or, if any

exist, they are inadequate. Since PWGSC argues it does not control the work place i.e. the scaffolding, that it is not responsible for the firm's actions and that it did not grant access to the firm's employees, I infer from this that PWGSC claims it has no responsibility in this case. I disagree with this position.

In my opinion, paragraph 125(v) of the Code extends the responsibility of Treasury Board (PWGSC) to ensuring that any person to whom it grants access to its work place does not, by his/her actions or inaction, endanger the health and safety of employees under federal jurisdiction working at that work place and does not endanger his/her own safety regardless of the jurisdiction which protects him/her. The purpose of this far reaching provision is, in my opinion, not for the employer to assume jurisdiction over these employees but to assume his/her responsibility in regards to the work place under his/her control. While I would agree that this provision seems to extend the responsibility of the employer beyond the traditional employer/employee relationship, it is most importantly one that makes good sense from a health and safety perspective.

In this case, the safety officer observed, during his inspection of the scaffolding, employees of the firm not wearing the safety equipment required by paragraph 12.10(1)(b)¹ of the Regulations. Paragraph 125(v) of the Code places a mandatory requirement on the employer to “...ensure that every person granted access to the work place by the employer...” uses the prescribed safety equipment. The expression “*every person granted access to the work place*” is all inclusive and makes no distinction on the basis of jurisdiction or any other basis. It includes non-employees such as visitors, members of the public, workers of all jurisdictions etc.

If the concept of “person” was read in a more restrictive manner, such as reading into this concept only “persons under federal jurisdiction”, it would restrict the application of many other provisions of the Code and the Regulations and defeat altogether their purposes. To give only one example out of possible multitude, under paragraph 128(2)(a), which provides an exception to the exercise of the right to refuse to do dangerous work, an employee would not be prevented from exercising his/her refusal to work and as a consequence, he/she could “*put(s) the life, health and safety of another person directly in danger*” unless the person referred to in that provision is known to be covered by the federal jurisdiction. I do not believe that Parliament intended to protect only the life, health and safety of only those persons under its jurisdiction and ignore those persons not subject to federal jurisdiction to whom the employer grants access to his/her work place.

Consequently, the project leader i.e. PWGSC, had the responsibility to ensure, on behalf of the employer Treasury Board, that every one working on the premises located at 189 Prince William Street, Saint John, New Brunswick was complying with the requirements, in this case, of paragraph 125(v) of the Code and paragraph 12.10(1)(b) of the Regulations. For failing to ensure this, I am of the opinion that Treasury Board (PWGSC) is in contravention of those provisions. I will vary the direction to identify the proper employer and to make a reference to paragraph 12.10(1)(b) of the Regulations.

¹ Since there has been no submissions on the application of the proper Regulations provision, other than a reference by Ms. Sabiston to deal specifically with fall-protection equipment as identified in the direction, I will identify the applicable provision but not dwell on its interpretation.

For all the above reasons, **I HEREBY VARY** item #1 of the direction issued under subsection 145(1) of the Code on January 5, 1999 by safety officer Luc Sarrazin to Public Works and Government Services Canada by replacing the references to “Public Works and Government Services Canada” with references to “Treasury Board (Public Works and Government Services Canada)” and by replacing the reference to “125(v)” with a reference to “Paragraph 125(v) of the Canada Labour Code, Part II and paragraph 12.10(1)(b) of the Canada Occupational Safety and Health Regulations”.

item #2 - paragraph 125(k) of the Code and subsection 2.15(1) of the Regulations

Subparagraph 125(k)(iv) (which is the appropriate reference in this case) of the Code and subsection 2.15(1) of the Regulations read as follow:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

(k) ensure that the use, operation and maintenance of

(iv) all gas or oil burning equipment or other heat generating equipment is in accordance with prescribed standards.

2.15 (1) Subject to subsection (2), where a salamander or other high capacity portable open-flame heating device is used in an enclosed work place, the heating device shall

(a) be so located, protected and used that there is no hazard of igniting tarpaulins, wood or other combustible materials adjacent to the heating device;

(b) be used only when there is ventilation provided;

(c) be so located as to be protected from accidental contact, damage or overturning; and

(d) not restrict a means of exit.

The safety officer and Ms. Sabiston explained that at the time of the incident there was no one at the construction site. For all practical purposes, the fire caused no damage. High winds (up to 65 km/hr.) caused a 30 feet by 30 feet hole in the shrink rap covering the work site. The heater was positioned on the ground so that heat would be blown up the wall. From the description given by Ms. Sabiston, which has not been challenged by the safety officer or by Mr. Bannister, the wind blew construction material in front of or on the salamander which caused a fire to occur. There is no evidence this material was adjacent to the salamander as specified by paragraph 2.15(1)(a) above. There is also no issue to the effect that the location of the salamander was problematic as indicated in paragraph 2.15(1)(c). Furthermore and most importantly, the essence of the safety officer's direction is that the salamander was left unattended i.e. without supervision during the evening. I agree with Ms. Sabiston: section 2.15 of the Regulations makes no mention of supervision. I find that the employer is not in contravention of section 2.15 of the Regulations.

While it could be argued that PWGSC had some responsibility for the fire occurring, it is a responsibility that, in the absence of employees or other persons at the site in question, finds no support under the Code or its Regulations. The responsibility of PWGSC in this case, if any, does not fall within the purview of the Code.

For all the above reasons, **I HEREBY RESCIND** item #2 of the direction issued under subsection 145(1) of the Code on January 5, 1999 by safety officer Luc Sarrazin to Public Works and Government Services Canada.

Direction applicable to 633 Queen Street, Fredericton, N.B.

This direction (Appendix B) makes reference to two contraventions i.e.

- item #1 - paragraph 125(c) of the Code and subsection 15.5 of the Regulations; and
- item #2 - paragraph 125(v) of the Code.

item #1 - paragraph 125(c) of the Code and subsection 15.5 of the Regulations

Paragraph 125(c) of the Code reads as follows:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

- (c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer; (my underlining)*

Paragraph 125(c) imposes upon the employer the obligation to investigate, record and report all accidents, occupational diseases and other hazardous occurrences known to the employer. However, the employer is to comply with this provision “*in the manner and to the authorities as prescribed*”. The word “*prescribe*” is defined at subsection 122(1) to mean “*prescribe by regulation of the Governor in Council*”. Consequently, the obligation of the employer to comply with paragraph 125(c) above is to the extent provided for by Regulations. The provisions addressing the obligation of the employer in reporting accident are sections 15.4 and 15.5 of the Regulations. They read as follow:

- 15.4(1)** *Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment, the employer shall, without delay,*
 - (a) appoint a qualified person to carry out an investigation of the hazardous occurrence;*
 - (b) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the person appointed to investigate it; and*
 - (c) take necessary measures to prevent a recurrence of the hazardous occurrence.*
- (2)** *Where the hazardous occurrence referred to in subsection (1) is an accident involving a motor vehicle on a public road that is investigated by a police authority, the investigation referred to in paragraph (1)(a) shall be carried*

out by obtaining from the appropriate police authority a copy of its report respecting the accident.

- (3) *As soon as possible after receipt of the report referred to in subsection (2), the employer shall provide a copy thereof to the safety and health committee or the safety and health representative, if either exists.*

15.5 *The employer shall report to a safety officer, by telephone or telex, the date, time, location and nature of any accident, occupational disease or other hazardous occurrence referred to in section 15.4 that had one of the following results, as soon as possible but not later than 24 hours after becoming aware of that result, namely,*

- (a) the death of an employee;*
- (b) a disabling injury to two or more employees;*
- (c) the loss by an employee of a body member or a part thereof or the complete loss of the usefulness of a body member or a part thereof;*
- (d) the permanent impairment of a body function of an employee;*
- (e) an explosion;*
- (f) damage to a boiler or pressure vessel that results in fire or the rupture of the boiler or pressure vessel; or*
- (g) any damage to an elevating device that renders it unserviceable, or a free fall of an elevating device.*

The safety officer cited PWGSC in this case for failing to report to a safety officer the accident that occurred on its premises. An employee of Procon Restoration Services Limited, a company that comes under provincial jurisdiction, lost the usefulness of both arms as a result of the accident. Section 15.4 requires the employer to take specific actions when any hazardous occurrence affects any of his/her employees at work. The operative word in this provision is “affecting”. The issue before me is not to interpret this provision but to concentrate on the employer’s reporting responsibility.

Section 15.5 is the appropriate provision in this case since it requires the employer to report to a safety officer any hazardous occurrence referred to in section 15.4 above which had one of the results listed in section 15.5 above. The injuries or events listed at section 15.5 specifically refer to the death or injury occurring to one or more employees or to other events which make no mention of the employment relationship. The injury that occurred to the employee of Procon Restoration Services Limited was not an injury to one of the Treasury Board (PWGSC) employees. In my view, Procon Restoration Services Limited was required under provincial law to report the accident to the New Brunswick Workplace Health, Safety and Compensation Commission.

There is no specific requirement in section 15.5 of the Regulations for Treasury Board (PWGSC) to report to a federal safety officer within 24 hours an injury that occurred to a provincial jurisdiction employee. In this case, the New Brunswick Workplace Health, Safety and Compensation Commission was informed of the accident. The Commission investigated the

accident and took remedial steps. In my opinion, the proper jurisdiction was informed of the accident and no telephone or telex reporting action to a federal safety officer was required by Treasury Board (PWGSC) in the instant case.

For all the above reasons, **I HEREBY RESCIND** item #1 of the direction issued under subsection 145(1) of the Code on December 23, 1999 by safety officer Luc Sarrazin to Public Works and Government Services Canada.

item #2 - paragraph 125(v) of the Code

The issue to be determined in this case, in my opinion, is whether Treasury Board(PWGSC) can be cited for a contravention that occurred several weeks before the investigation of the safety officer took place. The report of the safety officer informs us that an employee of Procon Restoration Services Limited was injured at the work place located at 633 Queen Street, Fredericton, N.B., on November 12, 1998. The investigation of the safety officer took place on December 23, 1998, almost six weeks later.

The firm had completed its work and, according to Ms. Sabiston's submission, had vacated the site on November 16, 1998.

The power of the safety officer to issue a direction under subsection 145(1) of the Code provides the following:

145. (1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally. (my underlining)

I agree with Mr. Bannister's comment that "safety officers cannot be at a work place every day to ensure that safety is maintained." Subsection 145(1) is however intended to correct situations detected by the safety officers during an investigation or an inspection and which do not accord with the law. Normally, the safety officer will require that corrective measures be taken within a specified period of time. The safety officer may give directions *orally* to the employer or employee concerned which is indicative that the contravention must exist at the time of his/her investigation. However, I do not agree with Mr. Bannister's general comment' that "A safety officer may issue a direction for a situation that occurred on another day..." unless the same conditions prevail in the work place at the time of the safety officer's investigation and there is a need for him/her to intervene to protect the employees and/or have these conditions corrected.

In my opinion, the direction issued in the instant case serves no purpose since compliance is impossible. The restoration firm had completed the project and left the premises six weeks before the safety officer investigated the matter. No one from this firm was around to comply with the direction. The safety officer concluded to a contravention of paragraph 125(v) but, in reality, he never established that a contravention was ongoing, as he did in the case of the direction applicable to 189 Prince William Street, Saint John, New Brunswick, when the safety officer

observed employees of the firm working without their protective equipment. The direction given in that instance had a purpose: the employees of the firm would have to wear the prescribed safety equipment while working at the work place under the control of Treasury Board (PWGSC).

It is also impossible for the employer to terminate the contravention since the circumstances referred to by the safety officer no longer exist. In my opinion, the safety officer should have used a different compliance mechanism if he intended to take action against one party for failing to comply with the requirements of the Code and the Regulations. In view of my responsibility under subsection 146(3) of the Code, I am of the opinion there is no need for this direction.

For all the above reasons, **I HEREBY RESCIND** item #2 of the direction issued under subsection 145(1) of the Code on December 23, 1999 by safety officer Luc Sarrazin to Public Works and Government Services Canada.

Decision rendered on September 3, 1999

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On January 5th, 1999, the undersigned safety officer conducted an inquiry in the work place operated by PUBLIC WORKS CANADA, being an employer subject to the Canada Labour Code, Part II, at 189 PRINCE WILLIAM STREET, P.O. BOX 7350, SAINT JOHN, N.B., the said work place being sometimes known as 189 Prince William Bldg.

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, is being contravened:

1. 125(v)

Ensure that all persons who are granted access to the work place by the employer are familiar with and used in the prescribed circumstances and manner all safety materials, equipment, devices and clothing.

At the time of the visit a number of employees were not using their fall protection devices properly such as not using the tie rope or/and not wearing any fall protection devices.

2. 125(k) 2.15(1)

When an open flame heating device is used in an enclosed work place, it shall be used in accordance with section 2.15(1) of the Canada Occupational Safety and Health Regulations and,

The open flame heating device shall not be left unattended.

At time of investigation it reveals that the device was left in operation. Materials fell on the heating device and set it on fire. No person was available to prevent it from burning or to warn any occupant of the work place.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than January 6th, 1999.

Issued at Saint John, this 5th day of January 1999.

Luc Sarrazin
Safety Officer
1828

To: PUBLIC WORKS & GOVERNMENT SERVICES CANADA
189 PRINCE WILLIAM STREET
P.O. BOX 7350
SAINT JOHN, N.B. E2L 4J4

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On December 23rd, 1998, the undersigned safety officer conducted an inquiry in the work place operated by PUBLIC WORKS & GOVERNMENT SERVICES CANADA, being an employer subject to the Canada Labour Code, Part II, at 633 QUEEN STREET, FREDERICTON, N.B., the said work place being sometimes known as Queen Street, Government of Canada Building.

The said safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, are being contravened:

1. 125(c)

Reports in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer.

As per section 125(c) of the Canada Labour Code Part II and subsection 15.5 Hazardous Occurrence Investigation, Recording and Reporting.

2. 125(v)

Ensures that every person granted access to the work place by the employer is familiar with and uses, in the prescribed circumstances and manner, all prescribed safety materials, equipment, devices and clothing.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions no later than January 10th, 1999.

Issued at Moncton, this 23rd day of December 1998.

Luc Sarrazin
Safety Officer
#1828

To: PUBLIC WORKS & GOVERNMENT SERVICES CANADA
633 QUEEN STREET
FREDERICTON, N.B. E3B 1C3

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Public Works and Government Services Canada

Respondent: Public Service Alliance of Canada

KEY WORDS

Person, contract, employer/employee relationship, salamander, fire, fall-protection equipment, scaffolding, accident reporting, work place under the control of, ongoing contravention, provincial jurisdiction, contractor, prescribe, Financial Administration Act, Public Service Staff Relations Act, work place, terminate contravention.

PROVISIONS

Code: 122(1), 122.1, 123(2), 125(c), 125(k), 125(v), 128(2)(a), 145(1),
COSH Regulations: 2.15(1), 12.10(1)(b), 15.4(1), 15.5

SUMMARY

A safety officer investigated separate incidents that occurred at two buildings owned by Public Works and Government Services Canada (PWGSC). In both case, PWGSC had entered into a contract with a provincial jurisdiction firm to do work on the buildings. PWGSC had no employees in the buildings however the buildings were occupied by other federal Departments.

In the first case under review, a fire occurred overnight at the building located at 189 Prince William Street, Saint John, New Brunswick due to material having being blown on a salamander that had been left unattended. The safety officer investigated the matter and, during his investigation, observed employees of the firm working on a scaffolding not using the prescribed fall-protection equipment. A direction was given to PWGSC for a contravention of paragraph 125(v) of the Code for not ensuring that employees wear the prescribed personal protective equipment and paragraph 125(k) of the Code and subsection 2.15(1) of the Canada Occupational Safety and Health Regulations (hereafter the Regulations) for having left the salamander involved in the incident unattended.

Upon review, the Regional Safety Officer (RSO) had to first determine who was the proper employer in this case. He concluded that Treasury Board was the employer and not PWGSC who was deemed to be the project leader acting on behalf of the Crown. Since paragraph 125(v) of the Code referred to the expression “every person granted access by the employer”, he also had to determine whether this expression extended the responsibility of the employer to non-employees. The RSO rules that since Treasury Board (PWGSC) controlled the work place, it had the obligation to ensure that every person granted access to its work place, including employees of the firm doing work on its building, was complying with the requirements of the legislation. The RSO

varied the first item of the direction to identify Treasury Board (PWGSC) as the proper employer in this case and to refer to paragraph 12.10(1)(b) of the Regulations concerning the use of fall-protection equipment. As for the salamander having been left unattended, the RSO rescinded this item of the direction because the reference to section 2.15 of the Regulations makes no mention of the salamander having to be under the supervision of someone.

In the second case under review, an employee of the firm doing work on the building located at 633 Queen Street, Fredericton, N.B fell from a scaffold. The accident occurred on August 25, 1998 and the safety officer's investigation took place on December 23, 1998. The safety officer gave a direction to PWGSC for not reporting the accident to the Labour Program as required by section 15.5 of the Regulations and also found the employer to be in contravention of paragraph 125(v) of the Code for not ensuring that the injured employee was wearing his fall-protection equipment when the accident occurred.

Upon review, the RSO ruled that section 15.5 of the Regulations only requires the employer to report accidents that affect any of his employees. Since the accident had been reported by the firm to the provincial authorities and the injured employee was not one of his employee, there were no requirement for Treasury Board (PWGSC) to report this accident to a federal safety officer. The RSO rescinded this item of the direction. As for the second item of the direction which refers to paragraph 125(v) of the Code, the RSO concluded that the direction was not needed since the accident had occurred six weeks before his investigation, that the firm and its employees had left the premises several weeks ago and it was impossible to comply with the direction since no one was around to comply with it. The RSO concluded that the contravention was not ongoing and rescinded the direction on this basis.