

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

St. Lawrence Seaway Management
Authority

applicants

and

Canadian Auto Workers Union

employee representatives

and

Paul Danton

health & safety officer

Decision No.: 02-020

October 10, 2002

- [1] On July 7, 2000, the St. Lawrence Seaway Management Authority (SLSMA) advised all SLSMA employees by letter that the three-person procedure for tying up and releasing vessels would be replaced by a two-person procedure as follows:

Effective December 1st, 2000, the lock crews will consist of two persons per lock, per shift at locks 2 to 4 in the Maisonneuve Region and locks 1 to 7 in the Niagara Region. St Lambert lock (Maisonneuve Region) will consist of 3 persons per shift due to local complexities. Flight locks, in the Niagara Region, will have one additional person per shift, to ensure smooth operations.

Effective at the close of the 2000 navigation season, there will be two persons per lock, per shift at Iroquois lock (Maisonneuve Region) and lock 8 (Niagara Region).

During the course of the current navigation season, procedures will be developed and the testing of new work methods and equipment, including communications equipment, will be carried out. The aim of this testing is to make the two-person process easier and to minimize the impact on lockage times.

- [2] On October 16, 2000, employees Messrs. Robert Clocherty, Dan Warner and Jim Kelly refused to work and participate in a validation test of the proposed two-person procedure organized by the SLSMA. The employees alleged in their written refusal to work complaint that the proposed two-person procedure for tying up and releasing vessels constituted a danger under the Code. They also held that the decision taken by the SLSMA to arbitrarily modify the procedure was in violation of various provisions of the Code which they enumerated.
- [3] The SLSMA health and safety committee investigated the refusals to work and wrote to SLSMA management in November of 2000 regarding employee health and safety concerns with the proposed change. The SLSMA management replied to the health and safety concerns and requested that the health and safety committee submit their final recommendations to the Corporation by the end of January 2001. The union issued a paper early in February, 2001. On March 5, 2001, and April 25, 2001 respectively, the SLSMA submitted the outstanding issues to Human Resources Development Canada (HRCD) at its Quebec Region and Ontario South Western Region for an interpretation or ruling.
- [4] Health and safety officer Paul Danton from HRDC's South Western Region, and health and safety officer Alain Messier from HRDC's Quebec Region jointly investigated into the matter. The two officers observed lock operations at St. Catherines, Ontario, on April 27, 2001, and at Montreal, Quebec, on May 10, 2001.
- [5] Following the investigation, the health and safety officers concluded that the capstans and bollards used at both SLSMA sites used for tying up and releasing vessels in the locks constituted motorized "material handling equipment" (MHE) under Part XIV of the *Canada Occupational Health and Safety (COHS) Regulations* entitled, "Material Handling." They further concluded that section 14.25 of the COHS Regulations applied in respect of SLSMA operations whenever the operator of motorized MHE did not have an unobstructed view of the area of operation.
- [6] On July 18, 2001, health and safety officer Danton met with SLSMA managers and employees employed at the St Catherines, Ontario location. He explained his findings and issued a direction to management at the St. Catherines site. The direction, made pursuant to section 145.(1) of the Canada Labour Code (hereto referred to as the Code or Part II), included 4 contravention items and directed management to cease the contraventions by July 30, 2001. A copy of the direction

is attached. Health and safety officer Danton subsequently confirmed to the appeals officer that the direction applied only in respect of the SLSMA's Niagara Region, but conceded that it would probably impact on SLSMA operations in their Quebec region.

[7] On August 10, 2001, the SLSMA appealed the direction to an appeals officer pursuant to 146.(1) of the Code and requested that items 2 and 4 of the direction be reviewed pursuant to subsection 146.1(1) of the Code. The SLSMA further requested that a hearing be held as soon as possible to review item 4 of the direction and that the review of item 2 occur later. Item four (4) of the direction reads:

4. Paragraphs 125.(1)(p)(q) of the Canada Labour Code Part II, and subsection 14.25 of the *Occupational Health and Safety Regulation*

The employer has failed to provide a signaller for the worker, who is operating materials handling equipment. During the procedure of tying up or releasing the mooring lines of a vessel, the worker, during a portion of this process, loses visual contact with both the vessel and mooring lines.

[8] A hearing to review item 4 was held in St. Catharines on February 13, 2001.

[9] Health and safety officer Danton provided a copy of his investigation report and testified at the hearing. His report will not be repeated here but forms part of the file. I retain the following from his report and testimony.

[10] During his testimony at the hearing, health and safety officer Danton clarified that motorized winches on board vessels also constitute motorized MHE. He noted that the motorized MHE on board vessels are used in conjunction with bollards to position and secure vessels in the locks and to rewind mooring lines after line haulers¹ have removed the lines from bollards to release the vessels.

[11] Officer Danton confirmed at the hearing that the word "worker," in item 4 of his direction referred to the employee operating the capstan and to the employee placing or releasing a mooring line from the bollard. He opined that bollards constituted MHE because they are auxiliary equipment to the capstans used for raising mooring lines from upbound vessels at low pool, and auxiliary equipment to on board winches used for positioning and securing vessels in the locks and for rewinding mooring lines after line haulers have removed the eyes from the bollards. He held that a signaller is needed for placing or removing a mooring line from a bollard when the operator of the motorized MHE on board vessel does not have an unobstructed view of the end of the mooring line on the bollard. He underscored that, in accordance with subsection 14.26(4) of the COHS Regulations, a signaller

¹ A line hauler is an employee at SLSMA who throws heaving lines to vessels and who places or removes mooring lines on or from bollards. The line hauler may have other duties.

is not to be engaged in any other work when acting as signaller. Subsection 14.26(4) reads:

14.26(4) No signaller shall perform duties other than signalling while the motorized materials handling equipment under the signaller's direction is in operation.

[12] He also confirmed at the hearing that he was aware of the YELLOW LINE RULE² at the SLSMA which reads as follows:

1. PURPOSE

The purpose of the Yellow Line Rule is to address two (2) provisions under of (*sic*) the Regulations Respecting Health and Safety made under Part II of the Canada Labour Code. They are:

- a. the requirement to use Lifejackets where there is a hazard of drowning; and
- b. the requirement to use fall-protection where there is an unguarded structure that is more than 2.4 m above the nearest permanent safe level.

2. RESTRICTED AREA ON LOCK WALLS

[Diagram in the copy provided by the SLSMA is not reproduced here. The diagram shows a yellow line drawn parallel to the coping and a distance of 1 metre from the coping. The area within the yellow line and coping is labeled as the "RESTRICTED AREA." Below the diagram is the following instruction.]

Operations Employees securing or casting off vessels may enter the area between the coping and the Yellow Line "**the Restricted Area**" without the a (*sic*) life jacket or a fall arrest system given the following conditions.

UPBOUND

- i. Throwing down a heaving line;
- ii. Signalling the ship crew that a cable has been secured;
- iii. Checking to ensure that the vessel is along side the wall before the lock is raised.

DOWNBOUND

- i. Throwing down a heaving line after a cable has been cast off.

Always use "toe holds" when working at the coping guards.

Where yellow lines have not been painted on tie up walls or docks, a one (1) metre **restricted area** from the face of the wall or dock must be respected.

All personnel³ required to be within the one (1) metre RESTRICTED AREA on Lock Walls, Tie up Wall or Docks etc., are required to wear life jackets or the appropriate fall protection.

² This is a reproduction of the rule and not a copy.

³ Mr. Drolet testified that this applies only to maintenance workers.

RESPONSIBILITIES

All Workers are required to follow the **Yellow Line Rule** and to remind their fellow Workers of the requirements should **the restricted area** be entered in violation of the rule.

Coordinators are responsible to ensure that the **Yellow Line Rule** is enforced.

Niagara Region
St. Catharines, Ontario
March 23, 2000

- [13] Officer Danton reiterated that this was an internal policy of the SLSMA and that it was not his role to advise the SLSMA how their YELLOW LINE RULE would operate with his direction, or to approve whatever compliance measures the SLSMA finally adopted. He held that, like a police officer, the role of a health and safety officer is to identify contraventions and enforce compliance. He disagreed that health and safety officers are responsible under subsection 145.(1)(b) of the Code for specifying what must be done to ensure that the contravention specified in the direction does not continue or reoccur.
- [14] Mr. Michel Drolet, Vice President Operations, Niagara Region, testified that he wrote to health and safety officer Danton on July 24, 2001, and informed him of the measures that the SLSMA was taking to comply with his direction. With regard to item 4, he wrote that procedures for tying up mooring lines had been drafted to ensure a signaller was in place when the car hauler⁴ was unable to see the mooring line below the coping, and that the procedures would be submitted to the local occupational health and safety committee for validation. At the same time, Mr. Drolet's letter expressed concern that item 4 of the direction forces employees to contravene the long standing YELLOW LINE RULE at the SLSMA. He held that requiring the signaller to stand within the restricted zone for extended periods of time and to lean over the coping to observe the mooring line introduces a potential hazard far more serious than not having a signaller.
- [15] Mr. Drolet explained the origin of the YELLOW LINE RULE at the SLSMA. According to Mr. Drolet, in 1991, a health and safety officer at HRDC directed the SLSMA to ensure that employees be provided with personal floatation devices and a fall arrest system when employed at the edge of the dock for tying up and releasing vessels. The SLSMA appealed the decision to HRDC and, following HRDC's investigation, HRDC officials agreed with the SLSMA and its employees that the regulation does not apply because the use of a fall arrest device would, in itself, create a hazard. Mr. Monteith, District Manager at the time, wrote to the SLSMA and confirmed that the SLSMA did not have to comply with the direction. His letter further specified that the SLSMA must ensure employees follow the YELLOW LINE RULE procedures developed jointly by the SLSMA and its employees.

⁴ The terms "car hauler" and "capstan operator" were used synonymously by parties.

[16] Mr. Daryl McDonald, Area Coordinator, Niagara Region, testified at the hearing. He described in detail current SLSMA procedures for tying up and releasing vessels in the locks using capstans and bollards. He testified that the capstan is bolted to the ground and the drum is activated by depressing a foot pedal control. Once a crew member has secured one end of the heaving rope to a mooring line, the other end of the rope is passed around the bollard and looped around the drum of the capstan. The capstan is switched on and the friction between the rope and the rotating drum of the capstan generates the force for lifting the mooring line. The capstan operator controls the amount of force exerted by the capstan on the mooring line by regulating the tension applied to the rope wound around the capstan drum. With this arrangement, the capstan operator can immediately detect any additional resistance to the heaving rope should a backlash occur or a mooring line become snagged on the wall or other surface. The operator can react to the situation by slipping or “clutching” the rope even before a problem is observed by a signaller. He also described SLSMA signaling procedures used by the line hauler to communicate between the car hauler and crew member when throwing down heaving lines connected with tying up vessels and when releasing their mooring lines.

[17] Following health and safety officer Danton’s direction, the Chief of operations at the Cornwall, Ontario office developed procedures to incorporate the role of signaller into the SLSMA procedures, and tasked Mr. McDonald with conducting validation tests related to the procedures. Prior to conducting the validation tests, Mr. McDonald consulted employees who would be involved in the tests to decide what the signaller should be observing during the tying up and releasing of vessels as this was not specified in the new procedures. SLSMA employees involved agreed that the signaller should see the vessel, the winch being used, the crew member and the cable. They further agreed that the signaller would have to stand within the yellow line to accomplish this. Mr. McDonald testified that he interpreted the direction to mean that the signaller must observe the line coming up the wall from the vessel in the case of upbound vessels. He decided that the signaller would not stand in the restricted area of the YELLOW ZONE during the validation tests since doing so could put the signaller’s health and safety at risk. Three validation tests were conducted between August 20 and 22, 2001 involving upbound and downbound vessels.

[18] Ms. Debra Riddle, Health and Safety Officer at SLSMA, participated in the three validation tests and took notes. Her notes reported that employees involved in the three validation tests agreed that it was necessary to stand in the restricted area of the yellow line to have visual contact with the vessel. Mr. McDonald said that the notes reflected the comments of the three crews involved in the validation tests, but he agreed that not all participants agreed with the conclusion reported in the notes. Excerpts from notes were as follows:

Results of Field Tests of Upbound and Downbound Lockage Procedure

Niagara Region

Test One:

Date: August 20, 2001 approx 1230 hrs
Location: Lock 3
Vessel: Upbound Stephen B Roman

- While observing the securing of the vessel, the “signaler” had to stand within the yellow line to attempt to have visual contact of the load. (The procedure states that the signaler is to stand behind the yellow line)
- The employee acting as the signaler stated that he could not see onto the ship deck without leaning over the coping
- Daryl McDonald also review (*sic*) the procedure with staff at Lock 1 and Lock 5 following the exercise, all agreed that the signaler can not stay outside the yellow line to perform the task
- All staff who participated and observed the procedure agreed that the signaler task/function added unnecessary exposure to risk and there is no safety value added to the procedure

Test Two:

Date: August 22, 2001 approx 1425 hrs
Location: Lock 1
Vessel: Downbound Canadian Century

- The only time the “signaler” had visual contact of the winch on the vessel was when he stood on the gate, but was unable to effectively communicate with his co-workers
- The crew stated that they could not find a safe place to stand on the wall to have visual contact of the ships (*sic*) mate, winch and the “load” being lifted
- Lock crew stated that the “signaler” task added no safety value to the procedure and that it is not safe to do safely.

Test Three:

Date: August 22, 2001 approx 1600 hrs
Location: Lock 3
Vessel: Upbound Halifax

- Employee acting as the “signaler” stated that he could not position himself safely to have a good line of sight
- The employee stood on the gate, which allowed him to have a good view of the vessels (*sic*) mate, deck, load and coworker, however this would only be applicable on the #1 wire on a 730
- The #1 and #2 winch and fairlead on the vessel were obscured by the second floor deck
- During the procedure the capstan operator noticed something was wrong on #1 wire and clutched the rope, the signaler/spotter told the employee to stop as the captain of the vessel called to state that there was a backlash. The spotter/signaler went up to the railing and noticed the backlash, once corrected he instructed the capstan operator to begin again. Point to note, the employee operating the capstan stated that due to the “feel” of the line, he knew that there was something wrong therefore he clutched the rope. The signaler/spotter only verified that there was a problem
- All staff who participated and observed the procedure agreed that the signaler task/function added unnecessary exposure to risk and there is no safety value to the procedure.

- [19] Mr. McDonald confirmed every lock crew member has a portable two-way radio and can hear the communication between the spotter and the captain. He said that their radios could be used to communicate with each other, although that would be difficult for the car hauler while operating the capstan.
- [20] Mr. Jacques Cormier, employee in the Quebec region and member of the local health and safety committee, testified regarding two accidents that had occurred in the previous year, 2001. He stated that on April 15, 2001 an employee employed at Saint Lambert, Quebec was injured when removing the eye of the mooring line from a bollard to release a vessel. According to the accident report, the mooring line had been slacked to release the vessel, but before the employee could remove the eye from the bollard, a crew member began rewinding the mooring line. The employee was injured when the line went taut and knocked him to the ground. Following the accident, the SLSMA complained to the vessel's agent that the crew member had contravened Seaway procedures by failing to wait for instruction before rewinding the mooring line. A similar accident occurred on October 12, 2001, at Brossard Quebec. In that case, the SLSMA advised the vessel's agent that they had violated Seaway procedures.
- [21] Mr. Tom Pinder, a service representative and lock crew member at St. Catherines, testified that he participated in the second and third validation tests. He held that the signaller was of no use during the tests because the signaller was not permitted by Mr. McDonald to cross the yellow line and observe in restricted zone. He volunteered that he has worked as a lock crew for 18 years and is completely at ease working inside the yellow line and with his foot in the coping. He estimated that signallers might have to stand in the coping for a total of 2 to 5 minutes.
- [22] He agreed with Mr. McDonald that all lock crew members have a portable two-way radio and can communicate with each other and hear the communications between the spotter and the vessel's Captain or Pilot. He held, however, that the line hauler and car hauler normally communicate with each other and with crew members using hand signals and oral-voice communications for tying up and releasing vessels. Where lock crews cannot see on board winch operators, they can communicate by radio with a crew member who is directing the on board winch operator.
- [23] Mr. Essiminy argued that I should rescind item 4 of the direction for the following reasons which do not necessary appear in the order and structure presented at the hearing.
- [24] Mr. Essiminy argued that Part XIV Regulations must be read and interpreted in a coherent manner. In this regard, he referred me to the definition of "signaller" found in section 14.1 of the regulations. The definition states, among other things, that a signaller is one who is instructed to direct the safe "movement and operation" of MHE. Since the definition refers to "movement and operation", Mr. Essiminy held that section 14.25 applies only in respect of motorized MHE that both moves,

and operates, and not to stationary capstans or bollards. In further support of his contention that motorized MHE must be capable of mobility, he referred me to numerous other Part XIV provisions that regulate, for example, steering controls, brake, horns, lights and seatbelts on motorized MHE.

- [25] He maintained that the Code does not apply in respect of vessels, crew members or on board winches and so these and the bollard are not relevant relative to health and safety officer Danton's finding that a contravention existed.
- [26] Mr. Essiminy further maintained that item 4 of the direction should be rescinded because the tests that the SLSMA conducted at the St. Catherines locks on August 20 and 22, 2001, concluded that compliance with item 4 of the direction would introduce a greater hazard. He referred to the case of Saskatchewan Wheat Pool and the Grain Services Union, Decision No. 21, December 23, 1996, in which regional safety officer Serge Cadieux found that compliance with a provision in the Code or regulations that creates a greater hazard would not be appropriate. Mr. Essiminy added that standing within the YELLOW LINE and leaning over the coping to observe the rope ascending the wall would contravene the direction that safety officer Harold Monteith issued to Mr. P. Vincelli, Chief Operational Services, SLSMA, on November 22, 1991. He pointed out that health and safety officer Danton refused to sanction any departure from Monteith's letter and the SLSMA's YELLOW RULE LINE.
- [27] It was Mr. Essiminy's additional contention that item 4 of the direction should be rescinded because current procedures work. Mr. Pinder testified that the hand and voice signals currently specified in SLSMA procedures are effective for communications between the line hauler and the car hauler, and between the line hauler and crew members. Mr. Essiminy added that having a signaller, as contemplated in section 14.25, is unnecessary because the car haulers can sense a problem immediately and clutch the rope before anyone observes the problem.
- [28] Mr. Essiminy then argued that item 4 of the direction should be rescinded because health and safety officer Danton is statutorily required by paragraph 145.(1)(b) of the Code to specify steps to terminate the contravention with the direction and he did not. He held that the principles of administrative and constitutional law dictate that item 4 be rescinded due to its lack of precision and instruction.
- [29] He further argued that the authority for an appeals officer to vary a direction is limited and cannot be used to re-invent a direction. He argued that the appeals officer must rely on the facts established by the health and safety officer's investigation and, since the facts in this case were insufficient to justify varying item 4 of the direction, it must be rescinded.
- [30] Mr. Vince Hearn argued that item 4 of the direction should be confirmed as a capstan is a motorized MHE and requires a signaller. He referred to paragraph 4 and 12 of a document that the SLSMA forwarded to the Co-Chairs of the Regional

Health and Safety Committee on December 27, 2000, entitled, “COMMENTS/REPLY AND POSITION DISCUSSION PAPER FOLLOWING NIAGARA HEALTH AND SAFETY COMMITTEE REPORT”. In the reply section of paragraph 4 entitled, “Capstan is an unguarded machine under the code (*sic*)”, the SLSMA wrote:

“...The role of the second person when using for upbound vessel is to serve as signaler to the vessel crew to let them know to pay out the mooring line off the drum, as the person operating the capstan does not have visual contact with the vessel crew. In the downbound direction, the capstan operator has visual contact with the vessel crew can communicate verbally if required, as the vessel deck is at or above the coping level.”

[31] In the reply section of paragraph 12 entitled, “Possible violation – using material handling equipment without a signaller.”, the SLSMA wrote:

“One of the functions of the second person, on upbound tie-ups is to serve as a signaler to the capstan operator and the vessel winch operator. The signaler verifies that the heaving line is properly secured, signals the vessel crew to payout the mooring line off winch, as the person operating the capstan does not have visual contact with the vessel crew. The signaler then leaves the restricted area. The capstan operator has full control over the rate of speed of wire being hauled (limited only by speed of drum on capstan) and must be aware and prepared at all times of the possibility of sudden increase in tension on the heaving line. If such is the case, the capstan operator is to release the tension on the heaving line. The other person, on upbound vessels, can re-enter the restricted area recommend corrective action, On down bound vessels, the capstan operator has direct visual contact with all equipment and vessel crew and a signaler would not be required.”

[32] Mr. Hearn also referred me to the SLSMA document entitled, “Vessel Lockage Procedures” and specifically to section J3 entitled “COMMUNICATIONS BETWEEN LOCK CREW AND THE VESSEL.” Section J3 includes a section on “Hand Signals and “Verbal Communications.”

[33] He argued that the validation tests on August 20 and 22, 2001 failed because the SLSMA was unwilling to change the YELLOW RULE LINE and to permit the signaller to observe and direct the operation of MHE from within the restricted area. He recalled that Mr. Pinder said he had no trouble seeing the vessel, crew members and the capstan operator with his foot in the coping. He reiterated that it is not necessary for the signaller to see the rope as it rises up the wall as contented by the SLSMA and so it is not necessary for the signaller to lean over the coping. He added that lock crews now wear personal floatation devices (PFD) and the current YELLOW LINE RULE permits employees to work in the restricted area if wearing a PFD.

[34] Finally, he held that crew members, vessels and vessel winches are all relevant to the health and safety of lock crews and cannot be disregarded.

[35] The issue in this case is whether or not section 14.25 of the COHS Regulations applies in respect of SLSMA lock operations involving the use of capstans, bollards and on board winches for tying up and releasing vessels such that a signaller is required when the operator of the motorized MHE does not have an unobstructed view of the area in which the motorized MHE is to be operated. In connection with this, I must first decide if the capstans, bollards and on board winches used thereto constitute motorized MHE under Part XIV of the COHS Regulations.

[36] If I find in the affirmative, then I must decide whether, as alleged by Mr. Essiminy, compliance with section 14.25 in respect of SLSMA operations creates a greater hazard such that its application would be inconsistent with the Code. I must also address Mr. Essiminy's argument that item 4 of health and safety officer Danton's direction must be rescinded because it does not specify the steps and time-frames therein for terminating the contravention as required by paragraph 145.(1)(b) of the Code. Paragraph 145.(1)(b) reads:

145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

(a) terminate the contravention within the time that the officer may specify;
and

(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or reoccur.

[Underlined for emphasis.]

[37] To determine if capstans, bollards and on board winches used in connection with SLSMA operations constitute MHE, I refer to the definition of MHE found in section 14.1. The definition reads:

14.1 materials handling equipment" means equipment, including its supporting structures, auxiliary equipment and rigging devices, used to transport, lift, move or position persons, materials, goods or things and includes mobile equipment used to lift, hoist or position persons, but does not include an elevating device that is permanently installed in a building; [My underline for emphasis.]

[38] According to the evidence, capstans at the SLSMA are used for lifting and manoeuvring mooring lines from the vessels to the bollards, and the on board winches are used in connection with bollards for positioning and securing vessels in the locks. Based on the very broad definition for MHE, I conclude that capstans, on board winches and bollards used for moving vessels through the locks constitute MHE. (I will address Mr. Essiminy's jurisdictional argument that winches on board vessels are not subject to the Code later.)

[39] Having found that that capstans, on board winches and bollards used for moving vessels through the locks constitute MHE, I refer to section 14.25 of the COHS Regulations which reads:

14.25 No employer shall require an operator to operate motorized materials handling equipment unless the operator
(a) is directed by a signaller; or
(b) has an unobstructed view of the area in which the equipment is to be operated.

[40] In accordance with the wording therein, section 14.25 only applies in respect of “motorized” MHE, a term which is not defined in the Code or the COHS Regulations. That being the case, principles of statutory interpretation dictates that one must consult the dictionary for the ordinary meaning of a term that is consistent with the purpose of the Part. According to the Tenth Edition of the Merriam-Webster’s Dictionary the terms “motor” and “motorize” are defined as follows:

motor - one that imparts motion, any of various power units that develop energy or impart motion, a small compact engine, a gasoline engine, a rotating machine that transforms electrical energy into mechanical energy.

motorize - to equip with a motor.

Since the Code is remedial in nature, the broadest interpretation consistent with section 122.1, the purpose clause of the Code, and with the circumstances must be applied. Therefore, I interpret that MHE is “motorized” if it is equipped with a motor that imparts motion by transforming energy from one form to another. The purpose clause of the Code 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.

[41] Mr. Essiminy argued to the contrary that the definition for “signaller” in section 14.1 refers to safe “movement and operation”, and paragraph 14.26(5) of the regulations refers to the “movement” of MHE. However, these sections do not constrain the application of section 14.25 which refers only to the “operation” of MHE. In my opinion, the purpose clause of the Code found in section 122.1 dictates that the term “operate” be interpreted in the broadest sense that favours the protection of employee health and safety. For example, in the case of a motorized crane, it might be possible for the operator to move the crane from one location to another, to move the boom of the crane up, down or sideways, and to raise or lower the cable and load. Where the operation of any of these functions, in whole or in part, could endanger an employee because the view that the operator has of the area of operation is obstructed, common sense dictates that the operation be directed by a signaller.

- [42] Nor am I persuaded by Mr. Essiminy's position that section 14.25 does not apply in respect of stationary equipment because the majority of Part XIV provisions regulate equipment such as steering controls, brake, horns, lights and seatbelts normally associated with mobile motorized MHE. In my opinion, the regulation regulates stationary and mobile equipment to the extent that they require regulation. I can no more anticipate the regulations regulating steering controls, brake, horns, lights and seatbelts for capstans than for wheel barrows, yet both pieces of equipment are regulated by the Part XIV of the COHS Regulations.
- [43] I, therefore, agree with health and safety officer Danton that, technically, section 14.25 of the COHS Regulations applies in respect of the operation of capstans and bollards by SLSMA employees.
- [44] However, the evidence in the case essentially persuades me that compliance with 14.25 would likely increase risk to SLSMA employees and suggests that the probability of an accident related to past practice is relatively low.
- [45] With regard to the latter, the evidence in the case was that past procedures for tying up and releasing vessels had been in place for more than a decade and only came into question when the SLSMA advised employees of its intent to reduce lock crews in some location from three to two person lock crews. Mr. Hearn submitted two accident reports connected with releasing a vessel but did not submit any evidence of accidents or near misses related to tying upbound vessels at low pool. In addition to this, capstan operators control the force that the capstan applies to the heaving rope and the speed of the lift by the amount of force they exert on the rope wound around the capstan wheel. This arrangement gives the operator a means of immediately detecting resistance on the line not available to an operator operating completely mechanized motorized MHE, and, arguably, mitigates to some degree against the absence of an unobstructed view by the capstan operator when heaving the mooring line of an upbound ship at low pool.
- [46] But more significantly, both the SLSMA and employees agreed that compliance with 14.25 in respect of upbound ships at low pool would necessitate the signaler to work inside the yellow line for an extended period of time, and to possibly lean over the coping, to see the mooring line, the winches on the ship, and ships' mates operating the on board winch. In my view, working longer inside the yellow line and possibly leaning over the coping would likely add more risk than that which section 14.25 aims to mitigate. This would be inconsistent with section 122.1, the purpose clause of the Code, and section 124 of the Code, duty of employer to ensure that the health and safety at work of every employee is protected. The YELLOW LINE RULE at the SLSMA substitutes for the absence of fall protection devices and I categorically disagree with the union's position that compliance with section 14.25 of the regulations can be achieved by permitting line haulers to work close to the edge of the coping for approximately 1 to 5 minutes per vessel, or by leaning over the coping, because any additional risk of falling from the dock is mitigated by the use of personal floatation devices (PDFs or lifejackets) that lock

crews currently wear. As stated by Mr. Essiminy, a PFD is not a substitute for a fall arrest system, and the fact that an employee might personally feel comfortable working close to the edge of the dock or peering over the coping with a foot in the coping is irrelevant. Section 124 reads:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[47] Since, in my opinion, compliance with section 14.25 in respect of tying up upbound vessels at low pool would likely create a greater hazard than that which it aims to address, such compliance would be inconsistent with sections 122.1 and 124 of the Code. As such, I find that item 4 of the direction cannot stand as specified.

[48] However, section 124 and 125 of the Code specify that, where a prescription is not provided in section 125 of the Code in respect of a specific hazard, or, as in this case, where a specific provision of the COHS Regulations does not apply in the circumstances, section 124 of the Code applies. Section 125.(1) of the Code reads:

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,... [Underlined for emphasis.]

[49] As a consequence of these two provisions, even if section 14.25 does not apply, the SLSMA must still ensure that the health and safety of its employees is protected regardless.

[50] The evidence in this case is that the rope can get hung up on the wall, the rope could backlash on the on board winch or get pinched between the wall and the hull of the vessel and that this could be hazardous to SLSMA employees. In addition, there were two accidents in 2001 involving the release of vessels. Thus, the SLSMA must comply with section 124 of the Code and, as a minimum, exercise its due diligence responsibilities with regard to ensuring that the health and safety of its employees is protected in connection with tying up and releasing vessels.

[51] With specific reference to on board winches, I would agree with Mr. Essiminy that section 14.25 generally does not apply in respect of such equipment because Part XIV applies in respect of off board equipment, and because the Code does not apply in respect of foreign registered vessels. However, paragraph 125.(1)(y) of the Code specifies that all federally regulated employers must ensure that the activities of every person granted access to the work place do not endanger the health and safety of its employees. Therefore, to the extent that crews on vessels moving through the locks operated by the SLSMA could endanger the health and safety of its employees, the SLSMA must ensure that the health and safety of its employees is protected. In the case of on board winches, the SLSMA must ensure its employees are protected where crew members operating on board winches do not have an unobstructed view of the area in which their motorized MHE is to be

operated and an employee of the SLSMA could be injured as a result. How this is achieved is between the SLSMA and vessels using the locks. Paragraph 125.(1)(y) reads:

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,

(y) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;

[52] For all of the reasons specified herein I am varying item 4 of the direction the health and safety officer Danton issued to the SLSMA on July 18, 2001 pursuant to section 145.(1) of the Code to replace reference to paragraph 125.(1)(p)(q) of the Canada Labour Code and section 14.25 of the COHS Regulations with reference to section 124 of the Canada Labour Code. Item 4 of the direction is varied by replacing everything therein as follows:

4. Paragraphs 124 of the Canada Labour Code, Part II.

The employer has failed to take measures to protect the health and safety of its employees who could be injured when the operator of motorized material handling equipment operates such equipment without an unobstructed view of the area in which the motorized materials handling equipment is used.

[53] Mr. Essiminy argued that an appeals officer is limited in regard to varying a direction. However, in the case of Vancouver Wharves Ltd. and James Edward (Ted) Mannion, Decision No. 95-006⁵, dated September 29, 1994, regional safety officer Serge Cadieux varied a direction issued by safety officer Andrew Chan and, based on the same facts in the case, replaced the reference in the direction from section 126.(1)(c) of the Code with 125.(p) of the Code. While the decision was successfully appealed to the Federal Court⁶, the Court did not disagree with Mr. Cadieux's authority under the Code to vary the direction in that manner. The Court only returned the case to provide the applicant with the opportunity to reply to the revised contravention. In this case, I have not identified a new contravention; rather I have only confirmed that section 124 of the Code applies where no specific duty exists.

[54] On October 9, 2002 Mr. Essiminy and Mr. Hearn agreed that the SLSMA will require time to analyze my decision in respect of item four of the direction, to consult with its employees, and to implement any procedures that may be required for compliance. Given that the current Navigation Season closes at the end of December, 2002, I am further varying the direction in respect item four. The date

⁵ See also the decision by regional safety officer Serge Cadieux in the case of Vancouver Wharves Ltd., and International Longshoremen's and Warehousemen's Union, Decision No. 97-004 and Federal Court of Canada Trial Division, decision no. T-1125-97, Vancouver Wharves Ltd. and The Attorney General of Canada.

⁶ Federal Court of Canada Trial Division, decision no. T-1391-95, Vancouver Wharves Ltd. and Serge Cadieux. As indicated above, see also Federal Court of Canada Trial Division, decision no. T-1125-97, Vancouver Wharves Ltd. and The Attorney General of Canada.

for complying with item 4 of the direction is varied from July 30, 2001, to March 25, 2003. March 25, 2003 corresponds with the opening of the next Navigation Season in year 2003.

- [55] Mr. Essiminy held that the SLSMA may require a further delay to the compliance date should compliance involve the expenditure of substantial amount of funds or major modifications to the lock structure. However, for safety, I am unprepared to extend the compliance date based on hypothetical possibility. Should the SLSMA require a further delay after March 25, 2003; the Corporation will have to address its need for a further delay to a health and safety officer at Human Resources Development Canada to avoid a prosecution.
- [56] I further clarify that, as agreed to by parties, I remain seized of the appeal made by the SLSMA regarding item 2 of the direction issued by health and safety officer Danton to the SLSMA on July 18, 2001 pursuant to section 145.(1).
- [57] Finally, Mr. Essiminy argued technically that the direction should be rescinded because health and safety officer Danton was required in accordance with paragraph 145.(1)(b) of Code to specify what steps were necessary for the SLSMA to terminate the contravention and timeframes thereto. He held that since health and safety officer Danton failed to comply with paragraph (b), a statutory requirement, principles of administrative law and constitutional law dictates that I must rescind the direction. Subsection 145(1) of the Code reads:

145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

- (a) terminate the contravention within the time that the officer may specify;
- and
- (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or reoccur.

In my opinion, section 145.(1) grants to health and safety officers the power to specify steps to ensure that the contravention does not continue or reoccur, but does not require it. In his book entitled, "The Composition of Legislation, Legislative Forms and Precedents, Second Edition, published by the Department of Justice and regarded as a standard for statutory interpretation, Elmer Driedger, Q.C., B.A., LL.B, LL.D wrote the following passage on page 87 which clarifies in connection with 145.(1)(b) that the health and safety officer may issue a direction and may specify the steps. The passage reads:

Questions often arise with these conjunctions in compound predicates with *may* and *shall*

He shall (a), (b) and (c).

This requires that all be done. If one is omitted the obligation is not discharged.

He may (a), (b) and (c).

This grants power or permission to do all. The normal meaning here is that the conjunction is joint and several. The holder of the power or permission may do all

or any. If, for example, power were conferred to make regulations respecting *(a)*, *(b)* and *(c)*, no one would suggest that the regulation-making authority could make regulations only on one subject or none.

Douglas Malanka
Appeals Officer

ANNEX

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

DIRECTION TO EMPLOYER UNDER PARAGRAPH 145(1)

On the 27th day of April 2001, the undersigned health & safety officer Paul G. Danton, accompanied by health & safety officer Alain Messier, conducted an inquiry in the work place operated by the THE ST.LAWRENCE SEAWAY MANAGEMENT CORPORATION, being an employer subject to the Canada Labour Code, Part II, at BOX 370, 508 GLENDALE AVENUE ST.CATHARINES ONTARIO, Ontario, L2R 6V8, the said work place being sometimes known as **THE ST. LAWRENCE SEAWAY**.

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

1. Paragraph 125.(1)(p) of the Canada Labour Code, Part II, and subsection 2.14(3) of the Occupational Health & Safety Regulation

The employer has failed to maintain travelled areas at the edge of the locks which are not free of holes, unequal levels, and obstacles.

2. Paragraph 125.(1)(v) of the Canada Labour Code, Part II and subsection 12.11(3) of the Occupational Health & Safety Regulation

The employer has failed to provide ladders that are capable of extending at least two rungs below the water level, which are affixed to the face of the locks, and are located every 60 m along its length.

3. Paragraph 125.(1)(l)(v) of the Canada Labour Code, Part II and subsection 12.11(1) of the Occupational Health & Safety Regulation

The employer has failed to provide a life jacket or buoyancy device to dock workers, during the procedure of tying up and releasing a vessel, which is capable of protecting the worker from the hazard of drowning.

4. Paragraph 125.(1)(p)(q) of the Canada Labour Code, Part II and subsection 14.25 of the Occupational Health & Safety Regulation

The employer has failed to provide a signaller for the worker, who is operating materials handling equipment. During the procedure of tying up or releasing the mooring lines of a vessel, the worker, during a portion of this process, loses visual contact with both the vessel and mooring lines.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1) of the Canada Labour Code, Part II, to terminate the contraventions no later than the 30th of July 2001.

Issued at London, this 18th day of July, 2001.

PAUL DANTON
Health & Safety Officer

To: THE ST.LAWRENCE SEAWAY AUTHORITY
BOX 370, 508 GLENDALE AVENUE
ST.CATHARINES, ONTARIO
L2R 6V8

SUMMARY OF APPEALS OFFICER'S DECISION

Decision No.: 02-020

Appellant: St. Lawrence Seaway Management Authority

Respondent: CAW

Provisions:

Canada Labour Code: 122(1), 124, 125, 145.(1)(b), 146.1(1)

Regulations: 14.1, 14.25, 14.26

Keywords: material handling equipment, operator, signaller, obstructed view, tie up and release of vessels, locks, on board winches, upbound vessels, low pool

Summary:

On July 7, 2000, the St. Lawrence Seaway Management Authority (SLSMA) advised all SLSMA employees by letter that its current three-person procedure for tying up and releasing vessels would be replaced by a two-person procedure in certain circumstances. On October 16, 2000, employees Messrs. Robert Clocherty, Dan Warner and Jim Kelly refused to work and participate in a validation test of the proposed two-person procedure organized by the SLSMA.

Health and safety officer Paul Danton from HRDC's South Western Region, and health and safety officer Alain Messier from HRDC's Quebec Region investigated into the matter. Following their joint investigations, health and safety officer Danton concluded that the capstans and bollards used at both SLSMA sites for tying up and releasing vessels in the locks constituted motorized "material handling equipment" (MHE) under Part XIV of the *Canada Occupational Health and Safety (COHS) Regulations* entitled, *Material Handling.* He further concluded that section 14.25 of the COHS Regulations applied in respect of SLSMA operations whenever the operator of motorized MHE did not have an unobstructed view of the area of operation. He ordered the SLSMA to terminate the contravention by July 30, 2001.

The appeals officer concluded from the evidence that compliance with section 14.25 of the COHS Regulations would likely create a greater hazard than those to which section 14.25 aims to regulate. However, the appeals officer confirmed that section 124 applies in the absence of a specific duty under section 125.(1). The appeals officer varied item 4 of the direction and substituted reference to paragraph 125.(1)(p)(q) of the Canada Labour Code and section 14.25 of the COHS Regulations with section 124 of the Canada Labour Code.