

Canada Labour Code
Part II
Occupational Health and Safety

Public Works and Government
Services Canada
applicant

and

Mark Hawkins
respondent

Decision No. 05-003
January 7, 2005

This inquiry involved an appeal made pursuant to subsection 146(1) of the *Canada Labour Code* (hereto referred to as the *Code* or Part II) of three directions issued by a health and safety officer pursuant to subsection 145(1) of the *Code*. A hearing was held in London, Ontario, on April 24, 2003.

Appearances

Applicant:

Jacqueline Dais-Visca, Counsel, Department of Justice for PWGSC; and
Dan Joyce, PWGSC, Regional Manager, Environmental Health and Safety, Corporate Security and Emergency Measures.

Respondent

Mark Hawkins, Human Resources Development Canada (HRDC);
Todd Woytiuk, Representative, PSAC.;
Kent Watson, Facilities Management Officer-Ontario Region, HRDC; and
Patti Doolittle, Acting District Manager, HRDC
Cindy Gagnon, Regional Health and Safety Officer, (RHSO) Human Resources Development Canada (HRDC).

- [1] On November 16, 2001, Walter Luciw, Regional Manager and Project Management, Base Building Construction, Public Works and Government Services Canada (PWGSC), convened a meeting with tenant health and safety committee members at the Dominion Public Building, in London, Ontario. The purpose of the meeting was to advise committee

members representing the various tenants at the building of PWGSC plans to renovate the Dominion Public Building which would include the removal of asbestos containing materials (ACM).

- [2] Dana Tompkins, Project Manager, Brookfield, LePage, Johnson Controls (BLJC) attended the meeting with PWGSC. She told participants that the removal of ACM from the Dominion Public Building had initially began in 1995 when ACM were removed from the perimeter of the building. Since all of the ACM located in the building was not removed at that time, its removal remained as an ongoing project for PWGSC. She informed meeting participants that PWGSC had contracted Decommissioning Consulting Service (DCS) in June 2001 to conduct a room by room survey for hazardous substances in the building and to prepare technical specifications for the removal of ACM from the building in advance of anticipated renovations.
- [3] Mark Hawkins, a health and safety officer employed by Human Resources Development Canada (HRDC) and working at the Dominion Public Building attended the joint meeting as an HRDC employee health and safety committee member. Following the meeting, he wrote to Regional Health and Safety Officer (RHSO) Gagnon via electronic mail and sent a copy to his manager, Patti Doolittle, Acting District Manager, HRDC. He wrote to RHSO Gagnon that he was considering issuing a direction to Treasury Board and PWGSC because PWGSC had commissioned the DCS hazard investigation without notifying tenant health and safety committees at the Dominion Public Building. As a result of this omission, Hawkins alleged that health and safety committees at the Dominion Public Building were prevented from exercising their right under the *Code* and *Canada Occupational Health and Safety Regulations* (COHSRs) to participate in the DCS investigation and to consult with DCS regarding its final recommendations to PWGSC. He held that this omission constituted a contravention of the *Code* and the COHSRs.
- [4] However, instead of issuing a direction to Treasury Board and PWGSC as he initially proposed, he submitted an HRDC Complaint Registration form to P. Doolittle on January 8, 2002, for action. In his complaint, made pursuant to section 127.1 (Internal Complaint Resolution Process) of the *Code*, he requested that a health and safety officer from HRDC, Labour Program, be appointed to investigate his complaint. Instead, P. Doolittle forwarded his complaint to Terry Maslen, BLJC Property Manager, Greater Ontario. T. Maslen replied directly to M. Hawkins in writing and stated that the purpose of the June, 2001 DCS survey was only to verify the ACM survey previously conducted by T. Harris Environmental Management Inc. in February, 1999. He held that the DCS survey was only to identify affected areas in the building and did not itself constitute a hazard investigation under the *Code* and COHSRs. He added that PWGSC does not normally notify health and safety committee members or representatives respecting this type of survey. T. Maslen assured M. Hawkins that the DCS survey did not pose a risk to employee health and safety as it was only to determine future renovation strategies. He added there still was no contract in place for the work.

- [5] M. Hawkins disagreed with M. Maslen's response and wrote to P. Doolittle on January 22, 2002, as an employee health and safety committee member. He reiterated in his letter that HRDC's health and safety committees had not been notified of the qualified person (DSC) appointed by PWGSC to conduct a hazard investigation at the Dominion Public Building and that this constituted a contravention of paragraph 10.4(1)(b) of the COSHRs. He further alleged that the health and safety committee was not afforded the opportunity to consult with DCS prior to DCS issuing its report to PWGSC and that this constituted a contravention of section 10.5 of the COSHRs. Finally, he alleged that the DCS report provided to PWGSC and later to the health and safety committee on Friday, November 16, 2001, did not comply with subsection 10.4(2) of Part X of the COSHRs in that it did not address all of the requirements in subsection 10.4(2). At this point RHSO Gagnon¹ was requested to investigate M. Hawkins' complaint as a health and safety officer.
- [6] RHSO Gagnon provided her investigation report and testified at the hearing. I retain the following from her report and testimony.
- [7] PWGSC owned the Dominion Public Building on behalf of the federal government and BLJC assisted PWGSC in the day-to-day maintenance of the building. Public Service tenants at the Dominion Public Building included three HRDC programs, Correctional Services Canada and PWGSC. The City of London, Ontario, also employed employees there.
- [8] She concluded from her investigation that the DCS investigation constituted an investigation referred to in paragraph 10.4(1)(a) of Part X of the COHSRs entitled "*Hazardous Substances*." She held that PWGSC had hired DCS to determine levels of asbestos that might occur during renovations and to recommend the appropriate type of asbestos removal, knowing that they intended to renovate the Dominion Public Building, that the building contained ACM and that the renovations were likely to disturb ACM. Therefore, PWGSC had a duty under paragraph 125.1(f) of the *Code* and paragraph 10.4(1)(b) of the COSHRs to notify each tenant health and safety committee and representative that DCS had been appointed as the qualified person to carry out the investigation.
- [9] She further concluded that the health and safety committees and representatives at the Dominion Public Building were entitled to participate in the DCS hazard investigation and to be consulted on DCS's final report and recommendations to PWGSC. Since PWGSC had only provided tenant health and safety committee members and representatives with a copy of DCS's report at the PWGSC November 16, 2001 meeting some four to five months following DCS's appointment, they acted in contravention of section 10.5 of the COSHRs.
- [10] Finally, RHSO Gagnon confirmed that the written report submitted to PWGSC by DSC had not addressed all of the criteria specified in subsection 10.4(2) of the COSHRs

¹ RHSO Gagnon was designated by the Minister as both a regional health and safety officer and a health and safety officer. She investigated Mr. Hawkins complaint as a health and safety officer.

respecting a hazard investigation and that this constituted a contravention of this subsection and of paragraph 125.1(f) of the *Code*.

[11] Following her investigation, RHSO Gagnon decided to issue three directions to Keith McTeer, Regional Director Ontario Region, PWGSC in respect of the three contraventions after considering:

- the definition of “employer” in the *Code*;
- HRDC’s Interpretation Policy Guideline (IPG) entitled *Reacting to Non-Compliance Within the Public Service 700-5-IPG-035*;
- the Treasury Board Real Property Administration Policy; and,
- the Treasury Board Policy entitled, *Chapter 4-6 – Procedures for Correction of Physical Safety and Health Hazards*.

[12] RHSO Gagnon noted that the definition of “employer” in the *Code* includes an employer’s organization and any person acting on behalf of the employer. She held that the federal government, like a private corporation delivers a broad range of programs and services to clients. While Treasury Board is the employer on behalf of the Crown, it delegates authority to departments to employ employees on its behalf. As a result, departments and their officials may constitute an “employer” under the *Code*. The definition in subsection 122(1) of the *Code* reads:

122.(1) Employer means a person who employs one or more employees and includes an employers’ organization and any person who acts on behalf of an employer.

[13] She held that HRDC’s IPG entitled *Reacting to Non-Compliance Within the Public Service 700-5-IPG-035* takes the position that the Crown (represented by Treasury Board) is the employer in the Public Service for the purpose of the *Code*. The IPG further states that individuals, department/agencies, including custodians and property managers, have been delegated authority to act on behalf of her Majesty and, from the perspective of Part II, are deemed to be employers.

[14] RHSO Gagnon noted that the IPG further instructs that Public Service departments and agencies, building custodians and property managers have diverse and sometimes overlapping responsibilities. The IPG further instructs that in certain cases of violations under Part II, some departments/agencies do not have the authority or responsibility to effect changes, and must rely on the custodian/property manager to effect the necessary corrections.

[15] She noted that section 3.3 of the IPG advises that the onus is on the responsible manager of the department/agency and the building custodian/property manager to determine their respective responsibilities for reacting to non-compliance,. The IPG advises health and

safety officers that, where the officer perceives an overlap of departmental authorities and the parties cannot agree on their respective responsibilities, the officer may issue directions to the appropriate responsible manager or managers. The terms “employer” and “responsible manager” are defined in the IPG as follows:

“Employer” means a person who employs one or more employees and includes an employer’s organization and any person who acts on behalf of an employer. In the Public Service context, it includes an agency acting on behalf of the Treasury Board, a department or any person who acts in a managerial capacity on behalf of a department.

“Responsible manager” means the person who has the authority to designate the funds necessary to effect the corrective measures, and/or has control over the conduct of employees while at work.

- [16] In this regard, she testified that the *Treasury Board Real Property Administration Policy* confirms that the Treasury Board has designated PWGSC as the custodian of offices and facilities provided to departments. Item 6.4 reads:

6.4 Public Works and Government Services Canada (PWGSC) is the designated custodian of general purpose office facilities provided on an obligatory basis to departments and agencies as listed in section 2 of the *Financial Administration Act*...

- [17] She held that PWGSC, as building custodian, was authorized by Treasury Board to spend funds for renovating the Dominion Public Building and, thereby, controlled the work related to the renovation. That being the case, she concluded that PWGSC was the responsible manager relative to assisting tenant departments to comply with their duties under the *Code* and COSHRs. RHSO Gagnon further maintained that PWGSC had a duty, as “responsible manager”, to provide complete and timely information regarding the renovations to Kent Watson, HRDC Facilities Management Officer-Ontario Region. She deduced that, since PWGSC failed to provide the required information to K. Watson in a timely manner, her directions were properly issued to PWGSC. Copies of the three directions are attached.
- [18] Don Joyce, Regional Manager, Environmental Health and Safety, Corporate Security and Emergency Preparedness, PWGSC, testified. I retain the following from his testimony.
- [19] PWGSC is a common service agency of the government and provides a myriad of services to departments that include providing accommodations and leasing premises, providing official translation services, purchasing and supplying goods, and providing architectural engineering services. PWGSC’s architectural engineering component provides the custodial services.

- [20] D. Joyce was responsible for the occupational health and safety of PWGSC employees, construction safety, corporate security and emergency preparedness and reported to the Regional Director General, PWGSC. However, his role was advisory in nature and he was not involved in day to day operations.
- [21] His counterpart, Mr. McTeer, was responsible for day to day operations and W. Luciw, Senior Project Manager in the Architectural Group of PWGSC reported to Mr. McTeer.
- [22] In accordance with the Asbestos Management Program at PWGSC, most of the ACMs have been removed from buildings owned by PWGSC. However, some ACM remain in some buildings in an encapsulated and non-hazardous state. PWGSC's policy is to remove such ACM at the time of renovations.
- [23] The Asbestos Management Program at PWGSC is subject to Deputy Minister (PWGSC) Directive **DIR: 057** entitled, *Asbestos Management*. While other directives apply in respect of the Asbestos Management Program, Directive 057 is the principal guiding document related the removal of ACM and other hazardous substances such as lead-based paints. The Directive requires PWGSC employees to maintain an accurate inventory of ACM and other hazardous substances and to communicate information regarding the elimination of the hazard substances.
- [24] For complying, PWGSC typically liaises with departmental facility managers to communicate the above noted information and to be informed of client tenant concerns. In this case, the HRDC Facility Management Officer at the Dominion Public Building was K. Watson.
- [25] He confirmed that ACM had been removed from the perimeter of the Dominion Public Building approximately three years ago, but not all of the ACM were removed at the time. PWGSC contracted with DCS to carry out a survey in anticipation of planned renovations to the Dominion Public Building during which more ACM would be removed. The objective of the survey was to confirm what type of ACM remained in the building and the appropriate removal procedure.
- [26] He testified that meeting minutes show that PWGSC held several meetings during which plans for the DCS survey were communicated to HRDC via K. Watson. D. Joyce confirmed that PWGSC was not a member of HRDC's workplace health and safety committees at the Dominion Public Building and did not attend their meetings. PWGSC relied on K. Watson to communicate information to HRDC.
- [27] D. Joyce also pointed out that, at the time of the hearing, PWGSC had neither drafted contract specifications for the renovation work at the Dominion Public Building nor negotiated a contract with a contractor to do the work.
- [28] In this regard, J. Dais-Visca proffered copies of minutes of meetings on behalf of PWGSC with the heading *Retrofit 2000*, Dominion Public Building 457 Richmond Street, London

which indicate that meetings were held on April 18, 2001, May 25, 2001, and June 15, 2001. The minutes also confirmed that K. Watson and other HRDC officials were present at each of the meetings and K. Watson participated in discussions.

- [29] For example, the minutes of the April 18, 2000, Dominion Public Building, Retrofit 2001 meeting read under the heading *Health and Safety*:

The meeting turned to health and safety matters during construction. Tom Helm and John Reid briefly discussed asbestos removal. It will not be done while spaces are occupied. John noted that there is encapsulated asbestos throughout the building. A copy of the minutes of the February 5th meeting was provided to Carolyn Lammiman who agreed that it would be good to have an H & S representative at the regular construction meetings. Kent advised Carolyn that **all stakeholders will be invited to review/approve and sign off the construction documents before tenders are called**. ISP will be consulted. Kent Watson asked that a copy of the consultant's report be provided to Elliot Welch, HRDC, 4900 Yonge Street. [My underline]

- [30] The minutes of the May 25, 2001 Dominion Public Building, Retrofit 2000 meeting indicate the following under the heading, *Asbestos Abatement*:

Walter Luciw advised that PWGSC had gone out to an outside consultant for a report on asbestos. PWGSC will provide a copy of the contract drawings and specifications to the Health and Safety Committee before starting work at the site (during the tendering period).

- [31] The minutes of the June 15, 2001 Dominion Public Building, Retrofit 2000 meeting indicate the following under the heading *Elevators, Asbestos, Office Screens*:

Erin Hartman advised that PWGSC's Environmental Services Division has a Consultant examining the building to clearly determine the scope of the work in asbestos abatement. Erin expects to receive their report very soon. Erin expects that asbestos removal work could be completed by Labour Day. Before starting any work, the Health and Safety Committee will be fully consulted and throughout the work air quality readings will be posted (in Edie Morris' office). Bill Keenan will give Elliot Welch a copy of the earlier Harris report and Erin will give him a copy of their Consultant's report.

- [32] J. Dais-Visca proffered copies of two reports that DCS had submitted to PWGSC on August 2001 and February 13, 2002. The DCS reports confirmed that PWGSC engaged them to conduct a room-by-room visual inspection of all accessible areas of the Dominion Public Building to determine the presence of materials suspected of containing asbestos. Where ACM were found, DCS was to assess the risk of exposure to building occupants and to make recommendations for any remedial actions considered necessary. Finally, DCS was to assist in providing budget cost and designing abatement specifications for the removal of the ACM found.

- [33] The DCS Reports concluded that it was possible that additional ACM would be encountered in locations that were inaccessible at the time of survey and, in the event or renovations, modifications or demolition, DCS could undertake further testing of such materials. The Report referred to other DCS submissions submitted to PWGSC but these were not provided to me.
- [34] J. Dais-Visca argued that the three directions issued by RHSO Gagnon should be rescinded because RHSO Gagnon had exceeded her jurisdiction under Part II when she named PWGSC as employer representative in respect of HRDC employees employed at the Dominion Public Building. She further maintained that there is no authority in the *Code* for health and safety officers to compel third person organizations or persons to assist an employer to comply with the *Code*.
- [35] In support of her position, J. Dais-Visca referred to section 122.1 (Purpose of Part) and to section 122 of the *Code*. Section 122.1 specifies that Part II applies in respect of employment and subsection 122.(1) defines *employer* as a person who employs one or more employees and includes any organization or person who acts on behalf of the employer.
- [36] She held that Treasury Board is the employer and, as evidence, cited the decision of Justice Heneghan in *Attorney General of Canada v. Public Service Alliance of Canada*, Docket T-1732-99, dated 2000.12.07. In his decision, Justice Heneghan confirmed the finding of RSO Cadieux in the case of PWGSC and PSAC, Decision No. 99-018, dated September 3, 1999, that Treasury Board, and not PWGSC, was the employer for the purpose of section 125.(v) of the *Code*. Paragraphs 9 and 12 read as follows:
- [9] The Regional Safety Officer made several findings. He found that the proper employer for the purposes of section 125.(v) was the Treasury Board. The employees who were to be protected pursuant to Part II of the *Code* were the federal employees occupying the building at Prince William Street.
- [12] Finally, he found that the workplace, as defined above, was under the control of the Treasury Board. Since the Treasury Board controls the workplace, it also controls access to the building, including access to the scaffolding for the purposes of the *Code*.

- [37] She also cited the finding of RSO Cadieux in the case of PWGSC and CUPE, Decision 99-012, dated May 10, 1999. In that decision, RSO Cadieux (see page 3) wrote that the issue of application of the *Code* to employment was first dealt by the Public Service Staff Relations Board (PSSRB) in the *J. Bidulka et al v Treasury Board*, PPSRB Files 165-2-2 to 13, in which Deputy Chair Michael Bendel wrote:

The application of Part IV² is defined, not in terms of places subject to federal jurisdiction, but in terms of employment subject to federal jurisdiction. The “pith and substance” of the “matter” of Part IV is employment.

- [38] J. Dais-Visca maintained that Treasury Board delegated authority to HRDC to represent the Board for employment relations in respect of the employees employed at HRDC. She held that HRDC controlled the work place and the work activities carried out by HRDC employees, and was responsible for discharging employer responsibilities under the *Code* including the establishment and operation of its work place health and safety committees. That being the case, HRDC was responsible for discharging employer obligations under the *Code* and not PWGSC. She reiterated that PWGSC had no representation on the HRDC Committee.
- [39] J. Dais-Visca agreed that RSO Gagnon had correctly identified PWGSC as the “property owner” on behalf of Treasury Board and that BLJC assisted PWGSC in the day to day maintenance of the building. She compared PWGSC’s role to that of a landlord in the private sector who was responsible for overseeing any work performed in the building. She agreed that PWGSC had an obligation to keep tenants, including HRDC, informed about the work place, but held that the obligation does not arise pursuant to Part II.
- [40] In this regard, she reiterated that PWGSC was performing “asbestos management” in the Dominion Public Building in its capacity as building custodian in accordance with the PWGSC Deputy Minister Directive, 057. Consistent with the Directive, K. Watson was apprised as HRDC Facility Manager at every step of the asbestos management program undertaken by PWGSC. Minutes of meetings confirmed that K. Watson attended the meetings and that he was advised that DCS was being retained to conduct a survey and report back to PWGSC. They were also advised of the timing of the work and were provided with a copy of the DCS report.
- [41] She held that it was K. Watson’s responsibility to convey this information directly to HRDC so that the responsible person at HRDC could notify HRDC’s health and safety committees and the committees could determine the level of involvement, if any, they wished to have. PWGSC did not have representation on the HRDC health and safety committees and relied on K. Watson and HRDC to fulfill their obligations. She reiterated that all three of the directions should be rescinded.

² Part IV is now Part II.

- [42] T. Woytiuk responded that the directions should not be rescinded if the Appeals Officer finds that PWGSC was not the employer. He held that the Appeals Officer has authority under Part II to vary the three directions as to the determination of the employer and could do so based on the evidence and arguments proffered to date.

- [43] There are two issues in this case. The first issue was whether or not RHSO Gagnon erred when she issued her directions to the Department of PWGSC as employer of HRDC employees relative to the removal of ACM from the Dominion Public Building. The second, issue was whether or not the study conducted by DCS constituted a hazardous substance investigation under paragraph 125.1(f) of the *Code* and Part X of the COHSRs.
- [44] The hearing held on April 24, 2003 to hear PWGSC's appeal of the three directions that RHSO Gagnon issued on February 2002 was adjourned at the request of PWGSC through counsel and with the agreement of M. Hawkins through his counsel. A telephone conference call was subsequently held on May 12, 2003. At that time, it was agreed that I would deal with the first issue and, if I found that it was proper for RHSO Gagnon to have named PWGSC in her three directions, the hearing would be reconvened to deal with the second issue. Parties agreed to proceed by way of written submissions on the question of who was the employer and did so.
- [45] For deciding the first issue, whether or not RHSO Gagnon erred when she issued her direction to the Department of PWGSC, it is necessary to consider the *Code* and the various standards and citations submitted in the case.
- [46] Section 122.1 of the *Code* confirms that the *Code* applies in respect of employment which implies a employer and employee relationship. Section 122.1 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.** [My underline]
- [47] The term "employer" is defined in subsection 122(1) of the *Code* and clarifies that "employer" includes individuals or organizations acting on behalf of the employer. The definition of "employer" reads:
- "employer" means a person who employs one or more employees **and includes an employers' organization and any person** who acts on behalf of an employer. [My underline]
- [48] In the case of the Public Service of Canada, the Crown, represented by Treasury Board Secretariat (Treasury Board), is the employer and Treasury Board has delegated individuals, departments and agencies to act on its behalf.

[49] In accordance with the *Code*, where the employees of an employer may be exposed to hazardous substances, paragraph 125.1(f) of the *Code*, the employer is required to investigate and assess the exposure in the manner prescribed in the COHSRs and with the assistance of the work place committee of health and safety representative. The applicable provisions of the *Code* and COHSRs read:

Code:

125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to any exceptions that may be prescribed, 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,

(f) where employees may be exposed to hazardous substances, investigate and assess the exposure in the manner prescribed, **with the assistance of the work place committee or the health and safety representative**; and

[My underline]

COHSRs:

10.4(1) If there is a likelihood that the health or safety of an employee in a work place is or may be endangered by exposure to a hazardous substance, the employer shall, without delay,

- (a) appoint a qualified person to carry out an investigation in that regard, and
- (b) for the purposes of providing for the participation of the work place committee or the health and safety representative in the investigation, notify either of the proposed investigation and of the name of the qualified person appointed to carry out that investigation.

10.4(2) In an investigation referred to in subsection (1), the following criteria shall be taken into consideration:

...

10.5 On completion of an investigation referred to in subsection 10.4(1) and after consultation with the work place committee or the health and safety representative,

- (a) the qualified person shall set out in a written report signed by the qualified person

...

[50] Treasury Board's administrative policy entitled *Treasury Board Real Property Administrative Policy* confirms that PWGSC is the designated custodian of general purpose office facilities provided on an obligatory basis to departments and agencies listed in section 2 of the *Financial Administration Act*. RHSO Gagnon's uncontested evidence was that PWGSC was the designated custodian of the Dominion Public Building on behalf of Treasury Board. Section 6.4 reads:

6.4 Public Works and Government Services Canada (PWGSC) is the designated custodian of general purpose office facilities provided on an obligatory basis to departments and agencies as listed in section 2 of the *Financial Administration Act* and other real property that does not otherwise have a natural program organization, such as the parliamentary *precinct, certain common-use facilities and miscellaneous infrastructures*.

[51] The PWGSC directive submitted by J. Dais-Visca entitled; *Deputy Minister Directive 057 - Asbestos Management*" appears to correspond with the *Treasury Board Real Property Administrative Policy*. The Directive specifies PWGSC's custodial responsibilities as landlord and employer relative to the control of ACM. According to item 2 of the Directive entitled, *Policy*, PWGSC is responsible for the control of ACM and must carry out the work in accordance with the *Canada Labour Code*, Part II, the COSHRs and Part X, *Hazardous Substances*, of the COSHRs. Section 2 of the Directive reads:

Public Works and Government Services Canada shall ensure the control of asbestos containing material (ACM). The responsibilities of the department, as building owner, tenant, **landlord and employer**, with respect to safety and health issues and environmental control issues, shall be fully addressed and **in accordance with the *Canada Labour Code, Part II, the Canada Occupational Safety and Health Regulations, Part X – Hazardous Substances***, and applicable provincial and territorial occupational health and safety and environmental protection legislation. [My underline]

[52] However, item 6.3 of annex B of the Directive gives some insight into PWGSC's interpretation of its responsibilities relative to the phrase "***in accordance with the Canada Labour Code, Part II, the Canada Occupational Safety and Health Regulations, Part X, Hazardous Substances...***" According to item 6.3, PWGSC Property Managers, Facility Managers and the Regional Asbestos Coordinator are required to notify tenant health and safety committees and representatives in writing of the existence of friable ACM and to

provide updates on conditions as modifications or changes are made. Thus it would appear that PWGSC considers tenant departments to be otherwise responsible for complying with the *Canada Labour Code*, Part II and Part X, *Hazardous Substances* of the *Canada Occupational Safety and Health Regulations*. This would include complying with paragraphs 10.4(1)(b), subsection 10.4(2) and section 10.5 of the Part X. Item 6.3 of the *Deputy Minister Directive 057 - Asbestos Management* reads:

6 Property Managers, Facility Managers and Project Managers shall implement this directive and code of practice as required, based on the nature of their function and the duties for which they are responsible, by

6.3 notifying, in writing, Workplace Safety and Health Committees and Representatives, (tenant departments and PWGSC), and employees and employers and contractors of the existence of friable ACM, and providing updates on conditions as modifications or changes are made; [My underline]

- [53] The minutes of the PWGSC Retrofit 2000 meetings held at the Dominion Public Building on April 18, 2001, May 25, 2001, and June 15, 2001, confirm that PWGSC conformed with Annex B in that it held meetings to notify and inform tenant building facility managers regarding the DCS survey and their plans to renovate the Dominion Public Building that included the removal of ACM. The minutes confirm that Mr. Watson, HRDC Facilities Manager Officer, attended and actively participated in the meeting, such that HRDC was informed regarding the DSC survey project.
- [54] RHSO Gagnon referred in her testimony to HRDC's 700-5-IPG-035 entitled *Reacting to Non-Compliance Within the Public Service*. According to item 3.2 of the guideline, health and safety officers are to ensure that compliance activities are undertaken with the appropriate parties. In this regard, item 3.3 of the IPG entitled *Procedures in Dealing With Public Service Department/Agencies* specifies that, where a department does not have the authority to effect change and must reply upon the custodian to effect the necessary change, the onus is on the responsible manager in PWGSC and the responsible manager in the department to determine their respective responsibilities. In this regard, the IPG opines that departments or agencies are more likely to be responsible for violations involving such things as equipment, furniture and personal protective equipment, while building custodians and property managers are more likely to be responsible for the building structure including elevators, fire protection equipment, ventilation, and other similar equipment.
- [55] Item 3.3 of the IPG further specifies that, where the responsible manager in the department and the responsible manager in PWGSC cannot agree on who is responsible for compliance, the standard process for achieving compliance described in HRDC's Operations Policy Directive (OPD) 700-5 entitled *Response to Non-Compliance with the Canada Labour Code, Part II*, is to be followed. Section 7.4 of OPD 700-5 entitled *Directions and National Registry* specifies that *Directions should normally be issued to the*

person who has the proper authority to take the necessary corrective measures. Recall that *responsible manager* is defined in HRDC's 700-5-IPG-035 as follows:

Responsible manager means the person who has the authority to designate the funds necessary to effect the corrective measures, and/or has control over the conduct of employees while at work.

- [56] Thus HRDC's OPD 700-5 and HRDC's 700-5-IPG-035 could explain RHSO Gagnon's interpretation that it was proper for her to issue her directions to PWGSC since her evidence was that PWGSC did not provide necessary and timely information to HRDC regarding the DSC survey.
- [57] However, in my opinion, HRDC appears to have introduced a "follow the money" approach in its OPD and IPG for designating the "employer" acting on behalf of the Treasury Board, where a department must reply upon the custodian to effect necessary changes. While the pragmatism of this approach for precipitating timely compliance with the *Code* and COSHRs in the Public Service is undeniable, and, on the surface, may appear conducive with the purpose clause of the *Code*, it is not, in my opinion, one that is corroborated in the *Code* or in the Treasury Board directives.
- [58] Furthermore I believe it is an approach that has the potential, as in this case, of creating uncertainty in the minds of departmental officials relative to their employer responsibilities under the *Code* to protect the health and safety of their employees. Such uncertainty is not consistent with section 122.1 (Purpose Clause), with section 124 (General Duty of Employer) or with section 125 (specific duties of employer) of the *Code*.
- [59] Specially, section 124 of the *Code* makes the employer responsible for ensuring that the health and safety of employees is protected. Section 124 reads:
- 124.** Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
- [60] I am aware that compliance with the specific employer duties enunciated under section 125 of the *Code* is limited to work places that are under the control of the employer and to activities carried out by an employer's employees to the extent that the employer controls the activity. However, section 125 does not restrict the generality of section 124 of the *Code*.
- [61] In her testimony, RHSO Gagnon opined that, if the building HRDC occupied was owned by a private enterprise not subject to the *Code*, HRDC would be responsible for complying with section 125.1(f) of the *Code* and section 10.4 of Part X of the COHSRs regardless. She opined that HRDC would have to include a provision in its contract with the private owner requiring that the private owner respect HRDC's responsibilities under the *Code* in the event of renovation or remedial work to the building. If the private owner did not comply with the contract agreement and the health and safety of its employees was

threatened, HRDC would have to take unilateral measures needed to protect the health and safety of its employees, which could include evacuating its employees from the building if there was no other option available.

- [62] I cannot disagree with her assessment, and in my opinion, departments occupying a building owned and maintained by PWGSC on behalf of Treasury Board have the same employer obligation to protect the health and safety of their employees should PWGSC, as custodian, be unable or unwilling to facilitate the department's timely compliance with the *Code* on behalf of Treasury Board. Stated more generally, the responsibility that a department has under Part II to ensure that the health and safety of every person employed by the department is protected is not supplanted by anything that PWGSC, or any other department or agency appointed by or acting on behalf of Treasury Board, says, does or advises in respect of the occupational health and safety of the persons it employs. They are essentially only acting as advisors to the employer.
- [63] Finally, Chapter 4-6 of the Treasury Board of Canada Secretariat procedures entitled *Procedures of Correction of Physical Safety and Health Hazards* apply to all Public Service departments and agencies as identified in Part I of Schedule 1 of the *Public Service Staff Relations Act* which includes HRDC and PWGSC. The Directive specifies procedures that must be followed where departments must rely on PWGSC to rectify hazards identified by a tenant department or a health and safety officer acting under Part II. While the Directive requires PWGSC to action the request for rectifying the hazard on a priority basis, I note that it only has to provide the department with an estimated date of completion where it cannot meet the required date. I can find nothing in this Directive to indicate that PWGSC's involvement in this regard replaces a department's responsibilities as an employer under the *Code*. The following are extracts from Treasury Board Chapter 4-6:

Application

1. These procedures apply to all Public Service departments and agencies, as defined in Part 1 of Schedule 1 of the *Public Service Staff Relations Act*.

General

2. ... Whenever hazardous situations are identified through internally-organized departmental programs, or through the services of outside inspection authorities, it is essential that such hazards be rectified with the least possible delay.

Hazard Correction

3. Departments that are responsible for the maintenance of their own property should establish internal procedures to ensure the identified safety or health hazards are given priority attention. **If, however, a department must call upon the services of the Department of Public Works (sic) to effect hazard correction, the following special procedure is to be used.**

If the request is the result of a direction issued by a Safety Officer under the *Canada Labour Code* Part II, or by an environmental health officer of Health and Welfare Canada, attach a copy of such direction.

4. Requisitions concerning health and safety hazards shall be actioned by the Department of Public Works on a priority basis, and the necessary work will be carried out as soon as practicable. **If the Department of Public Works is unable to meet the required date, the requesting department will be provided with an estimated completion date.** [My underline.]

- [64] Based on the evidence, I find that RHSO Gagnon erred when she issued her three directions to PWGSC as the employer on behalf of Treasury Board of the HRDC employees working in the Dominion Public Building. If, as alleged by RHSO Gagnon, the DSS study constituted a hazardous substance investigation referred to in section 10(4) of the COSHRs, then it was Treasury Board (HRDC), and not Treasury Board (PWGSC), who had a duty under the *Code* as the employer to ensure that HRDC was informed by PWGSC of the work and that HRDC informed its health and safety committee so that they had an opportunity to participate in any hazard investigation connected with the work. In accordance with the COSHRs, this would include notifying the health and safety committee of the hazard investigation pursuant to paragraph 10.4(1)(b) of the COSHRs providing the health and safety committee with an opportunity to consult with the qualified person prior to the hazard assessment report being issued pursuant to paragraph 10.5 of the COSHRs, and providing the health and safety committee with an opportunity to ensure that the hazard assessment report addressed all of the elements referred to in subsection 10.4(2) of Part X of the COSHRs.
- [65] Following my decision on the first issue that Treasury Board (HRDC) was the employer, I turned to the second issue and wrote separately to K. Watson and to P. Doolittle, District Manager and immediate supervisor to M. Hawkins, to invite them to submit evidence as to whether or not the DCS investigation constituted a hazardous substance investigation referred to in section 10(4) of the COSHRs.
- [66] K. Watson submitted that he did not consider himself qualified to interpret whether the DSC survey investigation constituted a hazardous investigation referred to in the *Code*, but he did not personally regard the DCS investigation as a hazardous investigation because the purpose of the survey was only to confirm existing information. The DSC survey was only a proactive review of the status of the building.
- [67] He also confirmed that not only he, but other HRDC local managers or their representatives attended PWGSC meetings on the proposed work and were made aware of the DSC survey. The other HRDC managers or their representatives included, Bruce Helm, Tom Helm, Sheila Jackson, Mary Lacy, Carolyn Lammiman and Edie Morris.
- [68] P. Doolittle in her submission confirmed that she was not involved in the PWGSC's meeting and was not aware of the matter until the November 16th, 2001 meeting held by

PWGSC. She also confirmed that she would not be making any written submission regarding the question of whether or not the DCS investigation survey constituted a hazardous substance investigation under section 10(4) of the COSHRs.

- [69] In this regard and as previously noted in paragraph 3, T. Maslen, BLJC Property Manager, Greater Ontario, maintained that the purpose of the June, 2001 DCS survey was only to verify the ACM survey previously conducted by T. Harris, Environmental Management Inc. in February 1999 and did not itself constitute a hazardous substance investigation under the *Code* and COHSRs. In addition, D. Joyce indicated in paragraph 24 that PWGSC had neither drafted contract specifications for the renovation work at the Dominion Public Building nor negotiated a contract with a contractor to do the work prior to the directions.
- [70] However, Dana Tompkins, Project Manager, BLJC stated that PWGSC had contracted Decommissioning Consulting Service (DCS) in June 2001 to conduct a room by room survey for hazardous substances in the building and to prepare technical specifications for the removal of ACM from the building in advance of anticipated renovations.
- [71] Moreover, I learned from the two reports that DCS had submitted to PWGSC on August 2001 and February 13, 2002 that PWGSC had engaged DCS to conduct a room by room visual inspection of all accessible areas of the Dominion Public Building to determine the presence of materials suspected of containing asbestos. Where ACM were found, DCS was to assess the risk of exposure to building occupants and to make recommendations for any remedial actions considered necessary. Finally, DCS was to assist in providing budget cost and designing abatement specifications for the removal of the ACM found.
- [72] I therefore agree with RHSO Gagnon's statement in paragraph 7 that PWGSC had hired DCS to determine levels of asbestos that might occur during renovations and to recommend the appropriate type of asbestos removal, knowing that they intended to renovate the Dominion Public Building, that the building contained ACM and that the renovations were likely to disturb ACM. On that basis, I find that the DCS investigation survey constituted a hazardous substance investigation referred to in section 10(4) of the COSHRs. I must, therefore, now consider what to do with the three directions issued by RHSO Gagnon.
- [73] In the PWGSC and PSAC Decision No. 99-018 referred to in paragraph 34, RSO Cadieux interpreted section 146 to include the authority for an appeals officer to vary a direction with respect of the employer named in the direction. In that decision he varied the direction to name Treasury Board (PWGSC) as the employer instead of PWGSC. I agree with S. Cadieux's interpretation of section 146 and believe that I should similarly vary the three directions issued by RHSO Gagnon and name Treasury Board (HRDC) as the employer.

[74] I am therefore varying the three directions issued by to RHSO Gagnon on February 15, 2002, pursuant to section 145(1) of the *Code* to substitute the name of PWGSC with Treasury Board (HRDC). The varied portion of the directions read as follows:

Treasury Board (Human Resources Development Canada) failed to notify each HRDC health and safety committee for the purpose of permitting each work place health and safety committee or representative to determine their level of participation in the hazard investigation which was carried out by the qualified consultant, in respect of building renovations where a hazardous substance (asbestos) was known to exist.

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

Further, you are HEREBY DIRECTED, pursuant to subsection 145(1)(b) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not continue or reoccur by no later that February 28, 2005.

To: Treasury Board (HRDC-DRHC)
Dominion Public Building
457 Richmond Street
London, Ontario

Treasury Board (Human Resources Development Canada) failed to consider all of the criteria required by subsection 10.4(2) of the COSH Regulations when conducting the hazard investigation into the likelihood of employee exposure to asbestos during proposed renovations.

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

Further, you are HEREBY DIRECTED, pursuant to subsection 145(1)(b) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not continue or reoccur by no later that February 28, 2005.

To: Treasury Board (HRDC-DRHC)
Dominion Public Building
457 Richmond Street

Treasury Board (Human Resources Development Canada) failed to consult with each work place health and safety committee following the hazard investigation in respect of the proposed building renovations where a known hazardous substance existed (asbestos) prior to the qualified consultant setting out their written report.

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

Further, you are HEREBY DIRECTED, pursuant to subsection 145(1)(b) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not continue or reoccur by no later than February 28, 2005.

To: Treasury Board (HRDC-DRHC)
Dominion Public Building
457 Richmond Street

Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-003

Applicant: Public Works and Government Services Canada

Respondent: Mark Hawkins

Key Words: Asbestos removal, building custodian, hazardous substance, hazardous investigation, health and safety committee participation, health and safety representative participation, internal complaint resolution process.

Provisions: *Code* 122.(1), 122.1, 124, 125, 127.1, 145.(1), 146.
Regulations 10.4(1)(b), 10.4(2), 10.5

Summary:

M. Hawkins, an employee health and safety committee member and HRDC health and safety officer wrote to his supervisor complaining that HRDC's health and safety committees had not been notified of the qualified person appointed to conduct a hazard investigation at his work place relative to asbestos removal from the building. He held that this constituted a contravention of paragraph 10.4(1)(b) of the COSHRs. He further alleged that the health and safety committee was not afforded the opportunity to consult with the qualified person prior to its final report to PWGSC and that this constituted a contravention of section 10.5 of the COSHRs. Finally, he alleged that the final report of the qualified person did not comply with subsection 10.4(2) of Part X of the COSHRs in that it did not address all of the requirements in subsection 10.4(2). A health and safety officer investigated M. Hawkins' complaint and, following its conclusion, issued three directions to PWGSC.

Following his review, the Appeals Officer determined that the study conducted by DCS constituted a hazard investigation under paragraph 125.1(f) of the *Code* and Part X of the COHSRs the varied the directions to identify Treasury Board (HRDC) and not PWGSC as the employer in respect or M. Hawkins.