

Canada Labour Code
Part II
Occupational Health and Safety

Canadian Pacific Railway
applicant

and

Allan Woollard
respondent

Decision No.: 05-048
November 30, 2005

This case was heard by Appeals Officer Douglas Malanka in London, Ontario, on January 19 and 20, 2005.

Appearances

For the applicant

Mike Pielak, Safety Specialist, Canadian Pacific Railway (CPR)
Karen Fleming, Counsel, CPR
Dennis Tasch, Track Maintenance Supervisor, CPR
Henry Rubert, Service Area Manager, CPR
Doug Wylie, Occupational Hygienist, OHG Consulting
Paul Sagriff, Supervisor Track Programs, CPR

For the respondent

G. James Baugh, Counsel, McGrady, Baugh & Whyte
Sarbjit Deepak, Counsel, McGrady, Baugh & Whyte
Allan Woollard, Machine Operator, Canadian Pacific Railway (CPR)
Bill Brake, Health and Safety Representative, CPR
Roberto Tirelli, Assistant National Coordinator, Teamsters Canada Rail Conference Maintenance of Way Employees Division (Teamsters)

Health and safety officer

Rod Noel, Human Resources and Skills Development Canada, Labour Program, Toronto, Ontario

- [1] On June 12, 2003, health and safety officer (HSO) Rod Noel issued a direction (Appendix A) to Canadian Pacific Railway pursuant to subsection 145(1) of the *Canada Labour Code* (the *Code*). HSO Noel's direction alleged two infractions and ordered CPR to terminate the contraventions by June 27, 2003. On July 9, 2003, Mr. Mike Pielak, CPR Safety Specialist, appealed the direction to an Appeals Officer pursuant to subsection 146(1) of the *Canada Labour Code* on behalf of CPR, requesting that the second item of the direction be rescinded.
- [2] For immediate reference, the second item of the direction reads as follows:
2. Canada Labour Code, Part II Paragraph 125.1(i) and Canada Occupational Health and Safety Regulation subsections 9.44(1), (2) and (3).
- Employees who work on and maintain maintenance of way track clearing equipment are regularly required to work outside in inclement weather where clothing becomes wet. During the operation and maintenance of equipment clothing is frequently contaminated by hazardous products such as diesel fuel, lubricating grease, antifreeze and hydraulic oils. The employer provides hotel rooms housing two employees per room for periods of several days. Employees are required to return to those rooms directly from the workplace, while wearing the wet or contaminated clothing. The employer has failed to provide a change room and separate storage area to ensure protection of employees exposed to wet or contaminated work clothing.
- [3] In this regard, CPR held that HSO Noel erred because he did not rely on solid evidence for his conclusion that the clothing of maintenance of way machine operators were regularly wetted due to inclement weather or contaminated by a hazardous substance. CPR further held that HSO Noel's interpretation and application of the terms "regularly engaged" and "contaminated" in section 9.44 of the *Canada Occupational Health and Safety Regulations* (COHSR) did not accord with proper statutory interpretation of the legislation.
- [4] Thus, the issue in this appeal is whether or not HSO Noel erred with regard to his finding and order relative to the second item of his direction.
- [5] HSO Noel submitted a copy of his investigation report prior to the hearing and testified at the hearing. I retain the following from his report and testimony.
- [6] On November 21, 2002, Allan Woollard, machine operator, complained that CPR was no longer providing maintenance of way crews with a separate room for storing their work clothing at the hotels and motels where CPR billeted them.

- [7] Mr. Woollard told HSO Noel that:
- he worked outdoors in remote locations and in all weather conditions, for periods ranging from one day to a week and more;
 - his clothing at work became contaminated by grease, oil and diesel fuel as the job entailed lubricating machinery, changing engine oil and oil filters and refueling equipment with diesel fuel;
 - when he worked in remote locations, CPR billeted him and his maintenance of way co-workers in local hotel or motel accommodations;
 - he normally returned to his hotel room at the end of the work day in his contaminated working cloths;
 - there was no separate room to store his contaminated clothing following his shower; and
 - odours from his wet or contaminated work clothes filled the room and made him ill at night, especially when the clothing had to be dried on the heater in the hotel or motel room.
- [8] For his investigation, HSO Noel traveled to the work place and observed Mr. Woollard and his co-workers for about four hours. He saw that their work involved the operation of diesel powered track maintenance equipment on the rails, which included brush clearing and cutting machines. He noted that the brush clearing equipment was equipped with hydraulically operated attachments.
- [9] HSO Noel further observed that Mr. Woollard and his co-workers had to refuel the equipment, change oil lubricants, replace filters and perform scheduled maintenance and repairs to the equipment. Some of the work had to be performed underneath the equipment. HSO Noel noted that the road bed and right-of-way was contaminated by trammel grease and other contaminants, including human waste from passing trains.
- [10] HSO Noel observed evidence of oil mist and oil leaks on the brush clearing equipment and on the track bed. He stated that he could also smell diesel fuel odours within the machine. He noted that Mr. Woollard's clothing and boots were visibly contaminated by oil and grease spots and stains at the end of the shift. However, he conceded that Mr. Woollard's clothing was not clean when he started his shift and that the degree of contamination would vary with the work. He confirmed that he did not take any samples or measurements of stains on Mr. Woollard's clothing.
- [11] At the end of the work day, HSO Noel returned with the crew to their hotel accommodations provided by CPR. He observed that two employees shared a room, which typically has a minimal space with twin beds and small closet. As there was only one small closet, wet and/or contaminated work clothing had to be stored with clean clothes. HSO Noel concluded that there was opportunity for cross contamination with this arrangement.
- [12] HSO Noel further observed that employees stored their contaminated work boots in the room, and there were noticeable odours from the clothing in the hotel room.

- [13] HSO Noel testified that he met with Mr. Tasch, Track Maintenance Supervisor, on April 6, 2003, to discuss the employees' living conditions. Mr. Tasch took him to a CPR facility in Cambridge, Ontario, to determine if the showers and locker room storage facilities there were suitable. HSO Noel testified that the locker room was dirty and did not meet the requirements for cleanliness specified in the Code and COHSR.
- [14] HSO Noel stated that CPR's track programs rules entitled *Motel and Camp Rules* had previously stipulated that a separate room was to be provided for the storage of the employees' dirty work clothes, but this requirement was deleted when the rules were revised in February 2002. HSO Noel held that the new rules did not ensure that wet or contaminated work clothes did not contaminate the clean non-work clothing.
- [15] HSO Noel noted in his report submitted prior to the hearing that Mr. Woollard had complained to his CPR joint health and safety committee in July of 2001, regarding the above noted rule change. According to HSO Noel, a subcommittee of the work place health and safety committee investigated his complaint and issued a report on its findings. It was signed by Chris Kane, Safety Advisor and Industrial Hygienist with CPR, and recommended that:
- controls be continuously evaluated to ensure that they are minimizing the potential for employees to be exposed to contaminants; and
 - surfacing crew employees should be given a place separate from their hotel room to store their work clothes...
- [16] HSO Noel further stated that CPR provided him with material safety data sheets (MSDSs) for the hazardous substances that Mr. Woollard and other maintenance of way employees used in their work. He noted the following excerpts from the MSDSs:
1. Diesel Fuel
 - Avoid prolonged or repeated skin contact...;
 - Remove contaminated clothing – launder before reuse;
 - Do no breath gas, vapour, spray;
 - Practice good personal hygiene;
 - Launder work clothes frequently.
 2. Hydraulic Oil (Hydrex XV)
 - Avoid inhalation and skin contact;
 - Launder work clothes frequently.
 3. Antifreeze (ethylene glycol)
 - Contact can cause slight irritation of skin, eyes and respiratory track;
 - Remove contaminated clothing – launder before reuse.
 4. Lubricating Oil (Ardee 32)
 - Similar to above.
 5. Lubricating Grease
 - Similar to above.

- [17] HSO Noel stated that he interpreted paragraph 9.44(1)(b) of the COHSR to mean that the employee is engaged in the work regularly and that the possibility of wet or contaminated clothing exists at any time.
- [18] HSO Noel confirmed that he was aware that surfacing crews received a laundry allowance from CPR for laundering their work cloths.
- [19] Mr. Rubert, Manager, Engineering Services for CPR, Southern Ontario, testified that he was responsible for structures, signals and communication and day to day track maintenance. I retain the following from his testimony.
- [20] Mr. Rubert confirmed that surfacing crews carry out periodic maintenance, deal with periodic breakdowns and assist mechanics in large repairs and monthly maintenance of equipment. He also confirmed that surfacing crews come into contact with hydraulic oils, grease and diesel fuel in the course of this work.
- [21] Mr. Rubert recalled that Mr. Woollard had submitted a CPR safety/hazard report on July 4, 2001, because CPR was no longer providing surfacing crews employed in remote areas with a separate change room for storing their work clothing when billeted at hotels and motels. At the request of the Southern Ontario Area Engineering Services Safety and Health Committee, a committee consisting of Mr. Kane, Mr. Brake, TP&E, and Mr. Poirier, BMW Safety Coordinator, carried out a hazard assessment. The assessment was to determine whether or not CPR was required by the Code and COSHR to provide a change room to surfacing crews whose clothing became contaminated by a hazardous substance.
- [22] In its assessment, the three person committee reviewed the chemical, physical and biological hazards present in the work place, and the work processes, practices and controls in place to reduce the potential for contamination. They concluded that only the following three products were likely to contaminate the clothing of surfacing crew members when they repaired and refueled equipment:
- Suncor Energy brand diesel fuel;
 - Petro-Canada Harmon AW22 Hydraulic Oil;
 - Esso Gear Oil, BX 85 W-140.
- [23] The committee reviewed the MSDSs on these products and noted that all three substances were slightly toxic. They concluded that:
- the only product meeting the hazard requirements of the *Controlled Products Regulations* under the *Hazardous Products Act* was diesel fuel;
 - a number of controls were in place to limit the exposure of employees to diesel fuel and the duration of potential exposure was a maximum of 30 minutes per day. The control measures included:
 - gloves, aprons and disposable overalls; and
 - use of a fuel truck to fuel machinery or, in the alternative, locating the drum and pump away from the nozzle during refuelling;
 - with the controls in place, section 9.44 of the COHSR did not apply to surfacing crew employees because they were not regularly engaged in work where their clothing became wet or contaminated by a hazardous substance.

- [24] The committee also referred to a previous hazardous assessment conducted by Mr. Scott Desautels, Engineering Safety Specialist. The hazard assessment carried out by Mr. Desautels reported that he looked at the work performed by track maintenance of way employees to determine the application of paragraph 9.44(1)(b) and subsection 9.44(4) in respect of the work. Mr. Desautels concluded in his report that weather conditions were an inherent condition for maintenance of way employees and, despite their rain suits, they did become wet in the performance of their job. While this was not a regular occurrence, he held that CPR could comply with subsection 9.44(4) of the COSHR by providing a hook on the wall near a heat source. Subsection 9.44(4) reads:

9.44(4) Every employer shall supply drying and cleaning facilities for the purpose of drying or cleaning wet or contaminated clothing referred to in paragraph (1)(b).

- [25] With regard to hazardous substances, Mr. Desautels further concluded that there was a possibility of contamination of clothing with a hazardous substance despite the controls instituted by CPR. He held that CPR had a responsibility to provide cleaning facilities or methods in the form of:
- clothing replacement;
 - cleaning services;
 - laundromats; or
 - on site washing facilities.
- [26] Following this review, Mr. Kane recommended to Mr. Rubert that surfacing crews be given a place separate from their hotel room to store their work clothes. This recommendation was not implemented.
- [27] Mr. Rubert stated that he did not implement Mr. Kane's recommendation because CPR was unsure the employees in question were regularly engaged in work in which their work clothes became wet or contaminated by a hazardous substance as specified in paragraph 9.44(1)(b) of the COHSR. Instead, he instructed Mr. Tasch to meet with crews and ensure that:
- surfacing employees were instructed to report to a nearby station facility, such as a work house, when their clothing became contaminated, to change into clean clothing; they could do so at any time during or after their shift;
 - surfacing crews were provided with disposable coveralls for heavy repairs; and
 - diesel refueling equipment was equipped with a nozzle similar to that found at gas stations.
- [28] Mr. Tasch testified for the appellant at the hearing. I retain the following from his testimony.
- [29] Mr. Tasch is a track maintenance supervisor who supervises approximately twenty-two permanent surfacing crew employees, including Mr. Woollard. He worked in connection with track maintenance for approximately twenty-two years.

- [30] Mr. Tasch stated that he spent approximately fifteen to twenty days visiting surfacing crews over a season. He confirmed that the work of surfacing crews included:
- conducting pre-start-up inspection of the equipment in the morning;
 - performing maintenance as required;
 - repairing equipment;
 - refueling the equipment with diesel fuel; and
 - operating the brush cutting equipment from inside the cab of the equipment.
- [31] Mr. Tasch stated that CPR uses an electric pump and dispensing nozzle similar to the ones used at a local gas station for dispensing diesel fuel. He added that CPR supplies surfacing crew employees with the following personal protective equipment:
- safety glasses;
 - safety boots;
 - gloves;
 - hard hat;
 - high visibility vest; and
 - disposable coveralls for use when carrying out heavy repairs.
- [32] CPR also provided employees with an allowance for:
- safety footwear; and
 - laundering their coveralls.
- [33] Mr. Tasch testified that the brush cutter machines were washed monthly to remove dust and hydraulic fluid. However, he conceded that it was possible to have an oil mist on the equipment, especially around areas where hydraulic oils lines are found. He further conceded that the clothing worn by surfacing crews could be wetted by rain or by hydraulic fluids.
- [34] Mr. Tasch confirmed that surfacing crews whose work base is permanent were provided with a change room located at their headquarters. However, since 2003, maintenance of way employees working in remote areas, like Mr. Woollard, had been advised to go to a tool house and change their clothing, if necessary. He also confirmed that the previously mentioned CPR camp rules did not apply to surfacing crews.
- [35] Mr. Wylie testified for CPR as an expert hygienist witness. He graduated from McMaster University with a degree in health and safety. At the time of the hearing, he was a Registered Occupational Hygienist with the Canadian Registration Board of Occupational Hygiene, a Canadian Registered Safety Professional, a Canadian Risk Manager and a Certified Industrial Hygienist with the American Board of Industrial Hygiene.
- [36] Mr. Wylie stated that he had been retained by CPR to advise on the interpretation of the term “contamination” as it appears in paragraph 9.44(1)(b) of Part IX, Sanitation, of the COHSR.

- [37] In this regard, Mr. Wylie opined that one must rely on a technical definition rather than a simple dictionary definition to interpret the word “contamination” in paragraph 9.44(1)(b). He held that the simple dictionary definition only conveys that a foreign substance is present on a material but does not indicate whether the foreign substance constitutes a hazard to the employee.
- [38] Mr. Wylie maintained that a technical definition of “contamination” or “exposure” incorporates both the quantity of the foreign substance and its toxicity for determining if the foreign substance constitutes a hazard to the employee. In other words, the determination of the level of contamination or exposure is risk based, and that is the way the term should be interpreted under paragraph 9.44(1)(b) of the COSHR.
- [39] Mr. Wylie added that, if the clothing worn by the surfacing crews was contaminated as understood by the technical definition, it would be improper to store the contaminated clothing in a separate room so that it could be worn the next day. Moreover, if the clothing worn by the surfacing crews was contaminated as inferred by the technical definition, CPR would have to:
- clean the operator cab at the beginning of every shift;
 - service mechanical equipment more frequently to prevent hydraulic oil lines from failing and spraying hydraulic oil around;
 - provide machine operators with disposable coveralls to be worn when carrying out heavy maintenance and repair; and
 - require employees to change and remove contaminated clothing immediately.
- [40] With regard to the Petro Canada MSDS for diesel fuel, Mr. Wylie opined that the notation to remove clothing contaminated with diesel fuel was probably based on a risk based technical definition of the term “contaminated”. That is, the clothing had to be contaminated not by a small amount but by a sufficient amount of diesel fuel to pose a hazard to the person.
- [41] Mr. Wylie reiterated that it was necessary to have proper sampling and measuring scientific equipment to determine whether the contamination on clothing was significant enough to constitute a risk to an employee.
- [42] Mr. Wylie stated that the toxicity of diesel fuel, hydraulic oil and antifreeze for the machine operators would depend on the degree of contamination of clothing, which likely varied every day. He further declared that, based on the exposure scenarios connected with Mr. Woollard’s work, it was unlikely that the contamination on Mr. Woollard’s work clothing, or the odours he detected in his hotel room during the evening and night, posed a health hazard for him. He added that after checking with many other industries where employees worked in remote areas, such as Manitoba Hydro and Canadian National Railway, he was unable to find any other company that dealt with contamination of work clothing by providing employees with a separate change room or storage room for their contaminated clothing.

- [43] Mr. Wylie agreed that HSO Noel was right to make a connection between stains and the products that he knew the employees were working with. However, he held that this was only the first step. HSO Noel had to then determine the quantity and the toxicity of the stains to establish if the clothing was contaminated. Instead, HSO Noel only relied on the simple dictionary definition of the term “contamination”, which conveys that a foreign substance is present.
- [44] Finally, I retain the following facts from the report that Mr. Wylie submitted prior to the hearing:
- Hydraulic oil is not a *WHMISable* product. That is, it does not display any chemical or physical properties to fall under WHMIS legislation. So it is hard to believe that the chemical would require any special controls respecting clothing storage;
 - Ethylene glycol does not fall under WHMIS or carry any significant warning with regard to dermal contact. Ethylene glycol has a low vapour pressure and significant air concentrations are not achieved unless the compound is heated or sprayed as a mist. The airborne concentrations in a hotel room would be a small fraction of what occurs during the day and would likely be so low as to be undetectable using normal analytical methods. Based on information reviewed, it is impossible to make a case for separation of clothing with incidental or normal contamination;
 - Diesel fuel has a relatively low volatility and is seldom hazardous as a vapour. The airborne concentrations in a hotel room would be a small fraction of what occurs during the day and would likely be so low as to be undetectable using normal analytical methods. Diesel fuel is moderately irritating to the skin and there is some evidence of cancer incidence from dermal contact. ACIGH classifies diesel fuel as A3 – confirmed animal carcinogen with unknown relevance to humans. An A3 rating is not considered to be carcinogenic by WHMIS legislation. Dermal absorption can be appreciable and the substance carries a skin notation to warn of the potential significance of absorbance of dermal contact;
 - It is difficult to imagine that clothing contaminated with these substances require specialized or elaborate precautions such as the use of duplicate or separate changing and storage facilities. Duplicate change rooms are called for in some cases, but this degree of controls is normally reserved for very toxic materials;
 - Upon arrival at the hotel/motel, the worker has the opportunity to remove their work clothing and bathe/shower. These clothes can then, at the employee’s option, be put aside and worn the next day or put aside for laundering in the future;
 - If the clothing is not going to be worn again until they are laundered, they can be placed in a plastic bag or container. Such a container can seal air tight and prevent any emissions from the clothing. After the employee has bathed, the sealed bag or container can be stored in their vehicle or in the room at the employee’s option; and
 - If the clothing is going to be worn the next day, the clothes may be kept in the hotel room. The separation between wet or contaminated clothing could be achieved by placing the clothes in a separate drawer or in a garment bag, or by placing a plastic garment bag between the clean clothes and the ones that are wet or contaminated.

- [45] Mr. Woollard testified at the hearing. I retain the following from his testimony.
- [46] Mr. Woollard has been employed as a surfacing crew member for the last ten years and has operated cranes, brush cutters and ballast regulators.
- [47] Mr. Woollard and other crew members must check for fluid leaks anywhere on the machinery and top fluid levels upon arriving at the worksite in the morning. The fluids include engine oil, antifreeze, hydraulic oil and diesel fuel.
- [48] While machine operators operate the equipment from within a cab on the equipment, they are also required to spend a significant amount of time servicing and repairing the equipment during a shift, because the equipment requires frequent servicing and is prone to fouling and failure and because a mechanic can be more than an hour away.
- [49] The ballast regulator that Mr. Woollard operated had to be greased about every four to eight hours. There are approximately 120 hydraulic oil lines on a ballast regulator and these lines fail frequently. When they fail, they blow oil everywhere on the equipment. It takes approximately half a day to replace the oil lines and this must be carried out while kneeling on the ground.
- [50] Mr. Woollard also operated a brush cutter. The brush cutting blades on the boom must be cleaned and greased about every five hours because they hit a lot of garbage strewn on the rail right of way. This must be carried out while kneeling on the ground and can expose operators to various hazardous substances or material on the road bed.
- [51] Crews are also required to assist mechanics to change the vibrator motor on a Tamper unit, under the similar conditions noted above.
- [52] Mr. Woollard's work clothing came in contact with diesel fuel, engine oil, hydraulic pump oil and antifreeze daily. It is also common for employees' clothing to come in contact with animal carcasses and with wheel grease that has fallen from rolling stock to the ground.
- [53] CPR previously provided its surface groups with boarding cars that were equipped with showers and change rooms. The practice changed when CPR began housing its work crews in hotels and motels and providing them with an additional room to shower, change and store their work clothing.
- [54] Crews used the heater in the storage room to dry out work clothing wetted by rain or by chemical products during their shift. Crew members could reuse their dried contaminated work clothing the next day when they had dirty work to complete on arriving at the work site.

- [55] CPR provided its crew with an allowance to have work clothes laundered. However, according to Mr. Woollard, motel or hotel owners and Laundromat owners did not permit crews to use their laundry machines.
- [56] Mr. Woollard also confirmed that CPR had provided crew members with various brands of disposable coveralls for their work. However, he maintained that these were generally unsatisfactory because: they tore easily, they were not impervious to water or to oils and not all brands were fire resistant. In addition, they tended to slide up and down arms and legs while the equipment was serviced.
- [57] In her summation argument, Ms. Fleming first argued that HSO Noel did not rely on solid evidence for concluding that the employees regularly engaged in work where their clothing became wet or contaminated by a hazardous substance at any time.
- [58] In this regard, Ms. Fleming maintained that the evidence showed that HSO Noel never observed employees engaged in refueling or performing maintenance, never observed employees getting diesel fuel, antifreeze, hydraulic fluid or any other substance on their clothing and never observed their clothing being wet. Instead, the evidence showed that HSO Noel relied on the fact that he observed stains on the clothing of the employees and made his finding without taking any measurements or samples or consulting with a hygienist to determine employee exposure to the hazardous substances.
- [59] Ms. Fleming further alleged that the evidence showed that HSO Noel had not considered the recommendations of the CPR health and safety committee that had conducted a hazard assessment following Mr. Woollard's complaint. It also showed that the health and safety committee had found that diesel fuel was the only product to which machine operators were exposed that was regulated by the *Controlled Products Regulations* under the *Hazardous Products Act*. Moreover, its overall finding was that a surfacing crew employee was not regularly engaged in work in which the employee's clothing became wet or contaminated by a hazardous substance and that this did not meet the requirements of section 9.44 of the COHSR.
- [60] Finally, Ms. Fleming held that HSO Noel had not considered the prevention measures instituted by CPR to lessen the potential for the clothing of machinery operators to be contaminated by diesel fuel or the personal protective equipment provided to surfacing crews to protect their health and safety.
- [61] Ms. Fleming referred me to the decision of Regional Safety Officer (RSO) Cadieux in *Canada Post Corporation and Qureshi*¹ and asked that I rescind the second item in HSO Noel's direction due to the absence of solid evidence confirming the alleged contravention. She paraphrased paragraph 24 of RSO Cadieux's finding, who wrote:

I must set aside the conclusions reached by the safety officer because of the inferences drawn from which I believe are not based on pertinent facts... There exist no solid evidence of the Corporation acting as the safety officer alleges and in the absence of evidence to the contrary, I cannot support the direction given by the safety officer.

¹ *Canada Post Corporation and Qureshi*, Regional Safety Officer Serge Cadieux, C.L.C.R.S.O.D. No. 3., Decision No. 94-003, November 16, 1993.

- [62] Ms. Fleming's further argument in favour of rescinding the second item of HSO Noel's direction was that HSO Noel's conclusion did not accord with proper statutory interpretation.
- [63] In this regard, Ms. Fleming held that neither the term "regularly" nor the term "contaminated" in paragraph 9.44(1)(b) of the COHSR were defined in the Code or COHSR. That being the case, she maintained that according to Sir B. Maxwell and his *Interpretation of Statutes*², words and phrases of technical legislation are used in their technical meaning if they have acquired one and are otherwise understood according to their ordinary meaning.
- [64] Ms. Fleming referred to the testimony of Mr. Wylie to point out that he had opined that the technical definition of the term "contaminated" should be used in the context of occupational health and safety legislation.
- [65] In this regard, Ms. Fleming referred to a letter that HSO Terry McKay wrote to Mr. Wally Geiler, of the United Transportation Union in Winnipeg, Manitoba, on May 22, 2003. The letter dealt with a complaint connected with section 9.44 of the COHSR, relatively to the provision of a change room for the storage of wet or contaminated clothing. HSO McKay wrote in paragraphs two and three of his letter:
- The second condition included in COSH paragraph 9.44(1)(b) is the contamination of work clothes by a hazardous substance. Our discussions indicate that employees' clothing would normally be soiled by sweat, dirt, grease, grime, exhaust fume and possibly trace amounts of chemical products used at the work or transported by rail.
- It has been determined that these "normally" soiled work clothes would not be considered to be contaminated by a hazardous substance. Therefore there would be no requirement in accordance with COSHR paragraph section 9.44(4) to have cleaning and drying facilities available for the regular cleaning of these clothes.
- [66] Ms. Fleming also referred to a letter that HSO Doug Gould had written to Mr. Pielak, CPR in Calgary, Alberta, on June 12, 2003, regarding the interpretation of section 9.44 of the COHSR. HSO Gould stated in his cover letter that he opined that paragraph 9.44(1)(b) meant that clothing contaminated by a "hazardous substance" as defined in section 122(1) of the Code would fall under Part X of the COSHR, Hazardous Substances. HSO Gould wrote that he was told by Mr. Bailey Seshagiri, Labour Program, Technical Services, that it was impossible to establish clothing contamination simply by examining the hazardous substances data sheets and that an officer would have to determine the quantity of the hazardous substances used, as well as the duration and the frequency of work.

² Sir Peter B. Maxwell, *On the Interpretation of Statutes*, 12th ed., P. St. J. Langan. London: Sweet & Maxwell, 1969.

- [67] Ms. Fleming added that HSO Gould opined in his letter that the term “contaminated” was not defined in the COHSR and that the definitions found in the English and French dictionaries that he consulted made him conclude that work clothing on which a hazardous substance has been deposited would be contaminated. However, HSO Gould noted that a previous version of the Regulation stipulated the following:

Every employer shall provide a change room where

...(b) and employee is regularly engaged in work in which his work clothing becomes wet or contaminated by a dangerous substance to a degree sufficient to constitute a health or safety hazard to himself or another person.

- [68] Therefore, Ms. Fleming maintained that HSO Noel erred when he used the ordinary dictionary meaning and interpreted the term “contaminated” to mean soiled, dirty, being in contact with clothing.

- [69] With regard to the term “regularly”, Ms. Fleming referred to a letter that HSO Ken Chemiliuk had written to Ms. Brenda Bannerman, CPR Manager, Field Safety, in Calgary, Alberta, on June 28, 2000, regarding the interpretation of the expression “regularly engaged”. He had written in paragraphs four and five of his letter:

As an example, a person who works in a wash bay area where his job entails the use of water pressure washing equipment is likely to become wet on a regular basis. In your example the wet clothing referred to would be as a result of being caught in a rain or snow storm. As we know weather cannot be predicted and rain and snow storms are intermittent in nature. The employees you refer to may not be exposed to the threat of wet clothing for extended periods of times and not on a regular basis.

I believe that subsection 8.44(1)(b) pertains to employees who are regularly engaged in work in which his work clothing becomes wet as described in my washbay example. If the intent of the regulation was to provide drying and cleaning facilities in the event a person could get caught in a rain storm, then the regulation would have stated such. As an example,...provide all employees who work outdoors with drying and cleaning facilities....this is not the case.

- [70] For these reasons, Ms. Fleming asked that I rescind the second item of HSO Noel’s direction.

- [71] Mr. Deepak countered that HSO Noel’s interpretation and application of section 9.44 of the COHSR was in accord with proper statutory interpretation. He held that reference must be to the ordinary meaning of the term “contaminated” and not to a technical definition which includes both the amount of hazardous substance and the toxicity of the substance.

- [72] In this regard, Mr. Deepak argued that the Code is remedial in nature and must be accorded the broadest interpretation consistent with the purpose clause of the Code, as stated in the *Interpretation Act*³. He added that the COHSR are minimum occupational health and safety standards of general application and are not specific to any trade, business or transaction.
- [73] Mr. Deepak asserted that Mr. Wylie was qualified as an occupational hygienist expert, but was not qualified to provide expert opinion regarding the provisions of the Code or the COHSR. Moreover, Mr. Deepak reiterated that there was no evidence that the word, “contaminated” had acquired a technical definition specific to section 9.44 of the COHSR. He concluded that it fell to the Appeals Officer to determine the meaning of the term “contaminated” by referencing the common dictionary definition.
- [74] In this regard, Mr. Deepak cited eight decisions where the Regional Safety Officer or the Appeals Officer confirmed that the “ordinary” definition of a word was to be used for interpreting a provision where the word was not defined in the legislation, including:
- *Canadian Freightways Ltd and Teamsters Local 31*⁴;
 - *Parks Canada Agency and Doug Martin*⁵;
 - *St Lawrence Seaway Management Authority and Canadian Auto Workers Union*⁶.
- [75] Mr. Deepak held that the previous HSO decisions referenced by CPR did not constitute binding precedents.
- [76] Mr. Deepak maintained that to agree with HSO McKay was to say that Parliament overlooked a significant health and safety hazard. He opined that, to the contrary, the technical definition suggested by CPR appeared to have been rejected by Parliament when the Code was amended in September 2000.
- [77] With regard to the interpretation made by HSO Gould, Mr. Deepak argued that according to Maxwell⁷, the rule of construction was that the Legislature intended what it actually expressed in the legislation.
- [78] Mr. Deepak agreed that the term “regularly” was not defined in the Code or COHSR. He held, therefore, that for interpreting paragraph 9.44(1)(b) of the COHSR, one had to consult the dictionary to obtain the ordinary meaning of the word. Mr. Deepak wrote that Webster Dictionary⁸ defined the terms “regularly” and “regular” as follows:

“regularly” means in a regular manner, on a regular basis, at regular intervals;

“regular” means recurring, attending or functioning at fixed or uniform intervals.

³ *Interpretation Act*, Revised Statutes 1985, c.I-21.

⁴ *Canadian Freightways Ltd and Teamsters Local 31*, Appeals Officer Doug Malanka, Decision No. 04-018, April 19, 2004.

⁵ *Parks Canada Agency and Doug Martin*, Appeals Officer Serge Cadieux, Decision No. 02-009, May 23, 2002.

⁶ *St Lawrence Seaway Management Authority and Canadian Auto Workers Union*, Appeals Officer D. Malanka, Decision No. 03-008, April 4, 2003.

⁷ Sir Peter Maxwell, *supra*.

⁸ Edition not specified.

- [79] Mr. Deepak disagreed with Ms. Fleming's first position that HSO Noel did not rely on solid evidence to conclude that the employees were regularly engaged in work where their clothing became wet or contaminated by a hazardous substance at any time.
- [80] Mr. Deepak pointed out that Mr. Woollard confirmed in evidence that he could stay in the same hotel room for up to eight consecutive days and that the odour from clothing contaminated with diesel fuel, gear oil and antifreeze gave him headaches, particularly when the clothing was heated so that it would dry.
- [81] Mr. Deepak pointed out that HSO Noel had reported that the equipment that he saw during his investigation was covered with hydraulic grease or hydraulic oil, there were grease spots on the steps and he could detect diesel fumes. HSO Noel further evidenced that there were visible stains on the employees' clothing, that he could detect an odour emanating from their work clothes and that the same odour was present on his own clothes when he arrived home.
- [82] Mr. Deepak referred to the Suncor Energy MSDS for diesel fuel and remarked that the MSDS specified that:
- repeated or prolonged exposure to the substance can produce target organs damage. Contains a material which causes skin tumours in lab animals. Pulmonary Aspirations Hazard – Can enter lungs and cause damage.
 - section 7. Do not breathe gas/fumes/vapour/spray. In the case of insufficient ventilation, wear suitable respiratory equipment.
 - death or coma;
- [83] Mr. Deepak stated that section 3 of the Petro Canada MSDS for diesel fuel specified that inhalation could cause central nervous system depression with symptoms of nausea, headaches, vomiting, dizziness, fatigue, lightheadedness, reduced coordination, unconsciousness, and possibly death. Petro Canada stated at section 4:
- In case of skin contact, "Remove contaminated clothing" and "launder" before use.
- [84] Mr. Deepak further held that the MSDS for hydraulic oil, greases and other oils and antifreeze confirmed that these substances were hazardous substances.
- [85] With regard to the disposable coveralls provided to employees by CPR, Mr. Deepak pointed out that Mr. Woollard testified that they:
- tore easily;
 - were not waterproof;
 - slide up on legs and arms;
 - were not impermeable to some oils; and
 - were supplied for use during heavy repair work and not on all occasions.

- [86] Mr. Deepak concluded that the issue was whether CPR had the statutory obligation to provide change rooms, not whether CPR had taken mitigating measures. Furthermore, the employer had to make proper provision for the storage of contaminated clothing. He added that the employer had to ensure that no employee left the work place wearing clothing contaminated by a hazardous substance.
- [87] In her rebuttal argument, Ms. Fleming referred to the Federal Court of Appeal decision in the case of *Canada (Attorney General) v. Fletcher*⁹. She noted that the Court confirmed that the review by the Canada Industrial Relations Board of a HSO decision regarding the absence of danger was a review of record. Ms. Fleming reiterated that HSO Noel's decision was not supported by the evidence and the reasons for the decision were neither valid nor reasonable given the circumstances of the case.
- [88] Ms. Fleming further alleged that the respondents had not submitted any evidence linking the presence of contaminated working clothing in the room to the headaches or sleeping difficulties reported by employees.
- [89] In terms of statutory interpretation, Ms. Fleming argued that it was appropriate to give a technical definition of the term "contaminated". She maintained that having no regard to the quantity or the toxicity of the substance under consideration led to the absurd result of determining that any amount of substance amounted to contamination. She reiterated that a dictionary definition could not be used where the resulting definition led to such an absurdity.
- [90] The issue to be decided in this case is whether or not HSO Noel erred when he found that CPR was in contravention of paragraph 125(1)(i) of the *Canada Labour Code* and subsections 9.44(1)(b), (2) and (3) of the *Canada Occupational Health and Safety Regulations* and directed CPR to terminate the contraventions.
- [91] For deciding the matter, it is necessary to consider the pertinent legislation and the facts in the case. The pertinent legislation is paragraph 125(1)(i) of the Code and paragraphs 9.44(1)(b), (2) and (3) of the COSHR. They read:
- 125(1)(I) 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,
- ...
- (i) provide prescribed sanitary and personal facilities;
- 9.44(1) A change room shall be provided by the employer where
- (a) the nature of the work engaged in by an employee makes it necessary for that employee to change from street clothes to work clothes for health or safety reasons; or

⁹ *Canada (Attorney General) v. Fletcher*, 2002 FCA 424, [2003] 2 F.C. No. 475

- (b) an employee is regularly engaged in work in which his work clothing becomes wet or contaminated by a hazardous substance.
- (2) Where wet or contaminated work clothing referred to in paragraph (1)(b) is changed, it shall be stored in such a manner that it does not come in contact with clothing that is not wet or contaminated.
- (3) No employee shall leave the work place wearing clothing contaminated by a hazardous substance.

[92] With regard to the expression “regularly engaged in work” stipulated in paragraph 9.44(1)(b), Ms. Fleming referred to a previous interpretation made by HSO Chemiliuk¹⁰, where the HSO made the following analogy:

As an example, a person who works in a wash bay area where his job entails the use of water pressure washing equipment is likely to become wet on a regular basis. In your example the wet clothing referred to would be as a result of being caught in a rain or snow storm. As we know weather cannot be predicted and rain and snow storms are intermittent in nature. The employees you refer to may not be exposed to the threat of wet clothing for extended periods of times and not on a regular basis.

[93] In my opinion, however, this interpretation of paragraph 9.44(1)(b) is unduly restrictive. To suggest that this paragraph only applies to workers whose clothing becomes wet everyday, such as a car wash employee, goes contrary to the fact that the Code is remedial in nature and must be interpreted broadly, in a manner which is consistent with the purpose clause given in section 122.1 of the Code. The purpose clause 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.

[94] Moreover, it is my opinion that if Parliament had intended the interpretation suggested by HSO Chemiliuk, paragraph 9.44(1)(b) would not have read that the employee is “regularly engaged in work in which his work clothing becomes wet or contaminated” but instead, it would have stipulated that the employee “is engaged in work in which his work clothing regularly becomes wet or contaminated”. (my underline)

[95] Regardless, I believe that the most reasonable interpretation of paragraph 9.44(1)(b) is that the expression “regularly engaged” means work that is carried out on a regular basis, as opposed to work that is performed part of the time, to special work or to exceptional work.

[96] With regard to paragraph 9.44(1)(b) and the interpretation of the term “contaminated”, Mr. Wylie held that one must adopt a technical definition. He further maintained that that technical definition must be one that considers the concentration and toxicity of the hazardous substance to which an employee is exposed. In this regard, Ms. Fleming

¹⁰ In paragraph 68 of the present decision.

referred to an opinion given by HSO Doug Gould¹¹ that referenced a previous version of paragraph 9.44(1)(b), which specified that the contamination had to be to a degree sufficient to constitute a health or safety hazard to the employee or to another person.

- [97] However, I have concerns about Mr. Wylie's position. First, I find that the words "to a degree sufficient to constitute a health or safety hazard to the employee or another person" are qualitative and vague, as opposed to quantitative and precise. As Mr. Tirelli expressed to Mr. Wylie, how is an employee to determine whether the contamination on his clothing is significant enough to constitute a risk without having test instrumentation available to determine the substance level of concentration every time it occurs?
- [98] Moreover, since the previous wording for this requirement followed along the lines of what Mr. Wylie suggested was a technical definition, I conclude that Parliament must have intended to remove this discretionary aspect of the definition of the term "contaminated" and that its absence does not constitute an oversight by Parliament.
- [99] According to the 10th edition of the *Merriam Webster's Collegiate Dictionary*, the term "contaminated" is defined as follows:

Contaminate(d): 1a: to soil, stain, corrupt, or infect by contact or association;

1b: to make inferior or impure by admixture.

2: to make unfit for use by the introduction of unwholesome or undesirable elements.

Contaminate implies intrusion of or contact with dirt or foulness from an outside source.

[My underline.]

- [100] In my opinion, that part of the definition which reads to "make unfit for use" appears to be consistent with the aforementioned purpose clause of the Code. I conclude from this that paragraph 9.44(1)(b) of the COHSR applies where the contamination by a hazardous substance makes the work clothing unfit relatively to the health and safety of the employee or any other person.
- [101] However, to interpret and apply paragraphs 9.44(1)(b) and 9.44(2) of the COHSR, it is necessary to consider these provisions in light of subsection 10.4(1) of the COHSR.

¹¹ See paragraph 66 of the present decision.

[102] Subsection 10.4(1) of the COHSR requires the employer to appoint a qualified person to investigate situations where the health and safety of an employee could likely be endangered by exposure to a hazardous substance. Subsection 10.4(1) further states that the work place health and safety committee or representative is to be informed of the investigation so that they may participate in the investigation. Subsection 10.4(1) reads:

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.

[my underline.]

[103] The definition of a hazardous substance given by the Code reads:

122(1) In this Part,

"hazardous substance" includes a controlled product and a chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person exposed to it;

[104] Subsection 10.4(2) further specifies that the investigation carried out by a qualified person must take into consideration, among other things, the chemical properties of the hazardous substance(s), the routes of exposure to the hazardous substance and the concentration of the hazardous substance to which an employee is likely to be exposed. It reads:

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

(a) the chemical, biological and physical properties of the hazardous substance;

(b) the routes of exposure to the hazardous substance;

(c) the acute and chronic effects on health of exposure to the hazardous substance;

(d) the quantity of the hazardous substance to be handled;

(e) the manner in which the hazardous substance is stored, used, handled and disposed of;

(f) the control methods used to eliminate or reduce exposure of employees to the hazardous substance;

(g) the concentration or level of the hazardous substance to which an employee is likely to be exposed;

...

[105] Paragraph 10.5(a) then requires the qualified person to set out in writing the qualified person's observations respecting the criteria considered in subsection 10.4(2) and recommendations respecting the manner of compliance with sections 10.7 to 10.26. Section 10.5 reads:

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
 - i. the qualified person's observations respecting the criteria considered in accordance with subsection 10.4(2), and
 - ii. the qualified person's recommendations respecting the manner of compliance with sections 10.7 to 10.26, including recommendations respecting sampling and testing methods; and
- (b) the employer shall develop and maintain a written procedure for the control of the concentration or level of the hazardous substance in the work place.

[106] Once the hazard assessment referred to in subsection 10.4 is completed, the employer is then in an informed position to determine its obligations relatively to paragraph 9.44(1)(b) of the COHSR and there is no further need to give a technical definition of the term "contaminated".

[107] According to the evidence, the health and safety subcommittee reviewed the situation following Mr. Woollard's complaint to CPR. According to Mr. Kane, the committee concluded that the only product used by machine operators that met the hazard requirements of the *Controlled Products Regulations* under the *Hazardous Products Act* was diesel fuel. Similarly, Mr. Wylie's report to CPR stated that neither hydraulic oil nor ethylene glycol (antifreeze) was a WHMISable product.

[108] However, I can give little weight to either of these hazard assessments as paragraph 9.44(1)(b) refers to a "hazardous substance" and not to products that meet the requirements of the *Controlled Products Regulations* under the *Hazardous Products Act* or to something that is "WHMISable". Furthermore, I can give little weight to the quasi-hazard assessment conducted by Mr. Desautels for determining CPR's liability in respect of section 9.44(1)(b) as I did not find Mr. Desautels' finding conclusive or helpful.

[109] CPR did not present evidence at the hearing of any other hazard assessment related to the work of machine operators and their exposure to hazardous substances. I can only conclude from this that CPR had not carried a hazard assessment pursuant to subsection 10.4(1) that accords with the definition of "hazardous substance" found in section 122(1) of the Code. Therefore, I conclude from this that CPR was not in a position to demonstrate that work clothing worn by its machine operators was not made unfit by diesel fuel, lubricating grease, antifreeze or hydraulic oils. To the contrary, CPR's past

procedures of providing a separate room to store wet or contaminated work clothing tends to suggest that the employer regarded the wet or contaminated work clothing to be unfit to remain in the living quarters of employees.

[110] In the narrative part of his direction, HSO Noel alleged that CPR was in contravention of paragraph 125.(1)(i) of the Code and subsections 9.44(1), (2) and (3) of the COHSR because:

- CPR required its employees to return to those rooms directly from the workplace, while wearing the wet or contaminated clothing; and
- CPR had failed to provide employees with a change room and a *separate* storage area to store their wet or contaminated work clothing.

[111] From my examination of paragraph 9.44(1)(b), I note that this paragraph only requires the employer to provide a change room, as opposed to a separate change room. The term “change room” is defined as follows in Part I, Interpretation, of the COHSR:

1.2 In these Regulations,

...

"change room" means a room that is used by employees to change from their street clothes to their work clothes and from their work clothes to their street clothes, and includes a locker room; (*vestiaire*)

[112] Similarly, subsection 9.44(2) of the COHSR states that wet or contaminated clothing referred to in paragraph 9.44(1)(b) must be stored in a manner that prevents it from coming into contact with clothing that is not wet or contaminated. However, this subsection does not specify that a separate storage room must be provided as specified by HSO Noel in his direction.

[113] With regard to the question of whether or not the work clothing of the machine operators was contaminated by a hazardous substance such that paragraph 9.44(1)(b) applies, the facts are that HSO Noel relied on what he observed regarding stains on employee work clothes and what employees told him regarding the work. While he used the MSDS sheets for confirming that diesel fuel, lubricating grease, antifreeze and hydraulic oils met the definition of a hazardous substance, he did not conduct any tests, or require CPR to provide him with a copy of a proper hazard assessment completed in accordance with subsection 10.4(1) of the COHSR and the definition of a hazardous substance in section 122(1) of the Code. Therefore, HSO Noel was not in a position to independently establish that the quantities of product present on the employees work clothing were sufficient to render the clothing contaminated or unfit to wear.

[114] Notwithstanding this, I am satisfied that the evidence in the case confirms minimally the following facts regarding the work:

- employees were regularly engaged in work that brought their clothing into contact with hazardous substances, which included diesel fuel, lubricating grease, antifreeze and hydraulic oils;
- the disposable overalls provided to employees by CPR were inappropriate because they were not sufficiently tear resistant under all aspects of the work and they were not impermeable to the oils used by employees;
- CPR failed to conduct a proper hazard assessment in accordance with subsection 10.4(1) of the COHSR and the definition of a hazardous substance given in section 122(1) of the Code; and
- CPR's past practice was to provide a separate room for changing and storing work clothing that was wet or contaminated by a hazardous substance.

[115] In light of the above noted interpretation of subsections 9.44(1), (2) and (3) of the COHSR and of the facts, I must decide whether to confirm, vary or rescind item two of HSO Noel's direction.

[116] In this regard, Ms. Fleming referred in her summation to the finding of the Federal Court of Appeal decision in *Canada (Attorney General) v. Fletcher*¹² that confirmed that the review conducted pursuant to section 129(7) of the Code was a review of record. She held that because HSO Noel had not relied on solid evidence for deciding to issue a direction to CPR, I was required to rescind HSO Noel's

[117] I must dismiss this argument for at least two reasons. First, the Federal Court of Appeal decision cited by Ms. Fleming applied in respect of the Canada Industrial Relations Board and the Public Service Labour Relations Board. Until the Code was amended in September 2000, these two Boards were responsible to hear appeals made under subsection 129(7) of the Code against the decision of a HSO that a danger did not exist.

[118] With the Code amendments of September 2000, appeals made pursuant to subsection 129(7) of the Code are now heard by another administrative tribunal, the Appeals Officer.

[119] Second, the Federal Court of Appeal recently confirmed in *Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada*¹³ that the Appeals Officer review was a *de novo* review and that the Appeals Officer had the authority under subsection 145.1(2) of the Code to issue a direction pursuant to subsection 145(1) of the Code. Thus, an Appeals Officer can receive and consider evidence from parties. Subsection 145.1(2) reads:

145.1(2) For the purposes of sections 146 to 146.5, an appeals officer has all the powers, duties and immunity of a health and safety officer.

¹² *Supra.*

¹³ *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*, [2005] F.C.J. No. 752, 2005 FCA 156, Docket A-491-03.

- [120] Moreover, in *Vancouver Wharves Ltd. and the International Longshoremen's and Warehousemen's Union*¹⁴, RSO Serge Cadieux confirmed that an Appeals Officer was empowered under the Code to vary a direction broadly, if the variance was supported by the same facts of the matter. The Federal Court did not dismiss this position in an appeal of that same case.
- [121] Given the facts of the present case and based on CPR's past practice of providing its machine operators working at remote locations with a separate change and storage room, as well as the absence of the proper hazard assessment by CPR as required by section 10.4 of the COHSR and the definition of a hazardous substance in section 122(1) of the Code, I am confirming item 2 of the direction issued by HSO Noel to CPR on June 12, 2003 to comply with the requirements of paragraph 125.1(i) of the *Canada Labour Code*, Part II, and of subsections 9.44(1), (2) and (3) of the *Canada Occupational Safety and Health Regulations*.
- [122] Furthermore, I am also issuing a direction to CPR under subsection 145(1) of the *Canada Labour Code*, to direct the employer to immediately appoint a qualified person to carry out a hazard investigation, in consultation with the health and safety committee, in accordance with section 10.4 of Part X of the COHSR and the definition of a hazardous substance in section 122(1) of the Code
- [123] In addition, a copy of the final report made by the qualified person is to be provided to the health and safety committee and to HSO Noel. As well, CPR is to provide a copy of the present decision to the assigned qualified person, to ensure that the hazard assessment addresses the following observations, made by Mr. Wylie and Mr. Woollard during the hearing.
- [124] On the one hand, Mr. Wylie opined that it was difficult to imagine that clothing contaminated by the hazardous substances in question required specific or elaborate precautions such as the use of duplicate or separate changing and storage facilities. Duplicate change rooms are called for in some cases, but this degree of control is normally reserved for very toxic materials. In my opinion, this question should be addressed during the hazard assessment.
- [125] Mr. Wylie further alleged that, upon arrival at the hotel/motel, the workers can remove their work clothing and bathe/shower. Their work clothes can then be put aside and worn the next day or put aside for laundering in the future. If the clothing is not going to be worn again until it is laundered, it can be placed in a plastic bag or container that can seal air tight and prevent any emissions from the clothing. The sealed bag or container can then be stored in the employee's vehicle or room. In my opinion, this question should be addressed during the hazard assessment.

¹⁴ *Vancouver Wharves Ltd. and International Longshoremen's and Warehousemen's Union*, Regional Safety Officer Serge Cadieux, Decision 97-004, April 25, 1997.

- [126] Mr. Wylie also declared that, if the work clothing is going to be worn the next day, it may be kept in the hotel room. Wet or contaminated clothing can be separated from clean clothes by placing them in a separate drawer or in a garment bag, or by placing a plastic garment bag between the clean clothes and the wet or contaminated clothing. In my opinion, this question should be addressed during the hazard assessment.
- [127] Mr. Wylie emphasized that, if the clothing worn by the maintenance of way crews was contaminated to the extent that it constituted a health and safety hazard to the employees, it would be improper to store the contaminated clothing in a separate room so that it could be worn the next day before the clothing is laundered. I cannot disagree with Mr. Wylie's view in this regard. In my opinion, this question should be addressed during the hazard assessment.
- [128] Moreover, Mr. Wylie opined that, if the clothing worn by the surfacing crews was being contaminated to the extent that it was unfit to wear, CPR would have to:
- clean the operator cab at the beginning of every shift;
 - service mechanical equipment more frequently to prevent hydraulic oil lines from failing and spraying hydraulic oil around; and
 - require employees to change and remove contaminated clothing immediately.
- [my underline.]
- [129] Based on the facts of the case, I cannot disagree with Mr. Wylie's opinion and I take the further view that this is something that CPR needs to address in the hazard assessment conducted pursuant to section 10.4 of Part X of the COHSR. I also believe that the hazard assessment must address the evidence that the machine operators can be exposed to human waste and to animal carcasses.
- [130] On the other hand, Mr. Woollard testified that hotel/motels and laundromat owners do not permit employees to use their laundry machines to clean their contaminated work clothing. Therefore, it is unclear to me how CPR protects the health and safety of its employees by providing them with a laundry allowance. In my opinion, this question should be addressed during the hazard assessment.
- [131] Mr. Woollard also submitted evidence that the employees' work boots can be soaked with diesel fuel in the course of their work and can cause sickening fumes when they are placed near the heater in the hotel room to dry. However, examination of the MSDSs for diesel and oils shows that leather goods, which would include working boots and gloves, should not be re-worn after they have been contaminated. The selection and use of proper personal protective equipment appears to be another subject that the CPR hazard assessment made pursuant to section 10.4 of the COHSR needs to address.

- [132] Finally, HSO Noel directed CPR to comply with subsection 9.44(3) of Part IX of the COHSR, Sanitation, which prohibits employees from leaving the work place wearing clothing contaminated by a hazardous substance. Mr. Rubert testified that he instructed Mr. Tasch to ensure that surfacing employees were instructed to report to a nearby station facility, such as a work house, to change into clean clothing when their clothing had become contaminated. In addition, I understood from the testimonies that parties agreed that the motel/hotel facilities constituted an extension of the work place when crews were working in remote sites. Beyond this, I received little evidence relative to when and where wet or contaminated work clothing should be changed. I suggest that this question should also be addressed by the hazard assessment.
- [133] Finally, although my direction requires to have a qualified person conduct a hazard assessment immediately, I have decided not to impose a specific date for completion of that hazard assessment. Nonetheless, I am relying on HSO Noel, or another HSO as the case may be, to meet with CPR in order to determine a reasonable date by which that hazard assessment can be completed, as well as to decide when the prevention measure(s) identified in the hazard assessment can be implemented. Once CPR provides the HSO with its hazardous assessment and a written notice of the measures it will take, the HSO can reassess the situation to determine if CPR has achieved compliance.

Douglas Malanka
Appeals Officer

Appendix A

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On April 9 and 16, 2003, the undersigned health and safety officer conducted an inquiry in the work place operated by Canadian Pacific Railway company, being an employer subject to the *Canada Labour Code*, Part II, at Cambridge, Ontario the said work place being sometimes known as Galt Sub-division and Galt Station.

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

1. *Canada Labour Code*, Part II paragraph 125.1(1)(e) and Canada Occupational Health and Safety Regulation paragraph 10.28(b) and subsection 10.34(1).

The employer has failed to make material safety data sheets readily available to employees who operate and maintain maintenance of way track clearing equipment. Some of the hazardous substances and/or controlled products that these employees handle or are exposed to are diesel fuel, ethylene glycol antifreeze, and hydraulic oils.

2. *Canada Labour Code*, Part II paragraph 125(1)(i) and Canada Occupational Health and Safety Regulations sub-sections 9.44(1) and (3).

Employees who work on and maintain maintenance of way track clearing equipment are regularly required to work outside in inclement weather where clothing becomes wet. During the operation and maintenance of equipment clothing is frequently contaminated by hazardous products such as diesel fuel, lubricating grease, antifreeze and hydraulic oils. The employer provides hotel rooms housing two employees per room for periods of several days. Employees are required to return to those rooms directly from the workplace, while wearing the wet or contaminated clothing. The employer has failed to provide a change room and separate storage area to ensure protection of employees exposed to wet or contaminated work clothing.

Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention(s) no later than June 27, 2003.

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

Issued at Woodstock, Ontario, this 12th day of June, 2003.

ROD NOEL
Health and Safety Officer
Id No ON3272

Phone Number (905) 570-7209
Fax Number (905) 572-2077

To: Henry Rubert, Regional Mgr.
CP Rail, Track Operations
2025 McCowan Road
Agincourt, Ontario
M1S 5K3

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

**DIRECTION TO THE EMPLOYER UNDER
PARAGRAPH 145(1)(B) AND SUBSECTION 145(5)**

On January 19 and 20, 2005, Appeals Officer Douglas Malanka conducted a hearing and examined submitted written documents concerning an appeal made by Canadian Pacific Railway in respect of a direction issued by health and safety officer Rod Noel on June 12, 2003, following his investigation of a complaint in the work place operated by Canadian Pacific Railway, being an employer subject to the *Canada Labour Code*, Part II, at Cambridge, Ontario, the said work place being sometimes known as Galt Sub-division and Galt station.

The undersigned Appeals Officer is of the opinion that the following provision is being contravened:

Paragraph 125.1(i) of the *Canada Labour Code*, Part II, and section 10.4 of the *Canada Occupational Health and Safety Regulations*,:

The employer has failed to appoint a qualified person to carry out the hazard investigation required by section 10.4 of the *Canada Occupational Health and Safety Regulations* to determine his obligation in respect of paragraph 9.44(1)(b) and subsections 9.44(2) and (3) of the same Regulations in respect of the hazardous substances used and handled by track maintenance machine operators, which include diesel fuel, ethylene glycol antifreeze, hydraulic oils, and greases, and in respect of feces and animal carcasses that may be found on the track bed.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II,, to immediately take steps to ensure that the contravention does not continue or reoccur.

You are also HEREBY DIRECTED, pursuant to subsection 145(5) of the *Canada Labour Code*, Part II,, to post, without delay, a copy of this direction in a conspicuous place in the work place and to give a copy to the work place health and safety committee.

Issued at Ottawa, this 30th day of November, 2005.

Douglas Malanka
Appeals Officer
Id No. 03237

To: CPR
Galt Sub-division
Cambridge, Ontario

Summary of Appeals Officer's Decision

Decision No.: 05-048

Applicant: Canadian Pacific Railway

Respondent: Mr. Woollard

Key words: hazardous substances, wet and contaminated clothing, change room, storage room, hazard assessment

Provisions: CLC: 122.(1), 122.1, 125.1, 145(1) and 146.1, COHSRs: 9.44, 10.4

Summary:

Following his investigation of a complaint, a health and safety officer decided that the employer had failed to provide employees working outdoors in remote locations and exposed to hazardous substances, including to diesel fuel, antifreeze, hydraulic oil and greases, with a separate change room to change from their wet or contaminated work clothing and a separate room in which to store the clothing.

The appeals officer confirmed the direction given by the health and safety officer and further directed the employer under subsection 145(1) of the *Canada Labour Code*, Part II, to conduct a hazardous assessment of employee exposure to the hazardous substances, and under subsection 145(5), to post a copy of his direction.