

Canada Labour Code
Part II
Occupational Health and Safety

Maritime Harbours Society
applicant

Decision No.: 05-054
December 20, 2005

This case was decided by Richard Lafrance, Appeals Officer.

For the applicant

C. William Watkins, Chairman of Maritime Harbours Society

Health and Safety Officer

Ronald P. Thibault
Human Resources and Skills Development Canada
Labour Program, Halifax, Nova Scotia

- [1] This case concerns an appeal made on June 3, 2005, under subsection 146(1) of the *Canada Labour Code*, Part II (the *Code*), by C. William Watkins, the chairman of Maritime Harbours Society (MHS), against two directions issued by health and safety officer (HSO) Ronald P. Thibault referring to the Digby Fishermen's Wharf operated by MHS and located in Digby, Nova Scotia.
- [2] C. W. Watkins argued that Human Resources and Skill Development Canada (HRSDC) Labour Program has no authority to enforce the Code over MSH and over the installation of the Digby Fishermen's Wharf because he held that both are under provincial jurisdiction and the two directions issued by HSO Thibault are *ultra vires*.
- [3] I retain the following from the documents provided by HSO Thibault.
- [4] Following a complaint made by fishermen from Digby regarding safety concerns at the Digby Fishermen's Wharf, a jurisdictional assessment was conducted on April 2005, by HRSDC Labour Program in order to determine the jurisdiction of this wharf.
- [5] This assessment revealed that the Digby Fishermen's Wharf was sold by Transport Canada to a local interest group, MHS, effective October 21, 1999, in accordance with the federal government's *National Marine Policy* and the *Canada Marine Act*. The only activity of MHS is the ownership and management of the Digby Fishermen's Wharf. The current customers of MHS are local fishermen who use the installation of the Digby Fishermen's Wharf for the purpose of tying up their vessels and loading/unloading their catch which is further picked up by local trucks in order to deliver it to fish plants. They pay MHS a fee to tie up at the wharf. There has been no traffic other than fishing vessels to the wharf since 1999 when MHS took ownership except for tall ships in the summer of 2004.

- [6] The information collected during the assessment also revealed that MHS has an individual on contract to act as a wharfinger. His name is Richard Thomas. MHS has also one office employee who does all the clerical work regarding invoicing, billing and answering phones, etc., and has never set foot on the wharf for work related activities. If anything major comes up, i.e. environmental issues or boats sinking at the wharf, she will pass these things along to C. W. Watkins. All other work related to repairs is contracted out.
- [7] The assessment finally revealed that the wharfinger of the Digby Fishermen's Wharf, R. Thomas, has two contracts with MHS: one to collect data on the fishing boats using the Digby Fishermen's Wharf and the other one to remove garbage from the wharf. The intent of either MHS or R. Thomas was that these arrangements were only contracts for service. R. Thomas owns his own disposal site and a company named Digby Salvage and Disposal Company Limited. R. Thomas does not have contracts exclusively with MHS. For example, he has other contracts with the town of Digby to collect garbage. When they are collecting garbage for the town, they just add the wharf to the route. In order to record which fishing boats use the wharf, MHS gave R. Thomas a form on which there is a list of the names of fishing boats that use the wharf. All he has to do is tick off beside the name of the boats if they were there that day. To do this, R. Thomas goes for about an hour once a day. He can pick whatever time he wants. No one supervises him or gives him directions or monitors his work. He has the ability to have himself replaced if for some reason he can not be there. There are no tools to do the counting of the boats, and he uses his own truck as the wharf is about 1900 feet long and too far to walk. At the end of the week, R. Thomas provides this information to MHS. He has liability insurance just in case he damages the wharf with his truck when doing the count. R. Thomas could not be fired but he could be sued for not fulfilling his contract or if he damaged the wharf. In turn, he could sue MHS for breach of contract if they terminated his contract prematurely. R. Thomas had a contract with the Coast Guard for 15 years doing the same thing. When Transport Canada transferred the ownership of the wharf over to MHS, he negotiated a contract with MHS for the same service. He invoices them on a monthly basis and charges H.S.T. (Harmonized Sales Taxes). He does not receive any employee benefits. As a contractor, R. Thomas has a H.S.T. number from Canada Customs and Revenue Agency.
- [8] To determine the jurisdiction of the Digby Fishermen's Wharf, HRSDC Labour Program relied on the following case law:
- **Hamilton Harbour Commissioners v. City of Hamilton** et al. (21 O.R (2d) 459);
 - **Montreal v. Montreal Harbour Commissioners**, (1926) 1 D.L.R. 849 at p. 848.
- [9] The department also relied on the following statement from Professor Peter Hogg, a leading constitutional law scholar in Canada:

The federal power over navigation and shipping in s 91 (10) confers federal legislative competence over navigable water, works of navigation, harbours, (...). Federal power over navigation and shipping is not confined to installations engaged in interprovincial or international shipping: it applies to vessels engaged in local shipping, and to pleasure boats as well as commercial vessels.¹

¹ found in Constitutional Law of Canada

- [10] Based on this and taking into account the activities of the Digby Fishermen's Wharf, HRSDC Labour Program concluded that the Parliament of Canada has not renounced its jurisdiction over a wharf even though the Department of Fisheries and Oceans or Transport Canada leased out or divested its authority over this wharf. It was also concluded that while the persona of the party exercising authority over a harbour may have changed, the actual nature of the operation, that of a fishing and recreational harbour, has remained unchanged.
- [11] Consequently, HRSDC Labour Program advised HSO Thibault that it was concluded that the Digby Fishermen's Wharf is an essential component to navigation and shipping which falls under federal authority as per the *Constitution Act* under subsection 91(10), and that MHS which owns and operates this wharf is a federal undertaking or business.
- [12] To determine whether or not the Code applies to MHS and its wharf, HRSDC Labour Program stated that it was necessary to establish an employer/employee relationship between R. Thomas and MHS.
- [13] In this regard, HRSDC Labour Program considered the fourfold test.
- [14] The fourfold test consists of four elements which are:
- the degree or absence of control, exercised by the alleged employer;
 - ownership of tools;
 - chance of profit and risk of loss;
 - integration of the alleged employee's work into the alleged employer's business.
- [15] HRSDC Labour Program stated that case law interpreted these four elements as follows:
- the degree or absence of control is the most important element of the fourfold test. If the employer has the right to hire and fire, to decide on the time, place and manner in which the work is to be performed, the notion of control of the worker's activities exists;
 - ownership of tools is determined by looking at the actual nature of the tasks being executed and the required tools to do these tasks. The nature of the relationship would be less affected by the application of the ownership of tools test;
 - chance of profit and risk of loss is not established if the employee does not assume any financial risk and is entitled to his full salary regardless of the financial health of the business. The remuneration must be clearly and firmly established and not be subject to variance according to various factors such as time required to execute or others;
 - integration of the alleged employee's work into the alleged employer's business occurs where the worker integrates the payer's activities into his own commercial activities. If it is the worker who integrates his own activities to the commercial activities of the payer so that the worker acts on behalf of the payer/employer, the notion of integration exists.

- [16] HRSDC Labour Program also noted that case law recognized that it is not essential that all four elements find complete application to conclude that an employment relationship exists.
- [17] Based on a preliminary assessment of the employer/employee relationship between R. Thomas and MHS using the fourfold test, the initial position of HRSDC Labour Program was that R. Thomas was not an employee of MHS.
- [18] Based on a second detailed assessment of the facts and a review of the two contracts entered into by MHS with R. Thomas, HRSDC Labour Program finally determined that R. Thomas is an employee of MHS.
- [19] The second analysis resulted in the following findings.
- [20] First, it was noted that both contracts were established with R. Thomas personally and not with the Digby Salvage and Disposal Company Limited which he also operates.
- [21] One contract reads as follows:

SERVICES CONTRACT

Between:
MARITIME HARBOURS SOCIETY (MHS)

and
R.H. THOMAS, CONTRACTOR

To act as Harbour Manager of the Digby Fishermen's Wharf on a part-time basis. The services include checking the wharf on a daily basis when Maritime Harbours Society representatives are not in Digby or are not available. The contractor will perform the duties as a representative of Maritime Harbours Society and will act on their behalf. During inclement weather, it will be necessary to visit the wharf several times a day to assess any damage or potential dangers as they occur. The contractor will remain in contact with Maritime Harbours Society to report any unusual activity at the wharf and to ensure that Maritime Harbours Society is well informed about activities at the wharf during their absences.

The contractor may be required to record the vessels that are at the wharf for billing and administrative purposes. All work must be completed to the satisfaction of Maritimes Harbours Society.

This contract is for the period of Jan. 21, 2005 to Jan. 21, 2006. The total price shall not exceed \$3, 000.00, or \$250.00 per month.

The above costs are exclusive of H.S.T. Total expenditure is not to be exceeded without written permission from the Maritime Harbours Society.

[22] The other contract reads as follows:

SERVICES CONTRACT

Between:
MARITIME HARBOURS SOCIETY (MHS)

and
R.H. THOMAS, CONTRACTOR

To provide labour, equipment and materials to clean the Digby Fishermen's Wharf and to remove garbage from the site and dispose of it at the town dump in accordance with all town ordinances and Federal and Provincial Landfill Regulations.

Cleaning and garbage removal is to be completed on a daily basis. Items of waste banned from landfills such as corrugated cartons, tires, batteries, used oil and fuel filters, etc., must be disposed of through Enviro Centres. All work must be completed to the satisfaction of Maritime Harbours Society.

Must carry appropriate levels of commercial and general liability insurance to the amount of 2 million dollars.

This contract is for the period of Nov. 01, 2004 to Oct. 31, 2005. The total price shall not exceed \$4, 800.00, or \$400.00 per month.

The above costs are exclusive of H.S.T. Total expenditure is not to be exceeded without written permission from the Maritime Harbours Society.

[23] With regard to the first contract, it was found that it outlines several duties required by R. Thomas in the absence of the MHS representatives.

[24] It was also pointed out that both contracts not only specify where and when the tasks are to be performed and where the garbage is to be disposed of, but they also specify that all tasks must be done to the satisfaction of MHS. In addition, one contract even differentiates how to dispose of different types of garbage. Based on this, the interpretation of both contracts was that they not only specify how the work is to be completed but also indicate the ability of the employer to terminate or fire if the work is not satisfactory.

[25] According to both contracts, it was clear that R. Thomas' duties must be conducted at the wharf for recording the vessels using the wharf and any damage or activities that occur there. Both contracts also stipulate when these duties are to occur i.e. daily, weekly and during bad weather depending on the task. It was also clear that R. Thomas carries out these duties on behalf of MHS and to its satisfaction, implying the ability to fire. Based on this, it was established that MHS exercises, or at least intends to exercise through the wording of the contracts, a high degree of control.

- [26] Regarding the ownership of tools, it was noted that R. Thomas must supply the equipment and materials for his garbage collection activity. However, for the recording of vessels using the wharf, a form is supplied by MHS on which the names of the boats using the wharf are listed. R. Thomas has to tick off beside the name of the boats using the wharf and provide this information to MHS on a weekly basis.
- [27] Regarding the chance of profit/risk of loss, it was concluded that the two contracts point strongly to an employer/employee relationship providing for a specific length of time, a specific yearly total amount as well as a monthly maximum payable amount where these expenditures would require preauthorization from MHS. Therefore, R. Thomas knows from month to month, regardless of MHS' financial situation, the amount he is to receive and the contracts do not provide for any situations or conditions that would bring about modification of these payments. Thus, under both contracts, it was established that no loss or reduction can occur due to certain conditions and no additional gain or profit can result from circumstances for R. Thomas.
- [28] Finally, regarding the integration test, it was considered that under both contracts, there was little doubt that it is the activities of R. Thomas that are integrated into MHS' activities. For fifteen years prior R. Thomas was in a similar contractual agreement with Transport Canada and following the divestiture to MHS, he simply changed contractual partner. Secondly, the contract states that "R. Thomas will act as Harbour Manager of the Digby Fishermen's Wharf on a part-time basis checking the wharf on a daily basis when MHS representatives are not in Digby or are not available" and that he "will perform the duties as a representative of Maritime Harbours Society and will act on their behalf". Finally, the reporting duties are "to ensure that Maritime Harbours Society is well informed about activities at the Wharf during their absences".
- [29] Considering the situational conjuncture of the two contracts, taken together or separately, it was finally the position of HRSDC Labour Program that an employment relationship exists in the case therefore declaring MHS an employer under the Code and the Code applying to the Digby Fishermen's Wharf.
- [30] Based on the conclusion that an employment relationship exists, on May 26, 2005, HSO Thibault conducted an inspection of the wharf.
- [31] Following his inspection, HSO Thibault issued two directions on May 30, 2005, to MHS, one made pursuant to subsection 145(1) of the Code and the other one made pursuant to subsection 141(1) of the Code.
- [32] The direction made pursuant to subsection 145(1) stated that HSO Thibault was of the opinion that the following provisions of the Code had been contravened:
1. Subparagraph 125.(1)(m)(iii) of the *Canada Labour Code* Part II and subsection 8.3(2) of the *Canada Occupational Health & Safety Regulations*.
Canadian Electrical Code 2002, Section 2-300 General Requirements.

Numerous electrical conduits were broken. A number of electrical junction box covers were missing. A number of electrical conduits located under Pier "A" were unsupported.

2. Subparagraph 125.(1)(m)(iii) of the *Canada Labour Code* Part II and subsection 8.3(1) of the *Canada Occupational Health & Safety Regulations*. *Canadian Electrical Code* 2002, Section 78-052(2)(3).

A non-weatherproof electrical junction box was being used. This junction box was badly rusted, opened and exposing electrical wires.

3. Subparagraph 125.(1)(m)(iii) of the *Canada Labour Code* Part II and subsection 8.3(2) of the *Canada Occupational Health & Safety Regulations*. *Canadian Electrical Code* 2002, Section 4-010(3).

An electrical extension cord was running across Pier "B" and shall be removed. Flexible cords shall not be used as a substitute for fixed wiring. This electrical extension cord was subject to vehicle traffic.

4. Subparagraph 125.(1)(q) of the *Canada Labour Code* Part II and subsection 14.43(1) of the *Canada Occupational Health & Safety Regulations*.

Derricks located at Pier A and Pier B: the safe working loads were not identified and have not been inspected by a qualified person in order to determine the safe working load.

5. Paragraph 124 of the *Canada Labour Code* Part II.

It was observed that the derricks were damaged and in need of repair.

6. Paragraph 124 of the *Canada Labour Code* Part II.

Pier "A","B" and "C" – a number of ladders were damaged. It was observed that a number of ladders had missing rungs or were not properly secured.

7. Paragraph 125.(p) of the *Canada Labour Code* Part II and paragraph 12.11(2)(a) of the *Canada Occupational Health & Safety Regulations*.

Pier "B" was missing a ladder.

8. Paragraph 125.(1)(o) of the *Canada Labour Code* Part II and paragraph 12.11(2)(a) of the *Canada Occupational Health & Safety Regulations*.

Pier "B" a life ring was missing from its station.

9. Paragraph 124 of the *Canada Labour Code* Part II.

Fire hydrants have not been inspected on an annual basis.

10. Paragraph 124 of the *Canada Labour Code* Part II.

Waste Oil Facility – oil has been leaking onto the ground. This has also created a slipping hazard.

11. Paragraph 124 of the *Canada Labour Code* Part II.

An inspection of the wharf and piers indicated that moderate, major and severe defects of the pilings, bracings and fasteners were evident at the Digby Fishermen's Wharf.

[33] HSO Thibault directed MHS pursuant to paragraphs 145(1)(a) and (b) of the Code to terminate the above contraventions no later than June 17, 2005, and to take steps to ensure that they do not continue or reoccur.

[34] In his direction made pursuant to subsection 141(1) of the Code, HSO Thibault directed MHS to have an assessment completed of the structural integrity of the Digby Fishermen's Wharf by a qualified engineer and that a copy of this report had to be presented no later than June 30, 2005. This direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 141(1)(a)

On May 26, 2005, the undersigned health and safety officer conducted an inspection regarding Digby Fisherman's Wharf, in the work place operated by Maritime Harbours Society, being an employer subject to the *Canada Labour Code*, Part II, at 68 Water Street, Digby, Nova Scotia, the said work place being sometimes known as Digby Fishermen's Wharf.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141(1)(a) of the *Canada Labour Code*, Part II, to have an assessment completed of the structural integrity of the Digby Fisherman's Wharf by a qualified engineer. A copy of this report shall be presented to the undersigned health and safety officer no later than June 30, 2005.

Issued at Dartmouth, this 30th day of May, 2005.

[35] I retain the following from the documents produced by C. W. Watkins.

[36] In reference to the statement of subsection 91(10) of the *Constitution Act* of 1867, C. W. Watkins agreed that navigation and shipping is under the authority of the Parliament of Canada.

- [37] However, C. W. Watkins held that MHS' operations are not essential or integral to navigation and shipping and therefore are not under the powers of the Parliament of Canada for the following reasons:
- by the introduction of the *Canada Marine Act* in 1998, Her Majesty in the Right of Canada determined that certain ports and harbours in Canada were not considered to be important in the administration of an overall transportation system in Canada and therefore waived the rights to navigation and shipping over divested harbours and ports, while enhancing those same rights in other ports and harbours such Port Authorities;
 - the Digby Fishermen's Wharf is not essential to navigation because there has been no navigation light on MHS property since February 1998 when the Canadian Coast Guard removed the navigational light.
- [38] In addition, the evidence provided by C. W. Watkins confirmed the following facts:
- since the transfer between Transport Canada and MHS, Transport Canada no longer had administrative control over the Digby Fishermen's Wharf;
 - the agreement entitled *Port Transfer Documents* signed between Transport Canada and MHS for the transfer of the wharf ended on October 22, 2001, and since that time, MHS is no longer required to operate the port in accordance with the rules of this agreement;
 - Fisheries and Oceans Canada has no jurisdiction under the *Fishing and Recreational Harbours Act* over the Digby Fishermen's Wharf;
 - no cargo ships have permission from MHS to berth, load or unload any goods since October, 1999;
 - the Digby Fishermen's Wharf is not a harbour authority but a local private property owned by a local private and provincially incorporated company.
- [39] Supported by the above facts, C. W. Watkins stated that MHS and its divested wharf are no longer under federal jurisdiction since the transfer of the wharf.
- [40] C. W. Watkins also argued that because HRSDC Labour Program did not provide the entire cases cited and that case law can lead to completely opposite determination, they should be rejected. He added that no weight should be given to Professor P. Hogg's statement because it is his opinion and not law having relative weight in determining the jurisdiction in this matter.
- [41] C. W. Watkins also argued that the Digby Fishermen's Wharf should be recognized under provincial jurisdiction just as the Yarmouth Sea Products Wharf. The document provided by C. W. Watkins concerning the said wharf stated that this wharf is a private wharf owned by Yarmouth Sea Products Limited and has been recognized under provincial jurisdiction by the provincial Labour Department when they investigated an accident that occurred at the wharf on November, 2005. According to the internet site provided by C. W. Watkins, the activities of Yarmouth Sea Products Limited seems to be fishing as well as fish preparation and the sale of fish products.

- [42] In addition, C. W. Watkins stated that no harbour dues were collected by Transport Canada since the transfer of the wharf to MHS. In C. W. Watkins' opinion, this fact confirmed that shipping did not take place at the Digby Fishermen's Wharf and that the only way that any shipping could occur at this wharf would be by MHS' express permission. C. W. Watkins added that MHS has not provided such permission since the transfer of the wharf in October of 1999 nor do they contemplate providing this permission in the future.
- [43] C. W. Watkins also pointed out that navigation and shipping referred to in subsection 91(10) of the *Constitution Act, 1867*, was not defined in this Act. He added that the general rule of interpretation where a term is not defined is that the ordinary dictionary meaning applies.
- [44] C. W. Watkins stated that the definition of navigation in the Merriam-Webster Online Dictionary is as follows:
- The science of getting ships, aircraft, or spacecraft from place to place; especially: the method of determining position, course and distance traveled.
- [45] Based on this definition, because there is no longer a navigation light on MHS property, C. W. Watkins held that the Digby Fishermen's Wharf was no longer essential or integral to navigation.
- [46] C. W. Watkins also stated that the definition of shipping in the Merriam-Webster Online Dictionary is as follows:
- To place or receive on board a ship for transportation by water.
- [47] Based on this definition, C. W. Watkins held that there had been no shipping at the Digby Fishermen's Wharf since the transfer of the facilities to MHS by Transport Canada in October 1999 and consequently, the Digby Fishermen's Wharf is no longer essential or integral to shipping.
- [48] Regarding the relationship between R. Thomas and MHS, C. W. Watkins argued that because HRSDC Labour Program did not provide case law supporting the interpretation of the fourfold test, their second assessment concluding that R. Thomas is an employee of MHS should be rejected.
- [49] C. W. Watkins finally held that R. Thomas and MHS have a pure business relationship for the following reasons:
- MHS could refuse to pay for the services rendered by R. Thomas under the two contracts which would end up in a legal action against MHS and the reverse is also applicable;
 - MHS could not exercise any control over R. Thomas because he has other contracts and commitments, and as such, R. Thomas determines when he can provide the services required under the contracts;

- the control factor is well within the hands of R. Thomas and not within the hands of MHS because a service contract exists with R. Thomas for the provision of service to MHS and R. Thomas uses his own company to provide the necessary services at a time he chooses;
- the Canada Customs and Revenue Agency considers R. Thomas to be a contractor;
- the salary/wage level for R. Thomas was negotiated and accepted by him as a contractor and if an employer/employee relationship existed between R. Thomas and MHS, there would be no negotiation to occur regarding salary or wages;
- in addition, MHS does not pay R. Thomas a salary or wage nor does MHS deduct any amounts paid to him for his services in relation to CPP (Canada Pension Plan) or EI (Employment Insurance);
- R. Thomas also invoices the GST/HST to MHS for which MHS must pay to R. Thomas for his necessary remission to the Canada Customs and Revenue Agency and if R. Thomas was an employee of MHS, the payment of HST/GST would not be paid by MHS;
- it was never the intent of MHS or R. Thomas that their arrangement be anything but a contract for services.

[50] The first issue to be addressed in this case is whether or not HRSDC Labour Program erred when they decided that MHS and the Digby Fishermen's Wharf fall under federal jurisdiction.

[51] If I find that they fall under federal jurisdiction, I must then decide whether or not MHS is an employer under the Code in order to determine whether or not the Code is enforceable at the Digby Fishermen's Wharf.

[52] For deciding these issues, I must consider the relevant legislation, the facts in the case and the jurisprudence cited.

[53] Subsection 91(10) of the *Constitution Act* of 1867 establishes the powers of the Parliament of Canada related to navigation and shipping as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good of the Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(...)

10. Navigation and Shipping.

- [54] Even though the *Constitution Act* of 1867 sets out the principles regarding the divisions of federal and provincial legislation jurisdiction, it does not provide any mechanism for determining jurisdiction. To decide whether or not MHS' operations and the Digby Fishermen's Wharf constitute a federal work, undertaking or business forming an integral part of navigation and shipping, I must look at the nature of their activities and the jurisprudence cited in the case.
- [55] To support his position that the Digby Fishermen's Wharf falls under provincial jurisdiction, C. W. Watkins compared this wharf to the Yarmouth Sea Products Wharf which is owned by a private company, Yarmouth Sea Products Limited, and located in the Yarmouth Harbour.
- [56] The concern that I have with this comparison is that the situation was not comparable. Even though MHS is provincially incorporated and its wharf is no longer linked to any federal department, has no navigation light and is mainly used by local fishermen, the evidence was that the Digby Fishermen's Wharf is open to any vessel that needs to use these facilities subject to paying MHS mooring fees. For example, tall ships used the wharf in the summer of 2004. Therefore, this wharf is an essential component to navigation. In addition, the Digby Fishermen's Wharf is associated with shipping because it is used for the local shipping of the fishermen's catch. The evidence was also that the only activity of MHS is to own and operate the Digby Fishermen's Wharf while the activities of Yarmouth Sea Products Limited are associated with fishing, fish preparation and the sale of fish products, which fall well within the provincial jurisdiction and are not associated with navigation.
- [57] C. W. Watkins also expressed the view that the *Canada Marine Act* of 1998 waived the rights to navigation and shipping over divested harbours and ports, and consequently, subsection 91(10) of the *Constitution Act* of 1867 does not apply anymore to these harbours and ports. I am of the opinion that this view is contrary to the statement of the Ontario Court of Appeal found in the Hamilton Harbour Commissioners *supra* decision in which the Ontario Court of Appeal stated that subsection 91(10) gives the Parliament of Canada exclusive jurisdiction over navigation and shipping.
- [58] To further support his position, C. W. Watkins argued that the jurisprudence cited must be rejected because it was irrelevant to the case at hand. C. W. Watkins also argued that no weight should be given to Professor P. Hogg's statement because it is his opinion and has no weight in law for determining the jurisdiction in this matter.
- [59] I examined the jurisprudence cited and Professor Hogg's statement.
- [60] In the Hamilton Harbour Commissioners *supra* decision, the Ontario Court of Appeal stated that harbours are an integral part of the federal jurisdiction over maritime navigation. Subsection 91(10) in this case reads as follows:

Section 91(10) gives Parliament exclusive jurisdiction over "Navigation and Shipping"... "By analogy, harbours are as essential to the effective jurisdiction over maritime navigation as are airports to effective jurisdiction over aerial navigation. Legislative control over airports has been considered by the Courts to be an integral and vital part of the federal jurisdiction over aeronautics.

[My underline]

[61] Professor P. Hogg who is a leading constitutional law scholar in Canada and has been frequently cited by the Supreme Court of Canada, stated that federal jurisdiction over navigation and shipping is not confined to harbours engaged in interprovincial or international shipping and it applies to vessels engaged in local shipping and to pleasure boats. Professor P. Hogg's statement reads as follows:

The federal power over navigation and shipping in s 91 (10) confers federal legislative competence over navigable water, works of navigation, harbours, (...). Federal power over navigation and shipping is not confined to installations engaged in interprovincial or international shipping: it applies to vessels engaged in local shipping, and to pleasure boats as well as commercial vessels.

[My underline]

[62] I concur with these positions and therefore, I am dismissing C. W. Watkins' application that MHS and its wharf are under provincial jurisdiction and confirm that MHS and the Digby Fishermen's Wharf fall under federal jurisdiction.

[63] The second issue in this case was whether or not MHS is an employer under the Code in order to determine the capability of applying and enforcing the Code at the Digby Fishermen's Wharf.

[64] The purpose clause of the Code, section 122.1, reads as follows:

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]

[65] The application of the Code found at paragraph 123(1)(a) reads as follows:

123. (1) Notwithstanding, any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment

(a) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in the Yukon Territory, the Northwest Territories or Nunavut;

(...)

[My underline]

[66] Section 2 of the Code also defines a federal work, undertaking or business as follows:

2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including without restricting the generality of the foregoing:

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping,(...)

[My underline]

[67] Subsection 122(1) of the Code interprets a work place as follows:

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

[68] Based on the above clauses, I conclude that in order for the Code to be enforceable at a federal undertaking or business, this undertaking or business must have at least one employee, thus establishing an employment relationship.

[69] To analyze whether or not an employer/employee relationship exists between R. Thomas and MHS, HRSDC Labour Program relied on the fourfold test.

[70] C. W. Watkins argued that HRSDC Labour Program’s second assessment should be dismissed because no jurisprudence has been cited on which HRSDC Labour Program relied. Nevertheless, C. W. Watkins had the opportunity in my review to provide citations that disagreed with the interpretation of the fourfold test provided by HRSDC Labour Program and used in their assessment.

[71] For deciding whether or not an employment relationship exists, I conducted my own assessment of the facts versus the fourfold test and made the following findings.

[72] In regard to the degree or absence of control, I conclude that the notion of control exists between R. Thomas and MHS for the following reasons.

[73] Even though no one supervises R. Thomas or gives him direction or monitors his work, MHS determined the way his duties were to be done i.e. to dispose of garbage at the town in accordance with all town ordinances and Federal and Provincial Landfill Regulations and “items of waste banned from landfills such as corrugated cartons, tires, batteries, used oil and fuel filters, etc., must be disposed of through Enviro Centres”.

[74] The evidence was also that, even though R. Thomas can choose at what time he can perform the work required under both contracts, MHS specified where and when R. Thomas’ work is to be completed i.e. at the wharf and “on a daily basis (...) during inclement weather, it will be necessary to visit the wharf several times a day”.

- [75] Finally, the evidence was that MHS decided that R. Thomas carries out his duties at the wharf on behalf of MHS and to its satisfaction. Based on this, I was convinced that MHS has the ability to evaluate the tasks and, even though this situation could result in a legal action, to fire R. Thomas if the tasks are not performed as requested by MHS.
- [76] With regard to ownership of tools, the evidence was that only a form is supplied by MHS to record the vessels and that R. Thomas must supply the equipment and materials for his garbage collection activity.
- [77] Therefore, because R. Thomas has to supply the main tools to complete his tasks, I conclude that the second element of the fourfold test does not apply.
- [78] Regarding the chance of profit and risk of loss, the evidence was that, even though there had been negotiation between R. Thomas and MHS regarding his remuneration, this remuneration was clearly established and R. Thomas knows from month to month the amount he is to receive. Besides, both contracts do not provide for any situations or conditions that would vary this remuneration. Under both contracts, it is also not written that loss or reduction can occur to R. Thomas' salary/wage due to certain conditions and nor do they state that additional gain or profit can result from such circumstances. Therefore, even though R. Thomas is considered a contractor by Canada Customs and Revenue Agency and has liability insurance coverage in case he causes damage to the wharf with his truck, I conclude that he does not have any chance of profit and does not assume any financial risk for the work he is doing at the wharf.
- [79] With regard to the integration test, I noted the following duties written in the two contracts:
- To act as Harbour Manager of the Digby Fishermen's Wharf on a part-time basis.
- (...) checking the wharf on a daily basis when Maritime Harbours Society representatives are not in Digby or are not available.
- (...) contractor (R. Thomas) will perform the duties as a representative of Maritime Harbours Society and will act on their behalf.
- (...) to ensure that Maritime Harbours Society is well informed about activities at the wharf during absences.
- [80] The evidence was also that, even though R. Thomas owns a company, both contracts signed with MHS are with R. Thomas personally and not with his company.
- [81] Based on the two above evidences, I conclude that R. Thomas' activities performed at the Digby Fishermen's Wharf are integral to the commercial activities of MHS and are connected with the payer/employer's business and not with his own company.
- [82] Consequently, I conclude that an employment relationship exists and that MHS is an employer under the Code.

- [83] I finally point out that the evidence was that there is another person working as an office employee for MHS and there is no evidence that this person is not an employee of MHS. This further supports that MHS is an employer under the Code.
- [84] Based on this, I confirm HSO Thibault's direction made pursuant to subsection 145(1) of the Code but vary HSO Thibault's direction made pursuant to subsection 141(1) of the Code because HSO Thibault cited paragraph 141(1)(a) where he should have cited paragraph 141(1)(h) (see attached direction).

Richard Lafrance
Appeals Officer

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 141(1)(h)

On May 26, 2005, the health and safety officer Ronald P. Thibault conducted an inspection regarding Digby Fishermen's Wharf, in the work place operated by Maritime Harbours Society, being an employer subject to the *Canada Labour Code*, Part II, at 68 Water Street, Digby, Nova Scotia, the said work place being sometimes known as Digby Fishermen's Wharf.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141(1)(h) of the *Canada Labour Code*, Part II, to have an assessment completed of the structural integrity of the Digby Fishermen's Wharf by a qualified engineer. A copy of this report shall be presented to the undersigned health and safety officer no later than June 30, 2005.

Issued at Ottawa, this 20th day of December, 2005.

Richard Lafrance
Appeals Officer

To: Maritime Harbours Society
P.O. Box 970
Digby, Nova Scotia
B0V 1A0

Summary of Appeals Officer's Decision

Decision No.: 05-054

Applicant: Maritime Harbours Society

Provisions: *Canada Labour Code*, 145(1) and 146(1)

Keywords: Notice of contraventions and having an assessment of a wharf's structural integrity, directions, jurisdiction

Summary:

Following an inspection, a health and safety officer issued two directions on May 30, 2005, under the *Canada Labour Code*, Part II, to Maritime Harbours Society for its wharf known as the Digby Fishermen's Wharf located in Digby, Nova Scotia. The first direction made pursuant to subsection 145(1) referred to contraventions under the *Canada Labour Code*, Part II, and its regulations. The other direction made pursuant to 141(1) required Maritime Harbours Society to have an assessment completed of the structural integrity of the wharf by a qualified engineer. Pursuant to subsection 146(1) of the *Canada Labour Code*, Part II, Maritime Harbours Society appealed the authority for the two directions arguing that MHS and its wharf are not under federal jurisdiction.

Following his review, the Appeals Officer decided that MHS and the Digby Fishermen's Wharf were under federal jurisdiction. The Appeals Officer also decided that MHS was an employer pursuant to the *Canada Labour Code*, Part II, therefore declaring the two directions enforceable at its wharf. The Appeals Officer confirmed HSO Thibault's direction made pursuant to subsection 145(1) but varied HSO Thibault's direction made pursuant to subsection 141(1) in which paragraph 141(1)(a) cited was varied for paragraph 141(1)(h).