

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2009-04
Decision No.: OHSTC-09-035

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Public Works and Government
Services Canada
appellant

November 26, 2009

This matter has been decided by Appeals Officer Katia Néron.

For the appellant
Stephan Bertrand, Counsel.

Canada

Appeal

- [1] This appeal was filed pursuant to subsection 146(1) of the *Canada Labour Code*, Part II (Code), by Glen Hynes, Provincial Director, Public Works and Government Services Canada (PWGSC), Newfoundland and Labrador (NL).
- [2] It is an appeal against two directions issued on November 25, 2008, to PWGSC by health and safety officer (HSO) Glen W. O'Neill, pursuant to subsection 145(1) of the Code. Those directions followed an inspection of diving activities that had been performed on October 28, 2008, by employees of a diving firm which had been retained at the time by PWGSC to perform diving work at a wharf in Ferryland, Newfoundland.
- [3] This case has proceeded by way of written submissions.

The facts

- [4] The appellant submitted twenty-five documents in support of its appeal.
- [5] The issues raised in the case originate from an incident that occurred around October 23, 2008, at the Ferryland wharf, where the wharf had partially collapsed as a result of some heavy wave action during a storm.
- [6] The wharf is owned by the Canadian government.
- [7] The federal Department of Fisheries and Oceans (DFO) is mandated to operate and maintain a national system of harbours, such as the wharf at Ferryland, that provide the commercial fish harvesters and other harbour users with safe and accessible facilities.
- [8] Some of DFO's tasks relative to managing, operating and maintaining the Ferryland wharf had been delegated to the local harbour authority.
- [9] However, DFO remained responsible for keeping this wharf open and in good repair. This responsibility was given to the NL marine Small Craft Harbours Program (DFO-SCH NL), SCH being a nationwide DFO program.
- [10] In a November 1, 2008 e-mail sent by Bill Goulding, Regional Director, DFO-SCH NL, to HSO O'Neill, concerning the relationship between DFO-SCH NL and the local harbour authority relative to control over the Ferryland wharf, B. Goulding stated:

[...]. Like all active harbours, the SCH property (both upland and waterlot) at this harbour is leased to a local harbour authority which is a federally-incorporated not-for-profit organization. In this case the departmental

property is leased to the Harbour Authority of Bay Roberts. By means of this lease, the property is effectively under the control of the harbour authority, however, as owner, DFO still retains a significant degree of influence over the site. [...]

- [11] In order to fulfil its mandate of keeping this wharf open and in good repair, DFO-SCH NL calls upon PWGSC to manage and deliver engineering and construction projects.
- [12] The roles and responsibilities of PWGSC and DFO-SCH NL pertaining to all marine engineering and construction projects within DFO-SCH NL, are set out in a document entitled "Program Charter for DFO-SCH Marine Engineering and Construction Program Newfoundland and Labrador between Department of Fisheries and Oceans Small Craft Harbours Branch, NL, and Public Works and Government Services Canada". The document was revised on December 12, 2007.
- [13] Pursuant to this program charter, PWGSC has contracting authority to perform work on each site.
- [14] In September 2007, a standing offer bearing title "Public Works and Government Services Canada Real Property Contracting NL Division Specification Regional Individual Standing Offer, Diving and Repairs to Marine Structures, Various Locations Eastern, Central & Western Newfoundland"(Solicitation No.: E0224-07R037/A) was initiated for the purpose of securing the services of a diving firm in response to the need to perform diving work on DFO-SCH NL floating structures, as well as the need to perform diving inspections of federal marine structures such as the Ferryland wharf.
- [15] In conjunction with the aforementioned standing offer, a conventional tender call was initiated. A two (2) year standing offer contract was subsequently awarded by PWGSC, on October 31, 2007, to Sea-Force Diving Ltd, the diving firm involved in the present case.
- [16] According to the standing offer (Solicitation No.: E0224-7R037/A), specific occupational health and safety responsibilities were attributed to the diving firm.
- [17] At item 2 of section 1.2, titled "Compliance Requirements", one of the contractor responsibilities reads:
 - .2 Comply with Canada Labour Code Part II, and the Canada Occupational Safety and Health Regulations made under Part II of the Canada Labour Code.
- [18] As well, at items 1, 2 and 4 of section 1.4, titled "Site Control and Access", other contractor health and safety requirements read as follows:

.1 Control each work site and entry points to inspection/work areas.

[...]

.2 Approve and grant access to each work site only to workers and authorized persons.

.4 Ensure persons granted access to site wear appropriate personal protective equipment (PPE) suitable to work and site conditions.

[...]

- [19] The same standing offer, at section 1.7, titled "Project/Site Conditions", presents a list of generally known or potential project/site conditions related to health, environmental and safety hazards – said list however, not to be considered as complete – designed to inform the diving firm of said hazards and requesting that they be properly managed during the course of work. Section 1.7 reads:

.1 The following are known or potential Standing Offer related health, environmental and safety hazards which must be properly managed if encountered during course of work:

- .1 Working in close proximity of water.
- .2 Wet/slippery conditions.
- .3 Inclement weather.
- .4 Heavy equipment activity in area.
- .5 Heavy lifting.
- .6 Overhead power/utility lines.

.2 Above list shall not be construed as being complete and inclusive of potential health and safety hazards encountered during work. Include above items in the hazard assessment process.

[...]

- [20] Section 1.6 however, titled "Hazard Assessments", specified that the contractor had to conduct a site specific health and safety hazard assessment prior to starting work.

- [21] Furthermore, pursuant to section 1.9 of the same standing offer, titled "Health and Safety Plan", the contractor had to develop a written site specific health and safety plan, based on the hazard assessment, and had to submit it for review to a PWGSC representative prior to commencement of work. Item 8 of section 1.9 states:

.8 Submission[s] of the Health and Safety Plan and updates, to the Departmental Representative, is for review and information [...]

- [22] Additionally, item 1.1 of the aforementioned section stated that further to obtaining the contractor's written site specific health and safety plan, an OHS PWGSC consultant would conduct spot checks to verify if the diving firm complied with all health and safety requirements under the contractual standing offer. Item 1.1 of section 1.9 of the standing offer states:

.1 [...]

- .1 Submit copy to Departmental Representative prior to starting work and OHS/Consultants will be doing spot check to see if firms are in compliance with all health and safety.

- [23] At item 3 of section 1.21, titled "Non-Compliance and Disciplinary Measures", it is stated that PWGSC uses a system of non-compliance notifications and disciplinary measures on sites, to address findings of violation or of non-compliance with the standing offer's health and safety contractor requirements and of provincial and federal regulations dealing with same by any worker, subcontractor or other person to whom the contractor has granted access to the work site.
- [24] According to the previously mentioned program charter signed by DFO-SCH NL and PWGSC, both federal departments retained responsibility for ensuring that all projects are managed in accordance with the Treasury Board Secretariat (Treasury Board) approved management framework, which includes safety management.
- [25] Paragraph 5 of section 4.2.2 of the program charter, under title "Marine Program Specific Roles and Responsibilities of the Project Manager" – the project manager being the PWGSC representative accountable for each project on each work site – , states:
- [...]
- The Project Manager, through implementation of a Project Plan for each project, ensures the project is delivered with appropriate attention to scope management, [...] safety management, [...]
- [26] In accordance with the program charter, PWGSC's senior project manager accountable for each project for DFO-SCH NL was B. R. (Randy) Clarke.
- [27] Having regard to the aforementioned PWGSC safety management, specific responsibilities are described at section 10 of the "Project Plan Template for Approval of Template Version #1 for DFO-SCH" dated December 12, 2007, as part of the program charter. This section reads as follows:

[...] While performing work on behalf of DFO, PWGSC will take whatever measures are necessary to protect the health and safety of government employees, agents, contractors and the public in accordance with Part II of the Canada Labour Code as well as Provincial OH&S acts and Regulations. This includes implementation of a safety management system that ensures the use of [...] safety materials, equipment and devices, the identification of hazards, the provision of training and orientation, [...], the inclusion of stop work authority in contracts, and adherence to workplaces inspection procedures and safe job procedures. [...] PWGSC Project Manager to ensure all information related to site assessments is gathered [...].

[28] Following DFO-SCH NL's report concerning the collapse of the Ferryland wharf, PWGSC representatives visited the site on October 24, 2008, and spoke with the diving contractor *via* telephone to provide explanation on the condition of the wharf as well as potential safety hazards. On October 27, 2008, a PWGSC representative sent an e-mail to Sea-Force Diving Ltd describing the known work site related hazards.

[29] On October 27, 2008, call-up (requisition) #53 against the standing offer was signed by a PWGSC representative – the surveys supervisor with PWGSC for DFO-SCH NL delivery under the program charter – to request Sea-Force Diving Ltd to conduct an inspection of the damaged Ferryland wharf. More specifically, the requisition described the work to be done as follows:

[...] To do inspection of the damaged wharf at Ferryland, condition survey and video of the existing wharf. The inspection of the piles, bracing, pile caps, ladders, fendering and sub deck. Locate what's left underneath the water on a drawing. Depth of water over remaining deck. Locate any remaining piles left in place. [...]

[30] In the previously mentioned e-mail sent by B. Goulding, the respective roles and responsibilities of DFO-SCH NL and PWGSC concerning the wharf inspection project were described as follows:

[...]...With respect to the project to dispose of the Bay Roberts vessels (or inspect the damage at Ferryland), DFO's role is that of project leader. DFO is the organization with the program responsibility (including funding) for these projects. PWGSC is the project manager; their role is to implement these projects on behalf of DFO. PWGSC is a federal government department and DFO provides them with access to SCH/DFO facilities in order to implement projects for DFO. For your reference, I've attached a document that we refer to as our "Program Charter"; it's a document that we have at the regional level between SCH and PWGSC which helps to define our relationship for the purposes of marine engineering and construction activity. The vessel disposal project was a special situation that was [...] covered by this agreement per se (i.e. it wasn't implemented by PWGSC's Architectural & Engineering Services group), however, the nature of the relationship between SCH and PWGSC is basically the same. PWGSC, like DFO, is fully bound to the Canada Labour Code, Part II, and just as we always try to conduct our activities in compliance with the Code, we rely upon and expect PWGSC to behave in the same way [...]

[31] On October 28, 2008, persons employed by the diving contractor were granted access to the Ferryland wharf to inspect the said wharf with the use of diving equipment. On the same day, having been informed that diving activities would be conducted at the wharf, HSO O'Neill went to that location for the purpose of inspecting the work being performed at the time.

[32] HSO O'Neill noted that a scuba diver was engaged in diving operations

without being tethered or having communications means with the surface support, contrary to section 18.65 of the Canada Occupational Health and Safety Regulations, Part XVIII, made under the Code (COHS regulations, Part XVIII). He also noted that no dressed-in standby diver or diver's tender were present at the time, contrary to COHS regulations, Part XVIII.

[33] As a result of these findings, on November 25, 2008, HSO O'Neill issued two directions to PWGSC pursuant to subsection 145(1) of the Code.

[34] The first direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 28th, 2008, the undersigned health and safety officer conducted an examination in the work place operated by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at the Federal Government wharf located in Ferryland, Newfoundland and Labrador.

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

125. (1) (z.14) – Canada Labour Code, Part II,

PWGSC, via standing offer, granted access to a diving contractor to perform diving work on a collapsed wharf in Ferryland, NL., however, PWGSC failed to inform the diving contractor of every known and foreseeable health and safety hazard at this workplace.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) (a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 25th, 2008.

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 contravention does not continue or reoccur.
[...]

[35] The second direction states as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 28th, 2008, the undersigned health and safety officer conducted an examination in the work place operated by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at the Federal Government wharf located in Ferryland, Newfoundland and Labrador.

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

125. (1) (w) – Canada Labour Code, Part II,

During the course of fulfilling a standing offer contract with PWGSC at the wharf in Ferryland, Newfoundland on October 28th, 2008 an un-tethered SCUBA diver was engaged in diving operations without the safety materials, equipment and devices ((ie.) Standby diver, communications, four person crew, etc...) as prescribed in Part XVIII of the COHS Regulations.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) (a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 25th, 2008.

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 contravention does not continue or reoccur.
[...]

- [36] Following HSO O'Neill informing PWGSC representatives, on October 28, 2008, that the diving activities being performed by the contractor's employees were not in compliance with the COHS regulations, Part XVIII, the PWGSC project manager spoke to the PWGSC project officer who, in turn, contacted the contractor. This brought about the immediate interruption of diving activities.
- [37] In a November 3, 2008 e-mail, B. R. Clarke, senior project manager accountable for PWGSC under the program charter, wrote as follows:
- [...]...The recent Ferryland issue was the case of storm damage to a DFO wharf for which we were requested to investigate. We sent divers to the site and it appears safety infractions were observed by others. [...] The divers were immediately pulled from the site to review and ensure safety was properly managed. [...]
- [38] Having reviewed HSO O'Neill's notifications concerning his safety concerns, the diving contractor agreed that errors in judgment had been committed by both the diving supervisor and the dive crew present at the Ferryland location at the time. His ensuing review of the documentation and forms resulted in the formulation of safe work practices relative to that specific work site, based on a job risk assessment. This document is dated October 28, 2008. As well, a daily dive plan was specifically developed with regard to the Ferryland wharf inspection.
- [39] On May 27, 2009, thus seven months later, the aforementioned documents were transmitted by the contractor to a PWGSC representative.

Issue

- [40] In the present case, the issue to be considered is whether HSO O'Neill erred in issuing the two above mentioned directions to PWGSC.

Appellant submissions

- [41] I retain the following from Stephen Bertrand's written submissions on behalf of PWGSC.
- [42] According to counsel, HSO O'Neill lacked jurisdiction to issue the two disputed directions to PWGSC, and this for the following reasons.
- [43] S. Bertrand first argued that PWGSC cannot be considered an employer, as this term is defined by the *Canada Labour Code*, Part II, in relation to Sea-Force Diving Ltd and the latter's employees who worked at the time at the location. Counsel finds support for this argument in section 3 of the *Canada Labour Code*, Part I, which defines "employer" as follows:

Employer: means (a) any person who employs one or more employees, and (b) in respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining.

- [44] On this basis, counsel submitted that neither Treasury Board nor PWGSC was an employer in relation to Sea-Force Diving Ltd and/or its employees, because these employees were not part of the collective agreement process and were not considered employees of PWGSC and/or Treasury Board under any agreement or arrangement.
- [45] S. Bertrand also referred to subsection 123(2) of the Code as founding the fact that PWGSC is a federal public administration department that comes within the application of the *Canada Labour Code*, Part II. However, he submitted that the persons who worked at the time at the Ferryland site were not employees of PWGSC because these persons were not employed in this department to the extent stated under Part 3 of the *Public Service Labour Relations Act* (the PSLRA). He then underlined that the PSLRA, at sections 239 and 240, specifies that the "public service and persons employed in it" are defined by the *Financial Administration Act* (FAA). The FAA in turn defines "public service" in relation to the core public administration at subsection 11(1) as "the several positions in or under...(a) the departments named in Schedule 1..." where PWGSC is listed. S. Bertrand then pointed out that there are no positions in or under PWGSC that include scuba divers. For this reason, S. Bertrand reiterated that the employees who worked at the Ferryland location at the time were not employees of PWGSC or

Treasury Board.

- [46] Based on what precedes, counsel argued that since the contractor's employees were neither employees of PWGSC or Treasury Board, then neither PWGSC and/or Treasury Board had any influence over them.
- [47] Second, S. Bertrand argued that the work place where Sea-Force Diving Ltd employees were working at the time was not a work place controlled by PWGSC.
- [48] In support of this argument, counsel referred to the manner in which Sea-Force Diving Ltd confirmed – following HSO O'Neill's notifications – that the site was under their care and control, as well as the manner in which they addressed the non-compliance issues with their own diving supervisor. He also referred to the contractor's requirements under the contractual agreement between PWGSC and the contractor. As provided in the standing solicitation E0224-07R037/A and requisition #53 signed on October 27, 2008, against this standing offer, S. Bertrand opines that since PWGSC surrendered control of the site to Sea-Force Diving Ltd, its responsibilities were limited, in S. Bertrand's opinion, to periodic site reviews to verify that Sea-Force Diving Ltd satisfied all of the undertaken obligations. As well, in S. Bertrand's opinion, the role of PWGSC under the same standing offer was limited to addressing non-compliance with the terms and conditions of the contract through notifications.
- [49] On this basis, S. Bertrand argued that Sea-Force Diving Ltd was the sole employer responsible for occupational health and safety issues on the said work site, at all relevant times and for all intended purposes.
- [50] He added that employees are not swept into federal jurisdiction by the mere fact of working on a federal site. To support this argument, he referred to the Supreme Court of Canada decision in *Construction Montcalm v. Minimum Wage Commission*.¹
- [51] For all of the above reasons, S. Bertrand maintained that on-site jurisdiction over a diving operation under the control of a provincial contractor comes solely within provincial jurisdiction and that only an occupational health and safety (OHS) officer designated under the provincial Newfoundland and Labrador OHS Act had the authority to issue an order and direct that appropriate OHS remedial actions be taken at the time.

¹ *Construction Montcalm v. Minimum Wage Commission*, [1979] 12 S.C.R. 754

Analysis

- [52] As already stated, the issue in the present case is whether HSO O'Neill erred in issuing the two disputed directions to PWGSC.
- [53] To decide this matter, I have to determine whether paragraphs 125(1)(w) and (z.14) of the Code applied to PWGSC at the time. Should I find that this was the case, I must then determine whether PWGSC was in violation of one or the other of the aforementioned paragraphs.

1 – Did paragraphs 125(1)(w) and (z.14) of the Code apply to PWGSC at the time?

- [54] Paragraphs 125(1)(w) and (z.14) of the Code read as follows:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, [...]

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

(z.14) take all reasonable care to ensure that all persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health and safety hazard to which they are likely to be exposed in the work place; [...]

[underline added]

- [55] In order to decide if the above provisions apply to PWGSC in this case, I have to answer the two following questions:

- a) Does the Code apply to PWGSC?
- b) Was PWGSC an employer, as defined by the Code, to whom paragraphs 125(1)(w) and (z.14) of the said Code could apply at the time?

a) – Does the Code apply to PWGSC?

- [56] Subsection 123(2) of the Code states:

123(2) This Part applies to the federal public administration and to persons employed in the federal public administration to the extent provided for under Part 3 of the *Public Service Labour Relations Act*.

[underline added]

- [57] PWGSC is a federal department and there is no dispute that it forms part

of the federal public administration². In his submissions, counsel maintained that PWGSC is part of the federal public administration as per the *Financial Administration Act* (FAA).

- [58] With regard to subsection 123(2) of the Code, I answer the aforementioned first question in the affirmative.

b) – Was PWGSC an employer, as defined by the Code, to which paragraphs 125(1)(w) and (z.14) of the said Code could apply at the time?

- [59] The term “employer” is defined at subsection 122(1) of the Code. The definition reads as follows:

122(1) In this Part, “employer” means a person who employs one or more employees and includes an employers’ organization and any person who acts on behalf of an employer; [underline added]

- [60] According to section 123 cited above, the Code applies to private sector employers coming within federal jurisdiction as well as to the public service of Canada.
- [61] However, in the context of the federal public service, the employer *persona* is a particularly complex concept. In all cases involving a federal government department, our interpretation of the Code must be guided by that particular context.
- [62] In the federal public service, no entity possesses all of the attributes generally conferred upon an employer. For instance, a government department needs delegations from the Public Service Commission to staff its positions pursuant to the *Public Service Employment Act* (PSEA), or delegations from Treasury Board to manage terms and conditions of employment under the *Public Service Labour Relations Act* (PSLRA), or delegations to approve expenses under the FAA. In addition, this same department, under the *Department of Public Works and Government Services Act* (the DPWGS Act), needs to call upon PWGSC as “Building Custodian” or as “Property Manager”. I reproduce here section 6 of the DPWGS Act, which assists in understanding the roles played by PWGSC for federal public service departments, namely the PWGSC roles of property manager and service provider played for DFO-SCH NL in the present case:

6. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada,

² The *Financial Administration Act* (R.S., 1985, c.F-11) can be referred to for a description of what forms part of the federal public administration.

relating to

[...]

(b) the acquisition and provision of services for departments;

(c) the planning and organizing of the provision of materiel and services required by departments;

[...]

(e) the construction, maintenance and repair of public works, federal real property and federal immovable[s];

(f) the provision of accommodation and other facilities for departments;

[...]

(h) the provision to departments of advice on or services related to architectural or engineering matters affecting any public work, federal real property or federal immovable; and

[...]

[63] The statutory mandate of PWGSC is exclusive of other federal government departments. Those could not, in this case, hire a contractor to perform the wharf inspection and, for that purpose, grant the contractor's employees access to the wharf. This is, and was at the time, PWGSC's legislated responsibility. In fact, the evidence shows that at the time of HSO O'Neill's inspection, PWGSC was providing the services for the purpose of allowing the wharf inspection at Ferryland to proceed for DFO-SCH NL. The contracts that were presented to me by counsel for PWGSC clearly indicate that Sea-Force Diving Ltd was retained by PWGSC to perform this activity. The work description appearing on the requisition signed by a PWGSC representative against the standing offer also indicates that Sea-Force Diving Ltd was under a contract for services with PWGSC for the purpose of inspecting the wharf at Ferryland at the time.

[64] Furthermore, the present case does not concern directions issued to an employer and aimed at protecting the occupational health and safety of the latter's employees, as would be the case with most of the Code provisions. Paragraphs 125(1)(w) and (z.14) are two provisions of exception in the Code in this respect. The objective of paragraph 125(1)(w) is not only the protection of employees, as defined in the Code, but also the protection of "every person granted access to the work place by the employer". In addition, the objective of paragraph 125(1)(z.14) is the protection of "all persons granted access to the work place, other than the employer's employees". In fact, there are only three provisions in the Code that refer to "person(s) granted access to the work place". Those are paragraphs 125(1)(w) and (z.14) as well as paragraph 125(1)(y). Paragraph 125(1)(y) reads as follows:

125(1) [...]

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

- [65] In *Attorney General of Canada v. Public Service Alliance of Canada*³, the Federal Court of Canada found that the words “every person” in the Code were not “merely limited to federal employees”. In that case, Mr. Justice E. Heneghan stated, at paragraphs 22 and 24 of his decision:

[22] In my opinion, the Regional Safety Officer was not extending federal jurisdiction over provincial employees. He was simply interpreting the words of section 125(v)⁴ in relation to the responsibility of an employer for the workplace under its control. The Regional Safety Officer found that the words “every person” were not limited merely to federal public employees. He justified the extension of section 125(v) on the basis that it is a far-reaching provision which requires the employer to assume responsibility for the workplace under its control.

[...]

[24] In conclusion, I am not persuaded that the Regional Safety Officer committed any error of law in his interpretation of section 125(v) of the Code. His decision is reasonable. [underline added]

- [66] This serves to confirm that people other than employees enjoy protection – and may not endanger the health and safety of employees present in the work place – while performing work at a work site controlled by an employer coming under application of the Code. Again, I reiterate that those provisions represent exceptions. In the present case, paragraphs 125(1)(z.14) and (w) of the Code deal with ensuring that “all persons granted access to the work place by the employer, other than that employer’s employees,” are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place and that “every person granted access to the work place by the employer” is familiar with and uses in the prescribed circumstances and manner all safety equipment and devices prescribed under COHS regulations, Part XVIII.
- [67] Consequently, the definition of employer under the Code must be read in a context that gives full effect to paragraphs 125(1)(w) and (z.14) of the Code.
- [68] With reference to subsection 125(1) of the Code, there are two circumstances under which this subsection can apply to an “employer”⁵ as defined by the Code. Those are:
- the work place is under the control of the “employer”; or
 - the work activity carried out by the employee is under the control of the

³ *Attorney General of Canada v. Public Service Alliance of Canada*, [2000] 198 F.T.R. 155 (F.C.)

⁴ Paragraph 125(1)(v) was replaced by paragraph 125(1)(y) in 2000.

⁵ The term “employer” as defined by The Code includes an employers’ organization and any person who acts on behalf of an employer.

"employer", while the work place where the activity is being carried out is not under the control of the employer.

- [69] I agree, as suggested by S. Bertrand, that the concerned Sea-Force Diving Ltd employees being neither employees of PWGSC nor of Treasury Board, that neither PWGSC nor Treasury Board had any control over them and that, for this reason, the second aforementioned circumstance under which subsection 125(1) can apply does not exist in the present case.
- [70] The circumstances of this case involved a work place owned by the Canadian federal government represented by DFO. Given the first circumstance concerning control over the work place noted above, one must then determine whether the work site came under the control of PWGSC at the time.
- [71] According to the New Shorter Oxford English Dictionary, 1993 edition, "control" means:
- Control: "The act or power of directing or regulating; command; regulating influence [...] A person or body that acts as a guide or check, a controller" [...] "Exercise power or influence over".
- [72] On the basis of the aforementioned definition as well as item 1.1 of section 1.9 and item 3 of section 1.21 of the standing offer and the 5th paragraph under section 4.2.2 of the program charter, I have formed the opinion that it was PWGSC that had an influence over and/or the power to verify how the contractor was complying with its contractual requirements having regard to control over the work site, not DFO-SCH NL.
- [73] I am then of the view that PWGSC did exercise significant influence and power over the said work site for the specific period of time, given its statutory mandate at the time vis-à-vis that location. For this reason, I am of the opinion that at that time, subsection 125(1) could apply to PWGSC at the work site in question.
- [74] Furthermore, when PWGSC contracted out the performance of the wharf inspection to a provincial independent contractor, it did not, in my opinion, relinquish its obligation to control the safety of the work site while the specific service that the said contractor had to provide at the time for DFO-SCH NL was being provided. PWGSC's statutory obligation to do so remained unchanged. Section 10 of the "Project Plan Template for Approval of Template Version #1 for DFO-SCH", which was part of the program charter signed with DFO-SCH NL, is very illuminating where the specific safety management responsibility of PWGSC vis-à-vis protection of the health and safety of the contractor in its service as well

as that of the public on site is concerned. As already stated, this specific responsibility was:

[...] While performing work on behalf of DFO, PWGSC will take whatever measures are necessary to protect the health and safety of [...] contractors and the public in accordance with Part II of the Canada Labour Code [...]

- [75] In addition, the position that an employer's statutory obligations "cannot be relinquished by contracting out performance of their responsibilities to an independent contractor" was reiterated by the Ontario Court of Appeal in *R. v. Wyssen*⁶.
- [76] In the case before me, S. Bertrand has formulated a position that culminates with his citing of the Supreme Court of Canada decision in *Construction Montcalm*, *supra*, concluding that Sea-Force Diving Ltd clearly falls within provincial jurisdiction.
- [77] I completely agree with Mr. Bertrand that Sea-Force Diving Ltd comes within provincial jurisdiction. However, I draw attention to the fact that the two disputed directions were not given to Sea-Force Diving Ltd. They were given to PWGSC.
- [78] Furthermore, those two directions were not directed at PWGSC as the employer of Sea-Force Diving Ltd employees, but rather as the federal public service department to which the Code applies and which had granted access to persons on the work site pursuant to a standing offer contract.
- [79] In this context and for all the above reasons, to have issued to Treasury Board or DFO, pursuant to subsection 145(1) of the Code, directions based on paragraphs 125(1)(w) or 125(1)(z.14), would have defeated the purpose of the legislation since HSO O'Neill's purpose in issuing the directions was to obtain compliance with the requirements of the two aforementioned provisions of the Code. In fact, the specific responsibilities attributed to PWGSC pursuant to the program charter signed with DFO-SCH NL and filed as evidence, make it possible for me to conclude decisively that PWGSC was the proper recipient of the directions, i.e. at the time, the "employer" referred to in paragraphs 125(1)(w) and (z.14) of the Code. In this respect, I draw attention to the very clear wording at section 10 of the "Project Plan Template for Approval of Template Version #1 for DFO-SCH" already mentioned above. As previously cited, this section reads:

[...] While performing work on behalf of DFO, PWGSC will take whatever measures are necessary to protect the health and safety of government employees, agents, contractors and the public in accordance with Part II of

⁶ *R. v. Wyssen*, 58 O.A.C. 67

the Canada Labour Code as well as Provincial OH&S Acts and Regulations. This includes implementation of a safety management system that ensures the use of [...] safety materials, equipment and devices, the identification of hazards, the provision of training and orientation, [...]

[underline added]

- [80] Based on all that precedes, I am consequently of the view that PWGSC was the sole entity positioned to ensure compliance with paragraphs 125(1)(z.14) and (w) of the Code at issue in this appeal, and that HSO O'Neill was entirely authorized to issue directions to PWGSC pursuant to subsection 145(1) of the Code.
- [81] Having concluded that HSO O'Neill had jurisdiction, at the time, to issue directions to PWGSC based on paragraphs 125(1)(w) and (z.14) of the Code, I will now turn to the merits of those two disputed directions.

2 – Was PWGSC in violation of paragraphs 125(1)(z.14) and (w) of the Code?

- [82] Pursuant to the standing offer, the contractor was to conduct a site specific health and safety hazard assessment, develop a written site specific health and safety plan based on the hazard assessment, and submit a copy of this plan for review to a designated PWGSC representative prior to starting work.
- [83] According to the program charter signed by DFO-SCH NL and PWGSC, the PWGSC senior project manager – who acted at the time on behalf of PWGSC for the specific wharf inspection project – was to ensure that the aforementioned safety responsibilities of management were fulfilled.
- [84] The evidence, however, shows that the contractor neither conducted a site specific health and safety hazard assessment, nor developed a written site specific health and safety plan, nor did the latter submit such plan for review to a PWGSC representative prior to commencement of the wharf inspection.
- [85] Having failed to ensure that the work not start before a site specific health and safety hazard assessment had been conducted by the contractor and, in addition, before a written confirmation had been sent by the contractor stating that its employees had been informed, based on the aforementioned health and safety hazard assessment, of every known or foreseeable health and safety hazard to which they were likely to be exposed while performing the wharf inspection at the work site, I arrive at the following conclusion. In my opinion, neither PWGSC nor the person accountable for PWGSC for the wharf inspection project at the location at the time, took all reasonable care to ensure that the contractor's employees who had been granted access to the work place

were informed of the aforementioned hazards in accordance with the requirements of paragraph 125(1)(z.14) of the Code.

- [86] However, in my opinion, the aforementioned omissions, as well as the consequences of these omissions, should have been specified by HSO O'Neill in the direction concerning paragraph 125(1)(z.14) of the Code. This would have had the effect of adequately advising the designated representative involved and accountable for PWGSC on the wharf inspection project, to request without delay both the aforementioned document and the aforementioned written confirmation from the contractor, and to request PWGSC to ensure that these omissions not be repeated with respect to similar contractual services in the future. Based on the evidence, I emphasize that this confirmation was sent by the contractor to a PWGSC representative only on May 27, 2009.
- [87] As regards the second direction issued by HSO O'Neill that concerned paragraph 125(1)(w) of the Code, I am of the opinion first, that in not ensuring that the contractor's site specific health and safety plan had been received and reviewed by a designated PWGSC representative prior to commencement of work, and second, by not ensuring that a written confirmation had been obtained from the contractor to the effect that its employees had been informed of the prescribed safety materials, equipment, devices and clothing they were to use and of the training received in this regard, neither PWGSC nor the person acting at the time on its behalf ensured that, in accordance with Cosh regulations, the contractor develop and implement written safety procedures specific to the diving activity to be performed at the time at that location. This resulted, in my opinion, in the contractor's employees, who had been granted access to the work site, not using the safety equipment and devices prescribed at Part XVIII of Cosh regulations.
- [88] In my opinion, these omissions were in violation of paragraph 125(1)(w) of the Code.
- [89] However, as for the first direction, I am of the opinion that these omissions and their consequences should have been specified by HSO O'Neill in the direction.

Decision

- [90] For the reasons stated above, I am varying the first direction issued by HSO O'Neill to PWGSC on November 25, 2008, as indicated below. The text in bold indicates my modifications.

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

DIRECTION ISSUED UNDER SUBSECTION 145(1)
TO PUBLIC WORKS AND GOVERNMENT SERVICES CANADA
P.O. Box 4600, St. John's, Newfoundland and Labrador, A1C 5T2

On October 28th, 2008, health and safety officer Glen W. O'Neill conducted an **inspection** of the work place **controlled at the time** by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at the federal government wharf located in Ferryland, Newfoundland and Labrador. Following this inspection, the health and safety officer issued, on November 25, 2008, a direction to the employer under subsection 145(1) of the *Canada Labour Code*, Part II.

Further to an appeal of the direction timely brought under subsection 146(1) of the *Canada Labour Code*, Part II, the undersigned Appeals Officer, pursuant to subsection 146.1(1) of the *Canada Labour Code*, Part II, inquired into the circumstances of the direction issued by health and safety officer O'Neill.

Having analysed the circumstances, the facts, the provisions of the *Canada Labour Code*, Part II, and the relevant case law, the undersigned Appeals Officer, pursuant to paragraph 146.1(1)(a) of the *Canada Labour Code*, Part II, varies the said direction as follows:

The said Appeals Officer is of the opinion that **paragraph 125(1)(z.14)** of the *Canada Labour Code*, Part II, has been contravened, **for the following reasons:**

PWGSC – **via its senior project manager – failed to ensure that a site specific health and safety hazard assessment had been conducted by the contractor prior to the commencement of work at the site by Sea-Force Diving Ltd employees to whom PWGSC had granted access to perform diving activities under the standing offer contract signed, on October 27, 2008, with Sea-Force Diving Ltd for the purpose of performing the inspection of the wharf at Ferryland.**

In addition, PWGSC failed to receive, prior to the commencement of work, a written confirmation from the aforementioned contractor stating that its employees had been informed, based on the aforementioned health and safety hazard assessment, of every known or foreseeable health and safety hazard to which they were likely to be exposed while performing the wharf inspection at the said work site.

This had the result of not ensuring that the contractor's employees had been informed of the aforementioned hazards before starting work.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than December 17, 2009.

Furthermore, you are also HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to report to health and safety officer Glen W. O'Neill or any other health and safety officer, within 30 days of receiving the present modified direction, on the measures taken that will ensure that the aforementioned omissions will not reoccur with respect to similar contractual services in the future.

- [91] For the same reasons as above, I am varying the second direction issued by HSO O'Neill to PWGSC on November 25, 2008, as indicated below. The text in bold indicates my modifications.

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

DIRECTION ISSUED UNDER SUBSECTION 145(1)
TO PUBLIC WORKS AND GOVERNMENT SERVICES CANADA
P.O. Box 4600, St. John's, Newfoundland and Labrador, A1C 5T2

On October 28th, 2008, health and safety officer Glen W. O'Neill conducted an **inspection** of the work place **controlled at the time** by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at the federal government wharf located in Ferryland, Newfoundland and Labrador. Following this inspection, the health and safety officer issued, on November 25, 2008, a direction to the employer under subsection 145(1) of the *Canada Labour Code*, Part II.

Further to an appeal of the direction timely brought under subsection 146(1) of the *Canada Labour Code*, Part II, the undersigned Appeals Officer, pursuant to subsection 146.1(1) of the *Canada Labour Code*, Part II, inquired into the circumstances of the direction issued by health and safety officer O'Neill.

Having analysed the circumstances, the facts, the provisions of the *Canada Labour Code*, Part II, and the relevant case law, the undersigned Appeals Officer, pursuant to paragraph 146.1(1) (a) of the *Canada Labour Code*, Part II, varies the said direction as follows:

The said Appeals Officer is of the opinion that **paragraph 125(1)(w)** of the *Canada Labour Code*, Part II, has been contravened, **for the following reasons:**

PWGSC – via its senior project manager – failed to receive the contractor's site-specific health and safety diving plan and to ensure its review by a designated PWGSC representative prior to the commencement of work at the site by Sea-Force Diving Ltd employees to whom PWGSC had granted access to perform diving activities under the standing offer contract signed, on

October 27, 2008, with Sea-Force Diving Ltd for the purpose of performing the inspection of the wharf at Ferryland.

In addition, PWGSC failed to receive, prior to the commencement of work, a written confirmation from the aforementioned contractor stating that its employees has been informed, based on the aforementioned site-specific health and safety diving plan, of the safety materials, equipment, devices and clothing that were to be used and that they were to use in accordance with COHS regulations, including the description of the training given to them as regards to this use.

As a result, during the course of fulfilling the aforementioned standing offer contract, an un-tethered scuba diver – **an employee of the contractor** – was engaged in diving operations without **having communications with the surface support**, contrary to the requirements of section 18.65 of the Canada Occupational Health and Safety Regulations, Part XVIII, made under the Canada Labour Code, Part II (COHS regulations, Part XVIII) and furthermore, no dressed-in standby diver or diver's tender were present at the time, as prescribed by COHS regulations, Part XVIII.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than December 17, 2009.

Furthermore, you are also **HEREBY DIRECTED**, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to report to health and safety officer Glen W. O'Neill or any other health and safety officer, within 30 days of receiving the present modified direction, on the measures taken that will ensure that the aforementioned omissions will not reoccur with respect to similar contractual services in the future.


Katia Néron
Appeals Officer