Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

Date: 2014-07-03
Case No.: 2013-26

Between:

Canada Border Services Agency, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Canada Border Services Agency* v. *Public Service Alliance of Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is confirmed
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the Appellant:	Ms. Christine Langill, Counsel, Department of Justice, Labour and Employment Law Group
For the Respondent:	Mr. Jean-Rodrigue Yoboua, Representation Officer, Public Service Alliance of Canada
Citation:	2014 OHSTC 11

Canada

REASONS

[1] This decision concerns an appeal brought by the Canada Border Services Agency (CBSA or "the employer") under subsection 146(1) of the *Canada Labour Code* ("the Code") against a direction issued on April 22, 2013, by Health and Safety Officer (HSO) Paul G. Danton. The direction relates to the introduction by the employer, effective December 11, 2012, of a new work requirement for Border Services Officers (BSOs) to wear a personal name tag identifier while performing their duties.

[2] The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)
>
> On or about the 4th April 2013, the undersigned health and safety officer conducted an investigation as a result of a previous Direction issued on or about the 12th December 2012 regarding the work place operated by Canada Border Services Agency, being an employer subject to the *Canada Labour Code*, Part II, at 99 Metcalfe Street, 3rd Floor, Ottawa, ON K1A 0L8, the said work place being sometimes known as Canada Border Services Agency.
>
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> No./ No : 1
>
> **Paragraph 125.(1)(z.03) - Canada Labour Code Part II**
>
> 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,
>
> (z.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;
>
> **Subsection 19.5(1) - Canada Occupational Health and Safety Regulations**
>
> 19.5 (1) The employer shall, in order to address identified and assessed hazards, including ergonomics-related hazards, take preventive measures to address the assessed hazard in the following order of priority:
> (a) the elimination of the hazard, including by way of engineering controls which may involve mechanical aids, equipment design or redesign that take into account the physical attributes of the employee;
> (b) the reduction of the hazard, including isolating it;

(c) the provision of personal protective equipment, clothing, devices or materials; and
(d) administrative procedures, such as the management of hazard exposure and recovery periods and the management of work patterns and methods.

The employer has failed to take preventive measures to address the assessed hazard associated with the implementation of the new Name Tag policy into various workplaces nationwide.

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 22nd May, 2013.

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.

Issued at London, this 22nd day of April, 2013.

(signed)
PAUL G DANTON
Health and Safety Officer
[…]

To: Mr. Marc Thibodeau
Director General, Human Resources Branch
Canada Border Services Agency (CBSA)
99 Metcalfe Street, 3rd Floor
Ottawa, ON K1A 0L8

[3] The grounds in support of the appeal are stated in a letter dated May 3, 2013, sent to the Occupational Health and Safety Tribunal Canada (the Tribunal) by the appellant's counsel, and read, in part, as follows:

[…]

There were numerous health and safety officers (HSOs) involved in investigating the various work refusals on the name tags issue. Only HSO Danton expressed concerns. Information was provided on two separate occasions to Mr. Danton and his colleagues involved in the initial direction from December 12, 2012. […]

Another critical factor is that a significant majority of the Health and Safety Officers that separately investigated the work refusals related to the implementation of the name tag policy did not find that the Agency lacked preventive measures. In fact, HSO Domenico Iacobellis clearly indicated that there was an excess of policies in place to address potential incidents:

> "The employer has various redundant policies in place such as the *Violence in the Workplace Policy* and Chapter 26: *Abuse, threats, stalking and Assaults against Employees* which discuss

> precursors to incidents and what to do when you are in a threat situation. There are also several measures that have been discussed that can be implemented from escorts to police involvement. I feel that this mitigates any risk that exists with the implementation of Name Tags."
>
> It is the position of the employer that the direction of HSO Danton is: (a) imprecise to the point where its implementation must be based on speculating as to its content, (b) inconsistent with the fact that existing policies and procedures address any potential risks that could be associated with the wearing of name tags, and (c) inconsistent with the previous decisions of other HSOs.

[4] The hearing of the appeal took place in Ottawa on December 9 to 11, 2013. HSO Danton appeared as a witness at the appeals officer's request and provided an overview of the circumstances that led to the issuance of the direction under appeal. The appellant called the following witnesses to testify: Mr. Jeremy Adams (Senior OHS Advisor, CBSA), Mr. Robert Braun (Chief of Operations, Blue Water Bridge, CBSA), Mr. Pierre Rivard (Director, Infrastructure and Information Security, CBSA) and Ms. Cindy Likins (Senior Program Advisor, CBSA). The respondent called Mr. Jason McMichael, (First National Vice-President, CEIU). The final submissions of the parties were received by the Tribunal on February 28, 2014.

Background

[5] On December 11, 2012, the CBSA's new Name Tag Policy became effective. Pursuant to that policy, BSOs are required to wear a tag bearing their family name, while performing their duties. The employer considers that compared to badge identifiers, name tags show the public that CBSA and its officers are accountable for their actions to serve and protect Canadian communities, and are committed to service excellence and professionalism. Originally, the name tag included the first initial of the given name and the surname of the employee. The initial was removed as a result of representations made to the employer by the BSOs' union representatives. Prior to the enactment of the Name Tag Policy, BSOs were identified by a numerical badge, which they wore on their uniform.

[6] It is common grounds that BSOs are employed to perform law enforcement responsibilities for the purpose of providing border control for the protection of Canadian society and economy through the facilitation of legitimate cross-border traffic and the prevention of the entry of people and goods that pose a potential risk to Canada. In order to carry out those duties, BSOs enjoy peace officer status and have the capability to arrest and/or detain individuals suspected of having committed offences under various Acts of Parliament. Their "clients" are Canadian citizens re-entering Canada and foreign nationals form every country in the world. Persons they deal with range from the highly compliant – the vast majority – to criminals. Negative reactions from persons against whom BSOs are called upon to take enforcement actions (payment of taxes, seizure, detention) can range from "volatile to violent". Their place of work can be in very small communities (e.g. crossings in rural areas) to very large urban centres, airports and seaports. It is fair to assume that BSOs' place of residence will be, for the most part, in the community close to where they work.

[7] The introduction of the obligation for front-line officers to wear name tags raised significant concern within the BSO community. These concerns were brought to the fore on several occasions when the matter came up for discussion at the CBSA's Policy Health and Safety Committee ("Policy Committee"). They related to the higher risk that BSOs could be harassed, threatened or injured by persons who may be angered as a result of their enforcement action towards them. It is feared that the personal identifier of their name would make it easier for those disgruntled persons to locate the BSO via Internet and sites such as Canada411 or social media such as Facebook or Twitter, and obtain personal information such as their place of residence or residential telephone number. Prior to the implementation of the Name Tag Policy, it was possible to identify a BSO by filing a formal access to information request to obtain the name of a particular officer, or by filing a formal complaint about an officer's conduct, which would eventually result in the identity of the officer being revealed to the applicant or complainant. However, it is suggested by the respondent that the time involved by the use of such formal processes allowed for a "cooling off" period, so to speak, which made the potential for aggressive behaviour less likely to materialize. As it was explained at the hearing, the concern voiced by BSOs is largely in relation to the "impulsive ill-intended" client, who now has immediate knowledge of a BSO's name, and as a result could rapidly obtain personal information - such as phone number, residential address - about him/her and their family, with potentially criminal intentions.

[8] The employer did not consider that the wearing of a name tag by BSOs presented an unacceptable hazard for them and decided to go forward and implement the Name Tag Policy, effective December 11, 2012. As a result, the CBSA's policy is now aligned with that of other enforcement entities, i.e. the RCMP, the Canadian Forces, the Correctional Service of Canada and the United States Customs and Border Protection, whose front-line officers all wear name tags. Regarding the RCMP, the evidence established that the RCMP has not adopted any formal policy providing for the unlisting of personal phone numbers of members or the reimbursement of costs related to a confidential number.

[9] Following the introduction of the requirement to wear name tags, a number of BSOs in various parts of Canada simultaneously exercised the right to refuse to perform their duties pursuant to section 128 of the Code, on the ground that wearing a name tag exposed them to a "danger" as defined in the Code. The refusals occurred on December 12, 2012, in the following locations: Pearson Airport (Toronto), Windsor Ambassador Bridge, Sarnia Blue Water Bridge, Montreal Marine and Rail, Montreal Airport, Walpole Island crossing (ON), Sombra (ON), Emerson West-Lynne (MB), Calgary Sunridge Office (AB), Coutts (AB). The refusals were investigated by eight (8) different health and safety officers including HSO Danton, who investigated work refusals at the Walpole Island and Sombra crossings.

[10] In all cases, the HSOs found that the wearing of a name tag did <u>not</u> present a danger to employees, meaning that they were to immediately resume their functions and wear the name as instructed to do so by the employer. This was the decision reached by HSO Danton as well, in relation to the Walpole Island and Sombra work sites. As it is reflected in his reports, HSO Danton found that CBSA had policies and procedures in place for the health and safety of the BSOs should they face situations of work place violence and harassment while performing their duties. It was mentioned that BSOs are trained in the CBSA *Workplace Violence Prevention Policy*, including a Duty Firearms Course and Control and Defensive Tactics; are

provided with personal protective equipment including a duty firearm, baton, spray, and bullet proof vest; are trained to deal with difficult citizens; and that Chapter 26 of the Comptrollership Manual specifically deals with abuse, threats, stalking and assaults against an employee and provides advice and guidance to the BSO as to what to do when they are in "threat" situation, with that further enhanced by the availability of the police services. He goes on to refer, appropriately so, to the definition of "danger" in the Code, which is the statutory framework which governed his investigation into the work refusals. At page 15 of his report, HSO Danton states as follows, perhaps hinting at what was to come:

> […]
>
> All the information previously mentioned about the BSO is currently available to the citizens, and the evidence does not suggest the mere presence of a name tag will increase the occurrence of a threat to the health and safety of the Border Services Officers. The employees who related personal incidents to me have not provided sufficient evidence that the wearing of the name tag would have changed any of the previous incidents that they reported. They would still have occurred, yet I am to believe that the name tag would make the situation more of a hazard.
>
> [Underlining added]

[11] All HSOs concluded along the same lines that the wearing of a name tag did not expose the BSOs to a "danger" within the meaning of the Code. I point out that the present decision does not deal with the decisions of no danger issued by health and safety officers in the context of the work refusals mentioned above.

[12] However, of the 12 separate work refusal investigations conducted in 10 different work places, six resulted in a direction under paragraphs 145(1)(*a*) and (*b*) of the Code and citing a contravention of paragraphs 125(1)(*z.03*) of the Code and 19.7(1)(*c*) of the *Canada Occupational Health and Safety Regulations* (COHSR), all related to the requirement to wear a name tag. HSO Danton issued such a direction, the operative portion of which stating that:

> […] *The employer failed to conduct a Hazard Identification and Assessment prior to the implementation of the new Personalized Name Tags Policy. The employer shall evaluate the effectiveness of the hazard prevention program and if necessary revise it whenever new hazard information in respect of a hazard in the workplace becomes available to the employer.*

[13] These directions are similarly-worded and were issued on December 12, 2012, by HSOs Danton (London), Iacobellis and Wells (Toronto) and on December 13, 2012, by HSO Kozubal, who had investigated the Emerson West-Lynne (Manitoba) work refusal. I point out that those directions were not appealed, and do not fall within the purview of the present appeal. I refer to them as contextual circumstances leading up to the issuance of the April 22nd, 2013 direction, which is the subject of the present appeal.

[14] In January 2013, the CBSA responded to the directions in question and provided the respective HSOs who had issued them with a copy of the Job Hazard Assessment (JHA)

conducted for the name tag requirement, under the auspices of the CBSA's Hazard Prevention Program. In conducting the hazard assessment, the employer considered documents such as quarterly security reports, existing procedures and policies dealing with violence prevention, threats and assaults, minutes of the Policy Health and Safety Committee, Q & As developed on the requirement to wear a name tag and a summary of BSO feedback setting out their concerns with the requirement to wear their name on their uniform. The employer noted the concerns expressed by BSOs that a name tag invites threats and harassment to BSOs and their families, and invites potential corruption or intimidation by organized crime towards BSOs.

[15] Turning to the JHA, it identifies the wearing of a name tag as an "individual task" that did not exist at the time of earlier Job Hazard Analysis regarding the functions of a uniformed officer. The employer identified the risk associated with that task as being "threats of violence/harassment by clients" and described it as a physical hazard. The employer then proceeded to rank the hazard by looking at its frequency and likelihood (probability) and its severity (critical). The JHA concludes as follows:

> The wearing of a name tag does not present a hazard to an employee, however the potential hazard that it could create was examined in this assessment. In using the Agency's Hazard Prevention Program tools to perform a hazard assessment on the wearing of name tags, the resultant hazard level identified through the assessment process placed the wearing of name tags at a level C hazard. In accordance with the Hazard Prevention Program, hazards assessed at a level C or D do not require an action plan to be completed however there is still a requirement for those hazards to be monitored and addressed if needed.
> Monitoring of the wearing of name tags as it relates to the safety of employees is accomplished through security reporting. Chapter 26 of the Security Volume of the Comptrollership Manual provides guidance for employees and managers on the steps to take should they encounter a situation of abuse, threats, stalking or assaults against employees. The Agency's Policy Health and Safety Committee monitors these reports on a quarterly basis and any significant trend will be brought to their attention.
>
> [Underlining added]

[16] In order to better understand the grounds raised by the appellant to challenge the validity of the April 22, 2013 direction, I will describe in some detail the process that led HSO Danton to issue his direction. HSO Danton testified at the hearing that a team of HSOs (Southwest and Toronto Districts of the Labour Program of Employment and Social Development Canada (ESDC)) was formed at the time of the work refusals, in order to deal with the issues arising out of the Name Tag Policy. The team was comprised of three of the HSOs who had issued a direction in December 2012, i.e. HSOs Danton, Iacobellis and Wells, as wells as two technical advisors (TA), Ms. Shimano and Mr. Manella, all from the Ontario Region of the Labour Program, where a number of the refusals had taken place. HSO Danton described himself as the senior officer and lead spokesperson for the team and he explained that the nature of the issue, so far as the Job Hazard Assessment was concerned, was clearly of national scope, i.e. the implementation by the employer of a national policy applying to all BSOs irrespective of their place of work.

[17] HSO Danton testified that upon review of the employer's JHA prepared in response to the December 12 directions, the HSO team formed the opinion that the assessment was deficient in identifying preventive measures as required by subsection 19.5(1) of the COHSR. On March 5, 2013, HSO Danton participated in a meeting with members of the Policy Committee as the team's leading officer. HSO Danton testified that he participated alone after acquiescing to the employer's request not to have all three HSOs involved in the matter, participate in the discussions. The purpose of HSO Danton's participation was to inform the Policy Committee of his concerns with respect to the lack of preventive measures in the JHA and also the role of the Policy Committee in the conduct of the JHA. HSO Danton testified that he expressed the view of the HSO team that while the employer had indeed complied with the December 12, 2012 directions by conducting a JHA of the requirement for officers to wear name tags, the analysis was deficient in that a new hazard had been created as reflected in the employer's JHA ranking worksheet - "threats of violence/harassment by clients" - and that the documents submitted did not provide any indication of any preventive measure being considered to address such a hazard, contrary to subsection 19.5(1) of the COHSR.

[18] HSO Danton testified that, at the conclusion of the teleconference, he requested the Co-Chairs of the Policy Committee to provide him, in writing, with clarification related to the newly-created JHA and his concerns that the JHA had not been conducted in accordance with the COHSR, namely the absence of preventive measures and the level of participation of the Policy Committee during the formulation of the document. He asked the Co-Chairs to provide such clarification on or before April 15, 2013. This was confirmed by an email that he sent to the employer and employee Co-Chairs of the Committee, Messrs. Thibodeau and McMichael respectively, which reads in part as follows:

> Further to our teleconference meeting yesterday (5th March 2013) dealing with the JHA which pertains to the introduction of the new CBSA Name Tag for BSO's, you have both committed to provide to my attention your respective positions on two issues: **"Preventative measures" and "participation" as it specifically relates to the newly created JHA submitted previously to this office and is a clarification of that previous submission.**
>
> This office is requesting clarification from both the employer co-chair and the employee co-chair to determine if the JHA that was presented as an attachment dated January 28th 2013 was in compliance with COHS regulation 19, Canada Labour Code Part II at the time of the submission.
>
> […]

[19] On March 26, 2013, Mr. Jeremy Adams, Senior OHS Advisor, at CBSA's headquarters, wrote an email to HSO Danton. The email reads in part as follows:

> […]
>
> When looking at the hazard assessment, during the meeting it did not seem clear to you what preventative measures were in place to address the concerns raised by employees with respect to the wearing of name tags. There may have been a labelling issue that created the problem so I have taken the liberty of highlighting the relevant portions in the hazard

> assessment (attached). The main concern of employees in wearing a name tag was the issue of persons taking action against them outside of the work place. In addressing any concern of this nature, the CBSA has a number of security policies that provide important guidance for employees and management in dealing with and preventing incidents from evolving.
>
> The next issue, and I believe the main reason for your attendance, was the participation of the committee in this change of policy and subsequent hazard assessment. For your convenience, I have put together a timeline below of the consultation that took place throughout the implementation of this change. […]
>
> [Underlining added]

[20] HSO Danton acknowledged receipt of this email and informed Mr. Adams that they were "currently consulting with our investigation team and will reply shortly". After further email exchanges, Mr. Adams reiterated the employer's position in an email dated April 9, 2013, sent to HSOs Danton, Iacobellis and Wells. The email reads in part as follows:

> The first point of clarification deals with preventative measures. It may not have been clear in the conclusions of the hazard assessment of what the Agency has in place with respect to preventative measures. If we look at the hazard assessment work sheet that was completed for the wearing of nametags, according to the Agency's hazard prevention program, the hazard level that was established was determined to be at a level that does not require an additional action plan. That is to say that based on the risks associated with this task, the current protocols or preventative measures in place are sufficient to protect employees. In particular, the CBSA's Policy on Abuse, Threats, Stalking and Assaults Against Employees which I have attached, and highlighted below are the specific preventative measures and what steps an employee should take if presented with a hazard […]
>
> [Underlining added]

[21] HSO Danton testified that as of April 15, 2013, no information was received from the employee Co-Chair of the Policy Committee and that the information provided by the employer side was, in his view, the same information that had previously been provided. He disagreed with the employer's characterization of the policies referred to it as being "preventive measures" within the meaning of section 19.5(1) of the COHSR. In his view and that of his colleagues on the team, the employer's response provided measures which would respond to violent incidents after they have occurred, rather than measures that would assist in preventing the harassment/violence from occurring in the first place. In his opinion, and that of his colleagues, the employer had thus failed to take preventive measures to address the hazard it had itself identified through the JHA, thereby contravening that section.

[22] HSO Danton stated that at that juncture, after internal consultations within the HSO investigation team and with Labour Program Officials at headquarters, he issued the direction under appeal on April 22, 2013. I must assume that the concerns regarding the level of participation by the Policy Committee in the formulation of the JHA must have been addressed

to HSO Danton's and his colleagues' satisfaction, as the direction makes no mention of that aspect of the issue.

[23] The appellant introduced a document (Exhibit A-5) purporting to comply with the direction. The document, still in draft form at the time of the hearing, sets out general tips for personal safety of officers while they are not on duty.

The issue

[24] The issue raised by the present appeal is whether the employer has put in place preventive measures in compliance with paragraph 125(1)(*z.03*) of the Code and subsection 19.5(1) of the COHSR, to address the hazard resulting from the implementation of its Personalized Name Tag Policy.

Submissions of the Parties

Appellant's submissions

[25] After reviewing the salient facts that led to the issuance of the direction under appeal, counsel for the appellant points out that the employer was never made aware that a nationwide joint Southwest/Toronto investigation was under way regarding the implementation of the Name Tag Policy. Despite several email communications, Mr. Adams did not receive any response from HSO Danton as to whether the December 12 direction had been complied with. Counsel first submits that the direction is, as a result, procedurally unfair, without authority and vague. She also points out to the inconsistency of the direction: while HSO Danton mentions that it applies to various work places nationwide, the site number and assignment number appearing on the covering page of the direction only match the work place known as Sombra, the location of one of the two work refusals investigated by HSO Danton.

[26] Counsel for the appellant points out that CBSA was never provided with any notice of a national direction being contemplated or in preparation. Such a failure is contrary to the appellant's procedural rights. The process leading up to the April 22, 2013 direction was procedurally unfair in that the appellant was never given the opportunity to address what issue remained to be answered to the satisfaction of HSO Danton. No investigation report and supporting documentation was ever provided to CBSA beforehand. Counsel stresses that such a breach is even more damaging given HSO Danton's evidence that his direction is a "national direction", with national implications. Counsel argues that a national direction would have required a nationally-coordinated effort to gather evidence, and more than "a paper exercise or a review of an employer's policies" (*Parks Canada* v. *Martin* (Appeals Officer Decision No. 02-009); *CNR* v. *Scully* (Appeals Officer Decision No. 01-002)

[27] Counsel submits that the direction is inconsistent with other HSO findings in similar circumstances and is a denial of the principle of finality (*Sachs* v. *Air Canada*, 2007 FCA 279). A number of other HSOs who had investigated the work refusals did not issue any direction upon their finding of no danger; a few HSOs issued a direction to conduct a Job Hazard Assessment, but only HSO Danton issued a direction on April 22, 2013. In doing so, HSO Danton effectively overturned the decisions of other HSOs and usurped the role of an appeals officer, who is the

only person legally empowered to overturn an HSO's direction (*Total Oilfields Rentals Limited Partnership*, 2011 OHSTC 20). According to counsel, other HSOs had accepted the fact that CBSA had policies in place that mitigated the risk associated with the wearing of the name tag; yet HSO Danton's direction is irreconcilable with those findings.

[28] Counsel for the appellant also submits that HSO Danton is in breach of subsection 145(6) of the Code by not having forwarded a copy of his April 22 direction to all employees whose complaint led to the investigation (*Parks Canada* v. *Martin*, at para. 190).

[29] Counsel for the appellant further submits that the direction is vague and, as HSO Danton never responded to CBSA's requests for clarification, ought to be rescinded on this ground alone, or, in the alternative, be limited to the work place known as Sombra (*CN Rail* v. *Teamsters Rail*, Appeals Officer Decision no. OHSTC-09-028, para. 92; *Maritime Employers Assn* v. *Harvey* (1991) FCJ No. 325 (QL), at page 4; *126-269 Ontario Inc. (Sky Harbour Aircraft*, Appeals Officer Decision No. 06-032, at para. 35; *Cast Terminal* v. *International Longshoremen's Assoc.*, Appeals Officer Decision No. 06-020, at paras 46 and 55).

[30] Counsel for the appellant argues that the direction goes beyond the scope of the Code and the work place and where the work place is concerned, CBSA already has existing policies and procedures. The concern raised by the wearing of the name tag relates to the fear that a disgruntled traveller having seen a BSO's last name on his/her name tag could take steps to get information about the BSO's phone number or place of residence, with an ill-intended purpose. Consequently, the measures that are being suggested all relate to matters falling outside the work place, and over which the employer has no control, such as Canada411, the Bell phone book, Facebook, Twitter, etc. Only danger and conditions which may exist at the place where the employee is required to work can be the subject of an investigation and a direction under the Code (*Luty* v. *Canada*, 2014 FC 15, para. 9; *Bidulka* v. *Canada* (1987) FCJ No. 274 (QL), page 4; *Canada (Revenue)* v. *PSAC*, (1999) CLCRSOD No. 15 (QL), paras 12, 14 and 16; *Dawson* v. *Canada Post*, Appeals Officer Decision No.02-023, paras 3 and 5; *WestCoast Energy Inc.* v. *Canada* (1995) FCJ No. 1584 (QL), para. 31. Counsel points out that where social media is operated or linked to a CBSA work activity, there are already measures in place. She refers to Ms. Likins evidence where she confirmed that she searched the names of the Sombra refusing employees on the Government Electronic Directory Service (GEDS) and none of the names were listed. Likewise, when participating in the "Border Security" TV show, the bargaining agent is consulted and has the opportunity to vet the episodes before they are aired and BSO's names are blacked/blurred out, and their consent is obtained from the production company.

[31] Counsel for the appellant points out that the bargaining agent itself provides the names of BSOs and the port at which they work in on its publications and website. Furthermore, she contrasts Mr. McMichael's claim to be concerned with his safety and that of his family with the fact that he does not himself incur the nominal fee ($2.00) to have his phone number unlisted, which is one of the possible preventive measures identified by HSO Danton in his testimony. The evidence also shows that, contrary to HSO Danton's assertion, the RCMP does not have a policy of reimbursing members wishing to have their telephone number unlisted. As to the relevance of having an address suppression program such as the one referred to in the *Toronto Police Association* case (OLRB), which was reviewed by the employer in the course of conducting its JHA, counsel points out that, contrary to what seems to have been accepted as a

fact before the OLRB, the Ministry of Transportation does not release residential address information to the general public from a licence plate number.

[32] Nevertheless, counsel for the appellant stresses the fact that the CBSA developed general tips for employees regarding their personal safety while off-duty, in an attempt to comply with the direction, as required by the Code. With respect to the work place itself, counsel for the employer argues that the CBSA has procedures designed to prevent BSOs from being harmed should someone try to carry out a threat and when a threat occurs, there is another layer of measures to respond on a case-by-case basis:

- *Policy on the Prevention of Violence in the Workplace*
- *Chapter 27 of the Comptrollership Manual: Internal Investigation into Alleged or Suspected Employee Misconduct*
- Critical Incident and *Stress* Management
- Building *design* which include but is not limited to restricted access, controlled access/card access areas; facility design; security guard and security zones; key pad locks; emergency plans; security screening for employees and contractors
- Training in: Duty Firearms Course, Control and Defensive Tactics, Violence Prevention in the Work place Awareness Training, Verbally de-escalating of belligerent traveller, security *Awareness* Training (On-line module), Arming Procedures
- Wearing of a vast range of personal protective equipment (vest, OC spray, baton, handcuffs, duty firearm)
- Alarms known as “PASS” radio which acts as a panic button and when pressed automatically dials the police
- The doubling up initiative which mandates that no BSO works alone
- Issuance of Intelligence or Security Alerts for specific concerns that may arise and for employees to look out for or avoid
- Exchange of information through portable radios and database information so that a traveller who may be of concern can be flagged
- The ability of the BSO to refer a traveller to secondary examination, to contact their supervisor, other BSOs, call the police or stand down/disengage
- The submission of a Security Incident Report, within 24 hours of a critical incident, which are assessed, responded to and monitored on a quarterly basis by the Policy Health and Safety Committee, each case being assessed on its own merit.
- *Chapter 15* of *the Comptrollership Manual: Reporting of Security Incidents*
- *Chapter 26 of the Comptrollership Manual: Abuse, Threats, Stalking and Assaults against Employees*

[33] The combination of the above measures has already been found to mitigate the mere possibility of a spontaneous attack against an officer by a violent traveller (*Martin-Ivie* v. *CBSA*, 2011 OHSTC 6, para. 113)

[34] Counsel for the appellant further submits that the bargaining agent is using the present appeal process as an attempt to address the issue of cell phones/electronic recording device used by travellers at ports of entry, which is an outstanding labour relations issue between the parties. Counsel stresses that the Code is not meant to provide a forum to debate general labour relations issues (*Fletcher* v. *Canada,* 2002 FCA 424). That particular issue was also investigated by another HSO, who issued a direction in that respect and that matter should not be allowed to piggyback onto HSO Danton's April 22, 2013 direction and inappropriately expand the scope of the direction (*Burchill* v. *Canada (Attorney General),* (1981) 1 FC 109, para. 5; *Schneidman* v. *Canada (CRA),* 2007 FCA 192).

[35] Counsel for the appellant concludes by stating that the evidence does not establish that name tags result in any increased risk in the work place. No specific incident related to the wearing of a name tag was raised, since the implementation of the policy. As acknowledged by HSO Danton, even before name tags became mandatory, the public could obtain the name of BSOs through various means such as an Access to Information request, or when BSOs testify in court. In other words, the nature of BSO's duties is such that they do not work in anonymity. There are other ways, beyond the CBSA's control, that employee names may be released to the public, whether it be from the bargaining agent website, an employee's Facebook or Twitter account, or other websites such as the Tribunal and other court and administrative bodies. The Tribunal has previously concluded that the obligation of an employer to ensure the health and safety of its employees is not based on an unattainable standard of absolute perfection, but on a reasonable basis (*Verville* v. *Canada (Correctional Service),* (2002) CLCAOD No. 12 (QL), paras 18-20.

[36] Counsel for the appellant accordingly seeks an order rescinding the April 22, 2013 direction.

Respondent's submissions

[37] The respondent's representative replied to the appellant's submissions as follows. He submits that it was evident as events developed that an investigation was taking place. The appellant cannot claim that it was not aware of the issues when all the discussions that followed the Job Hazard Assessment turned on the position that the appellant took with respect to the need for preventive measures/an action plan. The discussions at the March 5, 2013 Policy Committee meeting at which HSO Danton participated were precisely on that point. Subsequent communications clearly establish that an investigation was continuing regarding the adequacy of the preventive measures.

[38] The respondent's representative submits that the direction is clear, in that it identifies the employer's violation of the Code and the steps required to correct it. Furthermore, HSO Danton was well within his rights to issue a national direction in the circumstances of the present case: the appellant's policy was introduced nationally and applies to all BSOs. All the policies to which the employer referred had a national scope. The investigation team was comprised of 3 of the 4 HSOs who had issued a direction regarding the need for a JHA, and the direction was sent to the appellant's national headquarters office in Ottawa. The respondent's representative submits that HSO Danton had the power to issue such a direction, as long as the fact can support

it, which they do. What is at issue here is not the assessment of whether a danger exists in a specific work location, but a hazard applying generally (*CN – North America, Laurentian District and United Transportation Union* (1995) CLCRSOD No. 11, at paras 12-24; *Parks Canada Agency* v. *Martin* (supra). The fact that the direction showed the Sombra site number on it is at worst a small error which does not invalidate the direction (*D&W Forwarder and Stubley*, 2006 CLCAOD No. 49). In the final analysis, even if it is concluded that HSO Danton did not conduct a proper investigation or acted in a manner that breached the appellant's procedural rights, it is well established that the present hearing is a *de novo* hearing which provides an opportunity to the parties to cure any deficiencies in the investigation process (*Campbell Brothers Movers Ltd. (Re)*, 2011 LNOHSTC 26, para. 30).

[39] The respondent's representative also disagrees with the appellant's contention that in issuing his direction, HSO Danton varied the direction of other HSOs. The representative submits that HSO Danton and the investigation team came to their conclusion as a result of the work refusals they investigated, and on the basis of the facts and the evidence before them (*DP World (Canada) Inc.* v. *International Longshore and Wharehouse Union, Local 500*, 2011 LNOHSTC 17, para. 19). Furthermore, he notes that the decisions of other HSOs were made under a finding of "no danger" and were not conducted under the lens of preventative measures.

[40] The respondent's representative submits that the introduction of the requirement to wear a name tag does constitute a hazard. In the JHA prepared by the employer to comply with the December 12, 2012 direction, the appellant itself identified that there was a hazard associated with wearing a name tag and correctly pointed out that there was a risk of threats of violence and harassment by travellers for BSOs who deal with the public. The representative refers to the documents introduced in evidence whereby the employer warns its employees of the risk of identifying themselves on social networking websites (Facebook, MySpace), or against disclosing their home phone number and address. He also referred to a number of incidents which illustrate the risk associated with being identified by the name tag. As an example, he referred to the "rap group incident" on December 16, 2010, where members of a rap group were denied entry to Canada at the Pearson Airport. One of the members of the group took a picture of the BSO who had denied them entry and immediately posted her picture on Twitter with a caption stating that "this is the lady who f… up the show". This "tweet" generated several derogatory and threatening comments directed against the BSO on Twitter. This incident occurred prior to the issuance of the name tag; however, this shows that the BSO's last name could have appeared in the picture had she been wearing a name tag, thereby providing additional information that could be used to identify or locate her. The representative refers to other incidents where travellers who were angered by BSO's enforcement actions displayed aggressive behaviour and sought to obtain more personal information on BSOs in order to locate them.

[41] The respondent's representative points out that prior to the introduction of the name tag, if a traveller who wanted to obtain a BSO's name, the BSO would have been required to disclose his name through the application process. But this would have typically given information to the appellant about the person who was seeking the information. Now, travellers have more direct and immediate access to this information, which increases the chances of further identification with the intent of harassing, stalking or threatening BSOs.

[42] The respondent's representative further submits that the dictionary definition of "hazard", being "a source of danger", should apply here. When contrasted with the definition of "danger" in the Code, he argues that the threshold for a hazard to exist is lower than the notion of "danger" as defined. The evidence shows that the appellant in its JHA was of the opinion that the name tags did constitute a hazard, that it took the position that disclosing one's employment relationship with the CBSA could be a potential source of risk and that a person's last name is a piece of information that could be used to obtain additional information on that person, such as the place of residence, or the home phone number (*City of Winnipeg and Police Association*, 1986 CLB 9174; *Tench and Canada (National Defence, Maritime Forces Atlantic),* 2009 LNOHSTC 1, para. 24; *Bidulka* v. *Canada (Treasury Board* (supra).

[43] The respondent's representative reviewed the existing policies referred to by the employer and argues that they are not preventive measures. They provide for after-the-fact guidance/procedures once an incident has occurred. They are reactive. He refers to the decision rendered in the *Toronto Police Service* case (OLRB) and points out that in spite of the fact that wearing a name tag was found not to increase the risk of threat or assault, which remained at a low possibility, the employer in that case had taken preventive steps and provided suggestions and precautions to reduce the risk and harm to its police officers and their families. He disagreed with the appellant's suggestion that HSO Danton's direction amounts to submitting the employer to an absolute standard of perfection. Clearly in this case, the respondent brought evidence that shows that the name tag facilitates the ability to locate, harass and stalk BSOs and that none of the measures in place currently aim to prevent this new hazard. The representative submits that the personal safety tips prepared by the employer to comply with the direction fall short of being appropriate preventive measures.

[44] The representative submits further that the concerns raised with respect to the risk of harassment related to the work place, contrary to the appellant's contention. He argues that it is illogical to conclude that an employer does not have an obligation to protect an employee in respect of a task he or she is required to perform simply because the hazard that is related to the work activity can occur outside the work place (*Bidulka* (supra), Thurlow J.'s dissenting opinion); *Pearce* v. *Jazz Air Limited Partnership* (2011 OHSTC 14, para. 24). He stresses that an employee's professional life can spill into his/her personal life, and this has led tribunals to grant protection to employees even in cases where harassment occurs outside of the work place (*Perez-Moreno* v. *Kulczycki*, [2013] OHRTD No. 1674; *C.U.* v. *Blencowe* [2013] OHRTD No. 1080). The employer must provide its employees with the tools and knowledge necessary to protect themselves from harassment, threats, stalking and assault. This would include imparting BSOs with the tools needed to protect their identities. Familiarity with privacy settings and other privacy tools can vary from one BSO to another and this is why preventive measures are needed.

[45] The respondent's representative concludes by seeking that the direction under appeal be confirmed.

Appellant's reply

[46] In reply, counsel for the appellant reiterated that the CBSA was never formally advised that an investigation was being conducted by a team of HSOs and technical advisors of the Labour Program and the purpose of HSO Danton's communications was not clear to CBSA.

Furthermore, there was no evidence that 99 Metcalfe St. in Ottawa, where the direction was forwarded, was CBSA's national headquarters.

[47] Counsel for the appellant also reiterated the fact that HSO Danton only had authority to investigate the Walpole Island and Sombra work places, and notes that HSOs Iacobellis and Wells did not issue a direction similar to the April 22, 2013 direction. If it is found that HSO Danton's direction encompasses any direction that HSOs Iacobellis and Wells may have issued, it means that they allowed their conclusions for the work places that respectively investigated to be bound by the decision of another, which is impermissible, as established by the case law cited by the respondent. Counsel reiterates the argument that in issuing his direction of April 22, 2013, HSO Danton has set aside all decisions by other HSOs investigating the same circumstances in various work places, all of which is contrary to the Federal Court of Appeal's decision in *Sachs*.

[48] Counsel for the appellant further replies that the respondent's characterization of the measures set out in the various CBSA policies as being reactive, is not a fair description. Measures such as reporting policies constitute an additional layer of measures. They may react in the sense that should something happen despite all the existing preventive measures in place, then there are other measures to be invoked. However they are not merely reactive. Those subsequent layers of measures add to prevention, as they effectively prevent further incident.

[49] Counsel for the appellant goes on and distinguishes the *CU* v. *Blencowe* case cited by the respondent on the basis that it did not consider or apply the wording under the *Canada Labour Code*, and was based on a specific connection to the work place and on a finding that the harassment had occurred primarily at work. Likewise, the *Perez-Moreno* decision is also a Human Rights Tribunal case and was based on facts that were not contested. As to the *Tench* and *Pearce* decisions, counsel submits that the alleged harassment occurred while the employee was at work, unlike the concern stated in present case.

Analysis

[50] The basic substantive issue raised by the present appeal is whether the employer's Job Hazard Assessment of the new requirement for BSOs to wear a name tag satisfied the requirements of paragraph 125(1)(*z.03*) of the Code and subsection 19.5(1) of the COHSR.

> 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,
>
> (*z.03*) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

> 19.5 (1) The employer shall, in order to address identified and assessed hazards, including ergonomics-related hazards, take preventive measures to address the assessed hazard in the following order of priority:
>
> (*a*) the elimination of the hazard, including by way of engineering controls which may involve mechanical aids, equipment design or redesign that take into account the physical attributes of the employee;
>
> (*b*) the reduction of the hazard, including isolating it;
>
> (*c*) the provision of personal protective equipment, clothing, devices or materials; and
>
> (*d*) administrative procedures, such as the management of hazard exposure and recovery periods and the management of work patterns and methods.
>
> [Underlining added]

[51] Before addressing that central question however, I must deal with several collateral lines of attack raised by the appellant against the direction, namely related to the process followed by HSO Danton and that ought to, in the appellant's view, invalidate the direction. I will deal with these matters first, in the same order as they were presented by counsel for the appellant in her submissions.

CBSA's procedural rights have been infringed

[52] First, the employer contends that it was unaware that an investigation was being conducted by HSO Danton and that his failure to notify CBSA of the investigation violated the employer's fundamental procedural rights. Such a failure to notify the employer that a team of HSOs was conducting an investigation is exacerbated by the fact that such investigation led to the issuance of a "national direction", which the employer only heard about when the direction was served on it. The appellant submits that this constitutes sufficient ground to rescind the direction.

[53] I do not subscribe to that argument. The evidence presented at the hearing has established that there were several communications, mostly by email, between HSO Danton and, among other persons, Mr. Jeremy Adams, who is a senior OHS Advisor with CBSA's headquarters office in Ottawa, regarding the question of whether the employer had provided preventive measures to address the hazard associated with the wearing of name tags, as reflected in the JHA. Three of the four directions issued on December 12, 2012, were issued by officers of the same office, after the officers had dealt with work refusals related to the name tag issue. HSO Danton testified at the hearing that his office set up a team comprising himself, HSOs Iacobellis and Wells, and two technical advisors, with the knowledge and support of his superiors. He stated that he was communicating with the employer as the officer among that group who had the lead on this file. In early March, there were a few exchanges between HSO Danton and Mr. Adams regarding the possible participation, by teleconference, of the HSOs involved in the review of the JHA on name tags, to a meeting of the employer's Policy Committee. The issue of all three HSOs participating appeared to create some discomfort and further to discussions with

Mr. Adams, HSO Danton was eventually the only participant from the Labour Program at the March 5, 2013 meeting. I also note that Mr. Adams sent an email dated April 9, 2013, to all three HSOs involved with this matter at that point, which tells me that not only the employer knew that the adequacy of its JHA for the name tag requirement was still under review, but that it was conducted in a concerted manner by the health and safety officers from the London and Toronto area who had pursued the matter after the December 12, 2012 work refusals.

[54] I also note that in his chronology of activities (Tab 24 of Exhibit A-1), HSO Danton makes reference to an email that he sent to Mr. Adams acknowledging receipt of his March 26, 2013 email, and in which he indicated that "we are currently consulting with our investigation team and will reply shortly…". I am persuaded that the employer understood at that point that the file regarding the JHA and preventive measures, was not closed from the Labour Program's perspective, and that there were outstanding issues that were not yet resolved which HSO Danton and his colleagues continued to examine. Mr. Adams' subsequent email communications (April 9 and April 15, 2013) inquiring into where things were at, certainly support my conclusion. I point out that the thrust of those exchanges related to the implementation of the Name Tag Policy in general, across the CBSA, and was not confined to specific work places such as Sombra or Walpole Island. Finally, HSO Danton explained why there were no further communications with the employer in April, as he felt that the employer was not providing new documentation or elements that could be characterized, in HSO Danton and his colleagues' view, as preventive measures.

[55] In light of all the above, I conclude that the employer was not blindsided or otherwise lulled into a false sense of security by HSO Danton's conduct, was cognizant of the fact that the examination of the JHA relating to the introduction of the name tag generally was continuing, and that the issue of the absence of preventive measures was central to the HSOs' concern. I see no procedural irregularity that may have prevented the employer form fully stating its position or presenting evidence supporting its view that it was acting in full compliance with the regulations. It seems to me that the litigious question was clear in everyone's mind. What is perhaps less evident is the type of measures that would satisfy HSO Danton's understanding of what the preventive measures ought to be with respect to the name tag issue; but that question has more to do with the substantive issue, that I will address further in these reasons.

[56] As the respondent's representative submitted, my task is not to review the investigation process followed by the health and safety officer that led him to conclude that, in that officer's opinion, a contravention of the Code had occurred. My task is to determine whether the HSO was correct in concluding that the employer contravened the Code, on the basis of the evidence presented before me. The point being that if, through a faulty or otherwise inappropriate investigation, a party's right to present evidence or argument has been curtailed, chances are that the direction would be vulnerable as it would likely be founded on an incomplete or arbitrary factual basis. Any such deficiency in that process may be cured by the hearing before the appeals officer, which is a *de novo* process, in the course of which all parties have the opportunity to present evidence and argument.

No power to issue a "national direction"

[57] The appellant also submits that HSO Danton was not empowered by the Code to issue a "national direction" and argues that any direction that HSO Danton could issue in the circumstances presented in evidence could only apply to the two work sites where he conducted his investigation into the work refusals of December 12, 2012.

[58] Again, I do not subscribe to that argument. The Code confers on health and safety officers a number of investigation and enforcement powers, including the power to issue a direction when the health and safety officer is of the opinion that a contravention of the Code and its Regulations has occurred, and order that such contravention be corrected. In the present case, HSO Danton's direction is issued pursuant to subsection 145(1) of the Code, which reads as follows:

> 145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to
>
> (*a*) terminate the contravention within the time that the officer may specify; and
>
> (*b*) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

[59] The Code does not prescribe the conditions, circumstances or context that may give rise to the issuance of such a direction, other than the health and safety officer forming an opinion that the Code has been contravened. This can occur in the context of a routine inspection, a complaint made by an employee, a work refusal, an investigation into a fatality, in short any situation which causes the officer to attend a work place or become involved with an employer regarding its health and safety practices or policies. The Code does not make a distinction between a "local" or "national" direction. The scope of a direction is in my view entirely dependent on the nature of the contravention and the factual circumstances which cause the HSO to take such enforcement action. It may be that in most instances the scope will be limited to the condition prevailing at a particular work place, especially when an HSO is dealing with an allegation that a condition in a work place presents a danger to an employee (*Parks Canada Agency* v. *Martin*). However, when the contravention relates to a more general legislative requirement, which applies to the employer and employees generally, I see nothing in the Code that prevents a direction from having a broad scope, or a "national" scope when the employer involved is a national employer. In my view, this is precisely the case with the direction under appeal.

[60] HSO Danton and a number of his colleagues were first called upon to examine the name tag issue in the context of several work refusals exercised simultaneously in many regions of the country. All HSOs decided, after investigating the facts specific to each refusal in their proper statutory context, that the condition – wearing a name tag – did not present a danger to employees, within the meaning of the Code. In that process however, HSO Danton and three

other colleagues noted what appeared to them as a lacuna in the process followed by the employer prior to implementing the name tag requirement, and directions were issued requiring the employer to conduct a Job Hazard Assessment for this new work requirement. The evidence establishes that such an exercise was coordinated nationally, under Mr. Adams' direction. It is clear to me that from that point on, the issue related to the wearing of name tags was one of general application for BSOs, irrespective of where they worked, and was dealt with as such by the employer. The requirement to wear a name tag applies generally to all employees and was developed, discussed and implemented on a national basis. The debate around the preventive measures clearly turned on whether the employer's policies, applicable generally to all employees, met the regulatory standard. I do not consider that the April 22, 2013 direction constitutes an undue extrapolation of a purely local condition to all of the employer's operations. In my opinion, the issuance of a "national direction", i.e. a direction of general application to the CBSA, in the circumstances described above is not, by any means, at odds with the protection scheme provided under the Code and the enforcement powers that subsection 145(1) confers on health and safety officers.

[61] In the same vein, the appellant also submits that the April 22, 2013 direction bears the same reference number as the "no danger" decision and the December 12, 2012 direction for the Sombra work place, and as a result, is not capable of having a national application. It seems to me that this is a technicality that has no consequence on the validity of the direction. As mentioned above, the questions examined after December 12, 2012, were not contained to the Sombra crossing, and I am persuaded that the employer understood this to be the case.

Failure to forward copy of the direction as required by subsection 145(6)

[62] Thirdly, the appellant argues that HSO Danton failed to comply with subsection 145(6) of the Code because he did not send a copy of his April 22, 2013 direction to all "refusing employees" whose complaint led to the investigation, as required by that provision, and that such an irregularity is fatal to the direction.

[63] Subsection 145(6) reads as follows:

> 145.(6) If a health and safety officer issues a direction under subsection (1), (2) or (2.1) or makes a report referred to in subsection (5) in respect of an investigation made by the officer pursuant to a complaint, the officer shall immediately give a copy of the direction or report to each person, if any, whose complaint led to the investigation.
>
> [Underlining added]

[64] In my view, the obligation set out in subsection 145(6) does not arise in the present case. In my opinion, HSO Danton did not issue his direction further to a complaint made by a person, within the meaning of subsection 145(6). I have already stated that a health and safety officer may exercise the power to issue directions against contraventions of the Code in a variety of contexts - routine inspection, work refusals, etc. -. In this instance, HSO Danton first investigated a work refusal made pursuant to section 128 by employees who claimed that the wearing of a name tag presented a danger to them. He made a ruling of "no danger", did not issue a direction under subsection 145(2) and that decision disposed of the work refusal issue.

[65] However, that intervention caused him to have concerns with the manner in which the employer had implemented that new work requirement to all of its BSOs across Canada. This concern, which is distinct from the issue of danger that he had dealt with, caused him to issue a direction on December 12, 2012, ordering the CBSA to remedy the contravention and conduct a JHA, and a further direction on April 22, 2013, based on his opinion that the JHA was deficient insofar as the preventive measures were concerned. In my view, those two directions are not related to "a complaint […] leading to the investigation" which resulted in the direction under appeal, as contemplated in subsection 145(6). The wording of that provision clearly envisages the possibility of a direction being issued without there necessarily being a complaint made to a health and safety officer, and I find this to be the situation here.

[66] I will add that even if subsection 145(6) had applied and HSO Danton had been legally required to provide all refusing employees with a copy of his direction, his failure to do so does not nullify the direction, as such transmittal is not a condition going to the validity of the direction, in my opinion. Furthermore, if anyone had a legal interest to complain about this contravention, it would be the refusing employees, not the employer.

The direction unlawfully varies decisions of other HSOs

[67] Fourthly, the appellant argues that the direction effectively varies the decisions of other HSOs involved in the same matter, a power that only appeals officers have under the Code. The appellant's rationale is that since many HSOs involved with the name tag issue decided not to issue a direction such as the April 22, 2013 direction, that direction overrules such exercise of their discretion.

[68] I am not persuaded by this argument. I fail to see how the April 22, 2013 direction is capable of varying what is in fact an absence of decision. The appellant relies on the *Sachs* decision to support its reasoning. I read that decision to stand for the principle that an appeals officer may only be seized of an appeal of a direction under subsection 146(1), and that the decision of an HSO not to issue a direction, but to rely on a voluntary compliance approach, is not appealable. This judgment does not support the employer's thesis, in my view, quite to the contrary.

[69] In the present case, four HSOs have issued directions related to the employer's failure to conduct a JHA, after dismissing the work refusal they had investigated. HSO Danton testified that three of the four officers constituted an investigation team to follow up on this matter which presented, in their view, a national perspective. The fact that other HSOs involved with the name tag matter did not pursue the examination of the question is immaterial to the fact that HSO Danton and his colleagues did. I fail to see how the April 22, 2013 direction can be said to vary decisions/directions of other HSOs where there are none to vary. The exercise of discretion not to issue a direction is not a decision. The validity of a direction must be determined on the basis of the relevant facts that have led to its issuance. This is especially true in our legal context under the Code where directions issued by health and safety officers and decisions rendered by appeals officers have no coercive or legally binding effect on future HSO decisions in the enforcement of the Code (see: *DP World (Canada) Inc.* v. *International Longshore and Wharehouse Union, Local 500*).

[70] The appellant also suggests that the direction under appeal is contrary to the findings of many HSOs in various regions of the country, - including HSO Danton's own finding - and unlawfully supersedes those findings. I do not agree that this is the case. The findings of "no danger" made by HSOs and the rationale supporting them are all in relation to the question of whether the wearing of a name tag presented a danger to the BSOs, which is determined on the basis of a different legal test involving the definition of "danger" and sections 128 and 129 of the Code. Those sections do not come into play in the present appeal.

[71] I now turn to the heart of the issue, whether the direction under appeal is well-founded and whether the appellant contravened the Code by not taking preventive measures to address the hazard associated with the requirement for BSOs to wear a name tag, as required by paragraph 125(1)(*z.03*) and subsection 19.5(1) of the COHSR.

[72] For the reasons that follow, I conclude that the direction is well-founded and should be confirmed.

[73] The appellant first argues that the direction is vague and imprecise to the point where its implementation must be based on speculation as to its content. In my view, the direction is not vague or imprecise. The evidence establishes that the heart of the issue, in HSO Danton and his colleagues' view, was that the employer had not taken preventive measures to address the hazard. The employer was, and still is, of the view that its existing policies constitute appropriate preventive measures and are sufficient to address the hazard in question. The words "preventive measures" are not defined and are not prescribed by subsection 19.5(1) of the COHSR. The sufficiency of preventive measures, as regards to the requirements of that section, must be assessed on the facts of each case. Providing for preventive measures is an obligation that falls on the employer under the Code and it would be inappropriate for an HSO to be prescriptive in a direction by defining what preventive measures ought to be taken in order to address the hazard. It is the employer's duty and that duty must be carried out in consultation with its Policy Committee. Examples of preventive measures were referred to during the course of the investigation and at the hearing of the appeal. In my view, the action expected from the employer to comply with the direction, taken in its context and in relation to the hazard identified through the JHA, is not a matter of speculation and I dismiss the appellant's argument that the direction should be rescinded on that basis.

[74] The central question then is whether the employer has indeed taken preventive measures to address the hazard associated with the name tag. In January 2013, the employer conducted a JHA in relation to the name tag requirement, in response to several directions issued in December 2012 after HSOs concluded that CBSA had not done so prior to the implementation of its policy. The employer defines the hazard associated to the name tag in the following terms: "Threats of violence/harassment by clients". The conclusion reached by the employer reads as follows:

> The wearing of a name tag does not present a hazard to an employee, however the potential hazard that it could create was examined in this assessment. In using the Agency's Hazard Prevention Program, tools to perform a hazard assessment on the wearing of name tags, the resultant hazard level identified through the assessment process placed the wearing of name tags at a level C hazard. In accordance with the Hazard

> Prevention Program, hazards assessed at a level C or D do not require an action plan to be completed however there is still a requirement for those hazards to be monitored and addressed if needed.
>
> [Underlining added]

[75] Under the CBSA's Hazard Prevention Program, hazards ranked at level "C" are described as having a relatively low level of severity and it is stated that "this group should never be ignored but are not a priority". Yet, I note that the JHA Worksheet describes the severity of the hazard as "critical", albeit with low frequency, likelihood or probability. In contrast, hazards ranked at levels "A" or "B" under the Program require that "an action plan should be developed in order to implement appropriate preventive measures" (underlining added). Consequently, when the employer concludes that the identified hazard "does not require an action plan", other than security reports monitoring, this statement in effect means that CBSA does not see the necessity of taking preventive measures under the Program.

[76] I share the same concern with this approach as HSO Danton, as subsection 19.5(1) of the COHSR does not make the kind of distinction that the employer is making. Once the employer has identified a hazard associated with a particular task or work requirement, it cannot simply exonerate itself from considering preventive measures to address that hazard, on the basis of its own ranking system. This approach, in my view, falls short of the obligation prescribed by subsection 19.5(1) of the COHSR. Preventive measures must be taken once a hazard is identified. This obligation exists in a statutory context where the prevention of accidents and injury is the paramount objective of the Code, and the preventive measures must be designed to eliminate the hazard or, if not possible to do so, reduce it, in that order of priority, as reflected in sections 122.1 and 122.2 of the Code:

> 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.
>
> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.
>
> [Underlining added]

[77] The requirements of subsection 19.5(1) are to the same effect. The evidence presented at the hearing elaborated on the nature of the hazard associated with the wearing of a name tag, as compared to the former numeric badge identifier. What is of concern here is not so much the potential for violence/harassment while the BSO is at work, in the performance of his/her duties. The evidence is clear that the name tag does not in itself increase the risk of assault or other violent conduct from disgruntled travellers on BSOs while they are on duty. The employer has in place many policies and measures, that I have set out at length in the appellant's submissions, which provide for a secure work environment and protection for BSOs. The "new" hazard created by the name tag is rather that the family name now pinned or "velcroed" to the BSO's uniform allows a person who may be angered by the BSO's enforcement action, to quickly and surreptitiously obtain, with the assistance of modern technology and the Internet, his/her personal

information such as residential phone number or home address, with criminal intentions against the BSO and/or his family. That is the hazard directly resulting from the name tag, over and above the risk, in more general terms, of being harassed or assaulted by a disgruntled client. Hence, personal identification of the BSO by his/her name tag renders them more vulnerable to the occurrence of those situations. As the employer itself assessed it, the potential or likelihood for such a hazard to materialize may be low, however the severity may be critical. A few examples were referred to in evidence, where prior to the implementation of the name tag policy, a disgruntled traveller exhibiting aggressive behaviour has attempted to obtain names and addresses of BSOs, thankfully in vain. The evidence also highlighted an incident involving a rap group at Pearson airport, and it seems clear, as Mr. Adams recognized in his testimony, that had the name of the BSO also appeared on the picture posted on Twitter, it would have resulted in an additional level of stress for the officer involved, in light of the derogatory and threatening comments that the posting generated against her. Also, the evidence related to the preventive precautions taken regarding BSOs' participation in a "Border Security" TV show, namely obtaining their consent or blocking/blurring their names before airing the program, is an indication that being identified is indeed a genuine concern for BSOs, and recognized as such by the employer.

[78] These examples may seem anecdotal, but they aptly illustrate in my view the nature of the "new" hazard directly resulting from the requirement to wear name tags. The employer points out that it was possible to obtain the name of a BSO before the introduction of the policy and in that sense nothing has really changed. The employer also presented evidence that BSOs' names appear in publications of the union. In my view, the name tag changes that context. Where it was always possible to obtain the name of a BSO through processes such as access to information requests, or court or quasi-judicial documents, those processes take time, allowing for a "cooling off" period after the action which may have triggered the aggressive reaction, and in addition, the originator of the request had to identify himself/herself. As Mr. McMichael reiterated in his testimony, the concern of employees, beyond the existing possibility of being subject to harassment or assault that existed before the name tag was introduced, is in relation to the "impulsive disgruntled traveller" who is now, with the combination of the family name, currently available communication technology, the Internet and social media, able to have quick access, in complete anonymity, to personal information of a BSO, with possible criminal intentions in mind. In other words, I believe that the name tag has created a different kind of hazard in the work environment, which subsection 19.5(1) of the COHSR requires the employer to address and which, in my view, it has failed to do.

[79] The employer has cited a number of existing policies, procedures and measures that it already has in place that are designed to prevent injury caused by violent behaviour, stalking or harassment, and that it has characterized as preventive measures. It is not necessary to go into a detailed analysis of those policies which, as recognized by all, do provide an important framework of protection for employees. However, I agree with the respondent that the character of those policies, procedures and measures is essentially reactive in nature, in that they are triggered by the occurrence of an event. The measures and policies in question all pre-date the introduction of the name tags. They simply do not address the specific risk identified with the wearing of name tags, as I have described it above. Of course, they have a preventive dimension in that they are aimed at preventing that an incident re-occurs or escalates, but in my opinion, they do not eliminate the hazard or reduce the likelihood of the hazard occurring in the first

place. While the potential for a BSO to be stalked, harassed or assaulted may be low, these situations are not mere speculation and the hazard must be addressed by taking preventive measures, as required by subsection 19.5(1) of the COHSR. Accordingly, the question at issue here is not the sufficiency of preventive measures taken by the employer in accordance with subsection 19.5(1) of the COHSR, but, as HSO Danton put it in his testimony, the absence of such measures.

[80] It is appropriate to stress that the obligation prescribed by subsection 19.5(1) of the COHSR directly derives from the fundamental objective of the Code which is to prevent work-related accidents or injuries from occurring. The legislator expressly states that the first order of the employer's obligation is to eliminate the hazard altogether, which requires an examination of the source of the hazard and an assessment as to whether it is possible to eradicate the hazard. It is only when the hazard cannot be eliminated without eliminating the very essence of the function carried out by the employee, that the employer may resort to alternative preventive measures aimed at reducing the hazard, providing protective equipment or developing administrative measures, as stated in subsection 19.5(1). No evidence was presented that the employer addressed that first order of priority in this case. The demonstration that it is not possible to eliminate the hazard, as dictated by that subsection, must be laid out in the hazard analysis itself before other measures may be contemplated. This is the very purpose of a job hazard assessment. Stating that no preventive measures are necessary will simply not do it.

[81] The appellant also submits that it has taken all necessary preventive measures to address employee safety over which it has control, i.e. in a work place environment, as contemplated by sections 124 and 125 of the Code, which are concerned with hazards occurring at the work place. The employer stresses that the types of additional measures that HSO Danton and the respondent are seeking would relate to such matters as Bell Canada or Canada411, Facebook, Twitter, clearly go beyond the work place. These are all activities over which CBSA has no control, and they are not "work places controlled by the employer". As a result, the appellant submits that they do not fall under the mandate of Part II of the Code.

[82] I do not agree with the appellant's contention. The hazard that was identified through the JHA is indisputably linked with a work requirement for BSOs, i.e. wearing a name tag while on duty. The fact that he hazard may materialize outside of the work place through means over which the employer has no control, does not make the hazard, or the preventive measures to guard against it, unrelated to the work place. If a BSO is identified in his work place as a result of wearing his/her name tag and then stalked, harassed or assaulted outside the work place by an unruly client, it will most likely be as a result of enforcement action the BSO has taken against that person.

[83] The appellant cited the Federal Court of Appeal's decision in *Bidulka* in support of its argument. In that case, the question at issue was whether a work refusal under sections 85 and 86 (now sections 128 and 129) of the Code was permissible against the alleged danger presented by the crossing of a picket line before attending the work place, and the fear of retaliation and assault by picketers outside of the work place. Thus the central issue in that case was whether the employees could invoke the work refusal provisions when they were not "at work" as specified in those sections of the Code, and where the apprehended danger was not, strictly speaking, "a condition existing at the place of work". Clearly, the issue in that case did not involve the same

obligations and statutory requirements as those at issue in this appeal and is distinguishable for that reason.

[84] The employer also cited *Canada (Revenue) and PSAC* in support of its argument that events or hazards occurring outside of work are not covered by Part II of the Code. The issue in that case was whether the employer had an obligation, under the general provision set out in section 124 of the Code, to protect employees who were parked along the shoulder of the road as a result of picketing activity in front of its premises, and causing them to be exposed to traffic hazards. The appeals officer concluded that no such obligation arose, as it was not established that the hazard resulted from a direction or work requirement of the employer; in other words there was no nexus established with the employees' duties. Such a link is, in my opinion, clearly established in the present case.

[85] I also note that *Chapter 26 of the Comptrollership Manual: Abuse, Threat, Stalking and Assaults Against Employees* which the employer cites in its submissions, does contemplate events occurring outside the work place, as well as those that may involve an employee's family members, and provides measures to respond to such events, albeit once they have occurred. I reiterate that the purpose of the Code, as set out in section 122.1, is to prevent accidents and injury to health in the course of, but also arising out of and linked with, employment. This is unquestionably the case with the hazard resulting directly from wearing a name identifier.

[86] The employer contends that the direction subjects the CBSA to an unattainable standard of perfection. Of course, it may not be possible to completely eradicate a hazard associated with unpredictable and unlawful human behaviour. Be it as it may, I reiterate that the increased vulnerability of BSOs and their family to being intimidated, harassed or assaulted as a consequence of the greater ease of access to their personal information is the direct consequence of the requirement by the employer that they wear a name tag. As a result, the preventive measures in this matter ought to be geared towards first eliminating that hazard, then if not possible to do so without eliminating the function altogether, reducing the hazard to the fullest extent possible. The evidence presented at the hearing has touched on some of the preventive measures that could be considered, related for example to unlisted phone numbers and addresses, focussed training on the risks and precautions associated with the use of social media, offering personal safety tips and so forth. The respondent suggests that the employees should be provided with the tools and knowledge to protect themselves from harassment, threats, stalking and assault, and that this would in part include providing BSOs with the tools and knowledge needed to protect their identities, as familiarity with privacy settings and other privacy tools related to the use of Internet can vary from one BSO to another. It is not for me, no more than it was for HSO Danton, to prescribe what specific preventive measures should be taken to address the new hazard created by the wearing of name tags. As I have already stated, the obligation rests on the employer, in consultation with the Policy Committee, to develop such measures, following the order of priority set out in subsection 19.5(1) of the COHSR. The parties are in a better position to identify the kinds of measures that will address the hazard in a way relevant and meaningful to them. They may choose to inform their deliberations with the advice of subject matter experts, as the case may be, and may seek the assistance of health and safety officers designated by the Labour Program of ESDC in their compliance continuum, in view of the fact that the April 22, 2013 direction remains valid as a result of the present proceedings.

[87] For all the above reasons, I conclude that the direction is well-founded and should not be rescinded or varied.

Decision

[88] For the reasons set out above, I conclude that the direction issued by HSO Paul G. Danton on April 22, 2013, is confirmed and the appeal dismissed.

Pierre Hamel
Appeals Officer