Occupational Health and Safety Tribunal Canada

Date: 2015-05-05
Case No.: 2012-59

Between:

Black Sheep Aviation & Cattle Co. Ltd., Appellant

Indexed as: *Black Sheep Aviation & Cattle Co. Ltd.*

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Decision:	The direction is rescinded.
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Debra L. Fendrick, Counsel, Austring, Fendrick & Fairman
Citation:	2015 OHSTC 9

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by Black Sheep Aviation & Cattle Co. Ltd. (the "appellant", the "employer" or "Black Sheep") of a direction issued by Health and Safety Officer (HSO) Kimberly Wilson on August 8, 2012, pursuant to subsection 145(1) of the Code. The appeal was received by the Occupational Health and Safety Tribunal Canada ("the Tribunal") on September 7, 2012.

[2] The direction was issued further to HSO Wilson's investigation into an aircraft accident that took place on March 31, 2011, in the vicinity of Mayo, YT, and which resulted in the fatality of Mr. Bradley Chambers, a pilot employed by the appellant. The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*, PART II
> OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION to Black Sheep Aviation and Cattle Company Ltd.
> UNDER SUBSECTION 145.(l)
>
> On August 8, 2012, the undersigned health and safety officer completed a draft fatality report involving an employee employed by Black Sheep Aviation and Cattle Company being an employer subject to the *Canada Labour Code* Part II. The undersigned health and safety officer considers that a condition in a place constitutes a danger to an employee while at work:
>
> Black Sheep Aviation failed to follow the established procedure as outlined in their Company Operations Manual section 5.2.2 and 5.2.3 (See Appendix "A") by not ensuring the entries into the aircraft journey log book accurately reflected the correct flight times; this can lead to danger to the employee and the aircraft if the employee is not getting sufficient rest and the aircraft is not following its approved maintenance schedule due to inaccurate entries in the aircraft journey log book.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145.(2)(a)(i) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition that constitutes the danger by following Black Sheep Aviation and Cattle Company LTD. established system that monitors flight time, flight duty time and rest periods of each of its flight crew members immediately.
>
> Issued at Winnipeg, Manitoba, Canada, this 8 day of August, 2012.
>
> Kimberly Wilson
> [signed]
>
> […]
>
> To: Black Sheep Aviation and Cattle Company
> Box 21318

Whitehorse YT
YIA 6R6

[3] On January 3, 2013, the Tribunal informed the appellant that the appeal would be dealt with by way of written submissions. Counsel for the appellant filed her submissions on January 10, 2014, after a considerable exchange of correspondence with the Tribunal resulting from HSO Wilson's position regarding the extent of her obligation to file with the Tribunal all documentation in her possession that supported her investigation report and that led to the issuance of her direction.

[4] It is useful to briefly set out the chronology of the debate that has taken place on that point. Consistent with the Tribunal's practice when receiving an appeal, Appeals Officer Pierre Guénette requested from HSO Wilson that she produce her investigation report and attachments to it. That request was prepared in the form of an Order pursuant to subsection 146.2(d) of the Code, and was forwarded to HSO Wilson on September 12, 2012. HSO Wilson responded to the order by filing a copy of her investigation report on October 19, 2012, which included Appendix "A" referred to in her report, being a copy of sections 5.2.2 and 5.2.3 of the Company Operations Manual (the "Manual") quoted in her direction. Neither her investigation notes nor the statements of witnesses whom she interviewed during the course of her investigation were filed.

[5] On February 4, 2013, Appeals Officer Guénette, at the invitation of the appellant, requested more specifically from HSO Wilson that she provide the Tribunal with a copy of "witness statements and notes of interviews, particularly at paragraph 1.13 and paragraph 2.2 of [your] Investigation report". HSO Wilson responded that the witness statements and interview notes are Protected Level "B" and in accordance with section 144(5) of the Code, could not be released unless directed to do so by way of "*subpoena* or legal order". She also noted that the only attachment to her investigation report was Appendix "A", which she had already provided.

[6] HSO Wilson's reply caused Appeals Officer Guénette to issue another Order to HSO Wilson on April 4, 2013, for the production of the "complete witness statements or notes of interviews with third parties", for the purpose of the appeal proceeding. In response to that order, the Tribunal received a letter dated May 16, 2013 from Mr. Kevin Staska, counsel for the Department of Justice Canada, who indicated that the documents sought were "under the control of Transport Canada, a government institution and therefore, not under the control of the individual health and safety officer to whom the Order has been made". Counsel also submitted that the documents at issue contain personal information that do not form part of the final written report of the HSO, or any attachment thereto, and furthermore that they contain "informer information" gathered as part of a lawful investigation, and as such were protected from disclosure.

[7] The appellant objected to the position espoused by the AG of Canada and after more correspondence exchange with Mr. Staska, requested that an appeals officer issue yet another Order for the production of the documents, this time directed at Transport Canada, invoking procedural fairness and the appellant's right to a fair hearing. The appellant

pointed out that the witness statements are specifically referred to in HSO Wilson's investigation report and are relied upon by the HSO in her conclusions and recommendations.

[8] In a letter dated December 2, 2013, the Tribunal informed the appellant that despite the issuance of two production orders, the appeals officer dealing with the appeal at that point in time had decided that the issuance of the Order sought would be pointless, as it was made clear by counsel for Transport Canada that none of the documents requested would be provided. The appellant did not pursue the matter further before the Federal Court.

[9] Not surprisingly, the debate on the scope of the documents to be filed with the Tribunal delayed the presentation of the appellant's submissions on the merits of the appeal, which were filed on January 10, 2014.

Background

[10] The facts as they are set out in the appellant's submissions and HSO Wilson's report are not contested and may be summarized as follows. Black Sheep is a full service aviation charter company based in Whitehorse, Yukon with a satellite base in Mayo, Yukon. At the time of the events, Black Sheep offered small charter services from its Mayo base using various aircraft, including a De Havilland DHC-3 Otter. The appellant employed pilots to operate their aircraft and specifically, engaged Mr. Bradley Chambers as the pilot for its Otter aircraft.

[11] As of March 31, 2011, Black Sheep was carrying out its commercial aviation operation pursuant to its Manual, which was approved by Transport Canada. For the purpose of this appeal, the material section of the Manual is article 5.2, titled *Flight and Duty Time Limitations and Rest Requirements.* The two sections of the Manual which HSO Wilson referred to in her direction read as follows:

> ***5.2.2 System***
>
> An electronic system (FLTDUTY XLS) tracks a running total of each pilot's flight time, flight duty time and rest periods.
>
> Pilots are responsible for entering all relevant flight and time information into the program. This information shall include flying for other operators and/or private aircraft. The pilots shall forward the data to the office for copy and retention on the office copy at least once a month.
>
> FLTDUTY XLS will indicate, on any entry date, whether an assignment or a potential assignment will exceed the limits appropriate at the time. It will indicate ample warning when a limit is approaching and will note a violation with reference to the specific CARs in effect.
>
> Should any person become aware that a pilot will exceed the allowed times, that person is to advise the Operations Manager.

> Once a pilot reaches a flight time limitation he/she is deemed to be fatigued and shall not continue on flight duty or be reassigned to flight duty until such time as he/she has had the required rest.
>
> ***5.2.3 Flight Time***
>
> The Company and the pilots share in the responsibility of ensuring that a pilot's total flight time for all flights, including flights in non-company aircraft, conducted by the pilot will not exceed:
>
> - 1,200 hours in any 365 consecutive days;
> - 300 hours in any 90 consecutive days;
> - 120 hours in any 30 consecutive days or, in the case of a pilot on call, 100 hours in any30 consecutive days; and
> - 60 hours in any 7 consecutive days.
>
> However, *Operations Specification 092* allows for an increase in some of the above referenced flight time limitations. During *6* non-overlapping periods of 30 days consecutive days within 365 consecutive day period, the flight time may be increased to a maximum of (indicated in **bold** print):
>
> - 1200 hours in any 365 consecutive days;
> - **900 hours in any 180 consecutive days;**
> - **450 hours in any 90 consecutive days;**
> - **210 hours in any 42 consecutive days;**
> - **150 hours in any 30 consecutive days;** and
> - 60 hours in any 7 consecutive days.
>
> Also, the accumulated 30-consecutive day, 42-consecutive day and 90-consecutive day flight times may be *reset to zero* if the pilot is provided with at least 5 consecutive days free from all duty.

[12] On March 31 2011, the Otter crashed and Mr. Chambers sustained fatal injuries. HSO Wilson notes in her report that the aircraft seemed to come apart in the air and the wreckage was spread over a large area 800 feet wide and 1300 feet long. There were no witnesses to the accident and the pilot was the sole occupant of the aircraft. There was no distress call. HSO consulted the licence of the pilot, his training records, verified his Flight and Duty Records and was apprised that the toxicology report had shown negative results for alcohol and drugs. The cause of the accident could not be positively determined, nor could the causal factors be accurately determined.

[13] In May of 2011, before the issuance of the direction, the appellant voluntarily and of its own initiative, amended its flight and duty time reporting from "monthly" to "daily". This amendment to the appellant's Manual was filed with Transport Canada and eventually approved, as reflected in the revised article 5.2.2 filed with the Tribunal with the employer's submissions.

Issue

[14] The issue raised by the present appeal is whether the failure by the employer to ensure that the entries into the Aircraft Journey Log made by the employee under the

Manual accurately reflect flight times, constitutes a danger to employees and justify the issuance of the direction under appeal.

Appellant's submissions

[15] Counsel for the appellant first submits that the role of the appeals officer is to determine on a *de novo* basis whether there existed a danger by Black Sheep allegedly failing to follow the established procedure in their Manual by not ensuring that entries into the aircraft journey log book accurately reflected the correct flight time.

[16] The appeals officer is required to weigh the facts on a balance of probabilities and must refer to the definition of "danger" in the Code and as interpreted by appeals officers and the Courts (*DP World (Canada) Inc.* v. *International Longshore and Warehouse Union, Local 500,* 2013 OHSTC 3)

[17] Counsel for the appellant submits that at all times, the employer was following the procedure set out in the Manual, which provides that it is the pilot's responsibility to enter the data in the electronic tracking system and forward the data to the office for copy and retention at least once a month. In turn, Black Sheep's obligations are to retain a copy of the pilot's data and share with the pilot the responsibility of ensuring that the pilot's total flight times do not exceed the limits set out under section 5.2.3 of the Manual. According to the appellant, there is neither an express or implied requirement in the Manual that the employer ensures that the entries reflect the correct flight times.

[18] Regarding the definition of "danger", counsel for the appellant submits that such concept refers to an existing or potential hazard, but does not include a past danger that has been remedied by an employer. Counsel points out that on May 11, 2011, the employer changed the flight and duty time reporting data from once a month to daily. That new procedure was approved by Transport Canada. HSO Wilson therefore erred and exceeded her jurisdiction when she issued her direction based on past practice and when she failed to consider Black Sheep's current reporting requirements at the time of the issuance of her direction

[19] Finally, counsel for the appellant argues that Black Sheep's right to procedural fairness is prejudiced by HSO Wilson and Transport Canada's refusal to produce witness statements and interview notes that are highly relevant to the present proceedings. Given the exceptionally high threshold that must be met for the Federal Court to intervene in an ongoing administrative proceeding (*C.B. Powell* v. *Canada (Border services Agency),* 2010 FCA 61), the appellant has not brought an application before that Court. Nevertheless, without full disclosure of the matters in issue, a party cannot fully exercise its right to be heard and the appellant suffers substantial prejudice as a result (*Canada (Attorney General)* v. *Mavi,* 2011 SCC 30; *Downing and Graydon et al.,* [1978] O.J. No. 3539.

Analysis

[20] My duty as an appeals officer is to determine whether the direction issued by HSO Wilson is well-founded. As directed by subsection 146.1(1) of the Code, I must look into the circumstances of the direction and the reasons for it and I am authorized to vary, rescind or confirm the direction.

[21] I must carry out the review of the circumstances of the direction in a *de novo* manner, meaning that I am not bound by the findings of fact or conclusions of the HSO and I may consider all relevant evidence relating to the circumstances that prevailed at the time of the direction, including evidence which may or may not have been considered by the HSO (*DP World*).

[22] In the present case, I must first clarify the basis on which HSO Wilson issued her direction. In the title of the direction, it is mentioned that the direction is issued under subsection 145(1) of the Code. That section authorizes an HSO to issue a direction when the officer is of the opinion that a provision of Part II of the Code or of any regulations adopted pursuant to that Part, has been contravened. However, the wording of the direction also refers to "a condition in a place that constitutes a danger to an employee". That condition is described in the second paragraph as the failure by the employer "to ensure that the entries into the aircraft journey log book accurately reflect the correct flight times", contrary to the established procedure outlined in sections 5.2.2 and 5.2.3 of the Manual. Likewise, HSO Wilson quotes paragraph 145(2)(*a*)(*i*) of the Code as the statutory basis on which her direction is founded.

[23] On its face, the direction is somewhat contradictory. While subsection 145(1) is referred to in the heading of the direction, there are no provisions of the Code or of any of its regulations that are cited as having been contravened by the appellant. HSO Wilson bases her direction on a contravention of the Manual governing flight and rest time for pilots, as she interprets it. The Manual is not a regulation nor a statutory enactment made under the Code.

[24] I note that at page 24 of her report, HSO Wilson refers to section 124 of the Code, citing the obligation for the employer to ensure that the health and safety at work of every person employed by the employer is protected. She goes on to state that a direction (presumably the direction under appeal) was issued ordering the employer to follow established procedures as outlined in the Manual to ensure pilots that are employed by Black Sheep are accurately capturing the correct flight and duty times for the trips they operate in the aircraft journey log books. I am left to wonder whether it is that particular section of the Code that, in HSO Wilson's opinion, was contravened by the appellant, short of her so stating explicitly. In my view, it would be a stretch for me to interpret the broad obligation set out in section 124 in a way that implies the very specific obligation for the employer that was found to exist by HSO Wilson, i.e. to ensure that the entries an employee is required to write in the aircraft journey log book under the terms of the Manual, are accurate. So specific a requirement would typically be found in a regulation and there is no suggestion in the HSO's report that the employer is in breach of its general

duty of due diligence for safety, which is usually required before a finding that a contravention of section 124 has occurred.

[25] As no breach of the Code or its regulations has been specifically mentioned in the direction, I am of the view that I should determine the correctness of the direction on the same basis as that of HSO Wilson, i.e. whether a condition that constitutes a danger existed at the time of its issuance.

[26] The term "danger" is defined in subsection 122(1) of the Code:

> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[27] In *Canada Post Corporation* v. *Pollard*, 2007 FC 1362, 321 FTR 284, the Federal Court summarized the state of the law concerning the criteria for assessing the concept of danger:

> **[66]** As a matter of law, in order to find that an existing or potential hazard constitutes a "danger" within the meaning of Part II of the Code, the facts must establish the following:
>
> (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;
> (2) an employee will be exposed to the hazard, condition, or activity when it presents itself;
> (3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
> (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.
>
> **[67]** The final element requires consideration of the circumstances under which the hazard, condition, or activity could be expected to cause injury or illness. There must be a reasonable possibility that such circumstances will occur in the future. See: *Verville v. Canada (Correctional Services)* (2004), 253 F.T.R. 294 at paragraphs 33-36.
>
> **[68]** In *Martin* C.A., cited above, the Federal Court of Appeal provided additional guidance on the proper approach to determine whether a potential hazard or future activity could be expected to cause injury or illness. At paragraph 37 of its reasons, the Court observed that a finding of "danger" cannot be grounded in speculation or hypothesis. The task of an appeals officer, in the Court's view, was to weigh the evidence and determine whether it

> was more likely than not that the circumstances expected to give rise to the injury would take place in the future.

[28] In *Laroche* v. *Canada (Attorney General)*, 2011 FC 1454, the Federal Court reminds us of the analysis that must be conducted in applying the definition of "danger", as follows at paragraph 32 of the judgment:

> [32] The Federal Court of Appeal, which upheld this decision in *Pollard*, cited above, reiterated the criteria for applying the definition of "danger" as follows:
>
> > **[16]** The Appeals Officer**,** at paragraphs 71 to 78, reviewed the case law on the concept of "danger". Relying more particularly on the decision of this Court in *Martin v. Canada (Attorney General)*, 2005 FCA 156 (CanLII), 2005 FCA 156 and that of Madam Justice Gauthier in *Verville v. Canada (Correctional Service)*, 2004 FC 767, he stated that the hazard or condition can be existing or potential and the activity, current or future; that in this case the hazards were potential in nature; that for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.
> >
> > **[17]** This statement of the law is beyond reproach or is, at the least, reasonable in the *Dunsmuir* sense.
>
> [Underlining added]

[29] Turning to the circumstances of this case, HSO Wilson concluded, without much supporting analysis, that the employer's failure to verify the accuracy of the entries made by the employee into the aircraft log book, created a condition that constitutes a danger. I have great difficulty in reaching the same conclusion, for the reasons that follow.

[30] I will first look at the obligation of the employer under the relevant sections of the Manual. I understand the Manual to represent the conditions under which the employer is authorized by Transport Canada to operate its business. It is not disputed that the Manual in existence at the time of the accident was approved by Transport Canada. When I read sections 5.2.2 and 5.2.3 of the Manual, I simply cannot reach the same conclusion as HSO Wilson as to the extent of the employer's obligations. Applying fairly basic principles of interpretation, it is clearly stated in section 5.2.2 that "pilots are responsible for entering all relevant flight and duty time information into the program". It is worth noting that such flight and duty time includes flying time for other operators and/or private aircraft. The pilot's obligation is also to forward, at least once a month, the data to the office for copy

and retention. The purpose of that requirement is to allow the employer to track, as it is required to do under the next section, section 5.2.3, the number of flight hours to ensure that the number of hours does not exceed the limitations set out in that section and to provide appropriate rest periods to its pilots. The Manual specifically states that the pilots and the company share in the responsibility of ensuring that the number of hours is not exceeded. The Manual provides that should any person become aware that a pilot will exceed the allowed times, that person must advise the Operations Manager.

[31] It seems clear to me that requiring the employer to verify the entries made by their employees is not supported by the wording of the Manual. Employees are, pursuant to section 126 of the Code, required to fulfill their obligations regarding matters of health and safety. The Manual clearly places the responsibility of accurately reporting flight hours in the log book, on the employees. I note that those hours include flight time for the appellant, but also with other operators or private flying. Requiring the employer to ensure the accuracy of all entries, including the latter, would imply some kind of independent investigation into the actual flying time of the pilots, which is not in my view a reasonable interpretation of the Manual. In my view, if that was the intended result, the wording of the section should have so expressed more clearly.

[32] I also point out that HSO Wilson made no mention of the fact that, at the time she issued her direction, the employee's reporting requirements had been modified in May of 2011, such that flight and duty time had to be entered in the aircraft journey log book and forwarded to the employer on a daily basis, instead of monthly. This change, which was subsequently approved by Transport Canada, likely reduced the risk of inaccurate entries in the log book and improved the ability of both the employees and the employer to track the actual flight and duty hours of the pilots in a timely fashion, with a lower possibility of error. There is no indication in HSO Wilson's report that she considered that change and its implications on whether a danger existed at the time of issuing her direction. Consequently, her finding of danger and resulting direction rest on facts that were no longer applicable at the time of its issuance.

[33] Secondly, it could be said that the change in the reporting frequency from monthly to daily, changes nothing in relation to the employer's obligation read in by HSO Wilson, to monitor or "double-check" the validity of the entries of its pilots. I must therefore ask, regardless of the actual wording of the Manual, whether the failure by the employer to "ensure" by whatever means, the accuracy of the data that employees are reporting constitute, in and of itself, a condition that presents a danger to employees within the meaning of the Code?

[34] Applying the legal principles stated above, my view is that it does not. The hazard which HSO Wilson refers to is the failure to ensure the correctness of the entries. That condition, in and of itself, is not likely to directly cause injury or illness within the meaning of the Code. Rather, her conclusion and underlying rationale are likely based on the possible occurrence of the following events: if the employer does not monitor the accuracy of the pilot's entries in the log book, there is a risk that the information entered by the employee could be, inadvertently or by deliberate act on the employee's part as a way of earning more income, inaccurate. If the information is inaccurate and such inaccuracy

remains undetected by the system, it may be that the number of flying and duty hours will be exceeded at one point in time, by an unknown margin, which may affect compliance with the aircraft's maintenance schedule and the pilot's capacity to fly. Regarding the latter factor, limitations standards to flying and duty time is a preventive measure designed to ensure that pilots are not called upon to fly in a condition of excessive fatigue, presumed to exist pursuant to those standards: under the Manual, pilots are deemed to be fatigued if they reach the maximum number of flight and duty hours. Therefore, if such a situation was to occur, it is possible that the employee would actually be fatigued and could nevertheless fly in such a condition without having had the appropriate rest periods. And if so, it is possible that such fatigue could affect the pilot's performance and cause him or her to make mistakes, or lose concentration or fall asleep, thereby creating a condition that could cause an accident.

[35] In my opinion, the root cause found by the HSO to constitute a danger, illustrated by the above sequence of events, is simply too remote to satisfy the definition of danger in the Code and the criteria set out by the jurisprudence when applying that legal concept. While there is no question that the possible end result of that chain of events would reasonably be expected to cause injury or death, the likely occurrence of the factors leading up to it is, in my opinion, entirely speculative and hypothetical on the basis of the record presented to me.

[36] I point out that HSO Wilson never suggested in her report that incorrect entries in the aircraft log book, or a situation of excessive fatigue, or more generally any suggestion of a pattern of negligence on the part of the pilot or the employer, had any bearing on the fatal accident that occurred on March 31, 2011. At the time of the direction, the cause of the accident is said to be undetermined. Whether or not facts to that effect may have been found in the witness statements gathered by HSO Wilson in the course of her investigation is a matter of speculation, as I was not allowed to take cognizance of that evidence, for the reasons stated previously.

[37] For all the reasons stated above, I conclude that there was no danger within the meaning of the Code at the time HSO Wilson issued her direction and, founded as it is on her incorrect finding of danger, the direction must be rescinded.

[38] I cannot end without expressing concerns on the approach taken by the HSO and Transport Canada regarding the production of the complete investigation report and witness statements and notes taken during the investigation. The appeals officer is mandated by section 146.1 to inquire into the circumstances of the direction and make a determination as to its validity. Such an inquiry is quasi-judicial in nature and must conform with the rules of natural justice, which include the right for a party affected by the proceedings to know the case that it must meet and to be given an opportunity to present evidence and argument on the matter. This implies being apprised of all the elements that support the decision which is the subject of the appeal. The HSO's report and the evidence gathered in the course of the HSO's investigation are important elements of the record from which the appeals officer carries out his/her duties and are critical to the parties' gaining knowledge of the issues raised by the appeal.

[39] In order to realize those legal requirements, Parliament has vested the appeals officer with powers akin to those of a court. Section 146.2 of the Code authorizes the appeals officer to compel witnesses to appear before him and to produce documents that are relevant to his inquiry. The appeals officer may receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law. And finally the appeals officer is authorized to examine records and make inquiries as the officer considers necessary. With such wording, the Code makes it abundantly clear that appeals officer have a panoply of powers typically conferred on many quasi-judicial tribunals, to coerce the production of documents for the purpose of carrying out its mandate.

[40] Judged against that legal framework, the position of the HSO and of the AG of Canada regarding the production of the witnesses' statement is, in my opinion, without merit. The orders issued by Appeal Officer Guénette are clearly in the nature of "legal orders" that HSO Wilson referred to in her correspondence. Furthermore, contrary to HSO Wilson's assertion, the purpose of the disclosure of the information sought is unquestionably "for the purposes of" Part II of the Code, and as a result I am simply unable to agree that subsection 144(5) of the Code can be invoked to avoid compliance with the orders for the production of that material. Finally, the claim of privilege relating to "informer information" is simply unsubstantiated.

[41] The evidence and documents gathered during the HSO's investigation under the Code are clearly part of her investigation record and should have been disclosed and filed with the Tribunal. They are expressly referred to in HSO Wilson's report (at paragraphs 1.13 and 2.2) and form the basis of some of her recommendations, and likely of the direction under appeal. Not providing those documents does not allow the appeals officer to fully carry out its mandate as required by law, and results in procedural unfairness to the appellant, who is the sole party in the present proceedings.

[42] Since I have determined the direction to be unfounded and that the appeal succeeds, it is not necessary to resolve the legal consequences of HSO Wilson's refusal to disclose the totality of the evidence gathered in the conduct of her investigation on the rights of the appellant and its impact on the possible outcome of the appeal had I found the direction to be correct. Suffice it to say that determinations of appeals officers made on the basis of an incomplete record are not consistent with the sound administration of the Code. They would become open to challenge by the parties whose rights may be adversely affected and should be avoided. Such a situation is prejudicial, greatly undesirable and does not serve the objectives of the Code.

Decision

[43] For the above reasons, the appeal is upheld and I rescind the direction issued on August 8, 2012, by HSO Kimberly Wilson.

Pierre Hamel
Appeals Officer