Occupational Health and Safety Tribunal Canada

Date: 2016-01-28
Case No.: 2013-24

Between:

Todd Rudavsky, Appellant

and

Public Works and Government Services Canada, Respondent

Indexed as: *Rudavsky* v. *Public Works and Government Services Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of directions issued by a health and safety officer
Decision:	The directions are confirmed.
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the appellant:	Himself
For the respondent:	Ms. Vanessa Reshitnyk, Counsel, Department of Justice
Citation:	2016 OHSTC 1

REASONS

[1] This case concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against five of six directions issued by Health and Safety Officer (HSO) Rod J Noel on March 21, 2013.

Background

[2] On April 17, 2012, an 18,000 lbs. auxiliary counterweight fell off the Burlington Lift Bridge in Burlington, Ontario and crashed onto the concrete below. No one was harmed. The bridge was halted in a raised position. The bridge was being repaired at the time of the incident. The bridge is operated by Public Works and Government Services Canada (PWGSC), the employer and respondent in this matter.

[3] Bridge personnel responded to the incident, emergency procedures were put into play and senior management was alerted. Various people began arriving on site to handle the situation. Not knowing what the cause of the incident was, engineers decided to examine parts of the raised bridge. A Genie Lift (Mobile Elevated Platform) was called in. It was positioned on the pier by the canal under the bridge by late afternoon on April 17, 2012. Engineers went up in the lift bucket to inspect the bridge. An initial determination of the immediate cause of the incident was made. There was no concern for the bridge's imminent collapse.

[4] The next day, on April 18, 2012, the Genie Lift was deployed on the pier once again. Over the next few days several investigations were commenced by PWGSC and by two organizations interested in the repair work that was being performed on the bridge at the time of the incident. The PWGSC investigation was done by Mr. Cam Halliday, the PWGSC Regional Health and Safety Manager. It was completed on April 20, 2012. The raised bridge was lowered and eventually put back in operation.

[5] At the time of the incident, Joe Giglia was the Health and Safety Representative (H&S Rep). He was off work at the time of the incident but arrived later in the day on April 17, 2012. He did not participate in the investigations which followed the bridge incident. He remained the H&S Rep until December 2012.

[6] Seven months later, in late November, 2012, a complaint was made by the appellant, Mr. Rudavsky, another workplace H&S Rep, to Human Resources and Skills Development Canada (HRSDC now known as Employment and Social Development Canada) concerning the manner in which the incident was handled by the employer. The substance of the complaint was that an H&S Rep had not been involved in any of the investigations of the incident and that the H&S Rep had not received any reports of the investigation.

[7] On December 17, 2012, HSO Noel arrived at the Burlington Lift Bridge to investigate the complaint. He found that the complaint was justified. A copy of the

PWGSC investigation was then provided to the appellant. Concern was expressed by the appellant that it was not safe to have positioned such a heavy Genie Lift on the pier.

[8] A Hazardous Occurrence Investigation Report (HOIR) was prepared and signed by Clare Lamont, the Bridgemaster, on November 20, 2012. Joseph Giglia commented "I concur" and signed the HOIR on December 14, 2012. The OHS Coordinator, I. Shah, and Cam Halliday both signed the HOIR on December 19, 2012. Recommendations for the PWGSC investigation report were attached to the HOIR.

[9] On February 4, 2013, a meeting was held with HSO Noel and various workplace parties. It was agreed that the H&S Rep would receive copies of reports concerning the incident. The appellant and a manager, Dan Joyce, were to work together to review the investigation of the incident.

[10] On March 21, 2013, HSO Noel issued six directions under subsection 145(1) of the Code, organized in four parts:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER
> SUBSECTION 145(1)
>
> On December 17, 2012, and on subsequent dates the undersigned health and safety officer conducted an investigation in the work place operated by Public Works and Government Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at 1157 BEACH BLVD., Burlington, Ontario, L7P 4T4, the said work place being sometimes known as the Burlington Lift Bridge.
>
> The said health and safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, have been contravened:
>
> **No. 1**
>
> ***Canada Labour Code* - Part II Para. 125. (1)(c) and Para. 136.(5)(g) and Canada Occupational Health & Safety Regulations Para 15.4(1)(b)**
>
> The employer failed to provide for the participation of an employee health and safety representative in an investigation of a hazardous occurrence in the workplace. On April 17, 2012 a lift bridge cable counterweight, weighing approximately 18,000 lbs., was obstructed and dislodged during a routine bridge lift and fell to the bridge at the roadway level below. The employer conducted two investigations immediately following the occurrence. One

investigation was conducted by the PWGSC Regional Health and Safety Manager. Another investigation was conducted by a consulting company contracted by the employer. The *Canada Labour Code* prescribes that a workplace employee Health and Safety Representative participate in all inquiries, investigations, studies and inspections pertaining to the health and safety of employees. The employer failed to notify the employee Health and Safety Representative of the two investigations and failed to provide for his participation in the investigations.

No. 2

***Canada Labour Code* – Part II Subparagraph 125.(1)(d)(i)**

The employer failed to post a copy of the *Canada Labour Code*, Part II in the workplace as required.

No. 3

***Canada Labour Code* – Part II Para. 125.(1)(y)**

The employer failed to ensure that the activities of every person granted access to the work place by the employer did not endanger the health and safety of employees. On April 17, 2012, during contracted work activities, a lift bridge cable counterweight was dislodged and fell in the workplace. Contracted workers had been working on the bridge and performing mechanical alterations to the bridge structure. During a subsequent routine bridge lift, the 18,000 lb. counterweight was obstructed, and was dislodged and fell onto the bridge at the roadway level below.

No. 4

***Canada Labour Code* – Part II Para. 125.(1)(z.08) and Sub-Sections 136(6) and (7)**

The employer failed to cooperate with the workplace health and safety representative in the performance of his duties. The workplace health and safety representative, Todd Rudavsky, requested that the Regional Health and Safety Manager provide him with a copy of his investigation report of the counterweight failure hazardous occurrence. That information would have assisted him in the performance of his duties. His request was denied by the employer.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than April 5, 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 contraventions do not continue or reoccur.

Issued at North York, Ontario, this 21th day of March, 2013.

[signed]
ROD J NOEL
Health and Safety Officer
[…]

To: Public Works and Government Services Canada
4900 Yonge Street
North York, Ontario

[11] While HSO Noel referred to the above document as a single direction, he did identify six contraventions, hence it is more precise to say that he issued six directions. One of the directions, No. 2 above, concerning the failure to post a copy of the Code in violation of subparagraph 125(1)(*d*)(*i*), was not appealed.

[12] While the directions stated that the deadline for compliance was April 5, 2013, the accompanying letter by HSO Noel gave April 14, 2013, as the deadline for compliance.

[13] On April 5, 2013, Mr. Rudavsky, the H&S Rep who had made the complaint, appealed the directions on two grounds: 1) "the direction was not severe enough"; and 2) "other non-compliance violations were uncovered in the investigation but no direction was issued".

[14] On April 11, 2013, the respondent indicated that it had complied with the directions in a letter addressed to HRSDC. In the letter it was said that a package of material concerning the bridge incident was given to the appellant for "his review, recommendations and participation in completing the report".

[15] Over a year later, on May 7, 2014, Mr. Wayne Kole, Asset Manager Engineering Assets, PWGSC, sent an email to the appellant indicating that the "investigative process has been completed". Mr. Kole asked the appellant for his comments on the investigation reports and his recommendations. On May 8, 2014, the appellant emailed his response - that he would have comments and would get back to Mr. Kole.

[16] On July 15, 2014, the respondent, PWGSC, contacted the Occupational Health and Safety Tribunal Canada raising a preliminary objection that an appeals officer (AO) did not have jurisdiction to hear the appeal on the basis that the appellant was requesting the AO to issue a direction where the HSO had made a decision not to issue a direction, something barred by the caselaw.

[17] On October 7, 2014, a teleconference took place to deal with the issue of jurisdiction. AO Michael Wiwchar deferred the issue to the hearing on the basis that more facts were needed.

[18] On January 19, 2015, a second teleconference was held. I was the attending AO. The respondent required clarity about what direction or directions the appellant, who was unrepresented, was seeking. It was also not clear to the respondent what the appellant meant specifically by the directions not being "severe enough". The appellant provided some detail.

[19] On January 27 to 29, 2015, the hearing took place in Toronto. The issue of jurisdiction was considered first but a decision was deferred until the case on the merits was heard.

[20] The appellant was not represented in this matter. The appellant did not provide many details of what he was seeking specifically prior to the hearing. At the commencement of the hearing, the appellant provided a brief written statement that clarified to some degree what he was seeking.

[21] To be clear, the respondent is not contesting the directions of March 21, 2013. The respondent is contesting the appellant's request for new directions and his request to "add content" to the original directions. The respondent does not characterize any of the appellant's requests as requests for variations of the original directions, but as requests for new directions.

[22] I do not believe that it is obvious that the appellant is seeking new directions solely and is not requesting a variation of a direction.

Issues

[23] I have to determine the following issues:

1. Whether I have jurisdiction to hear the appeal; and, if in the affirmative,
2. Whether I should vary the directions in the manner sought by the appellant.

Submissions of the parties

A) Respondent's submissions

[24] The respondent states that, under the Code, an AO does not have jurisdiction to hear an appeal from an HSO's decision not to issue a direction. In the respondent's view, the appellant is using the appeal process under the Code to raise issues which HSO Noel chose not to include in his directions.

[25] In addition, the respondent asserts that the appellant is using the appeal process to challenge the adequacy of the respondent's compliance with HSO Noel's directions.

[26] The respondent states that what the appellant is attempting to do in this appeal is not covered by the purpose of an appeal under subsection 146(1) of the Code, which reads:

> 146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

[27] Subsection 146(1) refers only to a direction being the subject of an appeal, not a decision. The only reference in the Code to an appeal of a decision being allowed is where the decision concerns a work refusal under section 128.

[28] The respondent acknowledges the broad powers of an AO and the *de novo* nature of an appeal hearing but states that the appeal process does not allow an appeal to serve as a means by which issues not part of an HSO's direction are addressed.

[29] The respondent's primary authority for the limitation of the scope of an AO's decision is *Canadian Union of Public Employees and Air Canada*, [2002] C.L.C.A.O.D. No. 4 (QL), ("*Sachs*"). AO Malanka in *Sachs* concluded that he did not have jurisdiction to hear the appeal of a decision by an HSO not to issue a direction:

> [51] However, try as I might, I cannot persuade myself that the Code implicitly authorizes an appeals officer to review a decision by a health and safety officer not to issue a direction, whether or not the officer's investigation is biased or flawed. Regrettably, I find that I do not have jurisdiction to hear the appeal and the file is now closed.

[30] On appeal[1] to the Federal Court, Mr. Justice Hughes held that the Code sets out specific avenues of appeal and that there is no implicit right to appeal that can be read into the Code that goes beyond such avenues of appeal:

> [26][…] Here the *Code* provides an avenue of appeal by the employer where the employer has been required to do something, by decision or direction. Where no decision or direction has been made, an employee may, under certain conditions as set out in section 128 refuse to work. Judicial review is also available. […]
>
> [27] In the present case, the *Code* has carefully constructed certain avenues of appeal while leaving other resources available. *No implicit right to appeal can be read in.*
>
> [Respondent's emphasis added]

[31] The Federal Court of Appeal[2] agreed with AO Malanka and the Federal Court:

[1] *Sachs* v. *Air* Canada, 2006 FC 673

> [10] We are all of the view that the interpretation of subsection 146(1) adopted by Justice Hughes and Mr. Malanka is correct. Subsection 146(1) of the *Canada Labour Code* grants an employer, an employee or a trade union a right to appeal any direction by a health and safety officer under section 145, but does not grant anyone a right to appeal a decision by a health and safety officer not to issue a direction. […]

[32] The respondent's argument is that the following are equivalent:

1. Appealing an HSO's decision not to issue any direction at all; and
2. Requesting an AO to issue new directions other than the directions which the HSO did issue.

[33] If successful, the two scenarios above would have the same effect – a new direction issued by the AO. According to the respondent, the appellant's request to add new contraventions is an attempt to do indirectly what cannot be done directly according to the *Sachs* decision.

[34] The respondent also relies on the decision of AO Jean-Pierre Aubre in *Brinks Canada Limited* v. *La Croix, Stewart and Faulds*, 2015 OHSTC 2 ("*Brinks*") regarding an AO's jurisdiction under subsection 146.1(1):

> [20] […] Subsection 146.1(1) uses specific terminology to indicate the limits of what is submitted to an appeals officer. It states in mandatory form ("shall") that the appeals officer is to "inquire into the circumstances of the decision or direction [...] and the reasons for it." On this alone, I find that it is not within the jurisdiction of an appeals officer to seize oneself or to be seized for determination of a matter or issue that has not initially been the object of determination by a health and safety officer. In my opinion, the wording of the Code alone is sufficient to validate the proposition that *an appeals officer is seized with inquiring into the specific directions issued in the specific appeals of which he is seized.*
>
> [Respondent's emphasis added.]

[35] The difference between *Sachs* and *Brinks* is that *Sachs* covers the situation where an HSO considers an issue and decides not to issue a direction, while *Brinks* covers the situation where an issue was not considered at all by an HSO. In both situations, the respondent considers the case law to hold that the issues are not subject to appeal.

[36] The respondent relied heavily on the testimony of HSO Noel:

1. He chose not to direct the respondent to conduct another investigation and complete another HOIR;

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[2] *Sachs* v. *Air Canada*, 2007 FCA 279

2. At the February 4, 2013 meeting, it was decided that the appellant would be involved in the follow-up to the investigation;
3. He chose not to request an Assurance of Voluntary Compliance (AVC);
4. He chose not to address the adequacy of the follow-up to the investigation;
5. He chose not to address the use of the Genie Lift in his directions.

[37] The respondent's position is that following *Sachs*, the HSO's decisions about such matters listed above cannot be the subject of an appeal.

[38] With regard to the letter of April 11, 2013, the respondent argues that it concerned the manner in which the respondent complied with the directions. Disputes about the adequacies of the measures taken by an employer to comply with a direction are not matters appealable under subsection 145(1), relying on *Drew Lefebvre and Correctional Service Canada*, 2012 OHSTC 45, para. 24 ("*Lefebvre*").

[39] The respondent concludes by saying the appeal should be dismissed for lack of jurisdiction because:

1. An appeal of a decision not to issue a direction is not permissible (*Sachs*);
2. An appeal regarding a matter that the HSO did not consider is not permissible (*Brinks*); and
3. An appeal cannot be based on the manner in which the recipient of a direction complies with the direction (*Lefebvre*).

B) Appellant's Submissions

[40] According to the appellant, an AO has jurisdiction to issue a new subsection 145(1) direction (a contravention direction) in addition to the AO's power to vary, rescind or confirm the original contravention direction of an HSO.

[41] In support of his position he referred to the Federal Court of Appeal decision in *Martin* v. *Canada (Attorney General)*, 2005 FCA 156 ("*Martin*"). In that case, Mr. Justice Rothstein addressed a similar issue – whether an AO has jurisdiction to issue a subsection 145(1) direction where the HSO had issued a subsection 145(2) direction (a danger direction).

[42] It was held in *Martin*, that the addition of subsection 145.1(2) to the Code allows an AO to proceed under subsection 145(1) where the HSO had made a previous determination under subsection 145(2). Mr. Justice Rothstein based his decision on three observations:

1. An AO has broad powers under subsection 146.2;
2. An AO has the powers of an HSO according to subsection 145.1(2); and
3. An appeal hearing under the Code is a *de novo* hearing.

[43] The provisions referred to by Mr. Justice Rothstein are as follows:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
> (a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence under oath and to produce any documents and things that the officer considers necessary to decide the matter;
> (b) administer oaths and solemn affirmations;
> (c) 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;
> (d) examine records and make inquiries as the officer considers necessary;
> (e) adjourn or postpone the proceeding from time to time;
> (f) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
> (g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;
> (h) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;
> (i) decide any matter without holding an oral hearing; and
> (j) order the use of a means of telecommunication that permits the parties and the officer to communicate with each other simultaneously.
>
> 145.1(2) For the purposes of sections 146 to 146.5 an appeals officer has all the powers of a health and safety officer

[44] Given that an appeal before an AO is a *de novo* hearing, the wide powers of an AO under section 146.2, and the addition to the Code of subsection 145.1(2), the court stated:

> [28] […] there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).

[45] The court found that it was patently unreasonable for the HSO to have failed to have taken into account relevant evidence and then consider the issuance of a subsection 145(1) direction.

[46] As mentioned, the appellant was not represented. He did not provide much argument beyond citing the *Martin* decision. It can be assumed that the appellant believes that if an AO can issue a subsection 145(1) direction where a subsection 145(2) direction was originally issued by the HSO, then an AO can issue a new subsection 145(1) direction where a subsection 145(1) direction was originally issued by the HSO.

Analysis

Preliminary Objection regarding the Appeal Officer's jurisdiction

[47] Subsections 146(1) and 146.1(1) of the Code define the role of an AO:

> 146(1) An employer, employee or trade union that feels aggrieved by a direction issued by health and safety officer under this part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.
>
> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> (a) vary, rescind or confirm the decision or direction; and
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[48] The appellant's position is that HSO Noel's directions were not "severe enough" and did not cover all non-compliances that the HSO's investigation revealed. We will leave for the moment the question of whether the appellant's request to add content to a direction is a request to vary the direction. The respondent views the request to add content as a request for a new direction or as a request to add issues to a direction where those issues were not addressed by the HSO.

[49] To summarize the respondent's position, I do not have jurisdiction to hear the appeal on the merits because I have no authority to issue a new subsection 145(1) direction. The Code does not give an AO express authority to do such a thing. It only gives an AO express authority to issue a danger direction under subsections 145(2) and (2.1). The decision in the Federal Court of Appeal case of *Sachs* holds that an AO does not have jurisdiction to hear an appeal from a decision of an HSO not to issue a direction. As well, AO Aubre in the *Brinks* case has stated:

> [20][…] it is not within the jurisdiction of an appeals officer to seize oneself or to be seized for determination of a matter or issue that has not initially been the object of determination by a health and safety officer.

[50] In my view, the case at hand is quite different from the Federal Court of Appeal's decision in *Sachs* which concerned an appeal of an HSO's decision not to issue a direction. The HSO in *Sachs* did not issue an actual decision or direction but instead accepted an Assurance of Voluntary Compliance. In the present case, the HSO issued multiple directions.

[51] Subsection 146(1) of the Code provides the appeals officer with the authority to hear appeals of one or more directions issued by an HSO. Moreover, when seized

of an appeal, the appeals officer must, in accordance with subsection 146.1(1), inquire into the circumstances of the direction under appeal and after completing his inquiry may confirm, rescind or vary any direction issued by a HSO.

[52] The appellant's position in this appeal is that the directions "are not severe enough". He is requesting a variance of the directions. It may turn out to be the case that what the appellant is asking for can only be satisfied by the issuance of a new direction. At that point I will need to determine if I have the power to do that.

[53] I conclude that I have the authority to hear this appeal and to vary the HSO's direction which, *prima facie*, is at least in part what the appellant appears to be asking me to do.

The extent of an Appeal Officer's power to vary a direction

[54] The power to vary a direction given to appeals officers by subsection 146.1(1) of the Code can be used to make minor changes to the wording of a direction or to modify the compliance date and is also broad enough to allow the substitution of a different contravention than the one cited originally provided that the new contravention is concerned with the same issue (problem, hazard, error) as the original contravention. In *Vancouver Wharves Ltd.* v. *Canada (Attorney General)*, (1998) F.C.J. No. 943 (T.D.) (*Vancouver Wharves*) Mr. Justice Rouleau stated at paras. 12, 14 and 15:

> [12] […] The word "vary" […], is sufficiently flexible to permit expressing the problem identified by the safety officer in a different manner as long as its nature is not altered.
> […]
>
> [14] […] to prohibit the Regional Safety Officer from correcting a Safety Officer's direction by identifying the proper paragraph of section 125 of the Code and the proper Regulations would, in effect, negate the powers which the Regional Safety Officer has been expressly given by Parliament pursuant to subsection 146(3).
>
> [15] […] The power bestowed by a legislative enactment to "vary" a decision is sufficiently broad to allow the substitution of a new decision.

[55] Following the *Vancouver Wharves* decision, I have the power to vary a direction issued by HSO Noel by substituting a new contravention for the original contravention cited provided that the new contravention is based on the same facts considered by the HSO. If the concern is with some other failure of the respondent that HSO Noel did not identify, or choose not to identify, then citing a new contravention would constitute more than "varying" the original direction – it would be a new direction.

[56] At least one of the appellant's concerns appears to be about an issue that HSO Noel did not consider in issuing his directions. The appellant was of the view that

the respondent should have done an engineering assessment before allowing the Genie Lift on the pier. Whether that was an error on the part of the respondent or not, it is an issue separate and distinct from whether at the time of the accident the respondent was generally taking steps to ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees.

[57] Similarly, the appellant's reference to the training of the respondent's supervisors and managers as a failure on the part of the respondent is an issue not addressed by HSO Noel. Hence it is necessary to determine whether I have the power to issue a new subsection 145(1) direction.

Appeals Officers' power to issue contravention direction under subsection 145(1) of the Code

[58] The appellant has cited the *Martin* decision in which Mr. Justice Rothstein from the Federal Court of Appeal held that in view of the wide powers given to appeals officers and the addition to the Code of subsection 145.1(2), there is no rationale precluding an appeals officer from making a determination under section 145(1) of the Code if he finds a contravention of the Code even if the HSO had issued a direction under section 145(2).

[59] To be clear, there is no express authority in subsection 146.1(1) for an AO to issue a subsection 145(1) direction. The only express power an AO has to issue a direction is the power to issue a danger direction under subsections 145(2) or (2.1). This power is set out in section 146.1, which applies to appeals of subsection 145(1) contravention directions, subsections 145(2) and (2.1) danger directions and appeals of an HSO decision in a work refusal situation (subsection 129(7)).

[60] In essence, the appellant seeks to extend Mr. Justice Rothstein's reasoning to the situation at hand. If an AO can issue a subsection 145(1) direction where the HSO originally issued a subsection 145(2) direction, then an AO ought to be able to issue a new subsection 145(1) direction where the HSO originally issued a subsection 145(1) direction.

[61] The respondent did not explore the implications of the *Martin* decision in its submissions. The respondent's view of the *Martin* decision is that it is not relevant to the case at hand because it does not address the issue of the appeals officer's jurisdiction to hear the merits on an appeal made under section 146(1).

[62] The appellant took the view that the *Sachs* decision, relied on by the respondent, was not relevant as in that case the HSO did not issue any direction but chose to accept an AVC from the employer. The respondent's position is that *Sachs* is not distinguishable since, in the current case, HSO Noel could have chosen to accept an AVC from the employer but did not.

[63] I do not believe that I can extend Mr. Justice Rothstein's reasoning so as to conclude that I can issue a subsection 145(1) contravention direction about an issue not considered by the HSO. The reasoning in *Martin* cannot be stretched to the point where it can be said that an AO has an open-ended power to issue completely new subsection 145(1) directions. I do not have the ability to issue a direction for a situation the HSO did not consider, or did consider but then decided not to issue a contravention direction and to receive an AVC from the employer. Further, if there are problems arising from compliance with a direction after it has been issued, these are not matters that the HSO originally considered or could have considered, and so are not matters that are subject to a new direction.

[64] First, it can be said that the *Martin* decision is not in conflict with the *Vancouver Wharves* decision and that *Martin* does not really expand the authority of an AO beyond what was set out in *Vancouver Wharves*. The subsection 145(1) direction in Martin was concerned with the same factual situation -- the same issue -- that the original subsection 145(2) direction intended to correct. Mr. Justice Rothstein was of the view that the problem did not involve sufficient risk to constitute a danger and so there was an error as to the relevant provision chosen by the HSO.

[65] In *Vancouver Wharves* the Safety Officer chose the wrong contravention to address the situation and in *Martin* the HSO dealt with the situation pursuant to his powers arising from a different section of the Code. It is true that in *Vancouver Wharves* the better provision to cite was a different section of the Regulations that the same section of the Code, section 125, requires compliance with, whereas in *Martin* the better provision was subsection 145(1) of the Code rather than subsection 145(2) of the Code. One interpretation of *Martin* is that the HSO's direction was varied by citing subsection 145(1) rather than subsection 145(2). In both cases the hazard remained the same; there was no new hazard found on appeal.

[66] If a substitution of subsection 145(1) for subsection 145(2) can be characterized as a new direction rather than a variation, then a second and very different rationale for the view that *Martin* is not an authority for a further expansion of the powers of an AO is that a subsection 145(1) direction is a necessary "backup" for a subsection 145(2) direction but a new subsection 145(1) direction is not a necessary "backup" for a subsection 145(1) direction. The *Martin* case can be distinguished from the current case on the basis that Mr. Justice Rothstein was considering what can be done if a danger direction is not affirmed by an AO. A danger direction is different in nature from a contravention direction. There are many hazards in the workplace. Some are very high risk and are "dangers" within the meaning of the Code, and other hazards are of lower risk and are not "dangers". A low risk hazard involving a contravention of the Code or its Regulations is dealt with through a contravention direction. If there is nothing specific in the detailed regulations under the Code that matches a low risk hazard, then a contravention direction can be based on the contravention of the broad, regulation-independent duty of the employer in section 124 or perhaps the general duty of the employee in subsection 126(1):

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
>
> 126. (1) While at work, every employee shall
> (c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;

[67] An HSO in a workplace, either inspecting or investigating, will likely see a large number of potential contraventions. The HSO is not required to pursue them all, whether by way of prosecution or through issuance of a direction. The HSO has discretion to focus on the more significant contraventions, normally those of higher risk. The HSO also has discretion to determine what will be most effective in the circumstances to deter workplace parties from substandard practices. The HSO can give advice, a warning, accept an AVC, or proceed with directions or a prosecution.

[68] If, in an HSO's opinion, a hazard is of sufficiently high risk, the HSO will issue a danger direction. The HSO, however, may have over-estimated the risk. The risk may not reach the level of "danger" as set out in the rather complex definition of danger in the Code. On appeal of the danger direction, as the appeal hearing is a *de novo* hearing, the AO can hear evidence not available to the HSO when the HSO assessed the risk. If the AO finds there is no danger then the danger direction will be rescinded. The problem is that there may still be significant risk in the workplace that should be addressed. If the AO cannot issue a contravention direction in place of the danger direction, then the purpose of the Code will be defeated:

> 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.

[69] The definition of "safety" in subsection 122(1) of the Code refers to hazards that are dangers and hazards that are not dangers:

> "safety" means protection from <u>danger and hazards</u> arising out of, linked with or occurring in the course of employment;
> [Underlining added]

[70] An employee is not "safe" just because it is decided there is no danger. An employee may still be in need of protection from lower risk hazards.

[71] The ability of the AO to issue a contravention direction when a danger direction fails is a "back up" or "fail safe" measure. If the AO did not have such authority then an HSO may feel inhibited from issuing a danger direction because the HSO will know the direction is "all or nothing"; there's no fallback position.

[72] There are potentially a very large number of contraventions an HSO may identify; far more than hazards which are "dangers". The logic is that there are far more low risk hazards than high risk hazards. This is an accepted principle in the

practice of occupational health and safety. Indeed, a general duty such as in section 124 is necessary because it is impossible for regulations to address specifically all possible hazards. An HSO can potentially issue far more contravention directions than danger directions. If one contravention direction is rescinded on appeal there may be others which do not fail. The purpose of a direction is to motivate a workplace party to take action and to pay attention to OHS risks. If all contravention directions fail on appeal, the HSO can quite likely return to a problem workplace and find numerous other low risk contraventions that can be the basis for motivating a workplace party to take OHS more seriously. Putting it simply, there is more "back up" for contravention directions than for danger directions.

[73] In conclusion, while it can be argued that pursuant to the Federal Court of Appeal's decision in *Martin* an AO has the authority to issue a subsection 145(1) contravention direction if a subsection 145(2) or (2.1) danger direction is appealed and is rescinded, I am of the view that an AO does not otherwise have the authority to issue a completely new subsection 145(1) direction for an issue the HSO did not consider or for an issue the HSO considered but was not the basis of a direction or for an issue that arose from compliance with the HSO's direction. In the latter scenario, the path anticipated by the Code is further investigation and directions by the
HSO or prosecution. There is nothing in the Code to suggest that the AO's function is to monitor the entire enforcement process.

Should the directions be varied in the manner requested by the appellant?

[74] Having come to such conclusions about my jurisdiction and my powers, it still remains to be seen whether the appellant is asking for a variation of a direction or a new subsection 145(1) direction (or directions), or both. Where the appellant is requesting that content be added to an existing direction, does that constitute a request for varying the direction, or would the requested changes to the direction amount to a new direction being issued? I need to examine more closely what the appellant is seeking.

[75] The appellant submits that:

1. HSO Noel ought to have indicated expressly in his direction that it covered the "dangerous use" of the Genie Lift to inspect the bridge;
2. HSO Noel ought to have expressly stated in one of the original directions that the HOIR should be re-done, and with the participation of the H&S Rep, Mr. Rudavsky;
3. HSO Noel ought to have issued a direction of non-compliance under subsection 145(1) on the grounds that the respondent violated section 143 of the Code by making false statements in the letter of April 11, 2013;
4. There was a violation of paragraph 125(1)(*z*) by the respondent (although the appellant did not specify what the response should have been);

5. An email addressed to him was a “retaliation” and therefore a contravention of the Code (although he did not specify what the response should have been).

Item #1

[76] Regarding Item #1 above, the appellant is requesting that “information about the dangerous use of the Genie on the Pier following the accident on April 17, 2012, be added to direction #3”. The appellant is requesting that direction #3 be varied to “have the risk taken by PWGSC during the emergency repairs, specifically the Genie on the pier, without performing a (sic) engineering assessment/evaluation of the pier” added to direction #3.

[77] The appellant does not appear to be asking that, because of the “dangerous use of the Genie”, direction #3 should be transformed into a subsection 145(2) danger direction. In his written submissions on this point, the appellant referenced paragraph 125(1)(*y*), which states:

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

[78] HSO Noel’s direction #3 read:

> *Canada Labour Code* – Part II Para. 125.(1)(y)
> The employer failed to ensure that the activities of every person granted access to the work place by the employer did not endanger the health and safety of employees. On April 17, 2012, during contracted work activities, a lift bridge cable counterweight was dislodged and fell in the workplace. Contracted workers had been working on the bridge and performing mechanical alterations to the bridge structure. During a subsequent routine bridge lift, the 18,000 lb. counterweight was obstructed, and was dislodged and fell onto the bridge at the roadway level below.

[79] If the respondent complies with the existing direction and improves its policies and practices regarding the risks that visitors to the workplace pose to its employees it would cover future visitors. HSO Noel’s directions included the requirement “to take steps to ensure that the contraventions do not continue or reoccur”. HSO Noel did not include the Genie Lift activity expressly in his direction #3. I do not see how anything is to be gained by adding such content.

[80] Insofar as the appellant is seeking a declaration of danger in the wording of the direction I think that goes beyond what the purpose of a direction is. A subsection 145(1) direction is an order to bring oneself into compliance with a particular

provision of the Code or its Regulations; it is not to be used to make declarations. The appellant wanted the direction varied so that it was "more severe" or "more strongly worded".

[81] My impression of the appellant, through his questions and comments at the hearing, is that he misunderstands to some degree the purpose of a direction and, indeed, a regulatory statute such as the Code. The over-arching purpose of both is deterrence – to deter people from substandard practices and to motivate them to reduce risk so as to protect employees. The purpose is not to punish people for moral wickedness or to make mere declarations of fault or blame. My impression was that the appellant desired the direction to be varied so as to be more "punitive", which is not the purpose of a direction.

[82] Adding a reference to an alleged lack of an engineering assessment would change the nature of the direction because it would change the nature of the issue the direction aimed to correct. That part of the appellant's request goes beyond a variation. There are other provisions in the Regulations under the Code that apply to circumstances where engineering assessments should be done for new work. In his testimony, HSO Noel stated that he chose not to issue a direction concerning such other contraventions that might be involved with the Genie Lift. I do not have the authority to respond to activities, issues or hazards that were not the subject of the original directions. Here, the appellant is not asking for a variation of a direction but for a direction that covers a different contravention.

Item #2

[83] The appellant is requesting that, in effect, one of the HSO's directions be varied so as to "include more content". It is the appellant's contention that at the meeting of February 4, 2013, HSO Noel had given a "verbal direction" to redo the HOIR and to include the participation of the H&S Rep, Mr. Rudavsky. HSO Noel's direction #1 had to do with the involvement for the H&S Rep in the investigation of the bridge incident:

> *Canada Labour Code* – Part II Para. 125(1)(c) and Para. 136(5)(g) and Canada Occupational Health & Safety Regulations Para 15.4(1)(b)
> The employer failed to provide for the participation of an employee health and safety representative in an investigation of a hazardous occurrence in the workplace. On April 17, 2012 a lift bridge cable counterweight, weighing approximately 18,000 lbs., was obstructed and dislodged during a routine bridge lift and fell to the bridge at the roadway level below. The employer conducted two investigations immediately following the occurrence. One investigation was conducted by the PWGSC Regional Health and Safety Manager. Another investigation was conducted by a consulting company contracted by the employer. The *Canada Labour Code* prescribes that a workplace employee Health and Safety Representative participate in all inquiries, investigations, studies and inspections pertaining to the health and safety of

> employees. The employer failed to notify the employee Health and Safety Representative of the two investigations and failed to provide for his participation in the investigations.

[84] The appellant alleges that HSO Noel issued a verbal direction at the meeting of February 4, 2013 requiring that a new investigation and a new HOIR be prepared. HSO Noel, in his testimony, did not confirm this. Subsection 145(1.1) refers to an oral direction. It must be reduced to writing so as to make possible their appeal or their use as the basis of a prosecution. If it is not, it is no longer a direction. HSO Noel chose not to require that a new investigation be commenced and a new HOIR be completed. That makes sense. It would no longer be practical so long after the incident to start from scratch. The purpose of the Code would best be served at that point by having the appellant review documents from the investigations and provide his comments and recommendations. It was HSO Noel's testimony that that was the essence of the discussion at the February 4, 2013 meeting. The employer proceeded on that basis. I can only assume that either the appellant misunderstood what was discussed at the meeting, or else he simply disagreed with the HSO's exercise of his discretion on how to proceed.

[85] To the extent that the appellant wants the direction varied to require the investigation and HOIR to be redone, that wasn't practical in February of 2013 and it is not practical now.

[86] As previously mentioned, the respondent is not contesting the directions. The respondent eventually provided the appellant with all the reports of the bridge incident and sought to involve the appellant in the investigation process by having him comment on the reports and make recommendations. Whether that was sufficient or not to comply with direction #1 is for an investigating HSO to say. It is not within the ability of an AO to monitor the manner in which a direction is complied with. While it may appear that the appellant is asking for a variation of a direction, the appellant is really asking for a direction covering events which occurred long after the original direction.

Item #3

[87] The appellant requests that a new direction be issued regarding the letter of April 11, 2013 from PWGSC to HRSDC which set out how the Respondent had complied with the HSO's directions. The appellant's position is that some of the statements in the letter are false and thus constitute a breach of section 143 of the Code, which states:

> 143. No person shall obstruct or hinder, or make a false or misleading statement either orally or in writing to an appeals officer or a health and safety officer engaged in carrying out their duties under this Part.

[88] The appellant is asking for a new subsection 145(1) contravention direction. A contravention of section 143 was not part of HSO Noel's directions. This matter

concerns something which happened long after the bridge incident, and which was not about contraventions or hazards at the time of the bridge incident. The appellant is requesting a direction concerning the manner in which the employer responded to the original directions. If there is any merit to the appellant's allegation of false statements, and I make no assessment, then it is up to an HSO to investigate. In his testimony, HSO Noel said he had concerns about the letter but that he chose not to pursue the matter. The appellant said that he understood that the HSO would have pursued the matter but that the HSO was over-worked and pressed for time. An HSO's time and energy is limited and the HSO must allocate them as best the HSO can.

Item #4

[89] The appellant claimed in his written submissions that the employer has breached paragraph 125(1)(*z*), which states:

> 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) ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer;

[90] Paragraph 125(1)(*z*) is a requirement for the training of supervisors and managers. In his submissions, the appellant stated that the employer's supervisors were trained, but in spite of the training, still "failed to follow the law".

[91] Since the appellant stated that supervisors and managers were trained, he is not actually alleging that paragraph 125(1)(*z*) was contravened by the employer and so it cannot be said that he is asking for a new direction under paragraph 125(1)(*z*). It is not clear what he is asking for with this allegation. There was no mention of a violation of paragraph 125(1)(*z*) prior to the hearing, or during the hearing. There was no evidence about the training of supervisors or managers pursuant to the Code presented at the hearing and the appellant did not provide any information about such training in his written submissions. HSO Noel did not refer to paragraph 125(1)(*z*) as a contravention.

[92] A subsection 145(1) contravention direction by me regarding paragraph 125(1)(*z*) would be a completely new direction because it would be about an alleged failure on the part of the employer that is different in nature than issues HSO investigated originally and is not within my

power to issue such a direction. There was no evidence given of how the employer's supervisors and managers "failed to follow the law". Any direction based on this allegation would be a completely new direction.

[93] In addition, fairness alone dictates that issues which emerge for the first time in written submissions after the hearing should not be taken further by an AO.

Item #5

[94] There was a reference in the appellant's written submissions about an email sent to him from a PWGSC manager. The appellant alleged that this email was a "retaliation", which the appellant implied was a contravention of the Code.

[95] As per section 133 of the Code, allegations of this nature fall outside of the jurisdiction of an appeals officer. As a result, I will not entertain the appellant's submissions regarding this issue.

Decision

[96] For these reasons, I confirm the directions issued on March 21, 2013, by HSO Noel.

Peter Strahlendorf
Appeals Officer