Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-10-03
Case No.: 2017-34

Between:

Madysta Télécom Ltée, Appellant

Indexed as: *Madysta Télécom Ltée*

Matter:	Appeal filed under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour.
Decision:	The direction is rescinded.
Decision rendered by:	Mr. Jean Arteau, Appeals Officer
Language of decision:	French
For the appellant:	Mr. Carl Lessard, Counsel, Lavery, de Billy, LLP, Lawyers
Citation:	2018 OHSTC 12

REASONS

[1] This decision concerns an appeal filed under subsection 146(1) of the *Canada Labour Code* (the Code), by Madysta Télécom Ltée (Madysta or the employer), on October 10, 2017, against a direction issued on September 15, 2017 by Mr. Michael J. O'Donnell, an official delegated by the Minister of Labour (ministerial delegate) for the Labour Program of Employment and Social Development Canada (ESDC).

Background

[2] The following facts are taken from the ministerial delegate's report and his testimony given at the hearing.

[3] On September 12, 2017, Ontario's Ministry of Labour (MOL) received a call from a member of the public alleging that employees were working on the roof of an apartment building, located on Paul Anka Drive in Ottawa, without their fall protection equipment. MOL inspectors visited the site and found that, even though the employees in question were all wearing safety harnesses, they were not attached to a life line or other fall protection equipment. After having concluded that the employer was a work, undertaking or business that falls under federal jurisdiction, the MOL representatives contacted the ESDC Labour Program to inform them about the situation on the roof.

[4] On September 14, 2017, Ministerial Delegate O'Donnell visited the site to start his investigation. He was accompanied by his colleague, Mr. Daniel Keenan-Pelletier. Upon his arrival at the site, he found that the employees were wearing fall protection equipment and that a life line was found near the edge of the roof, but that none of the employees were attached to it.

[5] Mr. O'Donnell took a few pictures of the work location, which were submitted as proof during the hearing, and then contacted Mr. Pierre Lefort, Senior Advisor with the Labour Program, to inform the latter of his concerns. After a conversation with Mr. Lefort, Mr. O'Donnell decided to verbally issue a "danger" direction and a notice to the employer to immediately stop all work on the roof. He explained that he proceeded in this way because he did not have the material with him that was necessary to draft the direction and notice of danger.

[6] The next day, Mr. O'Donnell returned to the site with a written copy of his direction and affixed a notice of danger to the door leading to the roof. Since no one was present at the site at the time of this second visit, he also sent two certified copies of the direction to the employer by registered mail.

[7] The direction issued by officer O'Donnell was written in English and reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPHS 145(2)(*a*) AND (*b*)

On 14 September, 2017, the undersigned official delegated by the Minister of Labour conducted an inspection in the work place operated by Madysta Télécom Ltée, being an employer subject to the Canada Labour Code, Part II, on the rooftop at 3360 Paul Anka Drive in Ottawa, Ontario.

The said official delegated by the Minister of Labour considers that a condition in a place or the performance of an activity constitutes a danger to an employee while at work:

- There was no specific safety plan including a rescue plan to prevent employees from falling from a height of 12 stories at 3360 Paul Anka Drive in Ottawa, ON evident at the time of my inspection.
- The ties off points were not engineer rated and approved for use to secure fall protection equipment.

The employer failed to provide every person granted access to the work place with fall protection equipment, failed to ensure an anchor capable of withstanding a force of 17,8 KN was used and failed to ensure that employees were familiar with and used fall protection equipment as prescribed by Part XII of the Canada Occupational Health and Safety Regulations.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition no later than 28 Sept. 2017

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II to not perform the activity in respect of which the Notice of Danger No. H0531 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Issued at Ottawa, ON, this 15th day of September, 2017

Michael J. O'Donnell, B.A., M.T.S.
[…]

[8] On September 18, 2017, Mr. O'Donnell informed the employer by email that a written direction had been sent and that they should receive it at the latest on September 19. In this same email, he also stated that the employer must send him the following documents to comply with the direction: a risk identification and assessment, a rescue plan, an equipment inspection record, an engineer rated and approved report regarding the anchor points on the roof as well as training records for all employees who could be called upon to work on the roof.

[9] On October 4, 2017, after having received all required documents from the employer, including an engineering report regarding the anchor points, the ministerial delegate decided to

re-open the worksite and withdrew the notice of danger that he had affixed to the door leading to the roof.

[10] On October 10, 2017, the employer appealed the direction to an appeals officer. It should be stated that there is no respondent in this case. A hearing was held on May 15 and 16, 2018 in Montreal.

Issue

[11] The question raised by this appeal is the following: Was the direction issued by the ministerial delegate under subsection 145(2) of the Code well founded?

Appellant's submissions

[12] The following people testified on behalf of the appellant: Mr. Denis Ricard, Human Resources, Material Resources and Occupational Health and Safety Manager and Mr. Steve Cossette, Worksite Manager.

[13] Mr. Cossette, who has been employed by Madysta for approximately 20 years, was the site manager for the employer at the time the work was being carried out on the roof of the building in question. He explained that, at the time of the ministerial delegate's intervention, he was working at another site. He received a telephone call informing him that the worksite had been closed and went straight to the premises, but Mr. O'Donnell had left before he got there.

[14] He then had a telephone conversation with Mr. O'Donnell, during which the latter confirmed that the worksite was, in fact, closed. Mr. Cossette said he asked for the reasons motivating the decision to close the worksite but did not receive any answers from Mr. O'Donnell. Mr. Cossette confirmed that Mr. O'Donnell never requested any specific documents or information before issuing the direction. Mr. Cossette made an appointment with Mr. O'Donnell the next day, on September 15, at 10:00 a.m., to tour the site and try and understand what the reasons for issuing the direction were. Unfortunately, Mr. O'Donnell did not attend the appointment, in spite of several attempts by Mr. Cossette to contact him.

[15] Mr. Ricard explained that he started taking care of the case on September 14, 2017 when he was informed by Mr. Steve Cossette of the ministerial delegate's decision to close the worksite. Mr. Ricard confirmed that he then discussed the case with Mr. Cossette, who stated that he had made an appointment at the worksite with Mr. O'Donnell. The next day, Mr. Cossette informed him that Mr. O'Donnell never showed up for the appointment. Mr. Ricard therefore made the decisions to authorize Mr. Cossette to go up to the roof and secure the equipment and materials that were left because the employees were not able to pick them up the previous day when the ministerial delegate informed them of his decision to stop work on the roof.

[16] Mr. Ricard wrote a first email to Mr. O'Donnell asking him for an explanation of his decision to order work on the roof to be stopped and of the problems found, and which, in the ministerial delegate's opinion, compromised the employees' health and safety. Mr. O'Donnell

answered the following Monday, saying that he had sent the written direction by mail and that he had gone and affixed a notice of danger to the door leading to the roof late Friday afternoon.

[17] Mr. Ricard stated that he then informed Mr. O'Donnell of his intention to appeal the direction to an appeals officer. In the same email, he stated that the employer intended to comply with the direction and provide the required documents and information. Mr. Ricard also stated that he wished to communicate in French to make discussion between the parties easier.

[18] On September 19, 2017, after having received a written copy of the direction and notice of danger, Mr. Ricard sent a formal answer to the direction, accompanied by several documents containing the information and data required by Mr. O'Donnell's direction. In his answer, he mentions, among other things, that the employer has a risk prevention program, but the ministerial delegate never asked the employees for the document.

[19] Mr. Ricard concluded his testimony by explaining that, in his opinion, the direction and notice of danger only reported contraventions and that, if Mr. O'Donnell had asked the right questions and requested relevant information from the employees, he would have obtained answers to his questions and probably would not have had to issue a direction.

[20] The appellant argues that the written direction and notice of danger should be rescinded for the following reasons. First, according to the appellant, the direction issued by the ministerial delegate is void because it is vague, ambiguous and presents formal defects. In fact, the direction does not refer in any way to a dangerous situation within the meaning of the Code. Neither does it describe, in a precise and clear manner, the task accomplished, the people involved and the part of the task that is a danger or a dangerous situation within the meaning of the Code. As a result, it is not reasonably possible for the appellant to take cognizance of the problems found to be able to remedy them.

[21] To support its argument, the appellant refers to the decision rendered by the Federal Court of Appeal in *Maritime Employers Association* v. *Harvey et al.* (FCA), [1991] FCJ No. 325 in which Honourable Justice Pratte concluded in the following terms, in paragraphs 3 and 4:

> [*Translation*]
>
> The applicant also pointed out that the directions given by the safety officer and confirmed by the regional officer were too brief in that they simply ordered the employer "to take immediate measures to prevent danger" without otherwise stating what the employer had to do. To comply with the obligations set forth in paragraph 145(2)(a), argues the applicant, the health and safety officer should have indicated exactly the measures that the employer had to take to prevent the danger.
>
> Even if it is not expressly stated in the law, it is clear that the directions given pursuant to subsection 145(2) must be precise enough to determine whether or not the employer has complied with them. To have the required precision, it is not, however, necessary that the directions specify the means which the employer must use to prevent the danger to employees; it is sufficient that it specifies the results the employer must attain by clearly identifying the danger to the employees. If in fact, it may in certain cases be

> easy to state what the employer must do to remedy danger, in other cases it may difficult or even impossible. There may be a multitude of means to attain the desired results, or, it may be impossible for a person who does not have the specialized scientific knowledge to know how to attain the said result. It is normal under these circumstances that the choice of means to be taken to attain the goal that is assigned be left to the employer.

[22] The statements by Justice Pratte were repeated in two other decisions rendered by appeals officers. In *Cast Terminal v. International Longshoremen's Association, Local 1657*, decision No. 06-020, rendered on June 30, 2006, the appeals officer rescinded a direction based on the reasons that the latter was not issued in writing before leaving the work place and because the wording in the direction was vague and ambiguous. In a more recent decision, in *City of Ottawa (OC Transpo) v. Norman Macduff*, 2013 OHSTC 27, the appeals officer rescinded the direction for the same reasons of vagueness.

[23] Furthermore, the appellant argues that the direction only describes elements of non-compliance that were not verified by the ministerial delegate at the time of his investigation and that were, in fact, compliant.

[24] After having reviewed the concept of danger as set out in section 122 of the Code, as well as relevant case law, the appellant argues that the ministerial delegate could in no way conclude that danger existed and that he acted rather on the basis of unfounded assumptions and suppositions, while the employer offered him all the proof and that the alleged violations did not exist at the time of his visit of the worksite, on September 14, 2017.

[25] If the ministerial delegate had asked the right questions to the employer at the opportune time, he would have rapidly found that there was no reason to issue a written direction and notice of danger. According to the appellant, the ministerial delegate was negligent in his management of this case.

[26] For all these reasons, the appellant requests that the direction and notice of danger dated September 15, 2017 be rescinded.

Analysis

[27] In this appeal, it must be determined if danger existed for Madysta employees who were working on the roof of the building that day, and if the ministerial delegate's direction to this effect was well founded.

[28] Subsection 146(1) of the Code describes the power of an appeals officer when an appeal is filed against a direction issued after a situation has been concluded to be dangerous. An appeals officer may vary, rescind or confirm the direction:

> **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;

[29] It has now been well-established that an appeal filed pursuant to Part II of the Code is done through a hearing *de novo*, allowing the appeals officer to receive new relevant elements of proof, without regard as to whether these elements of proof were taken into consideration by the ministerial delegate during his or her investigation. These elements shall, however, pertain to circumstances about which the ministerial delegate investigated (See specifically *City of Ottawa (OC Transpo) v. MacDuff*, 2016 OHSTC 2 and *DP World (Canada) Inc. v. International Longshore and Warehouse Union, Local 500 et al.*, 2013 OHSTC 3).

[30] The concept of danger is defined in section 122 of the Code as follows:

> **122(1)** In this Part,
>
> ***danger*** means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;

[31] This new definition was added to the Code pursuant to modifications made to the *Economic Action Plan 2013 Act, No. 2,* SC 2013, c. 40. In the very first decision interpreting this new definition in *Correctional Service of Canada v. Ketcheson,* 2016 OHSTC 119 [*sic*], the appeals officer established the applicable criterion to determine the existence of danger:

> [199] To simplify matters, the questions to be asked whether there is a "danger" are as follows:
>
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[32] Moreover, in the decision *Keith Hall & Sons Transport Limited v. Robin Wilkins*, 2017 OHSTC 1, the appeals officer summarized as follows the essential elements required to conclude that danger is present:

> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of

> the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.

[33] In this case, as the appellant pointed out, it is difficult, when reading the direction issued by the appellant, to determine exactly what was the risk, situation or task that presented a threat to employees' health and safety. In fact, I agree with the appellant in stating that the ministerial delegate's direction does not state what situation or what aspects of the employees' tasks were a danger within the meaning of the Code. The appellant therefore argued that the direction should be rescinded because it did not refer to a situation of danger, but was limited to the description of alleged contraventions.

[34] The alleged contraventions listed in the direction are that:

- There was no hazard prevention program for this worksite to prevent an employee from falling, including a rescue plan;
- The anchor points were not certified and approved by an engineer;
- The employer did not provide any person allowed to access the work place with fall protection equipment;
- The employer did not ensure that the anchor points were capable of withstanding a force of 17.8 kN; and
- The employer failed to ensure that its employees were aware of and using fall-protection systems as required under Part 12 [*sic*] of the *Canada Occupational Health and Safety Regulations* (the Regulations).

[35] In *Arva Flour Mills Limited*, 2017 OHSTC 2, the appeals officer responded to a similar argument raised by the employer that a contravention to the Code is not sufficient to conclude that there is a danger. He stated the following:

> [119] While I concur with the appellants' assertion that a danger direction is generally not the appropriate vehicle for a contravention of the Code and its Regulations, I believe that there are certain circumstances within which a contravention to the Code may also constitute a danger. In *Ketcheson*, the appeals officer was of the same opinion when he established the following in paragraphs 115 and 213 of his decision:
>
> […]
>
> [120] To be sure, in some situations, certain contraventions to the Code or its Regulations may pose sufficient high risks to employees that they can amount to a danger as defined in the Code. Based on my analysis above, I have come to the conclusion that, in the case at bar, the identified contravention does not create a situation of danger as defined in the Code. Nonetheless, this does not mean that there is not a contravention to the Code that ought to be corrected.
>
> [my underlining]

[36] I will now review the alleged contraventions in the ministerial delegate's direction with respect to the evidence submitted, to determine whether they created a dangerous situation within the meaning of the Code.

1) Alleged lack of a hazard prevention program for the worksite, including a rescue plan

[37] In his direction, the ministerial delegate concluded that the employer did not have a hazard prevention program for the type of work that employees must perform on the building's roof. On the other hand, it appears from the appellant's witness testimony that during his visit to the site on September 14, the ministerial delegate never sought to obtain such a program from the employees present.

[38] The evidence shows that Mr. O'Donnell simply did not request this document from the employees present during his visit. The evidence submitted shows that a copy of the general hazard prevention program can be found in all Madysta vehicles and could have been provided by the foreman to Mr. O'Donnell if he had requested it. Moreover, the appellant also submitted as evidence a form entitled "*Liste de contrôle de sécurité des travailleurs*" (worker safety checklist), which is used by the foreman before beginning any new project on a new site. This form allows the foreman to identify the specific risks to this new site before beginning any new work.

[39] Therefore, I am convinced by the evidence submitted by the appellant that at the time of the ministerial delegate's intervention, there was a general hazard prevention program and a program for the work place in question.

[40] I am also satisfied by the documentary evidence submitted that the employer had a rescue plan available at the work place at the time of the ministerial delegate's investigation. In fact, it has been demonstrated that all Madysta employees who performed work at heights have in their possession a heights rescue kit to respond to any emergency, and that they have taken and completed at heights rescue training. Once again, it seems that the ministerial delegate neglected to ask the employees to inform him before issuing his direction.

2) Alleged absence of fall protection equipment and employee training

[41] With regard to the protective equipment provided by the employer, firstly, it should be noted that the direction does not in any way specify what, in the ministerial delegate's opinion, the missing or inadequate equipment was at the time of his investigation. The ministerial delegate, however, stated that he had observed during his visit to the work place that all the employees present were wearing a properly fitted harness, as well as the presence of properly anchored life lines.

[42] In addition, in a photo taken by the ministerial delegate that same day and submitted as evidence, we see the employees standing on a footbridge all wearing a safety harness. Although the employees were not attached, other photos taken by the ministerial delegate show the presence of life lines, as well as anchor points. Therefore, I am having a lot of difficult

understanding how the ministerial delegate was able to conclude, as he did in his direction, that the employer did not provide employees with adequate fall protection equipment.

[43] The appellant submitted as evidence directives from Bell Canada and Telus on working at heights on flat roofs, both of which were adopted by Madysta. These directives provide as follows: From the edge of the roof, namely from 0 m to 2 m from the edge, work is only permitted if the employee is equipped with a fall-protection system (harness and anchor); from 2 m to 4 m, work is permitted if there is a warning line 2 m from the roof's edge; over 4 m, work is permitted without restriction.

[44] Therefore, according to the employer's practices and procedures, employees are not necessarily required at all times to be attached to life lines when performing work on a building's roof. The requirement to be attached only applies when employees work within 2 or 4 m from the roof's edge. A warning line is set up to warn employees when they come close to that limit. I was able to see in several photos taken by the ministerial delegate that warning lines were present on the roof at the time of the ministerial delegate's intervention on the site. However, there is nothing in the evidence to conclude that the employees were not complying with this instruction on that day.

[45] As for the training provided by the employer on the use of protective equipment, the documentary evidence submitted by the appellant shows that all the employees have taken and completed, among other things, working at heights training, primarily focused on the following objectives: allow participants to familiarize themselves with the equipment; understand and comply with the rules and usage restrictions on fall protection equipment; and acquire the basic knowledge on the subject of fall protection.

[46] This training also aims to introduce participants to the use of the primary fall protection equipment, according to manufacturers' instructions and regulations on occupational health and safety. Among the specific objectives of the training, participants must demonstrate that they understand the regulatory requirement on anchor points. The appellant submitted as evidence all the training content and certificates of achievement of all those employees.

[47] Lastly, I am convinced by the photographic and documentary evidence submitted, as well as the testimony at the hearing, that at the time of the ministerial delegate's investigation, the employees were using and were all familiar with the fall protection equipment. Therefore, the delegate's conclusion in this regard is wrong.

3) Uncertified anchors not approved by an engineer and incapable of withstanding a force of 17.8 kN

[48] The ministerial delegate testified that when he examined the anchor points that were on the roof during his visit to the work place, he was unable to determine whether they were secure, without the approval and certification of an engineer.

[49] The appellant, for its part, claims that engineer-certified anchor points are not necessarily found on the roofs of all buildings where workers may be called on to perform work, but that

Madysta's employees are trained to find secure anchors capable of withstanding a force of 17.8 kilonewtons (kN), in accordance with Part XII of the Regulations.

[50] Despite this position and in order to comply with the direction, the appellant commissioned an engineering firm to analyze the anchor points that were used by the employees on the roof of the building in question. The engineering report determined that these anchor points were all in compliance with the requirement of subsection 12.10(3) of the *Regulations*, i.e. capable of withstanding a force of 17.8 kN.

[51] Subsection 12.10(3) of the *Regulations* reads as follows:

> **12.10(3)** The anchor of a fall-protection system shall be capable of withstanding a force of 17.8 kN.[1]

[52] The *Regulations* do not specify how this resistance should be verified nor by whom. On the other hand, there are several best practices guides, including the *Construction Safety Manual of Ontario* (the "Manual"), that specify how to check an anchor point's resistance and who can do it. The 2009 Manual or the 2017 IHSA Manual, contains recommendations on anchor points in Chapter 19, entitled "Personal Fall Protection Systems." In its 2017 issue, pp. 19-5 and 19-6, it specified, for existing structures not originally designed as anchor points, but used as such, like those found on the roof of the building in question, that the structural components should be checked by an engineer or a competent person to see if they can be used as anchor points. Figure 19-7 illustrates examples of adequate anchorage; the anchors photographed by the ministerial delegate correspond to four of the examples in Figure 19-7.

[53] As previously stated, Madysta employees have all undergone working at heights and fall protection training which, among other things, covered anchor points and these could, in my opinion, be considered as competent persons to check the resistance of anchors on the site.

[54] Notwithstanding the foregoing, and although I understand the ministerial delegate's position that because of the best practices in the industry, only a competent person or an engineer can determine whether an existing structure can adequately be used as an anchor point. I am of the opinion that the mere fact that an engineer did not certify the anchor points was not sufficient to conclude that there was a hazardous situation within the meaning of the Code and certainly did not justify stopping work on the roof.

[55] Deferentially, it is difficult for me to understand how the ministerial delegate was able to render his direction without even asking the employer to prove that the employer had not ensured that the anchor points used by the employees were able to withstand a force of 17.8 kN, while the anchor points on the roof are identical to the examples of anchor points deemed adequate in the Construction Health and Safety Manual, the one used by the ministerial delegate to support some of his other conclusions.

---

[1] In the French decision, the term "point d'ancrage" ("anchor point") is used instead of "point d'attache" ("attachment point") because, in the author's opinion, this better reflects the term "anchor" in the English version. In accordance with best practices for fall protection, the anchor of a fall-protection system is a solid element on a structure, to which is attached the end of the connecting sub-system's fall arrest system. An attachment point is a point that allows you to attach different components of a fall arrest system.

[56] In my opinion, even before concluding that the employees were exposed to a danger on the grounds that the anchor points used were not certified by an engineer, the ministerial delegate should have simply required the employer to have them assessed by an engineer beforehand. In light of the results of the analysis of the anchor points, I find that the ministerial delegate was not justified in concluding a danger on this ground.

4) The alleged risk of a pendulum effect in the event of a fall

[57] In his testimony, Mr. O'Donnell mentioned an additional element that he considers to be unsafe. That is the risk of a pendulum effect if a fall is stopped. Although the ministerial delegate did not include this element in his direction, I find that it is useful for me to address it, considering the *de novo* character of a hearing under Part II of the Code.

[58] An anchor point may be placed at a certain distance from a flat roof's edge. An employee working on a roof edge without a railing must wear "a fall-protection system" (section 12.10(2)). This system consists of a harness (a belt according to section 12.10(2)) connected to the anchor point by a connecting system. The shortest distance between the anchor point and the roof's edge is the distance measured on the perpendicular that joins the anchor point at the roof's edge. However, if the employee wants to work along the roof's edge or on the facade, he will have to use a longer connecting system than this shorter distance.

[59] If a fall occurs on the edge of a roof while the length of the connecting system between the anchor point and the harness is greater than the distance between the anchor point and the roof's edge, a pendulum effect occurs. In his testimony, Mr. O'Donnell cited the *Construction Health and Safety Manual*, of the Construction Safety Association of Ontario (CSAO), in its 2009 issue, particularly, page 6 in Chapter 19 of the Manual, to illustrate the pendulum effect along the edge of a roof.

[60] The risk of a pendulum effect is, in my opinion, a contravention of section 12.10(4) by allowing a free fall of more than 1.2 m.

> **12.10(4)** A fall-protection system that is used to arrest the fall of a person shall prevent that person
> **(a)** from being subjected to a peak fall arrest force greater than 8 kN; and
> **(b)** from falling freely for more than 1.2 m.
>
> **12.10(4)** Un dispositif de protection contre les chutes utilisé pour entraver (arrêter selon la version anglaise) la chute d'une personne, doit empêcher celle-ci :
> **a)** d'être soumise à une force d'arrêt supérieure à 8 kN;
> **b)** de faire une chute libre de plus de 1,2 m.

[61] In his testimony, Mr. Cossette explained that the risk of a pendulum effect raised by the ministerial delegate could not occur, given the position of the vertical life lines between the antennas on the facade. The building at 3360 Paul Anka Drive is made up of three 120° wings longer than wide; the antennas are fixed to the entire width of the narrow facades of the ends of the wings. Several existing structures located in the middle of the roofs of the wings are used as

anchor points. For a specific anchor point, the shortest distance between this anchor point and the edge of the roof on a facade's end is measured perpendicular to the roof's edge (the shortest distance). The intersection of this perpendicular with the roof's edge will be designated the central point. A life line is attached to the anchor point, placed on the roof and deployed vertically on the facade. The part of the life line placed on the roof is longer than the shortest distance. In order to avoid the pendulum effect, the life line is deployed vertically on the side of the antenna furthest from the central point. If a fall occurs, the antennas become obstacles that block the slippage of life lines on the roof's edge. The employee sees their fall stopped at the vertical antenna, without a pendulum effect. A photo in the ministerial delegate's report corroborates Mr. Cossette's testimony. Therefore, in my opinion, the employees were using proper working methods to prevent this phenomenon from occurring.

Conclusions

[62] Based on the totality of the evidence submitted, I conclude that it has not been proven to me that there was a situation, task or risk likely to constitute an imminent or serious threat to the health and safety of the employees who were working on the building's roof at 3360 Paul Anka Drive on that day. On the contrary, the evidence shows that at the time of the ministerial delegate's investigation, the alleged contraventions did not exist.

[63] In addition, I agree with the appellant's position that if the ministerial delegate had asked the right questions to the right people during his investigation, he would have obtained most of the information he was looking for. In fact, it appears that the delegate hastily drew conclusions based on incomplete information. According to the testimony and documentary evidence submitted, it is my opinion that the ministerial delegate did not conduct a thorough investigation before making a decision that had very significant consequences for the appellant. In addition, undue delays were caused, among other things, due to the ministerial delegate's inability to communicate in the working language of the employer and its employees.

Decision

[64] For these reasons, the appeal is allowed, and the direction and notice of danger issued by Ministerial Delegate O'Donnell on September 15, 2017 are rescinded.

Jean Arteau
Appeals Officer