Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Total Oilfield Rentals Limited Partnership, 2011 OHSTC 20

Date: 2011-08-16
Case No.: 2010-48
Rendered at: Ottawa

Between:

Total Oilfield Rentals Limited Partnership Inc., Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of four directions issued by two health and safety officers.
Decision:	Appeal allowed
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Grant N. Stapon, Q.C., Counsel, Bennett Jones LLP

Canada

REASONS

[1] The decision that follows concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of directions issued by Health and Safety Officers (HSO) Dawn MacLeod and Lisa Pan. Two directions are dated November 30, 2010, and two others are dated December 21, 2010. However, before considering the appeal proper, there are three preliminary matters that must be considered and decided.

[2] On the first preliminary matter, it must be noted at the outset that of these four directions, three were issued to the employer under either the name Total Oilfield Rentals Inc. or Total Energy Services Inc., both situated at the same address. Correspondence from Counsel for the appellant to HSO Macleod, dated December 16, 2010, sought to correct this apparent erroneous naming of the employer by informing "that all involved individuals were employed by, and the workplace involved was under the direction of Total Oilfield." The said correspondence went on to state that "Total Oilfield is an Alberta limited partnership, the name of which was changed from DC Energy Services Limited Partnership on March 17, 2010", and that "Total Oilfield Rentals Inc. is an Alberta corporation , and is the general partner of Total Oilfield." In a letter to Counsel for the appellant dated January 12, 2011, HSO Pan addressed this issue of improper identification or naming of the employer and the request by counsel that two of the directions be re-issued to properly name the employer. In that letter, HSO Pan, while not disputing the matter raised by Counsel, noted that health and safety officers do not have the authority under the Code to vary their own directions nor the power to rescind those for the purpose of satisfying the correction sought by Counsel for the Appellant, and that therefore the matter should be left to be resolved before the "OHSTC", therefore an appeals officer. While I agree with HSO Pan's comprehension of an HSO's authority, I am not convinced that this would apply to the mere correction of what solely appears to be akin to a mere clerical error apparently acknowledged by all parties concerned, and where the substance of the direction is not, for all intents and purposes, affected, nor is the real identity of the party or parties at whom the directions are intended, when one considers the investigation report of the HSO, in doubt. Be that as it may, it is true that under the legislation, I clearly have the authority to alter any direction to which the Code applies. However, in this instance, as jurisdiction will be the central issue, I am abstaining at this early stage from making any determination as to applicable jurisdiction. However, for the sake of properly identifying the party or parties who will be concerned by my decision, the style of cause of said decision will list the appellant as Total Oilfield Rentals Limited Partnership Inc. (Total Oilfield)

[3] The second preliminary matter concerns a single direction, which I refer to as the fourth direction issued in this case. This fourth direction was issued on December 21, 2010, by Health and Safety Officer Lisa Pan to one Daniel Murray, an employee of Total Oilfield Rentals Limited Partnership Inc., and a party to the accident that eventually led to the directions under appeal in this case. That direction indicates that the contravention to the Code that resulted in the direction is addressed solely to driver Murray, as having failed to follow prescribed procedures to ensure the health and safety of the swamper. Mr. Murray's response to the direction was that he "will not operate a vehicle directed by a

swamper without reviewing that protocol and the swamper in fact providing constant hand signals". In itself, that response can qualify as compliance with the direction. The Notice of Appeal signed and filed on December 27, 2010, by Counsel Stapon on behalf of the appellant Total Oilfield Rentals Limited Partnership Inc., identifies the legal firm of which he is part as "solicitors for Total Oilfield Rentals Limited Partnership" and stipulates that he is filing this document "as an appeal of various directions issued by your Ms. Dawn Macleod and your Ms. Lisa Pan and as a complaint in connection with the process employed by your Officers", thereby erroneously designating the two HSOs, who are Health and Safety Officers attached to the federal Department of Human Resources and Skills Development Canada as Officers of the Tribunal, which they are not. More important however, is the fact that while indicating that this is an appeal of various directions issued by the two HSOs, the notice does not stipulate first, that Total Oilfield is appealing the direction issued to Mr. Murray or second, that employee Daniel Murray is appealing the direction issued to him nor does it offer any indication that Counsel Stapon is acting on behalf of Mr. Murray or has been mandated to do so. Furthermore, as stated above, the response to the direction by Mr. Murray would seem to constitute compliance and thus it is difficult to see that there would be an intent by Mr. Murray to question the direction addressed to him. While it is true that subsection 146(1) of the Code allows an employer, an employee or a trade union to appeal a direction, therefore a direction that may not be addressed to the party seeking to appeal, the legislation sets as a pre-condition to acting at appeal that the party seeking to appeal feel aggrieved by the direction, something slightly more difficult to establish when appealing a direction not addressed directly to one seeking to appeal. In the case at hand, in addition to what I have stated above and the lack of a distinctly manifested intention to appeal the direction by Mr. Murray, it is important to note that the wording of the direction in no manner appears to be liable to affect Total Oilfield such that one could consider the employer possibly aggrieved. I am cognizant of the very brief argument made by Counsel Stapon vis-à-vis this particular direction where it is supposedly suggested that "Total Oilfield has failed to do its duty and that it is directed and required to do so." While it is true that another direction, this time addressed directly to Total Oilfield, may deal with the subject of code of signals and its implementation (or lack thereof) by the employer, I have found nothing in either the wording of the Murray direction or the rationale formulated by the HSO that could lead one to conclude by its tenor that the employer could or would have failed in this particular duty and thus be aggrieved by that conclusion or the tenor of the direction. As such then, I have no choice but to conclude that there has been no appeal filed vis-à-vis the direction issued to said employee Murray by the party to whom the direction was issued and addressed to wit, Mr. Murray and, given the lack of any other indication by the employer or serious claim of being aggrieved, I see no reason to conclude that an appeal has been brought against that particular direction. Consequently, the following appeal decision will concern solely the directions issued to Total Oilfield Rentals Limited Partnership Inc., as those that have been formally brought to appeal by an authorized party as per section 146 of the Code.

[4] The third and final preliminary matter that needs to be dealt with at the outset of this decision has to do with the Notice of Appeal filed by the appellant which, in addition to specifying that the appeal is against the four directions issued by the two HSOs named

above, also includes four "AVC Directions". For a clearer understanding of this issue, one has to understand that the acronym AVC stands for "Assurance of Voluntary Compliance", which is a form of compliance tool at the disposal of health and safety officers, whereby voluntary compliance relative to certain employer shortcomings in the application of and compliance with certain Code obligations is sought to be addressed through voluntarily agreed actions, thus encouraging a cooperative approach to compliance with the legislation as opposed to a more forceful and mandatory approach through directions. As such then, where an employer accepts to voluntarily comply with the Code, an HSO does not have to issue a direction. As the title indicates however, the employer's compliance decision has to be voluntary and thus must not be sought forcefully or presented as directory or akin to that characterization. It would appear from the words used by counsel ("AVC Directions") that those may have been perceived to be akin to directions, such that they are being appealed like the other directions issued by the two HSOs. The fact of the matter however is that AVCs are neither mentioned nor envisaged by the Code and constitute and are intended solely as an administrative tool or approach to seeking and obtaining voluntary compliance with the legislation. Where an AVC is sought and obtained by a health and safety officer vis-à-vis some form of required compliance, and I emphasize here that such an AVC may be sought or suggested, not imposed, this represents a decision by the HSO not to issue a direction. It flows from this that since no AVC can be imposed, any party who could be the object of such a measure is under no obligation to accept it. Under the Code, more specifically sections 146 and 129, the only matters that can be brought to appeal are directions and decisions of absence of danger issued by health and safety officers. Accordingly, Assurances of Voluntary Compliance are not appealable. The Federal court and Federal court of Appeal have dealt with this issue in a very clear manner. In *Pamela Sachs et al and Air Canada et al*, 2006 FC 673, the Federal Court clearly indicated that there is no appeal in the case of an AVC. It stated :

> The problem that faced the Appeals Officer and is before the Court relates to the jurisdiction of that Officer and, in particular, whether the Officer can consider, on appeal, a situation where the Health and Safety Officer did not make a decision or issue a direction but where that Officer accepted an assurance of voluntary compliance in lieu of a decision or direction.(...) 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. (...) The provisions of Part II of the Code respecting appeals are not such that they are capable of more than one interpretation. They are clear. The Charter does not have to be invoked in order to arrive at the proper interpretation.

Subsequently, in *Pamela Sachs et al and Air Canada*, 2007 FCA 279, the Federal Court of Appeal reviewed the decision of Mr. Justice Hughes above and concluded the following:

> 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. (...) We see no merit in the argument of the appellant that section 7 of the Charter is breached by subsection 146(1) of the Canada Labour Code. It is well established that there is no constitutional right to appeal, even in matters with a significant effect on the life, liberty and security of the person(...) . Section 7 of the Charter does not require Parliament to provide a statutory right to appeal a decision of a health and safety officer. Nevertheless, Parliament has provided a statutory right to appeal the issuance of a section 145 direction by a health and safety officer. We see no basis for concluding that, because of section 7 of the Charter, the existence of that limited right of appeal means that there must also be a right to appeal the decision of a health and safety officer not to issue such a direction.

Consequently, it is very clear that my jurisdiction as an Appeals Officer does not extend to the review of AVCs and consequently, having regard to what precedes, the 4 AVCs brought to appeal by the Appellant will not be considered or reviewed in the decision that follows.

Background

[5] Having somewhat lengthily dealt with these preliminary issues, a brief account of the background facts and circumstances to this appeal is in order. The circumstances that constitute the background to the directions under appeal are quite simple as they relate to a single incident that resulted in the intervention of the two HSOs. The directions under appeal were issued following an investigation into a fatal work place accident which occurred on November 26, 2010, at the appellant's work site, a storage yard where the appellant stores for use its rental equipment and which is situated in Grande Prairie, Alberta. Two employees of the appellant working as a team were involved in the accident. The team was made up of Mr. Daryl Janssen, a long-time oilfield employee who was employed as a "swamper" at the time of the occurrence. Mr. Janssen had at least two years experience as a "swamper" (assistant bed truck operator), having been hired by DC Energy Services Limited Partnership on October 15, 2008, and then becoming an employee of Total Oilfield for the same job on January 14, 2010, as DC Energy Services was amalgamated into Total Oilfield. The second member of the team was Mr. Daniel Thomas Murray, a professionally experienced tractor trailer operator of 14 years who had been hired by the appellant as a truck operator on November 22, 2010 and, prior to starting operating trucks for Total Oilfield, had received a three-day job training and orientation session provided by the employer Total Oilfield. Consequently, November 26, 2010, was the first day that Mr. Murray operated a truck for Total Oilfield Rentals Limited Partnership and is also the day when the fatal accident occurred.

[6] The particulars of the operation in which the two employee team was involved at the time of the accident are described in the investigation report prepared by HSO Pan under title Rationale for Directions. That operation consisted in offloading rig mats brought in by truck and trailer from a work site near Wokom, Alberta, in the employer's rental equipment storage yard situated in Grande Prairie. Rig mats are portable platforms used to support equipment used in construction and resource-based activities including drilling

rigs, camps, tanks, helipads, etc... A rig mat also includes a structural roadway to provide passage over unstable ground, pipelines and more. For transport, rig mats are skid-mounted to the transport truck to facilitate loading and offloading. In the initial part of the operation, the two employees opted to attempt to do the offloading by simply attempting to "shake the load off" through repetitive forward and backward movements of the truck. This proved to be unsuccessful as the mats were frozen and could not be freed from the trailer. The two employees consequently decided to opt for another unloading method which called for using the weight of the mats already on the ground by connecting a stack of mats on the ground with one on the trailer with a chain and then pulling the truck trailer ahead until the mats were pulled off the trailer. One end of the chain used for the unloading was pre-connected or attached to the passenger side of the mats already on the ground. Swamper Janssen's job was to hook the other end of the chain to the rear passenger side of the mats on the trailer. Prior to doing this, using appropriate signs as directions to the driver, he would have had to direct Driver Murray backing up the vehicle to a certain point where the chain would be long enough to be anchored to the mats on the trailer. Mr. Murray would have received those directions by looking at the rear-view mirror on the passenger's side of the truck. According to HSO Pan, it was confirmed that the driver was able to see swamper Janssen from the mirror. It is at this juncture that the fatal accident occurred.

[7] In the course of backing up the vehicle to a certain point, Mr. Murray saw that Mr. Janssen was standing at the back corner, passenger side, of the truck trailer, although the latter gave the driver no hand signals. Mr. Murray was waiting for a stop signal from the swamper in order to stop the movement of the vehicle. What occurred was that Mr. Janssen suddenly disappeared from the sight of driver Murray who, having confirmed that he no longer could see the other member of the team, hit the brakes to stop the truck trailer. At that time, maintenance worker Allan Kirkpatrick was in the immediate vicinity in the yard and had been witness to the operation being conducted by Messrs. Janssen and Murray. While not paying special attention to the work being done, he did witness Mr. Janssen standing on the driver side of the truck. A short time later, having completed the task that had brought him to that part of the yard and returned to his own vehicle, Mr. Kirkpatrick heard swamper Janssen yell, and having gotten out of his own truck, he could see some twenty five feet away that Mr. Janssen had been pinned between the mats. Once the truck had been moved ahead by Mr. Murray following instructions from Mr. Kirkpatrick, swamper Janssen was seen lying on the ground between the back of the trailer and the rig mats on the ground. Mr. Janssen later died from his injuries.

[8] The investigation into this occurrence began on November 27, 2010, with the two HSOs (Pan and MacLeod) arriving at the scene of the accident. It appears from the investigation report that upon their arrival, the two HSOs discovered that an investigation into the accident had been initiated the previous day by Alberta occupational health and safety officials with two provincial HSOs (Tait and Lennon) attending at the scene and interviewing two witnesses. The personal notes taken by these two provincial officials indicate that they were informed at the time by Total Oilfield operations manager that the employer had dealt in the past with federal occupational health and safety officials, that federal authorities had been informed of the accident and that federal HSOs would be

meeting with Total Oilfield representatives the following day. Quite surprisingly, this appears to have been enough for the provincial officers to conclude that federal jurisdiction applied to this employer and apart from turning over photos and the statements obtained during the interviews, they appear to have had no other involvement in this matter, nor were any questions raised by federal officials in this respect, except for a question asked by HSO MacLeod to Mr. Murray, the driver of the truck involved in the accident as to whether he recognized coming "under Federal Jurisdiction". The investigation by the federal HSOs (Pan and MacLeod) led the two officers to the conclusion that the employer was responsible for a number of contraventions to the Code and consequently three directions were issued to Total Oilfield. Two of these directions concern multiple contraventions. While it will become obvious later in this decision why it is not necessary to examine in detail the rationale behind each and every one of the said directions, it is useful to at least be cognizant of the nature of those directions and what generally brought them about.

-On November 30, 2010, HSO MacLeod having concluded that the employer was in contravention of paragraph 125(1)(z.03) of the Code and subsection 19.3(1) of the Canada Occupational Health and Safety Regulations (COSH), directed the employer to "develop a hazard identification and assessment methodology to be used for identifying and assessing the hazards associated with unloading and loading rig matting". According to the investigation report, the investigation had revealed that the employer did not have in place a hazard identification and assessment methodology to use in identifying and assessing potential hazards in the work place. In fact, this was admitted by the appellant. Furthermore, according to the HSO, the employer had failed to provide information that the work place health and safety committee or representative had been consulted as concerns the prevention of identified hazards.

-On November 30, 2010, HSO MacLeod having concluded that the employer was in contravention of both paragraphs 125(1)(z03) and 125(1)(q) in conjunction with section 19.4 and subsections 19.5(1) and 19.6(2) of COSH Regulations, issued three directions specifically dealing with the operation of loading and unloading rig matting. Briefly stated, the directions required the employer first, to identify and assess the hazards associated with loading and unloading rig matting, taking in consideration the various elements listed by section 19.4 of COSH Regulations. Surprisingly enough, while the direction appears based on paragraph 125(1)(z03) of the Code, it does not require that this be done within the scope of developing, implementing and monitoring a hazard prevention program in consultation with the policy or work place health and safety committee, as required by that provision of the Code. The second direction requires the employer to implement preventive measures to address the hazards associated with the loading and unloading of rig matting. Based on subsection 19.5(1) of COSH Regulations, this direction, while not stating so explicitly, appears to set the priority to be followed in complying with the direction. Once again, the direction is silent as to the Code requirement that this be done in consultation with the policy or work place committee. The third direction, based on the employer obligation to provide each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work, requires the employer to provide education to employees on the hazards

identified and control measures implemented to prevent the risk of hazard exposure to employees during the loading and unloading of rig matting and to do this prior to the employees performing this work activity. Justification for the issuance of these directions, as stated in the investigation report, is that the Directives Policies & Procedures of the employer were silent on the subject of safe work procedures for loading and unloading rig matting, and no job safety analysis had been done concerning the loading and unloading of rig matting. According to the HSO, there were two reasons to require such a job safety analysis in the case of this type of operation, the first being that an employee had lost his life while engaged in such an operation and second, because the rental and delivery of rig mats is one of the main services of the company. The HSO was aware that the employer had developed a job safety analysis concerning the loading of skidded units. However, in officer MacLeod's opinion, the employer could not substitute this analysis for one relative to rig matting loading and unloading for the basic reason that "skids" are not rig mats and although there may be similarities in the process of loading and unloading skids and rig mats, the job safety analysis of loading skidded units does not include all the basic steps involved in loading and unloading rig matting, and consequently, the safe work procedures therein cannot serve to replace the safe work procedures specific to rig matting loading and unloading. According to the HSO, "it is important not to make the steps too general as missing specific steps may result in missing their associated hazards". As further justification, the HSO determined that there was no information indicating that the work place health and safety committee or the health and safety representative for the work place had been consulted in the development of those procedures.

-On December 21, 2010, HSO Pan issued a two-part direction, having concluded that the employer was in contravention of paragraph 125(1)(q) of the Code and subsection 14.26 (1) and (2) of Cosh Regulations. According to the HSO, the employer had failed to ensure that the single code of signals to be used by signallers for the movement of motorized materials handling equipment that it had established was implemented. Secondly, the HSO found that the employer had failed to ensure that the hand signals to be used by a signaller were only those described in the single code of signals. She found that of the six hand signals described in the code of signals, none had been used or followed by driver Murray and swamper Janssen for the backing up of the vehicle involved in the accident, even though training records demonstrated that both had been trained in the use of hand signals. HSO Pan reasoned that the Code requires the employer to ensure that each employee has received the information, instruction, training and supervision necessary to ensure their health and safety at work, which means that the employer is not only responsible for giving instructions and training to employees in safe work procedures, but also for supervising them to ensure that safe work procedures are followed.

[9] The result of an Alberta Corporate Registration System search conducted on December 8, 2010, confirms that the current business name of the employer is Total Oilfield Rentals Limited Partnership, the result of a name change that occurred on March 17, 2010, from DC Energy Services Limited Partnership, with Alberta being listed on the document as the home jurisdiction. This being said, another document that is part of the

investigation report, titled Employer site update which appears to originate from the Labour Program of HRSDC, provides the following relevant information under title Company Business Information, thus making it possible to acquire a truer comprehension of the undertaking :

-Nature of Business: The rental and transportation of drilling, completion and production equipment to the oil and natural gas industry.

-Work areas (facilities, warehouse): Total Oilfield Rentals L.P. operates from 19 branch locations throughout British Columbia, Alberta and Saskatchewan.

-Types of equipment: Total Oilfield Rentals L.P. rents a wide variety of equipment used in the resource sector including, but not limited to, tanks, drilling surface equipment, completions surface equipment, loaders, rig mats, power and light generation and waste handling equipment. Total Oilfield Rentals L.P. also has a fleet of trucks, including boom trucks, bed trucks, texas beds, winch tractors, fluid haulers, service trucks and trailers.

-Hazardous Products: Total Oilfield Rentals L.P. engages in in-field hauling of oilfield fluids, including water, invert drilling muds and frac fluids. On-site storage of fluids is typically limited to fluids required for the ongoing maintenance of (the) truck fleet, oils, lubricants, etc.

-Other relevant information: The work location where the incident of November 26, 2010, occurred was a secondary storage yard, and is located across the street from Total Oilfield Rentals L.P.'s main Grande Prairie office and storage facility.

Issue(s)

[10] The issues that need to be determined in the instant case relate first to the actual application of the Code to the undertaking at the center of this case and, secondly, to the foundation of the various contraventions identified by the two HSOs that form the basis for the directions under review in this decision. In short then, I have to decide first whether Total Oilfield Rentals Limited Partnership constitutes a federal work, undertaking or business, a condition precedent to the application of the Code to the undertaking. Depending on my finding regarding this first issue, a determination will need to be made as to whether there is any substance to any or all of the contraventions identified by the two HSOs that would serve as foundation for the issuance of the directions under review.

Submissions of the parties

[11] No party has manifested itself or been identified to act as respondent in this case. Consequently, the only submissions that will be considered by the undersigned will be those of the appellant. In this regard, the appellant has indicated that the matter is to be decided on the basis of the written submissions it made in launching the appeal as well as

the written comments it made to the HSO, with copy to the registrar of the Tribunal some time after the appeal had been filed.

Appellant's submissions

[12] Counsel for the appellant very forcefully put forth in writing the position of the appellant when filing the appeal. Stated very briefly, it is the position of Counsel that the directions issued to its client have no foundation as no contravention to the Code has really occurred, although some differences may have surfaced relative to the strict application of the various provisions invoked, as opposed to a compliance with the intent and spirit of the legislation if not always the actual letter of such. Counsel has clearly indicated that in his opinion, the two HSOs involved demonstrated an overzealous attitude and a total lack of understanding of the work conducted by his client and the environment in which it operates, which has led Counsel to openly complain in connection with the process employed by the two officers.

[13] Counsel describes the undertaking as follows. Total Oilfield operates an oilfield rental business in Grande Prairie, Alberta. The ordinary course of that business involves the provision of numerous types of oilfield service equipment utilized in the drilling industry, often in remote locations. As part of its business, Total Oilfield employs its own transportation fleet for the purpose of delivering equipment ordered by customers to locations stipulated at the customer's request. On the subject of occupational health and safety, counsel pointed out that prior to the amalgamation of Total Oilfield and DC Energy, both undertakings had developed health and safety policies which, although similar, were "nuanced" and somewhat different in connection with similar tasks. Recognizing that fact, and in an effort to adopt best practices and before the accident to Mr. Janssen, Total Oilfield retained the services of an independent consultant to assist it in amalgamating and revising its safety and procedures manual to incorporate best practices from both operations. Counsel points out that throughout this amalgamation process, Total Oilfield has had an active health and safety committee in place, although until the end of 2010 (December 10), this committee was not an elected committee as provided under section 135 of the Code.

[14] As regards the accident proper, counsel points out that for the majority of its transportation operations, Total Oilfield requires that its drivers work with a "swamper" who assists the driver in loading and unloading the trailer. As such, counsel notes that the job description of a swamper requires that he be in communication with the driver at all times, either by way of eye contact, verbal communication or hand signals, and both the driver and the swamper are trained with respect to standard hand signal operations. In the case of Total Oilfield, their drivers receive that same training, as do drivers of tractors and trailers throughout the transportation industry. In the present case, swamper Janssen was trained in his position and had been provided with refresher training in connection with hand signals as recently as May 2010. In the case of driver Murray, apart from the fact that he is a professionally experienced tractor trailer driver, despite the latter's extensive experience, Total Oilfield required that he undergo a detailed safety and orientation training session before being put to work for the employer. On the actual

mechanics of the accident, which Counsel sees as simple, he comments that inexplicably, for some reason and contrary to considerable experience and training, Mr. Janssen apparently decided to go behind the moving trailer during the backup portion of the operation with no forewarning to the driver, and contrary to protocols for communication assistance between a driver and a swamper which are clearly established and utilized daily by Total Oilfield to the point of being second nature. As well, loading and offloading equipment with the use of skids is a common daily occurrence with Total Oilfield staff, and comprehensive procedures are in place for that process.

[15] From a general standpoint, the appellant's main position regarding the directions that were issued is that none of the actions required by said directions are related to the actual occurrence and none of those would have had any role in preventing the accident, which occurred as a result of operator error after substantial Total Oilfield and industry training. On the first direction, which requires the development of a written hazard identification and assessment methodology with respect to the unloading of rig matting, Mr. Stapon indicates that Total Oilfield does not appeal the requirement pursuant to the Code for the existence of such a document on a generic basis for its overall operations, but does appeal the necessity for creation of such a document in this specific instance. It is the position of the appellant that there is no evident need of the development of a particular hazard assessment for the specific loading and unloading job of rigmats. According to Counsel, all Total Oilfield drivers and swampers are trained in loading and offloading procedures, but the unusual nature of Total's business often requires site specific, condition specific plans to be adopted from time to time. Total Oilfield does provide its employees with safety training concerning loading and unloading generally and that safety training is applicable to rig mats and all other equipment it rents. Furthermore, the employer does in fact have a risk assessment procedure in place, where each job generally undertaken by its staff is assessed for the purpose of training and general risks. Thus, risks are identified, mitigating steps undertaken and personnel is trained in them by way of continuous updates. Therefore, such a directed specific requirement is described by Counsel as simply an inappropriate and uninformed "knee jerk" reaction by the HSOs issued with no basis.

[16] The second direction, or rather the series of three directions issued on November 30, 2010, is likewise described by Counsel as bearing almost no relation to the accident, which is really the result of a momentary lapse between the driver and the swamper. According to Counsel, Total Oilfield rents numerous types of equipment to the oilfield industry and rigmats are only one of them. As such, all equipment rented to the oilfield clients needs to be transported from the storage yard(s) to the place where it is put into service, and thus needs to be loaded and offloaded accordingly. Loading and unloading equipment from trailers with the use of skids both in the yard(s), and in remote field locations is actually a daily part of the job of drivers and swampers. It is the view of Counsel that the HSOs ought to have been aware that safe protocols for loading and unloading have already been established by Total Oilfield and that they relate to the loading and unloading of all of its rental equipment from its transportation equipment. Furthermore, after years of operations, there have been no identified "special" hazards associated with the loading and unloading of rigmats which would not be associated with

the general process of loading and unloading equipment. Therefore having appropriate training protocols in place, Total Oilfield objects to the suggestion that there is any contravention of the Code. Once again, in the words of Counsel, Total Oilfield objects to the "fishing" process by an apparently "inexperienced" officer requiring a specific hazard assessment for this specific piece of equipment when there is no evidence demonstrating the need for such a process or specificity.

[17] The third set of directions, issued on December 21, 2010, relative to the implementation of a single code of signals and ensuring that only those six signals be used by a signaller is likewise decried by Counsel, who states that Total Oilfield will circulate again a memorandum to its drivers and swampers regarding this basic communication protocol. However, he views as unnecessary and presumptive what he describes as the suggestion that Total Oilfield has failed to do its duty and that it is directed and required to do so, since it is the view of Total Oilfield that it is already in compliance with the direction(s). It is established fact first, that both employees involved in the accident had a great deal of experience and that the employer had nonetheless ensured and verified that they were aware of the manner in which to operate. Drivers and swampers work un-superintended as a team and direction and communication between the two are both essential and integral to the job and become rapidly second nature. By ensuring as it did that both driver and swamper were fully aware of their individual responsibilities, Total Oilfield has in fact done what it is required to do under the Code. Counsel thus argues that none of the incidents that resulted in the actual accident could have been prevented by Total Oilfield. Each of Mr. Murray and Mr. Janssen had received fully adequate training and there is nothing that Total Oilfield did not do to "ensure" that this accident not occur by way of safety compliance or training in the circumstances.

[18] Counsel concluded his submissions by making the following statement which refers back to the premise Mr. Stapon enunciated at the outset and will be repeated below as a lead-in to the first part of the undersigned analysis and conclusion. The statement reads a follows:

> The timing, vigour and process by which this incident has been reviewed, and our client's practices assessed by your group have resulted in the writer (Counsel Stapon) suggesting to Total Oilfield that it is far better off being governed by Provincial Regulators who are much more inclined to work with businesses which are proceeding in good faith, rather than issuing Directive after Directive, and Compliance Order after Compliance Order- particularly when the incident giving rise to your involvement would not have been prevented by any of the documents you have issued.

[19] Counsel did in fact raise the matter of the application of the Code to Total Oilfield in its initial Notice of Appeal, requesting that a ruling be made on this issue of the jurisdictional application of the Code to the operations of Total Oilfield as a pre-condition to any compliance directive or other actions in connection with this matter. Mr. Stapon formulated the appellant's objection in this regard in the following manner:

> Due to the manner in which this investigation has proceeded and the Directions which have been issued (and on the writer's advice), Total Oilfield is compelled to raise a jurisdictional objection to the application

> of the Canada Labour Code in the circumstances of this case, and to submit that the proper governance of this incident should be undertaken pursuant to Provincial Regulation under the Alberta Occupational Health and Safety Act.
>
> Total Oilfield had previously simply assumed that it was governed by the Federal Legislative process in its dealings with your Officers and Provincial Authorities, however, the manner in which this administration has proceeded in contrast to what is ordinarily expected in Alberta has caused it to challenge that process.
>
> Regarding jurisdiction, Total Oilfield is in the Oilfield rental business. All of its revenues are derived from equipment rentals to customers. The transportation component of Total Oilfield's operation is only ancillary to its main business of rentals and constitutes a fraction of its assets. Although Total Oilfield does maintain some inter-provincial operating authorities for some of its tractors and trailers to assist in the occasional cross-provincial shipment from a yard in one Province to a customer location in another Province, the vast majority of Total Oilfield's business is intra-provincial operating from local bases. In these circumstances, Total Oilfield submits that its operations are properly regulated by Provincial authority-not coincidentally whose Officers have much more experience in the business of oilfield services than the investigators assigned to this matter pursuant to the Canada Labour Code apparently have.

[20] As a result of this issue being raised, the undersigned Appeals Officer sought on a number of occasions from Counsel for the appellant additional or more comprehensive submissions in support of that position. This was to no avail as quite surprisingly, Mr Stapon made a number of rather unexpected statements. In response to a first request for submissions, Counsel noted that further analytical work was required with respect to Total Oilfield's business to challenge federal jurisdiction, work Total had not yet had the opportunity to undertake regarding this and other operational considerations. Therefore, they were withdrawing their objection for the time being and reserving the right to object in the future if deemed necessary. A second request for submissions which referred to section 2 of the Code and its application to any federal work, undertaking or business and pointed out the actual obligation by an Appeals Officer to ascertain his own jurisdiction, whether it be done following a request or objection or whether it be initiated *ex officio* prior to examining the merits of a case again met with a surprising response. Counsel pointed out that Total Oilfield was considering its overall position as to whether it wanted to be federally or provincially regulated, or both, and that it was "also possible that the organization may be restructured in part to best ensure those ends", such analysis being expected to take some time. Further, it was Counsel's position that since the HSOs had issued the directions they had, the Federal Government had thus purported to exercise jurisdiction and therefore jurisdiction had been assumed by the department to which the HSOs belonged. It was therefore his opinion that I, as Appeals Officer, could not first examine the matter of applicable jurisdiction prior to examining the merits of the appeal because there was no longer any challenge to jurisdiction by his client, and Total was prepared to accept that it would be "prepared to accept any estoppel risk" that could arise from its position, since statutory jurisdiction either existed or not, yet could not be

conferred. The undersigned sent a final request for submissions pointing out that my jurisdiction is derived from the legislation, that the Code clearly determines to which parties it applies, that my authority to review directions also entails reviewing whether they were validly issued from the standpoint of jurisdiction and that my jurisdiction, as derived from the legislation, cannot be the result of a consensual exercise. Once more Counsel responded with a statement that the appellant was not advancing any jurisdictional challenge and did not propose to submit evidence in connection with the question of jurisdiction. Counsel also stated the appellant's agreement with my "assessment that jurisdiction in connection with a case like this cannot be conferred by consent", a somewhat unexpected position since one would be led to believe that this appeared to be the intention of the appellant.

Analysis

[21] The appellate authority or function that constitutes the basis for the present review of the directions issued to the appellant is established by legislation, in this instance the *Canada Labour Code, Part II*, which provides a right of appeal vis-à-vis directions and decisions of absence of danger issued by a health and safety officer in application of the authority to do so under and pursuant to said legislation. This appellate authority allows the review of the circumstances and reasons of the said directions and decisions originating from a health and safety officer and authorizes the variance, rescission or confirmation of said directions or decisions, as well as the issuance of the appropriate directions where such is found proper and necessary. In my opinion, it is trite law that the review of circumstances and reasons for the said directions and decisions entails every time the determination of whether the issuance of such decisions or directions was based or founded on authority to wit, jurisdiction, to do so.

[22] The discharge of the appellate function or authority mentioned above is devolved exclusively to an appeals officer, who holds this authority through designation by the Minister of Labour or another Minister exercising the functions and authorities of the Minister of Labour. Under the legislation, an appeal is made to an appeals officer, and not to an administrative structure that may have been put in place to assist and facilitate the exercise of that specific authority. There flows from the legislation then that an appeals officer executing his or her statutory review mandate can and must also ascertain whether such directions or decisions were founded on authority/jurisdiction to be issued. Furthermore, the authority provided by legislation to vary or rescind a first step decision or direction can certainly be taken to mean that an appeals officer is neither bound by decisions or directions formulated by first step health and safety officers, nor bound by departmental authorities from which emanate directives and orders that may underlie the directions and decisions that may be brought to appeal.

[23] As the authority of an appeals officer to review directions and decisions of health and safety officers flows from the legislation that grants the appeals officers its powers, it stands to reason that the function or role must necessarily be discharged within the four corners of the applicability of said legislation to wit, its jurisdiction or jurisdictional coverage. In other words, acting or deeming to act outside the jurisdiction defined by the

legislation would be tantamount to acting without authority. That being said, the jurisdiction or jurisdictional coverage of the Code is defined at section 123 of the legislation as being to and in respect of employment:
a)on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;
b)by a corporation established to perform any function or duty on behalf of the government of Canada; and
c)by a Canadian carrier, as defined in section 2 of the *Telecommunications Act*, that is an agent of Her Majesty in right of a province.
That provision also stipulates that the legislation applies to the federal public administration and to persons employed therein to the extent provided under the *Public Service Labour Relations Act.*

[24] Upon reading the above, clearly on the facts, circumstances and evidence of this case, most of the elements mentioned in the previous paragraph find no application to the circumstances and particulars of the appellant. The sole element that retains relevancy from the standpoint of the appellant and the directions to the appellant under appellate review, from the standpoint of ascertaining whether jurisdiction existed and exists vis-à-vis the appellant and the directions of which the appellant is the subject, would be application of Part II of the Code to and in respect of "employment on or in connection with the operation of any federal work, undertaking or business", thus begging the question as to whether the appellant was at the time of the issuance of the directions and remains at the time of the appellate review a "federal work, undertaking or business". In order to attend to this question however, one needs to consider what constitutes a "federal work, undertaking or business" as the operative central wording to defining and understanding the scope of federal jurisdiction over occupational health and safety.

[25] Section 2 of the Code provides a definition of a federal work, undertaking or business in a two-part sequence. First, it is defined in terms of needing to be within the legislative authority of Parliament. Second, the definition offers a non-exhaustive list ("including without restricting the generality of the foregoing") of groups, types or categories of undertakings that Parliament obviously considered to be falling within the legislative authority of Parliament. It is clear then from that definition, and in particular the words "without restricting the generality of the foregoing", that the Code and in particular Part II of the Code could and would apply to any work, undertaking or business that, while not identifiable within the listing provided at section 2 of the legislation, could be found to come within the confines of the legislative authority of Parliament. I use the word "confines" knowingly as federal jurisdiction as it relates to occupational health and safety is obviously restricted since the listing at section 2 cannot begin to describe all of the types of work activity that can be found in a modern society. In fact, a well established saying relative to labour relations of any undertaking, which includes occupational health and safety, as part of the management of the undertaking, is that "provincial competence over labour relations is the rule, and federal competence is the exception" (*Four B Manufacturing* v. *United Garment Workers*, (1980) 1 S.C.R. 1031, at p. 1045).

[26] The appellant had initially claimed in its Notice of Appeal that it escaped federal jurisdiction by reason of its activities not coming within the four corners of what constitutes federal jurisdiction. Such a claim, if accepted, would mean that the HSOs who conducted the investigation that concluded with the directions under appeal would not have had jurisdiction to do what they did. Where this Appeals Officer is concerned, this would also mean that should I validate that claim or position, and in order to do so I would have to examine first the jurisdictional facts and circumstances relevant to the appellant prior to attending at the substance of the directions under appeal, my authority in such circumstances would be limited to rescinding the said directions. Counsel for the appellant has since then sought to withdraw said objection to jurisdiction and has insisted that I proceed to the merits of the case on the basis of the record as constituted and counsel's submissions given at various times, in other words that I consent to jurisdiction without examination and thus objected to my deciding to consider the issue of jurisdiction relative to the appellant. This I cannot do.

[27] The function I discharge can only be exercised vis-à-vis federal works, undertakings or businesses and it is therefore always incumbent upon an appeals officer to make such determination prior to proceeding to the merits of a case, as I am restricted to acting within the four corners of the jurisdiction established by the legislation. Furthermore, I do not require the agreement or consent of any party prior to making such a determination and thus I can act *ex officio*. In addition, given that Counsel would have the undersigned accept jurisdiction without question in light of the appellant withdrawal of its objection and the fact that it is envisaging a restructuring with a view to determining whether it wants to be regulated under federal or provincial jurisdiction or both, it is my opinion that jurisdiction cannot be the result of a consensual exercise, save for certain circumstances that find no application in this case, nor can it be considered prospectively in light of a party's intended reorganization or restructuring. In the case at hand, it is the jurisdiction as it stood at the time of the accident and the directions that ensued that I must consider. I am reinforced in my conclusion by the words of Macaulay & Sprague in *Hearings before administrative tribunals*, third edition, at page 5-1 and following:

> One of the dominant themes of administrative law is that government decision-makers do not have the authority to interfere with the lives of the citizenry unless they have been given that authority. If a decision-maker has not been given the authority or power to do something (i.e. the "jurisdiction") then it does not have it.
>
> Jurisdiction can flow from several sources:
> 1. legislation (either statute or regulation) through which Parliament or a Legislature gives the decision-maker the jurisdiction;(...)
> 4.consensual agreement where the parties to the agreement give power over themselves to some body or individual.
> (...)
> Where an agency's jurisdiction flows from legislation, unless the legislation contemplates an extension of that jurisdiction by the parties, the parties cannot expand the agency's authority by consent. Where

> legislation creates and empowers an agency the consent of the parties cannot alter or vary the nature and authority of that body simply because they agree to do so.
>
> If a body cannot point to a valid grant of authority flowing from one of these sources it does not have it. It does not have to expressly identify its source of authority but, when challenged, it must be able to do so.
> (...)
> Having said all of the foregoing, what is the status of decisions made without jurisdiction? Simply put, a decision made without jurisdiction is invalid or even void.

[28] Given what precedes, it is my opinion that given the facts and circumstances in evidence relevant to the undertaking at which the directions under review were directed, I have first to consider the matter of applicable (constitutional) jurisdiction applicable to the undertaking, having in mind what little information on the subject was collected by the HSOs in the course of their investigation and what little information was provided by the appellant upon request by the undersigned.

[29] As stated earlier, determination of constitutional jurisdiction starts with consideration of the list of works, undertakings or businesses that would come within federal jurisdiction as per section 2 of the Code. That list is essentially inspired if not entirely based on the division of powers found at sections 91 and 92 of the *Constitution Act, 1867*. In this regard, it is important to note that it is not the substance of the subject matter dealt with at Part II of the Code (occupational health and safety), or for that matter those dealt with at Parts I and III, but rather the fact that it attaches to a federal work, business or undertaking to wit, one that is within the legislative authority of Parliament, in other words one that operates in an exclusive field of federal jurisdiction, that is determinative. Those that do not are not drawn to federal jurisdiction. The question then is whether Total Oilfield is a federal work, undertaking or business.

[30] In order to answer that question, one must remain aware of the fact that in Canada, the regulation of labour relations over most of the economy is under property and civil rights in the province (subsection 92(13) of *Constitution Act, 1867*), a fact confirmed in *Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396, and that immediately after that decision, as recounted in Hogg, *Constitutional Law of Canada*, 5th edition, p. 21-12, "the federal Parliament amended its labour legislation to apply only to "employment upon or in connection with any work, undertaking or business that is within the legislative authority of the Parliament of Canada." (*Industrial Disputes Investigation Amendment Act*, S.C. 1925, c.14). That statute, which is essentially the precursor to the Code, "went on to list a number of industries which were within federal authority, such as navigation and shipping and inter-provincial transportation and communication, "but not so as to restrict the generality of the foregoing". Aside from the period of the second world war, this has been the pattern of coverage for federal labour law ever since, although the drafting has been slightly changed and the list of federal industries expanded" as evidenced by the listing at section 2 of the Code. Along this line, the Supreme Court of Canada has quite clearly established the criteria or rule to adhere to in determining whether federal jurisdiction exists. In *Canada Labour relations Board* v.

Yellowknife (1977) 2 S.C.R. 729, at p.736, the Court stated that federal competence exists only where it is found that the work performed by the employees is an integral part of an undertaking within federal jurisdiction, and that finding depends upon "legislative authority over the operation, not over the person of the employer".

[31] This being said, what is the Total Oilfield undertaking/operation? As stated repeatedly before, very little information was gathered by the HSOs regarding the actual Total Oilfield operation from a jurisdictional point of view and little more was obtained from Counsel for the appellant. What little was obtained however can be repeated here. First, the investigation report described the undertaking as follows:

-Nature of business: The rental and transportation of drilling, completion and production equipment to the oil and natural gas industry.

-Work areas: Total Oilfield Rentals L.P. operates from 19 branch locations throughout British Columbia, Alberta and Saskatchewan.

-Types of equipment: Total Oilfield Rentals L.P. rents a wide variety of equipment used in the resource sector including, but not limited to, tanks, drilling surface equipment, completions surface equipment, loaders, rig mats, power and light generation and waste handling equipment. Total Oilfield Rentals L.P. also has a fleet of trucks including boom trucks, bed trucks, texas beds, winch tractors, fluid haulers, service trucks and trailers.

-Hazardous Products: Total Oilfield Rentals L.P. engages in in-field hauling of oilfield fluids, including water, invert drilling muds, and frac fluids. On-site storage of fluids is typically limited to fluids required for the ongoing maintenance of (our) truck fleet oils, lubricants, etc.

[32] The description provided by the appellant came through its Counsel, first in its Notice of Appeal and subsequent to that notice, in a response to the HSO to the various directions that were issued with a copy to the attention of the Appeals Officer. The first description stated that "regarding jurisdiction, Total Oilfield is in the oilfield rental business. All of its revenues are derived from equipment rentals to customers. The transportation component of Total Oilfield's operation is only ancillary to its main business of rentals, and constitutes a fraction of its assets. Although Total Oilfield does maintain some inter-provincial authorities for some of its tractors and trailers to assist in the occasional cross-provincial shipment from a yard in one province to a customer location in another province, the vast majority of Total Oilfield's business is intra-provincial operating from local bases". In his December 27, 2010, response to the directions, Counsel stated somewhat similarly that "Total Oilfield is in the business of renting oilfield equipment for onsite use by its customers. Loading and unloading that equipment from its transportation truck is part of the daily business of its truck drivers and swampers. Total's customers ordinarily use the equipment at remote drill sites and other locations often serviced by temporary roads in the forest, etc.. Loading and unloading operations require site specific planning."

[33] Setting the above against the list of federal undertakings at section 2 of the Code makes it very clear that oilfield equipment rental is not part of that list. The sole element that would relate to an item at section 2 would be the transportation of the rented equipment across provincial boundaries. In this regard, I am aware of the "regular and continuous service rule" applicable when determining whether a transportation undertaking is conducting an inter-provincial operation. At the basis however, one has to be in the presence of a transportation undertaking. In the present case, Total Oilfield Rentals is clearly not in the transportation business. There is no claim or evidence to that effect. The transportation component of its operation appears to be solely in the support of what characterises or determines the nature or *raison d'être* of the Total Oilfield operation to wit, the rental of oilfield equipment, what Counsel describes as "ancillary", and there is no claim or evidence that it is anything but that. There would thus be no basis to a claim that Total Oilfield could be seen as a work and undertaking connecting the Province with any other or others or extending beyond the limits of the Province, to use the wording of paragraph 92(10) (a) of the *Constitution Act of 1867.* Furthermore, in again referring to the list at section 2 of the Code, I have no evidence and there has been no claim that Total Oilfield constitutes an undertaking that has been declared by Parliament to be for the general advantage of Canada or of two or more provinces. Alike, there is no evidence or claim that it constitutes a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces. This then leads one to conclude that the applicable jurisdiction in this case is to be found in that over property and civil rights in the province.

Decision

[34] For all the reasons I have stated above, I find that Total Oilfield is not a federal work, undertaking or business and that as a consequence, Part II of the *Canada Labour Code*, does not apply to Total Oilfield as this undertaking does not come within federal jurisdiction for the purpose of occupational health and safety. Consequently, the appeal is allowed on the basis that the HSO did not have jurisdiction. As a consequence the directions issued are void *ab initio.*

Jean-Pierre Aubre
Appeals Officer