

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant: Alberta Wheat Pool
Tilley, Alberta
Represented by: Mr. P.D. Kroli
Health and Safety Administrator

Interested Party: Mr. Stan Zahn
Elevator Manager
Alberta Wheat Pool Elevator #1
Tilley, Alberta

Mis en Cause: Mr. R.G.(Bob) Grundie
Safety Officer
Labour Canada,
Calgary, Alberta

Before: Serge Cadieux
Regional Safety Officer

An oral hearing, by way of a telephone conference, was held on February 4, 1992 with the agreement of all the parties.

Background

On October 23, 1990 safety officer R. Grundie carried out an inspection of the Alberta Wheat Pool Terminal #1 in Tilley, Alberta. The safety officer noted that the Terminal was not equipped with toilet facilities. While a portable toilet with "potable" water was proposed by the employer as an alternative, the safety officer concluded that the employer contravened the Canada Labour Code, Part II and the pursuant Regulations by not providing a toilet room as prescribed. Approximately one year after the initial inspection, the safety officer directed the employer to provide a toilet room in accordance with paragraph 125(g) of the Code and subsections 9.12(1) and 9.19(1) of Part IX (Sanitation) of the Canada Occupational Safety and Health Regulations.

The safety officer demonstrated, in the course of the hearing, that he is well aware that a toilet room is to be provided to employees on the condition that it is "reasonable practicable" to provide one (ss. 9.12(1), Sanitation Regulations). Nevertheless, in view of obtaining the Department's policy respecting this provision, the direction was issued knowing that an appeal of the direction could result in guidelines. The safety officer further stated that he would use the decision of the regional safety officer as a guideline in the course of his grain elevators inspections.

Decision

It should be stated at the onset that the regional safety officer does not establish departmental policies through his decisions. The regional safety officer is an administrative tribunal functioning within a quasi-judicial process. Therefore, the regional safety officer is an independent body within the Department and, as a consequence, is not bound by the Department's occupational safety and health policies and procedures. In fact, the Office of the Regional Safety Officer was created as an entity to ensure this tribunal remains independent and impartial.

I must also caution the safety officer against using this decision as "the guideline" for his future grain elevators inspections.

The powers of the regional safety officer are limited by the wording of subsection 146(3) of the Code which states:

"146 (3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction ..." (my underlining)

Hence, the regional safety officer is limited to reviewing the facts of the case before him and, based on an analysis of those facts and any evidence submitted in support of those facts, decide if the direction is justified. Therefore, any interpretation of a provision of the Code or the pursuant Regulations is made by the regional safety officer in regards to the particular situation at hand and should be read in light of those circumstances. In final analysis, the decision of the regional safety officer must reflect the situation that occurred and which resulted in the issuance of a direction.

In this case, and in other similar cases, the direction of the safety officer applies to the situation that was seen or investigated by the safety officer. Hence, the direction under review remains the direction of the issuing safety officer and, unless it is rescinded, the decision of the regional safety officer does not affect the ownership of the final direction. While a Department may consider decisions of tribunals similar to the regional safety officer in the development of its occupational safety and health policies, it is unlikely to limit itself to those elements considered in the decisions.

In this particular case, the issue to be decided is whether it is "reasonably practicable" for the employer to provide a toilet room under the circumstances. In my view, it is not reasonably practicable for Alberta Wheat Pool to do so and therefore the direction must be rescinded for the following reasons.

The safety officer correctly pointed out the various provisions of the Code and the Regulations applicable. Of primary importance is the condition found in subsection 9.12(1) of the Sanitation Regulations which stipulates:

"9.12(1) Where it is reasonably practicable, a toilet room shall be provided for employees and, subject to section 9.13, where persons of both sexes are employed at the same work place, a separate toilet room shall be provided for employees of each sex."

What must be clarified in this case is what is meant by "reasonably practicable" and then apply the elements of this concept to the case at hand. The expression "reasonably practicable" is not defined in the federal legislation. Therefore I must rely on the definitions of the dictionaries to assist me in defining that expression. The jurisprudence or other legislations may also be useful in this exercise.

The Concise Oxford Dictionary, Eight Edition 1990, defines practicable to mean "1 that can be done or used. 2 possible in practice". Reasonable (reasonably being its adverb) is defined to mean "having sound judgement; moderate; ready to listen to reason. 2. in accordance with reason; not absurd. 3.a. within the limits of reason; not greatly less or more than might be expected. b. inexpensive; not extortionate. c. tolerate, fair." Other dictionaries consulted provide similar definitions.

I have already stated in a previous decision, **The New Brunswick Telephone Company Limited v Gallant**, unreported, "Given that subsection 9.12(1) requires the employer to provide a toilet room "Where it is reasonably practicable...", in my view the legislator intended to allow for a determination to be made in each case of the necessity of providing a toilet room in relation to the effort required by him to achieve this."

Also, it is interesting to note that the province of Saskatchewan specifies a statutory definition for this expression, with which I agree and, in which:

""practicable" means physically possible in the light of current knowledge and invention"

and

""reasonably practicable" means practicable unless the person on whom a duty is placed can show that there is a gross disproportion between the benefit of the duty and the cost, in time, trouble, and money, of the measures to secure the duty."

Therefore, in light of the above information, the following are the important points that should be considered when assessing the "reasonably practicable" condition:

NOTE: A reference to the duty in the following test is a reference to the duty to provide a toilet room as prescribed.

1. A determination should be made in each case where the duty applies, as to whether it is "reasonably practicable" to comply with the duty.

2. In this case, the onus to demonstrate that it is not "reasonably practicable" to comply with the duty falls on the employer, Alberta Wheat Pool, because the duty is specified under paragraph 125(g) of the Canada Labour Code, Part II and the Canada Occupational Safety and Health Regulations, Part IX (Sanitation).
3. The above determination should take into consideration the benefit of the duty versus the cost, in time, trouble, and money, of the measures to secure the duty.
4. A computation should be made as to whether there is a gross disproportion between the benefit of the duty and the cost. If such a disproportion exists, then a conclusion that it is not reasonably practicable should be reached.

Consequently, the safety officer should have considered the above four point test, or similar factors, to determine whether the employer met the "reasonably practicable" condition. In this particular case, the safety officer admitted that he directed the employer to provide the said toilet room without considering the above points. The safety officer only considered that it was "practicable" to provide the toilet room i.e. that it could be done by today's standards, without considering the reasonableness of the requirement as specified by the Regulation.

The employer, on the other hand, has submitted the following information, which has not been challenged by the safety officer:

1. Elevator #1 was constructed in 1932.
2. The office portion of the Elevator consists of a two room building with no basement.
3. Town services (water and sewer) is across roadway from Elevator.
4. Estimated handling of Elevator #1 is 15,700 tonnes.
5. Estimated cost of upgrading office structure to include permanent washroom facilities is \$50,000.00 (because an addition to the existing structure would have to be build).
6. The current facility i.e Elevator #1, has a life expectancy of approximately 5 years (confirmed by a task force set up by Alberta Wheat Pool in a report completed in March, 1991).

The employer has submitted that "The average and estimated handling for this facility does not provide sufficient return to warrant the expenditure, nor does the estimated life expectancy justify the expense." Based on the above information and comparing this information to the four point test, I agree with the employer that it is not reasonably practicable for Alberta Wheat Pool to comply with the duty. To require the provision of a toilet room, as prescribed, in this Elevator would only justify, and possibly accelerate, the closure of the Elevator because of the costs involved. Consequently, the benefit derived from requiring the installation of the toilet room certainly creates a gross disproportion between the duty to provide the toilet room and the cost involved to achieve this which, in this case, is prohibitive.

The safety officer may wish to consider whether the outdoor privy provided at the Elevator is in compliance with the legislation. This issue is however not before me at this time.

For all the above reasons, I hereby rescind the direction issued by safety officer Robert Grundie, on October 30, 1991 to Alberta Wheat Pool.

Decision issued in Ottawa this 18th day of February, 1992.

Serge Cadieux
Regional Safety Officer