

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: Bell Canada
483 Bay Street, Floor 4 South Tower
Toronto, Ontario
represented by: André L. Paiement, Senior Counsel

Respondent: Joel Carr
National Representative
Communications, Energy and Paperworkers Union of
Canada

Mis en cause: Rod J. Noel
Safety Officer #1768
Human Resources Development Canada

Before: Bertrand Southière
Regional Safety Officer
Human Resources Development Canada

A hearing was held in Toronto on November 22, 1995. In attendance were:

- Joel Carr C.E.P.
- Paul Lochner C.E.P.
- Jim Locke C.E.P. Local 26
- Gary Lloyd C.E.P.
- Rod Noel HRDC - Labour
- P. Wright HRDC - Labour
- Mary Gawrylash Bell Canada
- Ward Saunders Bell Canada
- Dave James Bell Canada
- Al Thompson Bell Canada
- Terry Maiden Bell Canada
- Jim Allan Bell Canada
- Michelle Parent Bell Canada
- André L. Paiement Bell Canada

Background

The events leading to the direction under review are well detailed in the LAO ASSIGNMENT NARRATIVE FORM prepared by safety officer Rod Noel and dated February 9, 1995. At issue is a Bell Canada manhole located on New Street, east of Beverly Street, in Burlington, Ontario. Since 1991, this manhole has been known to be contaminated, probably with fuel oil. For some time now, Bell's claims department has been trying to identify the source of contamination, resolve the problem and receive compensation for the cleanup.

Since 1991, nobody has entered this particular manhole. In November 1994 however, an air leak in a cable was discovered, which air leak would eventually require repairs. On January 5, 1995, there was a meeting at the site with the following persons in attendance:

A. Nemet, senior environmental officer, Ministry of Environment, Ontario
E. Mann, staff manager - claims, Bell Canada
Paul Lochner, employees' representative, Safety & Health Committee, Bell Canada
Ward Saunders, cable maintenance manager, Burlington, Bell Canada
B. Dicaire, technician, Bell Canada
D. Beynon, technician, Bell Canada

There was still an odour in the manhole and it was decided to call in a private consultant to identify the contaminant and, hopefully, the source of contamination. At that time, Paul Lochner asked to be involved in any further investigation related to the site.

On January 9, 1995, at the request of Ward Saunders, Eileen Beck of Workplace Environments conducted an on-site evaluation of the manhole. Mr. Ward Saunders and Mr. Dave Beynon of Bell Canada were present at the time. On that same day, Paul Lochner filed a complaint with Human Resources Development Canada, Labour Program, to the effect that "the employer has failed to involve a joint health and safety committee member in the testing of a hazardous confined space". Safety Officer Rod Noel investigated the complaint and, as a result, issued a direction to an employee (appendix 1).

Submission by the employer's representative

The arguments presented by the employer were:

- 1 - the direction makes reference to subsection 10.2(1)(b) of the Canada Safety and Health Regulations; as there is no such subsection, the direction should be rescinded;
- 2 - Ward Saunders is a manager, not an employee; paragraph 126(1)(d) has to do with the duties of employees and is, consequently, not applicable;
- 3 - the evaluation which was carried out by consultant Eileen Beck was a qualitative evaluation, the sole purpose of which was to identify the contaminants present in the manhole so as to trace the source of contamination for the purpose of cost recovery; the presence of an employee of the Ontario Ministry of Environment at the January 5, 1995, on-site meeting indicates the

purpose of the survey; furthermore, an industrial hygiene survey, such as would have been carried out previous to entry in the manhole, would be a quantitative survey, designed to evaluate the exposure of a person to contaminants;

- 4 - if one supposes that section 10.2(1)(b) of the Regulations is the provision referenced in the direction, this provision states "Where there is a likelihood that the safety or health of an employee in a workplace..."; however, there was no intention to send a person down the manhole, hence there was no likelihood.

Submission by the employees' representative

The following arguments were presented on behalf of the employees:

- 1 - the investigation was carried out by an industrial hygiene consultant: this is an indication of the purpose of the survey;
- 2 - there was an air leak in the cable and even if temporary solutions can be used to compensate for leaks, such as raising air pressure or supplying nitrogen in the immediate vicinity of the leak from a compressed gas cylinder, the leak must eventually be repaired; the investigation was carried out for that purpose; the on-site meeting of January 5, 1995 involved the claims manager, but it also did involve a number of cable maintenance people;
- 3 - Elaine Mann, the claims manager, believed the cable maintenance people had to enter the manhole to fix the cable air leak; this belief stemmed from conversations with the cable maintenance managers over the previous months.

Discussion

I tend to agree with the employer's arguments: there was a known environmental problem; the survey was a qualitative survey by opposition to a quantitative survey; and there was in fact no entry. The employees' argument is based on suppositions, not on facts. There is however a more fundamental issue which appears to have been overlooked in this case. Subsection 10.2(1) of the Regulations reads as follows:

10.2 (1) Where there is a likelihood that the safety or health of an employee in a work place is or may be endangered by exposure to a hazardous substance, the employer shall, without delay,

- (a) appoint a qualified person to carry out an investigation; and
- (b) notify the safety and health committee or the safety and health representative, if either exists, of the proposed investigation and of the name of the qualified person appointed to carry out this investigation.

In Part II of the Canada Labour Code, in subsection 122.(1), work place is defined as:

"work place" means any place where an employee is engaged in work for the employee's employer.

Because there was no employee in the manhole, the manhole is not a workplace and subsection 10.2 (1) therefore has no application. However, manholes are confined spaces and, because confined spaces are particularly hazardous, the regulator has created special provisions to deal with them. These are outlined in Part XI, Confined Spaces. A point can also be made that, given a situation where two regulations are applicable, the more specific ones will take precedence: in this case, the confined spaces regulations are narrower in scope than the Hazardous Substances Regulations and consequently take precedence.

In Part XI of the Regulations, Confined Spaces, section 11.2 reads:

11.2 (1) Where it is likely that a person will, in order to perform work for an employer, enter a confined space and an assessment pursuant to this subsection has not been carried out in respect of the confined space, or in respect of the class of confined spaces to which it belongs, the employer shall appoint a qualified person

- (a) to carry out an assessment of the physical and chemical hazards to which the person is likely to be exposed in the confined space or in the class of confined spaces; and
- (b) to specify the tests that are necessary to determine whether the person would be likely to be exposed to any of the hazards identified pursuant to paragraph (a).

(2) The qualified person referred to in subsection (1) shall, in a signed and dated report to the employer, record the findings of the assessment carried out pursuant to paragraph (1)(a).

(3) The employer shall make a copy of any report made pursuant to subsection (2) available to the safety and health committee or the safety and health representative, if either exists.

(4) Subject to subsection (5), the report made pursuant to subsection (2) shall be reviewed by a qualified person at least once every three years to ensure that its assessment of the hazards with which it is concerned is still accurate.

(5) If a confined space has not been entered in the three years preceding the time when the report referred to in subsection(4) should have been reviewed and no entry is scheduled, the report need not be reviewed until it becomes likely that a person will, in order to perform work for an employer, enter the confined space.

When the events which gave rise to the direction are compared with the requirements outlined in 11.2, it is readily apparent that there was no contravention to the Canada Labour Code or to the regulatory requirements. If it was an environmental assessment, as claimed by the employer, the Canada Labour Code and the Occupational Safety and Health Regulations do not apply; if it was a hazard assessment leading eventually to a confined space entry as claimed by the employees' representative, it meets the requirements outlined above: the employer selected a qualified person to do an evaluation; the qualified person prepared a report of her findings; the report was made available to the safety and health committee.

Also, the directions stated that the manager failed to abide by the company's instructions contained in the Bell Manager's safety guide which states that "a representative of the Local Safety and Health Committee will be invited to witness the gathering of samples". This sentence is extracted from a publication entitled "Managing Safety - A Manager's Guide" published by Bell and dated 1993-01. More specifically, this sentence is found on page 37 of this booklet; the page is titled: Section 2 - ACCIDENT INVESTIGATIONS". This is not an accident investigation: it is an environmental evaluation (according to the employer) or, as a worst case, it is a hazard assessment prior to confined space entry. Consequently, the instruction alluded to does not apply in this case and the manager (or employee, depending on the viewpoint) did not have to abide by it.

Decision

For the reasons outlined above, I HEREBY RESCIND the direction issued by Safety Officer Rod Noel to Ward Saunders on January 10, 1995.

Decision given on December 7, 1995.

Bertrand Southière
Regional Safety Officer

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

DIRECTION TO AN EMPLOYEE UNDER SUBSECTION 145(1)

On January 10, 1995 the undersigned Safety Officer conducted an investigation in the workplace operated by Bell Canada, being an employer subject to the Canada Labour Code, Part II, at 1171 Pioneer Road, Burlington, Ontario, the said workplace being sometimes known as Bell - Burlington Work Centre.

The said Safety Officer is of the opinion that the following provision of the Canada Labour Code, Part II is being contravened:

Paragraph 126(1)(d) of the Canada Labour Code - Part II and subsection 10.2(1)(b) of the Canada Occupational Safety and Health Regulations.

The employee, Ward Saunders, a work centre manager, without any valid reason, failed to notify the Joint Health and Safety Committee that a hazardous substance investigation sampling procedure would be conducted. The employer's instructions to the manager, contained in the Bell manager's safety guide, state that "a representative of the Local Safety and Health Committee will be invited to witness the gathering of samples."

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code Part II, to terminate the contravention from the date the present direction is issued.

Issued at Burlington, Ontario this 10th day of January 1995.

Rod J. Noel
Safety Officer
Certificate #1768

To: Ward Saunders, Manager
Bell Canada
1171 Pioneer Road
Burlington, Ontario
L7M 1K5

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Bell Canada
483 Bay Street, Floor 4 South Tower
Toronto, Ontario
represented by: André L. Paiement, Senior Counsel

KEYWORDS

Manhole; workplace; contaminants;

PROVISIONS

Code: 126. (1)(d) and 122. (1)
Regulations: 10.2 (1)(b) and 11.2

SUMMARY

A Bell Canada manager retained the services of an industrial hygienist to carry out an environmental assessment of a contaminated manhole. The hygienist conducted her survey in the presence of the manager and of one of the technicians. A member of the joint safety and health committee complained to a safety officer that "the manager had failed to involve a joint health and safety committee member in the testing of a hazardous confined space". The safety officer issued a direction to the manager as an employee, to the effect that he had contravened paragraph 126 (1) (d) of the Canada Labour Code, Part II, and subsection 10.2 (1) (b) of the Canada Occupational Safety and Health Regulations.

The regional safety officer concluded that a manhole is not a workplace, unless a person works in it, consequently, subsection 10.2 (1) (b) of the Canada Occupational Safety and Health Regulations does not apply. Section 11.2 of the Canada Occupational Safety and Health Regulations contains the applicable requirements. The procedure followed by the manager agreed with the requirements of section 11.2, consequently, there was no breach of paragraph 126. (1) (d) of the Canada Labour Code. The direction was rescinded.