

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Cape Breton Development Corporation  
Represented by: J. Baldwin, P. Eng.

Respondent: United Mine Workers of America  
Represented by: A. McLean

Canadian Auto Workers  
Represented by: A. Grant

Canadian Union of Public Employees  
Represented by: A. MacEachern

Mis-en-cause: Bill Gallant  
Safety Officer  
Human Resources Development Canada

Before: Douglas Malanka  
Regional Safety Officer  
Human Resources Development Canada

**Background**

On April 22, 1998, heat was detected emanating from 500 tonnes of cut coal located at the blind end of 7 East Bottom, Cundy area, Phalen Colliery, operated by Cape Breton Development Corporation (DEVCO), near Waterford, Nova Scotia. The Mine Manager immediately informed the safety and health committee of the heating and of his plans to address the situation. He similarly advised safety officers at the Department of Human Resources Development Canada.

The Mine Manager first decided to muck the coal pile, but this did not eliminate the heating. He then decided to construct a temporary water containment wall approximately half the height of the roadway, and to impound water behind it to flood the stored coal. Construction of the water containment wall began on April 25, 1998.

On April 27, 1998, the Mine Manager wrote to the Coal Mining Safety Commission (hereto referred to as the "Commission") regarding the construction of the temporary water containment wall. He reminded the Commission that they had already approved the construction, for

ventilation purposes, of a permanent seal for sealing the stored coal in 7 East Bottom. He informed them that the approved seal had been partially constructed and that the stored coal had been flooded to eliminate the heating that was occurring. He clarified that the water, the water containment wall and the stored coal would be removed after the coal was flooded.

On April 29, 1998, the safety officer met with the Mine Manager to discuss the heating event. According to the safety officer, the Mine Manager assured him that he would seek Commission approval for the water containment wall and temporary flooding. However, the safety officer learned on May 4, 1998, that the Mine Manager had not submitted an application to the Commission, and that the water containment wall that had been used was in the process of being dismantled, and preparations were being made to muck the coal.

The safety officer went to the Mine on May 5, 1998, and issued an oral direction, confirmed by a written one the same day. Item 2 of the written direction specified that the employer was in contravention of paragraph 125.(u) of the Canada Labour Code (hereafter referred to as the "Code" or "Part II"), and paragraph 158.(1)(g) of the Coal Mines (CBDC) Occupational Safety and Health Regulations, (hereto referred to as the "CBDC OSH Regulations") because the employer had failed to submit to the Commission for approval a notice in writing of the employer's intention to construct a water storage reservoir prior to constructing it. The direction ordered the employer to cease the contravention immediately. A copy of the direction is attached.

The safety officer clarified to the Mine Manager that his direction required him to apply retroactively to the Commission for approval for the water containment wall, despite the fact that it was being dismantled at the time of his direction. On May 5, 1998, the employer requested that a Regional Safety Officer review the direction under section 146 of the Code. A review of the direction was completed via written submissions.

### **Safety Officer:**

Safety officer Bill Gallant submitted a written report to the Regional Safety Officer on July 2, 1998, which provided information leading up to his direction dated May 5, 1998 and attached several documents related to the case. These form part of the file and will not be repeated here in their entirety. I retain the following facts from the documents filed by safety officer Gallant.

On April 22, 1998, a spontaneous combustion event was detected at Phalen Mine in connection with approximately 500 tonnes of cut coal located in the blind end of 7 East Bottom whereby heat and carbon monoxide was produced.

The employer attempted unsuccessfully to control the spontaneous combustion by mucking the coal. The next day, Mr. Baldwin, Mine Manager, Phalen Colliery, decided to construct a water containment wall in front of the cut coal and to impound water behind it to extinguish the spontaneous combustion. Construction of the water containment wall commenced on April 23 and ended on April 25, 1998. Upon completion of the flooding, the coal was monitored using temperature sensors and gas detectors.

On April 27, 1998, Mr. Baldwin wrote to the Commission and notified them of his actions. Two days later, on April 29, 1998, safety officers K. Beaton and Gallant met with Mr. Baldwin to discuss the status of the spontaneous combustion event. They understood Mr. Baldwin to say that he would submit plans to the Commission for the water containment wall that had already been constructed.

The safety officer learned on May 4, 1998, that Mr. Baldwin had not submitted plans for the water containment wall. He returned the next day and issued an oral direction, confirmed in writing the same day. In item 2 of the written direction, he directed the employer to comply immediately with paragraphs 125.(u) of the Code and paragraph 158.(1)(g) of the CBDC OSH Regulations .

In response to my request for clarification<sup>1</sup>, dated October 1<sup>st</sup>, 1998, safety officer Gallant replied that sections 162, 163 and 164 apply in respect of the heating event. However, he confirmed that his May 5, 1998, direction did not address the possibility that there was a violation of these sections.

He stated that section 158.(1)(g) is applicable to the construction of water storage reservoirs which is what the Company constructed to control the heating or combustion taking place in the cut coal. He said that the reservoir was constructed over a 13 day period and there was sufficient time for the employer to apply to the Commission. He pointed out that the Commission has met on short notice in the past and shown that it is capable of rendering approvals on the same day of the application.

**Applicant:**

Mr. Baldwin submitted written reasons for requesting a review of the direction and included copies of correspondence between himself and the Designated Person<sup>2</sup> of the Commission. The documents form part of the file and will not be reproduced here. The following facts are retained from the documentation.

On April 22, 1998, heating was detected in cut coal that was being stored in the 7 East Cundy area. This was communicated to the safety and health committee and to safety officers at HRDC. The parties were kept informed about the status of the event from the time the heating was detected until the situation was resolved.

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<sup>1</sup> On October 1<sup>st</sup>, 1998, I wrote to the parties and safety officer Gallant. In the letter, I asked safety officer Gallant to comment on section 158 of the Coal Mines (CBDC) Occupational Safety and Health Regulations in terms of sections 162, 163 and 164 of the same Regulations. In particular, I asked safety officer Gallant if he was interpreting section 158 of the Regulations to mean that the employer must obtain Commission approval prior to taking measures to address an emergency situation. If so, I further requested safety officer Gallant to comment on whether this could have an adverse effect on overall employee safety and health.

<sup>2</sup> "Designated Person" means the person referred to in paragraph 137.2(2)(a) which reads:

"137.2(2)(a) On the application of an employer, the Commission or a person designated by the Commission for the purposes of this subsection may, where, in the opinion of the Commission or that person, protection of the safety and health of employees would not thereby be diminished, (a) approve in writing the use by the employer in coal mines of mining methods, machinery or equipment in respect of which no prescribed safety standards are applicable; or..." [My underline]

There was a need for immediate action to address the high temperatures detected in the stowed coal in 7 East Cundy and the construction of the water containment wall to impound water was commenced on April 23, 1998. The application of water to the stowed coal was a reasonable and effective measure to deal with the situation.

Mr. Baldwin wrote to the Commission on April 27, 1998, to notify them of his intent to construct a temporary water containment wall and to dam water behind the water containment wall to terminate any further heating. He referred in his notice to the Commission's previous approval for a ventilation seal in 7 East Bottom. He indicated that the approved seal had been partially constructed for flooding the stored coal. He further advised them that the water, the water containment wall and the stored coal would subsequently be removed.

Mr. Baldwin did not recall advising safety officer Gallant on April 29, 1998, that he would be applying to the Commission for approval for the water containment wall to impound water to terminate the heating event.

The Designated Person responded to Mr. Baldwin on April 30, 1998, and requested him to confirm whether his notice of April 27, 1998, was to advise the Commission that he would be submitting a plan for approval, or whether the notice was the submission. The Designated Person requested Mr. Baldwin to provide technical design specifications and factors of safety calculations certified by a Profession Engineer in connection with the notice.

When safety officer Gallant issued his direction on May 5, 1998, the removal of the water containment wall and of the water was scheduled to be completed later that night. Safety officer Gallant advised Mr. Baldwin that to comply with his direction, he should seek approval retrospectively for the wall that had been used to impound the water.

Mr. Baldwin argued that safety officer Gallant's direction on May 5, 1998, is without merit and should be rescinded because the direction requires the company to obtain Commission approval for a wall that served its purpose and no longer exists.

Mr. Baldwin held that, if Commission approval of the water containment wall was required prior to its construction, then the safety officer had a duty to advise the company before construction commenced because he was aware of the Company's intent. He argued that the timing of the direction made compliance impossible. He pointed out that the Commission refused to consider the company's submission for the water containment wall that was subsequently made in compliance with the direction.

In response to my aforementioned request for clarification dated October 1<sup>st</sup>, 1998, and safety officer Gallant's reply thereto, Mr. Baldwin indicated that the Company would have had to produce a professional engineered design plan for the water containment wall prior to applying to the Commission for its approval. He opined that the need for the Company to take immediate action was more important.

Mr. Baldwin indicated that the danger posed by the heating of the coal was more significant than that related to the construction of a reservoir. He held that the 5 foot water containment wall used for the dam was designed and constructed using reasonable mining practice. He stated that, even if the water containment wall had failed, which Mr. Baldwin estimated to be extremely unlikely, the out rush of water would not have been significant, and would have only presented a theoretical risk of injury.

He further stated that the direction made no sense because the company began removal of the water containment wall the same day the direction was issued.

Finally, he suggested that there is a gray area in the mining Regulations relative to activities that must be taken immediately to deal with an underground emergency situation which require Commission approval. In his opinion, it was necessary to proceed immediately with the construction of the water containment wall, as opposed to developing a design plan and submitting it to the Commission for approval.

**Respondent:**

The respondents were provided with a copy of all documents submitted to the Office of the Regional Safety Officer. They replied that that the review of the direction should be based on the written documents submitted.

**Decision:**

The issues in this case is whether the safety officer was authorized by the legislation to issue item 2 of his direction, and whether, in consideration of the circumstances surrounding the direction, it should be varied, rescinded or confirmed.

To decide whether safety officer Gallant was authorized by the legislation to issue item 2 of his direction, it was necessary to consider the Code provisions that he cited in item 2 of his direction. These include paragraph 125.(u) of the Code, and paragraph 158.(1)(g) of the Coal Mines (CBDC) Occupational Safety and Health Regulations. It was also necessary to consider subsection 125.3(1) of the Code which essentially requires the employer to comply with 158.(1)(g).

With regard to paragraph 125.(u) of the Code, this provision establishes that the employer must adopt and implement safety codes and standards referenced in the Code and regulations made pursuant to the Code. The paragraph reads:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
  - (u) adopt and implement prescribed safety codes and safety standards;

Paragraph 125.3(1)(d) requires the employer to submit to the Commission for approval a notice in writing of his or her intention to carry out any activity for which the submission of plans and procedures is prescribed. This includes those activities listed in subsection 158.(1) of the CBDC OSH Regulations. Paragraph 125.3(1)(d) reads:

125.3(1) Every employer of employees employed in a coal mine shall

(d) as a condition of carrying out any activity for which the submission of plans and procedures is prescribed, submit to the Coal Mining Safety Commission for approval, in the form and manner and at the time prescribed, plans and procedures relating to that activity and carry out the activity in conformity with plans and procedures as approved. [My underline]

Finally, paragraph 158.(1)(g) of the CBDC OSH Regulations requires the employer to submit to the Commission for approval a notice in writing, at least 90 days before beginning its construction, his or her intent to construct a water storage reservoir. This paragraph reads:

158.(1) The employer shall submit to the Coal Mining Safety Commission for approval a notice in writing of the employer's intention to carry out any of the following activities in a coal mine, at least 90 days before beginning any of those activities, namely,

(g) the construction of a tailing dam, a water storage reservoir or a structure above ground for the storage of explosives; [My underline]

Having considered the matter closely, however, I am of the view, for the following reasons, that paragraph 158.(1)(g) does not apply in respect of the water containment wall constructed in this case by the employer to eliminate the heating event in 7 East Bottom, Cundy. First, the heading of subsection 158.(1) identifies the activities listed therein as “Pre-development Requirements”. It does not seem to me that the impounding of water behind a water containment wall to eliminate a heating event could be characterized as a “pre-development” activity. Secondly, the reference in subsection 158.(1)(g) is to a “water reservoir storage”. In the case at hand, the water containment wall was not intended as a water storage reservoir but rather as a temporary impounding of water on an emergency basis to eliminate the heating occurring in the cut coal. Thirdly, subsection 158.(1) specifies that applications must be filed at least 90 days before beginning the activity. It is difficult to imagine that this subsection applies to activities in a coal mine whose objective is to address an emergency situation.

Notwithstanding this, paragraph 125.3(2) of the Code requires the employer to obtain Commission approval regarding any mining method for which there are no prescribed standards. Specifically, paragraph 125.3(2) reads:

125.3(2) No employer shall require or permit the use in a coal mine of any mining method, machinery or equipment in respect of which no prescribed safety standards are applicable unless the use thereof has been approved pursuant to paragraph 137.2(2)(a). [My underline]

In this regard, Webster<sup>3</sup> dictionary defines the term “mining” as “the process or business of working mines.” In my view, this definition would include the construction of a water containment wall to deal with the heating event that occurred. Since there are no prescribed standards in the CBDC OSH Regulations concerning structures to deal with the heating or spontaneous combustion, it is my opinion that this paragraph applies to the water containment wall that was constructed here. Therefore, paragraph 125.3(2) obliges the employer to seek the Commission’s or Designated Person’s approval for the water containment wall which is available under paragraph 137.2(2)(a).

Paragraph 137.2(2)(a) referred to in the above reads:

137.2(2) On the application of an employer, the Commission or a person designated by the Commission for the purposes of this subsection may, where, in the opinion of the Commission or that person, protection of the safety and health of employees would not thereby be diminished,  
(a) approve in writing the use by the employer in coal mines of mining methods, machinery or equipment in respect of which no prescribed safety standards are applicable; [My underline]

Mr. Baldwin stated in his submission that he proceeded without seeking Commission or Designated Person approval because there was a need to act rapidly and address the situation. However, there is nothing in paragraph 137.2(2)(a) of the Code that precludes a rapid submission and approval by the Commission or the Designated Person of any mining method for which there are no prescribed standards. Safety officer Gallant noted in his documents that, in the past, the Commission and Designated Person has dealt with an application on the same day that it was received. I therefore can give little weight to Mr. Baldwin’s argument that there was insufficient time in this case to make the required submission, or that there are grey areas in the legislation where the employer must act immediately to addresses emergencies and there is requirement under the Code to obtain Commission approval of the activity.

Mr. Baldwin further argued that the direction should be rescinded because it is without merit. He held that the water containment wall in question was being dismantled at the time of the direction and so it was not needed. Furthermore, it was impossible to comply with the direction after the water containment wall had been removed. As further proof of the futility of the direction, he pointed out that the Commission declined to consider his May 13, 1998, application for the water containment wall that was submitted in compliance with the direction.

Stated in a slightly different way, I interpret Mr. Baldwin’s argument to be that the direction should be rescinded because the contravention was essentially terminated at the time the direction was issued and so technically the Code was no longer being contravened. This being the case, there was nothing that he could do retroactively to comply with the direction that made any sense.

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<sup>3</sup> Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> Edition, 1998.

In this regard, subsection 145.(1) of the Code reads:

145.(1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally. [My underline]

However, Mr. Baldwin's interpretation of subsection 145.(1) would be a very narrow one which, I suggest, is not supported by the Interpretation Act which applies in respect of interpreting Federal legislation. In this regard, I note that the Interpretation Act specifies in section 12 and in subsection 31.(2) that:

"Section 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives. R.S., C 1-23, S. 11" [my underline]; and,

"Subsection 31.(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given."

I interpret these sections to say that a safety officer can issue a direction pursuant to subsection 145.(1) of the Code, if the safety officer is of the opinion that the conditions in the work place that led to the violation still exist or are "on-going." This is the same position that I took in the Brink's vs Prince, unreported Decision No. 98-014.

The contravention that safety officer Gallant referred to in his direction was not simply that the employer proceeded with a mining method for which there was no prescribed standards without the approval of the Commission or the Designated Person, as required by the Code. Rather, it includes the fact that the circumstances at the work place that led to the contravention continued to exist at the time of his direction.

The evidence in this case is that Mr. Baldwin either did not understand that he had to re-apply to the Commission, or the Designated Person, for approval to construct the water containment wall to flood the cut coal, or that he considered the situation to be an emergency and proceeded without obtaining the required approval. In either case, there is nothing in the submissions that I received that convinces me that, the employer would act differently in the future without the direction. As a result, the direction was needed.

That stated, I suggest that the employer could terminate the contravention by taking steps to ensure that its employees and supervisors understand their obligations under the Code and comply, and communicating these to the safety officer. In hind sight, one could disagree with the safety officer if he recommended that the employer comply with his direction by retroactively submitting to the Commission for approval a plan for the dismantled water containment wall. The Commission understood the futility of approving the employer's retroactive application and declined to do so.



With regard to Mr. Baldwin's statement that safety officer Gallant had an obligation to issue his direction earlier, I note that safety officer Gallant responded that he understood Mr. Baldwin was going to submit a request to the Commission in respect of the water containment wall. Notwithstanding the apparent misunderstanding, section 145.(1)<sup>4</sup> gives the safety officer the discretion to issue a direction or not, according to the circumstances. Therefore, it would be incorrect to say that the safety officer has a legal obligation to issue a direction when he or she becomes aware of any contravention of Part II.

For all of the reasons specified, I **HEREBY VARY** item 2 of the direction issued by safety officer Gallant on May 5, 1998, pursuant to subsection 145.1 of the Code by substituting the reference to paragraph 125.(u) of the Code and paragraph 158.(1)(g) Coal Mines (CBDC) Occupational Safety and Health Regulations with paragraph 125.3(2) of the Code. For clarity, item 2. of the direction now reads:

2. "Paragraph 125.3(2) of the Canada Labour Code, Part II

The employer did not submit to the Coal Mining Safety Commission for approval a notice in writing of the employer's intention to construct a water containment wall to impound water and flood the cut coal stored in 7 East Bottom Cundy prior to constructing the water containment wall."

Decision issued on February 9, 1999.

Douglas Malanka  
Regional Safety Officer

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<sup>4</sup> Subsection 145.(1) reads:

"145.(1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally." [My underline]

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On May 5<sup>th</sup>, 1998, the undersigned safety officer conducted an inquiry in the work place operated by CAPE BRETON DEVELOPMENT CORPORATION, being an employer subject to the Canada Labour Code, Part II, at PHALEN MINE, NEW WATERFORD, NOVA SCOTIA, the said work place being sometimes known as Phalen Mine.

The said safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, is being contravened:

1. Paragraph 125.3(1)(a) of the Canada Labour Code, Part II, Coal Mining Safety Commission Approval A98-05

The ventilation of 7 East Bottom Level, Phalen Mine was not in conformity with the approved plan.

2. Paragraph 125(u) of the Canada Labour Code, Part II, Paragraph 158(1)(g) of the Coal Mines (CBCD) Occupational Safety and Health Regulations.

The employer did not submit to the Coal Mining Safety Commission for approval a notice in writing of the employer's intention to construct a water storage reservoir prior to constructing the water storage reservoir.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions forthwith.

Issued at New Waterford, this 5<sup>th</sup> day of May, 1998.

Bill Gallant  
Safety Officer  
1879

To: CAPE BRETON DEVELOPMENT CORPORATION  
PHALEN MINE  
NEW WATERFORD  
NOVA SCOTIA  
B1H 2M4

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Cape Breton Development Corporation

Respondent: United Mine Workers of America  
Canadian Auto Workers  
Canadian Union of Public Employees

**KEY WORDS**

Coal mine, coal, spontaneous heating, combustion, water dam, partial seal, temporary water containment wall, muck, Coal Mining Safety Commission, approval of plans, contravention, Coal Mines (CBDC) Occupational Safety and Health Regulations.

**PROVISIONS**

Code: 125.(u), 125.3(1)(d), 125.3(2), 137.(2)(a), 145.(1),  
Coal Mines (CBDC) Occupational Safety and Health Regulations: 158.(1)(g)

**SUMMARY**

On April 22, 1998, heat was detected emanating from 500 tons of cut coal located at the blind end of 7 East Bottom, Cundy area, Phalen Colliery, operated by Cape Breton Development Corporation (DEVCO), near Waterford, Nova Scotia. The first remedial measure taken was to muck the coal pile, but this was not successful. The Mine Manager then decided to construct a temporary water containment wall approximately half the height of the roadway, and to impound water behind it to flood the stored coal.

On April 29, 1998, the safety officer met with the Mine Manager to discuss the heating event. According to the safety officer, the Mine Manager assured him that he would seek Commission approval for the water containment wall and temporary flooding as required under the Canada Labour Code. However, the safety officer learned on May 4, 1998, that the Mine Manager had not submitted an application to the Commission. The safety officer went to the Mine on May 5, 1998, and issued a written direction. Item 2 of the written direction ordered the employer to comply with paragraph 125.(u) of the Canada Labour Code (Code), and paragraph 158.(1)(g) of the Coal Mines (CBDC) Occupational Safety and Health Regulations. On May 5, 1998, the employer requested that a Regional Safety Officer review the direction under section 146 of the Code. An review of the direction was completed via written submissions.

Upon review of the direction, the Regional Safety Officer confirmed that the employer had contravened paragraph 125.3(2) of the Code as opposed to paragraph 125.(u) of the Code and paragraph 158.(1)(g) of the Coal Mines (CBDC) Occupational Safety and Health Regulations. The Regional Safety Officer **VARIED** the direction by substituting therein paragraph 125.(4) of the Code and paragraph 158.(1)(g) of the Coal Mines (CBDC) Occupational Safety and Health Regulations with paragraph 125.3(2) of the Code.