

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-21

Interlocutory decision
Decision No.: OHSTC-08-021(I)

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Royal Canadian Mounted Police
appellant

and

Scott Warren
respondent

August 27, 2008

This is an interlocutory decision on a request for an interim stay of a direction has been rendered by Pierre Guénette, Appeals Officer.

For the appellant

Harvey Newman, Counsel for the appellant

For the respondent

Sergeant Bill Nadeau, RCMP employee

Scott Warren, Sergeant Island District, Staff Relation Representative

- [1] This case is about an interlocutory decision on a request for an interim stay of a direction that was rendered in writing on August 8, 2008 and confirmed with reasons hereinafter.
- [2] The present decision concerns the appellant request for an interim stay of one month with respect to the direction issued by health and safety officer (HSO) Martin W. Davey to the Royal Canadian Mounted Police (RCMP) on July 11, 2008, under subsection 145(1) of Part II of the *Canada Labour Code*, (the *Code*).
- [3] HSO Davey issued this direction following his investigation conducted at the work place operated by the RCMP at 657 West 37th Avenue, Vancouver, BC, the said work place being sometimes known as "E" Division Headquarters.
- [4] HSO Davey's direction states:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

Since August 2, 2007, the undersigned health and safety officer has been conducting an investigation in the work place operated by Royal Canadian Mounted Police, being an employer subject to the *Canada Labour Code*, Part II, at 657 West 37th Avenue, Vancouver, BC, V5Z 1K6, the said work place being sometimes known as "E" Division Headquarters.

The said Health and Safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, are being contravened:

Paragraph 125. (1)(p) of Canada Labour Code Part II and Section 18.65 Canada Occupational Health and Safety Regulations

This section of the Canada Occupational Health and Safety Regulation, 18.65, requires a through water two way voice communication system between the untethered SCUBA divers and between these divers and the surface with the expectation that this communication system be maintained at all times in order to allow for the diver to be untethered. The employer is using a search pattern referred to as a Necklace or a Half Necklace in overhead environments such as beneath ships' hulls or beneath piers where the voice communication system is known to sometimes fail due to the obstructions and the SCUBA divers are untethered.

Paragraph 125.1(p) Canada Labour Code Part II and paragraph 18.22(a) Canada Occupational Health and Safety Regulations

The employer is not ensuring that a reliable communication system appropriate for the operation is always provided for when the Necklace or Half Necklace search pattern is used in overhead environments by untethered SCUBA divers.

Paragraph 125.1(q) Canada Labour Code Part II and 18.4(1)(b) Canada Occupational Health and Safety Regulations

The employer is using a search procedure referred to as a Necklace or Half Necklace in overhead environments where there is potential for an untethered SCUBA diver to become disassociated from the other divers, and if an emergency for that diver arises, the diver may not receive immediate assistance or may not be able to summon assistance or may not be able to immediately self rescue.

Paragraph 125.1(p) Canada Labour Code Part II and Section 19.5.(1) Canada Occupational Health and Safety Regulations

The employer is using the Necklace or Half Necklace search pattern in overhead environments with untethered SCUBA divers when a safer method of performing the works available for the divers.

Paragraph 125.1(p) Canada Labour Code Part II and paragraph 18.65(b) Canada Occupational Health and Safety Regulations

18.65(b), requires a diver's tender, for a SCUBA diver with a reliable through the water voice communications system who is not tethered to the surface by a lifeline or float. The purpose of a diver's tender is to attend to a diver for the duration of the dive.

The employer is not, under all conditions, ensuring reliable communication in overhead environments when performing the Necklace or Half Necklace search pattern with untethered SCUBA divers and therefore when communication fails there is no diver's tender attending to the diver.

Paragraph 125.1(p) Canada Labour Code and paragraph 18.65(a) Canada Occupational Health and Safety Regulations

18.65(a) requires a standby diver. The purpose of the standby diver is to be readily available to assist the submerged diver in the event of an emergency.

The employer is not, under all conditions, ensuring reliable communication in overhead environments when performing the Necklace or Half Necklace search pattern with untethered SCUBA divers and therefore when communication fails the standby diver may not be aware of the need for assistance by the submerged diver or the standby diver may not know exactly where the submerged diver is located meaning that for the purpose of the section there may not be a standby diver that meets the requirement.

Section 124 Canada Labour Code Part II

The employer is using a Necklace or Half Necklace search pattern in overhead environments for untethered SCUBA divers and in doing so:

- The through the water two way voice communication system (known as wireless) being used does not work well in overhead environments,

- Because the necklace technique incorporates a multitude of divers in the water at the same time, the probability of one or more divers experiencing communication problems is highly probable.
- Continuous visual monitoring between divers is not possible because the divers' primary focus is on the search.
- Divers are not tethered to a lifeline and can release a handhold of a search line at any time.
- The use of this search pattern in overhead environments and these conditions allows untethered SCUBA divers to lose contact with each other.
- Because divers are subject to disorientation/separation, and because the guideline used can be obstructed or entangled; divers would be required to find their own way out in search of the surface.
- A diver can potentially be (and often is) in a position where the diver is both untethered and in an overhead environment where a) the diver does not always have contact with a guideline to the surface and b) does not have visual and unobstructed access to the surface.
- A diver can potentially be (and often is) in a position where the diver is both untethered and in an overhead environment where the diver does not always have visual and unobstructed access to a dive buddy/stand-by diver.
- The employer is using the Necklace or Half Necklace search procedure for locating parasitic devices i.e. explosive devices in a manner that does not utilize (sic) the safest means of searching for these devices.
- Occupational divers work in an environment where their very existence relies on life support equipment. This type of work requires the highest degree of attention to the identification and reduction of hazards. The purpose of Part II of the Canada Labour Code is to **PREVENT** accidents and injury to health arising out of linked with or occurring (sic) in the course of employment to which this Part applies. For these reasons the employer is not ensuring that the health and safety at work of every person employed by the employer is protected.

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

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, to take steps no later than August 11, 2008, to ensure that the contraventions do not continue or reoccur.

Issued at Vancouver, this eleventh day of July 2008.

Martin W. Davey
Health and Safety Officer
Id No BC5841

To: William J. S. Elliott
Commissioner Royal Canadian Mounted Police
1200 Vanier Parkway
Ottawa, Ontario, K1A 0R2.

- [5] The issue to be decided in the present case is whether or not there are substantive grounds justifying that I grant an interim stay of one month with respect to HSO Davey's direction to the RCMP.
- [6] To reach a decision, I have to consider the direction of the health and safety officer and the arguments provided by both parties on August 8, 2008.

Appellant's arguments

- [7] Mr. Harvey Newman informed me that he is not familiar with the present case because he was just replacing Mr. Richard Fader who is on vacation until September 2008. Mr. Fader is the counsel for the appellant in this appeal. Mr. Newman added that he was not prepared to make submissions with respect to the three fold test raised on the *Metropolitan Stores Ltd.* decision¹.
- [8] Mr. Newman was asking for an interim stay of one month to give Mr. Fader some time to prepare his submission for a longer stay that will be based on the three criterion of the *Metropolitan Stores Ltd.* supra decision.
- [9] Mr. Newman added that there is no evidence of irreparable harm to employees if I grant a one month interim stay.
- [10] Mr. Newman said that the public safety could be jeopardized if there are some restrictions in search techniques. He added that the RCMP thinks that in certain circumstances the Necklace or Half Necklace search technique is the most effective procedure that is available to divers.

Respondent's argument

- [11] Sergeant Bill Nadeau submitted that he has several safety concerns with the Necklace and Half Necklace search technique. He added that it is an on-going issue for the last eleven months and employees were unsuccessful to obtain from management some corrective action to that search technique that he considers unsafe for divers.
- [12] Sergeant Nadeau said that divers have personal safety concerns by using the Necklace and Half Necklace search technique.
- [13] Sergeant Nadeau argued that the employer contravenes the *Code* and the Canada Occupational Health and Safety Regulations when it allows

¹ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, Docket 19609

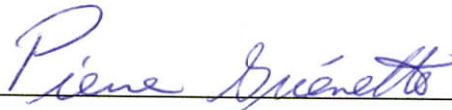
- employees to use the Necklace and Half Necklace search technique.
- [14] Sergeant Nadeau added that RCMP divers could use alternative search techniques that are safer for them. He added that those search techniques are used across Canada by the diving industry.
- [15] In conclusion, Sergeant Nadeau said that by granting the interim stay to the appellant it will put the individual diver's health and safety at risk because the employer will allow the diving team to use a search technique that has been identified unsafe by HSO Davey.

Analysis and decision

- [16] The issue in the present case is that Mr. Newman, on behalf of the appellant, was requesting a one month interim stay to let Mr. Fader prepare his submissions, based on the three criteria, to obtain a two month stay of the direction issued by HSO Davey.
- [17] Both parties presented oral submissions during a teleconference on August 8, 2008. Those submissions were only related to the interim stay requested by the appellant.
- [18] Therefore my decision on the interim stay is based on submission presented by both parties.
- [19] I believe that there is a serious issue to be tried because a direction has been issued following a very long investigation by the health and safety officer who tried to correct some working conditions (that he considered unsafe) involving a RCMP diving team.
- [20] The decision with respect to the interim stay request has a serious effect over the direction that has been issued by HSO Davey. It will suspend the application of the direction for a month.
- [21] The appellant did not convince me that if I grant a one month interim stay to the employer, that employees will not suffer irreparable harm. I believe that employees could be exposed to unsafe conditions that have been identified by HSO Davey during his investigation. The purpose of the *Code* is to prevent accidents and injury. The appellant did not provide strong arguments to convince me that employees will continue to use safe search techniques if I grant the interim stay.
- [22] In my opinion, the diving team will suffer a greater harm from the granting of an interim stay. I consider that the employer had enough time to deal with the search diving procedures that HSO Davey identified in his investigation. In addition to that, I believe that the employer will not suffer a greater harm if I am not granting the stay because their employees could continue to perform their diving duties by using safe alternative search techniques.
- [23] Mr. Newman did not submit an alternative temporary solution to further

protect the employees until the appeal can be heard by an Appeals Officer and a decision rendered.

- [24] As for the appellant's concern that the public safety could be jeopardized if they are some restrictions in search techniques, I have to specify that Mr. Newman did not submit any details about that statement.
- [25] RCMP divers are not limited to the Necklace and Half Necklace technique because they are using alternative search techniques that allow them to perform their diving duties safely, according to Sergeant Nadeau's statement.
- [26] Therefore, for the reasons stated above, I am not granting the interim stay of the direction. Consequently, the employer is to make every reasonable effort to comply with the direction.
- [27] The present detailed decision is to sustain the written decision that I rendered to both parties on August 8, 2008.



Pierre Guénette
Appeals Officer

SUMMARY OF APPEAL OFFICER DECISION

Decision No.: OHSTC-08-21(I)

Appellant: Royal Canadian Mounted Police (RCMP)

Respondent: Scott Warren, Employee representative

Provisions:

Canada Labour Code, Part II: 145(1)

Keywords: Search Necklace and Half Necklace diving procedures, unsafe conditions, direction, stay request.

Summary:

On July 11, 2008 health and safety officer Martin W. Davey issued a direction to the RCMP, stating that the employer did contravene Part II of the *Canada Labour Code* with respect to a specific search diving technique. The appellant had requested a month interim stay of the direction to allow the assigned appellant's counsel sufficient time to prepare his submission to request a two months stay. Both parties had submitted oral arguments during a teleconference on August 8, 2008. The appellant did not convince the Appeals Officer to grant an interim stay. Therefore no stay was granted to RCMP.