

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Bell Canada v. Communications, Energy and Paperworkers Union of Canada,  
2012 OHSTC 18

**Date:** 2012-06-19  
**Case No:** 2012-29  
**Rendered at:** Ottawa

**Between:**

Bell Canada, Applicant

and

Communications, Energy and Paperworkers Union of Canada, Respondent

**Matter:** An application for a stay of a direction

**Decision:** The stay of the direction is granted

**Decision rendered by:** Mr. Douglas Malanka, Appeals Officer

**Language of decision:** English

**For the Applicant:** Ms. Cheryl A. Edwards, Counsel, Heenan Blaikie LLP

**For the Respondent** Mr. Keith McMillan, National Representative Health and Safety – CEP  
Ontario Region, Communications, Energy and Paperworkers Union of  
Canada (CEP).

Canada

## REASONS

- [1] On May 8, 2012, Ms. Edwards, on behalf of Bell Canada (Bell) appealed the direction that Health and Safety Officer (HSO) Regis Tremblay had issued to Bell Canada on April 23, 2012. Ms. Edwards also requested a stay of direction.
- [2] The application for stay of the direction is made pursuant to subsection 146(2) of the *Canada Labour Code* (the Code). That subsection reads as follows:
- 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.
- [3] On Thursday, June 7th, 2012 parties were advised that the stay was granted and that my written decision with reasons would follow shortly.

### Background

- [4] The direction issued by HSO Tremblay to Bell Canada pursuant to subsection 145(1) of the Code reads as follows:

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code, Part II*, has been contravened:

Subsection 125.(1)(1) - *Canada Labour Code, Part II* and  
Subsection 11.3(d) - *Canada Occupational Health and Safety Regulations*:

Employer does not specify the protection equipment and emergency equipment to be used by a person who takes part in the rescue of a person from the confined space or in responding to other emergency situations in the confined space. Confined spaces targeted are the manholes “designated” and “specials” as named by Bell Canada.

Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code, Part II* to terminate the contraventions no later than May 7, 2012.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code, Part II*, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at St- Bruno (Qc) this 23<sup>rd</sup> day of April, 2012.

- [5] Ms. Edwards and Mr. Keith McMillan, National Representative Health and Safety – CEP Ontario Region participated in a hearing conducted by me by telephone on May 17, 2012. Parties subsequently forwarded written submissions.

## Analysis

- [6] The authority for an appeals officer to grant a stay is derived from the above aforementioned subsection 146(2) and the exercise of this discretion must be consistent with the purpose clause of the Code found in section 122.1 and any other applicable provisions.

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

- [7] In deciding this stay application, I applied the three part test adopted by the Tribunal. This test requires that:

- The applicant must satisfy the Appeals Officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim;
- The applicant must demonstrate that significant harm would be suffered if the direction is not stayed; and
- The applicant must demonstrate that measures will be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted.

### **Is the question to be tried serious as opposed to frivolous or vexatious?**

- [8] Ms. Edwards wrote in her submission that that this appeal raises the issue of whether Bell Canada's (Bell's) current confined space policies, practices and procedures satisfy the requirements of the Code and the Canada Occupational Health and Safety Regulations relative to confined space entry and work. Ms. Edwards added that Bell's current practices have essentially been in place with the knowledge of Human Resources and Skills Development Canada (HRSDC) and its predecessor, Labour Canada, for over 20 years. Ms. Edwards maintained that Bell has a strong *prima facie* case for the appeal and its appeal of the direction issued by HSO Tremblay is neither frivolous nor vexatious.
- [9] Mr. McMillan confirmed in his written submission that the union does not oppose a stay and that the appeal addresses a serious question to be tried.
- [10] On the basis of the submissions, I am satisfied that the appeal raises a serious question to be tried.

**Would the Applicant suffer significant harm if the direction is not stayed?**

- [11] Ms. Edwards submitted that Bell will suffer significant and irreparable harm if a stay of the direction is not granted as Bell would have to fundamentally alter its long standing confined space entry policies and procedures based on a disputed interpretation of sections 11.3, 11.4 and 11.5 of the Regulations.
- [12] Ms. Edwards held that, without a stay, Bell will be forced to incur significant expense to review its manhole designations, purchase equipment and train employees. Ms. Edwards submitted that Bell would suffer great and unnecessary cost and inconvenience for which it would not be compensated if it made the changes and had to revert back to the established structure if the Appeal succeeds. Ms. Edwards added that the current Regulations are currently under review by HRSDC and any changes made before the Appeal is decided could be replaced by a new set of regulatory requirements.
- [13] Mr. McMillan submitted that instituting confined space rescue procedures in compliance with the direction will represent a significant culture shift at Bell. He stated that the matter needs preparatory work to avoid discipline arising out of hastily prepared communications regarding changes sought by employees. He further stated that it may take time to select rescue equipment, and that, while the Union did not “necessarily” agree that Bell would suffer serious harm, the Union accepts that there will be some “organizational pain”.
- [14] I am persuaded by the submissions of Ms. Edwards that Bell would suffer significant harm if the direction is not stayed.

**What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?**

- [15] Ms. Edwards submitted that the issue under appeal does not involve a danger and HSO Tremblay did not make a finding of danger connected with the issuance of his direction.
- [16] Ms. Edwards stated that Bell employees have made over 92 thousand entries into manholes and there has never been a situation involving Bell employees in which protection and emergency equipment specified in HSO Tremblay’s direction would have been of use had it been available.
- [17] Ms. Edwards maintained that in certain circumstances the use of rescue equipment envisioned by HSO Tremblay could result in greater danger to an employee working in a confined space. While Ms. Edwards did not specify those circumstances, Mr. McMillan did not disagree with the assertion in his reply submission.
- [18] Ms. Edwards stated that Bell, without prejudice to its position on its Appeal, submitted an action plan to HSO Tremblay on May 7, 2012 to implement several

additional hazard assessments between now and 2013 for different categories of “designated” manholes. She stated that the purpose of the assessments are to determine if there would be any benefit of providing further protection equipment or measures or taking other prevention or risk mitigation measures when a person enters these manholes. She stated that the additional hazard assessments will be conducted on current “designated” confined spaces in the following order:

- Manholes identified to have chemicals or other contaminants;
- Manholes which are entered via a tunnel;
- Remaining designated manholes; and
- “Special” manholes.

[19] Ms. Edwards added that Bell will field test and implement any additional protection identified by the assessments.

[20] Mr. McMillan submitted that the Union supports the application of stay based on the continuing dialogue, cooperation and above action by Bell on the matter.

[21] Based on all of this, I am satisfied that the health and safety of Bell employees is protected should the stay be granted.

### **Decision**

[22] Bell Canada’s application for a stay of the direction issued by HSO Tremblay on April 23<sup>rd</sup>, 2012 is hereby granted until the case is heard on its merit and a decision is rendered by an appeals officer.

Douglas Malanka  
Appeals Officer