Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Bell Mobility Inc., 2012 OHSTC 26

Date: 2012-07-24
Case No.: 2011-55 & 2012-03
Rendered at: Ottawa

Between:

Bell Mobility Inc., Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of three directions issued by health and safety officers
Decision:	Two of the directions are rescinded and one direction is confirmed
Decision rendered by:	Appeals Officer Douglas Malanka
Language of decision:	English
For the appellant:	Mr. William Hlibchuk, Counsel, Norton Rose OR LLP

REASONS

Background

[1] The present matter concerns two Bell Mobility Inc. [Mobility] appeals that were joined on January 31, 2012.

[2] The originating appeal relates to a direction that was issued in September, 2011 by Health and Safety Officer (HSO) Marjorie Roelofsen (hereinafter "Direction #1"), pursuant to subsection 145(1) of the *Canada Labour Code* (the Code). This direction was issued after HSO Roelofsen investigated a report by a citizen who had taken photos of a Mobility employee working on a rooftop without fall-protection equipment. After concluding her investigation, HSO Roelofsen issued a direction on the basis that Mobility was in contravention of paragraph 12.10(1)(a) of the *Canada Occupational Health and Safety Regulations* (COHSR) because Mobility had not provided a fall-protection system (FPS) to employees, namely Radio Frequency Technicians, who are required to work on unguarded rooftops. The referenced regulation of the COHSR requires the provision of an FPS where an employee works from an unguarded structure above a certain height. The text of this Direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145.(1)
>
> On September 7, 2011, the undersigned health and safety officer conducted an investigation in the work place operated by Bell Mobility Inc., being an employer subject to the *Canada Labour Code*, Part II, at 940 Commissioners Rd. E., London, Ontario, N5Z 3J2, the said work place being sometimes known as Bell Mobility Inc.- London.
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
> **No./No:** 1
> Paragraph 125(1)(*l*) – Canada Labour Code Part II, Paragraph 12.10(1)(a) – Canada Occupational Health & Safety Regulation
>
> 125(1)(l) Without restricting the generality of section 124, every employer shall in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing.
>
> 12.10(1)(a) Subject to subsection (1.1), every employer shall provide a fall-protection system to any person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), who works from an unguarded structure or on a vehicle, at a height of more than 2.4 m above the nearest permanent safe level or above any

moving parts of machinery or any other surface or thing that could cause injury to a person on contact.

The employer has failed to provide a fall-protection system to the employee working on the roof of 940 Commissioners Road East, London, Ontario where a Bell Mobility Inc. tower is located.

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

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 London, Ontario, this 29th day of September, 2011.

Marjorie Roelofsen
Health and Safety Officer

[3] On September 26, 2012, HSO Roelofsen was accompanied by HSO Paul Danton to a meeting at the Bell Canada building on Dundas Street, London, Ontario. This meeting was held for the purposes of conducting an investigation. Also in attendance at this meeting was Cal Zavitz, Team leader Field Operations; John Cognigni, LHSC Rep Co-chair; and Ken McIntyre, Z Group Residential Maintenance Manager. In continuing their investigation, on October 27th, HSOs Roelofsen and Danton also interviewed Roger Dobbs, Bell Mobility Inc. Field Technician, Wireless Network Field Services, Southwest Ontario. Upon completing this investigation, HSO Roelofsen decided to issue a second direction (Direction #2).

[4] Direction #2 was issued on October 28, 2011, pursuant to paragraph 125.(1)(z.04) of the Code, which essentially requires an employer to develop, implement and monitor a prescribed program for the prevention of hazards. HSO Roelofsen then identified the specific prescribed steps set out in the sections 19.4 and 19.5 of the COHSR which pertain to hazard assessments. She concluded that Mobility had failed on demand to provide a specific job safety analysis and written safe work procedures for its employees who are required to work on an unguarded rooftop. The text of this Direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145.(1)

On September 26, 2011, the undersigned health and safety officer conducted an investigation in the work place operated by Bell Mobility Inc., being an employer subject to the *Canada Labour Code*, Part II, at 940 Commissioners Rd. E., London, Ontario, N5Z 3J2, the said work place being sometimes known as Bell Mobility Inc.- London.

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

No./No: 1

Paragraph 125(1)(*z.04*) – Canada Labour Code Part II,

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, (*z.04*) where the program referred to in paragraph (*z.03*) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.

Section 19.4 – Canada Occupational Health & Safety Regulations

The employer shall identify and assess the hazards in the work place, including ergonomics-related hazards, in accordance with the methodology developed under section 19.3 taking into account
(*a*) the nature of the hazard;
(*a.1*) in the case of ergonomics-related hazards, all ergonomics-related factors such as
(i) the physical demands of the work activities, the work environment, the work procedures, the organization of the work and the circumstances in which the work activities are performed, and
(ii) the characteristics of materials, goods, persons, animals, things and work spaces and the features of tools and equipment;
(*b*) the employees' level of exposure to the hazard;
(*c*) the frequency and duration of employees' exposure to the hazard;
(*d*) the effects, real or apprehended, of the exposure on the health and safety of employees;
(*e*) the preventive measures in place to address the hazard;
(*f*) any employee reports made under paragraph 126(1)(*g*) or (*h*) of the Act or under section 15.3; and
(*g*) any other relevant information.

The employer has failed on demand to provide a job safety analysis for the employees of Bell Mobility Inc. identified as Radio Frequency Technicians, who are required to work on an unguarded rooftop.

No./No: 2

Paragraph 125.(1)(*z.04*) – Canada Labour Code Part II

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, (*z.04*) where the program referred to in paragraph (*z.03*) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.

Section 19.5 – Canada Occupational Health & Safety Regulations

19.5 (1) The employer shall, in order to address identified and assessed hazards, including ergonomics-related hazards, take preventive measures to address the assessed hazard in the following order of priority:
(*a*) the elimination of the hazard, including by way of engineering controls which may involve mechanical aids, equipment design or redesign that take into account the physical attributes of the employee;
(*b*) the reduction of the hazard, including isolating it;
(*c*) the provision of personal protective equipment, clothing, devices or materials; and
(*d*) administrative procedures, such as the management of hazard exposure and recovery periods and the management of work patterns and methods.
(2) As part of the preventive measures, the employer shall develop and implement a preventive maintenance program in order to avoid failures that could result in a hazard to employees.
(3) The employer shall ensure that any preventive measure shall not in itself create a hazard and shall take into account the effects on the work place.
(4) The preventive measures shall include steps to address
(*a*) newly identified hazards in an expeditious manner; and
(*b*) ergonomics-related hazards that are identified when planning implementation of change to the work environment or to work duties, equipment, practices or processes.
(5) The employer shall ensure that any person assigned to implement ergonomics-related prevention measures has the necessary instruction and training.

The employer has failed on demand to provide in writing safe work procedures for employees of Bell Mobility Inc. identified as Radio frequency Technicians, who are required to work on an unguarded rooftop.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145.(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 18, 2011.

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 London, Ontario, this 28th day of October, 2011.

Marjorie Roelofsen
Health and Safety Officer

[5] In the meantime, Mobility obtained a stay of Direction #1 on November 1st, 2011, which was granted by the undersigned Appeals Officer. In deciding that stay application, I identified various factors raised by Mobility that supported a finding that Mobility would suffer significant harm if the direction were not stayed.

[6] In response to Direction #2, Mobility provided HSO Roelofsen with added information about the new and ongoing developments and implementation of its safety programs and procedures. This information package consisted of a "Flat Rooftop Safety Awareness" Accident Prevention Process and a "Flat Rooftop Safety Awareness Training Program". This was sent to HSO Roelofsen on November 18th, 2011. Mobility's aim in sending this package to the HSO was to find out if the therein described measures satisfied HSO Roelofsen that Mobility had complied with the requirements set out in Direction #2 pertaining to s. 125.(1)(z.04) of the Code and sections 19.4 and 19.5 of the COHSR.

[7] On November 21st, 2011 HSO Roelofsen sought advice from Labour Technical Advisors concerning the question of whether the stay that was granted on November 1st, 2011 alleviated Mobility's obligation to comply with prescribed legislation. It was not until December 14, 2011, that HSO Roelofsen met with two Technical Advisors via teleconference. The Technical Advisors confirmed for HSO Roelofsen that a stay of a direction does not change prescribed legislation.

[8] Because HSO Roelofsen did not receive a response from Labour Technical Advisors until December 14th, 2011, she had not yet responded to Mobility concerning the adequacy of the newly developed safety measures Mobility had sent to her on November 18th, 2011. However, due to an unexpected personal leave of absence, HSO Roelofsen never responded to Mobility's November 18, 2011 submissions, and the role of primary investigator was passed to HSO Paul Danton.

[9] Health and Safety Officer Paul Danton issued another direction to Mobility (Direction #3) on December 19, 2011. Direction #3 was not received by Bell Mobility until January 4, 2012. This direction was issued pursuant to subsection 125.(1)(x) of the Code, which requires an employer to comply with every oral or written direction given by an HSO. Direction #3 concluded that the employer had failed to provide the directed written safe work procedures as prescribed and as set out in Direction #2. Mobility was directed to terminate the contravention immediately, in accordance with the identified provision. The text of the Direction appeared as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145.(1)
>
> On December 14, 2011, the undersigned health and safety officer conducted an inquiry as a result of the non-compliance with a Direction dated 28 October 2011 in the work place operated by Bell Mobility Inc., being an employer subject to the *Canada Labour Code*, Part II, at 940 Commissioners Rd. E., London, Ontario, N5Z 3J2, the said work place being sometimes known as Bell Mobility Inc. -- London.
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
> **No./No:** 1

Paragraph 125(1)(*x*) – Canada Labour Code Part II,

125. (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, (*x*) comply with every oral or written direction given to the employer by an appeals officer or a health and safety officer concerning the health and safety of employees;

On October 28, 2011, a Direction, pursuant to Subsection 145. (1) was issued to Bell Mobility. The purpose of the noted direction required Bell Mobility Inc. to submit specific safe work procedures related to their employees who perform the duties of radio frequency technicians on unguarded roofs. Bell Mobility Inc. has failed to provide the directed written safe work procedures:

(1) As prescribed and:

(2) Within the time frame specified in the 28th October 2011 Direction being the said date to terminate the contravention no later than 18 November 2011.

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

Issued at London, Ontario, this 19th day of December, 2011.

Paul Danton
Health and Safety Officer

[10] Mobility has come to understand that Direction #3 was issued to allow Mobility to appeal the matter raised in Direction #2, which issued on October 28th, 2011. Subsection 146(1) of the Code requires that a direction be appealed to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing. Mobility was not able to appeal Direction #2 within the indicated timeframe due to HSO Roelofsen being unable to respond to Mobility's queries regarding the sufficiency of its new safety measures (see above at paragraphs 8-9).

[11] On January 24, 2012, Appeals Officer Michael Wiwchar, granted Mobility's request for an extension of the time for instituting an appeal of Direction #2. On January 31, 2012, Mobility's request to join the appeals was granted.

[12] On February 3, 2012, AO Wiwchar granted Mobility's application to stay Directions #2 and #3.

[13] Mobility now seeks to appeal the three issued Directions and is requesting that they be rescinded, or varied.

Background on Mobility's Implemented Safety Measures

[14] After being issued Direction #1 by HSO Roelofsen, on September 29th, 2011, Mobility implemented a temporary Rooftop Safety Directive (RSD) which, after fewer than two months,

was replaced by a permanent Rooftop Accident Prevention Process (Rooftop APP). These measures were introduced on October 14, 2011 and December 6, 2011, respectively. The details of the measures are as follows:

[15] In general, the RSD stipulated that no Mobility technician was to perform work on a rooftop within 4 metres from the edge of an unguarded rooftop. Specifically, the RSD reminded Mobility's technicians that all work performed within 2 metres from the edge of an unguarded roof (identified as the "Red Zone") must be left exclusively to approved Rigging Contractors equipped with a fall-protection system (FPS). The Directive also established a "Yellow Zone" where, until further notice, the procedures usually reserved for the Red Zone would be temporarily applied between 2 and 4 metres from the edge of an unguarded rooftop. This left the "Green Zone", defined as the area more than 4 metres from the unguarded edge of a roof. In this latter zone the RSD informed Mobility technicians that normal safety procedures were to apply, including the right to work in this zone without any requirement that they be attached to a fall-protection system.

[16] The RSD was eventually replaced by the aforementioned Rooftop Accident Prevention Process (Rooftop APP). Maintaining the colour-coded zoning features of the RSD, the APP added a "control zone" feature which includes a raised warning line demarking the beginning of the "Red Zone". It also added the construction of a "Permanent Safe Work Zone Perimeter" (PSWZP) to the roofs on which Mobility employees work. The PSWZP consists of non-penetrating guardrail and/or warning line systems, the mounting of which has been contracted to another company. According to Mobility, the installation of these guardrails and/or warning lines and other related materials across Mobility's unguarded rooftops began on January 16, 2012 and are scheduled to be completed at all sites by December 31, 2013.

[17] It is important to note that while Direction #3 was received on, January 4, 2012, by January 27th, 2012, the Rooftop APP and the PSWZP had been implemented and inspected at the work site concerning which HSO Roelofsen issued Directions #1 and #2. The same is true of two other locations in southern Ontario where Mobility's rooftop technicians work. Also implemented by this time was a "Rooftop Safety Awareness Program" that includes 120 minutes of instructor-led and online training for all employees who require access to rooftops to perform their job functions. This awareness program mandates annual retraining and stipulates that each employee will be observed by a direct supervisor in the rooftop environment once a year. The training is mandatory and was expected to be completed by January 31st, 2012.

Issues

[18] I have to determine the following issues:

1. Was HSO Roelofsen founded in her decision to issue Direction #1 on the basis that Mobility was required to provide a fall-protection for its employees, pursuant to s. 12.10 of the Canada Occupational Health and Safety Regulations?
2. Was HSO Roelofsen founded in her decision to issue Direction #2 on the basis that Mobility had failed on demand to provide a specific job safety analysis and

written safe work procedures for its employees who are required to work on an unguarded rooftop?

3. Was HSO Danton founded in his decision to issue Direction #3 on the basis that Mobility had failed to comply with an oral or written direction given by HSO Roelofsen, namely the direction that Mobility provide HSO Roelofsen with written safe work procedures as prescribed and as set out in Direction #2?

Mobility's Submissions

[19] Mobility submits that the safety measures included in the Rooftop Safety Directive (RSD) and Rooftop APP are in conformity with the Code, its Regulations and also consistent with provincial legislation and industry practice. As such, it argues that with its current and previous interim safety measures, no danger exists for technicians performing work on rooftops. Moreover, Mobility asserts that it is not in contravention of s. 12.10 of the Canada Occupational Health and Safety Regulations because this provision does not apply in their case.

[20] The appellant submits that the interpretation and application of Part II of the Code is to be governed by its purpose and that it offers preventive measures that can be taken to achieve this purpose, namely the provision of safety equipment as the "last line of defense". This reading is informed by the following provisions of the Code:

> **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.
> **122.2** Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[21] Supporting their assertion that the Code must be given a purposive interpretation that is consistent with the rules of statutory interpretation and case law, Mobility cites a previous decision of the Tribunal, namely, *Tremblay v. Air Canada* [2007] C.L.C.A.O.D. No. 40. Additionally, Mobility also cites the Supreme Court of Canada decisions, *Canada Trustco Mortgage Co.* v. *Canada,* 2005 SCC 54, at para 10, and *Celgene Corp.* v. *Canada (Attorney General)*, [2011] S.C.C. 1. Highlighting an example of when this purposive analysis was applied, Mobility also references *Canadian Union of Postal Workers* v. *Canada Post Corp.,* [2006] C.L.A.D. No. 372 at paragraph 140 [*CUPW*].

[22] The appellant points to the cited paragraph of *CUPW* as supporting the principle that a hazard must be present before preventative measures are taken. The appellant then extends the application of this principle to the Canada Occupational Health and Safety Regulations (COHSR), in particular sections 12.1 and 12.10. This is done to ground Mobility's assertion that section 12.1 of the COHSR must be read and analyzed before it can be concluded that section 12.10 applies in a given situation. The relevant provision identified in the latter regulation is subparagraph 12.10(1)(a).

[23] In reading the above mentioned regulations in tandem, Mobility argues that section 12.10 only applies once, using the words of section 12.1, "it is not reasonably practicable to eliminate or control a health and safety hazard in a workplace within safe limits", and only where "the use of protection equipment may prevent or reduce injury from [the] hazard".

[24] In other words, the appellant asserts that s. 12.10 is not to be read in isolation, but must be read in conjunction with, and is in fact limited by s.12.1 of COHSR. This reading supports the principle that an employer must first make every effort to eliminate or to control a hazard before it turns to personal protection equipment, a principle the appellant notes is supported by and explained in *Canadian Freightways Ltd (Re),* [2004] C.L.C.A.O.D. No 18 at paragraph 6, and *Robitaille v. Via Rail Ltd.,* [2005] C.L.C.A.O.D. No. 54 at paragraphs 64 to 66.

[25] The above is submitted by Mobility to argue that it is not a correct reading of the regulations to state that the COHSR requires the use of a fall-protection system on absolutely every unguarded rooftop to which workers have access. To the contrary, Mobility holds that every effort must first be made by employers to eliminate or control hazards, and that Mobility must provide personal protective equipment if it is unable to do this.

[26] In referencing its own rooftop safety measures, particularly its Rooftop Safety Directive and Rooftop Accident Prevention Process (see above paragraphs 15-18), Mobility maintains that it has complied with the requirements as stipulated in the COHSR. More specifically, it argues that the first criterion of s.12.1 is not met because as the employer it has eliminated or controlled the "hazard" through its safety policies. As such, Mobility argues that s. 12.10 of COHSR does not apply in the instant case.

[27] Citing health and safety legislation and guidelines from Ontario[1], Saskatchewan[2], Manitoba[3], British Columbia[4], Alberta[5], Newfoundland[6] and Nova Scotia[7], Mobility goes on to

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[1] *Occupational Health and Safety Act, Construction Projects,* O. Reg 213/91, ss. [*sic*]26(1), 26.1, 26.4 and 207. (Though cited by the appellant, s. 26(1) of this *Act* does not exist.)

[2] *Occupational Health and Safety Regulations,* [sic] *2006,* R.R.S. Chapter 0-1.1 Reg. 1, s. 116.2 (I note that the actual year of publication of these *Regulations* is 1996, not 2006 as cited.)

[3] *Workplace Safety and Health Regulation,* Man. Reg 217/2006, Part. 14. See also the Manitoba Workplace Safety and Health Division "Fall Protection Guideline", July 2008, pages 53-59.

[4] *Occupational Health and Safety Regulation,* B.C. Reg. 296/97, section 11.2(5). See also OHS Guidelines: G11.2(5)-1 Control zones and safety monitors as a work procedure acceptable to WorkSafeBC.

[5] *Occupational Health and Safety Code, 2009,* (Alberta) section 161. See also the "Occupational Health and Safety Code 2009 Explanation Guide" at pages 9-64.

[6] *Occupational Health and Safety Regulations, 2009,* N.L.R. 70/09, section 29. See also the "Occupational Health and Safety Explanation Guide 2009", Part X, pages 8-10.

further support the sufficiency of its safety measures by noting that with respect to work done on rooftops, the employer's measures are consistent with and in some cases in excess of the requirements stipulated in provincial legislation on the subject. This is shown to be the case as it relates to "safe" distances from roof edges and the raised warning line incorporated into Mobility's safety programs.

[28] Mobility argues that additional support for its measures is found in the Canadian Standards Association (CSA) Health and Safety Code for Suspended Equipment Operations. In particular, Mobility references the CSA's *Health and Safety Code for Suspended Equipment Operations,* CAN/CSA-Z91-02. Section 4.9.

[29] The provincial legislation and the employment safety standards referenced above are cited by Mobility to demonstrate that there is a general consensus throughout Canada that a fall-protection system for employees working on unprotected rooftops is only required when employees are within a certain distance of the roof's edge, and therefore it is not correct to hold that employees on an unguarded rooftop must wear fall-protection equipment irrespective of their distance from the roof's edge.

[30] Given the above, Mobility submits that Direction #1, 2 & 3 should be entirely rescinded on the grounds that its implemented safety policies eliminate or control the risks identified in the Directions and are consistent with the Code and the COHSR.

[31] Alternatively, Mobility requests that on the same grounds, the Appeal be granted and that Directions #1, 2 & 3 be varied in light of Mobility's new Rooftop APP and the measures that have been implemented since the issuance of Direction #1.

Analysis

Concerning Direction #1

[32] I agree with the appellant's submission that the Code and its Regulations are to be given a purposive interpretation that is consistent with the rules of statutory interpretation and case law, as argued above at paragraphs 21 to 22.

[33] I am also of the opinion that the appellant is correct in its above submissions at paragraphs 23 to 26 stating that before determining whether section 12.10 of the Canada Occupational Health and Safety Regulations (COHSR) applies in a given situation, section 12.1 of the COHSR must be looked to and used to analyze the potential health or safety hazard in question. For ease of reference, please find the relevant portions of the referenced Regulations below:

> **12.1** Where

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[7] *Fall Protection and Scaffolding Regulations*, N.S. Reg. 2/96, section 17(1). See also the Nova Scotia Occupational Health and Safety and Safety Division "Reference Guide" to the *Fall Protection and Scaffolding Regulations* for section 17(1).

(*a*) it is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits, and

(*b*) the use of protection equipment may prevent or reduce injury from that hazard,

every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part.

12.10 (1) Subject to subsection (1.1), every employer shall provide a fall-protection system to any person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), who works

(*a*) from an unguarded structure or on a vehicle, at a height of more than 2.4 m above the nearest permanent safe level or above any moving parts of machinery or any other surface or thing that could cause injury to a person on contact;

[34] The submitted jurisprudence on which the appellant relied to ground its argument concerning the appropriate reading of s.12.10 of the COHSR was helpful in leading me to draw the above conclusions. In particular, the following passages were most informative and persuasive – the first of which is from *Canadian Freightways Ltd (Re),* [2004] C.L.C.A.O.D. No. 18 at paragraph 6; and the second from *Robitaille v. Via Rail Ltd.,* [2005] C.L.C.A.O.D. No. 54 at paragraphs 64 to 66 [*Robitaille*]:

> 6 However, in connection with deciding on the applicability of paragraph 12.13(a), it is necessary to consider paragraphs 12.1(a) and (b) and 12.2(a) and (b) of the COHSRs which set out further criteria. In accordance with paragraph 12.1(a) and (b), paragraph 12.13(a) applies only if it is not reasonably practicable to eliminate or control a health and safety hazard in a work place within safe limits, and only where the use of protection equipment may prevent or reduce injury from the hazard. While terms, "reasonably practicable", "within safe limits" and "prevent or reduce injury" in paragraphs 12.1(a) and (b) are arguably open for interpretation, paragraph 12(a) and (b) establish the overall principle that the employer must first make every effort to eliminate or to control a hazard before turning to personal protection equipment such as a high-visibility vest, and the personal protection equipment must be effective for preventing or reducing injury.

[35] From *Robitaille*, the following passage is also very instructive:

> 64 Section 122.2 further specifies, (albeit not a mandatory part of the Code) that compliance with the Code should respect the following priorities:
>
> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.
>
> 65 So in order of priority, the prevention program should make every reasonably effort to eliminate the hazards. If the risk(s) associated with a hazard,

condition or activity cannot be eliminated, the next priority should be to control the risk(s) so that employees are protected. This would include complying with every prescription found in section 125 to 125.2 of the Code which, in terms of the prevention program, includes everything from machine guards, to hazard assessment and to training, to name but a few.

66 Where it is not reasonably practicable to eliminate or control a health and safety risk, section 12.1 of the Canada Occupational Health and Safety Regulations (COHSR) specifies that every person granted access to the work place who is exposed to the hazard is required to use personal protection equipment prescribed in the Part.

[36] It is important to note that Mobility's interpretation of s.12.10 is also supported by *Seair Seaplanes Ltd. v. Bhangal*, 2009 LNOHSTC 24 at paras 50-54. Although lengthy, this passage reinforces the principle that section 12.1 of the COHSR is to be analyzed before determining if prescribed safety equipment is necessary pursuant to subsequent Regulations.

50 In any event, I am convinced that the hazard of drowning for pilots, in addition to being negligible, is controlled within safe limits thus not requiring protection equipment which is in accordance with section 12.1 of the Regulations that states the following:

12.1 Where

a) it is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits, and

b) the use of protection equipment may prevent or reduce injury from that hazard, every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part.

51 There is agreement between the HSO, witnesses and the work place health and safety representative that the hazard of drowning exists when employees are working near the edge of the dock. I concur with this assessment. Life jackets are provided to employees in this circumstance because they are in close proximity to the water and it is not reasonably practicable to eliminate or control the hazard of drowning.

52 Then again, when pilots are in transit to their aircraft, I am not swayed that the hazard is beyond safe limits. I find that the employer has controlled the hazard in this circumstance by implementing a number of measures.

53 The following is a list of the measures the employer has taken to control the hazard of drowning in order to bring it within safe limits:

*The dock is structurally sound and is in good repair,

* No materials are stored on the dock and it is kept clean, particularly in the center walkway,

> * Pilots and passengers are instructed to walk down the centre of the dock and they are accompanied by dockhands,
>
> * Emergency rescue equipment is available on the dock and dockhands are trained in its use,
>
> * Emergency procedures are in place in the event of a fall into the water,
>
> * A slip resistant mat is installed along one perimeter and is to be installed along the opposite perimeter, and more notably, a mat will be installed down the center of the dock, thus providing additional safety and this will further indicate the path of travel,
>
> * Pilots not in transit to the aircraft who perform activities near the edge of the dock wear life jackets.
>
> 54 Finally, the HSO concluded, I am certain with good intention and in the interest of health and safety, to determine that a contravention existed in the circumstance based on, in his words, "the language of the Code" before receiving information regarding the hazard from the employer or in the alternative by seeking the facts on his own initiative. Item no. 2 of his direction stated that the employer did not have a hazard prevention program in place and therefore an assessment of work place hazards was never formally conducted. As a result, he was premature in requesting protection equipment for a hazard that neither the employer nor the HSO actually identified or assessed to be a hazard of drowning in the circumstance. It would have been preferable to wait for the outcome of the results of a hazard and risk assessment rather than determine that a hazard of drowning existed based solely on the language of the Code and Regulations.

[37] Read together, I interpret the above passages as strongly supporting a finding that, in accordance with the wording and structure of Part XII of COHSR (wherein we find sections 12.1 and 12.10), a fall-protection system (FPS) is to be considered a measure of last resort. In other words, I am persuaded that s. 12.10 does not apply where measures are taken to control or eliminate an identified hazard to the extent that is reasonably practicable.

[38] Additionally, although they are in no way binding on my own decision-making powers, I find the portions of the various provincial legislation cited by Mobility's counsel to be persuasive indications that a FPS is most appropriately regarded as a measure of last resort.

[39] I have reviewed the Ontario, Saskatchewan and Manitoba occupational health and safety legislation cited by the appellant (see above at Footnotes 1-3). As asserted by the appellant, the cited provisions indicate that provided there is a warning line system that forms a control zone indicating the 2 metre mark from the rooftop edge, employees may work on a rooftop without the requirement of a fall-protection system.

[40] I have also reviewed the cited legislation from British Columbia, Alberta and Newfoundland (see above at Footnotes 4 to 6). Here too I find that the appellant has appropriately interpreted these provisions to mean that a fall-protection system is not necessary if employees are performing work further than 2 metres from the edge of a roof. These provisions

only require a warning line if employees are to perform work within two metres of the a control zone (the area 2 metres from the roof's edge). As such British Columbia, Alberta and Newfoundland are rightly identified by the appellant as not requiring a fall-protection system or a raised warning line where employees perform work 4 metres away from the edge of rooftops.

[41] Adding further weight to the reasonableness of the appellant's position that a fall-protection system is intended to be a measure of last resort is legislation cited by the appellant from Nova Scotia indicating that a fall-protection system is required once an employee must perform work within a metre of the roof's edge (see above at Footnote 7). Further to this point is the Canadian Standards Association's Health and Safety Code for Suspended Equipment Operations. This CSA standard provides that a fall-arrest harness with lanyard is to be worn by employees when they work within 2 metres of an unguarded roof edge from which they could fall more than 3 metres.

[42] I am persuaded that the provincial legislation and the CSA standard just mentioned establish that there is a general agreement across Canada that a fall-protection system is most appropriately regarded as a measure of last resort. By extension, I believe that it is in this way that s.12.10 of the Canada Occupational Health and Safety Regulations should be read.

[43] My reading of the above referenced case law, provincial legislative schemes and the CSA standard concerning work performed on rooftops in Canada leads me to conclude that a fall-protection system, pursuant to s.12.10 of the COHSR, is not required where other preventive measures are implemented which control or eliminate the hazard of employees falling from such work spaces. Having come to this conclusion, the question that I must now address is whether, pursuant to s. 12.1 of the COHSR, Mobility has (within safe limits) eliminated or controlled the hazard in question, namely the risk of its employees falling off unguarded rooftops.

[44] As discussed in detail above (at paragraphs 15 to 18), Mobility has developed and begun implementing a number of preventative measures concerning rooftop safety. These measures include a Rooftop Accident Prevention Process (Rooftop APP), a Permanent Safe Work Zone Perimeter (PSWZP) for the roofs on which Mobility employees work, and a Rooftop Safety Awareness Program. These preventative safety measures will now be discussed individually.

[45] The Rooftop APP features a "Green Zone" which is the area more than 4 metres from the unguarded edge of a roof. In this Zone, Mobility employees are required to abide by Mobility's normal safety procedures, which allow employees to work in this Green Zone without requiring that they be attached to a fall-protection system. The Rooftop APP also mandates that all work performed within 2 metres from the edge of an unguarded roof (identified as the "Red Zone") be left exclusively to approved Rigging Contractors equipped with a fall- protection system (FPS). Furthermore, the Rooftop APP includes a "Yellow Zone", between 2 and 4 meters from the edge of rooftops, in which Mobility employees are only permitted to work if a Permanent Safe Work Zone Perimeter (PSWZP) has been established.

[46] The PSWZP serves as a "control zone" that includes a warning line demarking the beginning of the "Red Zone". The PSWZP also consists of non-penetrating guardrail and/or

warning line systems, the mounting of which has been contracted to another company. The Rooftop APP, along with the PSWZP began being implemented and installed on January 16, 2012 and, according to Mobility, will be completed at all sites by approximately December 31, 2013.

[47] Additionally, Mobility has moved to develop and implement a "Rooftop Safety Awareness Program". This program includes 120 minutes of instructor-led and online training for all employees who require access to rooftops to perform their job functions. This awareness program mandates annual retraining and requires that each employee be observed by a direct supervisor in the rooftop environment once a year. The training is mandatory and was expected to be completed by January 31st, 2012.

[48] I have assessed all of these preventative safety measures that Mobility has undertaken to develop and implement, and have thereby come to the conclusion that the risk of a Mobility employee falling from the rooftop while working is controlled, and controlled in a manner that is consistent with the meaning of s. 12.1 of the Canada Occupational Health and Safety Regulations (COHSR). As such, I am persuaded that s. 12.10 of the COHSR does not apply in this case, and that there is no legal requirement for Mobility to provide its employees with a fall-protection system.

[49] In other words, because the safety measures Mobility has introduced and begun implementing since the issuance of Direction #1 are sufficiently robust to control the risk of Mobility employees falling from rooftops, I find that s.12.10 of the COHSR does not apply in this case. If I were not convinced of the efficacy of these measures or other mitigating safety measures, I would have been inclined to find that a fall-protection system is required in this case.

[50] For all of these reasons, I hereby rescind Direction #1.

Concerning Direction #2

[51] My role as an Appeals Officer is to determine whether or not at the time of the issuance of a direction, a Health and Safety Officer was founded in finding a contravention of the Canada Labour Code or Canada Occupational Health and Safety Regulations and consequently issuing a direction pursuant the Code and/or the Regulations.

[52] Recall that it was on the basis of an identified contravention of sections 19.4 and 19.5 of the COHSR that HSO Roelofsen decided to issue Direction #2. The following excerpts from the Direction speak more specifically to the reasons for which it was issued:

> ***The employer has failed on demand to provide a job safety analysis for the employees of Bell Mobility Inc. identified as Radio Frequency Technicians, who are required to work on an unguarded rooftop.***
>
> ***The employer has failed on demand to provide in writing safe work procedures for employees of Bell Mobility Inc. identified as Radio***

> ***frequency Technicians, who are required to work on an unguarded rooftop.***

[53] At no time has Mobility argued that it was not in contravention in the ways identified in Direction #2. Moreover, Mobility has failed to demonstrate that during (or promptly following) the September 26th investigation that took place at its London offices, it satisfied HSO Roelofsen and HSO Danton's request to provide a specific job safety analysis and written safe work procedures for its employees who are required to work on an unguarded rooftop. This is important to note because the facts on record before me indicates that it was Mobility's unsatisfactory response to this on-site request that ultimately led to Direction #2 being issued.

[54] In light of this, I am persuaded that at the time Direction #2 was issued, Mobility was in contravention of the identified Regulations, namely sections 19.4 and 19.5 of the COHSR.

[55] That being said, I do recognize that the appellant did in fact satisfy the demand outlined in Direction #2 that Mobility produce for HSO Roelofsen the requested documents by November 18th, 2011. However, it must be noted that satisfying a demand outlined in a Direction is not grounds for having the Direction rescinded.

[56] Given that I have found that Mobility was in contravention at the time Direction #2 was issued, and that it is these circumstances alone that I am to consider in my role as an Appeals Officer, I hereby confirm Direction #2.

Concerning Direction #3

[57] Recall that Direction #3 was issued by HSO Danton on the grounds that Mobility had failed to provide for HSO Roelofsen in writing, specific work procedures related to employees who perform the duties by November 18th, 2011. Contrary to HSO Danton's finding, I am convinced by the facts on record that Mobility did actually provide the information demanded in Direction #2 by the required date.

[58] In particular, I am referring to a letter and safety information package addressed to HSO Roelofsen that is dated November 18th, 2011. The sender of the letter and package is counsel for Mobility, Mr. Hlibchuk. This information package included detailed and lengthy documents that outlined Mobility's new "Flat Rooftop Safety Awareness" Accident Prevention Process, as well as Mobility's new "Flat Rooftop Safety Awareness Training Program". I have carefully read through the provided details of these "Flat Rooftop Safety" measures and photos of the ongoing installation of the aforementioned rooftop protective mechanisms. In doing so, I have been persuaded that, pursuant to sections 19.4 and 19.5, the measures outlined, described and shown in the documents adequately identified, assessed, and included appropriately preventative actions that render Mobility's rooftop safety policies consistent with the Code and Regulations. Given that these documents were sent to HSO Roelofsen within the timeframe required by Direction #2 (November 18, 2011), contrary to HSO Danton's decision to issue Direction #3, I find that Mobility did actually satisfy the requirements stipulated in Direction #2.

[59] For these reasons, then, I hereby rescind Direction #3.

Decision

[60] On the basis of the reasons outlined above, and pursuant to my authority under s.146.1 (*a*) of Part II of the *Canada Labour Code*, I hereby:

> Rescind Direction #1 issued on September 29th, 2011by Health and Safety Officer, Marjorie Roelofsen;
>
> Confirm Direction #2 issued on October 28, 2011 by Health and Safety Officer, Marjorie Roelofsen; and
>
> Rescind Direction #3 issued on December 19, 2011by Health and Safety Officer Paul Danton.

Douglas Malanka
Appeals Officer