

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Cape Breton Development Corporation  
Sydney, Nova Scotia  
Represented by: Mr. Keith F.S. Crocker, Counsel

Mis en Cause: Bill Gallant  
Safety officer  
Human Resources Development Canada

Before: Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

This case proceeded by way of written submissions. The representatives of the three unions representing the employees of the Cape Breton Development Corporation (the "Corporation") i.e. Mr. Stephen Drake of the United Mine Workers of America, Mr. Gerard O'Neil of the Canadian Union of Public Employees and Mr. Angus Grant of the Canadian Auto Workers, were repeatedly invited to participate in the review of the direction under appeal. The calls for their participation remained unanswered.

Background

The events<sup>1</sup> that resulted in the issuance of the direction (APPENDIX) under appeal in this case were preceded by an incident that occurred on September 28, 1994. The safety officer reported that on that day, "A rock/gas outburst occurred at the bottom of No. 3 Slope, Phalen Mine, damaging several arches, releasing a quantity of methane and trapping one (1) miner between the distorted arches and the roadheader being used at the face." The safety officer was informed of the hazardous occurrence at the mine and proceeded to investigate the incident.

During his investigation, the safety officer was informed by senior employer representatives that "They intended to fire round (sic) of shots in Phalen (Slope) 7 East Btm Level as a precaution to see if sandstone above the coal would burst." The safety officer considered the matter and advised the employer representatives that, based on a prior approval given by the Coal Mining Safety Commission (CMSC) respecting Shootfiring Procedure at the Lingan Mine, an approval from the

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<sup>1</sup> The events referred to in the "Background" are taken mostly from the report prepared by the safety officer under the title SUMMARY OF INVESTIGATION.

CMSC was required in this instance. On September 29, 1994, CMSC Approval 94-48 was granted concerning the proposed shootfiring procedure to be used at the Phalen Colliery, No.7 Slope, at the place identified as Roof Bolted Level Drivages-Outburst Prone Zones.

The safety officer monitored the situation relating to the outburst in No. 3 Slope and requested specific information respecting the effects of the outburst that occurred earlier at that place. On September 30, 1994, the safety officer obtained from the Assistant Manager of the Phalen Mine an AVC<sup>2</sup> (Assurance of Voluntary Compliance) regarding stonedust, explosion barriers and methane gas monitoring.

It is on October 3, 1994 that the circumstances of the direction under appeal began to materialize. On that day, Mr. Robert Ross, General Manager, Phalen Colliery, informed the safety officer that he intended to shoot large pieces of stone in the debris from the outburst in the bottom of No. 3 Slope and that he wanted to follow the procedures that were approved in Approval 94-48. At that point, the safety officer advised Mr. Ross that if there is no prescribed applicable safety standard, the proposed method would have to be approved by the CMSC. He later explained that he was of the opinion that the proposed method should be approved by the CMSC.

On October 4, 1994, Mr. Ross informed the safety officer that "they (the Corporation) are going to shoot in No. 3 Slope using the procedure set out in Approval 94-48 today. He also stated he was of the opinion that no approval from the CMSC was required." The safety officer immediately reiterated his opinion that an Approval from the CMSC was required. After consulting with other persons on this matter, the safety officer decided that a direction under subsection 145(1) of the Canada Labour Code, Part II (the Code) was necessary. The safety officer explained that

"The rational (sic) being that the safety standard for the method being permitted in No. 3 Slope, namely the conditions set out in CMSC Approval 94-48, was not prescribed, nor was it approved by the Coal Mining Safety Commission for No. 3 Slope."

Although the Corporation's representatives had made known to the safety officer the method they intended to follow, the safety officer felt that the method had to be approved by the CMSC primarily because the shooting would take place in a different area of the mine and under different conditions for which no approval had been granted.

#### Submission of the Employer

The detailed submission of the employer is on record. Essentially, the following arguments were made by Mr. Crocker, i.e.

1. There was no use of explosives at the bottom of No. 3 Slope prior to the safety officer's direction. Therefore there was no contravention in respect of which a direction could have been issued under subsection 145(1) of the Code. The direction was unauthorized for that reason alone.

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<sup>2</sup> Assurance of voluntary compliance means a formal written assurance by the person in charge of a workplace that a contravention of the Code or Regulations will be corrected.

2. The safety officer could have acted under subsection 145(2) of the Code. By declining to act under that provision and by acting instead under subsection 145(1) of the Code, the safety officer in effect delegated his authority under subsection 145(2) of the Code to the CMSC. It is not the responsibility of the CMSC to act under that provision.
3. There was no need to obtain the CMSC's advance approval of the Corporation's use of explosives for the following two reasons:
  1. There already existed prescribed standards applicable to the use of explosives in the manner intended. Those are set forth by Part I of the Coal Mines (CBDC) Occupational Safety and Health Regulations [CBDC Regulations].
  2. The safety officer mistook mining/geological conditions for mining methods. He saw a new mining method in terms of the conditions he feared might recur while we used explosives.

It should also be noted that the authority of the safety officer to act under subsection 145(1) of the Code in this case was questioned by Mr. Crocker. In reply, Mr. Crocker was advised that the powers of the safety officer would be subject to scrutiny only to the extent that the safety officer was authorized under the Code to give the direction under review.

### Decision

To decide this case, I must therefore look at the power of the safety officer to direct an employer of employees working in a mine to stop contravening the Code. In the instant case, I will only look at the power of the safety officer to act under subsection 145(1) of the Code since the direction under appeal is given under that provision. Mr. Crocker acknowledged the power of the safety officer to act under subsection 145(2) of the Code and I will not expand on that point any further. If I decide that the safety officer was authorized to act under subsection 145(1) of the Code, I will proceed with analyzing the applicable provisions in this case and rule on the direction given.

Subsection 145(1) of the Code provides as follows:

**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 underlining)

Clearly then, the power<sup>3</sup> of the safety officer to act under subsection 145(1) of the Code applies to all the provisions found in the Code unless there exists another statutory authority which

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<sup>3</sup> The reference to the power of the safety officer is to be read as a reference to the power to give a direction under subsections 145(1) and (2) of the Code. Other powers are intentionally omitted for the purpose of deciding this case.

supersedes that of the safety officer. The powers of the Commission are subject to submissions or applications made by the employer. The Commission, as I read section 137.2 of the Code, cannot direct the employer to make the said submissions or applications. That role has been devolved upon the safety officer to the extent that the Commission is not exercising its authority under the Code. In fact, Parliament expressly mandated the safety officer to monitor compliance with all the provisions of the Code and to react in cases of non-compliance. To do so, the legislator entrusted the safety officer with discretionary and non-discretionary powers. The non-discretionary powers of the safety officer, which for the purpose of this decision are those found at subsection 145(2) of the Code, are not at issue in this case and therefore will not be scrutinized.

The discretionary powers of the safety officer, which are those found under subsection 145(1) of the Code and its direct relationship with subsection 141(1) of the Code, will only be superseded by the powers of the CMSC where that Commission<sup>4</sup> is authorized to act under section 137.2 of the Code. Therefore, once an approval or an exemption is sought by an employer or is granted by the Commission, the safety officer's discretionary powers must give way to the powers of the Commission. The safety officer could not interfere with the Commission's role and responsibilities when that Commission exercises its powers under the law.

In this case, no approval was sought or obtained from the Commission for the simple reason that the Corporation was of the view that it could proceed with shooting the debris in Slope No. 3 without obtaining the Commission's approval. As a result, the way was clear for the safety officer to intervene in this matter to the extent that he had formed an opinion that a provision of the Code was being contravened.

I am of the opinion that the safety officer was authorized to act under subsection 145(1) of the Code in the instant case.

The direction of the safety officer describes the contravention in the following manner:

Subsection 125.3(2) - The use of explosives in a rock/gas outburst prone area at the bottom of No. 3 slope has no applicable prescribed safety standard and is not permitted without the approval of the Coal Mining Safety Commission pursuant to paragraph 137.2(2)(a).

A close look at the provisions referred to above is necessary in the instant case.

Subsection 125.3(2) of the Code provides

**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).

and, subsection 137.2(2) of the Code provides

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<sup>4</sup> The acronym "CMSC" and the term "Commission" are used interchangeably in the text. Both refer to the Coal Mining Safety Commission.

**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; or

(b) approve in writing, notwithstanding anything in this Part, the use by the employer in coal mines, for a specified time and subject to specified conditions, of any mining method, machinery or equipment that does not meet prescribed safety standards applicable in respect of it.

In reading the two subsections above, one can appreciate the extent of the involvement of the Commission in the activities that are carried out in a coal mine. For all practical purposes, the Corporation is under the obligation to seek the approval of the Commission every time it intends to use a mining method, machine or equipment that is not specifically covered by the CBDC Regulations. In fact, the use of the expression "mining method" above would apply to almost any procedure used in a coal mine and for which no prior approval has been granted. I suspect that the Corporation would prefer a less extensive involvement of the Commission in its affairs.

In the instant case, the safety officer explained, in his report, that the rationale for the direction was "that the safety standard for the method being permitted in No. 3 Slope, namely the conditions set out in CMSC Approval 94-48, was not prescribed, nor was it approved by the Coal Mining Safety Commission for No. 3 Slope." (emphasis added). The use of explosives in a mine is governed, for any situation, by Part I of the CBDC Regulations. That Part establishes minimum requirements, or safeguards, to be adhered to when using explosives in a coal mine. Part I does not cover mining methods which, incidentally, may require the use of explosives as one of the many aspects of the method.

Therefore, it is not the use of explosives per se, or the manner in which they would be used, that overly concerned the safety officer. It was the method which was being permitted by the Corporation, which in the instant case, was the method approved for another portion of the mine, referred to as Slope No. 7, and which had been approved for a totally different purpose. The Corporation intended to apply that method, in a different portion of the mine referred to as Slope No. 3, to shoot large pieces of stones from an outburst that occurred previously, without submitting that procedure to the Commission for its approval, notwithstanding that the conditions prevailing in Slope No. 3 may have been significantly different.

The conditions referred to above, which are specific to the place where the blasting is to take place, must be assessed and controlled in such a way that the safety and health of the employees at work is not unduly put at risk. Consideration would have to be given, for example, to the release of methane gas, to airborne coal dust, to the potential for rock and gas outbursts and to numerous other conditions prevailing in a coal mine. Those conditions would vary significantly in a mine from one place to another, from one slope to another.

In my opinion, using explosives to blast large pieces of rock in outburst prone zones requires the approval<sup>5</sup> of the Commission every time such a mining method is carried out in a different portion of the mine. That assertion is particularly true when that portion of the mine is susceptible to outbursts. To argue that using explosives to shatter large pieces of rock in outburst prone zones does not constitute an integral part of a mining method is, to say the least, not very serious. I am convinced that it is a mining method which requires the application of mining technology. For this reason, I have decided to proceed on the basis that the procedure envisaged by the safety officer is part and parcel of a mining method.

The question that remains to be answered now is whether the Corporation could be found to be in contravention of subsection 125.3(2) of the Code although it did not actually use explosives at the bottom of Slope No. 3? Mr. Crocker would have me rule that because explosives were not actually used, the Corporation cannot be found to be in contravention of subsection 125.3(2) of the Code. In my opinion, to interpret that provision in such a restrictive manner would be contrary to the purpose of the Code and to the existence of the Commission. The stated purpose of the Code and the underlying purpose of the Commission is to prevent accidents and injuries to health of employees at work.

In a coal mine, the concept of prevention takes on a particularly important meaning given the unique and highly volatile hazardous conditions under which the miners are expected to work. In my opinion, the legislator was quite aware of those conditions when it established the Commission to oversee the mining activities to be carried out in the CBDC coal mine. Consequently, the applicable provisions of the Code should not be interpreted in such a restrictive manner, as suggested by Mr. Crocker, that it would undermine the safety and health of the miners or, to paraphrase subsection 137.2(2) of the Code, that the protection of the safety and health of employees would be diminished.

Therefore, the remaining issue to be decided is whether the employer permitted the use of explosives at the bottom of Slope No. 3 in such a manner that it contravened the Code, as reported by the safety officer. In my opinion, emphasis is to be placed on the word "permit" which is found in subsection 125.3(2) of the Code. Had Parliament intended the contrary, expressions such as "No employer shall use in a coal mine...", where the word "permit" is intentionally omitted, could have been used in subsection 125.3(2) of the Code. In fact, similar wording, such as "No person shall...", are currently used in several other provisions of the Code. For example,

S.143 No person shall obstruct or hinder ...a safety officer engaged in carrying out his duties under this Part.

In this provision, it is the action of obstructing or hindering a safety officer which constitutes a contravention of section 143 of the Code. Until that action is carried out, it could not be argued that the work of the safety officer was obstructed or hindered and it is unlikely that the safety officer would direct that person to terminate the contravention.

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<sup>5</sup> I note in passing that the approvals submitted by the safety officer refer to the wrong provision authorizing the Commission to give the approval. The approvals submitted refer to section (sic) 158(1)(a) of the CBDC Regulations. Approvals are authorized either under subsection 137.2(1) or paragraphs 137.2(2)(a) or (b) of the Code. Exemptions or substitutions would be authorized under paragraphs 137.2(3)(a) or (b) respectively.

SS.144(3) No person shall,...., publish or disclose the results of any analysis, examination, testing, inquiry or sampling made or taken by or at the request of a safety officer pursuant to section 141.

Again, in this provision, it is the actual publication or disclosure of the said results that constitute a contravention of that provision. Until such time that the results are actually published or disclosed, it would be very difficult, if not impossible, to argue that subsection 144(3) of the Code was contravened.

I need not dwell any longer on the importance to be given to the word "permit" used in the expression "permit the use of explosives". Since the verb "permit", which is used in subsection 125.3(2) of the Code, is not defined in the Code, I must refer to the common meaning found in the dictionary to help me interpret the expression "permit the use of explosives".

The Concise Oxford Dictionary, Eight Edition, 1991, defines the word "permit" to mean "1. give permission or consent to; authorize. 2. allow; give an opportunity to." The words allow, give permission, consent or authorize indicate that proceeding with the activity of using explosives to shoot large pieces of stone is conditional upon the Corporation authorizing, or allowing, or consenting to, or giving its permission to carry out that activity. In the instant case, the Corporation would meet the test of "permit the use of explosives" if an official of that company authorizes in advance that activity or that the actions of the employer, or his representatives, are such that the activity will manifestly take place without the intervention of the employer.

In this case, Mr. Robert Ross, Phalen Mine Manager, informed the safety officer they were going to shoot, on the same day, in No. 3 Slope using a procedure that had been approved by the Commission for another mining procedure. In my view, the safety officer acted properly by directing the employer under subsection 145(1) of the Code. The Corporation permitted, through its Mine Manager, the use of a mining method for which there exists no prescribed standard, without the approval of the Commission. The Corporation is under the obligation to obtain an approval by the Commission every time an activity, for which there exists no prescribed standard, will take place in a different part of the mine or under different conditions in the same part of the mine.

To sum it up, the safety officer is fully authorized to ensure that the Corporation, an employer under the Code, complies with its obligation, as described above, by directing it to do so under subsection 145(1) of the Code.

To remove the confusion resulting from the wording of the direction, I HEREBY VARY the direction issued on October 4, 1994, by safety officer Bill Gallant to the Cape Breton Development Corporation, by replacing the words "The use of explosives" in the third paragraph of the direction, by the words "The shootfiring of large pieces of stone in the debris of an outburst".

Decision rendered on December 22, 1994

Serge Cadieux  
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 4, 1994, the undersigned safety officer conducted an inquiry regarding the work place operated by the CAPE BRETON DEVELOPMENT CORPORATION, being an employer subject to the Canada Labour Code, Part II, at 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 provision of the Canada Labour Code, Part II, is being contravened:

Subsection 125.3(2) - The use of explosives in a rock/gas outburst prone area at the bottom of No. 3 slope has no applicable prescribed safety standard and is not permitted without the approval of the Coal Mining Safety Commission pursuant to paragraph 137.2(2)(a).

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

Issued at New Waterford, Nova Scotia, this 4th day of October, 1994.



Applicant: Cape Breton Development Corporation (the Corporation)

In this case, a safety officer gave a direction under subsection 145(1) of the Code to the Corporation because it authorized the use of explosives to shoot large pieces of rock, in a portion of the coal mine susceptible to rock and gas outbursts, without the approval of the Coal Mining Safety Commission (the Commission). The Corporation argued that since explosives were not actually used, the direction was not valid for that reason alone. It also challenged the safety officer's authority to proceed under that provision in the instant case. It also indicated that the use of explosives was governed by Part I of the Coal Mines (CBDC) OSH Regulations and therefore an approval was not necessary.

In his review, the Regional Safety Officer (RSO) agreed with the safety officer. The RSO concluded that since no approval was sought or obtained from the Commission, the safety officer was authorized to act in this case. The RSO also agreed that the Corporation had to obtain an approval to proceed with what he considered to be a mining method for which there were no prescribed safety standard. The RSO further found the Corporation to be in contravention of paragraph 125.3 (2) of the Code when it permitted the use of the explosives to shoot large pieces of rock in a rock and gas outburst prone zone. The RSO varied the direction only to remove the confusion caused by the use of the expression "the use of explosives".