

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-21

**Stay decision**  
Decision No.: OHSTC-09-022(S)

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

Royal Canadian Mounted Police  
(RCMP)  
*Appellant/Requester*

and

Sgt. Scott Warren  
*Respondent*

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May 26, 2009

This is a decision following a request for a stay of a direction heard by Michael Wiwchar, Appeals Officer.

**For the appellant**

Mr. Neil McGraw, Counsel for the employer, RCMP

**For the respondent**

Sgt. Scott Warren, Vancouver Island, Staff Relations Representative

## **INTRODUCTION**

- [1] This matter is in regards to a request for a stay of a direction brought under subsection 146(2) of the *Canada Labour Code* (the *Code*), Part II. A direction in accordance with subsection 145(1) of the *Code* was issued to the RCMP, the employer, by Health and Safety Officer (HSO) Martin Davey on July 11, 2008 in regards to a work place operated by them. The direction is attached as "Appendix A".
- [2] On May 6, 2009, in the course of the hearing into this appeal, Mr. McGraw, on behalf of the appellant, requested a stay of the said direction.
- [3] On August 8, 2008, Mr. Harvey Newman, in replacement of Mr. Richard Fader who was on vacation at the time, requested an "interim stay" for a period of one month because he was not ready to provide full submissions in support for the stay. This request was denied by my colleague, Appeals Officer Pierre Gu  nette, in a decision rendered on August 8, 2008 with reasons dated August 27, 2008.
- [4] I have decided to entertain a second request for a stay of HSO Davey's direction even though it is very unusual for the Tribunal to do so. I will hear this request due to the fact that Mr. Gu  nette's decision mentions that Mr. Newman did not provide full submissions and because Mr. McGraw submitted that additional international events will be held.
- [5] Each party provided me with written submissions which I have carefully considered.

## **ANALYSIS OF THE SUBMISSIONS**

- [6] The parties submitted arguments based on the three fold test developed by the Supreme Court of Canada in *Metropolitan Stores Ltd.*<sup>1</sup>. The three elements of the test are: a) Serious issue to be tried, b) Issue of irreparable harm and c) Balance of inconvenience. The Tribunal has added a fourth criterion to further protect the paramount objective of the *Code* to protect the health and safety of employees; d) The measures the employer has taken to protect the health and safety of the employees.
- [7] I will address the parties' submissions pertaining to the above test and I will consider the elements as they were presented to me by the parties in their submissions.

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

**A) SERIOUS ISSUE TO BE TRIED**

- [8] Both parties submitted that the issue to be tried is serious and I concur with them.

**B) ISSUE OF IRREPERABLE HARM**

- [9] Mr. McGraw, on behalf of the appellant, submits that while the half-necklace technique, which is used by divers to inspect the hulls of ships/vessels, is utilized in very limited circumstances the technique will, nevertheless, be required to fulfill the RCMP's security responsibilities for the 2010 Olympics in Vancouver as well as for other international events upcoming in June 2009 and the summer of 2010.
- [10] He further submits that the RCMP will be required to inspect the hulls of ships in these locations to ensure the security objective is met, that is, to ensure a proper and complete inspection of the hull is conducted. Although the technique in question is used on a very limited basis, it would cause irreparable harm to the RCMP and potentially the public, to bar its use completely in the context of the above mentioned events.
- [11] The appellant's position is that when risks and hazards are properly addressed and mitigated the half-necklace technique is the safest method of ensuring a complete search of a vessel, depending on its size and shape.
- [12] Mr. McGraw concluded by stating that the employer has the responsibility to protect persons as defined in the *RCMP Act* and its *Regulations*.
- [13] Sgt. Warren, on behalf of the respondent, submits that there are other techniques available which alleviate any inability to complete a search thereby ensuring the security objectives and that the mandate can be fulfilled utilizing other techniques and equipment that employees are trained to perform. The other options he mentions include the use of surface supplied air and cameras.
- [14] Sgt. Warren states that the half-necklace technique can never be the safest search technique unless certain aspects of the technique are defined in the policy. He submits that the half-necklace technique was not intended for large vessels and the employer's intention is to use the technique to search vessels the size of cruise liners which the policy inaccurately defines as a medium size vessel.
- [15] The respondent further submits, in response to the requirement of the use of the technique for an upcoming international visit in June 2009,

that there is no indication that a vessel will be involved in this event.

- [16] Justice Shore of the Federal Court has recently<sup>2</sup> reiterated a Federal Court of Appeal ruling<sup>3</sup> that the onus is on the applicant to demonstrate, through clear and convincing evidence of irreparable harm, that the extraordinary remedy of a stay is warranted. Irreparable harm must constitute more than a series of possibilities and cannot be simply based on assertions and speculation. On the face of the submissions presented to me on this element the appellant has not satisfied his onus of establishing that the employer, in the achievement of its mandate, will suffer irreparable harm should I not grant the stay of HSO Davey's direction.
- [17] My authority is derived from the *Code* therefore I must exercise my discretion in a way that furthers the purpose of the legislation, that is, the protection of health and safety of employees.
- [18] This technique is used in very limited circumstances and from what I understand, the employer can substitute this technique for another safe method or take alternative safe measures until the hearing is concluded and my decision is rendered. Furthermore, I believe that in doing so the RCMP's mandate and objective can be achieved while taking into account the health and safety of employees and all persons including the public and dignitaries.
- [19] As for responding to the upcoming events in June 2009 and the summer of 2010, it has been submitted that other safe techniques and safe alternative measures are available to address the yet unknown circumstances of these events.
- [20] Since the test for a stay is conjunctive, it is not necessary to address the remaining elements of balance of convenience and the measures the employer has taken to protect the health and safety of the employees having decided that there is no irreparable harm.
- [21] Furthermore, both parties have included in their submissions evidence adduced during the first days of the hearing from the testimony of witnesses. Given that the parties will be presenting further evidence through witnesses in support of their respective positions regarding this highly technical matter I find it very difficult at this stage to pronounce myself on whether or not the health and safety of employees is ultimately protected without hearing the case in its entirety.

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<sup>2</sup> Petrovych v. Canada (Minister of Public Safety and Emergency Preparedness), 2009 FC 110

<sup>3</sup> Atwal v. Canada (Minister of Citizenship and Immigration), 2004 FCA 427


[22] My colleague, Mr. Guénette, in paragraph 22 of his written reasons dated August 27, 2008, stated the following:

[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] Having had the benefit of thorough submissions, I come to the same conclusion as my colleague.

**DECISION**

[24] For the reasons stated above, the request by the appellant for a stay of the direction is denied and the employer shall make every reasonable effort to comply with the direction.



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Michael Wiwchar  
Appeals Officer

# Appendix "A"

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 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 37<sup>th</sup> 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) 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.

<b>OHSTC / TSSTC</b>	
Exhibit / pièce : <u>3 E2</u>	
Case / Cause #:	<u>2008-21</u> Date: <u>5/15/2009</u> <small>(dd/jj) (mm) (yyyy/aaaa)</small>
Case Name Nom de la cause:	<u>RCMP</u> c./v. <u>Sgt Scott Warren</u>
Appeals Officer Agent(e) d'appel:	<u>Michael Wiwchan</u>
Court Clerk Greffier (ière):	<u>Danielle Champagne</u>

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**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 work is 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:

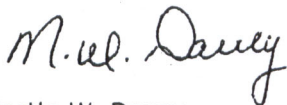
- The through the water two way voice communication system ( known as wireless) being used does not work well in overhead environments.
- Because the necklace technique incorporates a multitude of divers in the water at the same time, the probability of one or more divers experiencing communication problems 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 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 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

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