Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

Date: 2014-09-10
Case No.: 2012-29

Between:

Bell Canada, Appellant

and

Communications, Energy and Paperworkers Union of Canada, Respondent

Indexed as: *Bell Canada* v. *Communications, Energy and Paperworkers Union of Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is varied
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the Appellant:	Ms. Cheryl A. Edwards, Counsel, Mathews, Dinsdale & Clark LLP
For the Respondent:	Mr. Jesse Kugler, Counsel, Caley Wray
Citation:	2014 OHSTC 17

REASONS

[1] This matter concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by Bell Canada (Bell, or the employer) of a direction issued on April 23, 2012, by Mr. Régis Tremblay, Health and Safety Officer (HSO) with the Labour Program of Human Resources and Skills Development Canada (HRSDC) as it was then.

[2] The respondent is the Communications, Energy and Paperworkers Union of Canada (CEP), the certified bargaining agent of Bell employees.

Background

[3] The direction relates to Bell's policies and procedures in place for employees entering manholes, which are considered confined spaces pursuant to the *Canada Occupational Health and Safety Regulations* (COHSR, or the Regulations). Bell's network in Ontario includes approximately 65 000 manholes. Bell manholes are usually located under public spaces such as roads, sidewalks and parking lots. Bell manholes house telecommunication infrastructure, such as fibre optic cabling, that form part of its telecommunication network. Bell employees are regularly required to enter manholes in order to perform work on telecommunications infrastructure located inside the manholes.

[4] Bell has developed a system for classifying its confined spaces, based on hazards discovered and assessed over a period of years. All Bell manholes fall within one of the following classifications: designated, temporary designated, special and regular.

[5] A designated manhole is a confined space where one or more of the following conditions apply or hazardous conditions are known to exist: insufficient oxygen, contains toxic substances, there is a tunnel entrance to the manhole, presence of a collar longer than two meters, volume greater than 62 m^2, where employees are restricted in their movements, a joint-use confined space where electrical equipment over 300 volts is present, and no adequate ladder is present. Designated confined spaces entry is always a two person operation. Entry must be observed by a qualified person who must remain present at ground level throughout the work operations. It is the responsibility of the qualified person to:

- Ensure that all safety precautions are properly observed
- Be qualified in Basic First Aid
- Maintain voice contact with the employee working in the confined space
- Establish and maintain communication so that aid can be summoned in the event of an emergency
- Provide assistance in the event of an emergency

[6] A temporary designated manhole is a confined space where there are reasons to believe that any of the hazards applicable to designated confined spaces exist which may create an unsafe or hazardous environment. The hazards are deemed temporary and may be eliminated after corrective measures are taken, at which point the confined space will revert

back to regular status. If the hazard cannot be removed, then the manhole will become a "designated" confined space.

[7] A special manhole is a confined space that has a volume of 34 m^2 to 62 m^2 and that requires continuous ventilation. A regular manhole is a confined space that does not fall within any of the above noted categories.

[8] Since at least 1995, the CEP has raised concerns in respect of Bell's confined space rescue policies and procedures. The Corporate Health and Safety Committee (CHSC) held many meetings where this concern was discussed and ultimately decided to prepare an information package, which included a video that was distributed to fire departments across Ontario and Quebec to provide information regarding Bell's confined spaces.

[9] In 2007, there were two fatalities in what has come to be known as the "Wesbell Incident." That same year, employee representatives on the CHSC made a recommendation that Bell supply "proper equipment and training to facilitate Bell employees to complete successful confined space rescue". The CEP recommended that a tripod, body harness and lanyard, referred to in this decision as the "designated equipment," be provided at every confined space for rescue purposes, as well as training of employees on the use of the equipment.

[10] The lanyard is a cord or strap device attached to the worker's body harness and connected to a tripod structure above ground on top of the manhole access opening. In case of injury or loss of consciousness of the employee inside the confined space, such equipment could potentially be used for a non-entry type rescue to retrieve the employee.

[11] Bell disagreed with the CEP's recommendation to provide the rescue equipment and training which led the union to file a complaint with HRSDC. HSO Régis Tremblay was assigned to investigate the complaint. On March 11, 2010, he attended a meeting with the members of the CHSC during which, he was informed of the ongoing disagreement concerning emergency procedures and equipment. HSO Tremblay was told that Bell Canada's position was that if the requirements set out in paragraph 11.4(1)(*a*) of the COHSR cannot be met, the employee shall not be granted entry or other measures shall be implemented, such as the used of ventilation to control hazards so that emergency equipment is not required.

[12] Subsequent to the meeting, HSO Tremblay issued a letter to the respondent and the employer in which he describes the deployment of the designated equipment as a "good health and safety practice" and recommends that it be provided for planned entries into a designated confined space. Bell eventually decided not to implement HSO Tremblay's recommendation. On February 21, 2012, HSO Tremblay again met with Bell representatives regarding the issue since he received no answer regarding the 2010 letter. Following that meeting, HSO Tremblay conducted work site visits on March 19 and April 23, 2012, to view the opening of typical Bell manholes. During these visits, tripod type devices from various manufacturers were deployed at Bell manholes, for evaluation purposes. Based on what he observed, HSO Tremblay found that Bell was in contravention

of paragraph 125(1)(*l*) of the Code and paragraph 11.3(*d*) of the COHSR and issued a direction to Bell which 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 April 23, 2012, the undersigned health and safety officer conducted an inspection in the work place operated by BELL CANADA, being an employer subject to the *Canada Labour Code*, Part II, at 1, Alexander Graham-Bell, Ile-des-Soeurs, Quebec, the said work place being sometimes known as _____.
>
> 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) l) - Canada Labour Code Part II
> Subsection 11.3(d) - Canada Occupational Health and Safety
> 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 contravention 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 23th day of April, 2012.
>
> [Signed]
> Régis Tremblay
> Health and Safety Officer
> [...]
>
> To: Michel Filion, Dir.adj. Mtce Réseau Ext.
> BELL CANADA
> 1, Alexander Graham Bell
> Ile-des-Sœurs, (Quebec)
> H3E 3B3

[13] On May 8, 2012, Bell filed an appeal and requested a stay of the direction pending final disposition of the appeal. On June 7, 2012, Appeals Officer Douglas Malanka granted a stay of the direction until final resolution of the appeal. The reasons in support of the stay application were provided on June 19, 2012. The appeal hearings took place in Montreal on February 4 to 7, March 19 to 21 and May 21, 2013.

Issue

[14] The issue raised by the present appeal is whether the direction issued by HSO Tremblay identifying contraventions to paragraphs 125(1)(*l*) of the Code and 11.3(*d*) of the COHSR is well-founded.

Submissions of the parties

[15] The parties' final submissions were received on August 16, 2013, and are summarized as follows.

A) Appellant's submissions

[16] The appellant called the following witnesses to testify on its behalf: Ms. Stacy Aimola, Ms. Chad Bradley, Mr. David Robichaud and Mr. Daniel Mercier, all Bell Canada employees. It also called Mr. Carl Woychuk, an expert in health risk and exposure assessment, and Mr. Harry van Leeuwenkamp, an expert in confined space rescue.

[17] Ms. Aimola is the Manager, Health, Safety and Environment at Bell Canada, Ontario region. Her duties are to manage Bell's health and safety programs in Ontario, including safety relating to manhole entries. Ms. Aimola testified regarding her participation in the steps taken under the Action Plan. These included efforts made to contact Ontario fire departments to start inquiring into whether each department offers confined space rescue services, as well as updating Bell manhole database records. Ms. Aimola's survey identified several areas where proper fire department coverage was potentially problematic, which explains the current Bell initiative to explore the possibility of corrective measures using private contractors.

[18] Ms. Bradley is the Senior Health and Safety Consultant at Bell Canada. Her responsibilities include the development and implementation of policies, procedures and protocols that govern confined space entry. Ms. Bradley provided evidence about Bell's existing policies and procedures relating to confined space entry. Ms. Bradley also described the implementation of an Action Plan on hazard assessment and protection and emergency equipment feasibility by Bell pending the stay application and hearing of the appeal of the direction. She also said that Bell's current position is that in case of the need of a rescue inside a Bell manhole, the best procedure is to call 9-1-1. Following the fire department coverage surveys conducted in Ontario and Quebec, Ms. Bradley explained that for potentially problematic areas coverage by private contractors and providing specialized rescue equipment to unequipped fire departments was being explored.

[19] Mr. Robichaud is the Provincial Coordinator, Health, Safety and Environment at Bell Canada, Quebec region. He testified on the policies, procedures and protocol relating to safety for manhole entries. He described the Bell MMCS (Mechanics Management of Confined Space) database for recording conditions of confined spaces, used since early 2000, the ANPMC (Access Network Preventative Maintenance Centre or "Air Desk") and the safety steps that are to be taken prior and during confined space entries by all Bell employees and contractors. Mr. Robichaud explained that in case of emergency, Bell

workers are instructed to call 9-1-1 using the cell phone that the employer provides. He also explained that if loss of cell phone coverage occurs inside specific manholes, it is recorded in the MMCS database.

[20] Mr. Robichaud also gave testimony on the mandatory training for employees and on the different APPs (Accident Prevention Programs) related to manholes. He explained the safety procedures related to problematic or "flagged" manholes. Mr. Robichaud also testified on the efforts he made to contact Quebec fire departments to find out whether the different departments would offer confined space rescue services.

[21] Mr. Daniel Mercier is a consultant at Bell who testified regarding his research into the field trials conducted on potential rescue equipment at Bell manholes, including the trials for which HSO Tremblay was present. He also testified on employee feedback on the field trials.

[22] Mr. Woychuk was qualified by the Occupational Health and Safety Tribunal Canada (Tribunal) as an expert in health risk and exposure assessment, particularly in relation to confined spaces. In his opinion, Bell policies and procedures cover all risks or potential hazards that are present or may arise in its manholes. He testified that the risks involved are well controlled by Bell policies and procedures, and that although all risks can never completely be eliminated, it can be qualified as minimal. He also explained that according to his assessment it would be unlikely that an emergency occurring inside a Bell manhole would be caused by atmospheric issues. As part of a mandate from Bell, Mr. Woychuk conducted detailed risk assessments on "designated" and "special" type Bell manholes. He detailed the safety equipment and measures used for manhole entries by Bell personnel, such as the gas detection and the ventilation processes. This included detailed explanations of the safety coverage provided by the four gas monitoring equipment used by Bell workers.

[23] Mr. van Leeuwenkamp was qualified by the Tribunal as an expert in confined space rescue. As a general rule, Mr. van Leeuwenkamp does not recommend the use by Bell employees of the tripod type "designated equipment" suggested by HSO Régis Tremblay for confined space rescues with no entry inside the manhole. According to his expertise, the best practice is to have a rescue plan related to the specificity of each manhole in place, and not rely only on 9-1-1 calls as a rescue procedure. He recommended an entry type rescue into the confined space by properly trained personnel (e.g. a firefighter or private rescue service provider with specific equipment) equipped with a self-contained breathing apparatus (air supplied respirator). The victim assessment can then be performed on site and transport above ground to the surface can then be safely coordinated and performed.

[24] Mr. van Leeuwenkamp explained the conditions in which a non-entry type rescue using a tripod type designated equipment is not recommended. For example, he provided examples of the use of such "designated equipment" for non-entry type rescues that could potentially harm the worker if used by Bell employees or emergency personnel. More specifically, he described situations where the dragging of the victim's body inside the manhole using the lanyard could cause additional injuries. He also stressed the fact that use of such equipment could cause a hazard to workers in case of a collision of a road vehicle with the above ground tripod structure. In his expert opinion, entry type rescues are to be

favoured. Only in some very specific cases (victim visible from outside the manhole, victim able to communicate with the exterior, position of victim favorable to safe extraction and enclosed space configuration favorable to safe extraction), tripod type "designated equipment" are recommended and can be safely used for a non-entry type rescue.

[25] In her written submissions, Counsel for the appellant states that an appeal before an appeals officer is on a *de novo* basis. The appeals officer can review the matter anew and receive, in addition to the evidence obtained by the HSO during his inspection, any evidence that the parties may submit regardless of whether the information was available to the HSO at the time of the issuance of the direction. In support of this, the appellant cites the Federal Court of Appeal decision in *Martin* v. *Canada (Attorney General)*, 2005 FCA 156.

[26] The appellant submits that the interpretation of paragraph 11.3(*d*) of the COHSR is complex, and cannot occur in isolation from the other provisions of Part XI of the COHSR. In support of this, the appellant cites what is generally referred to as the "Modern Principle" of statutory interpretation in *Driedger's Construction of Statutes*. The appellant states that this principle if often cited in case law and has been confirmed in the Supreme Court of Canada case of *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. In this case, the appellant explains that the Court held that the "objects or the intentions of the legislature (and) the context of the words" must receive sufficient consideration by adjudicators when determining issues of statutory interpretation.

[27] Counsel for the appellant states that one aspect of the Modern Approach entails that the provisions of legislation are meant to work together as a whole, both logically and teleologically, and that an interpretation which results in internal inconsistency or which renders the meaning superfluous should not be embraced. The appellant indicates that the purpose of the provisions related to confined space entry is clearly worker protection. In following the Modern Principle, the appellant submits that the following interpretation of the COHSR is the correct one.

[28] First, the specified equipment at paragraph 11.3(*d*) is derived from the hazard assessment conducted at subsection 11.2(2). The appellant submits that protection and emergency and rescue equipment do not have to be detailed or specified in paragraph 11.3(*d*). Rather, the employer submits that paragraph 11.3(*d*) provides a general requirement coming from a two-part scheme for confined space entries specifying protection and emergency equipment for two separate types of entries. Those entries have been referred to as "controlled" versus "uncontrolled" entries during the course of the hearing. In addition, the appellant submits that nothing in the COHSR expressly requires the specifications to be in writing.

[29] The first type of entry according to the appellant is the entry discussed at section 11.4 of the Regulations, where the hazards are controlled as specified by the provision. The appellant points out that section 11.4 does not mention any rescue equipment or a tripod, lifeline or harness.

[30] The second type of entry according to the appellant is the entry discussed at section 11.5, where the atmosphere cannot be controlled while the employee is inside the confined space. Counsel for the appellant states that in those types of entries, the known risks of atmospheric hazard means that there is a greater likelihood that a rescue will need to be performed. As such, detailed requirements have been set in the COHSR with regard to requirements for attendants, rescue plans and rescue equipment including harness, lifeline and tripod. It is argued that the Tribunal must consider the specific requirements of section 11.5 in its interpretation of paragraph 11.3(*d*) in this case.

[31] Counsel for the appellant also submits that the headings as well as the entire context of the regulatory scheme must be examined when interpreting a provision. In support of this, she cites the decision of *Ontario (Ministry of Labour)* v. *Sheehan's Truck Center Inc.*, 2011 ONCA 645.

[32] It is also argued that the COHSR do not require a standard of perfection, rather that the object of occupational health and safety legislation is to promote and maintain a reasonable level of worker safety and to protect its workers in the performance of their assigned tasks, not against their unforeseeable conduct. In support of this argument, the appellant cites the decision of *R.* v. *Timminco Limited*, 2004 ONCJ 344, *R.* v. *Imasco Limited*, unreported, June 8, 1998 (Ont. Ct. Prov. Div.), and *Sheehan*.

[33] Counsel for the appellant states that throughout the hearing, the respondent and HSO Tremblay took the position that "anything could happen" with respect to the atmospheric conditions in a manhole, and suggested that regardless of whether Bell's policies seem to be successful at controlling all the hazards in a manhole, it is not certain that Bell employees will always follow policies. In answer to these comments from the respondent and HSO Tremblay, the appellant states that courts have established that employers can rely on employees to follow instructions, training and policies in place to prevent accidents (*Timminco*).

[34] The appellant indicates that the expert in health risk and exposure assessment, Mr. Woychuk, was of the view that if Bell's policies were followed, the chance of an atmospheric hazard arising are negligible. No expert evidence was provided to the contrary. It explains that Bell expects its employees to follow the procedures and that it would be incorrect to require Bell to deploy further rescue equipment based on the possibility that employees may not follow established procedures. It is also argued that to require Bell to provide specific rescue equipment going beyond sections 11.3 and 11.4 would be imposing a standard of perfection on Bell in relation to employee safety, which in Bell's view is unreachable.

[35] Lastly, the appellant reiterates the testimony of Mr. van Leeuwenkamp in that the equipment specified by HSO Tremblay may cause a hazard and that equipment which may cause hazards should not be introduced in the work place. Paragraph 11.5(3)(*c*) and subsection19.5(3) of the COHSR indicate that equipment or preventive measures should not be implemented if they themselves constitute a hazard. It is Bell's submission that it should not be directed to deploy this equipment in its manholes.

[36] Finally, the appellant submits that the direction should be rescinded in its entirety as Bell's policies and procedures are in compliance with the COHSR and the Code.

B) Respondent's submissions

[37] The respondent's case constituted of the testimony of Mr. Doug Dutton, a Bell Canada employee and President of CEP, Local 52.

[38] Mr. Doug Dutton testified to the CEP's attempts to work with Bell at improving existing policies and procedures relating to confined space entries. Mr. Dutton also testified on his experience regarding the industry best practices in the matter. He explained that the CEP's position is that the "designated equipment" should be used at manhole sites where the confined space environment is such that it allows for a safe non-entry rescue operation in case of emergency. Mr. Dutton also stated that the CEP has consistently raised concerns regarding Bell's complete lack of a confined space rescue plan. He stated that it was Bell's failure to respond to CEP's concerns that led to the complaint and the following direction.

[39] In its written submissions, the respondent accepts the appellant's characterization of the appeal as being on a *de novo* basis. The respondent also submits that the Tribunal should apply the Modern Principle of statutory interpretation.

[40] Counsel for the respondent submits that the direction is sustainable on the basis of paragraph 11.3(*d*) of the COHSR and explains that the purpose of section 11.3 is to ensure that workers entering, occupying and exiting confined spaces are provided with adequate protection to ensure their health and safety, which is of particular importance given the inherent risks associated with confined spaces.

[41] The respondent maintains that a plain and ordinary reading of paragraph 11.3(*d*) of the COHSR requires the employer to consider the hazard assessment and, based on that assessment, the employer must (1) specify the protection equipment and emergency equipment and (2) the equipment specified must be the equipment used in the rescue of a person from the confined space or in responding to other emergencies in the confined space.

[42] The respondent submits that paragraph 11.3(*d*) creates a procedural and a substantive requirement. Procedural in the way that the employer must "specify" the equipment in writing meaning that it be known by all stakeholders (workers, employers, supervisors, emergency response providers, etc.). Substantive because the equipment specified must, in fact, be capable of actually serving in the rescue of a person from a manhole. The respondent submits that Bell has failed to comply with both the procedural and substantive requirements.

[43] First, the respondent points out that the evidence confirmed that Bell has not specified, or clearly put in writing, the required protection equipment and emergency equipment. The respondent states that in all of the policies and procedures reviewed during the hearing, nothing specified the emergency equipment to be used in the rescue of a person

from a confined space and that Bell has acknowledged in his written submissions that it had not specified any equipment in writing.

[44] Second, the respondent submits that the evidence shows that Bell failed to comply with the substantive requirements of paragraph 11.3(*d*) because none of the equipment provided to persons entering a Bell manhole can directly affect the rescue of a person from the confined space. The respondent finds the equipment listed by Bell constitutes only the basic equipment to conduct work in manholes, such as a rope, gas monitor, ventilator and first aid kit, and cannot directly or indirectly serve to the rescue of a person from a confined space.

[45] The respondent submits that the designated equipment HSO Tremblay recommended would satisfy both the procedural and the substantive obligations of paragraph 11.3(*d*) and that the direction is entirely justifiable. Even if one could accept that providing a cell phone and calling 9-1-1 serves indirectly as an emergency equipment (which is wholly denied by the respondent) the evidence has demonstrated that cell phones are ineffective in some of Bell's manholes due to intermittent signals, and that a number of jurisdictions do not have the capacity to offer rescue services to confined spaces. The respondent states that even within the regions which have capacity to conduct confined space rescues, the response times are unreasonable and far below the standards set by the National Fire Protection Association, to the extent that the emergency services would at that point be conducting a recovery rather than a rescue. It thus argues that a cell phone cannot be considered sufficient to constitute protection or emergency equipment to be used by a person in the rescue of a person from a confined space.

[46] The respondent also raises what it considers as interpretative difficulties associated with Bell's interpretation of paragraph 11.3(*d*). Namely, the respondent is of the view that nothing in paragraph 11.3(*d*) could reasonably lead to the conclusion that the three designated equipment are only required under section 11.5. On that point, the respondent is of the view that paragraph 11.3(*d*) is a general requirement, applicable to all entries into confined spaces, controlled or not. The respondent is also of the view that the heading of "Entry Procedures", when reading the sections of the COHSR in their entirety, indicate that the substantive and procedural requirements contemplated by paragraph 11.3(*d*) applies to both section 11.4 and 11.5 entries.

[47] In addition, the respondent claims that paragraph 11.3(*d*) relates to all types of emergencies, including medical emergencies, not only emergencies related to atmospheric conditions contemplated in sections 11.4 and 11.5. Lastly, the respondent argues that the other subsections of 11.3 (the entry permit system, the provision of protective equipment, and the provision of any insulated protection equipment) apply to both section11.4 and section 11.5 entries. As such, the respondent is of the view that the obligation at paragraph 11.3(*d*) applies to entries under both section 11.4 and 11.5, contrary to Bell's interpretation that the three designated equipment only apply to section 11.5 entries.

[48] The respondent argues that Bell has failed to provide evidence showing that it was able to ensure that the atmospheric limits prescribed by section 11.4 are complied with at all times. As a result, the respondent is of the view that section 11.5 applies to Bell manholes.

[49] It relies on evidence provided during the hearing showing gas monitor alarms occurring during entry of Bell manholes. According to the respondent, the alarms indicate that the atmospheric conditions prescribed by section 11.4 are not being met. The alarms statistics show that between 2010 and 2012, a total of 724 alarms were recorded at opening of a manhole. Furthermore, a total of 31 of these alarms were for a second alarm occurring during occupancy or at re-entry of the confined space. Of these, between three and six were for second alarms resulting from atmospheric conditions inside the confined space, indicating that workers had been exposed to atmospheric conditions that did not comply with the levels prescribed by section 11.4 of the Regulations. The appellant is thus unable to ensure that the atmospheric conditions in its manholes comply with paragraph 11.4(1)(*a*) of the Regulations at all times and therefore the designated equipment must be provided pursuant to paragraph 11.5(2)(*c*) and subsection 11.5(3).

[50] The respondent argues that the designated equipment does not create a hazard. In support of that argument, the appellant cites paragraph 11.5(3)(*c*) and subsection 19.5(3) of the COHSR which state:

> 11.5 (3) The employer shall ensure that every person entering, exiting or occupying a confined space referred to in subsection (1) wears an appropriate safety harness that is securely attached to a lifeline that:
>
> [...]
>
> (c) protects the person from the hazard for which it is provided and does not itself create a hazard.
>
> 19.5 (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.

[51] The respondent submits that the evidence of Mr. van Leeuwenkamp supported the proposition that the three designated equipment do not create a hazard. When used properly, such equipment would not create a hazard and would be beneficial. It is the respondent's view that according to Mr. van Leeuwenkamp the "designated equipment" can be used in Bell manholes for the purpose of effecting the rescue of a person in a confined space. He confirmed that employees could be trained on the proper use of such equipment so as to avoid any such hazards. Mr. van Leeuwenkamp performed specific assessments of the use of the "designated equipment" in Bell's manholes, and concluded that such equipment would be effective in a significant number, but not all, of the confined spaces he assessed.

[52] In sum, the respondent submits that the direction should be maintained as Bell has failed to comply with both the procedural and the substantive requirements of paragraph 11.3(*d*) and that, in the context of Bell confined spaces, the designated equipment is the only equipment that could satisfy this legislative objective. It is also submitted that Bell is unable to ensure that the atmospheric conditions as set in section 11.4 are complied with at

all times. Lastly, it is submitted that the designated equipment would not introduce a hazard and could be beneficial to employees entering confined spaces.

[53] For all these reasons, the respondent submits the direction should be upheld and the appeal dismissed.

C) Reply

[54] In its reply, the appellant maintained that section 11.5 of the COHSR does not apply to Bell manholes as they are controlled environments and that the respondent's interpretation of the COHSR is flawed.

[55] Counsel for the appellant notes that the respondent chose to refer to the tripod, lanyard and harness as the "specified equipment" throughout its submissions. While the appellant accepts that this is a convenient way to refer to the equipment in this matter, counsel notes that the legislation does not specify the use of this particular equipment in paragraph 11.3(*d*). Rather, paragraph 11.3(*d*) provides the employer with the discretion to determine the type of equipment required.

[56] In parallel, the appellant also states that, although the HSO did testify that in his view, the equipment is a required best practice, the HSO did not identify this specific equipment in the direction. The employer is of the view that to meet the requirements of sections 11.3 and 11.4, it has the discretion to determine what, if any, protection, emergency and possible rescue equipment to specify, based upon the hazard assessment at section 11.2 and after appropriate consultation. As such, the appellant does not agree with the respondent's position that the interpretation of 11.3 requires both a procedural and substantive obligation, adding that even the HSO testified that normally, the employer has the discretion to determine what equipment to specify under paragraph 11.3(*d*).

[57] Counsel for the appellant further states that the reason for this broad discretion afforded to the employer is that the federal COHSR apply to many employers coming from different sectors, such as transportation, airlines and railways, with a diverse range of confined spaces. The appellant cites as example Mr. Woychuk's evidence referring to different considerations when entering the confined space of an aircraft wing. The appellant submits that because of the diversity of confined spaces covered, the regulation provides flexibility to the employer to determine what equipment is appropriate.

[58] Counsel for the appellant also claims that the legislation is very specific as to the situation in which an employer has to provide the employees with the tripod, lanyard and harness; only when the confined space entry takes place under section 11.5. The appellant argues that the respondent's interpretation that the designated equipment must be deployed at section 11.3 would render section 11.5 redundant. It is the appellant's view that the respondent's submissions completely ignore the scheme and distinctions between sections 11.3, 11.4 and 11.5.

[59] The appellant further argues that the respondent's suggestions that paragraph 11.3(*d*) applies to emergency situations in the confined space where the "designated equipment"

would be required in the event of a medical emergency is incorrect. In support of this argument, the appellant states that emergency situations can occur in sections 11.3, 11.4 and 11.5 entries. The fact that the legislator did not require, the tripod, lanyard and harness in section 11.4 confirms that there was no intention to require this equipment for personal emergencies. Second, counsel for the appellant claims that a medical condition is not always a medical emergency, and there may be nothing urgent about the situation.

[60] Counsel for the appellant also states that evidence shows that, as far as the health and safety managers and health and safety committee representatives can recall, there was never the need for an emergency rescue using the designated equipment from a Bell manhole. The only exception being the Wesbell incident, in which the entry procedures were not followed.

[61] The appellant also submits that confined spaces are work areas which may contain potential risks, but are safe as long as the necessary precautions are taken before and during entry. Bell's manholes are not presumed hazardous when entered and that all mentions of this by the respondent in his submissions are unsupported by any evidence. The appellant refers to the definition of confined space in the Regulations which states that a confined space is a space that "may become hazardous".

[62] Bell submits that the evidence provided by Mr. Woychuk is that there are potential risks identified which are all carefully eliminated or controlled and that hazards are non-existent if the proper entry and occupancy procedures are followed.

[63] With regard to the respondent argument related to the second alarm records showing an uncontrolled environment, Bell is of the view that the records could not, in any definitive manner, show that a second alarm had occurred during occupancy of a Bell manhole. Furthermore, Bell submits that the evidence provided by Mr. Woychuk was that a second alarm does not indicate an emergency. Rather, an alarm is an early warning causing an employee to exit or evacuate before an emergency could arise so that further investigation can be conducted.

[64] The appellant disagrees with the respondent's descriptions of situations where non-entry rescues by Bell employees with the "designated equipment" may be required, stating that these situations could not occur in Bell manholes if procedures are followed.

[65] The appellant also argues that the respondent has failed to demonstrate that the emergency response using existing equipment, measures, and 9-1-1 were not appropriate. Counsel for the appellant states that the respondent's statement that a response called from 9-1-1 which would be delayed would result in a recovery rather than a rescue lacks credibility, is speculative, and is unsupported by evidence.

[66] Bell submits that while certain jurisdictions in Ontario were not equipped with a 9-1-1 service provider that would perform entry rescue, it is clear by the evidence submitted that Bell is in the process of making arrangements for private provision of such services and that this is not speculative.

[67] Bell further maintains that the evidence presented clearly shows that the designated equipment does introduce a hazard. In support of this, Bell states that Mr. van Leeuwenkamp testified that using the equipment while working in a manhole would introduce additional hazards to the worker, such as the risk of getting caught on equipment in the manhole in congested spaces, the risk of an improper rescue with the "designated equipment" being attempted, or the risk of the tripod being struck by a vehicle.

[68] Counsel for the appellant also discusses the Wesbell incident, submitting that the evidence at the hearing was that the Wesbell employees, who were employed by a provincially regulated contractor, did not comply with any of the applicable pre-entry policies, such as testing of the atmosphere and pumping of water. Bell submits that there is no evidence showing that emergency equipment, including the "designated equipment", would have been used by the contractor even if available and that it is impossible to suggest with any certainty that any lives would have been saved if any further equipment had been available.

[69] Lastly, the appellant submits that the respondent's treatment of the evidence was mischaracterized and inaccurate. First, no clear evidence was provided by any witness of a situation in which neither the entrant nor the attendant at a manhole would be unable to call for assistance by using a cell phone. While the evidence was that cell signals for the entrant might be an issue in certain designated manholes, there would be a second person on the surface with a cell phone in such cases.

[70] Second, the appellant pointed out that no evidence was provided at the hearing relating to the National Fire Protection Association standards and that it is inappropriate to present it at this point since the expert on confined space entry did not have an opportunity to comment. Bell further submits that no evidence was provided as to the adequacy or inadequacy of the response times.

[71] Finally, the appellant states that Mr. van Leeuwenkamp did not recommend the use of the tripod, lanyard and harness as stated by the respondent. Rather, he recommended the equipment as a general best practice, but qualified that given the issues observed in Bell manholes; it would be of very little use for rescue and would create a hazard if used while work was being conducted.

Analysis

[72] Paragraph 125(1)(*l*) of the Code states:

> **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,
>
> (*l*) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing.

[73] Bell's manholes are confined spaces within the meaning of Part XI of the COHSR. Paragraph 11.3(*d*) of the COHSR relates to confined space entries and provides that:

> **11.3** Every employer shall, after considering the report made pursuant to subsection 11.2(2),
>
> [...]
>
> (*d*) 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.

[74] The determination of this case is largely based on the proper interpretation of paragraph 11.3(*d*) of the Code. I agree with both parties that this interpretation must not occur in isolation from other provisions of the Code and Part XI of the Regulations. The Supreme Court of Canada, for example in *Canadian National Railway Co.* v. *Canada (Attorney General)*, 2014 SCC 40; *Rizzo & Rizzo Shoes Ltd.*, cited previously, has often stated that legislation must be interpreted in light of the modern principle of statutory interpretation:

> "...the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."
>
> *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc. 2008)

[75] Applying this principle to the interpretation of the Code and Part XI of the COHSR must include the entire context and the intent of Parliament. Moreover, there is no dispute amongst the parties that Part II of the Code and the Regulations enacted under it are remedial in nature and have the objective of promoting work place health and safety and should be interpreted broadly.

Paragraph 11.3(d) of the Regulations

[76] Part XI of the Regulations covers aspects of occupational health and safety specific to work in confined spaces and is divided into the following headings: Hazard Assessment, Entry procedures, Confined Space Entry, Emergency Procedures and Equipment, Record of Emergency Equipment, Provision and Use of Equipment (...) Because of the very specific nature of work in confined spaces, part XI establishes strict methodologies and protocols that ought to be followed. In Section 11.3, entitled, "Entry Procedures," creates for the employer an obligation to establish entry procedures to be followed by a person entering, exiting or occupying a confined space. Paragraph 11.3(*a*) makes clear that the employer must establish entry procedures in consultation with the work place committee and based on the hazard assessment report made pursuant to subsection 11.2(2). Section 11.3 lists the characteristics these procedures must bear. The intent behind this requirement is to ensure

that entry and rescue in confined spaces are done in a safe and effective way by every employee or person and in a standard and pre-determined fashion.

[77] Paragraph 11.3(*d*) is the last requirement listed and obliges the employer to "specify the protection 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." It is important to note that paragraph 11.3(*d*) does not mention the emergency or protection equipment that must be specified. Consequently, I am of the view that it is left to an employer's discretion to decide which kind of protection and rescue equipment to use in their confined spaces. That determination should be made taking into account the qualified persons' assessment report as per subsection 11.2(2) of the Regulations, and be done in cooperation with the work place health and safety committee or health and safety representative.

[78] I am in agreement with the employer's argument that because of the diversity of situations covered by the Regulations, the intent of the legislator was to provide flexibility to all federally-regulated employers whose employees may operate in confined spaces to determine which protection and emergency equipment is appropriate for their confined spaces. This recognises the expertise, the knowledge as well as the control that the employer exercises over its work place. More importantly, it recognises the responsibility of the employer towards the protection of the health and safety of its employees as stated in the general duty of employers in section 124 of the Code.

[79] However, while HSO Tremblay did not mention the tripod, lanyard and harness in the direction, the evidence has revealed based on communications between Bell representatives and HSO Tremblay that this equipment is the only equipment acceptable to HSO Tremblay for compliance with the direction. As a result, much of the debate in this case was aimed at establishing Bell's legal obligation to provide these three pieces of equipment. Ample information was provided by both parties at the hearing on the use and effectiveness of this particular equipment. HSO Tremblay testified that in his opinion, the use of such equipment for the rescue of workers inside these confined spaces was part of the best practice to ensure worker's safety in case of an emergency at all "designated" and "special" manholes.

[80] The designated equipment requested by HSO Tremblay for compliance with the direction comes from section 11.5 of the COHSR. Bell contends that the legal requirement to specify and provide this equipment only applies to confined spaces that fall under section 11.5 of the Regulations.

[81] Section 11.5 of the COHSR, titled, "Emergency Procedures and Equipment," provides for more rigorous procedures that must be followed in cases where the atmospheric conditions in a confined space *cannot meet the minimum standards set out in paragraph 11.4(1)(a)* while a person is in the confined space. Under section 11.5(1) (*a*) the employer must:

- in consultation with the work place committee or health and safety representative, establish emergency procedures to be followed in the event of an accident or other emergency in or near the confined space;

- provide for the immediate evacuation of the confined space upon an alarm;

- ensure that a second qualified and trained individuals is in attendance outside the confined space and in communication with the person inside the confined space;

- ensure that two or more persons are in the immediate vicinity of the confined space to assist in the event of an accident or other emergency, provide emergency rescue equipment such as a safety harness worn by any person entering, exiting or occupying a confined space, and a lifeline (lanyard), anchored where practicable to a mechanical lifting device such as a tripod.

[82] In my view, a plain reading of sections 11.3 and 11.5 in the context of the entire Regulations leads to the conclusion that the designated equipment is only mandatory for the confined spaces that fall under section 11.5. Additionally, one can reasonably conclude that for these confined spaces, all three pieces of equipment should be specified under paragraph 11.3(*d*). On the contrary, for the confined spaces that do not fall under section 11.5, employers are given discretion pursuant to paragraph 11.3(*d*) - subject to subsection 11.2(2) - to determine the protection and emergency equipment to use in their confined spaces and are required to specify that equipment under paragraph 11.3(*d*) of the COHSR.

[83] Finally, given the broad and general wording used at paragraph 11.3(*d*), I am left to conclude that it is neither my role nor that of HSO Tremblay to compel the employer to use the designated equipment if the facts demonstrate that Bell manholes are not subject to the requirements of section 11.5.

Application of section 11.5 of the COHSR to Bell manholes

[84] As previously mentioned, section 11.5 applies to confined spaces where it is not possible to ensure that the specifications relating to the atmosphere and conditions in the confined space are met at all times a person is carrying out work inside the confined spaces. Paragraph 11.4(1)(*a*) sets out the requirements for the atmosphere and conditions in confined spaces and requires testing to be done prior to entry to verify compliance with the following:

> (i) the concentration of any chemical agent or combination of chemical agents in the confined space to which the person is likely to be exposed will not result in the exposure of the person
>
> **(A)** to a concentration of that chemical agent or combination of chemical agents in excess of the value referred to in paragraph 10.19(1)(*a*), or
>
> **(B)** to a concentration of that chemical agent or combination of chemical agents in excess of the percentage set out in

> subsection 10.20(1), or in subsection 10.20(2) under the circumstances described in that subsection.
>
> (ii) the concentration of airborne hazardous substances, other than chemical agents, in the confined space is not hazardous to the health and safety of the person, and
> (iii) the percentage of oxygen in the air in the confined space is not less than 18 per cent by volume and not more than 23 percent by volume, at normal atmospheric pressure;

[85] The employer contends that section 11.5 does not apply to its confined spaces because no entry or work is ever permitted in a manhole if the conditions and atmospheric requirements found in section 11.4 are not met. Testing of the air quality is done before entering the confined space and continues while the work is in progress. In addition, employees at Bell are directed and know to stop working and leave the confined space immediately if there is any chance that the requirements in section 11.4(1)(*a*) will not be met throughout their time in the confined space. Bell's policies and procedures provide that in the event an alarm is triggered and ventilation cannot restore air quality, the employee must leave the confined space and stop work at that manhole.

[86] The respondent essentially argues that based on the facts presented, Bell is not able to ensure that the atmospheric conditions in its confined spaces are compliant with paragraph 11.4(1)(*a*) of the Regulations at all times that their employees are in the confined space and that consequently, the designated equipment must be provided pursuant to section 11.5 and paragraph 11.3(*d*) of the COHSR.

[87] Based on the totality of the evidence presented, I find that Bell confined space entries are always performed under controlled conditions as set out under section 11.4. The evidence shows that the gas monitor worn by Bell employees working into manholes is designed to detect the following atmospheric conditions:

- Oxygen level under 19.5% (the Code sets 18% as the allowable minimum)
- Carbon Monoxide (CO) level at or above 25 ppm
- Hydrogen Sulphide (H_2S) level at or above 1 ppm
- Explosive or combustible gas level at or above 0.5% per volume (methane)

[88] All of these gases' levels are detected prior to entry in a Bell manhole and are continuously monitored during the entire time that the manhole is occupied. Before any manhole entry, the gas monitor is lowered inside the enclosed space. If an alarm is triggered no entry will be performed. Purging of the manhole to clear it atmospheric conditions is then performed using ventilation equipment for a minimum of 10 to 15 minutes. Gas monitoring verification is then performed to check if the condition has cleared. If it is the case, entry is granted. If not, the manhole is closed upon further investigation before any work can resume.

[89] Furthermore, before the worker has access to the confined space, continuous ventilation is installed inside the manhole, allowing for a rate of one air change every three

minutes. The only exception is for work scheduled for less than one hour inside a "regular" manhole where no continuous ventilation is required. An alarm will be triggered by the gas monitor worn by the Bell employee working inside the manhole if gas levels reach any of the thresholds described above. The worker is then instructed to leave the enclosed space immediately. In the case of each gas noted in section 11.5, Bell's gas monitoring gives the worker a sufficient safety margin of time to evacuate the confined space before any danger to the worker's health.

[90] While the respondent has pointed out in its written submissions to some 31 cases of gas detector alarms going off inside confined spaces being recorded in the Bell MMCS database, explanations given by Bell representatives regarding alarm statistics were not to that effect. The evidence has revealed that the 31 second alarms recorded between 2010 and 2012, over a total of some 303,846 manhole openings, were for alarms before re-entry (after the lunch break for example) or during occupancy, with no way of discerning between the two scenarios. Upon further analysis by Bell, 22 of the 31 alarms were judged as probably being input mistakes, since no abnormal gas readings were recorded in the MMCS database. A total of 10 alarms occurring after the opening of the manhole were also recorded in the statistics, with half of them being for oxygen levels between 18% and 19.5%, which is more stringent than the Code requirements (level under 18%). In the five remaining cases, the enclosed space were vented and cleared for work. In the last case, the manhole was closed upon further investigation. Also, for that same 2010-2012 period, only one detailed example of second alarm report provided to the appeals officer clearly showed a second alarm after the first entry (July 7th 2011 entry for CS #MH6). In this case, an oxygen level alarm at 17.7% was recorded some 135 minutes after the manhole opening and after 10 minutes of ventilation the alarm was cleared and work could resume.

[91] Furthermore, I was convinced by the expert testimony of Carl Woychuk that all risks and potential hazards are controlled to the extent possible by Bell's current policies and procedures. The assessments conducted as per subsection 11.2(2) of the COHSR demonstrate that the confined space atmospheres are controlled when policies and procedures are followed. Mr. Woychuk opined that while all risk can never be eliminated mathematically, he was satisfied that the risk related to entries in Bell's confined spaces is down to a "negligible level".

[92] In conclusion, considering the ventilation processes currently in place for Bell's confined spaces, the gas detection safety precautions taken as well as the characteristics of Bell's confined spaces, I am persuaded that Bell Canada manholes do not fall within subsection 11.5(1) of the COHSR. I am satisfied that entries inside Bell manholes are always done so in a controlled environment that meet or exceed the standards set in section 11.4. The evidence provided by Bell shows that competent persons conduct the assessments and if the environment is not in compliance with section 11.4, Bell's procedures instruct the employees not to enter.

[93] I note in passing that HSO Tremblay seems to be of the same view since he rightfully chose not to refer to section 11.5 in his direction. Moreover, throughout his investigation and testimony at the hearing, he never indicated that he believed Bell

manholes to be subject to the requirements of section 11.5. Had he believed so, he could have easily directed Bell to comply with the requirements of section 11.5.

Emergency procedures and equipment currently in place at Bell

[94] Having concluded that Bell manholes do not fall under section 11.5 and that therefore Bell is not under the obligation to provide the designated equipment, I will now examine the emergency and procedures currently in place at Bell in order to determine whether or not Bell policies and procedures in case of emergency as well as the equipment provided to employees entering and occupying manholes are in compliance with the requirements and spirit of paragraph 11.3(*d*) of the Regulations.

[95] The evidence has demonstrated that Bell employees who are required to enter and occupy manholes are given the following equipment: a rope, gas monitor, ventilator, first aid kit and personal protective equipment such as a hard hat, safety glasses, coveralls, gloves, and safety boots. In the event of an emergency in a Bell manhole, the main emergency procedure in place at Bell is to call 9-1-1 and wait for the arrival of the emergency services. For this, all Bell employees are equipped with a cell phone. In most cases, the employee working inside the confined space is expected to make that call. In certain manholes, those that are identified pursuant to Bell's procedures as "designated" manholes, a second person is available to make the call if it becomes necessary.

[96] Bell employees working in manholes are not trained in entry or in non-entry rescue from a manhole and are instructed not to attempt a rescue in the event of an emergency. It is Bell's position that based on the expert advice received, it is best left to the emergency providers who are the trained expert in rescue operations. The equipment that would be used by the emergency services to perform a rescue operation in a Bell manhole is in the possession of the emergency services and is not specified or provided by Bell.

[97] After having carefully reviewed all the evidence presented, specifically Bell's procedures and policies with respect to manholes entries, I have concluded as did HSO Tremblay, albeit on different grounds, that Bell has failed in its obligations under paragraph 11.3(*d*) of the COHSR.

[98] Firstly, Bell has failed to specify any equipment as required in paragraph 11.3(*d*). The Regulations call for the employer to "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 the responding to other emergency situations in the confined space," and this, in my view, requires the employer to ensure that all parties involved, such as, employees, supervisors, emergency response providers, all be made aware of the equipment in question. This can only be achieved if the equipment is clearly put in writing in the employer's procedures and policies to ensure that it will be known to all parties involved in rescuing a person from a confined space.

[99] I have noted that in all of Bell's policies and procedures, there is no written reference to the equipment to be used by a person undertaking a rescue in a Bell manhole. Bell has acknowledged in its written submissions that it does not specify in writing the

emergency equipment to be used in the rescue of a person from a confined space. Bell argued that paragraph 11.3(*d*) does not require that the protection and emergency rescue equipment be specified in writing but that it remains prepared to put in writing the equipment it provides to its employees regardless of the outcome of this appeal.

[100] The definition of "specify" informs my conclusion on the obligation the word "specify" puts on the employer. The Merriam-Webster Dictionary defines specify as meaning, "to name or state explicitly or in detail." The Cambridge dictionary defines it as, "to explain or describe something clearly and exactly." In the context of this appeal, Bell has not described clearly and exactly, for example in the form of a list, the kind of equipment that will be used to rescue a person from a confined space. In my opinion, there is no other practical way to achieve the Regulations' desired goal of making involved parties aware of rescue equipment other than making that information available in writing.

[101] Secondly, I find that, as stated by the respondent, the object and purpose of paragraph 11.3(*d*) is to ensure that employers will provide a means by which a person may affect the rescue of a person from a confined space or in responding to other emergency situations in the confined space. To that end, the equipment that should be specified under paragraph 11.3(*d*) is the equipment that will directly affect a rescue of a person from a confined space. In the present case, it is the equipment that the person undertaking the rescue will actually use to rescue an employee from a Bell manhole.

[102] Almost all of the equipment provided to Bell employees such as the rope, the gas monitor and ventilator cannot be said to constitute equipment that will be used to undertake a rescue of a Bell employee from a manhole. These are equipment to enter and exit a Bell manhole under non-emergency non-rescue conditions. I note here that the appellant also provides a first aid kit. Given the appellant's argument that employees that found themselves in an emergency situation in a manhole are prepared and equipped for self-rescue by calling 9-1-1, the only equipment provided by Bell that could be used to assist in a rescue is the cellphone to make a call to the emergency services.

[103] I find that the provision of a cell phone alone to call emergency services does not satisfy the requirements of paragraph 11.3(*d*). Placing a phone call is often the first step in obtaining emergency equipment and services. This is true in almost any environment, be it a work place or otherwise. Moreover, in my view, given that the Regulations specifically directs employers to specify equipment for emergencies and rescues, it cannot be that the basic equipment for conducting day-to-day operations in a confided space would also be the same equipment contemplated for a rescue unless Bell laid out procedures to that effect. Consequently, it cannot be said that a cellphone alone or the equipment provided by Bell to its employees performing non-emergency or non-rescue activities in manholes constitute emergency equipment as contemplated under paragraph 11.3(*d*).

[104] I find further justification for my conclusion that the sole provision of a cell phone by Bell to its employees entering and occupying confined spaces does not meet Bell's obligation under paragraph 11.3(*d*) when I look at paragraph 11.7(1)(*b*) of the COHSR which states that:

The employer shall provide

(a) [...]
(b) each person who is to undertake rescue operations with the protection equipment and emergency equipment specified pursuant to paragraph 11.3(*d*)

[Underlining added]

[105] From a combined reading of paragraph 11.3(*d*) and paragraph 11.7(1)(*b*), one can reasonably conclude that the intent is to compel employers to keep some control over the rescue operations to be performed in their confined spaces. Given the potential risks associated with working in confined spaces, there is a greater responsibility on the employer to ensure that proper procedures and equipment are put in place to safeguard the health and safety of employees in case of emergency.

[106] Given my earlier conclusion that Bell's manholes are not subject to section 11.5, I find that the Regulations do not prescribe who, whether it be Bell employees, fire departments or rescue specialists from private company, is to perform the rescue operations from a Bell manhole. The general wording used in paragraph 11.3(*d*) confers discretion to employers to that effect. However, in doing so, Bell cannot abdicate its responsibilities under the Code to protect the health and safety of its employees, which requires the specification of the equipment that will be used to affect a rescue of a person working in a Bell manhole.

[107] In addition, I believe that Bell's decision to relinquish all aspects of rescue operations inside its confined spaces to a third party i.e. the emergency services provider, must be made in accordance with the objective and purpose of the Code and Part XI of the Regulations. I find that taken together as a whole, Part XI obliges an employer to do more than just completely rely on the emergency services provider. The employer must be fully cognizant of the capacity and overall effectiveness of such services to conduct rescue operations in its confined spaces. To do so, the employer must at the least be aware and specify such things as: where a call will be directed for every manhole; whether the emergency services are well-equipped to perform entry type rescue operations in its manholes; the response times; and whether alternate course of action should be taken in remote areas.

[108] Even if I were to conclude that a cellphone constitutes emergency equipment, the evidence demonstrates that a cell phone alone can be ineffective. The evidence shows that at the time of HSO Tremblay's investigation, Bell had not taken any steps to contact the emergency service providers to inquire into the availability of responders to attend with confined spaces equipment. The appellant has provided in evidence a survey that was later conducted that revealed that in six jurisdictions in Ontario (Guelph, Woodstock, Ajax-Pickering, Caledonia, Markham and Unionville), the fire department would attend if called, but have no capacity to affect a rescue operations in a manhole. I am very troubled by the fact that in those jurisdictions, Bell employees that found themselves in an emergency situation would not have received any assistance with emergency equipment. Bell has,

pursuant to the Regulations, the obligation to specify and provide a mechanism in order to execute rescue operations in the manholes located in these jurisdictions.

[109] Lastly, I was made aware that steps have been taken by the appellant, following the receipt of the direction, to try to provide on-call rescue services by a private company in the jurisdictions where coverage is not possible by the different fire departments. However, no evidence was presented to confirm that there is in fact an arrangement between Bell and a third party emergency services provider. Even if that evidence had been presented, it would not have affected the outcome of this case. In exercising my role as an appeals officer, I am to review all the evidence to determine whether HSO Tremblay was justified to issue his direction based on the circumstances that prevailed at the time of his investigation. The lack of emergency confined space rescue service coverage in Ontario only serves to demonstrate to me that, at the time the direction was issued, Bell's emergency procedures and policies did not meet the intent of paragraph 11.3(*d*) of the Regulations, which is to ensure the rescue of a person in the event of an emergency in a confined space.

[110] For all these reasons, I find that, at the time of HSO Tremblay's investigation, the evidence clearly demonstrates that Bell failed to specify the protection and emergency equipment as set out in paragraph 11.3(*d*).

The relevance of "designated" and "special" manholes in the direction

[111] The direction issued by HSO Tremblay states that the manholes targeted for application of the direction are "designated "and "special" manholes. These two terms refer to specific internal Bell classifications for manholes. This classification was explained to me at length through different witnesses at the hearing and is summarized in paragraphs 4 to 7 of the present decision.

[112] Upon reviewing all of the evidence in this case, I find that the requirement to specify the protection and emergency equipment under paragraph 11.3(*d*) applies to all Bell manholes, irrespective of Bell's internal classification of its manholes. I do not agree with HSO Tremblay's decision to apply his direction to only "designated" and "special" manholes. In my opinion, paragraph 11.3(*d*) is broadly worded so as to capture any confined space and any type of emergency, for instance, medical emergencies that may require the rescue of a person from a confined space and not just emergencies that can relate to atmospheric conditions in the confined space.

[113] I will therefore vary the direction accordingly.

Decision

[114] For all the reasons described above, the direction issued by HSO Tremblay on April 23, 2014 to Bell Canada is maintained but varied so as to remove the reference to "designated" and "special" manholes.

Olivier Bellavigna-Ladoux
Appeals Officer

Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
AS VARIED BY APPEALS OFFICER OLIVIER BELLAVIGNA-LADOUX

On April 23, 2012, the undersigned health and safety officer conducted an inspection in the work place operated by BELL CANADA, being an employer subject to the *Canada Labour Code*, Part II, at 1, Alexander Graham-Bell, Ile-des-Soeurs, Quebec, the said work place being sometimes known as _____.

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

Paragraph 125(1)(l) - Canada Labour Code Part II
Paragraph 11.3(d) - Canada Occupational Health and Safety
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.

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 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 23th day of April, 2012.

(Signed)
Régis Tremblay
Health and Safety Officer
N° ON2182

To: Michel Filion, Dir.adj. Mtce Réseau Ext.
BELL CANADA
1, Alexander Graham Bell
Ile-des-Sœurs, (Quebec)
H3E 3B3

Canada