

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

Applicants:

Vancouver Wharves Ltd.  
Vancouver, B.C.  
Represented by: R. Alan Francis, Counsel

and

James Edward (Ted) Mannion  
Labourer  
Represented by: Richard Tattersall  
International Longshoremen's & Warehousemen's Union,  
Local 500

Mis en Cause:

Andrew Chan  
Safety Officer  
Human Resources Development Canada

Before:

Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

An oral hearing was held in Vancouver, B.C. on March 15, 1995. It was indicated at the hearing that separate decisions could be given in respect of each direction issued in the instant case. However, I have decided to give a single decision for both directions as they arose out of the same circumstances.

**Background**

The events that resulted in the issuance of two directions, one to Vancouver Wharves Ltd. and one to Mr. Ted Mannion, a longshoreman, are described in the safety officer's narrative report. The directions were issued as a result of an investigation carried out by safety officer Andrew Chan into a serious accident that occurred on the Vancouver waterfront on June 28, 1994. On that day, Mr. Ron Kitchen, a foreman in charge of the operation of loading pulp on a barge, was hit by a lift truck and suffered fatal injuries.

A damaged lift truck was lifted out of a barge by a mobile crane and, under the supervision of Mr. Kitchen, placed on the dock between the barge and a replacement lift truck. Mr. Kitchen began removing the shackles on the damaged lift truck so they could be secured onto the replacement lift truck. In the meantime, Mr. Ted Mannion walked towards the replacement lift truck. Mr. Mannion reported that Mr. Kitchen had directed him to move the replacement lift truck to bring it between the damaged lift truck and the barge to allow the crane to lift it onto the barge. As he walked by the damaged lift truck, Mr. Mannion noticed that Mr. Kitchen was removing the shackles on the damaged lift truck on the side of the barge; that side is directly opposite to the rear of the replacement lift truck. Mr. Mannion proceeded towards the replacement lift truck confident that Mr. Kitchen was out of range of the replacement lift truck.

Mr. Mannion mounted the replacement lift truck, looked around and began manoeuvring the machine in reverse. According to a statement he made during the accident investigation, the replacement lift truck could not be driven forward because he did not have enough room to manoeuvre it between or around a pile of salt, scrapped materials and a large box, all of which were stored on the dock and were encroaching on his passageway. Mr. Mannion therefore decided to back up his machine around the damaged lift truck to bring it between the barge and the damaged lift truck. As he was manoeuvring the replacement lift truck in reverse, Mr. Mannion's machine struck Mr. Kitchen and pinned him on the corner of the damaged lift truck closest to the replacement lift truck.

In response to Mr. Mannion's allegation that the replacement lift truck lurched when he began operating it, a mechanical inspection of the replacement lift truck was carried out by an investigation team and it was found to be in normal operating condition. The investigation carried out by the employer resulted in a conclusion that "the direct cause of the accident was operator error- he (Mr. Mannion) did not ensure that the area to the rear of his vehicle was clear." The safety officer carried out his own investigation into the matter. He noted in his report that the fatality was caused by the negligence of both the employer and the employee. As a direct result of this finding, the safety officer gave two directions.

Vancouver Wharves was given a direction (see APPENDIX-A) under subsection 145(1) of the Canada Labour Code, Part II (the *Code*) on the basis that " There is no safe work procedure for loading and unloading lift trucks using a mobile crane in connection with the pulp barge operations."

Mr. Mannion, on the other hand, was given a direction (see APPENDIX-B) under the same provision of the *Code* for "Failure to take reasonable and necessary precautions to ensure the safety and health of employees or any other person while operating a lift truck on June 28, 1994 at Vancouver Wharves Ltd."

The directions were appealed respectively by Vancouver Wharves Ltd. and by the International Longshoremen's & Warehousemen's Union, Local 500 (ILWU).

### Employer's Submission

The detailed submission of Vancouver Wharves Ltd. is on record.

In respect of the direction (APPENDIX-A) that was issued to Vancouver Wharves Ltd., Mr. Francis raised the following points.

Firstly, the safety officer had given his assurance to Company representatives that no direction would be given to Vancouver Wharves Ltd. in respect of the procedures for moving lift trucks off the scow on the condition that the Company would put such a procedure in place. Mr. Francis explained that the Company developed the said procedures and published it on September 21, 1994. On that basis alone, Mr Francis is of the view that Mr. Chan should have honoured his commitment not to issue the direction and that the Company was entitled to expect the safety officer to adhere to that commitment.

Secondly, Mr. Francis explained that the safety officer erred when he found that Vancouver Wharves violated paragraph 125(q) of the Code as well as paragraph 14.23(1)(c) of the Canada Occupational Safety and Health (COSH) Regulations. Mr. Mannion has been extensively trained in the safe and proper use of mobile equipment and therefore, Vancouver Wharves Ltd. has fully complied with the requirement of the Code and the COSH Regulations.

Two other points of interest were discussed with Mr. Francis. They are:

- i) whether it is the COSH Regulations that apply in this case or the Marine Occupational Safety and Health (MOSH) Regulations by virtue of paragraph 1.3(c) of the MOSH Regulations which makes these Regulations applicable in respect of "c) employees employed in the loading and unloading of ships",  
and,
- ii) whether a signaller was required in the circumstances of this case.

In respect of the application of the MOSH Regulations to this situation rather than the COSH Regulations, Mr. Francis submitted the following:

Section 1.3(c) of MOSH provides that they apply to "employees employed in the loading and unloading of ships". Section 1.4(c) of COSH provides that they do not apply to "employees employed on ships". From this it is clear that only MOSH applies to employees employed **on** ships. It is less clear whether MOSH applies exclusively to employees employed in the loading or unloading of ships since such activity is not expressly excluded from the scope of COSH.

It is our client understanding from discussions with the Coast Guard that MOSH applies on docks only within the swing of a ship's boom. In the case of barges such as the one in question, there is no ship's boom or rigging. Consequently, it is our client understanding that in practice, COSH has been applicable to the type of operation involved in this case, and MOSH has not.

In respect of the signaller's obligations, Mr. Francis submits that

Mr. Kitchen was the signaller solely with respect to the operation of the crane which hoisted the inoperative lift truck out of the barge and onto the dock. At the time of the accident the crane was inactive.

Furthermore, noted Mr. Francis after acknowledging that there exists no substantive difference between the pertinent provisions of the two sets of Regulations, a signaller is not required by either Regulations because Mr. Mannion had "a clear and unobstructed view of the area in which the equipment is being operated".

#### Submission for the Employee

In respect of the direction (APPENDIX-B) given to Mr. Mannion and in his defense, Mr. Tattersall explained that "After giving direction to Mr. Mannion to move #708 (the replacement lift truck), Mr. Kitchen then placed himself in the precarious position between the machines. This we commonly call "putting oneself in the Bight", a practice we all avoid in the work place at all costs."

Mr. Tattersall raised a number of interesting questions in his submission respecting the whereabouts of Mr. Kitchen at the time of the accident and his reasons for being at the point of contact with the lift truck. There is however no answers to those questions since only the victim, Mr. Kitchen in the instant case, could answer them.

Mr. Tattersall also noted that "The job was rushed and obviously some shortcuts in procedures were taken, in as that rather than Mr. Kitchen as a Foreman having to undo the shackles on #703 (the damaged lift truck) one of the longshore labourers should have been required to do that work."

### **DECISION**

#### **IN RESPECT OF THE DIRECTION GIVEN TO THE EMPLOYER (APPENDIX-A)**

There are a number of issues that must be addressed in this case. However, I believe it would not be appropriate for me to respond to Vancouver Wharves Ltd.'s complaint about the safety officer not honouring his commitment not to issue a direction to the employer. This is not a matter that should be dealt with within the context of a review of a direction.

The issues to be addressed are as follow:

1. Which Regulations apply: the COSH or the MOSH Regulations?
2. Who enforces the law beyond the "swing of the ship's boom"?
3. Was there a violation of the operator training provision?

4. To what extent has the employer contravened the Code?

1. Which Regulations apply: the COSH or the MOSH Regulations?

Since Mr. Francis acknowledged that there exists no substantive difference between the two sets of Regulations, and I agree with that statement as it applies to the contravention identified by the safety officer, identifying the proper Regulations will not cause a prejudice to the employer.

Mr. Francis' summary analysis of which Regulations apply i.e. the COSH or the MOSH Regulations above is, in my opinion, correct. The COSH Regulations do not apply on ships. By virtue of its application section, the MOSH Regulations apply to employees employed on some ships and in the loading and unloading of ships. Consequently, the MOSH Regulations apply exclusively on ships, including barges.

Since the COSH Regulations are only excluded from applying to employees employed on ships but are not explicitly excluded from applying on the docks, it is reasonable to conclude that the COSH Regulations apply on the docks.

However, since the MOSH Regulations apply specifically to employees employed in the loading and unloading of ships, it is reasonable to conclude that all activities directly associated with the loading and unloading of ships is also covered by the MOSH Regulations. It could certainly be argued that most, if not all, activities carried out on a dock are directly related to the loading and unloading of ships. One is tempted to automatically conclude that the MOSH Regulations apply on the docks to all employees carrying out activities associated with the loading and unloading of ships. That conclusion would not be unreasonable if we were to ignore that the MOSH Regulations are specifically designed to apply on ships. A quick overview of the provisions of MOSH Regulations have convinced me that, while technically speaking they appear to apply on the docks by virtue of the application section, in reality they apply almost exclusively on ships since everything the MOSH Regulations deal with concerns ships in one way or in another. In my opinion, the intent in developing these Regulations was that the MOSH Regulations would apply on ships and the COSH Regulations would apply off the ships.

Therefore, for the purposes of this case, I have come to the conclusion that the MOSH Regulations apply only from the moment a lonshoreman leaves the dock to go aboard a ship, not before. The COSH Regulations on the other hand apply on the docks. While I am aware that an argument to the contrary could be made, there is no such argument before me at this time. *Nonetheless, the sooner this situation is clarified, the better.*

2. Who enforces the law beyond the "swing of the ship's boom"?

As to who has the responsibility to enforce the various provisions of the different Regulations is of no serious consequences in this case since the Code makes no distinction between safety officers. A safety officer with the Canadian Coast Guard or a safety officer with the Human Resources Development Canada is a safety officer under the Code. Administrative arrangements made through mutual agreements between these two respective organizations do not, from a legal perspective, affect the application of the two sets of Regulations. Any safety officer can enforce those Regulations at any time.

I suspect that the application restriction referred to by the Coast Guard, i.e. that the MOSH Regulations only apply within the swing of a ship's boom, is a concept taken from the Tackle Regulations issued under the Canada Shipping Act. In my opinion, that restriction in application is only valid under that Act for the purposes of enforcing the Tackle Regulations. However, that concept has been extended over time to all the provisions of both sets of Regulations by safety officers from both organizations. In reality, it should have been restricted to the specific exclusions found at section 12.2 of Part XII (Materials Handling and Storage) of the MOSH Regulations and at paragraph 14.2(b) of Part XIV (Materials Handling) of the COSH Regulations in order to vacate the field of materials handling, where tackle is used or operated, in favour of the Tackle Regulations.

Since the crane was inactive at the time of the accident and that the use or operation of tackle is not a consideration in this case, Part XIV of the COSH Regulations applies and any safety officer duly appointed can enforce its provisions.

3. Was there a violation of the operator training provision?

In reply to that question, my answer is that the employer has not contravened paragraph 14.23(1)(c) of the COSH Regulations in the manner referred to in the direction.

That provision deals specifically with operator training and the employer has demonstrated quite satisfactorily that Mr. Mannion had received extensive and professional training in the operation of material handling equipment. Mr. Mannion was certified as a qualified operator who met the requirements of the training. There is no doubt in my mind that Vancouver Wharves had assumed its responsibilities in this area by ensuring that Mr. Mannion was fully trained in the proper and safe use of the equipment.

4. To what extent has the employer contravened the Code?

The employer has dealt with the issue of not providing a signaller to Mr. Mannion in this case. I accept Mr. Francis' submission, although hesitantly, that a signaller was not required in this case mainly because that issue is foreign to the intent of the direction. The safety officer did not deal with the requirement of a signaller for materials handling equipment and I should not presume of his intentions in this matter. The safety officer was satisfied that a signaller was provided for the operation of the crane and that this action satisfied the requirements under the Regulations. I will not dwell on that issue any longer.

The direction of the safety officer intended to correct a safety problem that existed on the dock when a replacement lift truck had to be brought into position to be later transferred onto the barge. The problem, in my opinion, was the manner in which materials, goods and equipment were stored in the working area. The task of moving the materials handling equipment i.e. the replacement lift truck, could not be and was not accomplished in a safe manner given the hazardous conditions under which Mr. Mannion had to work. The comments made by Mr. Tattersall to the effect that "The job was rushed and obviously some shortcuts in procedures were taken" are quite pertinent in this respect.

In my opinion, Vancouver Wharves Ltd. is responsible for allowing the area where Mr. Mannion was working to be cluttered in such a manner that it impeded the safe operation of the replacement lift truck. For example, it has been demonstrated to my satisfaction that

1. Mr. Mannion could not drive the replacement lift truck forward because he did not have enough room to manoeuvre it between or around a pile of salt, scrapped materials and a large box, all of which were stored on the dock and were encroaching on his passageway;
2. as a consequence of #1 above, Mr. Mannion had to drive the replacement lift truck in reverse;
3. in driving the replacement lift truck in reverse, Mr. Mannion had to bypass the damaged lift truck by driving around it and park the replacement lift truck between the barge and the damaged lift truck;
4. there are blind spots on those lift trucks when manoeuvring them in reverse which requires the driver to adopt an unnatural position to locate and steer clear of the obstacles;
5. the damaged lift truck was positioned by the crane under the supervision of Mr. Kitchen in such a manner that it was obstructing the passageway of Mr. Mannion;
6. Mr. Kitchen, the supervisor at the site, directed Mr. Mannion to move the replacement lift truck to a designated position to have it picked up by the crane knowing the conditions under which the truck had to be moved.

In my opinion, because of the disorder on the dock, Mr. Mannion was not working under conditions which were conducive to a safe working environment. By allowing goods and materials to be stored on the dock, by parking a replacement lift truck in the vicinity of those goods and materials and then, by positioning the damaged lift truck in a manner where it effectively entrapped the replacement lift truck knowing that it had to be moved, the employer contravened paragraph 14.49(2)(c) of the COSH Regulations.

That, in my opinion, is the extent of non-compliance of the employer in this case. I believe that this finding is in line with the intent of the direction. The direction should therefore be varied to reflect this situation.

For all the above reasons, **I HEREBY VARY** the direction given, under subsection 145(1) of the Canada Labour Code, Part II on September 29, 1994 by safety officer Andrew Chan to Vancouver Wharves by replacing the third and fourth paragraphs of the direction, immediately following the word "contravened", with the following two paragraphs:

*"Paragraph 125(p) of the Canada Labour Code, Part II and paragraph 14.49(2)(c) of the Canada Occupational Safety and Health Regulations.*

*Materials, goods or things shall not be stored or placed on the docks in a manner that impede the safe operation of materials handling equipment such as a fork lift truck."*

## **DECISION**

### **IN RESPECT OF THE DIRECTION GIVEN TO THE EMPLOYEE (APPENDIX-B)**

The safety officer issued a direction to Mr. Mannion because, in his opinion, Mr. Mannion failed to take all reasonable and necessary precautions when manoeuvring his machine in reverse. Mr Mannion knew that Mr. Kitchen was removing the shackles on the damaged lift truck and it was his responsibility to locate Mr. Kitchen, or any other employee working in that area before manoeuvring his machine. It was his responsibility to ensure that the course of travel was clear. The safety officer explained that

Further in considering the distance between the two machines and the position of the turning wheels of 708 (the replacement lift truck), the continuous motion of 708 will cause 708 to come into contact with 703 (the damaged lift truck).

Evidently, while Mr. Mannion may have looked around to ensure nobody was in the way, he failed to assess the situation correctly probably because he, and other employees, were in a hurry on that day. There was a collision of the fork lift trucks which caused Mr. Kitchen to be crushed by the two machines. This alone is evidence that Mr. Mannion failed to take all the necessary safety precautions to prevent an accident. While under normal circumstances a collision of this kind would not likely result in serious damages to the machines and would probably be of little consequence to anyone in the area, in this case it caused a fatality and the consequences are extremely serious.

I cannot believe that Mr. Mannion was so irresponsible when operating the replacement lift truck that he had complete disregard for the safety of Mr. Kitchen or any other employee in that area. Nonetheless, although I might not have given a direction to Mr. Mannion, I agree with the safety officer that Mr. Mannion must assume his share of responsibility in this case to the extent that he failed to comply with the Code.

Once a well-trained employee takes control of a motorized vehicle, he must assume full responsibility for his actions or omissions when operating that machine. The same is true for any person operating any motorized vehicle, such as an automobile for example. In this case, it is the driver's responsibility to take the necessary measures, when operating materials handling equipment, to ensure that his actions will not create a dangerous situation. It is his responsibility to take the necessary time to ascertain that the area is clear and safe to proceed. This is particularly true when materials handling equipment is operated in reverse and more so when the area is cluttered and there is pressure to get the job done quickly.

It is regrettable that these machines were not fitted with audible devices that alert employees in the working area and that are *automatically activated when the equipment is being operated in reverse*. Mr. Kitchen's life might have been spared if the lift truck driven by Mr. Mannion had



been equipped with such an automatic warning device. The current Regulations only require mobile equipment to be fitted with audible safety devices. It is my understanding that the Regulation are being up-dated to address that situation.

However, as sympathetic that I may be to Mr. Mannion, I have little choice but to agree with the safety officer in this case. Mr. Mannion "failed to take the reasonable and necessary precautions in contravention of s. 126(1)(c) of the Code." He failed to ensure that the course of travel followed by the materials handling equipment under his control would not endanger Mr. Ron Kitchen.

For all the above reasons, **I HEREBY CONFIRM** the direction given, under subsection 145(1) of the Canada Labour Code, Part II on October 6, 1994 by safety officer Andrew Chan to Mr. James Edward (Ted) Mannion.

Decisions given on May 31, 1995.

Serge Cadieux  
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On June 28, 1994, the undersigned safety officer conducted an inquiry in the work place operated by Vancouver Wharves Ltd., being an employer subject to the Canada Labour Code, Part II, at 1995 West First Street, North Vancouver, B.C., V7P 1A8, the said work place being sometimes known as Vancouver Wharves Ltd.

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II is being contravened:

Paragraph 125(q) of the Canada Labour Code, Part II and paragraph 14.23(1)(c) of the Canada Occupational Safety and Health Regulations.

There is no safe work procedure for loading and unloading lift trucks using a mobile crane in connection with the pulp barge operations.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than October 31, 1994.

Issued at Vancouver, this 29 day of September, 1994.

Andrew Chan  
Safety Officer

To: Mr. Mike McClellan  
Superintendent, Industrial Relations  
Vancouver Wharves Ltd.

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

DIRECTION TO EMPLOYEE UNDER SUBSECTION 145(1)

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The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, is being contravened:

**Paragraph 126.(1)(c) of the Canada Labour Code, Part II**

Failure to take reasonable and necessary precautions to ensure the safety and health of employees or any other person while operating a lift truck on June 28, 1994 at Vancouver Wharves Ltd.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention immediately on receipt of this Direction.

Issued at Vancouver, this 6 day of October, 1994.

Andrew Chan  
Safety Officer

To: Mr. James Edward (Ted) Mannion

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicants: Vancouver Wharves Ltd. and International Longshoremen's & Warehousemen's Union

**PROVISIONS**

Code: 145(1), 125(p), 125(q), 126(1)(c)

COSH Regulations: 1.4(c), 14.2(b), 14.23(1)(c), 14.49(2)(c)

MOSH Regulations: 1.3(c), 12.2, 12.22(1)(b)

**SUMMAR**

An accident occurred on the Vancouver waterfront in which a foreman in charge of pulp barge operations was fatally injured by a lift truck. Two directions were given by a safety officer:

one to the employer under subsection 145(1) of the Code for a contravention of paragraph 125(q) of the Code and paragraph 14.23(1)(c) of the COSH Regulations for failure to have a safe work procedure for loading and unloading lift trucks; and

one to the employee also under subsection 145(1) of the Code for a contravention of paragraph 126(1)(c) of the Code for failing to take reasonable and necessary precautions to ensure the safety of the deceased.

In the first case, the RSO concluded that:

- i) both sets of Regulations i.e. the COSH and the MOSH Regulations apply on the docks to employees employed in the loading and unloading of ships but that in reality only the COSH Regulations apply on the docks. Therefore the RSO concluded that for the purposes of this case, only the COSH Regulations would apply;
- ii) the employer did not contravene the paragraph 14.23(1)(c) of the COSH Regs since that provision deals with operator training and it was shown that the employee involved in the accident was adequately trained.

The RSO varied the direction to the employer because he found the employer to be in contravention of paragraph 14.49(2)(c) of the COSH Regs for allowing the work site to be cluttered in such a manner that it impeded the safe operation of materials handling equipment.

In the second case, the RSO reluctantly agreed with the safety officer in that the operator of materials handling equipment must be in full control of the equipment that he operates.

The RSO confirmed the direction to the employee.