

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code
of directions given by the safety officer

Applicant: Aéroports de Montréal
Mirabel, Quebec
Represented by: Jean-François Longtin and
Nathalie Drouin

Interested party: Attorney General of Canada
Department of Justice of Canada
Represented by: Raymond Piché and Nadine Perron

Mis-en-cause: Denis Caron
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

Oral hearings were held on June 19 and 20 and July 23, 1995, in Montreal, Quebec.

Intervention by the Attorney General of Canada

The Attorney General of Canada sought leave to intervene at the hearing of this matter. The Attorney General of Canada argued that since it was possible that no party would argue in support of these directions, he had the full interest required to argue that the impugned directions were in accordance with Part II of the Canada Labour Code (hereinafter referred to as "the Code").

Although counsel for Aéroports de Montréal (hereinafter referred to as "ADM") objected to this intervention on the basis that the reason stated by the Attorney General is not valid, I granted the Attorney General of Canada leave to intervene. I made this decision on the ground that the decision I would be making in this case could in fact have an impact on the occupational safety and health not only of the employees of ADM, but also of employees engaged in deicing airplanes. Accordingly, I have determined that the Attorney General of Canada has the interest asserted to intervene in respect of any undertaking under federal jurisdiction to ensure that a direction given by a safety officer is in fact consistent with the Code. Employees engaged in deicing airplanes are part of such an undertaking and, moreover, the safety officer had established a connection between these employees and the employees of ADM.

Background

The facts

On January 21, 1995, an accident on the job which caused the death of three employees of an employer subject to the Code, the airline company Canadian International Ltd. (hereinafter referred to as "Canadian"), occurred at Mirabel International Airport.

This accident occurred as the three employees and their fellow workers were deicing¹ a Boeing 474-400 aircraft belonging to the national air transportation company Royal Air Maroc (hereinafter referred to as "RAM"). The accident took place when the RAM aircraft started to move, although the deicing was not yet finished, so that the stabilizers at the rear of the aircraft struck the booms supporting the baskets, thereby overturning the two trucks being used for the deicing. The three employees of Canadian who were inside the baskets were then thrown to the ground, resulting in their death.

The investigation

On the same day, January 21, 1995, Denis Caron, a safety officer, went to Mirabel International Airport to conduct an investigation under the Code.

In the course of his investigation, the safety officer made several visits to a number of work sites, including the deicing centre and the Apron control tower. The officer also questioned Mr. Robert Tremblay, the apron controller, an employee of ADM, in the presence of several people. He took Mr. Tremblay's written statement and various ADM documents, so that he could do a detailed analysis of the events and of the various parties' responsibilities.

Upon completing his investigation, the safety officer concluded that there was a dangerous situation at the deicing centre which needed to be corrected in order to avoid any other deaths occurring. On the basis of his analysis of the responsibilities of ADM and of Mr. Tremblay with respect to the deicing centre, the safety officer concluded that these parties shared in the responsibility for the activities that went on at the deicing centre.

The responsibility assigned by the safety officer to ADM with respect to the deicing centre resulted from the fact that the centre is an infrastructure belonging to ADM and made available to airline companies so that they may have their aircraft de-iced. ADM was therefore required to control the activities that took place there, through its apron controller. The responsibility assigned by the safety officer to the apron controller was to the effect that the controller was required to ascertain from the pilot whether the deicing was finished before giving the pilot taxi clearance.

¹ For purposes of clarity, deicing is a procedure designed to melt the frost, ice and snow that has accumulated on an aircraft or to prevent it from forming or accumulating.

The directions

The safety officer issued a number of directions in this matter². Three of these directions were brought to the attention of the Regional Safety Officer by ADM. Two of these three directions were the subject of a request for a review made within the time allowed by the Code. The third direction is a direction given under subsection 145(1) of the Code to Mr. Robert Tremblay, the Mirabel Airport main apron traffic controller, employed by ADM.

It was established at the hearing that the time allowed for requesting a review of this third direction had expired, and that accordingly the Regional Safety Officer did not have the jurisdiction required to hear the request for a review of this direction. The fourteen days allowed under subsection 146(1) of the Code is a mandatory time limit which the Regional Safety Officer did not have the power to alter. Accordingly, the request for a review of this last direction was dismissed. However, the parties agreed that the review of the first two directions would deal with the same facts, and that accordingly the decision of the Regional Safety Officer concerning the first two directions will have the same effect on the third direction, even though there was no formal review in that case.

Accordingly, on February 4, 1995, the safety officer issued an initial direction (SCHEDULE A) to ADM under paragraph 145(2)(a) of the Code, in which he directed ADM to apply the said direction immediately.

On March 15, 1995, the safety officer issued a second direction (SCHEDULE B) to the employer³ under subsection 145(1) in which the safety officer stated the opinion that ADM had contravened section 124 of the Code.

ADM requested a review of both directions referred to above, and in addition requested a review of the third direction (SCHEDULE C), which had been given to Mr. Tremblay on March 15, 1995; as we now know, that request was dismissed by the Regional Safety Officer on the ground that it was untimely.

² Several airline and deicing companies received directions from the safety officer. The applications for review filed by the various companies involved were heard separately.

³ In this case, the title of the original section (see SCHEDULE B) issued by the safety officer read as follows: [TRANSLATION] DIRECTION TO EMPLOYEE UNDER SUBSECTION 145(1). The parties agreed that the reference to "employee" in that title was inaccurate, that it resulted from a typing error and that in reality the direction as it was framed was addressed to the employer and not to the employee in this specific case. I have corrected the direction accordingly. For purposes of clarity, I have decided to reproduce only the corrected version of the direction in the text of the decision.

Submission of ADM

The detailed argument of ADM was entered in the record.

Preliminary Argument

Mr. Longtin first submitted a preliminary argument, contending that the safety officer had no jurisdiction to issue these directions. According to Mr. Longtin, the safety officer did not have the power to issue directions to ADM in this matter, for one good reason: ADM had no employees working at the deicing centre, and it had no authority over the operations that go on there. This argument alone is sufficient, according to Mr. Longtin, for the directions to be rescinded.

Mr. Longtin continued his argument by dealing individually with each of the two directions (SCHEDULE A and SCHEDULE B) issued to the employer.

Direction under paragraph 145(2)(a) of the Code

On the question of the direction issued to the employer under paragraph 145(2)(a) of the Code, Mr. Longtin submitted that there was no dangerous situation at the deicing centre on February 2, 1995. The officer never described the dangerous situation alleged, but specified what measures the employer was required to take to prevent other accidents from occurring, which the Act does not authorize him to do.

Mr. Longtin pointed out that the safety officer took two points into account in issuing his direction under paragraph 145(2)(a) of the Code:

- The fact that the Royal Air Maroc aircraft was de-iced, with the motors running, by employees of Canadian; and
- The visibility of the deicing centre to the apron controller.

For the purposes of deicing the airplane, the deicing centre was under the control of Canadian, and not of ADM. The deicing of the airplane with the motors running was done by employees of Canadian, in contravention of Canadian's guidelines.

On the second point, Mr. Longtin explained that the role of the apron controller is to direct traffic between two points, and that the primary tool used in his work is radio communication. On the day of the accident, communication between the apron controller and the pilot took place by radio communication, as it was supposed to be done.

In addition, the apron controller should not assume the role of the airplane pilot, who must ensure that all operations are finished and that he is "Ready to Taxi"⁴. The safety officer directed ADM to take a specific measure to avoid another accident from occurring. [TRANSLATION] "This measure, which consists in directing the apron controller to ask the pilot whether he has received his visual signal before giving him taxi clearance is inappropriate and irregular and is certainly not such as would prevent other accidents;" Mr. Longtin said that "it is the responsibility of the pilot in command on the aircraft, with his ground crew, to ascertain that the flight preparation operations at the parking space are finished and that the airplane is free to move before stating that he is ready to taxi. The deicing centre is a parking space just like any other parking space on the apron (gate).

When the aircraft is parked, either at a gate or at the deicing centre, it is under the complete authority of the pilot in command and his ground crew. It is up to these two parties to establish a communication system between themselves (signaller, radio communications, intercom) so that the ground crew can transmit information to the pilot to advise that the maintenance operation is finished and the aircraft is free to move. ADM can in no way step in or interfere in the internal procedures of the companies that supply maintenance and mechanical services;"

For all these reasons, the direction under paragraph 145(2)(a) of the Code should therefore be rescinded.

Direction under subsection 145(1) of the Code

Mr. Longtin submitted that [TRANSLATION] "[i]n his direction, the safety officer stated that he was of the opinion that ADM has contravened section 124 of Part II of the Code, which provides:

Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.

although no employee of ADM suffered any accident on the job.

When the safety officer, Denis Caron, was examined at the hearing as to the measures that ADM was required take in order to cease contravening the direction issued under subsection 145(1), he stated that he can only find that there has been a contravention, and cannot tell the employer what measures to take in order to comply (e.g. flare and caustic). Mr. Caron then stated that he found that the employee had contravened paragraph 126(1)(c) of the Code (relating to the duties of employees). Paragraph 126(1)(c) provides:

⁴ In aeronautics, the expression "Ready to Taxi" means that the pilot and flight captain of an aircraft has ascertained that all maintenance and other operations on the aircraft have been completed and that the aircraft is free to move. When the pilot has done this and confirms to the apron traffic controller that his or her aircraft is ready to taxi, the controller transmits to the pilot the route to follow on the apron and the priority assigned to him or her, by radio.

While at work, every employee shall

- (c) take all reasonable and necessary precautions to ensure the safety and health of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;

Accordingly, with respect to the contravention of paragraph 126(1)(c) of the Code, the employee must have committed acts or omissions that could jeopardize the health and safety of anyone likely to be affected.

The evidence established, beyond a doubt, that the facts related by Denis Caron in the direction to the employer under subsection 145(1) are false since they are not consistent with reality. Analysis of the various frequency transcripts show that Mr. Tremblay [TRANSLATION] "never communicated with the Canadian Airline deicing crew to ask one of the crew members to call back when the deicing of the Royal Air Maroc Boeing 747-400 was finished and never awaited such a call or confirmation. In fact, it is not up to the apron traffic controller, in the performance of his duties, to verify, either with the deicing crew or with the pilot, whether deicing is finished. Robert Tremblay did not have to ask the pilot whether deicing was finished, since the pilot in command gave him that information by stating that he was ready to taxi".

Submission of the Attorney General of Canada

The Attorney General of Canada declined to present arguments to the Regional Safety Officer in support of the directions for which the employer requested a review.

Decision

It is important at this stage to point out that the silence of the Attorney General of Canada on the submission by ADM is a tacit recognition of the validity of the submission by ADM. At least, this is the conclusion I draw from it.

With respect to the preliminary argument by ADM, I agree completely with Mr. Longtin's argument that ADM has no employees either at the deicing centre or at the parking space for aircraft on the main traffic area, the apron. It is inconceivable that as experienced a safety officer as Mr. Caron could have assigned responsibility to ADM under the Canada Labour Code, an Act which applies only to employment in a work place under federal jurisdiction.

Moreover, subsection 123(1) of the Code unequivocally specifies the scope of the Code:

123(1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment (emphasis mine)

The expression "to and in respect of employment" means that there must be an employer-employee relationship in order for the Act to apply. The wording of the two directions issued by the safety officer clearly shows that the directions apply to the employer, and this implies that the employer contravened a provision of the Code by putting the safety and health of its employees at risk. It

was established to my satisfaction and beyond a doubt that ADM has no employees working at the deicing centre or in any other parking space. In addition, ADM has no control over the activities that go on there, since it is not involved in any way in the aircraft deicing operations, that activity being entirely the responsibility of certain airline companies and companies that specialize in it.

I have intentionally reproduced in this document certain parts of Mr. Longtin's submission concerning the two directions, in order to make the reader aware of the complexity of operating an airport like Mirabel. These passages are useful in that they not only show us the position of the employer with respect to the directions it is contesting, but also explain, clearly and precisely, the procedure by which traffic is controlled in an airport and the specific responsibilities assigned by Parliament to the various parties involved in this field, under the Airport Traffic Regulations. Although these regulations were submitted by the safety officer in his initial report to the Regional Safety Officer, it is now obvious that the officer did not understand the meaning and significance of the responsibilities assigned by Parliament to ADM and to the apron controller, in this case Mr. Tremblay.

Mr. Tremblay in fact has no responsibility in respect of the deicing centre other than to obtain confirmation from the pilot in command of the aircraft that he is ready to taxi on the apron. It is not the job of the apron controller to ascertain from the deicing team or the pilot that all maintenance operations are finished and that the aircraft is free to move and ready to taxi. This responsibility lies with the pilot in command of the aircraft, who in fact assumed this responsibility when he stated "Ready to Taxi".

The role of the apron controller was very clearly described by Mr. Longtin. Suffice it to say that the apron controller must ensure that traffic on the apron is completely safe. In order to do this, he must ensure that any aircraft that states that it is ready to taxi waits until he informs it that the apron is clear and it may proceed. If there is traffic on the apron or if other airplanes have requested taxi clearance, the apron controller informs the pilot accordingly and informs him or her of his taxiing priority. The role of the apron controller is to control traffic on the apron. Accordingly, the direction (SCHEDULE C) issued to Mr. Tremblay is unfounded.

The safety and health of Mr. Tremblay, as an employee of ADM, or of any other employee of ADM, was obviously never put at risk. Accordingly, ADM cannot be held responsible for any contravention of the Code, as an employer, for failing to protect the safety and health of its employees.

With respect to the allegation by the safety officer that there was a danger at the deicing centre, that danger, if danger there was that evening, was not described by the safety officer. Danger is defined in subsection 122(1) of the Code as follows:

"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected; (emphasis mine)

The power of the safety officer to remedy a danger is delineated in paragraph 145(2)(a) of the Code, which provides:

145(2) Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work,

- (a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the officer specifies

It is clear from the foregoing that the danger that exists must be described to the employer. In addition, it must be a danger that can be corrected, it must affect the safety and health of an employee, and it is the employer of that employee which must make the correction. These conditions are not met in the situation that concerns us here. ADM has no control over the activities that go on at the deicing centre since that control lies with various companies that do the deicing. ADM therefore cannot correct the situation since it has no employees working at the deicing centre.

I must make one comment concerning the conclusion reached by the safety officer in the direction (SCHEDULE B) given under subsection 145(1) of the Code. In that direction, the officer concludes:

[TRANSLATION]

... the employee therefore did not take all reasonable and necessary precautions to ensure the safety and health of any person likely to be affected by his acts or omissions, so that accidents occurred. (Emphasis mine)

The conclusion reached by the safety officer has serious consequences for ADM, since it assigns responsibility for the accident to ADM. It exposes ADM to civil actions, although the authorities responsible for determining the causes of the accident had not yet made their finding.

In this sort of situation, there is nothing to prevent the safety officer from conducting an investigation under the Code. However, in such cases the safety officer's responsibility is to determine whether there has been a contravention of the Code, and not to assign responsibility for the accident.

The comment "so that accidents occurred" was a gratuitous comment by the safety officer, since at the hearing the agent demonstrated that he was a layperson in the field of aeronautics. The safety officer knew perfectly well that the Canadian Transportation Accident Investigation and Safety Board was investigating this matter, and that under the Canadian Transportation Accident Investigation and Safety Board Act that Board had jurisdiction to determine the causes of the accident. The safety officer should have proceeded in cooperation with that Board's investigators, which he did not do.

In short, ADM played no role in this matter and should never have been identified by the safety officer as one of the parties responsible for the accident. For all of the foregoing reasons, I HEREBY RESCIND the direction (SCHEDULE A) issued under paragraph 145(2)(a) of the Code on February 4, 1995 by the safety officer, Denis Caron, to Aéroports de Montréal; and I HEREBY

RESCIND the direction (SCHEDULE B) issued under subsection 145(1) of the Code on March 15, 1995 by the safety officer, Denis Caron, to Aéroports de Montréal.

In addition, in order that there be no misunderstanding on this point, and for the reasons listed at the hearing and at the outset of this decision, the request for a review of the direction (SCHEDULE C) issued under subsection 145(1) of the Code by the safety officer, Denis Caron, to Robert Tremblay, an employee of Aéroports de Montréal is untimely and the said REQUEST IS DISMISSED.

Decision dated September 6, 1995

[signed]
Serge Cadieux
Regional Safety Officer

* Translator's note: this passage is taken from Schedule C; the wording used in Schedule B is slightly different.

SCHEDULE A

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

DIRECTION TO EMPLOYER UNDER PARAGRAPH 145(2)(a)

On February 2, 1995, the undersigned safety officer conducted an investigation at the work place operated by Aéroports de Montréal, an employer subject to Part II of the Canada Labour Code, situated at 12655 rue Commerce A-4, 7th floor, Mirabel, Quebec, which work place is sometimes known as the Deicing Centre of Montreal International Airport, Mirabel.

The said safety officer directs you, until further direction, to ensure that the apron controller confirms with a pilot who wishes to leave the deicing centre that the pilot has obtained the visual signal informing him that the deicing team has finished, before giving taxi clearance.

Accordingly, you are **HEREBY DIRECTED**, under paragraph 145(2)(a) of Part II of the Canada Labour Code, to apply this direction immediately.

Dated at Montreal, this 4th day of February 1995.

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

DIRECTION TO EMPLOYER⁵ UNDER PARAGRAPH 145(2)(a)

On January 21 and February 2, 1995, the undersigned safety officer conducted an investigation at the work place operated by Montreal International Airport, an employer subject to Part II of the Canada Labour Code, situated at 12655 rue Commerce A-4, 7th floor, Mirabel, Quebec J7N 1E1, which work places are sometimes known as the Deicing Centre and APRON CONTROL.

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

Section 124 of Part II of the Canada Labour Code (Part II).

By permitting Mr. Robert Tremblay, the "apron controller", to give the pilot of the R.A.M. B 747-700 taxi clearance when Mr. Tremblay had received no response to two calls asking the team that was deicing to confirm that the deicing was finished, and moreover, the controller, Mr. Tremblay, did not ascertain from the pilot whether the deicing was finished, the employer therefore did not exercise the necessary supervision to ensure the safety and health of any person affected by Mr. Tremblay's acts or omissions, so that accidents occurred.

ACCORDINGLY, you are HEREBY DIRECTED under subsection 145(1) of Part II of the Canada Labour Code to cease all contraventions immediately.

Dated at LaSalle, this 15th day of March 1995.

⁵ See footnote 3 supra.

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

DIRECTION TO EMPLOYEE UNDER PARAGRAPH 145(2)(a)

On January 31, 1995, the undersigned safety officer conducted an investigation at the work place which is under the authority of Montreal International Airport, Mirabel, an employer subject to Part II of the Canada Labour Code, and for which Robert Tremblay works as an apron controller. This company is situated at 12655 rue Commerce A-4, 7th floor, Mirabel, Quebec J7N 1E1, which work places are sometimes known as the Deicing Centre and APRON CONTROL.

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

Paragraph 126(1)(c) of Part II of the Canada Labour Code (Part II):

The employee communicated twice by radio with the team that was deicing the R.A.M. B 747-700. The first time, he reached the team and asked them to call back when the deicing was finished. The second time, he tried to reach the same deicing team to ask them to confirm that the deicing was finished; he was unsuccessful. Having received no confirmation for either of these calls, and moreover, by giving the pilot taxi clearance without ascertaining from the pilot whether the deicing was finished, the employee therefore did not take all reasonable and necessary precautions to ensure the safety and health of any person likely to be affected by his acts or omissions, so that accidents occurred.

ACCORDINGLY, you are HEREBY DIRECTED under subsection 145(1) of Part II of the Canada Labour Code to cease all contraventions immediately.

Dated at LaSalle, this 15th day of March 1995.

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: Aéroport de Montréal

PROVISIONS

Code: 145(1), 145(2)(a), 124, 126(1)(c)

KEY WORDS

Deicing, apron controller, pilot, ready to taxi, boom, basket, deicing truck, employment, TSB (Canadian Transportation Accident Investigation and Safety Board)

As a result of an accident which occurred during the deicing of a Royal Air Maroc (RAM) airplane at the deicing centre of Mirabel International Airport in which three employees of Canadian International Ltd. (Canadian) met a tragic end, the safety officer issued two directions to Aéroports de Montréal (ADM) and one direction to the traffic controller at the main apron of the airport, an employee of Aéroports de Montréal.

With respect to the two directions issued to ADM, one under paragraph 145(2)(a) of the Code and the other under subsection 145(1) of the Code, the Regional Safety Officer determined that ADM should not have been targeted by the safety officer as a party which played a role in the accident because ADM has no control over the activities that go on there. In addition, the officer had not described the alleged danger in the direction. The Regional Safety Officer also determined that the health and safety of the employees of ADM was never put at risk, and that since the Code applies to employment, there had to be such an employer-employee relationship. The Regional Safety Officer rescinded the two directions to ADM.

The direction issued to the employee required that he confirm with the pilot of the airplane that deicing was finished before giving the pilot taxi clearance on the apron. The direction [sic] was out of time and the request was dismissed. However, in view of the facts discussed on the review of the two directions issued to ADM, it was established that the role of the apron controller was solely to ensure that any traffic on the apron is completely safe. It is not the role of the apron controller to ensure that the pilot was "Ready to Taxi", an expression that was described as being the responsibility of the pilot, to ensure that all maintenance and other operations were finished and that the aircraft was free to move and accordingly ready to taxi.