Decision no. 95-013

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant:	Royal Air Maroc Montreal, Quebec Represented by: Mr. Edouard Beaudry and Mr. François Duprat
Interested party:	The Attorney General of Canada The Department of Justice Canada Represented by: Mr. Raymond Piché and Ms. Nadine Perron
Mis-en-cause:	Denis Caron Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

A hearing was held on June 21, 1995 at Montreal, Quebec

Intervention of the Attorney General of Canada

The Attorney General of Canada sought leave to intervene in the hearing in this case. The Attorney General of Canada argued that since it was possible that no party would intervene in support of the said directions, he had all the necessary interest in arguing that the impugned directions were consistent with Part II of the Canada Labour Code (hereinafter the Code). Mr. Duprat confirmed that he did not object to the Attorney General's intervening in this case. The Attorney General of Canada was therefore authorized to intervene.

Background

The facts

On January 21, 1995, a work accident that caused the death of three employees of an employer covered by the Code, namely, the airline Canadian International Airlines Ltd. (hereinafter Canadian), occurred at Mirabel International Airport.

This accident occurred when the three employees, who were standing in two buckets some fifteen metres above the ground, and their fellow workers were deicing[1]1 a Boeing 747-400 aircraft belonging to the national airline Royal Air Maroc (hereinafter RAM). The accident happened when the RAM aircraft began to move while deicing was still in progress. As a result, the aircraft's rear stabilizers struck the hydraulic booms that were supporting the buckets, overturning the two trucks performing the deicing. The three employees of Canadian in the buckets were thus thrown to the ground and died as a result of their fall.

The investigation

On January 21,1995, Mr. Denis Caron, a safety officer, visited Mirabel International Airport to conduct an investigation pursuant to the Code. On January 22, 1995, during a meeting at Canadian, the safety officer met with Mr. Mohamed Touhami, Station Manager, and Mr. A. Benmbarek, Manager for Canada, both RAM employees. The safety officer reported that he informed these two persons that he wanted to meet with the pilot and co-pilot involved in the incident to question them. The two pilots were never questioned because it was impossible for the safety officer to meet with them since they had returned to Morocco.

The safety officer's investigation was therefore limited to the analysis of the preliminary version of events as reported on February 13, 1995 by Mr. Gilbert Péloquin, the lawyer who normally represents RAM. According to this version, "the captain and his co-pilot stated that they received the radio message 'deicing completed'. Following this message, the captain tried twice to obtain confirmation that de- icing has been completed, but received no response." According to the safety officer, the captain then concluded that deicing had in fact been completed and requested permission to move "without receiving oral, visual or other confirmation".

With regard to the airline itself, the safety officer noted that "Royal Air Maroc has a contract with Canadian and that the two companies were supposed to have memorandums of understanding on aircraft deicing procedures and that Royal Air Maroc did not provide supervision that was adequate to ensure that the deicing procedures applicable to it are followed".

The directions

In this case,[2] the safety officer issued numerous directions. Two of these directions were brought to the attention of the Regional Safety Officer by RAM.

The first direction (APPENDIX-A) was issued by the safety officer under section 145(1) of the Code on March 15, 1995 to the captain, Mr. Boubker Cherradi, an employee of RAM, for contravening section 126(1)(c) of the Code, which reads as follows:

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[1] For information purposes, de-icing is a procedure used to melt frost, ice or snow that accumulates on an aircraft or to prevent one or another of the aforementioned from forming or accumulating.

[2] A number of airlines and de-icing companies were issued directions by the safety officer. The requests for review filed by the various airlines and companies in question were heard separately.

126(1) 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;

The second direction (APPENDIX-B) was issued by the safety officer pursuant to section 145(1) of the Code on March 15, 1995 to Royal Air Maroc, an employer subject to the Code, for contravening section 124 of the Code, which reads as follows:

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

Submission of Royal Air Maroc

The detailed written arguments of RAM were entered in the record. Mr. Duprat presented a number of arguments in this case. Briefly stated, they are as follows:

– The safety officer exceeded his jurisdiction by investigating this accident because only the Board established pursuant to the Canadian Transportation Accident Investigation and Safety Board Act had jurisdiction to investigate an aviation occurrence.

– Royal Air Maroc, located in Montreal, Quebec, is not the employer of Mr. Cherradi.

– The Code does not apply in the present case because the aircraft was in operation when the accident occurred.

– The safety and health of RAM's employees was never put at risk, as the direction claims, because the accident victims are employees of Canadian, and not of RAM.

– The pilot received oral confirmation that deicing had been completed.

Submission of the Attorney General of Canada

The detailed written submission of the Attorney General of Canada was entered in the record. Mr. Piché refuted one by one RAM's arguments and alleged that the pilot and the airline acted contrary to the Code in this case. I will have to repeat some of Mr. Piché's arguments in my analysis and I therefore do not intend to examine them in greater detail for the time being.

Decision

It is clear that this case is very complex. This is due, in part, to the many investigations conducted following the accident. For example, there were investigations by the Royal Canadian Mounted Police, the Canadian Transportation Accident Investigation and Safety Board (hereinafter the TSB), the Coroner, Transport Canada Aviation, Human Resources Development Canada, as well as internal investigations by the various companies concerned. With the exception of these

companies, all the participants had a specific mandate under a statute that authorized them to intervene. The same is true of the safety officer who investigated pursuant to the Code in this case. Consequently, the arguments made by Mr. Duprat raise very relevant questions that must be answered.

Argument No. 1

The safety officer exceeded his jurisdiction by investigating this accident because only the TSB established pursuant to the Canadian Transportation Accident Investigation and Safety Board Act had jurisdiction to investigate an aviation occurrence.

The fact that an aviation occurrence is investigated by the TSB does not preclude the launching of another investigation authorized by a different statute for a different purpose. It is clear on reading the Canadian Transportation Accident Investigation and Safety Board Act that the TSB has exclusive jurisdiction to investigate an aviation occurrence in order to make findings as to their causes and contributing factors. In my opinion, the TSB's monopoly of investigation exists only within these parameters. As Mr. Piché pointed out, section 127(2) of the Code implicitly recognizes the primacy of the TSB as regards control of the site of an accident involving an aircraft in order to enable the Board to investigate.

The memorandum of understanding signed between the Minister responsible for Human Resources Development Canada (HRDC) and the TSB distinguishes between the mandates of these two organizations and thus recognizes the separate application of each under their respective enabling statutes. The roles of the investigators may overlap in certain cases, but the ultimate objective of the investigation that each conducts is very different. The purpose of the Act governing the TSB is to advance transportation safety, whereas the purpose of the Code is primarily the protection of employees. Consequently, the safety officer conducts his investigation in cooperation with the TSB if necessary, but his investigation is not held up by this cooperation because the accident that occurred is a work accident that involves employers and employees who are subject to the Code.

A safety officer who is called upon to intervene following an aviation occurrence must investigate, not to make findings as to its causes and contributing factors, but to ensure that the safety and health of employees are not endangered. If the safety officer discovers a situation that is contrary to the Code and its Regulations, or sees that a danger exists to employees in the workplace, the safety officer must react by issuing appropriate directions to the employer or the employees. The safety officer thus has a power that TSB investigators do not have. To argue that a safety officer lacks jurisdiction to investigate these situations would be tantamount to condoning the unnecessary exposure of employees to risks, indeed dangers, until the TSB has completed its investigation. In my opinion, this position is untenable because it does not recognize the importance that Parliament gave to the safety of employees in the workplace by declaring that the Code applies, in this field, "notwithstanding any other Act of Parliament or any regulations thereunder" {s. 123(1)}.

In short, the safety officer was authorized to investigate in this case under the powers conferred on him by the Code. For all these reasons, I therefore reject Mr. Duprat's first argument.

Arguments Nos. 2, 3 and 4

2. Royal Air Maroc, located in Montreal, Quebec, is not the employer of Mr. Cherradi.

3. The Code does not apply in the present case because the aircraft was in operation when the accident occurred.

4. The safety and health of RAM's employees were never put at risk, as the direction alleges, because the accident victims are employees of Canadian and not of RAM.

I have grouped these three arguments under the same heading because they all deal with the jurisdiction of RAM. I cannot address any of these arguments without determining whether the Code applies to RAM and to the pilot and captain.

Mr. Duprat was very explicit in his arguments. He does not believe that a foreign company like RAM, whose head office is in Morocco, can be declared to be under federal jurisdiction and that a Canadian statute can apply to it. Consequently, the question I must answer first is this: can Canadian legislation governing labour relations and working conditions apply to a foreign airline such as RAM? To answer this question, I rely, first, on the decision of the Supreme Court of Canada in Commission de la santé et de la sécurité du travail and Ginette Bilodeau v. Bell Canada, [1988] 1 S.C.R. 749, a decision to which Mr. Piché referred earlier, and, second, on international practices relating to the observance of foreign labour legislation.

Decision of the Supreme Court of Canada

First, in order to understand clearly the importance of the application of the Code in general, one must understand the application of the individual parts of the Code. The Code comprises three separate parts. The purpose of Part I of the Code is to govern relations that exist between the various parties in their work environment. Part II of the Code ensures that the working conditions of employees do not endanger their safety and health. Part III of the Code establishes minimum employment standards. Taken together, the three parts of the Code constitute a legislative entity governing the labour relations and working conditions of works, undertakings or businesses under federal jurisdiction. This statute has a direct effect on the management of the undertaking because it sets out the criteria that a federal work, undertaking or business must meet.

In the above-cited decision, the Court held that the provincial legislation did not apply to Bell Canada, a federal undertaking. The Court based this finding on the fact that Parliament had exclusive jurisdiction in this case and that this jurisdiction precludes the application to federal undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking.

Consequently, this decision establishes that no provincial, and by extension, territorial or other statute dealing with labour relations or working conditions can apply to a federal undertaking because this statute would interfere directly with the management and the working conditions of the undertaking, which the Court found to be unacceptable. The corollary of this decision, in my

opinion, is that a federal statute, such as the Code, whose purpose is to establish standards governing working conditions or labour relations, cannot apply to a provincial, territorial and, a priori, a foreign undertaking, for the same reason as the Court gave in the above-cited decision.

International practices

As I noted above, the Code is a statute that governs the labour relations and working conditions of federal undertakings. The Code applies to employment, which means that it applies to all employees and employers through a contract of employment that binds these parties to one another. In certain sectors of activity, such as shipping and navigation and air transportation, to name but two, the Code imposes on the employer the obligation to protect their employees, even during trips of short duration by these employees abroad. In this regard, for example, section 128(5) of the Code provides, in the case of a refusal to work, the following:

> 128(5) For the purposes of subsections (3) and (4),
>
> (a) a ship is in operation from the time it casts off from a wharf in any Canadian or foreign port until it is next secured alongside a wharf in Canada; and
>
> (b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from any Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

It is clear from the wording of this provision that the Code applies to Canadian employees under federal jurisdiction even when these employees are required to work in a foreign country. Consequently, Parliament decided to apply Canadian labour legislation to Canadian employees working on foreign soil.

Because Canada extends its labour legislation to cover Canadians working in foreign countries, it is reasonable, and even desirable, that it agree to the application of Moroccan labour legislation to Moroccan nationals working on Canadian soil for a Moroccan airline. In fact, this is probably why, in deference to foreign legislation, a country like Canada does not apply its labour legislation, in the above-mentioned same sectors, to foreign employees of a foreign employer. This is especially true in the shipping and navigation sector where Canada defers to the application, aboard a foreign ship, of the labour legislation and accompanying regulations in force in the country of origin of this ship. In short, the Code does not apply aboard foreign ships that are not of Canadian registry.

Thus, were the Code to be applied to the airline RAM, whose head office is in Morocco, the immediate effect would be to impose on a foreign company the working conditions in effect in another country, such as Canada. Obviously, this situation would be no more acceptable to Morocco than it would be to Canada.

It would be unthinkable if, each time an aircraft landed on foreign soil, it automatically became subject to the labour legislation of the country where it landed. Were this the case, the minimum wage of crew members would vary from country to country, as would noise levels or lighting

levels, the composition of the occupational safety and health committee, payment of the salary of members of these committees, etc. This would cause total confusion.

Moreover, in the present case, RAM's aircraft was in operation when the accident occurred because the doors of the aircraft were closed, the engines were running and the aircraft was moving under its own power towards the apron in preparation for takeoff. In these circumstances, the members of the crew who, in the final analysis, were all Moroccans and not Canadians, are under the sole jurisdiction, in matters relating to working conditions and labour relations, of the airline RAM whose head office is in Morocco.

I am of the opinion that Part II of the Canada Labour Code does not apply to Royal Air Maroc, whose head office is in Casablanca, Morocco. In these circumstances, the Code likewise does not apply to the airline pilot, Mr. Cherradi, because he is a Moroccan employee wholly under the jurisdiction of RAM in Morocco.

Mention should be made here of the particular situation of RAM's ticket office in Quebec and the relationship that apparently exits between this office and the pilot of the aircraft, or its relationship with RAM's head office located in Morocco. It was established to my satisfaction that there is no connection, administrative or otherwise, between the pilot and RAM's ticket office. The ticket office is a separate operation. Its activities are essentially those of a travel agent, as was confirmed by the Commission d'appel en matière de lésions professionnelles du Québec for purposes of contributions to Quebec's compensation plan, although this does not necessarily exclude it from federal jurisdiction. However, the only link existing between the ticket office, on the one hand, and RAM's pilot and other crew members aboard the aircraft, on the other hand, is the fact that, at the time of the accident, the aircraft was on Canadian soil. In my opinion, this link is too ephemeral and tenuous to constitute a decisive consideration in relation to labour legislation, of federal jurisdiction over RAM, whose head office is in Morocco, and RAM's pilot and captain.

In short, in light of all the foregoing, I conclude that the safety officer should not have issued the directions that he issued in this case to the airline RAM and to the pilot and captain of the RAM aircraft.

I would add, however, that the fact that the Code does not apply in this situation in no way precludes the operation of another statute, such as the Canadian Transportation Accident Investigation and Safety Board Act, to ensure that the necessary and appropriate recommendations are formulated. If, under the Act concerning the TSB, or any other relevant statute, such as the Aeronautics Act or the Criminal Code, penalties must be imposed to guarantee safety in this transportation sector, it will be up to the competent authorities to take the necessary measures. Finally, this situation in no way diminishes the authority of the safety officer to investigate under the Code an aviation occurrence involving employees of a federal undertaking.

For all the above-mentioned reasons, I hereby RESCIND the direction issued by safety officer Denis Caron on March 15, 1995, pursuant to section 145(1) of the Code, to the employer Royal Air Maroc, and I hereby RESCIND the direction issued by safety officer Denis Caron on March 15, 1995, pursuant to section 145(1) of the Code, to Royal Air Maroc employee Mr. Boubker Cherradi, pilot and captain.

Mr. Duprat's final argument, namely, argument no. 5 mentioned earlier, is therefore moot because the Regional Safety Officer no longer has the necessary jurisdiction to consider the evidence.

Decision rendered on November 3, 1995.

Serge Cadieux
Regional Safety Officer

APPENDIX A

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

DIRECTION TO THE EMPLOYEE UNDER SECTION 145(1)

On January 21, 1995, the undersigned safety officer conducted an investigation in the workplace used by Mr. Cherrabi (sic) Boubker, a pilot employed by Royal Air Maroc, an employer which is subject to Part II of the Canada Labour Code and which is located at 1001, boul. de Maisonneuve ouest, bureau 440, Montréal (Québec) H3A 3C8, the said workplace being operated by various deicing companies and known by the name De-icing Centre, located at Montreal International Airport, Mirabel, Quebec.

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

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

The pilot of B 747-400, by requesting permission to move and by moving on the deicing site, while neglecting to obtain verbal, visual or other confirmation from the deicing team that deicing had been completed, did not take the necessary steps to ensure his own safety and health and the safety and health of any person likely to be affected by his acts or omissions, with the result that accidents occurred.

CONSEQUENTLY, you are HEREBY ORDERED, under section 145(1) of Part II of the Canada Labour Code, to cease all contraventions forthwith.

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

Denis Caron
Safety Officer
#1521

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APPENDIX B

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

DIRECTION TO THE EMPLOYER UNDER SECTION 145(1)

On January 21, 1995, the undersigned safety officer conducted an investigation in the workplace used by Royal Air Maroc, an employer subject to Part II of the Canada Labour Code and located at 1001, boul. de Maisonneuve ouest, bureau 440, Montréal (Québec) H3A 3C8, the said workplace being operated by different deicing companies and known by the name De-icing Centre located at Montreal International Airport, Mirabel, Mirabel, Quebec.

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

Section 124 of Part II of the Canada Labour Code, (Part II):

The employer, by allowing the pilot of B 747-400 to request permission to move and to move after neglecting to obtain oral, visual or other confirmation from the deicing team that deicing had been completed, did not provide the supervision necessary to ensure the safety and health of any person likely to be affected by the acts or omissions of the pilot, Mr. Cherrabi (sic) Boubker, with the result that accidents occurred.

CONSEQUENTLY, you are HEREBY ORDERED, under section 145(1) of Part II of the Canada Labour Code, to cease all contraventions forthwith.

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

Denis Caron
Safety Officer
#1521

TO: Mr. Abderrazak Benmbarek Mr. Gilbert Poliquin
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Decision no.: 95-013

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: Royal Air Maroc

Respondent: The Attorney General of Canada

KEY WORDS

Canadian Transportation Accident Investigation Safety Board (TSB), investigation, occurrence, Royal Air Maroc (RAM), aircraft in operation, foreign statutes

PROVISIONS

124, 126(1)(c), 145(1)

Following an accident that took the life of three employees of Canadian International Airlines Ltd. who were deicing an aircraft belonging to Royal Air Maroc (RAM), a safety officer concluded that the pilot of the RAM aircraft left the deicing centre before deicing had been completed. He issued a direction to RAM through the Montreal ticket office and a direction to the pilot and captain of the aircraft in question.

Upon review, the Regional Safety Officer determined that RAM, whose head office is located in Morocco, was not under federal jurisdiction and, furthermore, that in deference to foreign statutes, the Code should not be applied to a foreign airline. For all these reasons, the Regional Safety Officer RESCINDED the two directions.