

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

Applicant: Transport Super Rapide Inc.  
Montreal, Quebec  
Represented by: François Bouchard, Counsel

Interested party: Teamsters, Local 931  
Represented by: Réjean Massé, Business Agent

Mis-en-cause: Pierre Morin  
Safety Officer  
Human Resources Development Canada

Before: Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

This case was heard and decided by means of written submissions and a teleconference.

Background

On November 3, 1995, safety officer Pierre Morin visited the Lafarge Canada inc. cement works to conduct an inspection under Part II of the Canada Labour Code (hereinafter the Code). The safety officer visited this place to observe the work procedures of employees of Transport Super Rapide inc. In his Narrative Report, the safety officer describes his observations as follows:

"During my visit, I observed the work procedures of two employees of different companies, Lafarge and Transport Super Rapide. This observation enabled me to determine that in both cases, the employees must access the manhole located on top of the tank trailer by walking along a walkway in the form of a metal grid. They must do this before loading, in order to open the manhole, and after loading, in order to close it. I could see that the upper part of the tank trailer of Transport Super Rapide was equipped with two small metal walkways adjacent to the main walkway. I could also see that the height of these walkways exceeded 2.4 metres.

When I returned to my office, I consulted decisions of the regional safety officer for similar cases: Mantei's Transport Ltd., Calgary, Alberta; Auto Haulaway Inc., Oakville, Ontario; M/C Motors Carriers Limited, Oshawa, Ontario.

These decisions found in favour of the federal safety officers who had ordered employers to take steps to comply with the regulatory provisions of section 12.10(1)(a) and (l) for any unguarded structure more than 2.4 metres above the nearest permanent safe level.

Whereas, therefore, the tank truck observed did not meet the regulatory requirements even though a walkway adjacent to the principal walkway would not prevent an employee from falling if the employee lost his footing;

For all the reasons stated, I issued the employer, Transport Super Rapide, a direction requesting it to comply with the regulatory provisions in order to provide safe access for its employees to the top of the tank trailers."

A direction (APPENDIX) was issued to the employer under subsection 145(1) of the Canada Labour Code, Part II.

#### Submissions for the employer

Mr. Bouchard presented the following three arguments to the regional safety officer:

- the tank trucks operated by our client do not constitute a structure within the meaning of section 10.12 of the Canada Occupational Safety and Health Regulations;
- the CSA standards listed in paragraphs (a), (b) and (c) of section 12.10.2 of the Canada Occupational Safety and Health Regulations clearly do not apply to the type of operation performed by the employees of our client. On this second point, section 12.10 of the said Regulations cannot therefore apply in the instant case;
- generally speaking, a thorough reading of the Canada Occupational Safety and Health Regulations, the other regulations and the Canada Labour Code reveals that our client does not have to comply with safety officer Morin's directions.

Moreover, Mr. Bouchard pointed out that, in a case involving Transport Provost, a judge of an Ontario court acquitted this carrier in a case almost identical to the instant case. Mr. Bouchard subsequently asked the regional safety officer to suspend the hearing in this case until a Court of Appeal in Ontario rendered a decision, the trial judge's decision having been appealed. This request was granted.

#### Submissions for the employee

Mr. Massé did not have to submit arguments in this case. In fact, following a teleconference in which he participated, along with Mr. Bouchard, Mr. Morin, accompanied by his technical advisor, Mr. Richard Dupuis, and myself, we agreed that the decision of the Court of Appeal had effectively settled the matter at issue in this case.

## Decision

The question that I must decide in this case is this: does a tank truck constitute a structure within the meaning of paragraph 12.10(1)(a)(i) of the Regulations? This provision reads as follows:

12.10(1) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from

(a) an unguarded structure that is

(i) more than 2.4 m above the nearest permanent safe level,

the employer shall provide a fall-protection system.

In the course of their duties, the Department of Human Resources Development's safety officers have conducted investigations and inspections in all areas of federal jurisdiction, including the interprovincial trucking industry. They were therefore justified in arguing that the structures covered by section 12.10 of the regulations also applied to the trucking industry. Consequently, trucks were considered structures and the entire interprovincial trucking industry had to comply with the above-described regulatory requirement. The Office of the Regional Safety Officer also interpreted this provision in the same manner. Moreover, the safety officer relied, in part, in issuing the attached direction, on decisions rendered by me.

However, recently, in *Her Majesty the Queen v. Transport Provost inc.*, Mr. Justice J. H. Jenkins interpreted section 12.10 of the Regulations in the opposite manner. He affirmed the decision rendered by the Honourable Judge D.M. Stone of the Ontario Court (Provincial Division) in which the defendant (Transport Provost) was acquitted of six charges laid by the plaintiff (the Crown) for breaches of the Canada Labour Code and the Canada Occupational Safety and Health Regulations. The whole debate centered on what constitutes a structure within the meaning of section 12.10 of the Regulations.

Mr. Justice J. H. Jenkins analysed the case law, considered various dictionary definitions, applied the rules of interpretation and rendered the following judgment:

"I am satisfied that the ordinary meaning of structure cannot include a truck or tank trailer.

Applying an expanded meaning to the word structure, since the legislation is remedial by nature, it cannot in my view include a truck or tank trailer which are mobile vehicles. Under certain circumstances, if a tank trailer were converted to a non-mobile permanent use similar to a house trailer, then it might qualify under the expanded definition. The legislature must have considered this issue, since it dealt with unguarded structures, temporary structures, and ladders in section 12.10.

I agree with the learned trial judge in his interpretation of the law, and dismiss this appeal."

The safety officer's direction was issued under section 145(1) of the Code. This provision authorizes the safety officer to issue a direction, in this case to the employer, "where a safety officer is of the opinion that any provision of this Part is being contravened...". This is exactly what the safety officer did in the instant case in pointing out that Transport Super Rapide had contravened the following provisions of the Code:

Paragraph 125(j) of Part II of the Canada Labour Code and subparagraph 12.10(1)(a)(i) of Part XII (safety materials, equipment, devices and clothing) of the Canada Occupational Safety and Health Regulations.

Because the Crown was nonsuited twice by the Ontario courts, I am obliged to recognize the validity of the decisions rendered. Consequently, the ordinary meaning of the term structure cannot be expanded to include a truck, a tank truck or a tank trailer. This does not mean that there is no risk in working on mobile vehicles more than 2.4 metres above the nearest permanent safe level. I am merely recognizing that the Regulations make no specific provisions for employees working unprotected on these vehicles. Since the safety officer's direction is based on such a specific provision, I am obliged to rescind it because it is unfounded in law.

The regional safety officer's power, when reviewing a direction, is specified in subsection 146(3), which reads as follows:

(3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken. (emphasis added)

Consequently, even if it is acknowledged that there are risks in working on these vehicles without protective devices, the law does not authorize the regional safety officer to issue a new direction to the employer under paragraph 145(2)(a) of the Code. I addressed this situation in *Westcoast Energy Inc. v. Occupational Safety and Health Committee and Canadian Pipeline Employees' Association*, unreported decision No. 93-007, at page 8, in which I wrote as follows:

"I do not conclude from the above that the absence of a procedure to abort a pig launch does not place the employee in a situation of risk. I am merely observing that the absence of such a procedure does not constitute an infraction which can be corrected under subsection 145(1) of the Code. Furthermore, since the safety officer purported to act under this latter provision, I cannot look at whether the safety officer could have acted under subsection 145(2) of the Code. To do so, I would have to substitute my decision for that of the safety officer and, if needed, issue directions, a power which is not entrusted upon the Regional Safety Officer when acting under section 146 of the Code."

For all the above reasons, I HEREBY RESCIND the direction issued on November 23, 1995 under subsection 145(1) of the Code by safety officer Pierre Morin to Transport Super Rapide inc.

Decision rendered on April 25, 1996

Serge Cadieux  
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On November 3, 1995, the undersigned safety officer checked the work procedures used by employees during loading of the tanks of trucks operated by Transport Super Rapide inc., an employer subject to Part II of the Canada Labour Code and located at 12321, boul. Métropolitain est, Montréal (Québec) H3B 3Z5.

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

Paragraph 125(j) of Part II of the Canada Labour Code, and subparagraph 12.10(1)(a)(i) of Part XII (safety materials, equipment, devices and clothing) of the Canada Occupational Safety and Health Regulations.

In this case, the persons working more than 2.4 m above the nearest permanent safe level are not protected against falls.

I hereby order you pursuant to subsection 145(1) of Part II of the Canada Labour Code to cease the contraventions not later than January 20, 1996.

Issued at Montreal, this 23 day of November 1995.

Pierre Morin  
Safety Officer  
No. 1726

TO: Transport Super Rapide inc.  
12321, boul. Métropolitain est  
Montréal (Québec)  
H3B 3Z5

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: Transport Super Rapide

Interested party: Teamsters, Local 931

**KEYWORDS**

Structure, truck, tank truck, Transport Provost.

**PROVISIONS**

Code: 125(j), 145(1)

Regs: 12.10(1)(a)

**SUMMARY**

A safety officer issued a direction under subsection 145(1) of the Code for a contravention of paragraph 12.10(1)(a) of the Regulations. This provision stipulates that a fall-protection system shall be provided to an employee working from an unguarded structure more than 2.4 metres above the nearest permanent safe level. This instruction was to the same effect as previous decisions rendered by the regional safety officer and in which trucks in general were equated with structures.

However, in a similar case that ended up in the Ontario Court of Appeal, the judge held that a truck or a tank trailer was not a structure within the meaning of section 12.10 of the Regulations. The regional safety officer therefore had no choice but to RESCIND the direction, since it was unfounded in law.