

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: Ottawa MacDonald-Cartier International Airport Authority
Ottawa, Ontario
Represented by: Charles E. Hurdon, Lawyer

Respondent: Public Service Alliance of Canada
Represented by: Rick Taylor, Regional Representative

Mis en Cause: Pierre Guénette
Safety officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

The parties agreed to proceed with this case by way of written submissions.

Background

On March 12, 1997, a tragic accident occurred on the premises of the Ottawa International Airport Authority (hereafter the Airport Authority). Mr. Lewis, an employee of the Airport Authority, suffered fatal injuries when a sweeper attached to a truck i.e. a snowplow, which he had left running, was driven over him.

The facts of this case are not disputed. Mr. Lewis was a member of the crew that was told by the crew supervisor to hook up sweepers onto the back of the trucks to clean the runway. This equipment is used for snow removal. Mr. Lewis hooked up his equipment, left the garage area and pulled up in front of the repair portion of the garage building. The events that followed are unclear. For some reason, Mr. Lewis left his truck, walked around it and went to the rear sweeper. When the accident occurred, he was standing in close proximity to the rear wheels of the sweeper, possibly checking a gauge since the control panel with the gauges is located in front of the rear tires.

Mr. Lewis had parked his truck, with the sweeper hitched to it, both with their motors running, in front of bay number 3 of the garage, thereby blocking its access. Another vehicle had to be repaired and to do so, it was necessary to use that bay. It was decided to have the operator of the truck, Mr. Lewis in the instant case, move his equipment away from the front of bay number 3. A mechanical supervisor went out to have the operator move his truck. He looked around but did not see anyone in the cab of the truck. He assumed that the driver had joined some co-workers at the pumps, a short distance away. The mechanic mounted the truck, released the maxi¹ brake, checked both side view mirrors, put the truck into the “drive” position and moved the vehicle ahead. It was later established that the rear wheel of the sweeper rolled over the victim inflicting him fatal injuries.

The investigation of the safety officer resulted in the issuance of a direction (see APPENDIX) under subsection 145(1) of the *Canada Labour Code*, Part II (hereafter the *Code*) to the Airport Authority. The safety officer was of the opinion that the Airport Authority contravened section 124 of the *Code* for failing to have a safe work procedure implemented prior to moving motorized equipment.

Submission for the Employer

The detailed submission of Mr. Hurdon is on record. In summary, the Airport Authority appealed the direction on the following grounds:

1. The Direction does nothing to ensure that the health and safety of employees of the Ottawa MacDonald-Cartier International Airport Authority are protected.
2. The employer is not guilty of any violation of s.124 of the *Canada Labour Code*, Part II and the Direction is aimed at employees of the Ottawa MacDonald-Cartier International Airport Authority and not at the employer, and therefore is not a proper Direction to Employer under s. 145(1).
3. Any other grounds on which the employer may rely at an oral hearing of this matter.

Mr. Hurdon elaborated on each argument. Interestingly enough, Mr. Hurdon prefaced the detailed submission with a Preliminary Argument in which he wrote:

“The Authority submits that the Safety Officer’s Direction should be rescinded as a result of a defect with the form of the said Direction. Directions are a powerful regulatory instrument that but for their exempted status would be published in the *Canada Gazette*. There are certain requirements of form which must be followed so as to permit the person in receipt of the direction to know what section is alleged to have been breached. The Safety Officer’s Direction refers to s.124 of the *Canada Labour Code*, Part II and then appears to cite that section of the *Code*. Section 124 is the general duty of employers section and does not deal with specific obligations of employers. Specific obligations are contained in s.125 in the regulations. The Direction is therefore wrong as it appears to impose a specific statutory obligation which does not exist.”

¹ The maxi brake is similar in concept to an automobile’s emergency brake and is designed to prevent the truck from being moved until the air pressure has reached the proper operating pressure.

Submission for the Employees

The detailed submission of Mr. Taylor is on record. Essentially, Mr. Taylor disagrees with Mr. Hurdon on every point. The Direction of the safety officer is appropriate because it conforms to industry standard in that drivers of all trucks must do a walk around of their vehicles before moving them. Also, Mr. Taylor argued the direction to employer under subsection 145(1) of the *Code*, citing a contravention of section 124, is appropriate in the circumstances because the direction deals with a safe work practice.

Decision

The issue to be decided in this case is whether a safe work procedure such as a walk around, or visual circle check as specified in the direction, must be carried out before an operator moves a motorized piece of equipment. However, before ruling on the substance of the direction, I must decide whether the safety officer is authorized to direct an employer to terminate a contravention of section 124 of the *Code* when there exists no specific obligation on the employer pursuant to section 125 of the *Code* to comply in the manner directed.

As Mr. Taylor noted above, the direction is issued to address a safe work practice. The Canada Occupational Safety and Health Regulations (hereafter the Regulations) do not however, as submitted by Mr. Hurdon, specifically address walk around of motorized equipment. The question I need to answer is therefore whether the safety officer has exceeded his jurisdiction by requiring the employer to comply as directed.

Section 124 provides:

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

The word “ensure²” found in section 124 of the *Code* means “to make certain”. The use of this word in the general duty of the employer evidently imposes a high standard of compliance upon the employer. Therefore, compliance with section 124 of the *Code* can only be achieved if the employer takes all reasonable precautions to protect the safety and health of his employees at work. This is particularly true in those situations where serious injury can occur and no safety standards have been prescribed to protect the safety and health at work of employees. In my opinion, the safety officer is authorized to consider the application of section 124 of the *Code* in those situations where there exists no regulatory standards applicable to the case before him/her.

It is noteworthy that a contravention of section 124 constitutes an offense subject to a prosecution which could be instigated in this case under subsection 148(6) of the *Code*. In this particular case, on a prosecution for a contravention of section 124 of the *Code* “*it is a defense for the person to prove that the person exercised due care and diligence to avoid the contravention.*” Evidently, if section 124 does not impose a specific obligation on the employer as section 125 of the *Code*

² The Concise Oxford Dictionary, Eight Edition, 1990, when followed by the clause *that*.

does, it nevertheless imposes on him/her an obligation to take all reasonable precautions to protect the safety and health of his/her employees at work, which obligation can be expressed as an obligation of due diligence.

Also, as stated in the preface to section 125 of the *Code*, that provision cannot restrict the generality of section 124 of the *Code*. Clearly then, since it was impossible for Parliament to address by Regulations all possible hazardous situations, the safety officer is authorized to reference section 124 of the *Code* when no specific regulatory standard exists or when a peculiar or unique hazardous situation needs to be addressed. That is the purpose of section 124 and it is the defense of the employer to show that all reasonable precautions were taken, in the instant case, to prevent the accident.

The accident investigated by the safety officer in the instant case resulted from circumstances that are not specifically covered by the Regulations. Given that

- sweepers are heavy machinery with their own source of power,
- that they are hitched to another vehicle with also its own source of power,
- that there are blind spots on this type of machinery,
- that the control panels on the sweepers are located in a very hazardous position,
- that the area where the equipment was parked is a busy work environment,

the safety officer was justified, in my opinion, to require that a safe work procedure be followed whenever a motorized piece of equipment is to be moved.

Turning to the issue to be decided in this case, I am of the opinion that the direction of the safety officer is slightly defective in that it requires the implementation of a specific procedure i.e. a visual circle check commonly referred to as a walk around, whenever an unspecified “motorized piece of equipment” is to be moved. Obviously, the safety officer intended for his direction to apply not only to the combined truck and sweeper but also to other pieces of motorized equipment. However, the wording of the direction gives the employer no flexibility to adapt a particular safe work procedure to a particular risk.

I agree with Mr. Hurdon that this type of direction could lead to problems in other similar situations. For example, requiring a walk around of a pallet truck or other small pieces of motorized equipment before moving them is excessive. Moving such equipment can be accomplished safely by other means such as following the manufacturer’s recommendations. Hence the wording of the direction should be amended to reflect both the situation investigated by the safety officer and other similar situations involving the movement of various pieces of motorized equipment.

Mr. Hurdon argued that a walk around of the truck and sweeper involved in the accident does nothing to ensure that the safety and health of employees is protected. He explained that the total length of the combined snowplow and sweeper (the Unit) is 19 meters, or 62 feet. Mr. Hurdon submitted that “an employee who would perform a walk around of the Unit would take

approximately 45 to 50 seconds before returning to the cab and engaging the vehicle.” According to Mr. Hurdon, during this time period, another person could position himself/herself in the same hazardous position and be injured in the same manner Mr. Lewis was.

I do not accept that argument. While it is impossible to cover all scenarios, I firmly believe that a safe work procedure must be developed and implemented whenever a piece of motorized equipment is to be moved. In this case, if the mechanic had carried out a walk around of the Unit he would have, in all likelihood, seen Mr. Lewis and prevented the tragic accident. Clearly then, a walk around of the Unit, or another equivalent safe work procedure, would ensure that the safety and health of employees at work is protected.

Mr. Hurdon suggested that, if a direction must be issued it should be varied to the following:

Before an operator moves a motorized piece of equipment, he shall perform such checks as are necessary to ensure no person is at risk of being struck.

In this proposed variance, it is incumbent upon each individual operator of motorized equipment to assume the responsibility to determine which checks are necessary and to perform them in such a manner that no person is at risk of being struck. While I agree with the concept proposed, I would remove from the proposed variance the onus which has been placed on the operator to determine the procedure that should be followed and impose that onus clearly upon the employer. To satisfy his obligation of due diligence referred to above, the employer is responsible to develop and communicate to the employees the rules and procedures to be followed, to provide the employees with adequate instruction, training and supervision in respect of the foregoing, to enforce those rules and procedures and, where necessary, discipline employees who do not adhere to the employer’s instructions and to record the above actions.

I am also of the opinion that the direction issued for a contravention of section 124 of the *Code* is a proper one since it is directed to the employer who controls the work place, the equipment and the employees. The responsibility to protect the safety and health of each employee is devolved by legislation upon the employer to ensure that all reasonable precautions are taken to protect the employees’ safety and health. Like the safety officer before me, I am not convinced that the employer had taken all reasonable precautions to protect, in this case, the safety and health of Mr. Lewis. There is no evidence the employer has clear procedures that would ensure that motorized equipment can be moved safely.

Mr. Hurdon asserts that “the *Code* cannot impose a positive duty on an employer to do something which can only be carried out by employees.” This statement ignores the basic concepts of occupational safety and health. Safety and health is a shared responsibility. Mr. Lewis has paid with his life for an accident that was, in my opinion, easily preventable. As I said above, the legislation devolved upon the employer the responsibility to develop safe work procedures and ensure the employees adhere to those procedures. I was not made aware of the existence of such procedures. Unless a safe work procedure is developed and implemented for future similar situations, the same tragedy could easily repeat itself.

I would vary the direction of the safety officer and retain its essence by rephrasing the description of the contravention to ensure the employer develops a safe work procedure that would address the circumstances of this case. At the same time, the amended direction should provide the employer with sufficient flexibility to allow for risk analysis to be carried out in other similar situations and appropriate safety measures implemented.

While the direction will be phrased in a more generic manner to apply to the various pieces of motorized equipment used at the airport, I support the safety officer's requirement for a visual circle check of the Unit involved in the accident before moving it. This does not mean that this is the only procedure acceptable, however until such time that another equivalent safe work procedure is developed, the employer is on notice to abide by the safety officer's direction as it concerns the Unit. The employer should inform the safety officer if another procedure is implemented.

In closing, I would add that a procedure developed without the involvement of the safety and health committee or, if none exists, the safety and health representative, is a procedure that stands little chance to be accepted and adhered to by employees.

For all the above reasons, **I HEREBY VARY** the direction issued under subsection 145(1) of the *Code* on March 12, 1997 by safety officer Pierre Guénette to the Ottawa MacDonald-Cartier International Airport Authority by replacing the description of the contravention with the following description:

1. Section 124 of the Canada Labour Code, Part II

There is no safe work procedure, such as a visual circle check, to be followed prior to moving a motorized piece of equipment.

Decision rendered on August 27, 1997

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On March 12th, 1997, the undersigned safety officer conducted an inquiry into the fatality of Mr. Peter Lewis in the work place operated by OTTAWA AIRPORT AUTHORITY, being an employer subject to the *Canada Labour Code*, Part II, at MACDONALD-CARTIER INTERNATIONAL AIRPORT, BUILDING T-51, GLOUCESTER, ONTARIO, the said work place being sometimes known as Ottawa International Airport.

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

1. Section 124 of the *Canada Labour Code*, Part II

Before an operator moves a motorized piece of equipment, he shall perform a visual circle check to ensure no person is at risk of being struck.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than March 12th, 1997.

Issued at Gloucester, this 12th day of March 1997.

PIERRE GUÉNETTE
Safety Officer
1759

To: OTTAWA INTERNATIONAL AIRPORT AUTHORITY
MACDONALD-CARTIER INTERNATIONAL AIRPORT
BUILDING T-51
GLOUCESTER, ONTARIO
K1A 0N5

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Ottawa MacDonald-Cartier International Airport Authority

Respondent: Public Service Alliance of Canada

KEYWORDS

Sweeper, snowplow, truck, due diligence, walk around, visual circle check, motorized equipment, ensure, safe work procedure.

PROVISIONS

Code: 124, 145(1), 148(6)

SUMMARY

An employee of the Airport Authority was killed when a combined unit of a truck and sweeper, which he had momentarily left running to check some gauges on the sweeper, was driven over him. The safety officer gave a direction to the employer requiring him to have employees carry out a visual circle check of motorized pieces of equipment prior to moving the equipment. On review the Regional Safety Officer (RSO) essentially agreed with the safety officer. The RSO discussed the appropriateness of referencing section 124 of the *Code* when no specific regulations exist to address the situation investigated by the safety officer. The RSO **VARIED** the direction to allow the employer to carry out a risk analysis of each situation where motorized equipment needs to be moved and to give the employer the flexibility to decide which procedure is most appropriate in each case.