Decision no.: 97-019

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant:	Quebec Ports Terminals Inc. Represented by: Messrs. Jean Gaudreau, Denis Caron and Normand Giroux
Respondent:	International Longshoremen's Association Local 2033 Represented by: Mr. Ange-Marie Lévesque
Mis-en-cause:	Daniel Michaud Safety Officer Transport Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

This case was heard through the submission of briefs and, with the parties' consent, was supplemented by a teleconference. Since I am satisfied that the requests for review were timely in both cases, I notified the parties of my intention to hear the arguments concerning the two directions (APPENDIXES A and B).

Background

An investigation was begun further to a complaint from a longshoreman concerning the pitiful state of cranes aboard the ship " Kappara " in the port of Gros-Cacouna and the employer's intention to load the ship despite this situation. Loading of the ship began late in the day on July 17, 1997. According to the safety officer's report, "Employees were deployed on the wharves and on the ship to perform the said operations when we arrived. Mr. André Ouellet, the duty superintendent, was aboard the ship giving instructions to his employees to perform the work." At that point, the safety officer apparently forbade the employees and the superintendent to use the cranes aboard the ship until his inspection was completed. To quote Mr. Michaud, "It was more than obvious, in this case, that the cranes were in a pitiful state."

Following inspection of the various cranes aboard the ship and a check of the documents that were required to be aboard, the safety officer informed Mr. André Ouellet that the cranes were still not safe and that he could not use them to unload the ship. In the safety officer's words, " **Had we not intervened**, the company would have performed the said operations despite the plainly visible advanced state of deterioration of the cranes, even though their condition was known to the people on the site."

The safety officer made an order, "S.I.7", under the *Canada Shipping Act* covering the Captain, the ship's owners and the shipping agents that forbade them to use the tackle. The ordered described in detail thirteen infractions that were contributing in making the use of the cranes unsafe. The safety officer also issued two directions to the employer. The first direction (APPENDIX A), issued pursuant to subsection 145(1) of Part II of the *Canada Labour Code* (hereinafter the *Code*), describes two contraventions of the *Code*. The second direction (APPENDIX B) describes a condition that the safety officer considered a danger to the longshoremen.

The employer's arguments

Mr. Giroux made a written submission setting forth the grounds for contesting the two directions. It states the following concerning the direction issued under subsection 145(1) of the *Code*:

> "As is stated in the written direction, the latter is based on Mr. Michaud's belief that QPT contravened two provisions of Part II of the Canada Labour Code, namely:
>
> **1) "section 124 of Part II of the Canada Labour Code, in that the employer is not ensuring the protection of safety and health at work by not instructing its employees to do visual and mechanical examinations to evaluate the apparent state of compliance of elevating devices."**
>
> **2) "paragraph 125(t) of Part II of the Canada Labour Code, in that the employer is not ensuring that machinery, equipment and tools used by its employees in the course of their loading, unloading or handling goods aboard ships meet prescribed safety standards."**
>
> QPT is requesting that this direction be reviewed and rescinded for the following reasons:
>
> 1) The first contravention that Mr. Michaud claims to have observed is based on erroneous, unverified facts.
>
> QPT instructs its employees to do visual and mechanical examinations to evaluate the apparent state of ships' elevating devices. More particularly, this was done in the case of the M.V. "Kappara", the whole as described in a letter of August 8, 1997 from Mr. Jean-Louis Perez to Mr. Daniel Michaud.

2) The second contravention that Mr. Michaud claims to have observed is based on erroneous, unverified facts and the obligation to which Mr. Michaud refers cannot in this case be held against QPT.

As stated earlier, QPT instructs its employees to do visual and mechanical examinations to evaluate the apparent state of ships' elevating devices, but QPT does not have to ensure that these devices meet regulatory standards because this is not a place controlled by it.

In fact, the ship is controlled by the Captain, and he and Transport Canada are responsible for ensuring that these elevating devices meet regulatory standards. QPT cannot do these examinations and has neither the authority nor the expertise to do so.

Moreover, in this case, Mr. Michaud himself issued orders to the Captain, under the powers conferred on him, to ensure that the elevating devices meet regulatory standards."

With regard to the second direction issued to the employer under paragraph 145(2)(a) of the *Code*, Mr. Giroux presents the following arguments:

"This second direction is based on the following opinion of Officer Michaud:

"It is dangerous for any employee to use the cranes aboard the Maltese ship (SIC) "Kappara" that the employer makes available to employees to load goods aboard the said ship, because the said cranes do not meet the applicable regulatory standards and do not therefore protect the safety and health of the employees at work."

QPT is asking that this direction be reviewed and rescinded for the following reasons:

1) The observation that Mr. Michaud claims to have made is incorrect, unverified and erroneous because QPT's employees did not work aboard the ship and because Mr. Michaud subsequently issued directions.

2) Even assuming that Mr. Michaud's observation is correct, which, moreover, is not the case, this same direction is improper and unlawful because its purpose is also to require QPT to verify that the ship's cranes meet the applicable regulatory standards. QPT has no such authority and cannot do these examinations. This is the responsibility of Transport Canada and its officers.

We are asking you to extend the 14-day time limit for requesting a review of the Safety Officer's directions and to proceed with your inquiry immediately."

Mr. Gaudreau explained during the teleconference that, apart from the question of the time limit, he had no real desire to debate the specific facts of this case. He wanted instead to know, in the case of the first direction, to which regulatory standard the safety officer was referring. If it was a standard under the Tackle Regulations made pursuant to the *Canada Shipping Act*, then he would object.

With regard to the contravention of section 124 of the *Code* mentioned in the direction issued pursuant to subsection 145(1) of the *Code*, Mr. Caron argued that he could establish, with supporting documents, that the employees had in fact received training in the use and examination of tackle. In the letter he sent me further to my request concerning these documents, Mr. Caron writes as follows:

"As for the wording of the description of the danger in the direction issued pursuant to section (sic) 145. (2), the text of which reads as follows:

> "It is dangerous for any employee to use the cranes aboard the Maltese ship "Kappara" that the employer makes available to employees to load goods aboard the said ship, because the said cranes do not meet **the applicable regulatory standards** and do not therefore protect the safety and health of the employees at work."

we consider that the description of the danger is imprecise, but we would accept this description if the objectionable part of this text was eliminated. We are well aware that under Part II of the C.L.C., there are no applicable regulatory standards with respect to equipment for loading and unloading ships."

Arguments on behalf of the employees

Mr. Lévesque did not make any written submissions but participated in the teleconference. He explained that he was never asked personally to participate in the investigation or to go aboard the ship, and this was confirmed by the safety officer during the teleconference. Mr. Lévesque further explained that, contrary to what the safety officer implied, when a ship is to be unloaded, each equipment operator does a visual and mechanical examination of the tackle. However, the safety officer was of the opinion that the employees were very unclear as to how to do these examinations.

Decision

Time limit for requesting a review

The first question resolved during the teleconference was the time limit prescribed by subsection 146(1) of the *Code* for requesting a review of the direction issued under subsection 145(1). The safety officer indicated that the direction was given orally to the employer during the inspection of the ship on July 17, 1997. The written direction, however, is dated July 25, 1997.

The safety officer stated that the direction was given orally to Mr. André Ouellet, the employer's representative at the time, the precise words being that "the employer must establish clear procedures for doing examinations of the equipment provided by the ships". However, the written direction differed significantly from the oral direction because it made no mention of "establishing" clear procedures, but referred instead to the training of employees and the application of regulatory standards, in the following terms:

1) "Section 124 of Part II of the Canada Labour Code, in that the employer is not ensuring the protection of safety and health at work by not instructing its employees to do visual and mechanical examinations to evaluate the apparent state of compliance of elevating devices."

2) "Paragraph 125(t) of Part II of the Canada Labour Code, in that the employer is not ensuring that machinery, equipment and tools used by its employees in the course of their loading, unloading or handling goods aboard ships meet prescribed safety standards."

The facts related by the safety officer concerning the time limit for making a request to the regional safety officer are hotly contested by the employer. The employer also stated that what it received on July 17 was not a direction, but rather an oral warning concerning the danger that the use of the cranes posed which, moreover, eventually took the form of a direction issued under section 145(2)(a) of the *Code*. According to Mr. Gaudreau, the safety officer was confusing the two directions and this, claimed Mr. Gaudreau, was confirmed by the employer's representatives at Cacouna.

In *Brink's v. Jean Patry et al.*, unreported decision no. 93-004, the employer stated that the direction that it had received by mail was the same direction it had been issued orally in the workplace three months earlier. Having analysed the facts, I concluded that I could not hear this case because the fourteen-day time limit prescribed by subsection 146(1) of the *Code* had expired and the regional safety officer had no authority to vary it.

In the present case, the employer alleged that what happened was the opposite of what had happened in Brink's, *supra*, namely, that the direction issued orally and the direction received by mail were separate and very different. Mr. Lévesque did not contest this allegation. Moreover, contradictory facts were related by the safety officer, because the written direction was not identical to the direction that he claims to have issued orally.

In my opinion, the employer cannot be penalized in this case. It cannot be denied its right to appeal a direction because there is a misunderstanding concerning the date of the direction, its content or the type of direction. I believe that there are real differences between the oral direction, which I consider genuine, and the written direction. Moreover, subsection 146(1) of the *Code* stipulates the following:

> 146. (1) Any employer, employee or trade union that <u>that considers himself or itself aggrieved by any direction</u> issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.

The written direction, which was separate from the oral direction, was mailed on July 25, 1997 and received in the employer's offices on August 7, 1997. Not until then was the employer aggrieved by the written directions. Since the request for a review was made on August 20 and received in the regional safety officer's office on August 21, 1997, I will uphold the employer's

request for a review by entertaining the request. The request to review the written direction issued on July 25, 1997 by safety officer Daniel Michaud under subsection 145(1) of the *Code* is **ALLOWED**.

The directions

1. The direction issued under subsection 145(1)

First contravention

According to the text of this direction, the employer contravened section 124 of the *Code* "by not instructing its employees to do visual and mechanical examinations to evaluate the apparent state of compliance of elevating devices".

Section 124 of the *Code* stipulates the following:

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

This section imposes a general obligation on the employer to protect the safety and health of its employees at work. The employer's specific obligations are set out in section 125. In the absence of a specific obligation, which is the case here, the employer has the general responsibility to take the necessary steps to protect the safety and health of its employees at work. However, it was not demonstrated to my satisfaction that the employer did not meet this obligation.

Mr. Gaudreau stated that the employer's policy on safety and health was present everywhere in the workplace and that all the employees of Quebec Ports Terminals Inc. were very familiar with it. I personally doubt this. However, the documents submitted confirm the statement that these employees did in fact receive training in the use of tackle. Mr. Lévesque seemed to substantiate the employer's statements and confirmed that the employees received the training necessary to do their work in complete safety. The safety officer appears to have neglected to check the employer's records concerning this important aspect of the direction. Moreover, I must give some credence to the statement that the duty supervisor examined the condition of the cranes before allowing the employees to operate them. In my opinion, there is a preponderance of evidence in the employer's favour, for the time being. For all these reasons, the directions issued are not justified in the circumstances and must be rescinded.

The second contravention

According to the wording of this direction, the employer contravened paragraph 125(t) of the *Code* in that the employer "is not ensuring that machinery, equipment and tools used by its employees in the course of their loading, unloading or handling goods aboard ships meet prescribed safety standards**."**

Paragraph 125(t) provides as follows:

> 125. Without restricting the generality of section 124, every employer shall, in respect of every workplace controlled by the employer,
>
> (t) ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed safety standards and are safe under all conditions of their intended use.

The safety officer's intention was to resolve a situation that visibly was unsafe for the employees by using a direction which, unfortunately, does not apply here. Section 125 of the *Code* applies only to "every workplace controlled by the employer". However, the ship "Kappara" is a foreign ship which is certainly not controlled by Quebec Ports Terminals Inc. Consequently, section 125 of the *Code* has no application here and the direction is not justified in the circumstances and must be rescinded.

For all the above-mentioned reasons, **I RESCIND** the direction issued to Quebec Ports Terminals Inc. on July 25, 1997 by safety officer Daniel Michaud under subsection 145(1) of the *Code.*

2. Direction issued under paragraph 145(2)(a)

According to the wording of this direction, the safety and health of the employees of Quebec Ports Terminals Inc. were put at risk because "it is dangerous for any employee to use the cranes aboard the Maltese ship "Kappara" that the employer makes available to employees to load goods aboard the said ship, because the said cranes do not meet the applicable regulatory standards and do not therefore protect the safety and health of the employees at work."

The employer does not contest the fact that the cranes were in a pitiful state, a situation which was plainly visible according to the safety officer. There appears to be general agreement on this point. Moreover, order "S.I.7" describes the condition of the cranes very clearly. It is true that the regulatory standards, i.e., the standards established by the *Marine Occupational Safety and Health Regulations*, do not apply here because, in any case, these regulations do not apply aboard foreign ships. However, it is important to understand that where a safety officer uses the powers conferred on him under section 145(2) of the *Code*, powers which, in my opinion, are exceptional, the safety officer can rely on any applicable standard, even if this standard is not specifically mentioned in the *Marine Occupational Safety and Health Regulations*. In fact, under this extraordinary power, a safety officer is not limited to any one standard.

However, for purposes of the direction, there is no need here to refer to a standard, because the danger exists regardless of whether or not there is a standard. I will refrain from describing the danger in full detail, because one need only refer to the order to realize the seriousness of the situation.

I will therefore delete from the direction everything in it that is superfluous. For all these reasons, **I VARY** the direction issued by safety officer Daniel Michaud to Quebec Ports Terminals Inc. on July 25, 1997 pursuant to paragraph 145(2)(a) of the *Code* by deleting from the description of the

danger, in paragraph three, the following words: "that the employer makes available to employees to load goods aboard the said ship, because the said cranes do not meet the applicable regulatory standards and do not therefore protect the safety and health of the employees at work", and by preceding this description with a reference to sections 3 to 12 of order O.N.4147. For greater clarity, the danger will be described as follows, once the necessary grammatical changes have been made:

"Having regard to sections 3 to 12 of order O.N.4147 of July 17, 1997, it is dangerous for any employee to use the cranes aboard the Maltese ship "Kappara "."

Decision rendered on February 17, 1998.

Serge Cadieux
Regional Safety Officer

APPENDIX A

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On July 17, 1997, the undersigned safety officer conducted an inspection in the workplace operated by Quebec Ports Terminals Inc., an employer subject to Part II of the Canada Labour Code and located in the place sometimes referred to as the port of Gros-Cacouna.

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

1) Section 124 of Part II of the Canada Labour Code, in that the employer is not ensuring the protection of safety and health at work by not instructing its employees to do visual and mechanical examinations to evaluate the apparent state of compliance of the elevating devices."

2) "Paragraph 125(t) of Part II of the Canada Labour Code, in that the employer is not ensuring that machinery, equipment and tools used by its employees in the course of their loading, unloading or handling goods aboard ships meet prescribed safety standards."

Accordingly, you ARE HEREBY ORDERED, pursuant to subsection 145(1) of Part II of the Canada Labour Code, to terminate all contraventions no later than August 8, 1997.

Issued at Rimouski, this 25th day of July 1997.

Daniel Michaud
Safety Officer
No. 3022

TO: Quebec Ports Terminals Inc.
C.P. 71
Cacouna, Québec
G0L 1G0

APPENDIX B

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(A)

On July 17, 1997, the undersigned safety officer conducted an inspection in the workplace operated by Quebec Ports Terminals Inc., an employer subject to Part II of the Canada Labour Code and located in the port of Gros-Cacouna, the said place sometimes being referred to as the ship “Kappara”.

The said safety officer is of the opinion that the use of a machine constitutes a danger to an employee at work in that:

> **It is dangerous for any employee to use the cranes aboard the Maltese ship “Kappara” that the employer makes available to employees to load goods aboard the said ship, because the said cranes do not meet the applicable regulatory standards and do not therefore protect the safety and health of the employees at work.**

Accordingly, you ARE HEREBY ORDERED, pursuant to paragraph 145(2)(a) of Part II of the Canada Labour Code, to take immediately measures for guarding the source of danger.

Issued at Rimouski, this 25th day of July 1997.

Daniel Michaud
Safety Officer
No. 3022

TO: Quebec Ports Terminals Inc.
C.P. 71
Cacouna, Québec
G0L 1G0

Decision no.: 97-019

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: Quebec Ports Terminals Inc.

Respondent: International Longshoremen's Association Local 2033

KEY WORDS

Cranes, S.I.7, ship.

PROVISIONS

Code: 124, 125(t), 145(1), 145(2)(a)

SUMMARY

A safety officer issued two directions to the above-mentioned longshoring company. The first direction was issued under subsection 145(1) du Code for a first contravention of section 124 of the Code because the employer allegedly did not instruct its employees to do visual and mechanical examinations to evaluate the apparent state of the cranes. The regional safety officer **RESCINDED** this direction because the employer established, with supporting documents, that the longshoremen had received the training to discharge this responsibility. The union representative was also of this opinion and the safety officer had neglected to check the employer's records in connection with this obligation. The second contravention identified in the direction was also **RESCINDED** because the safety officer cited the employer for a contravention of paragraph 125(t) of the Code, whereas section 125 of the Code applies only where the employees' workplace is controlled by the employer. The ship "Kappara", on which the longshoremen were required to work, was a foreign ship and was not therefore controlled by the employer.

The second direction was issued because of a dangerous condition under paragraph 145(2)(a) of the Code. The regional safety officer **VARIED** the direction by deleting from it what he considered to be a superfluous description of the danger and added to the description a reference to a part of order S.I.7. The regional safety officer, like the parties, recognized that a danger existed aboard the ship, but the parties did not agree on its description. The regional safety officer referred to the physical infractions that were identified by the safety officer, who was also a Coast Guard officer, in his order S.I.7 issued under the Canada Shipping Act. The pitiful state of the ship was described in these physical infractions. The safety officer's power to make such a reference was authorized by paragraph 145(2)(a) of the Code.