

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Brymag Enterprises Inc.  
LaSalle, Quebec  
Represented by: T. Gerych, Counsel

Intervenor: Mrs. Phillips  
LaSalle, Quebec

Mis-en-cause: Claude Léger  
Safety Officer  
Human Resources Development Canada

Before: Douglas Malanka  
Regional Safety Officer  
Human Resources Development Canada

**Background**

On January 20, 1998, Mrs. Josephine Phillips filed a complaint with safety officer Claude Léger, Human Resources Development Canada (HRDC) against Accent Transportation Services Inc. (hereto referred to as Accent) and Brymag Enterprises Inc. (hereto referred to as Brymag) concerning a fatal highway accident involving her son, Mr. Michael Phillips, on May 19, 1997. According to her complaint, her son's employer failed to report the accident to a safety officer within 14 days of its occurrence.

Safety officers Yves Laberge and Claude Léger subsequently met with Mr. Bob Magyar, President of Brymag. They investigated into the activities of Accent and Brymag, Mr. Phillips' relationship with the companies, and the facts surrounding the accident of May 19, 1997. Following his investigation, safety officer Léger concluded that Michael Phillips was an employee of Brymag from August 30, 1996, to and including the day of his death, May 19, 1997, and that Brymag had not reported the fatal accident to a safety officer as required by the legislation. On April 9, 1998, he issued a direction pursuant to subsection 145.(1) of the Canada Labour Code (hereto referred to as the Code or Part II) and ordered the employer to terminate the contravention to section 125 of the Code and paragraph 15.5(a) of the Canada Occupational Safety and Health (COSH) Regulations no later than April 23, 1998. A copy of the direction is attached.

The employer requested a review of the direction on April 23, 1998, and a hearing was held on November 5, 1998, in Montreal, Quebec.

**Safety Officer:**

Prior to the hearing, safety officer Léger submitted a copy of his report including relevant documents. A copy of these are included in the file and will not be repeated here. However, I retain the following facts from the documentation submitted by safety officer Léger and his testimony at the hearing.

Safety officer Léger testified that his investigation established that Accent has been in existence since 1989, and engages in extra-provincial transport to Ontario, Canada, and to the United States of America (USA). He noted that Brymag is a licensed trucking firm and Accent is not. His investigation showed that Mr. Phillips used the company's trucks for his deliveries and that he was paid by mileage and deliveries. He also ascertained that when Mr. Phillips was making his deliveries, he had to report daily to the dispatcher concerning his whereabouts and any delays, modified destinations or other work related problems. Safety officer Léger also indicated that Mr. Phillips was once paid a wage advance, and had received a letter of reprimand in the spring of 1997. However, he confirmed that he was unable to obtain a copy of the reprimand.

Safety officer Léger provided copies of Agreements that Mr. Phillips had signed with Brymag and Accent, and that were in effect at the time of the accident. Both Agreements stipulate Mr. Phillips as an "Independent Broker providing his driving services to trucking companies", and contain identical terms and conditions.

The terms and conditions in the Agreements specify, among other things, that Mr. Phillips, the signatory, agreed to drive the Company's trucks between Quebec, Ontario and USA, and agreed to an annexed payment schedule for "mileage", "stops" and "store copies." He also agreed to accept responsibility for all damage caused by his negligence to the company's equipment, and to follow all Company and highway regulations that apply in the jurisdictions where he drove.

The Agreements contained two provisions deemed to be "essential conditions" of the Agreement. The first was that Mr. Phillips incorporate himself as an "Independent Broker" within 12 months after the signing of the Agreement, and the second was that he register with the "CSST"<sup>1</sup> as an "Independent Broker" and pay in a timely fashion any assessment owing. Both Agreements were signed on August 30, 1996. Safety officer Léger noted that, on November 17, 1997, the CSST initially refused a claim for accident benefits for Mr. Phillips because he was not registered with the CSST as an independent broker at the time of the May 19, 1997, accident.

Following investigation, safety officer Léger concluded that Mr. M. Phillips was an employee of Brymag.

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<sup>1</sup> CSST - Commission de la santé et sécurité, Province of Quebec

**Applicant:**

Mr. Bloomfield, Dispatcher for Accent, and Mr. Magyar, President of Brymag and Accent, testified at the hearing. The following was retained from their testimony.

Mr. Bloomfield testified that he was employed at Accent for approximately 3 years as a dispatcher and was also responsible for hiring drivers. He confirmed that Brymag owned or leased the vehicles used by Accent drivers, but the drivers worked for Accent. He reiterated that Brymag had never engaged drivers or dealt with delivery invoices during the time of his employment at Accent. He clarified that he was not employed at Accent on the day of the accident involving Mr. Phillips.

He recounted that Accent had 5 employee drivers and 10 "Independent Broker" drivers during the period of 1996 and 1997. He estimated that, on average, employee drivers began their workday between 6 a.m. and 7 a.m., and ended it between 4 and 5 p.m. He said that the employee drivers typically worked 5 days per week and were paid an hourly salary. On the other hand, he testified that the "Independent Brokers", which included Mr. Phillips, were paid according to mileage and deliveries, called "drops", and that they did not have regular work hours. He said that the "Independent Brokers" could accept or decline jobs and were not penalized or otherwise disciplined for declining a job. He simply contacted the next "Independent Broker" on the list.

Mr. Bloomfield testified that he first met Mr. Phillips when Mr. Phillips responded to a newspaper advertisement for drivers that Accent had placed in the Montreal Gazette. He said that Mr. Phillips wanted to be an independent broker instead of a driver because he wished to specify his own work hours. Mr. Bloomfield stated that, as the dispatcher, he was responsible for calling the "Independent Brokers" when there was a job. He estimated that he contacted Mr. Phillips 90 percent of the times when there was a job, and that Mr. Phillips accepted the work approximately 50 - 60 percent of the time. He said that Mr. Phillips sometimes declined trips because he was busy doing odd jobs such as house painting. He noted Mr. Phillips sometimes called him to find out if there was work.

Mr. Bloomfield disagreed with safety officer Léger's report that Mr. Phillips had received a pay advance. He also explained that Mr. Phillips only reported his whereabouts in the morning to the dispatcher so that Accent could update its clients on expected delivery times.

Mr. Magyar testified that he was President of Accent and Manager of Brymag. He explained that Accent was set up in the fall of 1989 and that Brymag was incorporated in the mid 1990s. Documents later submitted to the Office of the Regional Safety Officer by Mrs. Gerych confirmed that Accent was incorporated on October 18, 1989, and Brymag was incorporated on November 18, 1994.

Mr. Magyar explained that Accent was set up to transport goods within Canada and to the USA. In 1992, Accent began to lease trucks from a leasing company. However, during the first year, one of the trucks leased by Accent was stolen. When it came time for Accent to renew its vehicle insurance, the insurance company was reluctant to insure Accent vehicles. To resolve the

difficulty, Mr. Magyar established Brymag as a company for the sole purpose of leasing trucks for Accent. The insurance company accepted this arrangement and insured Brymag vehicles.

Mr. Magyar reiterated that Mr. Phillips was paid by mileage and deliveries, and that Accent had never provided Mr. Phillips with a salary advance. He testified that all the documents connected to the work performed by Mr. Phillips, such as delivery receipts, "Combination Straight Bill of Lading - Express Shipping Contract" forms, trip reports and invoices, were under the name of Accent. Copies of the various documents were provided as evidence. He also submitted a document listing Mr. Phillips's hours. He said the document proves that Mr. Phillips did not work full time for Accent, and that his salary varied between a couple of hundred dollars and a thousand dollars. Mr. Magyar testified being aware that Mr. Phillips did odd jobs around the house for people.

**Intervenor:**

Mrs. Phillips was granted intervenor status in this review and was permitted to cross examine witnesses and to present evidence and testimony. She testified that, on appeal, the CSST had overturned its initial ruling communicated in a letter dated November 17, 1997, and confirmed that Mr. Phillips was an employee of Accent at the time of his accident. CSST correspondence confirming this fact was submitted.

Following the hearing Mrs. Phillips proffered a copy of a newspaper advertisement that had appeared in the August, 1996, edition of the Montreal Gazette and that called for drivers. This differed from undated advertisement that she had submitted at the hearing, but she maintained that this was the one that led her son to apply at Brymag. The add reads:

"Class 2 Drivers needed for Que., Ont. & N. E. USA. Min 2 years verifiable exper.  
Present yourself with current abstract at 7328 Cordner,(sic) Lasalle."

She further testified that her son did not have a independent broker's license and was not an independent broker or owner operator. She hypothesized that, if he had been an independent broker, normal practice dictates that he would have owned or leased his own vehicle and would have paid for the gas and maintenance of his truck himself. Instead, Brymag owned or leased the trucks used by her son and other drivers, and her son used Accent's credit card on trips for servicing and fueling the vehicle. Copies of Accent's gas credit card receipts, signed by her son, were produced as evidence. She testified that her son had only worked for Brymag and no other company. She insisted that her son had worked more hours than what Mr. Magyar had stated in his written and notarized document.

**Submissions:**

Ms. Gerych stated that there were two issues in this case. The first was to decide whether Mr. Phillips had performed work for Accent or Brymag. The second issue was to decide whether Mr. Phillips performed the work as an employee of the company or as an independent contractor. In this regard, Ms. Gerych held that Mr. Phillips performed his work for Accent. She held that all

the invoices, bills of lading, delivery receipts are all in the name of Accent and this proves that he performed his work for Accent and that he had no relationship with Brymag.

She further argued that Mr. Phillips was an “Independent Broker” and not an employee of Accent because the Agreement that Mr. Phillips signed with Accent specifies that he was engaged as an “Independent Broker”. She held that Mr. Phillips did not receive an hourly salary, but was paid in accordance to his mileage and number of deliveries made. Furthermore, his services were not on a constant or regular basis and there was no regular start time related to the work. She reiterated that Mr. Phillips could refuse to take a job and there was no discipline for refusing. Finally, she noted that Mr. Phillips had performed work for other people and indicated that this established Mr. Phillips’s economic independence from Accent.

Mrs. Phillips argued that there was no difference between Brymag and Accent. She said that there was no mention of independent brokers in the newspaper advertisement that appeared in the Montreal Gazette and to which her son applied. She reiterated that her son applied to Brymag as a driver and not as an owner operator. Furthermore, she said that her son did not have a broker or contractor license and did not work for any other trucking company. She said that he often helped people by doing odd jobs around their house, but that he was not employed by them or anyone else. She argued that, following their appeal review of the matter, the CSST ruled that her son was an employee.

### **Decision:**

The two issues that I must decide in this case are whether Mr. Phillips performed his work as an employee or as an independent broker or contractor, and for whom he carried out his work. There was no other issue or argument with respect to the direction.

In the case at hand, neither the applicant or intervenor cited legal precedence pertaining to the question of whether Mr. Phillips acted as an employee or an independent broker with the company(s). Therefore, I rely on the facts in the case for deciding the issues.

For deciding whether Mr. Phillips performed his work as an employee or “Independent Broker”, I note that Mr. Phillips did not own or lease his truck or trailer. In addition, Mr. Phillips paid for fuel and services for the vehicle with an Accent credit card. As a result, there was little possibility for business profit or loss relative to his work as normally associated with an independent business. The evidence further showed that Mr. Phillips did not drive for any other company as an employee or an independent broker or contractor. In reality, he was totally reliant on Brymag or Accent for the vehicle, and on Accent for his income, and for payment for the oil, gas and servicing of the vehicle.

Mr. Phillips had to advise the dispatcher daily concerning his whereabouts, and on any delays, modified destinations or other work related problems. Consequently, Mr. Phillips had little freedom to independently organize or schedule his work as he saw fit. Mr. Bloomfield said that the requirement to keep the dispatcher informed was only to enable Accent to advise its clients concerning their deliveries. Whether this was the case or not, the company exercised ongoing control over Mr. Phillips as one of their employees. I further note that the safety officer’s

contention that Mr. Phillips had once been disciplined was not disputed by Mr. Bloomfield or Mr. Magyar.

Ms. Gerych argued that the fact that the Brymag/Accent “Independent Broker” drivers could refuse to accept a job without discipline shows that they were not employees. However, I do not accept this fact as proof that an independent relationship existed between the company and the “Independent Broker” drivers because the same arrangement could apply in respect of an employer and a group of spare employee drivers. If one refused, the dispatcher would simply go to the next name on the spare list of employees.

With regard to the advertisement in the Gazette, purported by Mrs. Phillips to be the one to which her son responded. It is clear that it advertises for Class A1 drivers. This was not disputed by the employer, and I note, as mentioned by Mrs. Phillips, that there is no mention of owner operators or independent brokers.

Finally, the contract that Mr. Phillips signed with Accent and Brymag contained provisions which required Mr. Phillips to incorporate himself as an “Independent Broker” within a year of signing the Agreement, and to register with the CSST as an “Independent Broker” and pay any assessments to them in a timely manner. However, at the time of the accident, some 8 months after the signing of the Agreements, Mr. Phillips had not incorporated himself as an Independent Broker or registered with the CSST as an Independent Broker. Despite the fact that Accent and Brymag deemed these provisions in the Agreements to be essential for establishing an independent broker arrangement, there is no evidence that either company exerted any pressure on Mr. Phillips to conform to these requirements. Based on the actual working conditions, I am inclined to believe that Mr. Phillips did not incorporate himself as an independent broker, or register with the CSST as an independent broker, because he saw himself only as an employee. For all these reasons, it is my view that Mr. Phillips performed his work as an employee.

Having decided that Mr. Phillips performed his work as an employee, the second issue before me is to decide which company or companies employed Mr. Phillips. For this, I considered the following facts. First, Accent was incorporated in November of 1989 and is engaged in the business of transporting goods extra-provincially. For a short period of time in the mid 1990’s, Accent leased vehicles directly for its drivers. However, following the loss of a vehicle to theft, the insurance company no longer wished to insure Accent vehicles. To resolve the matter, a company called Brymag Enterprises Inc. was established and registered as a corporation to lease vehicles to Accent drivers. Notwithstanding the creation of Brymag, and the safety officer’s contention that Accent’s extra-provincial transport operating license was transferred to Brymag, all evidence, including the invoices, bills of lading, delivery receipts, time sheets, confirm that Accent continued to be responsible for the daily operations related to the business. Therefore, based on the facts in this case, it is my view that, for the purposes of section 125 of the Code and paragraph 15.5(a) of the Canada Occupational Safety and Health (COSH) Regulations, Mr. Phillips was an employee of Accent at the time of his accident. Other administrative bodies may make different findings under different circumstances as there is a written Agreement between Mr. Phillips and Brymag.

For this reason, and because no other issue was raised in respect of the direction, **I HEREBY VARY** the direction issued pursuant to subsection 145.(1) of the Code by safety officer Léger on April 9, 1998, and replace the name “Brymag Enterprises Inc.,” with, “Accent Transportation Services Inc.,” The varied part of the direction now reads:

“On March 25, 1998, the undersigned safety officer conducted an inquiry in the work place operated by Accent Transportation Services Inc., being an employer subject to the Canada Labour Code, Part II, at 7328 Codener Street, Ville Lasalle, Quebec.”

Decision issued on January 28, 1999.

Douglas Malanka  
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On March 25<sup>th</sup>, 1998, the undersigned safety officer conducted an inquiry in the work place operated by Brymag Enterprises Inc., being an employer subject to the Canada Labour Code, Part II, at 7328 Cordener Street, Ville Lasalle, Quebec.

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

**1. 125(c) 15.5(a)**

**The employer did not report to a safety officer the accident of May 19, 1997 causing the death of Michael Phillips, within 24 hours after becoming aware of a situation causing the death of one of his employees.**

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than April 23<sup>rd</sup>, 1998.

Issued at Montréal, this 9<sup>th</sup> day of April 1998.

CLAUDE LÉGER  
Safety Officer  
1778

To: Brymag Enterprises Inc.  
7328 Codener street,  
Ville Lasalle, Quebec  
H8N 2W8



SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Brymag Enterprises Inc.

Intervenor: Mrs. Phillips

**KEY WORDS**

**PROVISIONS**

Code: 145.(1), 125.(c)

Regs: 15.5(a),

**SUMMARY**

Following his investigation of a complaint that an employer of an extra-provincial trucking company had failed to report a fatal highway accident as required under paragraph 125.(c) of the Canada Labour Code (Code) and paragraph 15.5(a) of the Canada Occupational Safety and Health (COSH) Regulations, the safety officer concluded that the driver was an employee of the company and not an independent broker, as claimed by the company. The safety officer directed the employer to terminate the contravention.

The Regional Safety Officer reviewed the circumstances and agreed with the safety officer's finding that the driver was an employee and not an independent contractor. However, the evidence showed that there were two separate companies incorporated for the same extra-provincial trucking operation. The first company, which held the extra-provincial trucking license, was responsible for leasing the trucks used for the work, and the other company was responsible for carrying out the actual work including the driving. The driver had an identical work agreement with both companies.

Following his review, the Regional Safety Officer varied the direction by substituting the name of the Company leasing the vehicles with the name of the company carrying out the actual work as the employer who employed the employee at the time of his accident.