Decision N^{o}.: 01-001

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

Requester:	Le Groupe Océan Québec, Quebec Represented by: Me André Joli-Coeur
Mis en cause:	Gilles Marcotte Safety Officer Transport Canada, Marine Safety
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

A hearing was held on December 7, 2000 at Québec, Quebec

Preliminary issues:

Me. Joli-Coeur made a number of points at the commencement of the hearing. First of all, he noted that there was a preliminary issue relating to the delay involved in this case. The explanations given to the regional safety officer concerning the reasons for the delay were complete and were entered in the record.

Second, Me. Joli-Coeur stated that he did not wish to raise the question of jurisdiction in this case before the regional safety officer, although he felt that the company he was representing was subject to provincial jurisdiction.

Finally, Me. Joli-Coeur explained that the basic position of the employer was that the direction issued by the safety officer to the employer was not in itself a direction within the meaning of federal law since it did not contain any "criticism" of the employer. It did not identify any corrective action to be taken to a situation involving fault. It did not tell the employer what it had done wrong. It did not prescribe any time for compliance. In addition, although the direction required action in accordance with paragraph 145(2)(*b*), it was in practice necessary to act under paragraph 145(2)(*a*). Finally the Groupe Océan Inc. was not the interested party here. The group had various subsidiaries that did totally different things. The direction should have been addressed to the Industries Océan Inc. subsidiary, which, according to Me. Joli-Cœur, fell within provincial jurisdiction. In short, the direction was not issued to the correct employer since the two companies were quite separate entities.

Background:

Mr. Marcotte reported that on the morning of March 21, 2000, at around 7:30-8:00 a.m., a fire occurred on board the barge *Betsiamites*, which was moored at Wharf # 20 in the Port of Québec. The barge belonged to Groupe Océan Inc. Three employees of *Réparations Navales Océan*, a subsidiary of Groupe Océan Inc., were asphyxiated by the smoke and had to be evacuated by ambulance. The safety officer stated that he went to the barge in the company of a colleague at about 12:30-1:00 p.m. to note the facts relating to the accident. Employees were involved in welding work at the bottom of the Bow Thruster Compartment.

When he arrived, the safety officer met with people from Groupe Océan and officers of the Sûreté du Québec. Together, they were informed about the incident, visited the site and noted the conditions of the site. The officer reported that the firefighters had extinguished the fire when he arrived and had removed from the compartment two members of the staff who were unconscious or semi-conscious. The condition of these employees was thought to be serious. A third employee had succeeded in getting out by his own means. According to analyses of the situation and fire experts, the fire had extinguished itself because of the lack of oxygen.

The officer testified that he visited the site in the company of Mr. Collin, Director of Operations for *Réparations Navales Océan* and supervisor in charge of the repairs and of the staff at the site, and Mr. Hamel, the Groupe Océan Inc. employee responsible for the project, for the purpose of determining the cause of the incident.

The safety officer stated that there was fuel in the bottom of the compartment and that there was a smell of diesel, although he admitted that he had not analysed it. However, the safety officer wondered whether the diesel was present in the compartment where the fire occurred before the fire broke out or whether this fuel had been spread by the water used by the firefighters to extinguish the fire. The officer also stated that there was diesel in the adjoining compartment, where a welder had worked. He also noted that there was fuel in the other compartments, although he did not analyse it, and pointed out that it was not very clean. However, he said that there were no flames in the latter compartments since the flames had been limited to the compartment where a welder was working. He noted that there was soot at that location although it was also relatively dry and not particularly oily. The safety officer assumed that, when the work began, the location was adequate for such work. He also noted that the workers "were welding a sheet at the bottom of the compartment to be placed above the cement that had been added in the previous year".

The safety officer continued his investigation in the presence of Mr. Collin, who asked about the duration of the investigation and explained the need to complete some of the work. The officer stated that once he completed his investigation in a compartment, he sealed it to ensure that the site would not be disturbed. Following his investigation, on March 21, 2000, the safety officer informed Messrs. Collin and Hamel that a written direction would be issued that the compartments should be cleaned and that the fuel should be removed from the bottom so that the work could continue. According to the safety officer, the place was dangerous at that point because there was a risk that the flames could flare up again. For the safety of the staff, therefore, it was essential to have the compartment adequately cleaned. Furthermore, the safety officer asked to visit the compartments before the work resumed and he did so on March 27, 2000. At that point, he gave Mr. Collin permission to continue the work.

The direction dated March 24, 2000 was delivered on March 28 to the office of Mr. Guy Hamel of Groupe Océan Inc., since Mr. Collin was not at the site to receive it. According to the safety officer, Mr. Hamel was supposed to give the direction to Mr Collin, although this was apparently not done. Consequently, there was an unexplained delay from March 28 to April 13, on which date Mr. Collin allegedly became aware of the direction. In any event, according to the safety officer, Mr. Collin had fully understood the message because on March 27, 2000, before he had been given the written direction, he apparently executed his orders concerning the cleaning of the compartment so that the work could continue. At that time, the safety officer testified, [TRANSLATION] "the written direction became a mere formality confirming the oral direction".

The safety officer interpreted the concept of confined space by referring to the definition in the *Marine Occupational Safety and Health Regulations* [hereinafter "the Regulations"]. He explained that the situation in question concerned the pump rooms or mechanical compartments that were visited only occasionally for repairs. The officer indicated that the opening to these spaces offered only limited access, that the natural ventilation there was inadequate and as a result fans were needed to ventilate them and the space subject to the direction was not designed for permanent occupation. In fact, the space was limited because there was only one entrance in the middle of the compartment toward the top and no emergency exit. The officer concluded that the space in question was a confined space but he would nevertheless not require that all the procedures required under the Regulations be applied before people entered the confined space. He also explained that he did not consider this space to be a "one hundred per cent confined space because a hole had been made in the deck, which improved the ventilation". Consequently, he concluded, "they could avoid conducting tests before entering each confined space."

The safety officer stated that a confined space remained a confined space regardless of the changes made to it, because it was impossible to change the nature of a confined space, which was permanent. A compartment was declared to be a confined space even though repairs were made to it, even if the roof were opened, that is to say the whole deck, since the space would become a confined space again as soon as the barge left. In this particular case, the change made to the confined space was minimal and did not change its character as a confined space. However, it was not necessary, in his view, to comply with all the requirements of the Regulations such as conducting tests before entering the confined space because the ventilation had been improved by adding fans and the compartment in which the employees were working had been cleaned.

On examination by Me. Joli-Coeur, the safety officer gave a number of explanations concerning his investigation. On a diagram of the *Betsiamites*, he located (1) the entrance to the staircase leading to the bottom of the barge, (2) a hole that was approximately three feet by seven feet near the entrance to the staircase at a height of about twenty-four feet from the floor of the Bow Thruster Compartment, and (3) a ventilation opening between three and four feet in diameter on the starboard side. He also noted the presence of two to three exhaust fans that were to be used by the welders and acknowledged that there was probably another ventilation opening on the port side. Me. Joli-Coeur told the safety officer that there was a great deal of ventilation in that place, and the safety officer had accepted this. The officer stated also that he felt that at the time of his visit the air was healthy, there was no lack of oxygen and no hazardous gases were present in the air.

The safety officer stated that on March 21, 2000, he directed orally that the compartment be cleaned, i.e. that the fuel there be removed and that the lighting be replaced so that the work could continue. He explained that the whole of the oral direction, with the exception of the lighting aspect, which seemed to have been forgotten, was included in the written direction in the reference to flammable or explosive products. The written direction was delivered on March 28, 2000, the day following the date on which the safety officer confirmed that the employer had completely complied with his oral direction since the cleaning and lighting tasks were completed as requested on March 27, 2000. The safety officer stated that at that point it was safe to work in the compartment. He then gave permission for the work to continue.

Testimony of Mr. Collin:

Mr. Collin is the Director of Operations in the *Réparations navales Océan* branch. He explained that there was not one but two ventilation openings in the chamber where the work was carried out. These were used to ventilate the space and took in air from the space itself and exhausted it onto the deck. He added that there were three ventilation shafts with fans that were ten inches in diameter, well above the six-inch diameter required by the standard. Both these shafts were used to capture the smoke from the welding and to channel it to the deck. Mr. Collin said that he visited the site before the work began and that he did not see any fuel on the floors at the time of his visit. He explained that the work involved cutting steel plates on site that were then to be welded in place. He acknowledged, however, that the compartments adjoining those where the work was done had not been cleaned before the work continued as far as the possibility that oil was there was concerned.

Finally, Mr. Collin said that he had received the written direction a few weeks after March 28, 2000.

Arguments of the employer:

In addition to his preliminary remarks, Me. Joli-Coeur argued that there were “the periods before and after the accident”. There had been an accident, following which an oral direction was issued to clean the location where the fire had occurred. The direction was implemented immediately by the employer. The concept of confined space was referred to in the written direction. According to Me. Joli-Coeur, the safety officer felt that there were two types of confined space, namely genuine confined spaces and those to which the Regulations did not have to be applied. The Regulations themselves did not make such a distinction, since section 9.1 defined confined space and this provision could not be avoided. The physical characteristics of the place where the work was done mean that the compartment in question was not a confined space. Me. Joli-Coeur suggested that the safety officer implicitly recognized this fact when he confirmed that there was a lot of ventilation in this compartment, that there was a lot of oxygen and that there were no hazardous substances in the air. Me. Joli-Coeur noted that [TRANSLATION] “the explanation given for the fire is that it is not a fuel fire, it was a short circuit in the welding equipment that travelled to the battery just above. There is a battery that is completely burned on the side that appears to have caught fire because of this problem with the welding machine”. This comment was challenged by the safety officer, who argued that the fire was caused by the presence of fuel and that the battery was not in any way the cause.

Finally, Me. Joli-Coeur added that the seal referred to by the safety officer was certainly not a seal in the form required by the law since it was not posted when the work was scheduled to begin. The work involved cleaning the place after the fire, which was normal following a fire, and it was done without any specific direction from the officer other than an oral direction. Everything was done informally, according to Me. Joli-Coeur, until the employer received a [TRANSLATION] "direction that appears to refer to earlier things with nothing to support it and that is based on a mistaken understanding of confined space in the Regulations".

Reasons for Decision:

The problem to be resolved in this case is as follows: Is the written direction (APPENDIX) issued on March 24, 2000 pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II (hereinafter "the Code") to the employer justified in the circumstances of this case? In order to answer this question, I must look at several aspects of the investigation in light of the applicable provisions of the Code as well as the arguments of Me. Joli-Coeur. Naturally, I must first decide the question of the delay.

The delay:

According to the safety officer, the regional safety officer should dismiss the request for review on the ground that the period of fourteen days provided by the Code for appeals from the safety officer's direction had expired.

Subsection 146(1) of the Code provides as follows concerning this time:

> *146. (1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction 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.*

In light of this provision, any request for review of a direction must be made within fourteen days of the direction. However, a direction referring to a danger under the Code must necessarily be issued under section 145(2) of the Code. This section provides as follows:

> *(2) Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work,*
>
> *(a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer immediately or within such period of time as the officer specifies*
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> *(i) to take measures for guarding the source of danger, and*
>
> *(ii) to protect any person from the danger;*
>
> *(b) the safety officer may, if the officer considers that the danger cannot otherwise be guarded or protected against immediately, issue a direction in writing to the employer directing that the place, machine or thing in respect of which the direction is made shall not be used or operated until the officer's directions are complied with, but nothing in this provision prevents the doing of anything necessary for the proper compliance with the direction.*

Under paragraph 145(2)(*a*), *supra*, the safety officer must comply with two conditions when he or she issues a direction in the event of danger. First, he or she must warn the employer of the danger and, second, must give the employer written directions designed to protect the employees from the danger.

On the first point, all the testimony suggested that the safety officer notified the employer of the existence of the danger. In fact, no witness contradicted the safety officer's statement that [TRANSLATION] "the place was dangerous at that point because there was a risk that the fire could break out again". However, it seems that the officer did not necessarily use these words to declare the presence of a danger but instead informed the employer [TRANSLATION] "that a written direction would be issued to have the compartments cleaned and the fuel removed from the bottom before the work could continue". Indeed, the safety officer testified that he directed the employer to clean the said compartment and to add lighting, and this was done without delay.

On the second point, the safety officer must issue a written direction to the person indicated in the direction. He or she may do so immediately on the site of the investigation or at any other time of his or her choosing since the Code is silent on this point. According to the safety officer's testimony, [TRANSLATION] "the direction was written on March 24 and delivered on March 28, 2000 to the office of Mr. Guy Hamel of Groupe Océan Inc., since Mr. Collin was not present to receive the said direction". Mr. Collin, who is the person referred to in the direction, stated that he received the said direction only two weeks later, on April 11, 2000. I have no reason to doubt the *bona fides* of Mr. Collin. Nevertheless, the mere fact that Mr. Collin did not receive the direction in person, while Groupe Océan was advised of the fact that it had been received by Mr. Hamel, is insufficient to claim a right to be heard under subsection 146(1) of the Code when the time for appeal has expired.

However, the written direction delivered to Mr. Collin is completely different from the oral direction given by the safety officer at the location since it deals with confined spaces rather than lighting and the cleanliness of the place. This finding is conclusive in the circumstances. If Mr. Collin must comply with a direction, he needs to know what it contains. Consequently, I find that the written direction constituted a new direction that took effect only when it was received, i.e. the time when it was brought to the recipient's attention. It was received by Mr. Collin, the intended recipient, on about April 11, 2000. Since the request for review was made on Thursday, April 13, 2000, it was within the period of fourteen days prescribed by the Code. I accordingly accept the request for review of the direction set out in the Appendix filed by Le Groupe Océan Inc.

Need for the written direction:

The issue to be resolved in this case is whether the written direction was justified in light of the oral direction. The written direction poses serious problems. Me. Joli-Coeur mentioned some of them at the commencement of the hearing and I must admit that I agree with him on several points, except for that dealing with jurisdiction. Since it was admitted at the outset that we would not deal with that issue, I shall proceed to review the direction as though Mr. Collin's company were subject to federal jurisdiction.

Thus, very briefly, I note that the written direction issued by the safety officer displays major problems, namely:

- it does not contain any description of the danger existing at the time of his investigation as required by paragraph 145(2)(*a*) and does not reflect the concept of real and immediate danger as required by the case law;
- it does not indicate any time for compliance, as required by paragraph 145(2)(*a*);
- it requires action in accordance with paragraph 145(2)(*b*), whereas in practice paragraphs 145(2)(*a*) and (*b*) apply;
- it refers to contraventions rather than dangers within the meaning of the Code, i.e. to risks or actual situations in which employees are likely to be injured at the time of the safety officer's investigation;
- it does not correspond to the oral direction given on the site as the safety officer expressed it, namely [TRANSLATION] "*the written direction became a mere formality confirming the oral direction*";
- it does not refer to the use of any notice of danger (seal) in the form prescribed by the Code, as required by subsection 145(3) of the Code and does not contain any written direction as required by paragraph 145(2)(*b*) authorizing him to prohibit the use of the site.

In the circumstances of this case, the safety officer informed the employer of the existence of a danger and gave it oral directions that were to be confirmed in writing later, as was required under paragraph 145(2)(*a*) of the Code. It transpires that the written direction issued later by the safety officer did not correspond to the oral direction. Furthermore, the written direction, as worded, does not refer to dangers, as it is required to do by the Code, but rather to contraventions. Thus, the mere fact that an employer does not comply with the procedures set out in the Regulations does not in itself constitute a danger within the meaning of the Code but rather a contravention. Only the specific facts of a particular situation can be used to prove the existence of a danger and it is especially necessary for the safety officer to collect these facts at the time of his or her investigation. The same is true of hot work in a confined space.

To correct this situation, I should:

(i) either change the written direction referring to a danger into one referring to a contravention of the Code,

(ii) or substitute the wording of the oral direction for it.

(i) Change the written direction

I may not convert a written direction referring to a danger issued under subsection 145(2) into one that refers to a contravention under subsection 145(1) of the Code. On this point, I stated the following in my earlier decision in No. 99-010, *Terminus Maritimes Federaux v. Longshoremen's Union, CUPE, Local 375 and International Longshoremen's Association, Local 1657* (hereinafter *Terminus Maritimes Fédéraux)*:

> When the review reveals that the "danger" observed by the safety officer constitutes a contravention of the Code or Regulations, or is simply a danger in the general sense of the term, I will have no alternative but to rescind the direction in question because section 146 of the Code does not authorize the regional safety officer to issue a new direction. Subsection 146(3) of the Code provides as follows:

> *146 (3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefore and may vary, rescind or confirm the direction and thereupon shall in writing notify the employer, employee or trade union concerned of the decision taken.*

To transform a direction issued under subsection 145(2) in respect of a danger into a direction for an offence requires that a new direction be issued under subsection 145(1) of the Code, a power that I do not now have under the Code. Moreover, Rouleau J. of the Trial Division of the Federal Court had the opportunity earlier to rule on the same point in *Vancouver Wharves Ltd. v. The Attorney General of Canada*, Court No. T-1125-97. At page 8 of the judgment, in reply to the applicant's objection to the regional safety officer's jurisdiction to vary a direction and the interpretation I had given concerning the limits of my jurisdiction under subsection 146(3) of the Code, Rouleau J. stated the following:

> *Applying these principles to the case at bar, I can find no fault with the Regional Safety Officer's determination of the jurisdictional issue before him.*

It is important to note that the Federal Court Trial Division, which reviewed a decision on this subject, upheld my position in *Terminus Maritimes Federaux*. However, the Court's decision was appealed to the Federal Court of Appeal and the decision is currently pending.

(ii) Substitute the wording of the oral direction

As to whether I could simply reproduce the wording of the oral direction issued concerning the danger and vary the written direction by substituting the words in the oral direction, it is my opinion that it is impossible for me to do so, for the following reasons:

First of all, I am not convinced that there was in fact a real and immediate danger at the time of the safety officer's investigation in the compartment where the employers were supposed to work. The concept of danger has been examined many times by administrative tribunals such as the Canada Industrial Relations Board, the Public Service Staff Relations Board and by the regional safety officer as well as by the Federal Court Trial Division and the Federal Court of Appeal. In short, this concept of danger must meet the following tests, as I set them out in the decision in *Terminus Maritimes Federaux*, *supra*:

> The danger must be immediate and real (*Montani v. Canadian National Railway Company, C.L.R.B. decision No. 1089*). The danger must be present at the time of the safety officer's investigation (*Bonfa v. Minister of Employment and Immigration, Court No. A-138-89)*. The danger must be more than hypothetical. Moreover, as Mr. Benaroche noted, the safety officer must determine, following an investigation, whether a danger within the meaning of the Code exists. The safety officer cannot presume the existence of a danger in order to intervene, but must gather evidence in this regard (*Mario Lavoie, [1998] F.C.J. No. 1285)* and his decision must be based on objective criteria (*Coulombe v. Empire Stevedoring Company Ltd., C.L.R.B. decision N^{o} 747*). The danger must be one that is contemplated by the Code. Consequently, a danger that is inherent in the employee's work or that constitutes a normal condition of employment cannot serve to justify the right to refuse (*Montani, supra*).

> In a well-known decision (No. 686) rendered on April 26, 1988, the Vice-Chairman of the Canada Labour Relations Board, Hugh R. Jamieson, wrote as follows:
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> > Danger is defined in the Code as:
> >
> > "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto, before the hazard or condition can be corrected
>
> If one recalls that Part IV of the Code referred to "imminent danger" prior to the adoption of the present definition of danger in 1984, it is readily apparent from the carefully chosen words in the definition that the legislators intended to retain an essence of immediacy in the concept of danger as it relates to an employee's right to refuse under sections 85 and 86, and also to a safety officer's powers to issue a direction in the dangerous situations under section 102(2).
>
> Following this decision, administrative tribunals and the Trial and Appeal divisions of the Federal Court took the same position as that taken in the above-quoted decision. They enunciated principles similar to the principle of imminent danger, namely, that the danger must be immediate, real, present at the time of the safety officer's investigation, more than hypothetical, based on objective criteria, etc. [Emphasis added.]

The safety officer did not establish by specific measurements and facts that there was a real and immediate danger. By refraining from analysing the contaminants in the employees' environment, the safety officer deprived himself of data that were essential to the making of decisions concerning the existence of a real and immediate danger at the time of his investigation. His decision was accordingly subjective and based on observations that were not objective.

Thus, to state that hot work must not be performed in a space[1] that is possibly closed and possibly contaminated with fuel would require an analysis of the air or the liquid and the ice present at the bottom of the compartments in order to determine what hazardous substances are present in the employees' environment and in what concentrations. Their flammability and explosiveness levels should also have been considered. In order to assess the risk level, consideration should also have been given to the preventive measures put in place by the employer to prevent an explosion, fire or excessive contamination of the workers' ambient air. Mr. Collin's testimony was to the effect that there was ample ventilation in the compartment and that there was [TRANSLATION] *"not one but two ventilation outlets in the compartment where the work was being done. These ventilation outlets are used to ventilate the compartment and the air they use comes in from the*

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[1] It is possible that the space under consideration here is a confined space. However, the mere fact that there was a failure to comply with the provisions governing confined spaces does not constitute a danger within the meaning of the Code but rather a breach of the Marine Occupational Safety and Health Regulations. For example, it would be dangerous to enter a confined space, if the oxygen content were insufficient, if the space was contaminated by an excessive concentration of a hazardous substance etc and the measures taken to protect the employees were inadequate. The fact that the safety officer considered this space not to be one hundred per cent a confined space and allowed the employer not to comply with certain provisions of the regulations, a discretion that is not permitted by the Regulations, makes suspect his statement that the space in question was a confined space that posed a danger for the employees.

compartment itself and is exhausted onto the deck. He added that there were three ventilation shafts with ventilators ten inches in diameter, well above the six inches in diameter required by the standard. These two shafts are used to recover the smoke from the welding and to channel it to the deck. Mr. Collin said that he had visited the site before the work began and stated that he had not seen fuel on the floor at the time of his visit." Moreover, the safety officer admitted that there was a lot of ventilation in the place. The officer also said that he felt that the air was clean at the time of his visit, there was no lack of oxygen and no hazardous gases were present in the air.

Although the safety officer said that he smelt an odour of diesel fuel, he acknowledged that he had not analysed it, which would have allowed him to conclude on the basis of an objective test that danger was or was not present. It is possible that the diesel or other fuel came from the other compartments and was spread over the floor of the compartment where the employees were working by the water used by the firefighters to extinguish the fire and that a clean-up was needed. However, the presence of a smell of diesel is insufficient in itself for a declaration that there was a risk that the fire could recur and to justify a complete stoppage of the work. The safety officer's role is to determine from the facts whether a real danger exists at the time of his or her investigation. Consequently, it is difficult if not impossible in the circumstances for me to find in the absence of specific measurements and facts that there was a danger within the meaning of the Code

Second, I cannot at this stage correct the direction by including the terms of the oral direction in it since I would personally have to describe the real and immediate danger at the time of the safety officer's investigation while the safety officer's direction did not give a description of the danger but a series of measures that were, in the safety officer's view, designed to prevent a recurrence of a fire. Thus, the safety officer should have said, if he had conducted the required tests, that the presence of "X" concentration of a particular fuel in the work area of the employees is likely to cause a fire in the presence of hot work and in the absence of measures to protect employees from the danger. Instead, the safety officer opted to order the employer to clean the compartment and to add lighting, which does not inform us at all about the existence and the nature of the danger. I cannot substitute my opinion for that of the safety officer in these circumstances since I do not have the required information on hand in order to do so.

Finally, the mere presence of the safety officer in these forbidden places without conducting tests beforehand, without taking safety precautions and in the presence of unprotected persons is indicative of the danger at the site in question. In my opinion, the direction was not justified in the circumstances described above.

Decision:

For all the reasons set out above, I RESCIND the direction issued under paragraph 145(2)(*b*) of the Code on March 24, 2000 by safety officer Gilles Marcotte to Mr. Jean-Claude Collin of Groupe Océan Inc.

I would add the following remarks in *obiter*. It is not the purpose of this decision to criticize the work of a safety officer. On the contrary; the safety officer has shown that his conduct at the time of the investigation and his dedication to the cause of health and safety are irreproachable and much to his credit. He is an undisputed expert in the marine field. The investigation report that he prepared and submitted to Transport Canada, with supporting colour photographs, is a model that I would not hesitate to recommend. However, any safety officer must be aware that the issuance of a direction to an employer or employee has major legal consequences for the person to whom it is issued. Consequently, the direction must comply with the rules governing it and faithfully represent the facts collected in the investigation.

Decision rendered on January 23, 2001

Serge Cadieux
Regional Safety Officer

APPENDIX

In the matter of the Canada Labour Code
Part II – Occupational Safety and Health

DIRECTIONS TO EMPLOYER UNDER PARAGRAPH 145(2)(*b*)

On March 21, 2000, the undersigned safety officer conducted an investigation on the barge "Betsiamites" at wharf 20 in the Bassin Louise in the Port of Québec, the said barge being the property of "Le Groupe Océan inc.". This company is subject to Part II of the *Canada Labour Code*.

The said safety officer is of the opinion that doing hot work in a confined space on the barge "Betsiamites", when it contains flammable or explosive products without the measures required by the Regulations entitled "Marine Occupational Safety and Health Regulations, SOR/DORS 87-183, Part IX, being taken, constitutes an immediate potential for a serious accident to the workers.

The said safety officer is of the opinion that accessing a confined space on the barge "Betsiamites", without detailed access procedures and the necessary training being provided to the workers, as required by the Regulations entitled "Marine Occupational Safety and Health Regulations", SOR/DORS 87/183, Part IX, constitutes an immediate potential for a serious accident to the workers.

Consequently, you are hereby directed under paragraph 145(2)(*b*) in Part II of the *Canada Labour Code* to take action to protect people against this danger.

Done at Québec, March 24, 2000

Gilles Marcotte
Safety Officer
Identification No.:3366

To: Le Groupe Océan
105, Abraham-Martin, Suite 500
P.O. Box 1963, Terminus
Québec, Quebec G1K 7M1

Attention: Mr. Jean-Claude Collin

Decision N^{o}: 01-001

SUMMARY OF THE DECISION RENDERED BY THE REGIONAL SAFETY OFFICER

Applicant: Le Groupe Océan
Québec, Quebec
Represented by: Me André Joli-Coeur

KEY WORDS:

Barge, fire, confined space, danger, tests, odour of diesel, hot work, ventilation, time for appeal, converting a direction referring to a danger into one referring to a contravention, oral direction, written direction

PROVISIONS:

Code: 145(1), 145(2)(*a*) and (*b*), 145(3)
Regulations: Marine Occupational Safety and Health Regulations, SOR/DORS 87/183, Part IX (Confined spaces)

SUMMARY:

Following a fire on a barge, a safety officer issued an oral direction to the employer referring to a danger and ordering the employer to comply with certain provisions of the Occupational Safety and Health (Ships) Regulations, Part IX (Confined spaces). During the investigation, the safety officer apparently told the employer to take certain measures to prevent the fire from recurring. He also informed the employer of this situation and gave the employer a written direction that was completely different from the oral direction. The employer challenged the written and oral directions and identified numerous problems in them.

Following the review, the regional safety officer confirmed that there were indeed many problems with the direction on appeal. He noted that the written direction was completely different from the written direction, that the latter did not constitute a direction referring to a danger within the meaning of the Code but rather contraventions, that the danger alleged during the safety officer's investigation did not exist and that he could not correct these problems because he had neither the power nor the necessary information to do so. For all these reasons, the regional safety officer RESCINDED the direction.