Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Case No. 2005-07
Decision CAO-07-037

Canada Labour Code
Part II
Occupational Health and Safety

Maritime Employers Association
appellant

and

Syndicat des débardeurs,
Canadian Union of Public Employees,
Local 375
respondent

September 28, 2007

This case was heard by Appeals Officer Katia Néron in Montreal, Quebec on February 27 and 28 and March 1, 20, 22 and 28, 2007.

For the appellant
André C. Giroux, Ogilvy Renault

For the respondent
Isabelle Leblanc, Lamoureux Morin Lamoureux

[1] This case concerns an appeal filed on February 22, 2005 under subsection 146(1) of Part II of the *Canada Labour Code* (the *Code*) by André Giroux on behalf of the Maritime Employers Association (MEA). The appeal is from a direction for danger issued to the MEA on February 18, 2005 by Health and Safety Officer (HSO) Claude Léger under paragraphs 145(2)(*a*) and (*b*) of the *Code*.

[2] In his request, Mr. Giroux submitted that the direction issued to the MEA by HSO Léger is unfounded in fact and in law for the following reasons.

[3] Mr. Giroux alleged that, since only Logistec Stevedoring Inc. controlled its work place and the work activities carried out there by longshoremen at the time of HSO Léger's investigation, it alone, and not the MEA, had the duties set out in subsection 125(1) of the *Code*. Moreover, in Mr. Giroux's opinion, only Logistec Stevedoring Inc., and not the MEA, was truly able to correct the dangerous condition described in HSO Léger's direction, as he had directed. Mr. Giroux therefore submitted that HSO Léger should have issued the direction of February 18, 2005 to Logistec Stevedoring Inc. and not the MEA.

[4] Isabelle Leblanc, on behalf of the Syndicat des débardeurs, Canadian Union of Public Employees (CUPE), Local 375, made a preliminary objection, arguing that there is *res judicata* in this case. I must therefore decide that issue before determining whether I will examine the case.

Facts

[5] On November 15, 2004, François Lasalle, who had been teamed up with another longshoreman, Pierre Langlois, was assigned to hangar 48 at the Port of Montreal, a work place operated by Logistec Stevedoring Inc., to move steel plates that were to be loaded onto a truck using a forklift. P. Langlois operated the forklift, and F. Lasalle's job was to put wooden blocks under the steel plates, which were stored one on top of the other, to create space between them. Once the blocks were placed, the forklift operator could thus slide the two forks all the way under the steel plates to lift and move them. To enable F. Lasalle to position each wooden block, the forklift operator slid the end of one fork under the pile of steel plates and then raised the pile slightly while F. Lasalle slipped a wooden block under it. At the time of the accident, F. Lasalle was leaning over a pile of six steel plates. The fork lifting the pile slipped, rebounded upwards and struck François Lasalle. It was a fatal blow.

[6] HSO Léger's investigation showed that the forklift operator did not know the weight of the pile of six steel plates to be lifted and that the equipment's safe working load had been exceeded when he had tried to lift the pile after sliding the end of one of the forks under it. The operator had an OTRLO classification, which means that he had successfully completed the training given by the MEA on the operation of the 25-ton lift trucks used at Logistec Stevedoring Inc.

[7] When HSO Léger questioned that employee and other longshoremen with the same OTRLO classification, he found that, to determine whether the weight of the load to be lifted exceeded the equipment's lifting capacity, the employees did not check the load chart for the lift trucks they were operating, contrary to the manufacturer's instructions, but instead proceeded on a trial-and-error basis. In other words, they lifted some or all of the load with the equipment and, if the equipment's rear wheels lifted, they inferred that the load exceeded the safe working load.

[8] Based on these findings and the conclusions reached by Appeals Officer Pierre Guénette In *Maritime Employers Association*,[1] HSO Léger issued a direction for danger to the MEA on February 18, 2005 under paragraphs 145(2)(*a*) and (*b*) of the *Code*, stating that it was his opinion that the trial-and-error method used by longshoremen operating lift trucks at the Port of Montreal constituted a danger to an employee while at work.

[9] HSO Léger's direction reads in part as follows:

> [Translation]
> Since November 15, 2004, the undersigned health and safety officer has been investigating the death of François Lasalle at the work place operated by

[1] *Maritime Employers Association*, Decision CAO 04-046, December 6, 2004.

> LOGISTEC STEVEDORING INC, sections 40 to 53, Port of Montreal, a member of the Maritime Employers Association. The said MARITIME EMPLOYERS ASSOCIATION (MEA) is an employer subject to Part II of the Canada Labour Code and is located at the Port of Montreal Building, Wing 2, Cité du Havre, Suite 1040, Montreal, Quebec H3C 3R5. It has control over the longshoremen, whom it assigns to the various work places operated by its members to perform work activities related to longshoring.
>
> The said health and safety officer considers that the performance of an activity by certain longshoremen in the work places operated by the MEA's members constitutes a danger to an employee while at work, to wit:
>
> The employer is not ensuring that the health and safety at work of every person employed by the employer is protected, since it is not ensuring that the longshoremen it assigns to operate motorized materials handling equipment use that equipment safely and properly in accordance with any instructions provided by the manufacturer by using the load chart to determine the maximum load that can be handled.
>
> In actual fact, some longshoremen determine the maximum load that can be handled by trial and error. They lift some or all of the load to check whether the rear part of the motorized materials handling equipment lifts up. As a result of this approach, the load being handled may exceed the safe working load for the equipment, creating a danger of tipping, loss of control or breakdown of the motorized materials handling equipment, which may cause serious injuries to the operator and persons nearby.
>
> Accordingly, you are HEREBY DIRECTED, under paragraph 145(2)(*a*) of Part II of the *Canada Labour Code*, to correct the condition immediately.
>
> You are ALSO HEREBY DIRECTED, under paragraph 145(2)(*b*) of Part II of the *Canada Labour Code*, NOT to perform the activity in respect of which notice of danger #2299 was affixed pursuant to subsection 145(3) of Part II of the *Canada Labour Code* until these directions are complied with.

Is there res judicata in this case?

Respondent's arguments

[10] Ms. Leblanc alleged that the issue to be decided in this case is the same issue decided by Appeals Officer Guénette in *Maritime Employers Association, supra*.

[11] Ms. Leblanc argued that this means there is *res judicata*, since not only the parties but also the cause and the object are obviously the same in both cases. Therefore, relying on the principle of consistency in decision-making, Ms. Leblanc argued that *res judicata* must apply here.

[12] In support of this position and to explain the concept of *res judicata* and the importance of maintaining consistency in decision-making, Ms. Leblanc filed the following case law:

- **Concept of *res judicata***

  Société canadienne de Métaux Reynold Limitée Baie-Comeau (Québec) et Le Syndicat National des Employés d'Aluminium de Baie-Comeau (C.S.N.), Arbitration Tribunal, Richard Marcheterre, Arbitrator, Case R-342-99-A, February 10, 2000

- **Concept of consistency in decision-making**

  Syndicat du personnel clinique et Syndicat du personnel non clinique de l'Hôpital La Providence de Magog et du Foyer Sacré-Cœur de Magog (CSN) et Centre de Santé Memphrémagog, Arbitration Tribunal, Francine Beaulieu, Arbitrator, Case 2002-6992, March 12, 2005

- **Consequences of not maintaining consistency in decision-making**

  "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs", *Revue de Droit de l'Université de Sherbrooke*, vol. 21, no. 1, Faculty of Law, Université de Sherbrooke, Quebec, Canada, Les Éditions R.D.U.S.

  Union internationale des Travailleurs Unis de l'Alimentation et de Commerce, section locale 405P et Les Aliments Lesters Ltée, Arbitration Tribunal, Nathalie Faucher, Arbitrator, Case 2002-8468, April 19, 2005

[13] Ms. Leblanc also cited the decision rendered by de Montigny J. of the Federal Court in *Maritime Employers' Association v. Syndicat des débardeurs, C.U.P.E. Local 375*,[2] which dismissed the application for judicial review filed by the MEA to have Appeals Officer Guénette's decision set aside. She also referred to the decision of Décary J.A. of the Federal Court of Appeal in the same case,[3] in which the MEA sought once again to have the decision of de Montigny J., and thereby the decision of Appeals Officer Guénette, set aside. However, the Federal Court of Appeal agreed with the conclusions of de Montigny J.

[14] Since the Federal Court and the Federal Court of Appeal affirmed the findings made by Appeals Officer Guénette in *Maritime Employers Association, supra*, namely that the MEA can be considered an employer for the purposes of the *Code* and can be issued a direction under the *Code*, Ms. Leblanc argued that I am bound by those findings unless what must be assessed in this case differs from that which was before the Federal Court and the Federal Court of Appeal in the above-mentioned case. According to Ms. Leblanc,

---

[2] *Maritime Employers' Association v. Syndicat des débardeurs, C.U.P.E. Local 375*, 2006 FC 66, Mr. Justice Yves de Montigny, January 24, 2006.

[3] *Maritime Employers' Association v. Syndicat des débardeurs C.U.P.E. Local 375*, 2006 FCA 360, Mr. Justice Robert Décary, November 6, 2006.

since some of what I must analyse in this case is the same, I can only deny Mr. Giroux's request without even reviewing the specific facts of this case or the evidence that may be submitted to me.

Appellant's arguments

[15] Mr. Giroux alleged that, in this case, the direction – the legal or physical fact that is the direct and immediate source of the right to appeal under subsection 146(1) of the *Code* – is not the same as the one that served as the basis for the appeal in *Maritime Employers Association, supra*. Since these two legal or physical facts are different, Mr. Giroux argued that there is no identity of cause and thus that the principle of *res judicata* does not apply in this case.

[16] To support his position, Mr. Giroux cited *Tom Duguay, Donald Bertrand et le Syndicat canadien des travailleurs du papier local 33 v. Produits Forestiers E.B. Eddy Ltée*.[4]

[17] Mr. Giroux also argued that administrative tribunals are not bound by *res judicata* unless there is a line of authority that can justify maintaining some consistency in decision-making. The rules of justice on which administrative tribunals must primarily rely are autonomy and independence in decision-making.

[18] Since Appeals Officer Guénette's decision was an isolated decision dealing with a new issue, Mr. Giroux argued that, in these circumstances, an issue identical to the one considered in *Maritime Employers Association*, *supra*, may be reconsidered by another appeals officer and a different decision may result.

[19] To support his position, Mr. Giroux cited *Domtar v. Quebec (Commission d'appel en matière de lésions professionnelles)*.[5]

[20] Mr. Giroux further argued that this case must be considered in light of the new evidence and not dismissed solely because there appear to be similarities in the facts already examined by Appeals Officer Guénette in *Maritime Employers Association*, *supra*.

[21] Mr. Giroux also submitted that, although de Montigny J. of the Federal Court held that patent unreasonableness was not the standard of review applicable to Appeals Officer Guénette's findings, this does not mean he concluded that that decision contained no errors or was entirely correct.

---

[4] *Tom Duguay, Donald Bertrand et le Syndicat canadien des travailleurs du papier local 33 v. Produits Forestiers E.B. Eddy Ltée*, Arbitration Tribunal, Decision AZ-89141050, Jean-Guy Clément, Single Arbitrator, November 22, 1988.

[5] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)* or *Roland Lapointe v. Domtar Inc. and Commission d'appel en matière de lésions professionnelles*, [1993] 2 S.C.R. 756, L'Heureux-Dubé J., April 1, 1993.

Preliminary objection relating to *res judicata*

[22] What I understand from the case law submitted is that, to decide whether there is *res judicata* in this case, I must determine whether the following three identities are indeed present, having regard to the decision rendered by de Montigny J. of the Federal Court and affirmed by the Federal Court of Appeal:

- identity of parties, that is, the parties were the same in the other case;
- identity of cause, that is, the demand is based on the same ground;
- identity of object, that is, the issues raised were the same in the other case.

[23] If any of the three identities is not present, the principle of *res judicata* does not apply.

[24] With regard to identity of parties, it is clear that the parties are the same in both cases. One is the MEA, the employers' association for longshoring companies operating at the Port of Montreal, including Racine Terminal (Montreal) Ltd. and Logistec Stevedoring Inc., for which the longshoremen in question worked. The other is the Syndicat des débardeurs, CUPE, Local 375, whose members include the longshoremen covered by the direction issued by HSO Léger on February 18, 2005 as well as the longshoremen covered by the direction issued by HSO Sirois on February 27, 2003, which was varied by Appeals Officer Guénette in *Maritime Employers Association*, *supra.*

[25] I am also of the opinion that there is identity of cause, since what triggered the MEA's request in both cases was the receipt of a direction for danger issued under the *Code*.

[26] I find that identity of object also exists, since two of the issues to be considered in this case are the same issues already decided by de Montigny J. in the above-mentioned case, namely:

- whether the MEA can be considered an employer for the purposes of the *Code*;
- whether a direction for danger can be issued to the MEA under the *Code*.

[27] In the above-mentioned case, de Montigny J. wrote the following at paragraphs 15, 52, 53 and 58:

> [15] . . . Although, unlike Part I, Part II of the Code does not define an employer's organization, the MEA performed such a role as a result of its constitution and functions.
>
> [52] Moreover, it is worth comparing the definition of the word "employer" in Parts I and II. While the word "employer" is defined in section 3 as "any person who employs one or more employees", section 122(1) defines the same word as "a person who employs one or more employees and includes an employer's organization and any person who acts on behalf of an employer". The reason for this is obviously that an employer's organization may only be regarded as an employer for the purposes of Part I in the

> context dealt with in section 33, whereas there is no provision for such a limitation in connection with Part II.
>
> [53] Consequently, the appeals officer could conclude that an employer's organization like the MEA is an "employer" for the purposes of Part II. . . .
>
> [58] I also cannot accept the argument that the direction is moot and cannot be carried out. The direction issued is deliberately vague and general . . . and the MEA may certainly comply with this within the limits of its responsibilities. It should be borne in mind that in the collective agreement the MEA undertook to make efforts to [TRANSLATION] "eliminate at source any danger to the safety and physical integrity of employees" (clause 11.01). It is also the applicant which provides employees with health and safety courses (clause 11.13) and provides (with the stevedoring businesses) protective clothing or equipment. Accordingly, it is not true to say that the MEA can in no way be subject to the appeals officer's direction, although in the circumstances of the case at bar the stevedoring businesses are undoubtedly more directly affected.
>
> (emphasis added)

[28] In addition, Décary J.A. wrote the following at paragraph 6 of his judgment, agreeing with the conclusions of de Montigny J.:

> [6] . . . The MEA is in a hybrid position. Given the fact that in practice it is an employer's organization for employers of longshoremen whose health and safety are at issue, its status as employer representative for the purposes of the collective agreement signed with the Syndicat des débardeurs, and the undertakings that it makes on its behalf in this agreement in health and safety matters, it cannot be excluded from the application of Part II of the *Canada Labour Code*.
>
> (emphasis added)

[29] As I understand it, given that the facts are the same in this case, and in light of the definition of "employer" in subsection 122(1) of the *Code*, de Montigny J. of the Federal Court and Décary J.A. of the Federal Court of Appeal concluded that, since the MEA is an employers' organization for employers of longshoremen working in the longshoring industry – and is therefore covered by the definition of "employer" set out in the *Code* – and since it has made undertakings or assumed responsibilities related to the health and safety of those employees under the collective agreement,[6] it cannot avoid the application of the *Code*, and it may be issued a direction under the *Code*.

[30] Since the three identities are present, I find that there is *res judicata* on the two issues already decided by courts at a higher level than I am, whose decisions are binding on me.

---

[6] Collective agreement signed by the MEA and the Syndicat des débardeurs, CUPE, Local 375.

[31] However, I am of the opinion that there is also another issue to be decided in this case, namely whether the direction issued by HSO Léger under the *Code* on February 18, 2005 could apply to the MEA, having regard to the dangerous condition described in the direction.

[32] To decide this issue, I must consider any new facts concerning this case, the provisions of the *Code* and any relevant case law.

Could the direction issued by HSO Léger under the Code on February 18, 2005 apply to the MEA, having regard to the dangerous condition described in the direction?

Appellant's evidence

[33] I retain the following from the testimony of Jean-Pierre Langlois, a senior labour relations advisor for the MEA, Stéphane Morency, the manager of the MEA's Training Centre, and Stéphane Saucier, the MEA's occupational health and safety coordinator.

[34] Mr. Langlois stated that, in the geographic area of the Port of Montreal, the MEA represents the following seven employers under the collective agreement: Empire Stevedoring Ltd., Logistec Stevedoring Inc., Racine Terminal (Montreal) Ltd., Termont Terminal Inc., Ceres Terminals Incorporated, Cast Terminal Inc. and the Contrecoeur Terminal owned by Logistec Stevedoring Inc.

[35] Under the collective agreement, the MEA has undertaken to dispatch workers to all of these employers' work places to carry out their operations.

[36] The collective agreement also requires the MEA to ensure that the longshoremen working in these businesses are trained and qualified for the activities they have to perform.

[37] Mr. Langlois also stated that, to be on the list of longshoremen covered by the job security plan and to be part of the dispatch procedure managed by the MEA and provided for in the collective agreement, each unionized longshoreman must successfully complete the course given by the MEA on the operation of lift trucks under 25 tons to obtain the minimum classification required, namely OLIFT.

[38] Mr. Morency stated that, in the past, the MEA taught longshoremen who operated lift trucks the trial-and-error method for checking whether the weight of the load to be lifted exceeded the equipment's lifting capacity. This explains why the longshoremen were using that method at the time of Mr. Lasalle's accident.

[39] However, Mr. Morency stated that this approach was no longer being taught when he started managing the MEA's Training Centre in October 2005. The theoretical training that each new lift truck operator receives to obtain the OLIFT classification now includes the use of the equipment's load chart. To determine the weight of the load to be lifted, the operators are taught that they must ask the checkers, who have this information.
Mr. Morency also suggested that, after the new longshoremen receive their practical training, they be supervised by trainers during an integration period at the terminals.

[40] The training on operating 25-ton lift trucks was also changed at the request of Logistec Stevedoring Inc. and Empire Stevedoring Ltd. to incorporate the use of the load chart for such equipment. Practical training on the operation of these trucks is given in each terminal of Logistec Stevedoring Inc. and Empire Stevedoring Ltd., since that is where this type of truck is mainly used.

[41] According to Mr. Morency, the longshoremen who had already been trained on this equipment, that is, the longshoremen with the OLIFT classification and other classifications allowing them to operate other types of lift trucks, were not recalled by the MEA's Training Centre to receive additional training on how to use the load chart as directed by the manufacturer. However, operators of such equipment at Logistec Stevedoring Inc. and Empire Stevedoring Ltd. were given written instructions prohibiting them from using the trial-and-error method. On the other hand, Mr. Morency does not know whether those employees have learned how to use the load chart for the lift trucks they operate.

[42] According to Mr. Saucier, it was Logistec Stevedoring Inc. that issued instructions on March 15, 2005 in response to the direction issued to the MEA by HSO Léger on February 18, 2005. The general rules set out in the instructions issued by Logistec Stevedoring Inc. read in part as follows:

> [Translation]
> 1. The "trial-and-error" method must not be used to check the lifting capacity of any lift truck. This method involves lifting until the rear part of the machine lifts up, the tires collapse or the machine refuses to lift.
> 2. Operators must ensure in every respect that the load to be lifted does not exceed the capacity of their equipment. For this purpose, they must read the instructions written on the part to be lifted. If a weight is not written or cannot be found, they must ask the checker to determine the weight or number of units that can be lifted safely with the equipment being used. . . .

[43] Moreover, Mr. Saucier stated that, following the direction issued by HSO Léger, Logistec Stevedoring Inc. had pressured the MEA's Training Centre to change the training given to longshoremen on the operation of lift trucks. This explains why, when Mr. Morency started managing the Centre in October 2005, the content of the lift truck operation courses given to obtain the OLIFT classification for trucks with a lifting capacity of 3 to 15 tons and the classification for 25-ton trucks had already been changed to include the use of load charts.

Respondent's evidence

[44] I retain the following from the testimony of Pierre Lafortune, a longshoreman who is a member of the Syndicat des débardeurs, CUPE, Local 375, and Daniel Gauthier, a union training advisor.

[45] Mr. Lafortune stated that he had conducted his own investigation of Mr. Lasalle's accident and found that some lift truck operators used a trial-and-error approach.

[46] Mr. Gauthier stated that the OLIFT classification, which permits the operation of a small lift truck from 3 to 15 tons, is one of the basic classifications that any candidate must have to be hired as a longshoreman. The training is given by the MEA, and more than 300 longshoremen working at the Port of Montreal have this classification.

[47] Mr. Gauthier added that operators of 25-ton lift trucks have other classifications. For example, those working at the terminals of Logistec Stevedoring Inc. and Empire Stevedoring Ltd. have "primary" classifications, namely OTRLO at Logistec Stevedoring Inc. and OTREM at Empire Stevedoring Ltd. There is also a "secondary" classification, OTRTR, which permits the operation of a 25-ton lift truck in all work places operated by all the employers at the Port of Montreal.

Appellant's arguments

[48] Mr. Giroux submitted that, while it is true that the collective agreement requires the MEA to train all longshoremen at the Port of Montreal, only the longshoring companies, and not the MEA, have the statutory duty under paragraph 125(1)(*q*) of Part II of the *Canada Labour Code* to "*provide, in the prescribed manner, each employee with the . . . instruction . . . necessary to ensure their health and safety at work*".

Respondent's arguments

[49] Ms. Leblanc submitted that, since the MEA is an employers' organization included in the definition of "employer" in subsection 122(1) of the *Code,* it is subject to the statutory duties set out in the *Code*.

[50] Since the MEA is responsible under article 19.03 of the collective agreement for developing courses for longshoremen and evaluating candidates, and since it alone grants them a classification, specifically, in this case, to operate the lift trucks in question, Ms. Leblanc argued that there is also no doubt that the MEA controlled and still controls or was and still is responsible for the work procedures used by the longshoremen to perform their activities.

[51] Accordingly, in Ms. Leblanc's opinion, the MEA was able to correct the work procedure called into question in the direction issued by HSO Léger on February 18, 2005.

Analysis and decision

[52] In this case, the contravention alleged against the MEA by HSO Léger in his direction was failing to ensure that the health and safety of the longshoremen it assigned to operate lift trucks at the Port of Montreal was protected, since it had not ensured that the longshoremen used that equipment safely and properly. The evidence shows that, at the time of HSO Léger's investigation, those employees were not using the load chart as directed by the manufacturer but were using a trial-and-error approach to check whether the load to be lifted exceeded the equipment's lifting capacity.

[53] In the above-mentioned judgments, the Federal Court and the Federal Court of Appeal established that, since the MEA is an association for employers of longshoremen, it is

included, as an employers' organization, in the definition of the term "employer" in the *Code*. In addition, those two courts established that a direction for danger can be issued to the MEA because of the undertakings it made in the collective agreement that may affect the longshoremen's health and safety.

[54] In this case, the evidence shows that the MEA undertook in the collective agreement to train longshoremen in the operation of lift trucks before granting them the related classifications and to dispatch them to the various employers at the Port of Montreal to perform that activity.

[55] The evidence further shows that the training provided by the MEA to the longshoremen operating lift trucks not only at Logistec Stevedoring Inc. but also throughout the Port of Montreal did not comply with the instructions given by the manufacturer of that equipment, since it did not include the use of load charts.

[56] Paragraph 125(1)(*q*) of the *Code* and paragraph 14.23(1)(*c*) of the *Canada Occupational Health and Safety Regulations* (*COHSR*) under the *Code* provide as follows:

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> (*q*) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work[.]
>
> 14.23(1) Subject to subsection (2), every employer shall ensure that every operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for
>
> (*c*) its safe and proper use, in accordance with any instructions provided by the manufacturer and taking into account the conditions of the work place in which the operator will operate the materials handling equipment.
>
> (emphasis added)

[57] Based on the foregoing, I conclude that the MEA, as an employers' organization included in the term "employer" as defined in the *Code*, did not fulfil the specific duty imposed on an employer to provide, in the prescribed manner, each longshoreman who operated a lift truck at the Port of Montreal with the instruction and training required by paragraph 125(1)(*q*) of the *Code* and paragraph 14.23(1)(*c*) of the *COHSR*.

[58] Accordingly, in light of the evidence adduced, the legislation and the case law, I am of the opinion that the direction issued by HSO Léger on February 18, 2005 could be issued to the MEA, since the result of its contravention, as mentioned above, was that the work procedures taught by the MEA to the longshoremen operating lift trucks exposed them to

a risk of tipping, loss of control or breakdown of that equipment, which could have caused serious injuries to the longshoremen or persons nearby.

[59] On the other hand, I am of the opinion that the MEA's contravention should have been referred to first in the direction issued to it by HSO Léger, since it was the specific duty imposed by the *Code* that the MEA had not fulfilled and on which it could have had a direct influence.

[60] Moreover, looking at the list of longshoremen classification codes used by the employers at the Port of Montreal pursuant to article 19.02 of the collective agreement, I note that those codes relate to the following classifications:

- Logistec: OTRLO – lift truck operator, 25 tons, and OFRUI – lift truck operator
- Cast: OVIDE and OTASK – lift truck operator, 25 tons
- Empire: OTREM – lift truck operator, 25 tons
- Ceres: OTRCE – lift truck operator, 25 tons

[61] The same list indicates that there are other classifications for lift truck operators at the Port of Montreal, namely:

- OTRTR – lift truck operator, 25 tons
- OLIFT – lift truck operator
- OBLOC – lift truck operator and block handler
- PLIFT – lift truck operator – hold

[62] Based on the evidence adduced and this list, I conclude that employees with these classifications can be assigned to operate lift trucks for any employer at the Port of Montreal.

[63] The evidence also shows that, after HSO Léger issued his direction, the MEA did not recall any of the employees working at the Port of Montreal to give them the training required by paragraph 14.23(1)(*c*) of the *COHSR* in the proper use of the load chart for lift trucks.

[64] In light of this evidence and all of the foregoing, I am of the opinion that the MEA is still not fulfilling the duties set out in paragraph 125(1)(*q*) of the *Code* and paragraph 14.23(1)(*c*) of the *COHSR*, with the result that the longshoremen operating lift trucks are still exposed to the danger described above.

[65] Accordingly, for all the above-mentioned reasons, and as I am authorized to do by subsection 146.1(1) of the *Code*, I am varying the direction issued by HSO Léger on February 18, 2005 in the manner indicated below.

[66] I ask that HSO Léger or any other health and safety officer ensure that the MEA complies with the said direction.

Case No. 2005-07
Decision No. CAO-07-037

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

DIRECTION TO THE MARITIME EMPLOYERS ASSOCIATION UNDER PARAGRAPHS 145(2)(*a*) and (*b*)

Further to an appeal filed under subsection 146(1) of Part II of the *Canada Labour Code*, the undersigned Appeals Officer has made an inquiry, pursuant to section 146.1 of Part II of the *Canada Labour Code*, into a direction issued to the Maritime Employers Association under paragraphs 145(2)(*a*) and (*b*) of Part II of the *Canada Labour Code* on February 18, 2005 by Health and Safety Officer Claude Léger pursuant to an investigation of François Lasalle's death on November 15, 2005 at hangar 48 at the Port of Montreal, a work place operated by Logistec Stevedoring Inc.

After reviewing the facts, the legislation and the case law, the undersigned Appeals Officer is of the opinion that the Maritime Employers Association, an employers' organization subject to Part II of the *Canada Labour Code* and located at the Port of Montreal Building, Wing 2, Cité du Havre, Suite 1040, Montreal, Quebec H3C 3R5, is contravening the following provisions of Part II of the *Canada Labour Code* and that the resulting condition constitutes a danger to an employee while at work:

> Paragraph 125(1)(*q*) of the *Canada Labour Code* and paragraph 14.23(1)(*c*) of the *Canada Occupational Health and Safety Regulations*
>
> ***The MEA has not ensured that longshoremen operating the lift trucks used in the various work places at the Port of Montreal have been given appropriate instruction on the safe and proper use of this motorized materials handling equipment, since it has not taught them to use the load chart for this equipment as directed by the manufacturer. The result of this is that, when this equipment is operated, the load being handled may exceed the safe working load for the equipment, creating a risk of tipping, loss of control or breakdown of the motorized materials handling equipment, which may cause serious injuries to the operator and persons nearby.***

Accordingly, you are HEREBY DIRECTED, under paragraph 145(2)(*a*) of Part II of the *Canada Labour Code*, to take measures to correct the condition immediately.

You are ALSO HEREBY DIRECTED, under paragraph 145(2)(*b*) of Part II of the *Canada Labour Code*, NOT to assign anyone who has not been given the said training to any work place at the Port of Montreal.

Issued at Ottawa this 28th day of September 2007.

_____

Katia Néron
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: CAO-07-037

Appellant: Maritime Employers Association

Respondent: Syndicat des débardeurs, CUPE Local 375

Provisions: *Canada Labour Code*, 146(1), 145(2)(a) and (b), 125(1), 146(1), 122(1)
Canada Occupational Health and Safety Regulations, 14.23(1)

Key Words: Direction, lift truck, preliminary objection, *res judicata*, weight, training, classification, vary

Summary:

On February 22, 2005, the Maritime Employers Association appealed the direction for danger issued on February 18, 2005 by Health and Safety Officer Léger following the death of an employee of Logistec Stevedoring Inc.

Following her analysis, the Appeals Officer varied the direction issued by the Health and Safety Officer.