



# Occupational Health and Safety Tribunal Canada

**Date:** 2015-03-05  
**Case No.:** 2013-17

**Between:**

Ottawa Macdonald Cartier International Airport Authority, Appellant

**Indexed as:** *Ottawa Macdonald Cartier International Airport Authority*

**Matter:** Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.

**Decision:** The direction is rescinded.

**Decision rendered by:** Mr. Michael McDermott, Appeals Officer

**Language of decision:** English

**For the appellant** Mr. Paul R. Lalonde, Counsel, Emond Harnden LLP

**Citation:** 2015 OHSTC 5

## REASONS

[1] This decision concerns an appeal filed by the Ottawa Macdonald Cartier International Airport Authority (“the Authority”) on March 21, 2013, pursuant to subsection 146(1) of the *Canada Labour Code* (the Code), against a direction issued on February 22, 2013, by Health and Safety Officer (HSO) Suzanne Arsenaault.

### Background

[2] On January 4, 2013, at or about 12:50 hours, Jason Cole, an employee of Air Canada at the time standing on the apron at Gate 16 of Ottawa’s Macdonald Cartier International Airport and engaged in completing paperwork for baggage loaded onto a Toronto bound flight, was struck in the back by an empty baggage cart as it and other attached empty carts were being towed away from the aircraft. Mr. Cole incurred painful injuries consisting of contusions on his upper and lower left leg, bruises to his left thigh and lower back. He was attended to at the site and at 13:25 hours was taken by ambulance to the Civic Campus of the Ottawa Hospital.

[3] A Sergeant with the Ottawa Police Service (OPS) arrived at the scene at 12:55 hours where one minute later an OPS Constable joined her. Weather at the time is described as being “overcast and -2C”. Both officers noted that the area surrounding the aircraft consisted of packed snow and was slippery. The Sergeant reports that Joshua Barre, an Air Canada employee, advised her that he had complained to his supervisor approximately one hour earlier that conditions on the tarmac were not satisfactory. When speaking to Steven Sexton, Air Canada Manager Station Operations, he showed her his Blackberry which had a time stamp of 12:47 hours making note of poor surface conditions.

[4] None of the Air Canada employees in the vicinity at the time, including Kevin McNeil the driver of the tug towing the empty carts, actually saw the incident happen. However, witness statements were taken from two passengers who had boarded the flight and were seated in window seats 14F and 17F positioned above the baggage hold and conveyor belt and who were able to view what occurred. One such written account, from the occupant of seat 14F is included in the Police General Occurrence Report obtained by the HSO. It refers to the witness having seen Mr. Cole being hit and reads in part as follows:

The baggage cart driver did not see that the last cart was jackknifed and as he pulled away the jackknifed cart “sandwiched” the loader into the conveyor at speed.

A CCTV video of the incident was saved and the police report describes how it shows the tug pulling four carts drawing up to the conveyor belt in a semi-circular swing with the loop being completed once the carts are unloaded and towed back to the terminal building. The report adds that the driver “does not appear to be speeding, but as he moves forward the fourth cart jack knives striking Cole.”

[5] An inspector from the OPS Forensic Identification Section was called to the scene and arrived there at 14:45 hours. He took a number of photographs depicting the equipment in use at

the time of the incident as well as the then current apron surface conditions. The photographs were made available to the HSO and are included with her report.

[6] The Labour Program at HRSDC (as it was then) was contacted and HSO Michael O'Donnell was informed of the incident. He in turn requested HSO Arsenault to attend the scene. She arrived on site at 15:08 hours and commenced her investigation. The OPS officers advised her of their findings and her own account of the incident and the baggage loading operations is in keeping with those findings. She notes that upon her arrival the apron was slippery and it was both windy and snowing, subsequently adding that the "area surrounding the aircraft consisted of hard packed snow, on top of ice, and it was very slippery and was a contributing factor in this incident." The HSO interviewed Mr. Sexton and Bob Atkinson, another Air Canada employee, on site. Mr. McNeil had left the scene in order to see Mr. Cole at the hospital. The HSO released the site at 15:22 hours.

[7] HSO Arsenault continued her inquiries over the ensuing weeks conducting interviews, taking statements and seeking related documentation. Much of the information gathered, such as Mr. Cole's and Mr. McNeil's qualifications and training records and maintenance logs and incident records pertaining to tugs and baggage carts, is most relevant to directions the HSO issued to Air Canada that are not the subject of this appeal. Of more direct relevance to the appeal is the information obtained concerning the distribution of responsibilities and duties relating to the implementation and timing of snow and ice clearing operations at the site between Air Canada and the Authority. Apart from brief notes she made of comments from two non-Air Canada airline staff members expressing concerns about tardiness in snow and ice clearance, the information gathered by the HSO in this respect came mainly from Mr. Sexton at Air Canada and Mr. Clem Poupart, the Authority's Manager of Airfield Operations.

[8] In his statement to the HSO, Mr. Sexton describes snow and ice clearance as a cooperative procedure requiring coordination between the carriers and the Authority. He maintains that the Authority calls Air Canada to advise when it is ready to commence clearance and to request the removal of servicing equipment from the sterile zone to permit access. The sterile zone appears to be a prescribed area around where an aircraft stands at a gate that Mr. Sexton indicated may vary in relation to the size of an aircraft in place at the time. Asked whether there have been issues with respect to implementation of the clearance procedure, Mr. Sexton responded that issues have been raised with the Authority numerous times and that e-mails have been sent by Air Canada expressing concerns about snow and ice removal.

[9] Advised by the HSO of concerns expressed by the Authority about Air Canada failing to clear the sterile area in preparation for snow and ice removal, Mr. Sexton replied that requests to remove equipment are always made at the last minute, adding that he has requested more coordinated snow removal efforts be developed. In a similar vein and also responding to the HSO's question, he agreed that there is a need for better communications between all parties and for a pro-active plan that is well organized to take account of flight schedules.

[10] After receiving confirmation that Gate 16 is a Rapidair Gate, the HSO sought clarification with respect to the Authority's claim that it had at times asked Air Canada to switch gates during the day in order to allow for snow and ice removal but that no such change

happened. Mr. Sexton replied that the Authority can dictate gate changes, noting that Gate 17 is also a Rapidair Gate.

[11] The HSO's notes on her conversation with Mr. Poupart refer to weather conditions requiring continuous removal of snow from December 21<sup>st</sup>, right through the holiday period including on the day of the incident. They also indicate a reactive snow and ice clearing procedure working from gate to gate and that when an aircraft is at a gate clearing commences some 20 feet away from it. Further, an effort is made to remove as much snow as possible before the 6:00am start up. Subsequently the Authority relies on gate management to advise when aircraft are leaving gates so that Authority personnel can try to clear snow as best as possible. Mr. Poupart referred to Air Canada as the biggest culprit with respect to equipment left on the apron inhibiting snow and ice removal.

[12] The notes mention that there is "no manpower to clear snow within 20 feet of gated aircraft". The statement appears to be somewhat ambiguous in that subsequent information referred to below indicates that the Authority accepts requests for clearance within 7.5 metres of an aircraft at a gate and that its personnel responds to such requests accepting instructions and directions from airline staff when doing so.

[13] After completing her inquiries the HSO issued a direction under subsection 145(1) of the Code. The direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On January 4th, 2013, the undersigned health and safety officer conducted an inspection in the work place operated by Ottawa MacDonald Cartier International Airport Authority, being an employer subject to the *Canada Labour Code*, Part II, at 1000 Airport Parkway Private, Room 2500, Ottawa, Ontario, K1V 9B4, the said workplace being sometimes known as Ottawa MacDonald Cartier International Airport.

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

**Canada Labour Code Part II, Paragraph 125.(1)(p)**

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, ensure, in the prescribed manner, that employees have safe entry to, exit from and occupancy of the work place.

**Canada Occupational Health & Safety Regulations,  
Subsection 2.14(1)**

Every exterior stairway, walkway, ramp and passageway that may be used by the employees shall be kept free of accumulations of ice and snow or other slipping or tripping hazards.

**The employer failed to ensure that the apron at gate 16 was free of ice and snow on January 4<sup>th</sup>, 2013.**

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than March 15, 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Ottawa, this 22<sup>nd</sup> day of February, 2013.

[signed]  
Suzanne Arsenault  
Health and Safety Officer  
[...]

To: Ottawa MacDonald Cartier International Airport Authority  
1000 Airport Parkway Private  
Room 2500  
Ottawa, Ontario  
K1V 9B4

## **Issue**

[14] The issue I have to determine is whether or not the HSO was justified in her finding of the contravention and in issuing the direction under appeal.

## **Appellant's submissions**

[15] The appellant describes the grounds of its appeal as twofold. Firstly, it contests any alleged violation of subsection 2.14(1) of the COHSR and, specifically, contests that there was any accumulation of ice and snow at the scene of the incident on January 4, 2013. Secondly, and in the alternative, it submits that the Authority met the due diligence standard by following the procedures and practices it had in place for snow and ice removal.

[16] With respect to the first grounds for the appeal, the appellant notes that the text of the cited subsection of the COHSR which states that "Every exterior stairway, walkway, ramp and passageway that may be used by employees shall be kept free of accumulations of ice and snow or other slipping or tripping hazards." It is then argued that for there to have been a violation of the subsection there must have been an accumulation of ice and snow on January 4, 2013. Instead, it is noted the HSO's wording of the contravention concludes that the Authority failed to ensure that the apron at Gate 16 was free of ice and snow on that date. As such, it is submitted that the HSO "erred by applying the wrong test to determine compliance with the Regulations" and that doing so represented "an unreasonable standard of perfection which is not required by the Regulations, and which is not practically possible to meet when there is a snow and/or ice storm."

[17] Turning to the second and alternative grounds for the appeal, the appellant describes the scope of the airport's operations and the manner in which it claims to meet its obligations with respect to winter service. Its written submissions portray a busy and successful international airport that has won prestigious service quality awards within the two to five million annual passenger category. It is operational around the clock, supporting both visual rules and instrument rules flights that use its three runways and related structures and facilities. The main content of the submissions, however, describes the nature and implementation of the Authority's winter maintenance plans and activities, an account buttressed by relevant exhibits.

[18] The Authority holds a certificate to offer airport services pursuant to the *Canadian Aviation Regulations* and must comply with a number of requirements established by Transport Canada relating to winter maintenance. The appellant outlines the Authority's Winter Maintenance Plan and provides a copy of the plan for 2012-2013 that was in effect at the time of the incident. The appellant indicates that the Winter Maintenance Plan is prepared in consultation with stakeholders including members of the Airline Operators Committee (AOC) and that a pre-winter meeting is held to discuss the draft annual plan. It also appears that pre and post weather event discussions are held to review day to day operations during the winter season. It is submitted that an audit assessment report issued by Transport Canada in November 2012 contained only one adverse finding and that it was not related to snow and ice removal.

[19] The submissions provide additional details with respect to snow and ice removal procedures that show the removal crew splitting into two parts following a runway clearance with one half of the crew assigned to the taxiways and the other half to the main apron that includes the gates. The rhythm of the procedures and the size of removal crews and resources applied may be varied in response to changing weather conditions. With specific reference to the apron area, the winter maintenance plan indicates a focus on mechanical broom sweeping of the taxi lanes and lead in lines to the gates. It notes that in order to facilitate clearance, the carriers are required to remove equipment from a 7.5 metre (about 25 feet) safety zone around an aircraft, also referred to as the sterile zone and adds the following:

Airport Authority snow removal crews will not operate closer than 7.5 metres of an aircraft without instructions and directions by airline staff.

[20] The appellant outlines both the staff complements as well as the equipment and supply inventories that are generally available to effect snow and ice removal at an airport which on average can expect an annual snowfall of some 235 cm plus other mixed precipitation. With particular reference to the date and time of the incident, the appellant's claims that there were periods of continuous snowfall and that there were one and a half snow and ice clearance crews on duty in the evening of January 3 and all day on January 4, are reflected in the statistics provided. Similarly, the Authority's runway surface condition reports for the period from January 1 to 5, 2013, depict active snow clearing taking place, including at the apron area near Gate 16.

[21] It is submitted that, "In addition to regular snow and ice clearing, airside operators such as Air Canada can make specific service requests when faced with situations that dictate an immediate need. These requests are directed to the Airport Operations Centre who will coordinate the request with winter maintenance crews." It is pointed out that, in line with the

winter maintenance plan procedures, airside operators should be prepared to meet the Authority's crews at the location giving rise to the specific request. A log is kept of such service requests and the appellant reports that on January 4, 2013, "carriers, including Air Canada, requested priority snow and ice control assistance for other Gates, but not for Gate 16."

[22] Having made the above submissions regarding the weather conditions prevailing on January 4, 2013, the appellant argues that even if I were to find that there was an accumulation of snow on that day in contravention of the regulations, "an employer may still be found not guilty where it is proven on a balance of probabilities that due diligence was used in an attempt to avoid the contravention."

### **Analysis**

[23] As previously indicated, the issue before me is whether or not the HSO was justified in finding a contravention of paragraph 125(1)(p) of the Code and of subsection 2.14(1) of the COHSR and in issuing the direction under appeal. The appellant's submissions are confined to those in writing referred to above and there is no respondent in this proceeding. At the outset, it is useful to cite the relevant legislative provisions.

Paragraph 125(1)(p) of the Code reads:

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 the employer controls the activity,

(p) ensure, in the prescribed manner, that employees have safe entry to, exit from and occupancy of the work place.

Subsection 2.14(1) of the COHSR reads:

2.14(1) Every exterior stairway, walkway, ramp and passageway that may be used by employees shall be kept free of accumulations of ice and snow or other slipping or tripping hazards.

[24] The appellant's first grounds for appeal turns on whether or not there was an accumulation of snow and ice. With reference to the underlined description of the contravention in the text of the convention (see paragraph 13 above), it is submitted in effect that the absence of "accumulation" from that wording negates the finding of a contravention of subsection 2.14(1) of the COHSR. I find such an argument hard to accept. Looking at the information available to me, I note from the photographs provided by the OPS that the surface around the scene of the incident was snow covered. Whether the amount of snow present constituted an accumulation is a matter of definition. While I can accept that the etymological roots of "accumulation" would suggest heaping or amassing, I doubt that common usage of the term requires such precision. Furthermore, the full text of the direction cites the legislative provisions in question including the words from subsection 2.14(1) of the COHSR, "free of accumulations of ice and snow or other slipping or tripping hazards". The police officers who attended the scene very shortly after Mr. Cole was struck reported finding as they exited their vehicles packed snow that was slippery.

[25] In addition, I do not believe it is reasonable, as the appellant implies, to sever specific and underlined wording from the text of the direction which in my view must be read and comprehended in full. Having done so I conclude that the HSO was fully aware of the statutory language and the underlined portion of the text was simply by way of specifying certain details and the location of the contravention she believed to have occurred. Consequently, I do not find acceptable the appellant's argument on the semantics of the direction. However that does not dispose of the appellant's submission detailed in paragraph 16 above that the direction sets a standard of perfection "which is not practically possible to meet". That matter is more appropriately examined in the context of the appellant's second and alternative argument.

[26] Before doing so, however, a comment on the incident that initially brought the HSO to the scene might be useful. It occurred at a work place under the control of Air Canada, even if that control was divided and to some extent shared with the Authority. It involved employees of Air Canada directly, as well as equipment owned by that company and a loading procedure sanctioned by it. After a comprehensive investigation of the incident, the HSO issued three directions to Air Canada. Two of the directions were issued for contraventions pursuant to specific paragraphs of subsection 125(1) of the Code. The third direction was issued pursuant to a contravention of section 124, the general duty of the employer to ensure the safety and health at work of its employees. Since the specific nature of the contravention detailed in the latter direction has a bearing on my decision in this appeal, I find it useful to cite its wording:

The employer failed to ensure that the Airport Authority at the Ottawa International Airport had cleared the apron of snow and ice ensuring the safety of their employees.

[27] In its submission on due diligence, the appellant sums up the measures taken by the Authority to meet its obligations with respect to snow and ice removal that are detailed above. It notes that it "has a Winter Maintenance Plan of Operations in place which is in compliance with industry standards" and that the plan "was prepared in consultation with stakeholders to ensure that it corresponds to the needs of airport carriers and all potential risks." As such, it is submitted that the Authority "has taken all reasonable steps to prevent the accumulation of snow and ice" and that it "has been and remains duly diligent in its attempts to comply with subsection 2.14(1)".

[28] As part of its argument, the appellant submits that the defence of due diligence is expressly recognized under subsection 148(4) of the Code quoting the words "[...] it is a defence for the person to prove that the person exercised due care and diligence to avoid the contravention." It is important to clarify that this statutory reference to due diligence applies specifically when a prosecution for a contravention is launched which is not the case in this appeal.

[29] That said, I cannot altogether ignore the appellant's claims with respect to the scope of the Authority's Winter Maintenance Plan, a cooperative plan developed in consultation with the carriers and claims that are supported by the information appended to the appellant's submissions. Similarly, the personnel and equipment dedicated to snow and ice clearance duties and the procedures followed to implement the same are well documented, as are the weather conditions



prevailing on and around the date of the incident and injury to Mr. Cole which indicate periods of continuous snow. It is also clear that Air Canada's flight operations and all the associated movement around Gate 16 were continuing despite the prevailing weather. In short, a situation in which literal compliance with the wording of the provisions in dispute would be challenging up to the point of impossibility.

[30] I also believe it is fair to take into consideration the expectation the Authority had under the Winter Maintenance Plan of receiving a request from Air Canada with respect to "situations that dictate an immediate need". Although Mr. Barre told the OPS Sergeant that he had complained to his supervisor about an hour before the incident of unsatisfactory conditions on the tarmac, Mr. Sexton's Blackberry recorded poor surface conditions at 12:47 hours, approximately three minutes before the incident. Furthermore, the Authority's records indicate no request for priority service at Gate 16 on January 4, 2013.

[31] In the event, a situation existed in which, on the face of things, the prescribed wording of subsection 2.14(1) of the COHSR appears to have been contravened. However, there is a context which I find must also be taken into account in my decision. That context includes the prevailing weather conditions and the continuation of flight services on the apron at Gate 16 that inhibited access to the area for the Authority's snow clearance crews without instructions and directions from the carrier.

[32] In addition, and as confirmed by the direction the HSO issued to Air Canada referred to in paragraph 26 above, no request was made to the Authority for priority snow and ice removal at Gate 16. There is jurisprudence with respect to circumstances in which an employer is kept unaware of a potential contravention that in my view is germane to this appeal. I am referring to the Federal Court's decision in *Westcoast Energy Inc. and the Attorney General of Canada* ([1995] F.C.J. No. 1584). In that case an appeals officer (known at that time as the Regional Safety Officer) identified a contravention of paragraph 125(1)(v) of the Code (now paragraph (w)) and of section 12.1 of the COHSR based on his finding that employees were not wearing prescribed respiratory equipment. In his decision Mr. Justice Cullen concluded that the employer had been given no knowledge that its employees contravened the policy on respiratory equipment and quashed the appeals officer's decision. In the present case the Authority received no service request for a situation requiring immediate attention.

## **Decision**

[33] For the reasons given above and pursuant to paragraph 146.1(1)(a) of the Code, I rescind the direction issued by HSO Suzanne Arsenault on February 22, 2013.

Michael McDermott.  
Appeals Officer