Decision No. 97-004

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant:	Vancouver Wharves Ltd. Vancouver, B.C. Represented by: R. Alan Francis, Counsel
Respondent:	International Longshoremen's & Warehousemen's Union, I.L.W.U. Local 500 Represented by: Jim Peters
Mis en Cause:	Andrew Chan Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

Hearings were held in Vancouver on March 3 and 4, 1997. The safety officer, who no longer resides in Canada, did not attend the hearing. Also, the Department of Human Resources Development Canada informed the Regional Safety Officer that, in the absence of the safety officer, it would not be attending the hearing.

Background

This case was heard for the first time on March 15, 1995, in Vancouver. The circumstances of this case were described in detail in *Decision No. 95-006* rendered on May 31, 1995. The following summarizes the essential facts:

On June 28, 1994, Mr. Ron Kitchen, a foreman in charge of the operation of loading pulp on a barge on the Vancouver waterfront, was hit by a lift truck and suffered fatal injuries.

The chain of events started when a damaged lift truck was lifted out of a barge by a mobile crane and, under the supervision of Mr. Kitchen, placed on the dock between the barge and a replacement lift truck. Mr. Kitchen began removing the shackles on the damaged lift truck so they could be secured onto the replacement lift truck. Mr. Kitchen asked Mr. Mannion to drive the replacement lift truck to a location between the damaged lift truck and the barge so the crane could

lift the replacement lift truck onto the barge. As he walked by the damaged lift truck, Mr. Mannion noticed that Mr. Kitchen was removing the shackles on the damaged lift truck on the side of the barge; that side is directly opposite to the rear of the replacement lift truck. Mr. Mannion proceeded towards the replacement lift truck confident that Mr. Kitchen was out of range of the replacement lift truck.

Mr. Mannion mounted the replacement lift truck, looked around and began manoeuvring the machine in reverse. According to a statement made by Mr. Mannion to the investigating safety officer, the replacement lift truck could not be driven forward because he did not have enough room to manoeuvre it between or around a pile of salt, scrap material and a large box, all of which were stored on the dock and were encroaching on his passageway. Mr. Mannion therefore decided to back up his machine around the damaged lift truck to bring it between the barge and the damaged lift truck. As he was manoeuvring the replacement lift truck in reverse, Mr. Mannion's machine struck Mr. Kitchen and pinned him against the corner of the damaged lift truck closest to the replacement lift truck.

Mr. Harry Taylor investigated the accident for the employer and concluded that "the direct cause of the accident was operator error- he (Mr. Mannion) did not ensure that the area to the rear of his vehicle was clear."

Investigation by the safety officer

Safety officer Andrew Chan carried out an investigation into the matter. He concluded that the fatality was caused by the negligence of both the employer and the employee. In his analysis of the accident, the safety officer identified the factors that he believed contributed to the accident by making references to the Code and the Regulations. For those factors that the safety officer found to be under the responsibility of the employer he wrote, under the following heading:

A. EMPLOYER:

The loading and lifting out of lift truck on barge using mobile crane is a regular pulp barge handling operation of Vancouver Wharves. However, there is a lack of established procedure to ensure the safety of the employees. The investigation reveals that:

A1. COSH Reg. 14.25(1)(b) requires the operation of materials handling equipment to be directed by a signaller. In this case two signallers were used. The crane operator stated that he had received the proper signal from a worker on the barge to lift the machine out and the proper signal from Ron Kitchen to rest the machine on the dock. Although no one person was designated as the signaller for the crane, this action complied with the requirement of Reg. 14.25(1)(b).

Mr. Jimmy Keith, ILWU B.A., explained that the practice of Vancouver Wharves is to use a designated signaller only in low tide where the crane operator can not see down the bottom of the barge. Mr. Earl Steward, Maintenance foreman and SHC member, that it is a standard procedure to use a signaller to direct the operation of a crane during maintenance work.

Reg. 14.37(2) requires the area to be under the control of a signaller. However, Ron Kitchen did not have a safe procedure to prevent the lift truck driven by Ted Mannion from coming within dangerous proximity with him while he was disconnecting the shackles. As a result, the movement of the equipment was not adequately coordinated. If the damaged machine had been disconnected and moved away prior to manoeuvring the replacement machine into the area, the injury would have not occurred.

There was a lack of established procedure to ensure the safety of the employees at work. Further the employees are not trained to work in a safe manner due to the lack of procedure; thus, violating COSH reg. 14.23(1)(c)

2. A salt pile and scrap materials were permitted to store at the work site in a manner that encroached upon the passageways of the lift truck operated by Mr. Ted Mannion. Mr. Mannion stated that the action he chose in the handling of the lift truck, backing up close to machine 703, was in consideration of the salt pile and scrap materials, and he did not have enough room to manoeuvre his machine through another course.

   As indicated by Photo No. 7, 11 and 12, there was an estimated 10 feet of space between the clamps of the lift truck and a box rested on the north bull rail of the dock. Mr. Mannion could have moved the machine forward to gain more space and to avoid coming into contact with Ron Kitchen as he back up machine 708.

   However, the salt pile and the scrap materials may have affected his judgement and had certainly restricted the passageway of the materials handling equipment operated by Ted Mannion; thus, violating COSH Reg. 14.49(2)(b)(c).”

As a direct result of his findings, the safety officer gave two directions.

Vancouver Wharves was given a direction (see APPENDIX-A) under subsection 145(1) of the Canada Labour Code, Part II (the *Code*) on the basis that: "There is no safe work procedure for loading and unloading lift trucks using a mobile crane in connection with the pulp barge operations."

Mr. Mannion, on the other hand, was given a direction under the same provision of the *Code* for: "Failure to take reasonable and necessary precautions to ensure the safety and health of employees or any other person while operating a lift truck on June 28, 1994 at Vancouver Wharves Ltd."

Requests for Review of Directions

Separate applications under section 146 of the Code were made by Vancouver Wharves Ltd. and by the International Longshoremen's & Warehousemen's Union, Local 500 (ILWU) to have the respective employer and employee directions reviewed. Following my reviews, I confirmed the direction given to Mr. Mannion and varied the direction given to Vancouver Wharves.

The direction issued to Mr. Mannion is not an issue in this case and therefore I need not dwell on this direction any further. Following my review of the direction given to Vancouver Wharves I varied the original direction by replacing the third and fourth paragraphs of the direction, immediately following the word "contravened", with the following two paragraphs:

> "*Paragraph 125(p) of the Canada Labour Code, Part II and paragraph 14.49(2)(c) of the Canada Occupational Safety and Health Regulations.*
>
> *Materials, goods or things shall not be stored or placed on the docks in a manner that impede (sic) the safe operation of materials handling equipment such as a fork lift truck*."

This variance is the subject of this hearing.

Appeal to the Federal Court, Trial Division

Vancouver Wharves appealed the variance described above to the Federal Court, Trial Division, on the basis that it was denied procedural fairness. The Regional Safety Officer, it argued, did not give notice to the employer of his intent to consider other provisions of the legislation and did not provide the employer with an opportunity to provide evidence and to make submissions on the alleged breach to the Canada Labour Code, Part II (hereafter the Code) and the pursuant Canada Occupational Safety and Health Regulations (hereafter the Regulations). The Court agreed with the Applicant and issued an Order in respect of the variance. The Order stipulates that the variance is "set aside and referred back for redetermination." Having been informed of the Court's decision, I informed both parties that another day of hearing would be necessary in this case to resolve the matter.

Objections

Several objections were raised by Mr. Francis at the rehearing. Some were preliminary objections which required an immediate attention and some were formulated when presenting the evidence or making submissions. The objections concern the following issues:

1. The first set of issues relates to the union's participation in these proceedings

Issue #1: Does the union have standing to participate as a party at this stage when it was not a party to Vancouver Wharves' application at earlier stages?

Issue #2: Is the union bound by the agreement it made at the hearing of March 15, 1995 not to take a position on the direction issued to Vancouver Wharves?

Issue #3: Is the union estopped from taking any position or participating in Vancouver Wharves' case when its representation was that it would not do so?

2. The second set of issues relates to the jurisdiction of the Regional Safety Officer

Issue #1: Does the Regional Safety Officer have jurisdiction to substitute a contravention of a different section of the Code and a different section of the Regulations on different facts from under the power to vary given to the Regional Safety Officer under section 146 of the Code?

Issue #2: Does the Regional Safety Officer have jurisdiction to, in effect, review and reverse the decision made by the safety officer not to issue an order or direction with respect to such contravention?

3. The third set of issues will relate to evidentiary type of issues

The burden of proof and the prima facie case will be raised as issues if I decide I have jurisdiction. Also, the safety officer's absence should be addressed. It should cause the Regional Safety Officer to dismiss the case because Vancouver Wharves has no opportunity to cross-examine the safety officer.

Before proceeding with hearing the evidence in this case, Mr. Francis suggested that I hear the objections first and render a decision on each one. There was no objection by Mr. Peters on this proposal and consequently, it was agreed to proceed as requested.

1. The first set of issues: Those issues relating to the union's participation in these proceedings will be addressed as follows:

Issue #1- *Union Standing*

Issues #2 and #3 - *Promissory Estoppel*

Union Standing

Mr. Francis submitted that the I.L.W.U. was not a party to Vancouver Wharves' section 146 application originally. The union, who was represented at that moment by Mr. Tattersall, was present at the original hearing only because it had made a separate section 146 application with respect to the direction given to Mr. Mannion. The Regional Safety Officer had decided to consolidate both applications into one hearing. At that hearing, the I.L.W.U. did not adduce any evidence with respect to Vancouver Wharves' case. Mr. Francis emphasizes that Mr. Tattersall had specifically stated that the union would take no position in respect of Vancouver Wharves' application for review of the direction given to the company. Having not participated in the hearing before the Regional Safety Officer, the union made no objection to the conclusion and subsequent decision of the Regional Safety Officer. Furthermore, when the case was appealed to the Federal Court, Trial Division on judicial review, the union did not participate or seek to intervene in those proceedings. The union never intended to take any position in Vancouver Wharves' case until Mr. Tattersall left the union and the matter came back to the Regional Safety Officer to be re-heard. The union has not been a party to these proceedings and is not entitled to be declared a party at such a late date to bring evidence or to make allegations against the company in this matter when it did not do so before.

Mr. Peters reluctantly accepted the submission of Mr. Francis mainly because he had no evidence to refute Mr. Francis' assertions. The union nonetheless felt it should be entitled to present their side of the case since the Regulations had been devised to protect and benefit the workers in this industry. Mr. Francis took exception to this last comment of Mr. Peters by stating that the union could have participated in the last hearing. Mr. Francis stated that the issue before us was that of a pile of salt being on the dock which was never identified by the union or the safety and health committee as being a problem before. In response, Mr. Peters observed that the pile of salt being there was not an issue until it contributed to the accident.

Reasons for Decision re Standing

This case is being re-heard because the Federal Court, Trial Division felt that the decision I had rendered previously had been reached in a manner that was procedurally unfair. According to the judgement, the Applicant i.e. Vancouver Wharves, had not been notified of my intention to consider other provisions of the legislation and was not given the opportunity to present evidence and to make submissions on the alleged breach of the Code and the Regulations.

I explained to both parties that any decision rendered by the Regional Safety Officer will undeniably influence the rights and interests of the workers affected by that direction. To deprive them of the right to participate in this hearing, which right had been granted to them originally and which was never put into question, would amount to committing the same procedural mistake that had been made against Vancouver Wharves.

Decision: My decision is that the I.L.W.U., Local 500 was and remains a party in these proceedings and is granted standing accordingly. The objection is **DISMISSED**.

Promissory Estoppel

Submission for Vancouver Wharves:

This issue is related to standing. Mr. Francis stated that, when this case was first heard, the union was present as the representative of employees and as the certified bargaining agent that acts in that capacity. Mr. Francis submitted that in that capacity, it entered into an agreement with the company. The agreement is set out in Mr. Francis' Statutory Declaration which has been entered under the quote D-18 of the documents filed in this case. The agreement was made with Mr. Tattersall, the union representative at that time. Mr. Francis observed that although Mr. Tattersall was absent from this hearing, the agreement was made by him on behalf of the Union.

Mr. Francis explained that according to the agreement, Vancouver Wharves "would not take any position on the Union's application and would not cross-examine Mr. Mannion provided the Union did not take any position on our application." In his Declaration, Mr. Francis also reports that "At the hearing, I stated that the Applicant took no position on the Union's application and Mr. Tattersall stated that he took no position on the Applicant's application." Mr. Francis further states in his Declaration that "Mr. Tattersall did not make any submissions in argument nor take any position on the Applicant's application. I did not make any submissions in argument nor take any position on the Union's application."

Mr. Francis explained that both sides honoured the agreement at the hearing of this case. As a result, the union benefitted from the agreement. Mr. Mannion was not cross-examined at a time where he was distraught. There was no blame laid against Mr. Mannion at that time. Mr. Francis submitted that he relinquished his right to cross-examine Mr. Mannion at a time much closer to the incident and to bring any other evidence such as Mr. Mayor. Mr. Francis further submitted that the company could have shown that Mr. Mannion was entirely responsible for the accident "except maybe for Mr. Kitchen who may have contributed to it." The union, said Mr. Francis, continued to comply with the agreement to take no position until very recently. Mr. Francis was adamant: the union should be held to its agreement. It should not be allowed to renege on the agreement by coming to this hearing and taking a position. The agreement was made in contemplation of litigation and for the purposes of litigation.

Mr. Francis submitted that the legal doctrine of estoppel applies in this case. A Brief of Authorities was entered into evidence in support of the doctrine of promissory estoppel. Mr. Francis explained briefly, in his own words, that the doctrine of estoppel (or promissory estoppel) at law is:

> "Where a person makes a promise or representation that it will not exercise its legal rights and that promise or representation is intended to be acted upon by the other party and the other party acts upon it to its detriment or to its prejudice, then the party making that promise or representation is not permitted, is estopped, from asserting its rights."

A number of cases[1] were cited by Mr. Francis as the applicable jurisprudence for estoppel. Suffice to say that Mr. Francis has argued that administrative tribunals, such as the Regional Safety Officer sitting on appeal of a direction, must also hear and decide objections based on the doctrine of estoppel.

Finally, Mr. Francis submitted that the existence of an agreement and all the elements of promissory estoppel have been proven and are not disputed.

Submission for the union

Once again, Mr. Peters reluctantly accepted the submission of Mr. Francis mainly because he had no evidence to refute Mr. Francis' assertions. When asked if he challenged the existence of the agreement between Vancouver Wharves and the union, Mr. Peters indicated that he was not prepared to do so. Mr. Peters did mention that he was vaguely aware through discussions with Mr. McLellan that the company had an agreement with Mr. Tattersall on this case. Mr. Peters was concerned that he had not seen Mr. Francis' "Declaration" ahead of time and indicated that had he been apprised of this agreement, he would have attempted to talk to Mr. Tattersall or have him present at the hearing, although Mr. Tattersall was no longer with the union.

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1. Scivitarro v. Ministry of Human Resources et al., (1982) 4 w.w.r. 632
2. Darby v. Maier, 8 B.C.L.R. (3d) 41 (BCSC)
3 City of Penticton, 18 L.A.C. (2d) 307 (BCLRB)
4. School District No. 39 (Vancouver), unreported arbitration award May 29, 1995 (McPhillips)
5. School District No. 39 (Vancouver), BCLRB No. B173/96

Mr. Peters indicated that it was not the intention of the union to lay blame in this case but to make sure that this situation never repeats itself. It was his opinion that there were circumstances that contributed to the accident and surely, the pile of salt, which was cleaned up after the fact, is one such circumstance which was indicated in the report of the safety officer. Mr. Peters was of the view that when the company applied to the court to have the decision changed it caused the rules to be changed. It was the union's understanding that the company would accept the Regional Safety Officer's decision. Mr. Peters noted that Mr. Francis presented an argument of estoppel. In his view, that argument should relate to the particular situations that are pertinent to this hearing. Furthermore, Mr. Peters expressed the view that this is not a labour relations issue nor an arbitration issue, but an issue of safety to protect the workers in their every day workplace. As far as the union is concerned, the rules have changed when the hearing was set and Mr. Peters believed that the employer would accept the union's participation.

As a final point, Mr. Peters expressed concern about the introduction of a very legal type of objection by referring to the objection of promissory estoppel. The use of this type of objection would require that all participants in these hearings be lawyers. This situation creates a problem for both unions and workers in general. Nonetheless, Mr. Peters did take time to reflect on this objection and on the time given to the union to answer the objection. His decision was that, although the union felt their obligation in respect of the agreement was finished and that the Code should supersede any agreement, the union did not wish to adjourn the hearing but wished to continue.

Reasons for Decision re Promissory Estoppel

I am asked to rule that the union is estopped from exercising its right to participate in this case on the basis that Mr. Tattersall, on behalf of the International Longshoreman and Warehouseman's Union, Local 500, agreed with Vancouver Wharves not to take any position on the review of the direction issued by safety officer Andrew Chan to the Company on September 29, 1994. At the March 15, 1995 hearing, both Mr. Tattersall on behalf of the Union and Mr. Francis on behalf of Vancouver Wharves confirmed and reaffirmed, in my presence, the agreement. Furthermore, the agreement was strictly adhered to throughout the hearing and in closing arguments by both parties and both sides benefitted from the agreement.

In the case of the direction issued to Mr. Mannion, he was not cross-examined by Mr. Francis who alleges to have been able to show that Mr. Mannion was entirely responsible for the accident. No evidence was adduced against Mr. Mannion and no submissions were made in arguments on the direction issued to Mr. Mannion. There is also this whole aspect concerning litigation which will not be addressed here but which was a significant consideration when making the agreement.

I am satisfied that administrative tribunals must decide issues of promissory estoppel. Since this hearing is only a continuation of the initial hearing held on March 15, 1995, I can only find that, in light of everything that was said above and in all fairness to Vancouver Wharves, the Union must be held to its agreement.

It is important at this point to clarify the contradiction that may appear to exist in this case where one party is granted standing and where that same party is being estopped from exercising its rights. In this case, the Regional Safety Officer had initially granted standing to the union and expected the union to take part in the review of the direction given to Vancouver Wharves. However, by making an agreement with the employer not to take any position respecting the direction issued to the company, the union decided not to exercise its right to participate in the review of the direction given to the employer in order to gain benefits during the review of the direction given to Mr. Mannion. Evidently, such a decision is fraught with consequences particularly since the agreement was made without defining any limits. According to the agreement, both sides agreed not to take any position on the review of their respective direction.

Decision: My decision respecting the objection raised by Mr. Francis regarding promissory estoppel is to **UPHOLD** the objection. The International Longshoremen's & Warehousemen's Union, Local 500 is estopped in this case from taking any position on Vancouver Wharves' case.

However, Mr. Francis was notified that, having sustained the objection, I intended to proceed hearing this case by considering the safety officer's investigation report. Mr. Francis was further advised to adduce any evidence he may have or considers introducing in this case and he should be prepared to do so at this time.

2. The second set of issues: Those issues relating to the jurisdiction of the Regional Safety Officer in these proceedings will be consolidated under the heading: *Jurisdiction of the Regional Safety Officer*

Jurisdiction of the Regional Safety Officer

Note: Mr. Francis submitted that the Regional Safety Officer must answer the objections before proceeding with hearing the evidence. I decided to take the objections under advisement and hear the evidence on the condition that I would decide the issues of jurisdiction in my written report.

The detailed submission of Mr. Francis is on record. Essentially, Mr. Francis is of the view that the Regional Safety Officer lost his jurisdiction or exceeded his jurisdiction because he issued a complete new direction when he purported to vary the direction, a power that is not supported by the wording of the legislation. Rather than summarizing the arguments of Mr. Francis, I will reproduce the objection as formulated and decide whether I have jurisdiction to proceed.

Issue #1 - Does the Regional Safety Officer have jurisdiction to substitute a contravention of a different section of the Code and a different section of the Regulations on different facts from under the power to vary given to the Regional Safety Officer under section 146 of the Code?

Issue #2- Does the Regional Safety Officer have jurisdiction to, in effect, review and reverse the decision made by the safety officer not to issue an order or direction with respect to such contravention?

Reasons for Decision re Jurisdiction of the Regional Safety Officer

Before deciding the issues above, it is important in my view to consider the Order of the Federal Court. The Court set aside the variance I made to the direction and referred it back for redetermination because my decision was made in a manner that was procedurally unfair. I interpret the Court's Order to mean that I should provide the Applicant with the opportunity to provide evidence and make submissions on the alleged breach of the Code and the Regulations and re-decide the case on this basis. Therefore, I believe I cannot come to the conclusion that I have lost or exceeded my jurisdiction to decide this case.

In *Decision No. 95-006*, I made the following findings:

1. In reply to the question: Was there a violation of the operator training provision? I said that the employer has not contravened paragraph 14.23(1)(c) of the COSH Regulations in the manner referred to in the direction

2. In reply to the question: To what extent has the employer contravened the Code? I said: "In my opinion, because of the disorder on the dock, Mr. Mannion was not working under conditions which were conducive to a safe working environment. By allowing goods and materials to be stored on the dock, by parking a replacement lift truck in the vicinity of those goods and materials and then, by positioning the damaged lift truck in a manner where it effectively entrapped the replacement lift truck knowing that it had to be moved, the employer contravened paragraph 14.49(2)(c) of the COSH Regulations.

   That, in my opinion, is the extent of non-compliance of the employer in this case. I believe that this finding is in line with the intent of the direction. The direction should therefore be varied to reflect this situation."

Therefore, on the basis of the above, I made a variance to the original direction on the basis of the following findings:

Finding #1. The employer is not in contravention of the operator training provision.
Finding #2. The factors that I have taken into consideration to vary the direction are:
i) the impediment created by the placing of the damaged lift truck; and
ii) housekeeping on the dock.
Finding #3. The employer is in contravention[2] of paragraph 14.49(2)(c) of the Regulations and paragraph 125(p) of the Code.

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[2] Canada Labour Code s.***125.*** *Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,*
(p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place; and,
COSH Regs. ss.14.49(2) No materials, goods or things shall be stored or placed in a manner that may
(c) impede the safe operation of materials handling equipment;

In *Decision No. 95-006*, I concluded (Finding #1 above) that the employer had not contravened paragraph 14.23(1)(c) of the COSH Regulations since that provision dealt with operator training. There is no issue on this aspect of my decision and therefore I may set this finding aside and continue my analysis.

The original direction of safety officer Chan set out to correct the following problem:

> "There is no safe work procedure for loading and unloading lift trucks using a mobile crane in connection with the pulp barge operations."

The basis for the direction is reported by the safety officer to be, in part, that:

> "Reg. 14.37(2) requires the area to be under the control of a signaller[3]. However, Ron Kitchen did not have a safe procedure to prevent the lift truck driven by Ted Mannion from coming within dangerous proximity with him while he was disconnecting the shackles. As a result, the movement of the equipment was not adequately coordinated. If the damaged machine had been disconnected and moved away prior to manoeuvring the replacement machine into the area, the injury would have not occurred.
>
> There was a lack of established procedure to ensure the safety of the employees at work. Further the employees are not trained to work in a safe manner due to the lack of procedure; thus, violating COSH reg. 14.23(1)(c)"

The safety officer sought to prevent the re-occurrence of the tragic accident by requiring the employer to establish and have his employees adhere to a procedure for the safe transfer of lifts trucks from a barge onto the dock. Requiring a procedure under the Code and the COSH Regulations is problematic because the COSH Regulations do not prescribe procedures in general but rather prescribe specific standards that must be followed to ensure the safety and health of employees at work. Those standards are minimum standards which must be adhered to strictly to prevent accidents from occurring. During his initial submission of March 15, 1995, which is on record, Mr. Francis readily acknowledged that the safety officer, who required a safe work procedure, made a mistake in referencing paragraph 125(q) of the Code. Mr. Francis said:

> "When 125(q) says "provide in the prescribed manner", we are not aware of any prescribed manner for providing a procedure such as that which is the subject to this order."

Obviously, paragraph 14.23(1)(c) of the Regulations did not accord with the problem to be corrected because the Regulations do not prescribe a safe work procedure for loading and unloading of lift trucks during the pulp barge operations. The safety officer was clear in his mind which main factor under the control of the employer resulted in the accident. He wrote "*If the damaged machine had been disconnected and moved away prior to manoeuvring the replacement machine into the area, the injury would have not occurred*." That conclusion of the

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[3] The issue of whether a signaller was required in the circumstances of this case was set aside by the safety officer and will not be addressed as an issue in this case.

safety officer formed the basis of his direction as he obviously considered this situation to be the root cause of the accident.

The solution chosen by the safety officer i.e. operator training, was determined in *Decision # 95-006* to be incorrect. In order to correct that error, I varied the direction while preserving its intent (to correct the problem described in the previous paragraph) and identified the correct provision that would achieve the purpose that the direction of safety officer Chan intended to achieve. The question raised by Mr. Francis is whether the power given to the Regional Safety Officer to vary a direction would accommodate a variance that would identify different provisions that accord with the problem to be corrected.

The word "vary" is defined by The Concise Oxford English Dictionary, Eight Edition, 1990, to mean 1. Make different; modify, diversify; 2.a. undergo change; become or be different. The french equivalent of "vary" is "modifier"which, according to Le Petit Robert Dictionary, 1991, means A1. Changer (une chose) sans en altJrer la nature, l'essence;". Clearly then, the word "vary" or its french equivalent "modifier" which has the same force in law, is sufficiently flexible to permit expressing the problem identified by the safety officer in a different manner as long as its nature is not altered.

When Parliament enacted Part II of the Code, it included a purpose clause through which the words and provisions in the Code must be interpreted. It provides:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

Hence, we must ask ourselves: what was the purpose of Parliament when it entrusted the Regional Safety Officer with the power to vary a direction? Under section 146 of the Code, the Regional Safety Officer already has the power to rescind or confirm a direction. Surely then, the power to vary a direction meant that if the safety officer references the wrong regulation in the direction, the Regional Safety Officer can redress the error as long as the correction accords with the facts reported by the safety officer. The Regional Safety Officer, like the safety officer before him, is guided in his responsibilities by this purpose clause.

The power to review a direction requires that the Regional Safety Officer look at the same circumstances investigated by the safety officer and, if needed, vary the content of the direction. This does not mean that if the safety officer looked at whether the employer contravened subsection 145(1) of the Code, I could conclude that the safety officer purported to look at whether a danger existed and issue a direction under subsection 145(2) of the Code. That, in my opinion, would amount to exceeding my jurisdiction because it would require that I issue a new direction for danger, a power that was not given to the Regional Safety Officer. The direction that I varied was issued under the authority of subsection 145(1) of the Code and the variance that I made to the direction is also made under the same authority on the basis of the same facts considered by the safety officer.

In the instant case involving a fatality, the safety officer felt that on the basis of the evidence gathered that the employer was in contravention of the law. I am of the view that the Regional Safety Officer can ensure, under the power to vary a direction, that the contravention accords with the facts notwithstanding that the safety officer may have referenced the wrong provisions of the Code and the Regulations. If this was not the case, situations could exist where steps would not be taken to prevent the re-occurrence of a serious accident or fatality. It is difficult to conclude that Parliament would permit this to happen.

In my opinion, the variance I made to the direction and the conclusion of the safety officer express the same idea by using different words. Hence, saying *"If the damaged machine had been disconnected and moved away prior to manoeuvring the replacement machine into the area, the injury would have not occurred"* amounts to saying that the damaged lift truck should not have been placed in a manner that impeded the safe operation of the replacement lift truck in combination with its surroundings, whether permanent or transitory, a situation clearly in contravention of paragraph 14.49(2)(c) of the COSH Regulations.

Therefore, to the extent that

> * I have expressed the problem identified by the safety officer by using different words without altering the nature of the problem; and that
>
> * I have referenced a different provision of the Code and Regulations that accords with the problem to be corrected and the facts considered by the safety officer;

it is my opinion that the portion of the variance respecting the placing or positioning of the damaged lift truck in a manner that impeded the safe operation of the replacement lift truck is justified.

As a consequence of all the above, the following is my decision in respect of Issue #1:

Issue #1: Does the Regional Safety Officer have jurisdiction to substitute a contravention of a different section of the Code and a different section of the Regulations on different facts from under the power to vary given to the Regional Safety Officer under section 146 of the Code?

Decision: The objection as formulated is **DISMISSED**. It is my opinion that, pursuant to section 146 of the Code, I have jurisdiction to vary a direction issued under subsection 145(1) of the Code by substituting a contravention of a different section of the Code and a different section of the Regulations where the variance is based on the same facts[4] reported by the safety officer and accords with the factors that he considered and the problem that he intended to correct.

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[4] In Issue #1, Mr. Francis makes reference to the variance being made on different facts. There are two sets of facts. The first set concerns the positioning of the damaged lift truck which is dealt with in this issue. The second set of facts concern housekeeping and is addressed in Issue #2.

To decide *Issue #2* above, I must look at the second set of facts (page 3 above) considered by the safety officer. Those facts relate to the pile of salt, the scrap paper and the debris on the dock. A safe work procedure would take into consideration the surroundings, including the housekeeping aspect on the dock and the positioning of the damaged lift truck under those conditions. It was Mr. Mannion's contention, whether rightly or wrongly, that he could not move forward because of the presence of the pile of salt, the paper and the debris at the site. He decided to move the replacement lift truck backwards and had to move it around an obstacle, the damaged lift truck, that was placed immediately behind the replacement lift truck under the supervision of the foreman, the representative of the employer on the dock. The safety officer considered all of the above and in his testimony, introduced as evidence by Mr. Francis under the quote D-18, page 3, lines 21 to 28 he said

> "...there are a number of things that we found at the site that are contributing factors to the accident mainly the housekeeping and the debris of paper spreading around and also there is a pile of salt in close proximity to the two lifts trucks and these are contributing factors narrowing the passage way of Ted Mannion's operation, however, the company was very quick in responding in clean up the site in removing the salt therefore, I feel it is not necessary to issue the company a direction on the issue of obtaining the AVC because they have taken immediate action to clean up the work site."

It is clear from the above that the safety officer was concerned that the surroundings, in this case the pile of salt and the scrap materials, had contributed to cause the accident. However, I must also acknowledge that the safety officer had decided not to issue a direction to Vancouver Wharves Ltd. on housekeeping although he felt it was a contributing factor to the accident. While it is possible that the power to vary a direction under section 146 of the Code would authorize me to take housekeeping into consideration, I am not prepared at this time to assert my authority to that extent. I believe that little would be gained by doing so since housekeeping was considered as a contributing factor whereas the positioning of the damaged lift truck is considered as the root cause of the accident.

On this basis, the portion of the variance referring to the presence of a pile of salt, the paper and the debris on the dock must be removed from the variance. I will clarify the variance to take the safety officer's decision into consideration by eliminating any reference to Finding #2(ii) above.

As a consequence of all the above, the following is my decision in respect of Issue #2:

Issue #2: Does the Regional Safety Officer have jurisdiction to, in effect, review and reverse the decision made by the safety officer not to issue an order or direction with respect to such contravention?

Decision: The objection as formulated is **UPHELD**. As the Regional Safety Officer deciding this case, it is my opinion that the portion of the variance dealing with the pile of salt, the paper and the debris constitutes a direction to have the work site cleaned up after the accident. The Regional Safety Officer has no jurisdiction to review a decision of a safety officer not to issue a direction with respect to such contravention. To that extent, that portion of the variance is not justified and will be adjusted accordingly.

3. The third set of issues: Those issues will be addressed as follows:

Issue #1 - *Burden of Proof* and *Absence of Safety Officer*
Issue #2 - *Prima Facie Case*

Burden of Proof and *Absence of Safety Officer*

Submission for Vancouver Wharves

The detailed submission of Mr. Francis is on record. Essentially, Mr. Francis takes the view that the burden of proof is not on the company but on the safety officer. The company is entitled to a presumption of innocence and it must be proven on a balance of probabilities that it contravened the Act or regulations before any such finding can be made. Also, the absence of the safety officer at the hearing should cause the Regional Safety Officer to dismiss the case on that basis alone.

Reasons for Decision re Burden of Proof and Absence of Safety Officer

The legislator entrusted safety officers with specific powers and responsibilities. The safety officer is a trained professional who investigates a hazardous occurrence under the authority of the Code and usually in the presence of the employer and employee representatives. His observations and findings have been submitted in a written report. The report has been adduced as evidence and its content was not challenged as a whole. The same report was adduced in evidence at the Federal Court, Trial Division when the company appealed the decision of the Regional Safety Officer.

The safety officer was present at the hearing of March 15, 1995 and was cross-examined on the report and on the same facts that are in issue before me in this hearing. The safety officer's cross-examination was adduced as evidence by Mr. Francis as Exhibit AB" of the documents submitted in a stack and which have been received under the quote D-18. The fact that the safety officer is not present at this particular hearing is not a major issue. I take official notice that the safety officer no longer resides in Canada. I note that the Code does not require his presence during a review of the direction. In fact, section 144 of the Code protects a safety officer from being compelled to give evidence in civil proceedings except with the written permission of the Minister.

Where a company disagrees with a direction, it applies for a review of the direction under section 146 of the Code. By doing so, the Applicant must show that the safety officer erred and adduce evidence accordingly. It is the Applicant who challenges the findings of the safety officer and for this reason, the Applicant has the burden of proof. On review of the direction, it is the responsibility of the Regional Safety Officer, a quasi-judicial decision making body, to decide on the balance of probabilities whether the employer has discharged himself/herself of that burden. I am of the opinion that the burden of proof falls on the employer. It is particularly important to emphasize this point in the instant case because, among other reasons, the union was estopped from exercising its right to participate in these proceedings.

Decision: For all these reasons, the objections of Burden of Proof and Absence of the Safety Officer are **DISMISSED**.

Prima Facie Case

Submission for Vancouver Wharves

The detailed submission of Mr. Francis is on record. Essentially, Mr. Francis argues that there is not a prima facie case (a case of first instance) against the company. Mr. Francis is of the view that there is no admissible or acceptable evidence before the Regional Safety Officer of a contravention of section 125(p) of the Code or section 14.49(2)(c) or any other part of the Regulations.

Reasons for Decision re Prima Facie Case

This case is, in my opinion, identical to the case investigated by the safety where he concluded that the employer, as well as the employee, was responsible for the accident. The facts are the same. The decision that I rendered, which was appealed by Vancouver Wharves to the Federal Court, dealt with both (1) the placing of the damaged lift truck and (2) housekeeping. The procedure that was envisaged by the safety officer dealt with the impediment created by the foreman when the damaged lift truck was not removed prior to moving the replacement lift truck although he expressed it in a different manner. The nature of the problem described by the safety officer has not changed due to my referencing a different provision of the Code and the Regulations.

The variance was made primarily on the basis of the facts reported by the safety officer. The provisions referenced accord with the facts. Paragraph 125(p) of the Code is the authority for paragraph 14.49(2)(c) of the Regulations since it addresses safe occupancy of the workplace, the issue in this case. Mr. Kitchen was fatally injured because his workplace was unsafe as a result of placing the damaged lift truck immediately behind the replacement lift truck, an action that impeded the safe operation of the replacement lift truck. Placing the damaged lift truck in that position knowing that it had to be moved effectively entrapped the replacement lift truck. Both, Mr. Mannion and the safety officer, shared the view that the surroundings of the replacement lift truck affected the ability to safely move the lift truck and the judgement of Mr. Mannion, a qualified operator of materials handling equipment.

If anything, this hearing, which is the continuation of the hearing of March 15, 1995, gives the employer the opportunity to adduce evidence and make submissions that could demonstrate that the safety officer erred. However, Mr. Francis has not shown that the employer has not contributed to the accident. The variance I made to the direction is consistent with the findings of the safety officer notwithstanding that a portion of the variance is being removed for possible lack of jurisdiction. In my opinion, we are faced with the same accident, the same case, the same circumstances and, for all practical purposes, the same remedy.

Decision: For all these reasons, the objection raised on the issue of the absence of a prima facie case is **DISMISSED**.

THE ACTUAL CASE

It would appear that some confusion is permeating this case. The confusion arises from the fact that the contravention for placing, or positioning, the damaged lift truck in a manner that impeded the safe operation of the replacement lift truck and the alleged contravention respecting the pile of salt and the scrap materials are both dealt with under the same provision i.e. paragraph 14.49(2)(c) of the Regulations. Throughout this hearing and during the appeal of this case to the Federal Court, Mr. Francis ignored that, in *Decision #95-006*, I emphasized the importance of the first set of facts reported by the safety officer and considered them to have directly contributed to the accident. Much of the evidence adduced by Mr. Francis centred on housekeeping to the detriment of the positioning of the damaged lift truck.

However, Mr. Francis was advised at the hearing of my intention to consider the positioning of the damaged lift truck as the principal cause of the accident. Mr. Francis was asked to make submissions on this point given that it had been considered in my initial decision in order to vary the direction. The submissions of Mr. Francis on this point were that the replacement lift truck was not engaged in operations on the dock, that the positioning of the damaged lift truck was not an obstruction of Mr. Mannion's passageway and as a consequence, that action does not constitute a contravention of the Regulations. I disagree with such a restrictive interpretation of paragraph 14.49(2)(c) of the Regulations. As I said earlier in the text, the damaged lift truck, or any other thing for that matter, should not have been placed in a manner that, in consideration of its surroundings, impeded the safe operation of the replacement lift truck, a situation clearly in contravention of paragraph 14.49(2)(c) of the Regulations.

In my opinion, the variance to the direction of safety officer Chan is justified and, most importantly, necessary if we are to ensure that a similar tragic accident never occurs again.

For all the above reasons, **I HEREBY VARY** the direction given, under subsection 145(1) of the Canada Labour Code, Part II on September 29, 1994 by safety officer Andrew Chan to Vancouver Wharves by replacing the third and fourth paragraphs of the direction, immediately following the word "contravened", with the following two paragraphs:

> "*Paragraph 125(p) of the Canada Labour Code, Part II and paragraph 14.49(2)(c) of the Canada Occupational Safety and Health Regulations.*
>
> *A damaged lift truck was placed on the dock immediately behind a replacement lift truck in such a manner that it impeded the safe operation of the replacement lift truck*."

Decision issued on April 25, 1997

Serge Cadieux
Regional Safety Officer

APPENDIX-A

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On June 28, 1994, the undersigned safety officer conducted an inquiry in the work place operated by Vancouver Wharves Ltd., being an employer subject to the Canada Labour Code, Part II, at 1995 West First Street, North Vancouver, B.C., V7P 1A8, the said work place being sometimes known as Vancouver Wharves Ltd.

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

Paragraph 125(q) of the Canada Labour Code, Part II and paragraph 14.23(1)(c) of the Canada Occupational Safety and Health Regulations.

There is no safe work procedure for loading and unloading lift trucks using a mobile crane in connection with the pulp barge operations.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than October 31, 1994.

Issued at Vancouver, this 29 day of September, 1994.

Andrew Chan
Safety Officer

To: Mr. Mike McClellan
Superintendent, Industrial Relations
Vancouver Wharves Ltd.

Decision No.: 97-004

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicants: Vancouver Wharves Ltd. and International Longshoremen's & Wharehousemen's Union

PROVISIONS

Code: 145(1), 125(p), 125(q), 126(1)(c)
COSH Regulations: 1.4(c), 14.2(b), 14.23(1)(c), 14.49(2)(c)
MOSH Regulations: 1.3(c), 12.2, 12.22(1)(b)

KEYWORDS

Lift truck, fatality, Federal Court, standing, promissory estoppel, jurisdiction, variance, vary, burden of proof, prima facie, procedure, loading, unloading.

SUMMARY

An accident occurred on the Vancouver waterfront in which a foreman in charge of pulp barge operations was fatally injured by a lift truck. Two directions were given by a safety officer. The direction to Vancouver Wharves was appealed to the Federal Court, Trial Division on the basis that the variance was arrived at in a manner that was procedurally unfair. The Court set aside the variance and sent it back to the Regional Safety Officer (RSO) to be redetermined.

Before hearing the case, the RSO had to hear and decide several objections. In the end, the RSO concluded that the portion of the variance dealing with the positioning of the damaged lift truck was contrary to section 14.49(2)(c) of the Regulations. The portion of the variance dealing with a pile of salt, scrap paper and debris being on the dock amounted to the RSO giving a new direction to have that material cleaned up. On that last point, the RSO noted that it was the decision of the investigating safety officer not to issue a direction to the employer for that aspect because the employer was quick in cleaning up the site. The RSO concluded that he did not have the power to review a decision of a safety officer not to issue a direction and removed any reference in the variance to housekeeping..