

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Clarke Road Transport Inc.  
Represented by: Mr. Ross Langley  
Counsel

Respondent: Mrs. J. King  
Represented by: Mr. B.A. Jones  
Counsel

Mis-en-cause: M. Fougere  
Safety Officer  
Human Resources Development Canada

Before: Douglas Malanka  
Regional Safety Officer  
Human Resources Development Canada

Background:

On May 4<sup>th</sup>, 1998, a tractor-trailer loaded with bales of hay arrived at its first drop-off destination. When the driver, Mr. James King, released the tension on the rear tie down straps securing the load, he noticed that the bales of hay were deformed and leaning. He waited for a few minutes and then proceeded with stowing the tie down straps on the trailer. At that moment, three bales from the trailer toppled and struck and fatally injured him.

A safety officer from Human Resources Development Canada investigated the accident. He concluded that the driver was an employee of Clarke Road Transport Canada Inc. (Clarke) and that Clarke was subject to the Canada Labour Code, Part II, (hereafter referred to the Code or Part II). He further decided that Clarke was in contravention of paragraph 125.(q) of Code and section 14.39 of the Canada Occupational Safety and Health Regulations (hereto referred to as the COSH Regulations) for having failed to develop and implement procedures for working around cargo that may create a hazard. He also concluded that Clarke was in contravention of paragraph 125.(t) of the Code and subsection 14.3(1) of the COSHRs for having failed to provide a guard or device to protect employees from a hazardous condition while working with materials handling equipment.

Clarke agreed that it was a federally regulated Company and subject to the Code, but asserted that the driver was an independent broker<sup>1</sup> and not an employee of Clarke. The Company also insisted that it had not contravened the Code or the COSH Regulations as alleged by the safety officer. As a result, Clarke requested a review of the direction pursuant to section 146 of the Code. Review hearings were held on July 6, 1999 in Truro, N.S. and on July 29 and September 1, 1999, in Halifax, N.S. Final written arguments were submitted on February 7, 2000.

Safety Officer:

Before the hearings, safety officer Mark Fougere submitted to the Regional Safety Officer a copy of his accident investigation report and numerous documents he had obtained and considered during his investigation. He also testified at the review hearings. The documents will not be repeated here but are included in the file. I retain the following facts from the documents and his testimony.

Safety officer Fougere said that he decided that Clarke was a federally regulated enterprise because the Company provided for-hire trucking services to eastern Canada, Ontario, Quebec and the United States of America (USA). The Company did not dispute this conclusion. He stated further that he relied on safety officer training he received from his Department, and on case law found in a book titled, "The Law of Dismissal in Canada<sup>2</sup>," for determining Mr. King's employment status with Clarke. While the book referred to various employment tests including the "Control test," the "Four-fold test", and the "Organization test," safety officer Fougere said he essentially relied on the Four-fold test for his determination. The Four-fold test considers four criteria that include: "Control"; "Ownership of Tools"; "Chance of Profit"; and "Risk of Loss."

Safety officer Fougere testified that the following facts convinced him that Clarke controlled the work, owned the tools, and determined J's Trucking chance of profit and risk of loss:

*1. Item "C" of Appendix "D" of the Independent Broker Agreement - Flat Bed Division (IBA) between Clarke and J's Trucking specified that the insurance coverage specified in items "A" and "B" of the Appendix are:*

*"...given under the condition that the Contractor "is employed by and works exclusively for the Company.";*

*2. Item "D" of Appendix "E" of the IBA between Clarke and J's Trucking specified that J's Trucking was to be remunerated at the rate of 81% of gross revenues for the goods hauled;*

*3. Clarke paid Nova Scotia Workers Compensation Board (WCB) payments on behalf of Mr. King and, following the accident, the Board paid settlement to the family under the employer name of Clarke;*

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<sup>1</sup> In this review, the terms "Owner Operator", "Broker", "Independent Broker", and "Contractor" were used in testimony and text as being interchangeably when referring to J's Trucking or to Mr. King. For this decision, I regard them as having the same meaning and have opted to use the term "Broker" which is used in the IBA."

<sup>2</sup> Law of Dismissal in Canada, Howard A. Levitt, B.A., LL.B, Ontario Bar, 2<sup>nd</sup> Edition, Canada Law Book Inc., (pages 10 to 19.)

4. *Clarke maintained a Broker's file on Mr. King that identified 27 items. The documents included Mr. King's employment application; driver abstract; emergency information; record of traffic violations; record of annual provincial vehicle inspection. The file also contained Mr. King's test results relative to; transportation of dangerous goods and USA Motor Carrier Safety Regulations testing conducted by Clarke. In addition, it confirmed his receipt of Clarke's alcohol and drug policy; his participation in Clarke's group insurance plans, and his use of a Clarke credit card. Other documents confirmed Mr. King's receipt of trip sheets; expense envelopes; accidents report forms; cargo claims forms; business forms; and Company notices regarding transportation safety and government safety requirements..*

5. *Clarke provided Mr. King with a document entitled "To All New Drivers re: Summary of Driver Duties and Responsibilities" that." The document listed driver responsibilities under Clarke relative to: fuel cards, cash advances, ferry tolls, trip envelopes and logbooks. It also dealt with load security, dangerous goods, axle weight and fines, cargo protection, cargo claims, rough roads, pre-trip inspections, safety protection equipment, restricted use of power units, fuel, authorization for passengers, tolls and bills of lading. The "Summary" specified that Mr. King had to report daily to Clarke's dispatcher regarding his availability or progress, and to report any delays including breakdowns, bad weather, or accidents. Mr. King was also required to advise Clarke of vehicle defects discovered during pre-trip inspections, repair purchases, cargo damage and claims;*

6. *Clarke controlled Mr. King's scheduling and did the bookkeeping for J's Trucking; and,*

7. *Mrs. King told safety officer Fougere that Clarke's dispatcher obliged Mr. King to accept assignments when called, or risk not being called in the future.*

Safety officer Fougere said that he issued his direction because Clarke had a duty under the Code to ensure that the trailer had been fitted with stakes and that Mr. King knew how to protect himself.

Applicant:

Prior to the hearing, Mr. Langley provided the Office of the Regional Safety Officer with Clarke's rationale for requesting that the direction be rescinded and called two witnesses during the hearings. The documents form part of the file and will not be repeated here. However, I retain the following from the documents submitted and testimony given.

Mr. Clark, Loss Safety and Health Manager with Clarke testified on behalf of Clarke. He pointed out that the IBA was between Clarke and J's Trucking/ Virginia King<sup>3</sup>, a Broker. Section 7.1 further specified that the agreement was for the provisions of services by an independent contractor and not in the nature of employment. He noted also that Appendix E of the contract specified that the Broker was to supply all equipment for the work.

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<sup>3</sup> In this review, the name "J's Trucking" and "Virginia King" were both used in testimony and text when referring to J's Trucking. Since "J's Trucking" was the name specified in the IBA and was also the registered name of the company owned by Virginia King, I will refer to the Company in my decision as J's Trucking.

On the issue of control, he emphasized that section 3.1 of the IBA permitted the Broker to hire employees to assist in the work, and the only limitation was that the Broker could not employ anyone in the name of Clarke or pledge the credit of Clarke. He stressed that Clarke did not supervise the work done by Mr. King and that J's Trucking could terminate the contract after a 30-day notice to Clarke.

With regard to documents referred to in Mr. King 's Broker file, Mr. Clark explained that Clarke held the extra-provincial motor carrier license under which J's Trucking operated when they did work for Clarke. Because of this, Clarke was required under National Safety Code and the USA Motor Carrier Safety Regulations to conduct various competency tests and to collect and maintain driver records. This included driver training, vehicle inspections, vehicle maintenance, log books, insurance coverage and medical and drug testing programs. A copy of the USA Department of Transportation Motor Carrier Safety Regulations and extracts from the National Safety Code were provided in support of this position. He said that these third party obligations also required J's Trucking to carry Clarke's logo and Clarke to retain an employment application for Mr. King.

Mr. Clark held that J's Trucking was not obliged to purchase a trailer through Clarke, use the Clarke's credit cards for fuel and repair and toll fees, or to participate in Clarke's group insurance plans. He said that J's Trucking did so voluntarily. He further clarified that Clarke paid J's Trucking workers compensation fees on a charge back basis because Nova Scotia law dictates that Clarke, as the contractor, is liable if a Broker defaults on fee payment.

Regarding the accident, Mr. Clark denied that Clarke was in contravention of health and safety standards. He said J's Trucking was to provide all tools, and that unforeseen hazards can arise despite the best of training.

Respondent:

Mr. Jones clarified that Mrs. King was participating in the hearing relative to her late husband's employment status with Clarke. He confirmed that the Workers' Compensation Board of Nova Scotia had deemed that Mr. King was an employee of Clarke and paid out benefits to the King family. He added that my decision would not prejudice Ms. King.

Mrs. King testified that she owned J's Trucking with her husband and that both were principals of the Company. She testified that she regarded herself as a party to the IBA despite the fact that she had not participated in its negotiation with Clarke or signed it. Instead, she had provided her husband with her power of attorney. In addition, she clarified that she did not have any dealings with Clarke relative to the work carried out by her husband for Clarke. She said that Clarke's dispatcher instructed her husband where to pick up and deliver goods, and Clarke handled all the administration and bookkeeping. She confirmed that he could refuse to take a job from the dispatcher, but if he did, he might not get another job for weeks. She also testified that, following her late husband's accident, Clarke authorized the use of her tractor-trailer to complete the delivery of the load without her authorization.

Summations:

Mr. Langley held that the direction should be rescinded in its entirety because Mr. King was not an employee of Clarke and so the Code did not apply in respect of his activities. He pointed out that, unlike Part I, Part II of the Code does not define the term “employee” relative to “dependent contractors.” He argued that it was therefore necessary to turn to common law to determine who is an “employee” for the purposes of Part II, and that the determination is essentially an assessment of fact. He suggested that the appropriate common law tests include the Four-fold test, the “control test”, and a determination of “whose business is it?” He insisted that the common law integration test should be rejected because the application of the “integration test” will always be positive. He cited several examples of case law in support of his contention that Mr. King was not an employee of Clarke.

Mr. Langley argued that the business of J’s Trucking was the business of Virginia King and James King and not the business of Clarke. He noted that J’s Trucking was listed in the Nova Scotia Business and Consumer Services Registry of Joint Stock Companies as a registered business entity, and reminded me that Mrs. King had testified that the contractual agreement was between Clarke and J’s Trucking. He pointed out that revenue payments paid by Clarke were made to J’s Trucking and not to Mr. King.

With regard to the issue of “control” Mr. Langley pointed out that Mr. King was not required by the contract to accept assignments or to work any specific hours or minimum number of hours for Clarke’s in any given week. He disputed Mrs. King’s contention that Mr. King was obliged to work when contacted by Clarke’s dispatcher and reiterated that the normal habit was that the Broker contacted Clarke’s dispatcher for work. He noted that nothing in the IBA prohibited Mr. King from driving for another company and that item 3.1 of the IBA specifically provided that J’s Trucking could have hired another driver to help carry out the work. Clarke’s only limitation was that they screen the driver because a motor carrier is required to do so by federal law. He added that Clarke never supervised Mr. King work’s; never paid Mr. King vacation, leave or overtime pay, and never withheld Canada Pension Plan, Employment Insurance or tax from the revenue payments paid to J’s Trucking. He clarified that J’s Trucking opted voluntarily to participate in Clarke’s group plans, to have Clarke pay J’s Trucking worker compensation obligations on a payment recovery basis and to use Clarke business forms.

Mr. Langley contended that none of the documents referred to in the case established an employee-employer relationship. He held that many of the documents related to J’s Trucking’s participation in Clarke’s group plans and to Clarke’s third party requirements originating from the National Safety Code and the USA Motor Carrier Safety Regulations. He insisted that drivers were only required to report daily to the dispatcher so that Clarke could determine the status of deliveries, the availability of trucks, and, as the Motor Carrier, ensure driver compliance with statutory hours of service standards.

On the issue of ownership of tools, Mr. Langley reiterated that the IBA specified that the Broker was to provide all tools required to perform the work. He pointed out that J’s Trucking owned a truck and two trailers when the Company entered into the contractual agreement with Clarke. He

added that J's Trucking only leased a step-deck flat-bed trailer from TIP through Clarke to take advantage of Clarke's commercial buying power.

Mr. Langley argued that J's Trucking had a significant chance of profit because the Company received 81% of gross revenues relative to work performed for Clarke. He opined that their profits depended on the use of a modern cost-effective vehicle, the efficient operation of the vehicle and the volume of loads carried by their operations. He further held that J's Trucking also had a significant risk of loss related to the manner of operating and maintaining their vehicles on the highway.

Finally, Mr. Langley held that, even if I decide that Mr. King was an employee of Clarke, the direction should still be rescinded because Clarke took all reasonable measures to ensure the occupational safety and health of its drivers including Mr. King. He further held that J's Trucking was responsible for supplying all tools required to do the work and so were ultimately responsible to provide and use whatever tools were needed to avoid the accident.

Mr. Jones cited various documents in the case which he argued referred to Mr. King as an employee, or as if he were an employee of Clarke. He argued that both the documents and the actual practice show that Clarke controlled who did the work, what was hauled, where it was hauled, when the load was picked up and how the load was transported. Mr. Jones pointed out that Clarke leased the trailer from TIP Leasing that Mr. King used, provided the business forms used by Mr. King, did the bookkeeping, and owned the dispatch system unit, the warehouse, the cargo storage and the parking space.

He reiterated that Mr. King had to report daily to the dispatcher at Clarke and to display Clarke's logo on his truck. Mr. Jones held that Clarke controlled J's Trucking's chance of profit because it determined the division of revenues resulting from the work performed by Mr. King and maintenance schedules for his vehicle. He also held that Clarke carried a higher risk of loss than Mr. King. Mr. Jones cited the case of *M.A.N.-B&W Diesel v. Kingsway Transport*, [1997] 99 O.A.C. 69, Ontario Court of Appeal, and held that, despite the fact that the driver was labeled by the Company as an independent contractors, the facts showed he was an employee of the company.

Decision:

Part II states in section 123.(1) that the Code only applies in respect of employment. The section reads:

*123. (1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment*

*(a) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in the Yukon Territory or Northwest Territories; [My underline.]*

The issues that I must decide in this case is whether Mr. King was an employee of Clarke or of J's Trucking. If I find that Mr. King was an employee of Clarke, I must then decide if Clarke had contravened any provision of the Code and the COSHRs relative to the accident. If, on the

other hand, I find that Clarke engaged Mr. King as an independent Broker, then I must rescind the direction because the Code does not apply in respect of work carried out by Mr. King.

For determining Mr. King's employment status with Clarke, I agree with safety officer Fougere and Mr. Langley that the Four-fold test, and the "whose business is it" test, are useful for deciding the matter. I further agree with Mr. Langley that the determination is essentially a question of fact, and for this I must examine both the contract and the actual relationship that existed between Clarke and J's Trucking.

Looking first at "whose business was it", Mrs. King confirmed that "J's Trucking" was registered with the province of Nova Scotia as an independent trucking company and that it operated as an independent Broker prior to signing on with Clarke. She further confirmed that she had given her husband power of attorney and that Mr. King had signed the IBA with Clarke for J's Trucking. So for the purpose of this review, I regard J's Trucking, Virginia King and James King as essentially one in the same.

With regard to the Four-fold test and the issue of control, I note that the IBA signed between Clarke and J's Trucking specified recurrently that the relationship was to be one "of service" rather than one "for service" as an employee. Specific reference is made to the preamble that identified the contract as an "Independent Broker Agreement Flat Bed Division" agreement and specified Virginia King as the contractor. Reference is also made to: item 1.0, "Term and Termination," that specified that the Broker could terminate the contract upon giving 30 days of notice in writing to Clarke; item 2.0 that specified that the Broker was required to obtain and maintain at his own expense insurance for bodily injury and death, damage to the property of others, and loss and damage of the insured vehicle; item 3.0 that specified that the Broker was free to hire his own employees to assist in carrying out the work; Appendix "E" of the IBA that specified in item "E" that the Broker was to provide all equipment; and item 7.0, entitled, "Nature of Relationship" that specified that:

*"[the] relationship is in the nature of the provision of services by an independent contractor, and is not in the nature of agency, partnership, or employment."*; and,

In my view, considerable weight must be given to the clear intent of parties and wording in an IBA, unless there is proof that an employer coerced an employee into signing the agreement, or through agreement, the parties colluded to frustrate or avoid compliance with applicable legislation. However, there was no evidence or suggestion of that in this case.

Safety officer Fougere held that item 5.0, "Group Purchasing", item 6.0, "Workers' Compensation" (WCB) and the wording in item C) of Appendix "D" of the IBA suggested an employee-employer relationship. However, as argued by Mr. Langley and uncontested by Mrs. King, I deduce that participation in Clarke's group purchasing, and agreement for Clarke to pay the WCB payments on a charge back basis was voluntary for J's Trucking. As such, neither J's Trucking participation in Clarke's group plans or the WCB payment arrangement alters the essential nature of the agreement. Regarding item C) of Appendix "D" of the IBA, it is my view that the clause requiring J's Trucking to work exclusively for Clarke was a limitation of the insurance coverage and not an agreement by the parties to an employee-employer relationship.

With regard to the documents in Mr. King's Broker file, safety officer Fougere testified that it was the collective weight of the evidence that convinced him rather than any one factor. I have to agree with him that the degree of business integration between J's Trucking and Clarke was compelling. Like the safety officer, I was struck by the fact that Clarke handled J's Trucking bookkeeping, handled records regarding the maintenance and repair of vehicles operated by J's Trucking and gathered and maintained all documents required by the National Safety Code. I was also struck by the fact that Clarke provided Mr. King with notices and advisories regarding Customs and Excise requirements, the completion and use of numerous business forms, and regarding transportation, road and occupational safety.

This, however, was contrasted by the fact that J's Trucking was in business before contracting with Clarke, J's Trucking willingly agreed to the IBA as a Broker, and Mr. King specified to Clarke that he would not take trips to the USA. I doubt that an employee could impose such a limitation on his employer. In addition, Clarke held that it never supervised or disciplined Mr. King, never paid for vacation, leave or overtime, and never withheld Canada Pension Plan, Employment Insurance or tax from the revenue payments paid to J's Trucking. Clarke also maintained that they were required by the National Safety Code to maintain records on their drivers. Without proof, ideally from Mr. King himself had that been possible, that Clarke controlled his daily work to the extent that he ceased to function as a Broker, I can not accept that the documents establish that Clarke controlled Mr. King's work. Since no such evidence was provided, it is my view that the aggregate of documents relied upon by the safety officer do not conclusively establish that Clarke controlled the work of Mr. King or that Mr. King was an employee of Clarke.

Clarke did not dispute that the fact that Mr. King had to report daily to their dispatcher. However, the documents and Mr. Clark's testimony confirmed that this was to keep clients informed as to delivery times, to assist the dispatcher in scheduling Brokers and to ensure driver records were maintained as required by third party requirements on Motor Carriers. Rather than establishing proof of an employee-employer relationship, I interpret it more as Mr. King being held to the same business standard that Clarke applied to itself relative to its clients and its operations. Since Clarke's and J's Trucking shared the same clients, both had to work jointly to meet customer needs.

Ms. King testified that, when Clarke's dispatcher called Mr. King respecting available work, he had to accept it or risk being overlooked the next time a job became available. While this could be regarded as a form of discipline, I was not provided with any proof that Mr. King was, in fact, disciplined or overlooked. Moreover, Mrs. King agreed with Mr. Langley that the normal procedure was for Mr. King to call the dispatcher for work rather than reverse.

Looking at J's Trucking risk of economic loss, one could see how rapidly increasing fuel prices or other transportation costs could create a risk of loss situation for J's Trucking. While Mr. King's use of Clarke's gas credit card enabled J's Trucking to take advantage of Clarke's buying power, neither its use, nor the IBA protected J's Trucking against increased operating expenses. Thus, the risk of loss was omnipresent.



On the other hand, J's Trucking had a chance of profit. The Company owned its own vehicles and were not prohibited by the IBA from contracting with other companies for work or from hiring other drivers to ensure that their vehicles were on the road producing maximum revenues possible. J's Trucking might have had to lease other equipment or to obtain insurance coverage outside of Clarke's group plan, but nothing in the IBA prevented them from doing so. Moreover, just as J's Trucking had a risk of loss from increasing operating expenses, the Company would have profited by decreasing operating expenses. I further recall that safety officer Fougere agreed during the hearing that, despite his earlier conclusions, he was satisfied that there was a chance of profit and risk of loss for J's Trucking.

The evidence in this case was that J's Trucking owned their own truck and two flat bed trailers prior to signing on with Clarke and contracted with Clarke as an independent Broker. J's Trucking appeared to have had control over the business, owned the tools to carry out the work, and had a risk of loss and chance of profit. Notwithstanding Clarke's unauthorized movement of Mr. King's tractor-trailer following the accident, I accept, on the balance of probability, that Mr. King, for the purpose of Part II, was an employee of J's Trucking and not of Clarke. That being the case, there is no authority under the Code for the direction. As a result, I HEREBY RESCIND the direction safety officer Fougere issued to Clarke Road Transport Inc., on March 24, 1999, pursuant to paragraph 145.(1) of the Code.

Decision rendered 6 June 2000.

Douglas Malanka  
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On May 4<sup>th</sup>, 1998, the undersigned safety officer conducted an inquiry in the work place operated by CLARKE TRANSPORT CANADA INC., being an employer subject to the Canada Labour Code, Part II, at 68 CHAIN LAKE DRIVE, BAYERS LAKE INDUSTRIAL PARK, HALIFAX, NOVA SCOTIA, the said work place being sometimes known as Glenview Farms, 156 Old Bay Bulls Road, St John's, Newfoundland.

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

1. Canada Labour Code, Part II, Section 125(q) and Canada Occupational Safety and Health Regulations, Materials Handling, Section 14.39

Develop and implement procedures for working around Cargo that may create a hazard area.

2. Canada Labour Code, Part II, Section 125(t) and Canada Occupational Safety and Health Regulations, Material Handling, Section 14.3(1)

Provide a guard or device to protect employees from hazardous condition while working with materials handling equipment.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions no later than April 7<sup>th</sup>, 1999.

Issued at Halifax, this 24<sup>th</sup> day of March 1999.

MARK FOUGERE  
Safety Officer  
1833

To: CLARKE ROAD TRANSPORT  
68 CHAIN LAKE DRIVE  
BAYERS LAKE INDUSTRIAL PARK  
HALIFAX, NOVA SCOTIA  
B3S 1A2

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Clarke Road Transport Inc.

Respondent: Virginia King

**KEY WORDS**

Owner Operator, Independent Broker, National Safety Code, U.S. Federal Motor Carrier Safety Regulations, Workers Compensation Board, Four-fold Test, business integration.

**PROVISIONS**

*Code:* S. 123.1, 125(q), 125(t)

*Regs:* 14.3(1), 14.39

**SUMMARY**

In the process of unloading a tractor-trailer loaded with bales of hay, three bales toppled from the trailer and fatally injured the driver before he could escape. The safety officer who investigated the accident concluded that the employer was in contravention of paragraph 125.(q) of Code and section 14.39 of the Canada Occupational Safety and Health Regulations (hereto referred to as the COSH Regulations) for having failed to develop and implement procedures for working around cargo that may create a hazard area. He also concluded that the Clarke was in contravention of paragraph 125.(t) of the Code and subsection 14.3(1) of the COSHRs for having failed to provide a guard or device to protect employees from a hazardous condition while working with materials handling equipment. The employer requested that the direction be rescinded because the driver was an independent Broker and not employee of the Company. Following his review, the Regional Safety Officer decided that, for the purpose of Part II, the driver was not an employee of the Company and rescinded the direction.