

**Canada Labour Code**  
**Part II**  
**Occupational Health and Safety**

Cast Terminal  
*appellant*

and

International Longshoremen's Association,  
Local 1657  
*respondent*

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Decision No.: 06-020  
June 30, 2006

Appeal heard by Katia Néron, Appeals Officer, on May 10, 2006, in Montreal, Quebec.

**Appearances**

**For the appellant**

Philippe Vachon, counsel

**For the respondent**

Edward Doyle, health and safety union officer, International Longshoremen's Association,  
Local 1657

**Health and Safety Officer**

France Racicot, Human Resources and Social Development Canada, Labour Program,  
Montreal, Quebec

- [1] On March 1st, 2004, Cast Terminal (Cast) appealed, under subsection 146(1) of the *Canada Labour Code* (the *Code*), the direction issued verbally on February 3, 2004 and confirmed in writing on February 6, 2004 by health and safety officer (HSO) France Racicot, following her investigation into the fatal accident of Pascal Santamaria, a trucker employed by Rollex Transport Ltd.
- [2] In this matter, Cast representative, counsel Philippe C. Vachon, asks that HSO Racicot's direction be rescinded because it is vague and ambiguous and the officer did not comply with the process prescribed in subsection 145(3) and paragraph 145(1.1)(a) of the *Code*.
- [3] I retain the following from HSO Racicot's investigation report, dated October 29, 2004, and her testimony at the hearing.

- [4] On February 2, 2004, Pascal Santamaria was authorized to enter Cast Terminal, at section 74 of the Post of Montreal, to bring back an empty container. To do so, P. Santamaria first had to have it checked by a Cast inspector<sup>1</sup>.
- [5] At the beginning of 2003, Cast had temporarily set up in section 74 the waiting area for tractor-trailers that were bringing back containers and the containers inspection and checking area.
- [6] Each area had five parallel traffic lanes that were bordered by yellow lines painted on the ground. The lanes were separated into two sections, one behind the other. The rear section was the waiting area and the front one was used to check and inspect containers.
- [7] Stop signs had been put in front of the waiting area, to indicate to the truckers that were moving forward where to stop and to separate the two areas. Therefore, there were sometimes five tractor-trailers waiting side by side behind five other ones on which empty containers were being checked. Because the inspection only lasted a few minutes, tractor-trailer traffic went uninterrupted in the two areas.
- [8] When the two areas had been set up, a space of about 20 feet had been allocated between them, to enable Cast inspectors and checkers<sup>2</sup> to access the containers they were to inspect by the rear section of the trailers. Orange cones had been added to the stop signs, to indicate to the truckers that were waiting where the stopping line was. While doing the inspections, Cast inspectors had to put cones in front of each truck, remove them when the lane was clear and tell the waiting trucker to move forward, and then replace the cone in front of the next waiting truck.
- [9] However, HSO Racicot noted in her investigation report that it was tolerated and common to see, in the containers checking and inspection area, truckers as well as Cast inspectors and checkers walking freely between the trucks moving in their designated lane. She also noted that there was no assigned signaller to direct truck and pedestrian traffic when trucks that were in the area would start moving.
- [10] HSO Racicot specified that she measured the width of lanes #4 and #5 in the checking and inspection area and that both were about 12 feet wide. However, a tractor-trailer usually measures around 8 feet wide. While we could deduce that, therefore, this could have left some 48 inches of space to walk between the trucks that were in the lanes, HSO Racicot said that at the time of the accident, she established that in reality, that space was 45 inches wide. In fact, HSO Racicot specified that the space left to walk between trucks in the checking and inspection area could vary depending on the way trucks were parked.

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<sup>1</sup> The inspector is responsible for checking the condition of empty containers that are brought back according to Cast's specifications.

<sup>2</sup> Once the inspection is done, the checker writes down a code on the side of the container, to identify the storage area where the trucker will bring the container back. The checker must also sign the trucker's bill. Finally, he must inform, by radio, the person in charge of the storage area that a truck will be arriving with the container.

- [11] Therefore, when the accident happened on February 2, 2004, Pascal Santamaria had entered lane #5 of the waiting area with his tractor-trailer to bring back the empty container. A few minutes later, he was signalled to move forward into the inspection and checking area. Once there, he turned off the engine, left his truck and went to Cast invoice department to get his transshipment receipt.
- [12] When P. Santamaria came back to his truck, he walked along the passenger side and then climbed on the trailer by the rear, to open the doors of the container, so that the Cast inspector could do the inspection. Once it was done, he closed the doors of the container.
- [13] During that time, the container carried on the truck parked in lane #4 had been inspected and the driver had been authorized to move to storage and given the directions to take. So he started the engine and then checked his mirrors to make sure that there were no obstacles on either side. He did not see anyone.
- [14] A few seconds later, Pascal Santamaria jumped from his trailer, from the driver side, that is between his trailer parked in lane #5 and the trailer in lane #4. He lost his balance as he was touching the ground and while trying to regain it, he flipped and fell feet forward in front of the rear wheels of the trailer in lane #4.
- [15] Simultaneously, the trucker in lane #4 had started to move his truck forward, thus pulling Pascal Santamaria's body under the right rear wheels of his trailer. The injuries sustained were fatal.
- [16] All the facts mentioned above were submitted to the parties before the hearing and neither offered any contradictory evidence.
- [17] After concluding a preliminary investigation at the accident site on the same day, HSO Racicot issued no direction to Cast.
- [18] However, the next day, February 3, 2004, before leaving the work place, HSO Racicot gave Cast a verbal direction under paragraph 145(2)(a) of the *Code* on the existence of a danger in the empty containers checking and inspection area. HSO Racicot believed that the employees working in the area, as well as any other person granted access there, risked being hit by a moving truck. HSO Racicot delineated the dangerous area by establishing a safety zone with a security tape.
- [19] HSO Racicot confirmed in writing her direction to Cast on February 6, 2004.
- [20] Her direction reads:

[TRANSLATION]

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

**DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)**

On February 3, 2004, the undersigned health and safety officer conducted an investigation into the death of Mr. Pascal Santamaria, a trucker employed by Transport Rollex Ltd., at the work place of Cast Terminal, section 74 north, in the Port of Montreal, being an employer subject to the *Canada Labour Code*, Part II, situated at 305 Curatteau Street, in Montreal, Quebec, H1L 6R6, the said work place being sometimes known as Cast Terminal, Cast-Racine.

The said health and safety officer is of the opinion that the following situation constitutes a danger:

During the inspection and checking of empty containers transported by trailers in section 74 north of the Port of Montreal (known as the empty containers area), the employees and any person granted access to the site risk being hit while trucks are moving.

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

In compliance with subsection 145(3), a security tape has been used to delineate the safety zone and it cannot be removed without the authorization of the health and safety officer. Given the size of the safety zone, the security tape constitutes due notice.

- [21] In her investigation report, HSO Racicot specified that in July 2004, Cast definitely ceased all handling of empty containers in section 74 north. However, Cast transferred these activities in another section of the Port of Montreal.
- [22] I retain the following from the final submissions offered at the hearing by counsel Vachon for the employer.
- [23] To establish how health and safety officers must react to situations of non-compliance to the *Code*, counsel Vachon noted that, in January 2004, an internal Operational Program Directive entitled OPD 700-5, Response to Non-Compliance with the *Canada Labour Code* (Part II), was in application at the Operations Direction of the Labour Program Branch, Human Resources and Social Development Canada (HRSDC), known at the time as Human Resources Canada. According to counsel Vachon, the OPD was accessible to the public in 2004, through HRSDC's web site, and it still was when the hearing was held.
- [24] Counsel Vachon gave the examples of Appendix D of OPD 700-5 to demonstrate how must be written, on the one hand, a direction under paragraph 145(2)(a) of the *Code*

where there is a dangerous situation but no need to cease using the place, and, on the other hand, a direction issued under paragraph 145(2)(a) and (b) of the *Code* where the danger is such that the place must not to be used.

[25] I retain the following excerpt appearing at the beginning of Appendix D:

#### Legal Wording of Directions

Directions containing incomplete or erroneous information could be challenged by an employer, employee or union and be rescinded on grounds of faulty drafting even if they were justified by the situation and issued in all good faith.

Moreover, given that we often deal with employers who have multi-regional work sites, it is important that our directions and covering letters be consistent in format, style and content.

Consequently, direction formats were drafted to include all the legally required information ...

It is of the utmost importance, for legal adequacy and uniformity of directions, that safety officers use these formats wherever possible to issue directions under Part II.

- [26] Counsel Vachon argued that HSO Racicot's direction was not in compliance with HRSDC's operational directives since it did not specify the situation or condition to be corrected, as prescribed in the examples given in OPD 700-5.
- [27] Counsel Vachon also argued that, as indicated in a letter dated April 19, 2004 by Wayne Smith, Cast Health, Safety and Environment Consultant that he submitted for the hearing, it was difficult, if not impossible, for Cast to identify the corrective measures it had to take to comply with the direction without knowing exactly what was the situation or condition to be corrected.
- [28] Furthermore, Counsel Vachon observed that a direction issued under the *Code* constitutes a legal notice that can lead to criminal proceedings under the *Code* if it is established that the person or employer to whom it was issued did not comply with it. Consequently, any employer or person who receives such notice has the right to expect it to clearly identify the result to be attained.
- [29] In evidence, counsel Vachon referred to the following excerpts of paragraphs 123 and 126 of *Apotex Inc. v. Canada (Attorney General)*<sup>3</sup>:

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<sup>3</sup> *Apotex Inc. v. the Attorney General of Canada, the Minister of National Health and Welfare, Merck & Co., Inc. and Merck Frosst Canada Inc. (C.A.)*. [2000] 4 F.C. 264, A-922-96, May 12, 2000.

[123] The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking [...]

[126] Therefore, in the absence of binding authority to the contrary, I conclude that the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need [...]

[30] Counsel Vachon also referred to the following paragraph 13 of the judgment on *Maritime Employers Association v. Harvey et al.*<sup>4</sup>, which specifies some principles on the precision required of a written direction under subsection 145(2) of the *Code*. It reads:

[TRANSLATION]

[13] Even if not specifically expressed in the *Code*, directions issued under subsection 145(2) must obviously be sufficiently clear to enable to determine if the employer complied. However, to attain that precision, the directions do not have to specify how the employer will protect the employees from the danger; all they need to specify is the result that the employer must achieve, by clearly identifying the danger encountered by the employees and by requiring the employer to take the necessary measures. In fact, it may sometimes be easy to specify what measures the employer must take to correct a danger; however, this can also be difficult and even impossible. There can be a vast mixture of ways to achieve the desired result, or it can be nearly impossible for a person who is not scientifically knowledgeable to know how to achieve that result. In these cases, it is reasonable to let the employer choose by which means he will obtain the required results.

[31] Counsel Vachon also argued that the fact that HSO Racicot had not affixed a notice written and signed by her on the dangerous place meant that she did not issue her direction as required by subsection 145(3) of the *Code*.

[32] Subsection 145(3) reads:

145(3) If a health and safety officer issues a direction under paragraph (2)(a), the officer shall affix or cause to be affixed to or near the place, machine or thing in respect of which the direction is issued, or in the area in which the activity in respect of which the direction is issued is performed, a notice in the form and containing the information that the Minister may specify, and no person shall remove the notice unless authorized to do so by a health and safety officer.

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<sup>4</sup> *Maritime Employers Association v. Harvey et al.*, F.C., A-553-90, April 22, 1991.

[33] Counsel Vachon also declared that HSO Racicot did not issue her direction in compliance with paragraph 145(1.1)(a) of the *Code* by not issuing in writing, before leaving the work place, the direction she gave orally on February 3, 2004. Paragraph 145(1.1)(a) reads:

145(1.1) A health and safety officer who has issued a direction orally shall provide a written version of it

(a) before the officer leaves the work place, if the officer was in the work place when the direction was issued;

[34] For all these reasons, counsel Vachon argued that HSO Racicot's direction should be considered legally unsound and rescinded.

[35] For his part, Edward Doyle, health and safety union officer, International Longshoremen's Association, Local 1657, submitted no argumentation or position against the position presented by counsel Vachon for the employer.

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[36] The two following issues must be decided here:

- (1) Is the direction vague and ambiguous?
- (2) Did HSO Racicot comply with the process prescribed in subsection 145(3) and paragraph 145(1.1)(a) of the *Code*?

[37] To answer these questions, I must consider the reported legal decisions, the relevant legislation and all the facts.

[38] After inquiring into the circumstances of the direction, I may, as authorized by paragraphs 146.1(1)(a) and (b) of the *Code*, rescind or vary the direction, or I may issue a new direction under subsection 145(2) or (2.1) of the *Code*.

[39] Paragraphs 146.1(1)(a) and (b) of the *Code* are the following:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into **the circumstances of the decision or direction**, as the case may be, and **the reasons for it and may**

- (a) **vary, rescind or confirm the decision or direction**; and
- (b) **issue any direction that the appeals officer considers appropriate under subsection 145(2) ou (2.1)**,

[My underline]

[40] As to the first question about the direction being vague and ambiguous, I believe that the decision in *Apotex Inc. v. Canada (Attorney General)*<sup>5</sup> cannot really help me determine the reasons that would enable me to decide if HSO Racicot's direction is sufficiently precise or not under the *Code*.

[41] However, I believe that the principles specified by Judge Pratte in *Maritime Employers Association v. Harvey et al.*<sup>6</sup> are particularly relevant to determine the degree of precision required by directions issued under subsection 145(2) of the *Code*.

[42] In fact, Judge Pratte considers that "directions issued under subsection 145(2) must obviously be sufficiently clear to enable to determine if the employer complied. However, to attain that precision, the directions do not have to specify how the employer will protect the employees from the danger; all they need to specify is the result that the employer must achieve, by clearly identifying the danger..."

[43] However, the danger cannot be clearly identified solely by mentioning its existence in the direction. As prescribed in subsection 145(2) of the *Code*, the direction must also describe the condition existing in the place, the machine or thing used in the place, or the activity performed in the place that constitutes the hazard according to the health and safety officer. This way, the officer will be able to identify not only the danger that exists in the place but also the result that is expected.

[44] Subsection 145(2)(a) of the *Code* reads:

145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

(i) correct the hazard or condition or alter the activity that constitutes the danger, or

(ii) protect any person from the danger [.]

[45] This being said, HSO Racicot's direction does not specify, contrary to subsection 145(2) of the *Code*, the condition in the place that has to be corrected. Consequently, the direction does not identify the danger in the work place. Consequently, this imprecision in the wording of the direction does not enable the employer to know what result is expected by the officer in order to eliminate the danger of being crushed.

[46] For these reasons, I decide that HSO Racicot's direction is not sufficiently precise according to the *Code* and that as a result, it is vague and ambiguous.

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<sup>5</sup> *Apotex Inc. v. Canada (Attorney General)*, *supra*.

<sup>6</sup> *Maritime Employers Association v. Harvey et al.* *supra*.

[47] Given the facts gathered by HSO Racicot's on the accident and the provisions prescribed by paragraph 145(2)(a) of the *Code*, I would have written the direction as follows:

The said health and safety officer believes that, in the traffic lanes set aside for trucks in section 74 checking and inspection area, the following situation constitutes a danger:

*There is no control measure in place to ensure that nobody is in or close to the lanes when trailer-trucks start moving in one of them, which results in a danger of being struck or crushed by a truck, and consequently of being injured, for employees, truckers or any other person granted access to the work area.*

Therefore, you are HEREBY REQUIRED, under paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures to protect any person from the danger.

[48] Furthermore, I also believe that HSO Racicot did not comply with the procedure set out in subsection 145(3) and paragraph 145(1.1)(a) of the *Code*.

[49] In fact, HSO Racicot gave a direction concerning the presence of a danger under paragraph 145(2)(a), but evidently, she should also have posted a notice of danger to the place or near it, in compliance with subsection 145(3) of the *Code*. In addition, I believe that HSO Racicot could not use a security tape delineating the safety area in lieu of the notice of danger.

[50] I believe that, as prescribed in paragraph 145(1.1)(a) of the *Code*, HSO Racicot should have confirmed her verbal direction in writing, before leaving the work place.

[51] I also believe that the direction should have been issued under both paragraphs 145(2)(a) and (b) of the *Code* instead of paragraph 145(2)(a) only. This way, in compliance with the *Code*, the officer would have forbidden the use of the place until compliance with the direction.

[52] Paragraph 145(2)(b) of the *Code* reads:

145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph

prevents the doing of anything necessary for the proper compliance with the direction.

[53] In fact, I believe that on February 2, 2004, given the circumstances of Pascal Santamaria's fatality and the pressing need to take measures in order to avoid a similar accident, if HSO Racicot had not finished gathering on that day all the information necessary to identify, in writing, the condition to be corrected because it constituted a danger, the officer could simply have reminded Cast of its duty under subsection 127(1) of the *Code* not to disturb the scene of the accident until the end of the investigation.

[54] Subsection 127(1) of the *Code* reads:

127(1) Subject to subsection (2), if an employee is killed or seriously injured in a work place, no person shall, unless authorized to do so by a health and safety officer, remove or in any way interfere with or disturb any wreckage, article or thing related to the incident except to the extent necessary to

- (a) save a life, prevent injury or relieve human suffering in the vicinity;
- (b) maintain an essential public service; or
- (c) prevent unnecessary damage to or loss of property.

[55] For all the above mentioned reasons and given that the checking and inspection area of section 74 north is now closed and that I have received no information on the new Cast inspection area in the Port of Montreal or on the work procedures now in place, I am rescinding the direction issued by HSO Racicot to the employer without issuing another one.

[56] I will nevertheless ask HSO Racicot or any other health and safety officer to ensure that Cast Terminal has taken the measures required so that no person will be in the vicinity of moving trucks in the reserved lanes, in order to protect every employee, trucker or person granted access in the checking and inspection area from the hazard of being hit or crushed by a truck.

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Katia Néron  
Appeals Officer

## Summary of Appeals Officer's Decision

**Decision No.:** 06-020

**Appellant:** Cast Terminal

**Respondent:** International Longshoremen's Association, Local 1657

**Key Words:** Danger; persons in the vicinity of moving trucks; directions not given in writing before leaving the work place; vague and ambiguous directions; no notice of danger

**Provisions:** *Canada Labour Code*: 145(2)(a), 145(1.1)(a), 145(3) and 146(1)

### Summary:

Following a preliminary investigation on the fatal accident of a trucker in the employer's work place, the health and safety officer issued to the employer a verbal direction concerning a danger under paragraph 145(2)(a) of the *Canada Labour Code*. The health and safety officer did not confirm the direction in writing before leaving the work place, contrary to paragraph 145(1.1)(a) of the *Canada Labour Code*. However, she did confirm it in writing three days later.

In her written direction, the health and safety officer required that immediate measures be taken to protect employees and any person granted access to the work place against the hazard of being crushed by moving trucks. However, the health and safety officer did not specify in her direction what condition in the work place constituted a danger. Also, the officer did not affix or cause to be affixed a notice of danger to or near the place, contrary to subsection 145(3) of the *Canada Labour Code*.

The appeals officer rescinded the direction and did not issue another one.