SCC File No. 37787

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

CANADA POST CORPORATION

Applicant
(Appellant)

– and –

CANADIAN UNION OF POSTAL WORKERS

Respondent
(Respondent)

RESPONDENT'S FACTUM (CANADIAN UNION OF POSTAL WORKERS)

CAVALLUZZO LLP
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6
Fax: 416-964-5895

Paul J.J. Cavalluzzo, LSUC #13446V
Tel: 416-964-1115
Email: pcavalluzzo@cavalluzzo.com

Amanda J. Pask – LSUC No. 35628S
Tel: 416-964-1115
Email: apask@cavalluzzo.com

Lawyers for the Respondent, Canadian Union of Postal Workers

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Fax: 613-688-0271

Owen Rees
Tel: 613-780-2026
Email: orees@conway.pro

David Taylor
Tel: 613-691-0368
Email: dtaylor@conway.pro

Agent for the Respondent, Canadian Union of Postal Workers

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

TORYS LLP
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416-865-7380

Sheila Block
Tel: 416-865-7319
sblock@torys.com

John Terry
Tel: 416-865-8245
jterry@torys.com

Jonathan Silver
Tel: 416-865-8198
jsilver@torys.com

Counsel for the Appellant, Canada Post Corporation

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Fax: 613-788-3587

Jeffrey W. Beedell
Tel: 613-786-0171
jeff.beedell@gowlingwlg.com

Agent for Counsel for the Appellant, Canada Post Corporation

INDEX

PART I: OVERVIEW

1. This is an appeal by Canada Post Corporation ("CPC", "Canada Post" or "the Appellant") from an order of the Federal Court of Appeal on judicial review overturning a decision of an Appeals Officer of the Occupational Health and Safety Tribunal Canada and reinstating a ruling of a Health and Safety Officer that directed Canada Post to carry out annual safety inspections on letter carrier routes and points of call in Burlington, Ontario with the participation of the local joint health and safety committee, pursuant to the requirements of section 125(1)(z.12) of the *Canada Labour Code*, R.S.C., 1985, c. L-2, (the "Code").

2. At issue in this appeal is whether the inspection obligation set out at section 125(1)(z.12) of the Code can reasonably be interpreted as being of no application to work places that are not under the "physical" control of an employer, irrespective of whether the facts in a particular work place may be such that the employer is capable of fulfilling that obligation.

3. Section 125(1)(z.12) of the Code reads as follows:

> **Specific duties of employer**
>
> **125. (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, …[1]
>
> **(z.12)** ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year;

4. Section 125(1)(z.12) is one of the 45 specific employer health and safety obligations listed under the introductory language at s.125(1) of the Code. The Code uses the same introductory language at ss. 125.1 and 125.2 which list further specific employer obligations relating to hazardous substances and emergency reporting.

---

1 Section 124 of the Code places a general obligation on employers to "ensure that the health and safety at work of every person employed by the employer is protected".

5. In the decision overturned by the Federal Court of Appeal the Appeals Officer found an unspecified number of the obligations listed under s.125(1) to be of no application to work places not under the "physical control" of an employer. The inspection obligation set out at (z.12) was held to be one such obligation. Canada Post's position, as described in its factum, is that more than two-thirds (28) of the 45 health and safety obligations listed under s.125(1) also have no application whatsoever in work places over which employers do not exercise "physical control".[2]

6. The joint inspection obligation at s.125(1)(z.12) of the Code plays a pivotal role in amendments to the Code in which Parliament placed primary responsibility for health and safety in the hands of workers and employers, through the mechanism of the work place committees. The Appeals Officer's interpretation of the Code limits the capacity of joint work place health and safety committees to fulfil their statutory mandate, significantly restricts the scope of health and safety obligations under the Code and profoundly undermines the objectives of the legislation and the intent of Parliament.

7. The position of the Canadian Union of Postal Workers ("CUPW" or "the Respondent") is that the majority of the Federal Court of Appeal correctly held this severely limiting interpretation of occupational health and safety protections under the Code to be unreasonable given the language, context, scheme and purpose of this remedial legislation.

8. The reasoning stated by the Appeals Officer in support of his conclusion that the inspection obligation set out in s.125(1)(z.12) does not apply to work places that are not under the "physical control" of the employer is as follows:

(a) "the purpose of the work place inspection obligation is to permit the identification of hazards and the opportunity to fix or have them fixed", and;

(b) "control over the workplace is necessary" to fulfill this purpose.[3]

9. The Appeals Officer found that CPC does not have "control" over the letter carrier routes

---

2 CPC Factum, at para. 22

3 *Canada Post Corporation v. Canadian Union of Postal Workers*, 2014 OHSTC 22 ["Appeals Officer Decision"], at para. 96, Appellant's Record ["AR"], Vol.1, Tab A, p.19

and points of call within the meaning of s.125(1)(z.12), in that it “does not have physical control” or “exclusive access” to those locations, and in that some of those locations are on private property. The Appeals Officer acknowledged the high degree of control that Canada Post exercises over the work activity on letter carrier routes ("right down to the way they hold their satchels and how they walk the routes"[4]) but did not address whether the extent of that control is sufficient to engage the purposes of the obligation to inspect under section 125(1)(z.12).

10. The Appeals Officer concluded that Canada Post was not bound by the obligation to inspect that is set out in s.125(1)(z.12) in relation to letter carrier routes and points of call in Burlington, Ontario.

11. The Appeals Officer reached this conclusion despite acknowledging that the language of s.125(1)(z.12) does not limit the inspection obligation to work places controlled by an employer, and despite acknowledging in his decision that Canada Post can in fact inspect, identify hazards and take steps to have hazards fixed on letter carrier routes and points of call.

12. The decision subject to review therefore relieves an employer who does not have "physical control" over a work place from taking steps that it is known to be capable of taking to identify and have hazards fixed in that work place, and does so based on the reasoning that it is an employer incapable of taking steps to identify and have hazards fixed in the workplace.

13. The Respondents submit that Justices Nadon and Rennie of the Federal Court of Appeal correctly found this decision to be unreasonable.

14. The dispute in the present appeal turns on a narrow question. All parties and all decision-makers below agree that the applicable standard of review is that of reasonableness. Similarly, all parties and decision-makers below agree that the principles of statutory interpretation established by this Court in *Rizzo*[5] require the Code's occupational health and safety provisions to be

---

4 Appeals Officer Decision, at para 98, AR, Vol. 1, Tab A, p.20

5 *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 SCC 837, [1998] 1 SCR 27 ["*Rizzo*"], Respondent's Book of Authorities ["RBOA"], Tab 1.

generously interpreted in a manner that is in keeping with its language, context, scheme and objects.

15. The Appeals Officer therefore correctly acknowledged that the obligations set out in s.125(1) and 125(1)(z.12) must be interpreted such that "employers are bound to the fullest extent possible by those obligations".[6] This conclusion is mandated by the *Rizzo* decision, in which an interpretation that served to limit the reach of protections under remedial legislation was held to be unreasonable where a less restrictive interpretation could be supported by reference to the words, context, purpose and objects of the legislation. [7]

16. Accordingly, the issue for the Court's determination is whether the highly restrictive interpretation imposed on s.125(1) and s.125(1)(z.12) by the Appeals Officer is also the least restrictive reasonable interpretation that may be placed on these provisions, in the sense that it serves to bind employers to the obligations set out in s.125(1) of the Code "to the fullest extent possible".

17. The position of CUPW in this proceeding is that the decision of the Appeals Officer is based on an internally inconsistent reasoning process and results in an interpretation of the Code that is contrary to the language, the scheme and the purposes of the legislation.

18. It is also an interpretation whose practical consequences would profoundly undermine the objectives of the legislation and the intent of Parliament, by limiting the scope of obligations under the Code and by taking from the hands of joint work place committees the ability to identify and take steps to resolve health and safety hazards, wherever in the work place those hazards may be located.

---

6 Appeals Officer Decision, at para 95, AR, Vol.1, Tab A, p 19; See also Judgment and Reasons of the Federal Court, dated February 26, 2016 ["Federal Court Decision"], at para 58, AR, Vol. 1, Tab B, p. 49, where the Court says "The Appeals Officer recognized that Parliament intended to give the broadest possible protection to employees including to those performing work in a place which the employer may not control."

7 *Rizzo*, supra, para 40, RBOA, Tab 1.

19. Contrary to the position put forward by the Appellant there are alternative interpretations of the statutory language at issue that are less limiting of the protections set out in s.125(1) and s.125(1)(z.12) of the Code, and that are entirely reasonable based on the language, context, scheme and purpose of the legislation, including consideration of their "practical consequences" and "effects on the ground".[8]

20. Accordingly, the decision of the Appeals Officer should be quashed and the original decision of the Health and Safety Officer should be reinstated, as held by the majority of the Federal Court of Appeal.

PART II: FACTS

A. Background Facts

21. The Appellant, Canada Post, is a crown corporation with exclusive jurisdiction over the establishment and operation of postal services in Canada. The Respondent, CUPW, is the bargaining agent for letter carriers employed by Canada Post, including letter carriers based in Canada Post's facility in Burlington, Ontario.

22. The parties maintain a Local Joint Health and Safety Committee in Burlington, at which issues concerning the health and safety of Canada Post employees are raised and through which the parties maintain compliance with the health and safety obligations of Part II of the Code.

1. Health and Safety Officer Directions

23. In 2012 CUPW representatives on the Local Joint Health and Safety Committee at Burlington, Ontario proposed that safety inspections be extended to include individual letter-carrier routes and points of call, and filed a formal complaint that reads as follows:

> LJOSH has been told that when doing building inspections we are only to inspect part of our work place. Postal workers spend 2 hours in the building, but then 6 hours outdoors. LJOSH wants to

8 *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, 2018 CarswellBC 1234, at para 41, RBOA, Tab 2.

inspect not only in the building but also letter carrier routes for hazards – and CPC said no.[9]

24. The Health and Safety Officer issued a Direction in relation to this Complaint requiring Canada Post to allow the Local Joint Health and Safety Committee to carry out route safety inspections pursuant to s. 125(1)(z.12).[10] This Direction was appealed by Canada Post.

2. Proceedings Before the Appeals Officer

25. The position of Canada Post before the Appeals Officer was that "control over the work location is necessary in order for that location to be considered a work place within the meaning of section 125(1) of the Code".[11]

26. The position of the Union before the Appeals Officer was that the term "work place" as it appears in s.125(1) is to be interpreted broadly and that to do so was consistent with the statutory definition[12], as well as with established jurisprudence recognizing that "work place" can include multiple outside locations and may be moveable, and was also the only interpretation consistent with the objectives of the Code.[13]

27. Evidence was placed before the Appeals Officer of Canada Post policies under which Canada Post has extensive knowledge and control over the routes and points of call covered by letter carriers in their regular duties. For example:

(a) Letter-carrier work is measured under Canada Post's "Letter Carrier Route Measurement System", which breaks down each element of a letter carrier's work

---

9 Appeals Officer Decision, at paras. 5-6, AR Vol. 1, Tab A, p.2; Complaint Registration to Human Resources and Skills Development Canada, dated August 28, 2012, AR Vol. 1, Tab F, p.105

10 Appeals Officer Decision, paras 7-9, AR Vol. 1, Tab A, p. 2-5; Directions of Health and Safety Officer Campbell, dated September 21, 2012, AR Vol. 1, Tab G, p.108

11 Appeals Officer Decision, at paras.15, 16 and 30, AR Vol. 1, Tab A, pp. 5-6, 8-9.

12 Code, s.122(1) "*work place* means any place where an employee is engaged in work for the employee's employer"

13 Appeals Officer Decision, at paras. 50–51, AR Vol. 1, Tab A, p. 12.

day so as to permit Canada Post to structure routes on the basis of 480 minutes. This includes measuring the amount of walking on each route, the number of relay boxes, the number of stops, the number of stairs, etc. This system is also based on the specification of work methods by Canada Post which permit the establishment of average time values for various aspects of a letter carrier's work.[14]

(b) Consistent with this system, Canada Post requires letter carriers to walk their route in a specified pattern and sequence and to deliver to points of call in a specified order.[15]

(c) The "National Depot Management Program" includes an "On Street Activities and Safe Work Observations" checklist. [16]

28. In addition, Canada Post Policy 1202.5 sets out a detailed protocol for delivery employees and supervisors with respect to delivery hazards, including for the identification and investigation of hazards and for the resolution of hazards with customers. Under Policy 1202.05 supervisors are responsible to investigate and report hazards and to conduct inspections at the site of unresolved hazards. Supervisors may then decide to divert or suspend mail delivery to that location until the hazard is resolved.[17]

29. The Union responded to assertions by Canada Post that the obligation to carry out an annual inspection of all letter carrier routes and points of call in Burlington would "overwhelm" the employer and "hamstring" the Committee by adducing evidence that it would be possible for the Local Joint Health and Safety Committee to inspect all routes in Burlington in eighteen (18)

---

14 Letter Carrier Route Measurement System Manual, Respondent's Record ["RR"], Tab B, pp. 10-21.

15 LC Burlington Main Walk 02 – Deliveries and Routing Scenario, RR, Tab C, pp. 22-24.

16 National Depot Management Program: On Street Activities and Safe Work Observations, AR Vol II, Tab L3, p. 15-32.

17 Canada Post Policy 1202.05, Hazards and Impediments to Delivery on Route, AR Vol II, Tab L10, p. 190; Appeals Officer Decision, at paras. 31, 100, 107 and 108, AR Vol. 1, Tab A, pp. 9, 20, 22.

days, or even less, depending on the inspection protocol put in place by the Committee. Moreover, the uncontraadicted evidence before the Appeals Officer was that Canada Post approved route inspections of letter carrier routes by local joint health and safety committees in connection with the Workplace Hazard Prevention Programs. This included checking the points of call to which delivery is made to identify hazards and suggest proactive measures to prevent accidents.[18]

B. Decision of the Appeals Officer

30. The Appeals Officer ruled that the term “work place”, as it is used in s. 125 of the *Code*, should be interpreted broadly and must be held to include letter carrier routes and points of call, and not merely Canada Post fixed facilities. This ruling was not at issue in the judicial review application, nor is it in the present appeal.[19]

31. In reviewing the language of section 125(1), the Appeals Officer noted that "subsection 125(1) specifically accounts for the employer who controls both the work place and the activity, or solely the activity and not the work place", but nevertheless found that “it becomes clear on a plain reading” that “(i) some obligations apply to any employer, whether or not they control the work place, as long as they control the work activity, and (ii) other obligations, in order to be executed, require that the employer have control of the physical work place.”[20]

32. The Appeals Officer held the obligation to inspect under to belong to the category of obligations which can only be carried out at a work place that is under the control of the employer, because "the purpose of the work place inspection obligation is to permit the identification of hazards and the opportunity to fix them or have them fixed" and because "[c]ontrol over the work place is necessary" to permit the identification of hazards and the opportunity to fix them or have them fixed.[21]

---

18 Appeals Officer Decision, at paras. 32, 59, 61, AR Vol. 1, Tab A, pp. 9, 14. See also Union Submissions, AR Vol. 3, Tab 20, pp. 149-154.

19 Appeals Officer Decision, at para. 92, AR Vol. 1, Tab A, pp. 18-19.

20 Appeals Officer Decision, at para. 93, AR Vol. 1, Tab A, p. 19.

21 Appeals Officer Decision, at para. 96, AR Vol. 1, Tab A, p. 19.

33. Turning to Canada Post, the Appeals Officer held that Canada Post "does not have physical control over the individual points of call or lines of route of a letter carrier, in that "many points of call are private property". He concluded that "[g]iven that Canada Post does not have exclusive access to private properties, nor can it alter or fix the locations in the event of a hazard, it cannot be said that a point of call or line of route is controlled by the employer".[22]

34. On the basis of this line of reasoning the Appeals Officer ruled that "subsection 125(1)(z.12) does not apply to any place where a letter carrier is engaged in work outside of the physical building at 688 Brant St. Burlington, Ontario…"[23]

35. The Appeals Officer reached this conclusion despite finding that Canada Post controls work activity on letter carrier routes "right down to the way they hold their satchels and how they walk the routes"[24], and despite finding elsewhere in his decision that Canada Post has programs and policies in place that include inspections of locations on routes and points of call to be carried out by CPC supervisors and that specifically outline the steps that can be taken "in order to identify, report and resolve the hazards found on route", based on the evidence before him, including the uncontested documentary evidence set out at paragraphs 25 and 26, above.[25].

C. Federal Court Decision

36. CUPW filed an application for judicial review in relation to the decision of Appeals Officer. The Application Judge held the Appeals Officer's interpretation of s.125(1) and paragraph 125(1)(z.12) to be reasonable on the grounds that the Appeals Officer's determination that the employer can only satisfy certain obligations imposed by the subsection when in control of the work place was driven by "a determination that the underlying purpose of paragraph 125(1)(z.12) can only be achieved where the employer is in a position to both identify and fix

22 Appeals Officer Decision, at paras. 98-99, AR Vol. 1, Tab A, p. 20.

23 Appeals Officer Decision, at para. 99, AR Vol. 1, Tab A, p. 20.

24 Appeals Officer Decision, at para. 98, AR, Vol. 1, Tab A, p.20.

25 Appeals Officer Decision, at paras. 107–108, AR, Vol. 1, Tab A, p.22.

hazards".[26]

37. The Application Judge found that the Appeals Officer did not adopt an unreasonable interpretation of "control" in considering section 125(1) of the Code, on grounds that "it was not unreasonable for the Appeals Officer to conclude that an employer did not control the work place and in turn could not effectively carry out an inspection and accomplish the underlying purpose of paragraph 125(1)(z.12)", given that "the employer does not exercise physical control over the points of call or lines of route", and that "there was no dispute that many points of call are private property". [27] The Application Judge found there to be "no need, in my opinion, for the Appeals Officer to address the question of employer control over work activity." [28]

38. The Application Judge noted that the Appeals Officer properly recognized "that Parliament intended to give the broadest possible protection to employees including to those performing work in a place which the employer may not control." [29]

39. Ultimately, the Application Judge upheld the Appeal's Officer's interpretation of subsection 125(1) and paragraph 125(1(z.12) on the grounds that it was consistent with the obligation to give the legislation a broad interpretation insofar as it excluded only obligations that the employer "would be unable to fulfil".[30]

40. At no point in the course of the judgment did the Application Judge address the fact that Canada Post is able to audit and inspect letter carrier routes and points of call and to identify and take steps to have hazards fixed on letter carrier routes and points of call, and that therefore, in relation to these work locations, it is not "unable to fulfil" an obligation that has been held to be directed at this purpose.

---

26 Federal Court Decision, at para. 52, AR, Vol. 1, Tab B, pp. 45-46.

27 Federal Court Decision, at para. 54, AR, Vol. 1, Tab B, pp. 46-47.

28 Federal Court Decision, at para.55, AR, Vol. 1, Tab B, p.47

29 Federal Court Decision, para 58, AR, Vol. 1, Tab B, p. 49.

30 Federal Court Decision, at para. 59, AR, Vol. 1, Tab B, p. 49.

D. Federal Court of Appeal

41. A majority of the Federal Court of Appeal allowed the application for judicial review of the decision of the Appeal Officer and reinstated the Direction of the Health and Safety Officer. The Court wrote three sets of reasons with Justice Rennie concurring in the result with Justice Nadon and writing supplementary reasons to "take the analysis one step further", and with Justice Near writing reasons in dissent.

42. All members of the Federal Court of Appeal concurred that the applicable standard of review is that of reasonableness, and that the proper approach to statutory interpretation is that set out in *Rizzo*.[31]

(a) Justice Nadon

43. Justice Nadon found the Appeals Officer's interpretation of s.125(1)(z.12) to be unreasonable on two grounds.

44. First, because s.125(1) clearly and unambiguously provides that every employer shall fulfil the obligations it sets out in two circumstances: when the employer controls the work place and when the employer does not control the work place but controls the work activity of the employees in that work place.

45. Justice Nadon held that it was simply not open to the Appeals Officer on the language of s.125(1) to find the inspection obligation to apply only when the employer controls the work place. The Appeals Officer's interpretation "read out one of the two circumstances enunciated in subsection 125(1)" and "redrafted the provision" contrary to the clearly expressed intent of Parliament.[32]

---

31 *Canadian Union of Postal Workers v. Canada Post Corporation*, 2017 FCA 153 ["Federal Court of Appeal Decision"], at paras.14, 15 per Near J.A., AR, Vol. 1, Tab C, p. 76; Federal Court of Appeal Decision, dated July 13, 2017, at paras.14, 15 per Nadon J.A., AR, Vol. 1, Tab C, pp. 85, 86.

32 Federal Court of Appeal Decision, at paras. 48-50, AR, Vol. 1, Tab C, pp. 88-89.

46. Justice Nadon addressed Justice Near's observation that "and" could be construed as either conjunctive or disjunctive, in part by observing that this principle was of no assistance to the interpretation placed on s.125(1) by the Appeals Officer since, on the language of s.125(1) either construction would require the obligations to be applied in both of the listed circumstances.[33] We note in this regard that s.125(1) expressly states that the second pre-condition (control in respect of the work activity), which follows the word "and" applies in relation to work places that do not meet the first condition (control of the work place).

47. Second, Justice Nadon found that it was unreasonable to conclude, as did the Appeals Officer, that Canada Post "is unable to identify and fix hazards on letter carrier routes and points of call" for the reason that "it does not have access or exclusive access to private properties".[34]

48. Justice Nadon held in this regard that Canada Post's policies, including Policy 1205.05, which sets out a "detailed protocol" for the investigation of hazards, for supervisor visits to the site of hazards and the diversion or suspension of mail until a hazard is resolved, serve to "demonstrate [that] control over private property is not necessary to fulfil the paragraph 125(1)(z.12) obligation".[35]

(b) Justice Rennie

49. Justice Rennie concurred with Justice Nadon that the Appeals Officer's conclusion was unreasonable in so far at it concluded that control of the work place is determinative of whether or not the obligation in s.125(1)(z.12) applies to an employer. In this regard he accepted Justice Nadon's analysis that all of the obligations set out in subsection 125(1) must be held to apply both to an employer who controls a work place, and to an employer who controls work activity but not the work place.[36]

50. Justice Rennie's reasons then "take the analysis one step further", to hold that "once it is

---

33 Federal Court of Appeal Decision, at para 55, AR, Vol. 1, Tab C, p. 90.

34 Federal Court of Appeal Decision, para. 61-64, AR, Vol. 1, Tab C, pp. 92-93.

35 Federal Court of Appeal Decision, para 65, AR, Vol. 1, Tab C, p. 94.

36 Federal Court of Appeal Decision, para 75 and 78, AR, Vol. 1, Tab C, pp. 97, 98.

determined, as it is here, that the employer controls the work activity, it is necessary to engage with the express statutory language in the provision – the extent to which the employer controls the activity".[37]

51. Justice Rennie held that, following the language of the statute, the extent of control of work activity necessarily informs the extent of the inspection obligation and that a "fact specific analysis" is required to make a determination of the extent of the inspection obligation in any particular work place not under the control of an employer.[38]

52. Justice Rennie concurred with Justice Nadon's ultimate disposal of the case based on the facts specific to this case and the factual finding of the Appeals Officer that Canada Post exercised control over the activity of letter carriers on their routes "right down to the way they hold their satchels and how they walk the routes. "[39]

53. Justice Rennie noted that a consequence of applying the words "to the extent that the employer controls the activity" as serving to limit on the scope of obligations under s.125(1)(z.12) was that the obligation would not automatically apply to any work activity in any work place. This would be a matter for "fact specific analysis" based on the extent of control over the work activities.

(c) Justice Near

54. Justice Near would have upheld the decision of the Appeals Officer on grounds that "the word "and" may be read disjunctively or conjunctively depending on the circumstances"[40], and based on his acceptance of the Appeals Officer's view that some of the obligations listed under s.125(1), including the inspection obligation at (z.12), "cannot apply where the employer has no control over the work place".[41]

---

37 Federal Court of Appeal Decision, para 78, AR, Vol. 1, Tab C, p. 98.

38 Federal Court of Appeal Decision, para 78 and 80, AR, Vol. 1, Tab C, pp. 98, 99.

39 Federal Court of Appeal Decision, para 81, AR, Vol. 1, Tab C, p. 99.

40 Federal Court of Appeal Decision, para 16, AR, Vol. 1, Tab C, p. 76.

41 Federal Court of Appeal Decision, para 17-18, AR, Vol. 1, Tab C, p. 77.

55. Justice Near did not see it as unreasonable for the Appeals Officer to fail to address the extent of the control exercised by Canada Post over work activity on letter carrier routes and points of call for the reason that, in his view, "no amount of control over the work activity" would assist an employer who does not control the work place to ensure that the work place is inspected."[42]

56. The fact that Canada Post can and does seek "to identify and resolve hazards" as well as "carry out audits" on letter carrier routes and points of call was held not to render the Appeals Officer decision unreasonable. Justice Near's reasoning in this regard was that "if the obligation to ensure an inspection applied to work places not under the employer's control, the respondent would not simply be expected to attempt to identify and fix hazards and carry out some route audits. Rather, the respondent would be legally obligated to ensure that any hazard on any letter carrier route, including on private property, was identified and fixed".[43]

57. Justice Near was of the view this such an obligation went beyond "what is reasonable and logical" and would, on that basis, have upheld the Appeals Officer's decision as reasonable. [44]

PART III: ISSUES AND LAW

58. At issue in this appeal is whether the Appeals Officer reached an unreasonable decision by finding that Canada Post was not obliged to conduct inspections pursuant to section 125(1)(z.12) of the Code on letter carrier routes and points of call in Burlington, Ontario, based on an interpretation of s.125(1)(z.12) of the Code as having no application to work places that are not under the “physical control" of an employer.

59. The Respondent’s position is that the interpretation placed upon s.125(1)(z.12) by the Appeals Officer is inconsistent with the text, the context, the purpose and the scheme of the statute, and that the decision was correctly held to be unreasonable by a majority of the Federal

42 Federal Court of Appeal Decision, para 19, AR, Vol. 1, Tab C, p. 78.

43 Federal Court of Appeal Decision, para 20, AR, Vol. 1, Tab C, pp. 78-79.

44 Federal Court of Appeal Decision, para 21, AR, Vol. 1, Tab C, p. 79.

Court of Appeal.

A. Standard of Review

60. The standard of review applicable to the Appeals Officer's interpretation and application of section 125(1)(z.12) of the *Canada Labour Code* is that of reasonableness. [45]

61. Under a standard of reasonableness a Court will intervene where a decision lacks transparency, justifiability and intelligibility. In addition, while tribunals have a margin of appreciation within the range of rational outcomes, Courts will intervene where the outcome lies outside the range of acceptable outcomes defensible in respect of the facts and law. [46]

62. The range of acceptability and defensibility under the reasonableness standard "takes its colour from the context."[47] In cases concerning statutory interpretation, where there is more than one reasonable interpretation, deference gives the "interpretive upper hand" to an administrative decision-maker interpreting their home statute, as Canada Post submits. However, in the same decision the Court noted that "[i]t will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance. In those cases, the "range of reasonable outcomes" will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it."[48]

63. Deference does not mean that reviewing courts must show blind reverence to the

---

45 *Canada Post Corp. v. Canadian Union of Postal Workers*, 2011 FCA 24, 2011 CarswellNat 133, at 17-18 ("*Canada Post v. CUPW*"), RBOA, Tab 3.

46 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ["*Dunsmuir*"] at para. 43, RBOA, Tab 4.

47 *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para 59, RBOA, Tab 5.

48 *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paras, 38, per Moldaver SCJ, writing for the majority, RBOA, Tab 6.

statutory interpretations applied by administrative decision-makers.[49] In *Dunsmuir* itself the statutory interpretation imposed by a decision-maker on its "home statute" was held to "fall outside the range of admissible statutory interpretations", and to be unreasonable "in the context of the legislative wording and the larger labour context in which it is embedded".[50] The Court held in that case that "the reasoning process of the adjudicator was deeply flawed" and that "it relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations." In our submission the same is true of the decision of the Appeals Officer in this case.

64. The Court has, moreover, given specific direction as to the role of a reviewing Court faced with a tribunal's interpretation of remedial legislation that serves to limit its protections. In *Rizzo* the Court ruled such an interpretation to be unreasonable where an alternative, less restrictive, interpretation could be supported based on the language of the statute, the purpose of the legislation and the intention of the Legislature. The Court ruled the tribunal's adoption of the more limiting interpretation to be unreasonable, as inconsistent with the purposes of the legislation; as undermining or defeating of its remedial objectives[51] and, therefore, as amounting to an absurdity.[52]

B. The interpretation of section 125(1)(z.12) in the decision under review is unreasonable

1. Applicable principles of statutory interpretation

65. All parties to this proceeding accept that principles of statutory interpretation require that statutes "be read in their context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” Accordingly, the Court should attempt "to identify the intended goals of the legislation and the means devised to achieve

---

49 *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 SCR 770, at para 21, RBOA, Tab 7.

50 *Dunsmuir*, supra, at paras. 72 and 76, RBOA, Tab 4.

51 *Rizzo*, supra, at para 40, RBOA, Tab 1.

52 *Rizzo*, supra, at para 27, RBOA, Tab 1.

those goals".[53]

66. All parties similarly accept that remedial public welfare legislation such as Part II of the *Canada Labour Code* is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme.[54] The purpose of health and safety legislation is well established in the case law. It is to protect the health and safety of workers. Accordingly, when interpreting this legislation it should be generously interpreted in keeping with this objective.[55]

67. While the Appeals Officer acknowledged the above principles, it is submitted that his decision is wholly inconsistent with their substantive application.

2. The interpretation of s.125(1)(z.12) as applicable solely to work places under employer control is inconsistent with the text of the provision

68. Section 125(1) of the Code sets out the specific health and safety obligations of employers, which are to be carried out by employers as part of their general obligation under section 124 to ensure the health and safety of their employees at work. The provisions are set out below:

> **General duty of employer**
>
> **124.** Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

69. Section 125 opens with an introductory section stating the circumstances in which the 45 specific duties it lists below apply, as follows:

> **Specific duties of employer**

---

53 R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada Inc., 2008), at pp. 1-2, RBOA, Tab 13.

54 Interpretation Act (R.S.C., 1985, c. I-21, s.12, RBOA, Tab 17; *Rizzo*, supra, at para 36, RBOA, Tab 1; *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75 ["*Blue Mountain*"], at paras. 24, 25, RBOA, Tab 8.

55 *Ontario (Ministry of Labour) v. Hamilton (City)*, [2002] O.J. No. 283 (ONCA) at para. 16, RBOA, Tab 9.; *Rizzo*, supra at para. 36, RBOA, Tab 1.

> **125. (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,…

70. The same introductory language appears at section 125.1, listing further specific duties in relation to hazardous substances, and at section 125.2 concerning employer obligations to provide information in an emergency.[56]

71. In our submission section 125(1) states clearly and unambiguously that the duties listed under the section apply in two situations:

(a) "in respect of every work place controlled by the employer **and**,"

(b) "in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity".

72. The provision has been described by another Appeals Officer of the Occupational Health and Safety Tribunal in the following terms:

> **122** As part of these general duties [set out in section 124], subsection 125(1) of the Code also imposes specific duties on an employer in the two following circumstances:
>
> in respect of every work place controlled by the employer; and
>
> in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity.[57]

73. Following the express wording of s. 125(1), it is submitted that all of the obligations listed under s.125(1) apply:

(a) where the employer controls the workplace, and;

---

56 Code, ss.125.1 and 125.2, RBOA, Tab 15

57 *Laroche v. Canada Border Services Agency*, 2010 LNOHSTC 12, at paras. 122-124, RBOA, Tab 10.

(b) where the employer does not control the work place, to every work activity carried out by employees to the extent that the employer controls the activity.

74. There is simply nothing in the language of this provision that could support an inference that the obligations it lists apply exclusively to only one of the two listed circumstances. Indeed the Appeals Officer acknowledges that "the wording does not specify which obligation applies to which situation". In our submission, it would have been a simple enough matter to do so, had this been the legislative intent.[58]

75. The Appeals Officer placed an interpretation on s.125(1) such that some of its obligations do not apply "in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity…", despite the fact that the provision says that the obligations apply in respect of such work activities AND in respective of work places controlled by the employer. In the Court below Justice Near, in dissent, expressed the view that this interpretation was open to the Appeals Officer because the word "and" may be read conjunctively or disjunctively as the context requires. In support of this principle Justice Near reproduces a passage from the decision of the Federal Court of Appeal in *Seck v. Canada (Attorney General)* which, in turn, cites other cases and commentary. [59]

76. A review of the cases and commentary cited by Justice Near reveals that they all concern circumstances in which a statutory provision sets out two preconditions linked by "and" before setting out a consequence. The issue is whether "and" may be read disjunctively, in the sense that the consequence is triggered if either one of the two listed conditions joined by the word "and" is met, or whether it should be read conjunctively, in the sense that both conditions need to be met to trigger the consequence[60]. As Justice Nadon correctly pointed out, reading s.125(1) either

---

58 Code, s.125(1)(a) to (z.19), RBOA, Tab 15; Appeals Officer Decision, at para 93, AR Vol. 1, Tab A, p. 19.

59 Federal Court of Appeal Decision, at para. 47, per Near J.A., AR, Vol. 1, Tab C, pp. 88.

60 *Seck v. Canada (Attorney General*), 2012 FCA 314, at paras 43 & 47, RBOA, Tab 11; *Canada (Minister of Citizenship & Immigration) v. Hyde*, 2006 FCA 379, at para. 22, RBOA, Tab 12; R. Sullivan, *Construction of Statutes, 5th ed.* (Markham: LexisNexis Canada, 2008), at pp. 81 to 84, RBOA, Tab 13; P. St. J. Langan, *Maxwell on the*

disjunctively or conjunctively, as per the cases and commentary cited by Justice Near, does not in any way assist Canada Post in this case, since either construction would still mean that the obligations are triggered in both of the listed circumstances, for the reason that the second "precondition" in s.125(1) expressly states that it applies "in a work place that is not controlled by the employer". As Justice Nadon stated "[i]n any event, even if the word "and" is read disjunctively in this case, the subsection still requires that the obligations be applied in both situations".

77. CUPW submits the interpretative principle relied on by Justice Near provides no support for the conclusion that, where two conditions precedent to a consequence are joined by the word "and", it is permissible to find that the consequence is triggered by only one of the conditions, and not by the other.

78. Canada Post further argues in support of the Appeals Officer's interpretation that the section draws a "clear distinction" between "work places that are controlled by the employer and those that are not" and that to interpret the provision such that all duties apply in both cases is to "read out" this distinction.

79. CUPW agrees that there is a distinction drawn by the section. The distinction is that, in a work place in which the employer does not control the work place, but does control the work activity, the application of the obligations listed in the section is limited by the extent of the employer's control over the work activity, as Justice Rennie observed. This is clear on the face of the provision. It is equally clear that, having drawn this distinction between the two circumstances, the section states that the obligations apply to both.

80. The above distinction, as drawn by the statute, provides a full answer to Canada Post's submissions that, had Parliament intended the obligations to apply in all work places without distinction, it could have said so. It is important to clarify that CUPW has at no time in these proceedings, or in the proceedings below, taken the position that the inspection obligation

---

Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969), at pp. 232 to 233, RBOA, Tab 14.

applies equally to all work places, or even to the entire work place at Canada Post. This case concerns letter carrier routes and points of call in Burlington, Ontario. It has at all times been CUPW's position that Canada Post's arguments concerning, for example, potential obligations to inspect public transit routes beca'use its members may take a bus to their route; or places unknown to the employer at which members may elect to take their paid lunch; or the speculative difficulties that might be faced by other employers in inspecting every location that their employees may possibly traverse in the course of their employment,[61] are arguments directed at "straw men."[62]

81. It is therefore submitted that Justice Nadon correctly held that the language of s.125(1) is clear and unambiguous in providing that every employer shall fulfil the obligations set out in the paragraphs of the subsection in both of the circumstances that it outlines, and that the Appeals Officer decision effectively "reads out" the second condition and "redrafts" the legislation.

82. It is further submitted that Justice Nadon also correctly found that the interpretation imposed by the Appeals Officer on section 125(1)(z.12) is inconsistent with a contextual or purposive analysis of the statutory language.

3. The interpretation of s.125(1)(z.12) as applicable solely to work places under employer control is inconsistent with the context

1. Reading s.125(1)(z.12) in the context of the other subsections of s.125(1)

83. Canada Post argues that an analysis of the other obligations listed under s.125(1) provides support for the Appeals Officer's decision that some of these obligations are capable of application only if the employer has physical control over a work place. The Appellant points to s.125(1)(a), which requires employers to "ensure that all permanent and temporary buildings and

---

61 See, for example, paragraphs 77 – 80 of the Appellant's Factum

62 We further note, with respect to the decision of Justice Nadon, that it does not stand for the principle that s.125(1)(z.12) must be interpreted as being of equal application to any "work place". Rather, it stands for the principle that the Appeals Officer's decision concerning the interpretation of the provision in application to Canada Post letter is unreasonable, based on the two issues that his decision outlines.

structures meet the prescribed standards, and that was relied on by the Appeals Officer as a provision that could be applied only by an employer who owns or leases the building in question; s.125(1)(m), requiring employers to "ensure that the use, operation and maintenance" of boilers, escalators, heating and cooling systems is "in accordance with prescribed standards"; s.125(1)(b) requiring employers to "install guards, guard-rails, barricades and fences in accordance with prescribed standards"; 125(1)(h) requiring the provision of "prescribed first-aid facilities and health services"; s.125(1)(i) requiring the provision of "prescribed sanitary and personal facilities" and regarding sanitary and personal facilities; and s.125(1)(n) requiring employer to "ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards".

84. What these obligations have in common is that they concern physical conditions in a work place. It therefore appears to be Canada Post's position that it is reasonable for the Appeals Officer to conclude that no employer can ensure that a work place conforms to the obligations set out in the above provisions unless it "owns or leases" the property. This position, however, cannot be supported either logically, or on the evidence before the Appeals Officer.

85. First, as Justice Nadon correctly observes, the undisputed fact that CPC can and does resolve hazards arising from physical conditions on letter carrier routes and points of call, despite its lack of property rights over those locations, furnishes definitive proof that property rights are not a necessary prerequisite for an employer to have the capacity to protect the health and safety of employees against threats to their health and safety arising from physical conditions in a work place.

86. CPC's ability to do this serves to illustrate the more general point that a legal right to unilaterally cause physical alterations to a work place is not the only means available to employers to resolve a hazard arising from physical conditions in a work location, and bring the employer into compliance with Code obligations that concern such conditions. In CPC's case, it is the close control that it exercises over the work activity of letter carriers on letter carrier routes that allows it to alter its instructions to employees to direct them not to provide service to specific locations. This direction has the effect of excluding from the work place a location that presents a physical hazard (and/or that is otherwise not in compliance with an obligation under

s.125(1) concerning the physical conditions in a work place), and of immediately bringing the employer into compliance with its obligations. In Canada Post's case the suspension of delivery to customers pending specified physical alterations to the location can also cause the owner of the location to make the necessary physical alterations, so that the location is no longer unsafe as a work place, and delivery can be resumed. Indeed, we note that the hazards that Canada Post can and does address in relation to points of call on letter carrier routes can concern building standards violations, such as a lack of appropriate rails or unsafely constructed steps. Other employers facing different health and safety issues may be able to resolve a hazard arising from the physical conditions in a work place through changes to work processes or the use of protective equipment, depending on the facts.

87. Canada Post’s bare statement that "an employer needs control of the physical work place" in order for it to be possible to meet the obligations it lists cannot, therefore, be accepted as accurate.

88. It is important to be clear that the capacity of joint work place health and safety committees to identify steps that may be taken to protect the health and safety of employees in locations not subject to employer property rights, such as are outlined above, will depend in significant part on whether committees are permitted to conduct inspections under s.125(1)(z.12).

89. At issue in this case is whether it is reasonable to interpret s.125(1) and s.125(1)(z.12) of the Code such that, in work places neither owned nor leased by an employer, the parties should be wholly relieved of considering what steps may be taken to ensure compliance with obligations concerning the physical conditions in that work place, and such that work place health and safety committees are denied the ability to carry out inspections to identify threats to the health and safety of the many employees who work in locations not subject to employer property rights.

90. Canada Post's position entails that an employer who does not control a work place, in the sense of owning or leasing that work place, but who directs its employees to carry out work in a specific location on a regular or daily basis, can ignore the Code's obligations concerning physical conditions in that work place, and can legitimately prevent its joint work place

committee from carrying out inspections that might allow them to identify where those obligations are not met, as well as other hazards to employees. In our submission, this is a wholly unreasonable interpretation and outcome, given the scheme and purpose of Part II of the Code.

91. The lack of rational basis for the interpretation placed on s.125(1) by the Appeals Officer finds further illustration in his example of an obligation that applies to a work activity rather than a work place. The Appeals Officer expressed the view that an obligation to ensure the safety of tools or equipment falls into the category of obligations relating to a work activity, because it is not dependent on location or the employer's control of a work place. However, if, by way of example, an employer is using equipment that it neither owns nor leases (as is often the case where the equipment is provided by the entity for whom an employer is performing contractual services) some employers will be in no better position to unilaterally alter the equipment than an employer who operates in work locations it neither owns nor leases. Both employers will, however, be in a position to direct employees not to use that equipment or work place, unless and until it is safe, and should properly be held accountable to do so.

92. In sum, the fact that the inspection obligation appears in the context of a list of obligations that includes some obligations that address the physical conditions in a work place provides no support for the decision of the Appeals Officer.

2. Reading section 125(1) in the context of section 124 and the Work Place Hazard Prevention Program provisions of the Code and Regulations

93. At paragraphs 69 and 83 to 87 of its factum, Canada Post argues that the restrictive interpretation placed by the Appeals Officer on s.125(1) and s.125(1)(z.12) is "congruent with" the scheme of the Code and should not be found to undermine or contravene its legislative purposes, for the reason that Canada Post remains subject to the general duty in s.124, and because it has a work place hazard prevention policy in place, as it is obliged to do pursuant to s.125(1)(z.03) of the Code[63], and Part XIX of the Canada Occupational Health and Safety

63 Section 125(1)(z.03) requires employers to "develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the

Regulations, SOR 86-304 ("COHSRs").[64]

94. The premise of this argument is that the purposes of section 125(1), including section 125(1)(z.12), are already met through the general obligation set out in s.124 and, further, that the specific obligation set out in s.125(1)(z.12) is satisfied through adherence to a different specific obligation under the same section in s.125(1)(z.01).

95. To accept this submission would amount to a ruling that all the obligations set out in 125(1), in addition to the specific obligation in section 125(1)(z.12), are redundant and superfluous to achieving the purposes of the statute, as is contrary to all applicable principles of statutory interpretation. We also note in this regard that all employers, including those who control a workplace and who the Appeals Officer acknowledges to be bound by the inspection obligation in s125(1)(z.12), are also bound by the general obligation in s.124 and by s.125(1)(z.03) and Part XIX of the COHSRs, so that if the provisions are redundant they are redundant for all work places, not merely those not subject to employer control.

96. It is further submitted that the specific obligations in s.125 are not properly characterized as "supplementary" to the obligation in s.124 to "ensure that the health and safety at work of every person employed by the employer is protected". Rather, s.125 sets out the minimum specific obligations that must be met by employers in order to be found to be in compliance with the general obligation set out in s.124.

97. CUPW submits that the presence in the Code of the specific obligations listed under section 125(1), including the inspection obligation in section 125(1)(z.12), conclusively demonstrates that Parliament made a determination that the imposition of these obligations serves to substantively promote the health and safety of employees in the context of the legislation as a whole, including the context that is provided by s.124, s.125(1)(z.03) and Part

---

prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters".

64 Part XIX of the COSHRs is headed "Hazard Prevention Program" and details the steps that must be taken to comply with s.125(1)(z.03).

XIX of the COHSRs.

3. The Context Provided by the Canada Occupational Health and Safety Regulations

98. Reading section 125(1) in the context of the regulations enacted by Parliament to implement its terms provides further confirmation that the Appeals Officer's interpretation of that section is unreasonable.

99. The Canada Occupational Health and Safety Regulations, SOR 86-304 ("COHSRs") state that the regulations are prescribed for the purposes of sections 125, 125.1, 125.2 and 126 of Part II of the Code.[65] If the Appeals Officer's interpretation of the opening language of s.125(1) is accepted then, according to Canada Post, some 28 of the 45 obligations under s.125(1) may have no application in work places not under the physical control of an employer. The potential corollary is that all the regulations enacted pursuant to those provisions would similarly be of no application in such work places. It is submitted that this result is wholly incompatible with the intended operation of the statute.

100. Moreover, certain sections of the COHSRs specify that they are of application only where a work place is under the control of an employer, or where the employer is also the owner of a building[66]. By way of example, section 2.20 specifies that sections 2.21 to 2.24 "apply to every work place that is equipped with an HVAC system and that is under the employer's control" and there is similar provision in section 5.17 with respect to boilers. Both of these sections prescribe standards pursuant to s.125(1)(m), concerning the use, operation and maintenance of boilers, escalators, heating and cooling systems, which is one of the obligations that Canada Post puts forward as capable of application only to work places under an employer's control. If, as Canada Post asserts, the entirety of section 125(1)(m) is of no application in work places that are not under the employer's control, the express limitation in section 2.20 would be wholly redundant. Moreover, this would serve to defeat the apparent legislative intent that the other sections

---

65 COHSR, s.1.3, RBOA, Tab 16

66 For example, COHSR, ss.2.16(3); 2.20; 5.17; 16.1 (definition of "health unit"; 17.5(1)(b)

enacted under s.125(1)(m) , not subject to this express exclusion, should apply whether or not the work place is under the employer's control.

101. Canada Post also puts forward subsection 125(1)(b), regarding installation of guard rails etc., and subsection 125(1)(h), regarding provision of first-aid facilities as provisions that are incapable of application except where the employer has physical control of the work place.

102. Again, by way of example,, if Canada Post's analysis were to be accepted as reasonable, none of the COHSRs concerning the installation of guard rails would apply to employers who do not control the work place. However, some of those obligations concern the installation of guard rails on temporary structures, often used in work places outside an employer's control.[67] Similarly, certain sections of the COHSRs concerning first aid facilities, also submitted by the Appellant to be of application only to work places within the physical control of an employer, appear to be plainly directed to work places located outside the physical control of the employer, including, for example, directions applicable to "wilderness" work locations. [68]

103. CUPW does not set out such examples with the intention of asking the Court to rule on the scope of every subsection of 125(1) or every provision in the COHSR's, but rather to clarify to the Court that, reading s.125(1|) in the context of the COHSRs, the inference is clear that Parliament intended all obligations under s.125, s.125.1 and s.125.2 to apply under both conditions set out in the opening language to these sections, and that, where it assessed that a specific step to be taken pursuant to that obligation ought to be restricted in advance to employers with control over the work place, this is specified in the regulations prescribed pursuant to these sections of the Code.

4. The Appeals Officer's interpretation of s.125(1)(z.12) is inconsistent with a purposive analysis of the provision

104. The Appeals Officer found that the underlying purpose of the work place inspection obligation in s.125(1)(z.12) is "to permit the identification of hazards and the opportunity to fix

67 COHSRs, s.3.14., RBOA, Tab 16

68 COHSRs, s.16.3(1)(c)., RBOA, Tab 16

or have them fixed".

105. CUPW submits that it cannot be held reasonable to identify this as the purpose of s.125(1)(z.12) and then fail to take into account the fact that Canada Post is able to identity and fix or have fixed hazards on letter carrier routes and points of call despite its lack of "physical control" over those locations in determining whether this obligation applies.

106. In the context of this identified purpose and this fact it is not possible to conclude that the Appeals Officer's interpretation of s.125(1)(z.12) is consistent with the recognized legislative intent to ensure that the obligations listed in s.125(1) "apply to the fullest extent possible", since the interpretation serves to relieve an employer from an obligation that it is known to have the capacity to fulfil.

107. There are, in CUPW's submission, less restrictive, reasonable interpretations available of the statutory language in issue that render unreasonable the highly restrictive interpretation imposed by the Appeals Officer.

108. First, the Appeals Officer gave an unnecessarily restrictive interpretation to the term "control" by finding that employers exercise control over a work place only where they have "physical" control, meaning rights of ownership or exclusive access. This definition is not found in the statute. The statutory language and the legislative intent to ensure the application of the obligations listed under section 125(1) to the fullest extent possible could, however, be respected by an interpretation of "control" under which, whether an employer has the requisite "control" over a work place is a matter to be assessed in relation to each subsection, by reference to whether the control that can be exercised by the employer is sufficient to meet the objective of that subsection.

109. Second, once the Appeals Officer had reached the determination that Canada Post did not control the route within the meaning of the first condition set out in s.125(1), he should have gone on to determine the extent of the employer's control over the work activity of a letter carrier on a route. As set out above, the provision plainly requires both assessments.

110. The language that serves to ensure that employers are not placed under obligations they are "unable to fulfil", while simultaneously ensuring that each obligation applies to the fullest extent possible, is the language that states that the obligations apply in a work place which the employer does not control only "to the extent of the employer's control" over the work activity. There is, accordingly, no rational basis for the Appeals Officer's decision to effectively read the second condition out of the statute in order to achieve this end.

111. Third, as Justice Nadon held, it is unreasonable to conclude on the facts of this case that CPC is unable to fulfil the objectives identified by the Appeals Officer as specific to s.125(1)(z.12); namely, identifying and fixing hazards on letter carrier routes and points of call because "it does not have access or exclusive access to private properties", given the fact that Canada Post is demonstrably able to audit, investigate, identify and take steps to fix hazards on letter carrier routes and points of call.

112. Canada Post's factum takes the position that the fact that Canada Post supervisors can inspect, identify hazards and attempt to resolve hazards on some letter carrier routes and points of call does not entail that it has the capacity to carry out a "comprehensive annual inspection" of such routes and points of call through the work place committees under s.125(1)(z.12) of the Code.

113. CUPW therefore notes that, whether the volume of routes would overwhelm the employer and "hamstring" the LJHSC, is a question of fact that was argued before the Appeals Officer by Canada Post and responded to by CUPW with evidence that the route inspections for Burlington could be carried out by the Burlington work place committee in 18 days or less, depending on the inspection protocol arrived at by the Committee.[69] The decision subject to review outlines this evidence and decides the case on other grounds.

114. Canada Post's attempt to resurrect this factual argument in the context of this proceeding cannot assist it in defending an Appeals Officer decision that was made on the basis that no employer who lacks control over a work place could meet the purpose of the inspection

69 Appeals Officer Decision, at paras. 32, 61, AR Vol. 1, Tab A, pp. 9, 14.

obligation as it was identified by the Appeals Officer.

115. In that regard, as set out above, and as held by Justice Nadon, Canada Post's policy of suspending delivery and removing a physical hazard from the work place hazard unless and until it is corrected by the owner of the property is determinative that an employer's control over work activity can be sufficient to engage the purpose of the inspection obligation.

116. Moreover, suspension of delivery is a step that it always available to Canada Post. Accordingly, even if the Court were to accept Justice Near's dissenting view that the imposition of the inspection obligation under s.125(1)(z.12) to letter carrier routes would cause Canada Post to be "legally obligated to ensure that any hazard on any letter carrier route, including on private property was identified and fixed", this obligation could not be held to be "impossible to fulfill". CUPW submits that an employer who fixes a work place physical hazard by removing it from the work place, rather than by making a physical alteration to the space would bring itself equally into compliance with the Code's health and safety obligations, since either approach is fully protective of employees.

117. Canada Post cannot demonstrate that the inspection obligation is impossible for <u>any</u> employer lacking physical control of a work place to fulfil. As a result, Canada Post's sole argument in defence of the Appeals Officer's decision is its stated position that any interpretation of the Code requiring a "fact-specific" analysis as to whether an employer who lacks physical control of a work place has the capacity to fulfil the inspection obligation, is too "uncertain", "imprecise" and "time-consuming" in its effects; and that any less restrictive application would have "effects on the ground" that would serve undermine the objectives of the legislation as intended by Parliament and would, accordingly be unreasonable.[70]

118. In the following section we therefore turn to an analysis of the scheme of Part II of the Code and to a review of the relevant "effects on the ground". CUPW submits that requiring employers and work place committees to conduct a fact-specific analysis to consider whether and how employers can meet all of the health and safety obligations under the Code, in every

70 See CPC Factum, at para 93

work place, is not only a reasonable outcome, but is the very essence of the scheme of the Code.

5. The interpretation of s.125(1)(z.12) with reference to its practical implications and the scheme of the legislation

119. The joint inspection obligation in section 125(1)(z.12) was introduced as part of a comprehensive set of amendments directed at modernizing the occupational health and safety provisions of the Code. The legislation was to introduce a scheme under which primary responsibility for health and safety is placed in the hands of the workers and employers, through the mechanism of the joint work place committees, with government acting as "a guide rather than an interventionist".

120. When the bill containing these amendments was introduced at second reading the representative of the government of the time made a statement that included the following:

> …. Bill C-12… is based on the philosophy that the proper role of the Government of Canada is to empower workers and employers to assume responsibility for the regulation of their own workplace.
>
> In general, the government's role should be that of a guide rather than an interventionist.
>
> Workers and employers should be given the power and discretion to identify and resolve new and emerging health and safety hazards. I have no doubt that this is the right approach.
>
> The Government of Canada can only empower the parties rather than impose solutions from above. This approach is evident in the amendments to the powers and duties of existing workplace health and safety committees.
>
> These bodies will be required to regularly inspect their workplaces and to deal with problems and issues as they arise, reducing the need for direct government intervention.

> In terms of dispute resolution, management and employee representatives of the committee will be responsible for investigating all disagreements and conflicts. Only when the parties cannot reach an agreement will a government health and safety officer become involved.[71]

121. CUPW submits that this excerpt from Hansard expresses what is also clear on the face of the legislation. Specifically, that the Code's language reflects a Parliamentary intent to place primary responsibility in the hands of workers and employers, and in particular in the hands of the work place committees, for the very purpose of allowing them to conduct "fact-specific" analyses of how best to take the initiative to identify and resolve safety hazards in their own work places.

122. Equally clear from both Hansard and the drafting of the legislation is the fundamental importance to the proper operation of this legislative scheme of the role of the work place committees in conducting regular inspections of their work place, as is required by s.125(1)(z.12) of the Code and by s.135(7)(e), which provides that the duties of a work place health and safety committee include participation in inspections pertaining to the health and safety of employees.

123. It is wholly consistent with the language and scheme of this legislation that work place committees should conduct a "fact-specific" analysis to identify whether, in a work place over which an employer lacks "physical control", it nonetheless exercises sufficient control to engage the purpose of the inspection obligation. That purpose is to allow the work place committee, including its worker representatives, to obtain the information necessary to identify and resolve threats to the health and safety of workers, including the many workers employed outside facilities owned by their employer. Far from "diverting" work place committees from their proper function, as Canada Post argues, this role lies at its core.

---

71 Canada, Parliament, House of Commons Debates, 36th Parl, 2nd Sess, Hansard Vol 71 (March 24, 2000) per Mrs. Judi Longfield (Parliamentary Secretary to Minister of Labour, Lib.) , RBOA, Tab 18; See also Canada, Parliament, House of Commons Debates, 36th Parl. 2nd Sess. Hansard Vol 104, (May 31, 2000) per Minister of Labour, Claudette Bradshaw, RBOA, Tab 19.

124. Moreover, the scheme of this legislation is not to provide employers with "certainty" imposed from above, irrespective of the facts on the ground, it is to empower local parties, including workers, to identify and resolve health and safety issues in their own work places.

125. Work place committees are the primary means through which employees have the opportunity to ensure that their work place is safe. In its wisdom Parliament decided that, in advancing its public policy of safe work environments, workers should have a meaningful role to play in ensuring work place health and safety. This legislative objective is among those defeated by the restrictive interpretation that the Appeals Officer gave to s.125(1)(z.12) of the Code.

126. It is a direct consequence of the interpretation that Canada Post asks this Court to uphold as reasonable that work place health and safety committees will be left blind in relation to locations in their own work places over which their employer does not exercise property rights. This will be so irrespective of whether the work place is one in which an employer directs employees to the same precisely identified location on a daily basis, and irrespective of whether the employer has the capacity to identify and resolve hazards in relation to that work place, as is the case for CPC on letter carrier routes. This result is entirely inimical to the scheme of this legislation.

127. Further, the interpretation of s.125(1) that Canada Post asks this Court to uphold is one under which it asserts that more than two-thirds of all of the obligations listed under s.125(1) and, presumably, all of the regulations enacted to implement those obligations, are of no application outside facilities over which the employer holds property rights. Such an interpretation would effectively dismantle the health and safety protections of the Code for the thousands of employees who work in places other than facilities owned or leased by their employers.

128. Accordingly, the effect "on the ground" of the Appeals Officer's interpretation of s.125(1)(z.12) of the Code, would be to create lines within Canadian federal work places beyond which there could be no effective joint responsibility for health and safety in the work place and beyond which employers have no obligations relating to physical conditions in the work place, even if the employer in fact has the capacity to inspect and to meet health and safety obligations

relating to physical conditions in that work place. This, in our submission, is a clearly "absurd" result, within the meaning given to that term by *Rizzo*[72], and one that falls well outside the range of acceptable outcomes defensible in respect of the facts and law.

129. Finally, CUPW submits that the decision in *Blue Mountain*[73], on which Canada Post relies, provides further support for the positions taken by CUPW in these proceedings..

130. *Blue Mountain* stands for the principle that "a generous interpretation of public welfare statutes cannot justify extending the reach of the legislation beyond the intent of the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation."

131. *Blue Mountain* is a case in which the Court held that the death of a guest in a hotel swimming pool by natural causes was not reportable under occupational health and safety legislation, for the reason that this legislation was directed at the protection of workers rather than customers. The Court overturned the administrative decision-maker's interpretation of the reporting provisions of the Act because it had applied a "textual" based interpretation that "entirely failed to take into account the purpose and objectives of the legislation", for the reason that:

> *There was no evidence that the Blue Mountain guest's death in the swimming pool was caused by any hazard that could affect the safety of a worker…*[74]

132. The decision in *Blue Mountain*, which concerned the extension of the Code to non-workers, is of no assistance to Canada Post, who is asking the Court to uphold an interpretation of health and safety legislation that is highly restrictive of its protections in relation to the safety of the many Canadian workers whose employment takes them beyond facilities subject to employer property rights. *Blue Mountain* in fact provides further strong support for CUPW's position in this proceeding, in that it demonstrates that Courts will intervene on judicial review

72 *Rizzo*, supra, at para 27, RBOA, Tab 1.

73 *Blue Mountain*, supra, RBOA, Tab 8.

74 *Blue Mountain*, supra, at paras. 48- 51, 61, RBOA, Tab 8.

where a decision-maker gives an interpretation to health and safety legislation that is not "consistent with the Act's purpose and objective of protecting the health and safety of workers."

PART IV: ORDERS REQUESTED

133. For the reasons set out above the Respondent CUPW requests the following orders:

(a) An order affirming the judgment of the Federal Court of Appeal, quashing and setting aside the decision of the Appeals Officer in respect of Contravention No. 1, and reinstating HSO Campbell's finding of September 21, 2012 that CPC is in contravention of s. 125(1)(z.12) of the Code;

(b) Its costs of this appeal and the proceedings below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF AUGUST, 2018.

Paul J.J. Cavalluzzo **Amanda Pask**

Lawyers for the Respondent, Canadian Union of Postal Workers

PART V: LIST OF AUTHORITIES

CASES

1. *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 SCC 837, [1998] 1 SCR 27

2. *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, 2018 CarswellBC 1234

3. *Canada Post Corp. v. Canadian Union of Postal Workers*, 2011 FCA 24, 2011 CarswellNat 133

4. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190

5. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339

6. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895

7. *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 SCR 770

8. *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75

9. *Ontario (Ministry of Labour) v. Hamilton (City)*, [2002] O.J. No. 283 (ONCA)

10. *Laroche v. Canada Border Services Agency*, 2010 LNOHSTC 12

11. *Seck v. Canada (Attorney General)*, 2012 FCA 314

12. *Canada (Minister of Citizenship & Immigration) v. Hyde*, 2006 FCA 379, [2006] F.C.J. No. 1747

SECONDARY SOURCES

13. R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada Inc., 2008)

14. P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969)

LEGISLATION

15. *Canada Labour Code*, R.S.C. 1985, c. L-2

16. *The Canada Occupational Health and Safety Regulations*, SOR 86-304

17. *Interpretation Act*, R.S.C. 1985, c. I-21

18. Canada, Parliament, House of Commons Debates, 36th Parl, 2nd Sess, Hansard Vol 71 (March 24, 2000) per Mrs. Judi Longfield (Parliamentary Secretary to Minister of Labour, Lib.)

19. Canada, Parliament, House of Commons Debates, 36th Parl. 2nd Sess. Hansard Vol 104, (May 31, 2000) per Minister of Labour, Claudette Bradshaw