Federal Court of Appeal | Cour d'appel fédérale

Date: 20170713

Docket: A-94-16

Citation: 2017 FCA 153

CORAM: **NADON J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Appellant

and

CANADA POST CORPORATION

Respondent

and

FETCO INC. (FEDERALLY REGULATED EMPLOYERS - TRANSPORTATION AND COMMUNICATIONS)

Intervener

Heard at Toronto, Ontario, on December 8, 2016.

Judgment delivered at Ottawa, Ontario, on July 13, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRING REASONS BY: RENNIE J.A
DISSENTING REASONS BY: NEAR J.A.

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REASONS FOR JUDGMENT

NEAR J.A. (Dissenting Reasons)

I. Introduction

[1] The appellant, the Canadian Union of Postal Workers, appeals from the February 26, 2016 decision of the Federal Court (2016 FC 252), in which the application judge dismissed the

appellant's application for judicial review of the November 27, 2014 decision of the Occupational Health and Safety Tribunal (the OHST). An Appeals Officer of the OHST (the Appeals Officer) determined that the employer's work place inspection obligation, under paragraph 125(1)(*z.12*) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), only applies to work places controlled by the employer. As such, the Appeals Officer found that the respondent, Canada Post, is not obligated to ensure that all areas outside the physical Canada Post building in Burlington, Ontario are inspected annually.

II. Legislative Provision

[2] Paragraph 125(1)(*z.12*) of the Code provides as follows:

Specific duties of employer	Obligations spécifiques
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,	**125** (1) Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :
…	[…]
(*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;	*z.12*) de veiller à ce que le comité local ou le représentant inspecte chaque mois tout ou partie du lieu de travail, de façon que celui-ci soit inspecté au complet au moins une fois par année;

[3] On August 28, 2012, an employee member of the local joint health and safety committee, represented by the appellant, filed a complaint that only the Canada Post building in Burlington was being inspected. The member alleged that the letter carrier routes should also be inspected.

[4] On September 21, 2012, following an investigation of the complaint, a Health and Safety Officer (the HSO) issued a direction citing four contraventions of the Code, only one of which is relevant to this appeal. The HSO was of the opinion that the respondent had failed to ensure that the work place health and safety committee had inspected the entirety of the work place annually, thereby contravening paragraph 125(1)(*z.12*) of the Code. The HSO found that the committee had been restricting its inspections to the physical building in Burlington. The respondent appealed the HSO's direction to the OHST.

[5] On November 27, 2014, the Appeals Officer varied the HSO's direction and rescinded the contravention of paragraph 125(1)(*z.12*) of the Code. Based on his interpretation of the provision, the Appeals Officer concluded that the inspection obligation did "not apply to any place where a letter carrier is engaged in work outside of the physical building" in Burlington (reasons at para. 99).

[6] The Appeals Officer first determined that the term "work place", as found in subsection 125(1), must be interpreted broadly to include all areas where an employee works, "whether or not they are under the employers' control." Under this interpretation, the work place for Canada Post letter carriers includes points of call and lines of route (reasons at paras. 91-92).

[7] Next, the Appeals Officer determined that subsection 125(1) clearly distinguishes between circumstances where the employer controls the work place and those where it does not. The Appeals Officer found that the provision covers "the employer who controls both the work place and the activity, or solely the activity and not the work place" (reasons at para. 93). On a plain reading of the obligations listed under subsection 125(1), the Appeals Officer determined that: some obligations apply, regardless of whether the employer controls the work place, so long as the employer controls the work activity; and other obligations require control over the work place to be fulfilled (reasons at para. 93).

[8] The Appeals Officer then found that "the purpose of the work place inspection obligation is to permit the identification of hazards and the opportunity to fix them or to have them fixed." As a result, control over the work place is required to fulfil the obligation under paragraph 125(1)(*z.12*) (reasons at para. 96). The Appeals Officer found that the respondent has no physical control over the points of call and lines of route and, therefore, cannot fix hazards. The Appeals Officer concluded that the respondent cannot ensure areas outside the physical building are inspected in accordance with paragraph (*z.12*) (reasons at para. 99).

[9] On December 19, 2014, the appellant sought judicial review of the Appeals Officer's decision on the ground that his interpretation of paragraph 125(1)(*z.12*) of the Code was unreasonable.

III. Federal Court Decision

[10] The application judge reviewed the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) of the Code on a reasonableness standard, noting that the range of possible and acceptable outcomes may be relatively narrow because the question at issue was primarily one of statutory interpretation.

[11] The application judge determined that the Appeals Officer's interpretation was reasonable as it recognized the broad nature of the employer's obligations to protect the health and safety of employees under the Code but avoided imposing obligations that the employer would be unable to fulfill. The application judge determined that it was not unreasonable for the Appeals Officer to find that the respondent could not fulfill the purpose of the inspection obligation without control over the work place. The application judge accepted that subsection 125(1) distinguishes between control over the work activity and control over the work place and that the latter is determinative in respect of the obligation under paragraph (*z.12*).

IV. Issue

[12] The only issue on appeal is whether the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) of the Code was reasonable.

V. Standard of Review

[13] On an appeal of an application for judicial review, this Court must determine whether the application judge chose the correct standard of review and applied it properly. In doing so, this

Court "step[s] into the shoes" of the Federal Court judge (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559).

[14] Both parties submit that the Appeals Officer's decision is to be reviewed on a reasonableness standard. While I am not bound by their agreement, I find that the parties have identified the appropriate standard of review (*Canadian Union of Postal Workers v. Canada Post Corporation*, 2011 FCA 24 at para. 18, 330 D.L.R. (4th) 729). The question to be answered is whether, given the overall context, the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) of the Code was reasonable (*Zulkoskey v. Canada (Employment and Social Development)*, 2016 FCA 268 at para. 15).

VI. Analysis

[15] The preferred approach to statutory interpretation provides that the "words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 36 O.R. (3d) 418 [*Rizzo*]).

[16] Subsection 125(1) of the Code contemplates two circumstances: (i) where employers control the work place (and the activity); and (ii) where employers do not control the work place but control the work activity. While the two circumstances are separated by 'and' in the wording of subsection 125(1), the word 'and' may be read disjunctively or conjunctively depending on the context (*Seck v. Canada (Attorney General)*, 2012 FCA 314 at para. 47, 234 A.C.W.S. (3d) 118).

[17] In my view, the Appeals Officer reasonably found that some obligations listed in subsection 125(1) cannot apply where the employer has no control over the work place. For example, the Appeals Officer recognized that if the employer does not own the buildings nor has a right to alter them, an employer cannot ensure that those buildings meet prescribed standards, as required under paragraph (*a*). Further, as the respondent argued, if the work place was not under the employer's control, an employer could not install guard rails and fences, as required under paragraph (*b*). Conversely, even if the employer did not control the work place, the Appeals Officer recognized that an employer could ensure the safety of the equipment being used by its employees, as required under paragraph (*t*), so long as it controlled the employees' activity.

[18] Further, the Appeals Officer reasonably found that the work place inspection obligation under paragraph (*z.12*) can only apply if the employer falls within the first circumstance contemplated in subsection 125(1), namely where the employer has control over the work place. It was not disputed that the respondent does not have physical control over individual points of call or lines of route, many of which are situated on private property (reasons at para. 98). The parties accepted, on appeal, the Appeals Officer's assessment of the purpose of the inspection obligation as "to permit the identification of hazards and the opportunity to fix them or to have them fixed" (reasons at para. 96). The Appeals Officer reasonably found that the respondent "does not have exclusive access to private properties, nor can it alter or fix the locations in the event of a hazard" (reasons at para. 99). As such, the Appeals Officer reasonably concluded that the respondent does not have sufficient capacity or control outside of the physical Canada Post building in Burlington to achieve the purpose of paragraph (*z.12*).

[19] Contrary to the appellant's submissions, the Appeals Officer's interpretation does not 'read out' the second circumstance contemplated in subsection 125(1), namely where an employer controls the work activity, but not the work place. The Appeals Officer's interpretation recognizes that fulfilling certain obligations depends on having control over the physical work place. If the employer does not control the work place, it is not possible for the employer to ensure that the work place is inspected; no amount of control over the work activity will assist the employer in this regard. The Appeals Officer reasonably found that the respondent fell within the second circumstance contemplated in subsection 125(1); the respondent controls the letter carriers' work activities but has no control over the lines of routes and points of call. As such, the obligation to ensure that these areas of the work place are inspected in accordance with paragraph (*z.12*) cannot apply to the respondent.

[20] The appellant argued that the Appeals Officer's findings on the respondent's health and safety policies demonstrate that the respondent has the capacity to achieve the purpose of paragraph (*z.12*), thereby rendering the Appeals Officer's decision unreasonable. I disagree. The Appeals Officer observed that the respondent seeks to identify and resolve hazards at points of call as well as carry out route audits in certain areas (reasons at paras. 100, 107-08). Appellant's counsel argued that the respondent can suspend delivery in the face of a hazard. In my view, these observations do not amount to a finding that the respondent has the capacity to ensure all areas of the work place outside the physical Canada Post building are inspected annually. 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.

[21] The Appeals Officer's interpretation, while limiting the applicability of the inspection obligation, does not undermine the objective of the Code to protect the health and safety of employees. The Appeals Officer recognized: that the Code must be interpreted liberally (reasons at para. 91); that subsection 125(1) binds employers to the fullest extent possible (reasons at para. 95); and that employers have obligations under the Regulations to implement hazard prevention programs (reasons at para. 100). In my view, the Appeals Officer's interpretation promotes the public welfare objectives of the Code without over-extending the work place inspection obligation beyond what is reasonable and logical (see *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75 at paras. 25-27, 114 O.R. (3d) 321; *Rizzo* at para. 27).

[22] I am of the view that my conclusion above is sufficient to dispose of this appeal. However, the submissions of the intervener, Federally Regulated Employers – Transportation and Communication (FETCO) should be noted. FETCO seems to suggest that, pursuant to section 135 of the Code, the mandate of work place committees is limited to work places under the employer's control. FETCO did not appear before the Appeals Officer and the Court would have benefitted from the OHST's consideration of its submissions. In any event, it is not necessary to determine the issue to dispose of this appeal. At best, the intervener's submissions serve to reinforce the importance of interpreting provisions of the Code textually, contextually, and purposively, which in my view, the Appeals Officer did in respect of paragraph 125(1)(*z.12*).

VII. Conclusion

[23] For the foregoing reasons, I would dismiss the appeal with costs.

"D. G. Near"

J.A.

NADON J.A.

[24] I have read, in draft, the reasons which my colleague Near J.A. gives in concluding that we should dismiss the appellant's appeal. Because of my view that Gleeson J. of the Federal Court (the Judge) erred in determining that the decision dated November 27, 2014 (2014 OHSTC 22) of an Appeals Officer of the Occupational Health and Safety Tribunal (the Appeals Officer) was reasonable, I must respectfully disagree with my colleague's disposal of the appeal.

[25] For the reasons that follow, it is my opinion that the Appeals Officer's decision is unreasonable and that, as a result, the Judge ought to have intervened. Consequently, I would allow the appellant's appeal.

[26] The background facts and the issue under appeal have been correctly set out in Near J.A.'s reasons and I need not repeat them.

[27] I begin my discussion, as I must, with a review of the Appeals Officer's decision. Before the Appeals Officer was an appeal under subsection 146(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) of a direction issued by a Health and Safety Officer, namely that the respondent

> …has failed to ensure that the work place health and safety committee inspects each month all or part of the workplace, such that every part of the work place is inspected at least once per year. The work place health and safety committee's current inspection activity is restricted to the building located at 688 Brant St Burlington, Ontario.

More particularly, the Health and Safety Officer was of the view that the obligation to inspect the work place included the obligation to inspect areas outside of the employer's building in Burlington, Ontario.

[28] First, on the basis of subsection 122(1) of the Code which defines "work place" as "any place where an employee is engaged in work for the employee's employer", the Appeals Officer held that the expression "work place" was broad enough to include letter carrier routes and points of call. Consequently, the Appeals Officer found that a work place was a place where an employee worked whether the work place was under the employer's control or not.

[29] In so concluding, the Appeals Officer rejected the respondent's argument that such a broad interpretation of the words "work place" was not appropriate considering that it would turn every location visited by a letter carrier into a work place. In the respondent's view, to require it to inspect each of these locations would be absurd.

[30] The Appeals Officer then turned his attention to subsection 125(1) of the Code and noted that the provision clearly distinguished between a work place controlled by the employer and one that was not so controlled, adding that the wording of the subsection did not spell out which of the obligations provided in the following paragraphs applied to one or the other situation.

[31] The Appeals Officer then stated the view that certain obligations found in the paragraphs of subsection 125(1) were such that they could not be fulfilled by an employer unless it controlled the work place, while other obligations could be performed by the employer as long as

it controlled the employees' activities. In his view, the obligation found in paragraph 125(1)(*z.12*) fell in the category of obligations which required control of the work place by the employer because the paragraph required the identification and fixing of hazards.

[32] Because, in his view, the respondent did not have access to private properties and hence could not alter or fix hazards found on those properties, there could be no doubt that the employer did not have control over the work place in which the letter carriers operated. Consequently, the Appeals Officer could not understand how the respondent could fulfil its obligation to ensure that the inspection provided for at paragraph 125(1)(*z.12*) be carried out.

[33] The Appeals Officer then indicated that it was not contested before him that the respondent did not have "physical control over the individual points of call or lines of route of a letter carrier," adding that the evidence was clear, however, that the work activities of the letter carriers were controlled by the respondent "right down to the way they hold their satchels and how they walk the routes" (para. 98 of Appeals Officer's reasons). I wish to point out that the respondent does not challenge the Appeals Officer's finding that it controlled the activities of the letter carriers while they operated outside of the physical building situated in Burlington, Ontario.

[34] Consequently, the Appeals Officer determined that paragraph 125(1)(*z.12*) did not apply to the work place in which the letter carriers operated outside of the respondent's physical building in Burlington, Ontario.

[35] The Appeals Officer then pointed to the existence of policies, programs and assessments which the respondent had put in place, the purpose of which was to ensure the health and safety of its employees. In particular, he pointed to the Work Place Hazard Prevention Program (WHPP) developed by the respondent so as to identify and report hazards encountered by letter carriers on their routes. In his view, that program was "an excellent example of how the Code and its Regulations are implemented to protect the health and safety of employees performing all kinds of activities in all kinds of work places" (para. 100 of Appeals Officer's reasons).

[36] Hence, the Appeals Officer varied the Health and Safety Officer's direction which cited a contravention of paragraph 125(1)(*z.12*). As a result, the appellant sought judicial review of the Appeals Officer's decision before the Federal Court.

[37] By his decision dated February 26, 2016 (2016 FC 252), the Judge dismissed the appellant's application. In his view, the Appeals Officer's decision was reasonable because it was "justified, transparent and intelligible" and fell "within a range of possible acceptable outcomes defensible in respect of the facts and law" (para. 59 of the Judge's reasons). In the Judge's opinion, the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) demonstrated "sensitivity to preserving the broad nature of the employer's obligations to ensure the health and safety of its employees without placing obligations upon the employer that the latter would be unable to fulfill" (para. 58 of the Judge's reasons).

[38] More particularly, the Judge accepted the Appeals Officer's distinction between a work place controlled by the employer and one that was not. The Judge also accepted that that

distinction was significant and meaningful in interpreting subsection 125(1). At paragraph 55 of his reasons, he wrote as follows:

> [55] Further, I am of the opinion that the Appeals Officer's finding that the respondent exercises substantial control over the work activity is neither internally inconsistent with the decision, nor does it undermine the reasonableness of the decision. The Appeals Officer identifies that subsection 125(1) draws a clear distinction between control over the work place and control over the work activity. He found that distinction to be significant and meaningful in interpreting subsection 125(1). Having concluded that the subsection distinguishes between work place control and work activity control, and having determined that work place control was the determinative factor in respect of the obligations imposed by paragraph 125(1)(*z.12*) there was no need, in my opinion, for the Appeals Officer to address the question of employer control over work activity.

[39] The appellant now appeals the Judge's decision to this Court. I agree with Near J.A. that the Appeals Officer's decision is subject to the standard of reasonableness. As he points out in his reasons, at paragraph 13, our duty is to determine whether the Judge identified the correct standard (which he did) and whether he applied it. In conducting that exercise, we must, in effect, step into the shoes of the Federal Court Judge (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45 to 47).

[40] Near J.A. concludes that the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) is reasonable. More particularly, he accepts, as reasonable, the Appeals Officer's approach that because certain obligations found in the 45 paragraphs of subsection 125(1) cannot be fulfilled by an employer unless it controls the work place, it necessarily follows that subsection 125(1) cannot be interpreted as requiring the respondent, which does not control the work place outside the physical building in Burlington, to ensure that the inspection prescribed at paragraph 125(1)(*z.12*) is carried out.

[41] My colleague also accepts the Appeals Officer's finding that because the purpose of the obligation found at paragraph 125(1)(*z.12*) is to identify and fix hazards found on the letter carriers' routes and points of call, control of that work place is a necessary condition for enforcement of the paragraph 125(1)(*z.12*) obligation. In Near J.A.'s opinion, that finding is reasonable because:

> 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.
>
> (emphasis in original, at para. 20 of Near J.A.'s reasons)

[42] In the end, Near J.A. is satisfied that the Appeals Officer interpreted the provision at issue in a textual, contextual and purposive manner. Hence, his decision is reasonable.

[43] With respect, I cannot subscribe to that view. In my opinion, the Appeals Officer's interpretation of paragraph 125(1)(*z.12*) is unreasonable for two reasons. First, the Appeals Officer's interpretation constitutes, in effect, a redrafting of the provision. Second, the Appeals Officer unreasonably found that the obligation found at paragraph 125(1)(*z.12*) could not be fulfilled by the respondent because it did not have control of the work place, i.e. it did not have access or exclusive access to private properties. Hence, it was not possible, in the view of the Appeals Officer, for the respondent to identify and fix the hazards which might be found on the letter carrier routes and points of call.

[44] The provision at issue, paragraph 125(1)(*z.12*) of the Code, reads as follows:

Specific duties of employer	Obligations spécifiques
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,	**125** (1) Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :
…	[…]
(*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;	*z.12*) de veiller à ce que le comité local ou le représentant inspecte chaque mois tout ou partie du lieu de travail, de façon que celui-ci soit inspecté au complet au moins une fois par année;

[45] I also reproduce section 124 to which subsection 125(1) refers:

124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.	**124** L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.

[46] There is no dispute between the parties that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 36 O.R. (3d) 418 at para. 21 (*Rizzo*)).

[47] There is also no dispute that legislation such as Part II of the Code, the purpose of which is to protect the health and safety of workers, is deserving of a generous interpretation in order to attain the purpose and objectives of the legislative scheme (*Rizzo* at para. 36; *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321 at paras. 24 and 25).

[48] In my respectful opinion, subsection 125(1) of the Code is clear and unambiguous. It provides that every employer shall fulfil the obligations set out in the paragraphs of the subsection in two circumstances. The first is when the employer controls the work place in which the employees work. The second is when the employer does not control the work place but controls the work activity of the employees in that work place. On a plain grammatical reading of the subsection, if one or the other circumstance is met, all of the obligations set out in its paragraphs, including the obligation set out at paragraph 125(1)(*z.12*), must be performed by an employer. I fail to see how the provision can be otherwise read.

[49] In my view, the Appeals Officer made no real attempt to interpret paragraph 125(1)(*z.12*). Rather than interpreting the provision as per the accepted rules of interpretation, the Appeals Officer determined that the subsection had to be read in such a way that the second circumstance set out in subsection 125(1) would not apply to obligations which, in his view, could not be fulfilled by an employer. Thus, because the respondent was not able to identify and fix hazards on letter carrier routes and points of call on private properties, paragraph 125(1)(*z.12*) did not apply to the respondent. Thus, the Appeals Officer read out one of the two circumstances enunciated in subsection 125(1) relevant to its application: where the employer does not control the workplace but controls the work activities.

[50] I am satisfied that the Appeals Officers' approach to the subsection was clearly not open to him and constitutes an unreasonable interpretation. As I indicated earlier, it is my view that in order to make the determination which he made, the Appeals Officer redrafted the provision. In my respectful opinion, if Parliament intended subsection 125(1) to mean what the Appeals Officer says it means, it would have no doubt drafted the provision very differently. At the very least, it would not have drafted the provision the way that it did.

[51] It must be remembered that it is not open to courts nor to tribunals to use the purpose of the legislation to frustrate or rescind Parliament's clear intention. As the Supreme Court of Canada said, per Gonthier J. writing for the majority, in *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476 at paragraph 42, albeit in a different context:

> … courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole.

[52] The fact that the provision at issue may pose difficulties or problems for the respondent, or any other employer, in regard to the fulfillment of the obligations set out in the paragraphs of subsection 125(1), is not, in my respectful view, a legitimate reason for the Appeals Officer to depart from the clear intent of the legislative provision. The answer to such a situation is that if Parliament failed to consider all of the consequences or implications resulting from its enactment, it is up to Parliament, not the courts or tribunals, to remedy the matter.

[53] At paragraph 16 of his reasons, Near J.A. indicates, relying on this Court's decision in *Seck v. Canada (Attorney General)*, 2012 FCA 314, 234 A.C.W.S. (3d) 118 at paragraph 47, that depending on the circumstances, the word "and" can be read disjunctively or conjunctively. In my respectful view, it is clear that the word "and" in subsection 125(1) cannot be read to mean "or". The French version of the provision uses the words "ainsi que" which clearly mean "and" and not "or". The phrase "ainsi que" can only be conjunctive, not disjunctive. The translation given for "ainsi" in *Harrap's Standard French and English Dictionary* (Edinburgh: Harrap Books, 1991) is:

> 2. *conj*. So, thus… (*b*) as also

[54] Likewise, *Le Petit Robert de la langue française* (Paris: Dictionnaires Le Robert, 2004) defines the words "ainsi que" as follows:

> De la même façon que. → comme … Tout comme. → et

[55] In 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: the employer "shall" "ensure that the work place committee... inspects each month all or part of the work place" in either situation.

[56] Consequently, there cannot be any doubt in my mind that subsection 125(1) of the Code renders all of the obligations found in its paragraphs applicable to work places controlled by the respondent and to work activities in work places which it does not control, to the extent that it controls the employees' activities in that work place. As I indicated earlier, the Appeals Officer found that the respondent controlled the activities of its letter carriers "right down to the way they hold their satchels and how they walk the routes" (para. 98 of Appeals Officer's reasons).

As I also indicated previously, the respondent does not challenge that finding. Thus, the requirements of the subsection are met in the present matter and hence the paragraph 125(1)(*z.12*) obligation must be fulfilled by the respondent.

[57] In my opinion, the only reasonable interpretation open to the Appeals Officer was that the paragraph 125(1)(*z.12*) obligation was an obligation that the respondent had to fulfil, considering that it controlled the activities of the letter carriers in the work place situated outside of the respondent's physical buildings. I should add that I see nothing in the context or the purpose of this legislation which supports the interpretation of subsection 125(1) reached by the Appeals Officer. Thus, the conclusion reached by the Appeals Officer is not one that falls within the range of acceptability and defensibility in respect of the law. As the Appeals Officer's decision turns essentially on his interpretation of subsection 125(1) of the Code, he, in my respectful view, was constrained by the text, context and purpose of the Code (See our decision in the *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General*), 2013 FCA 75, 444 N.R. 120 at paras. 13 and 14). Consequently, the Appeals Officer's decision is unreasonable.

[58] Although this conclusion is sufficient, in my view, to determine this appeal, I will now address the second reason for which the Appeals Officer's decision is unreasonable.

[59] As I indicated earlier, it is my view that the Appeals Officer's decision is also unreasonable because of his finding that the obligation found at paragraph 125(1)(*z.12*) could not be fulfilled by the respondent. That obligation, as the provision clearly states, requires an

employer to ensure that the work place committee or the health and safety representative inspect, at least once a year, the work place in which the employees work. In the case before us, this means that the respondent must ensure that the letter carrier routes and points of call are inspected at least once a year.

[60] The Appeals Officer determined that the paragraph 125(1)(*z.12*) obligation required the respondent not only to inspect the letter carrier routes and points of call, but to identify and fix the hazards found in that work place. Thus, in the Appeals Officer's view, as the respondent did not control that work place, it could not fulfil the obligation prescribed by paragraph 125(1)(*z.12*). As a fall-back position, the Appeals Officer, at paragraph 100 of his reasons, indicated that the various policies, programs and, in particular, the WHPP were "exemplary…for identifying and reporting hazards that are encountered at the points of call." Thus, although he was of the view that the 125(1)(*z.12*) obligation could not be imposed on the respondent because the respondent was not in a position to meet that obligation, the Appeals Officer was satisfied that the respondent, through its programs was, in effect, doing the necessary in identifying and addressing hazards encountered on letter carrier routes and points of call.

[61] I am satisfied that the appellant is correct in its submission that, on the evidence before the Appeals Officer, the respondent was fully able to identify and address hazards to employee health and safety on letter carrier routes and points of call. In that regard, the appellant points to the respondent's Policy 1202.05 entitled *Hazards and Impediments to Delivery Enroute*. The policy, which comprises 18 pages, defines the scope of the policy as follows:

> This document outlines the necessary steps that Delivery Employees, Rural Suburban Mail Carriers (RSMCs), Supervisors and Superintendents must take to identify and correct hazards and impediments to delivery.

[62] The policy then goes on to explain, in some detail, what constitutes hazards and impediments. It then sets out the roles and responsibilities of Delivery Employees, RSMCs, Supervisors and Superintendents, outlining how each of these employees is to identify hazards and impediments to delivery and the attempts which are to be made to resolve issues with customers following the identification of the hazards and impediments. For example, the policy provides that withholding the mail and/or the diverting and suspending of mail may be necessary to solve the problem at hand.

[63] Thus, Policy 1202.05 sets out a detailed protocol for delivery employees and supervisors with respect to delivery hazards and impediments, including the identification and investigation thereof and a protocol for resolving these with customers. Under the policy, it is the supervisors' responsibility to investigate and report hazards and impediments and to visit the site of unresolved hazards and impediments. As a result, supervisors may divert or suspend mail delivery to a location until the hazard or impediment is removed or prevented.

[64] In other words, through its various policies and programs, the respondent is, in effect, able to identify and resolve hazards and impediments encountered by the letter carriers on their routes and points of call. On the evidence, to say, as the Appeals Officer says, that the respondent is unable to identify and fix hazards encountered on the letter carrier routes and points of call because it does not have access or exclusive access to private properties is, in my respectful view, unreasonable.

[65] As the existing policies of the respondent demonstrate, control over private property is not necessary to fulfill the paragraph 125(1)(*z.12*) obligation. The fact is that the respondent can ensure that the letter carrier routes and points of call are inspected with a view of identifying hazards and impediments and rectifying them without direct control over the work place.

[66] In any event, I am satisfied that the respondent is capable of ensuring that the obligation found at paragraph 125(1)(*z.12*) is met. However, it may have to change or modify its protocol because an annual inspection would have to be performed by the work place committee, rather than by the employees identifying hazards as they work. In other words, the manner in which the inspection of the letter carrier routes and points of call is carried out may have to be modified, but I have no doubt that the results which are already achieved by the respondent's policies will continue to be met.

[67] Consequently, the Appeals Officer's finding, on the evidence before him, that the respondent could not perform the paragraph 125(1)(*z.12*) obligation is, in my respectful view, unreasonable.

[68] Before concluding, I wish to address an argument put forward by the intervener.

[69] Relying on subsection 135(1) and paragraph 135(7)(*k*) of the Code which provide that:

135 (1) For the purposes of addressing health and safety matters that apply to individual work places, and subject to this section, every employer shall, for each work place controlled by the employer at which twenty or more	**135** (1) Sous réserve des autres dispositions du présent article, l'employeur constitue, pour chaque lieu de travail placé sous son entière autorité et occupant habituellement au moins vingt employés, un comité local

employees are normally employed, establish a work place health and safety committee and, subject to section 135.1, select and appoint its members.	chargé d'examiner les questions qui concernent le lieu de travail en matière de santé et de sécurité; il en choisit et nomme les membres sous réserve de l'article 135.1.
…	[…]
135 (7) A work place committee, in respect of the work place for which it is established,	**135** (7) Le comité local, pour ce qui concerne le lieu de travail pour lequel il a été constitué :
…	[…]
(*k*) shall inspect each month all or part of the work place, so that every part of the work place is inspected at least once each year; and	*k*) inspecte chaque mois tout ou partie du lieu de travail, de façon que celui-ci soit inspecté au complet au moins une fois par année ;

the intervener says that a work place committee's role is limited to the work place for which it is established. In its view, that work place in the present matter is the respondent's building in Burlington, Ontario.

[70] Consequently, the intervener submits that the work place committee "does *not* have a wide-ranging mandate to inspect work places over which the employer has no control" (para. 15 of the intervener's memorandum of fact and law, emphasis in original). In brief, the intervener says that the work place committee's duties are to be exercised exclusively in the work place controlled by the employer.

[71] In my view, that submission is incorrect. First, to accept the intervener's submission, we would have to ignore the text of subsection 125(1). The paragraph 125(1)(*z.12*) obligation differs slightly from that enunciated at paragraph 135(7)(*k*), as according to the plain language of

subsection 125(1), the paragraph 125(1)(*z.12*) obligation applies to a wider range of work situations than the paragraph 135(7)(*k*) obligation. Second, the intervener invites us, without so saying, to read paragraph 125(1)(*z.12*) as if the introductory line thereof said "subject to paragraph 135(7)(*k*)". I see no basis for reading paragraph 125(1)(*z.12*) in that way.

[72] Third, the fact remains that subsection 125(1) is clear and unambiguous. To repeat myself, it provides that when either or both of the circumstances provided therein is met, an employer shall have to perform the obligations enumerated in the following paragraphs. Nothing in the text of paragraph 135(7)(*k*) allows the reader to limit the scope of subsection 125(1).

VIII. Conclusion

[73] I would therefore allow the appeal with costs, I would set aside the judgment of the Federal Court and, rendering the judgment which ought to have been rendered, I would allow the appellant's application for judicial review of the Appeals Officer's decision with costs and I would reinstate the Health and Safety Officer's Direction in regard to contravention number 1.

"M. Nadon"

J.A.

RENNIE J.A. (Concurring Reasons)

[74] I have had the benefit of reading the reasons for judgment of my colleagues Nadon and Near JJ.A. I have a different understanding of the scope of paragraph 125(1)(*z.12*). The limiting words "to the extent that the employer controls the activity" in subsection 125(1) lead to the conclusion, in my respectful view, that Parliament did not intend the inspection obligation in paragraph 125(1)(*z.12*) to apply equally to all activities in all circumstances.

[75] My colleague Near J.A. upholds as reasonable the Appeals Officer's conclusion that control of the work place is determinative of whether or not the obligation in paragraph 125(1)(*z.12*) applies to the respondent. As Nadon J.A. points out, this analysis is not complete. It effectively reads out the remainder of the provision. Nadon J.A., in contrast, would find that the obligation applies where there is control over the work place *and* where there is control of the work activity but not the work place, reading the impugned provision conjunctively to apply equally to either circumstance.

[76] Thus, my colleagues each appear to address the effect of the qualifying language "to the extent that the employer controls the activity" solely as triggering a binary determination of the applicability of the obligation in paragraph 125(1)(*z.12*). Put more simply, the obligation in paragraph 125(1)(*z.12*) either fully applies to the work activity or it has no application.

[77] In my view, neither of these approaches gives effect to the clear intention of Parliament. The words "to the extent that" require a consideration, based on the facts and circumstances of

each case, of the extent to which the obligation may apply to the work activity. To be clear, the point of departure between myself and my colleagues is whether the words, and I paraphrase, "extent of control of the activity" determine whether there is any obligation at all, or whether there is an obligation, the extent of which depends on consideration of those aspects of the activity which are within the control of the employer and those that are not.

[78] I agree with my colleague Nadon J.A. that all of the obligations in subsection 125(1) presumptively apply, both to an employer who controls the work place and to an employer who controls the work activity but not the work place. However, I would take the analysis one step further. Once it is 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. It is my view that the extent of control of the activity necessarily informs the extent of the inspection obligation.

[79] It is true that Canada Post controls many aspects of how the mail is delivered - the choice and design of the route, how it is walked or driven, how the satchel is carried and so forth, but I do not agree that the inspection obligation invariably follows each aspect along with it without any variance in the extent of application. In my view, simply because Canada Post may control aspects of the activity, i.e. it may direct the postal worker to take public transit to return to the post office at the end of the route rather than a taxi, it does not follow that the inspection obligation applies to the fullest extent, for example, to the safety of public transit, as appears to be urged by the appellant. Similarly, Canada Post may give instructions as to how to deal with dangerous dogs, but this does not necessarily mean that the inspection obligation extends to an

assessment of the risk posed by the dog. Canada Post may tell postal workers how to navigate icy sidewalks and provide them with cleats, but this does not mean that there is an obligation to inspect all of the sidewalks in a city or check on the effectiveness of city sidewalk snow clearing and sanding operations.

[80] It is my view that Parliament, through its careful choice of language, intended that the scope of the inspection obligation would be informed by the extent of control of the activity. Parliament acknowledges that there are aspects of the employment activity which are beyond the control of the employer. In each case, the analysis of the activity, and the parameters of the employer's control over it, requires a fact specific analysis, informed by the nature of the activity and a parsing of the risks posed by the activity.

[81] In this case, the Appeals Officer found that there was control over the activity of letter carriers "right down to the way they hold their satchels and how they walk the routes". This finding was not challenged before this Court, and hence we are effectively bound by it. The consequence of this, and for this reason alone, I would therefore concur with Nadon J.A.'s disposal of the appeal. It may be, that in a future case, the scope of the activity, and segregation of those aspects of it which are beyond the control of the employer will be re-examined by the Occupational Health and Safety Tribunal. That case is for another day.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE GLEESON DATED FEBRUARY 26, 2016, DOCKET NUMBER T-2574-14)

DOCKET:	A-94-16
STYLE OF CAUSE:	CANADIAN UNION OF POSTAL WORKERS v. CANADA POST CORPORATION AND FETCO INC. (FEDERALLY REGULATED EMPLOYERS - TRANSPORTATION AND COMMUNICATIONS)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 8, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRING REASONS BY:	RENNIE J.A.
DISSENTING REASONS BY:	NEAR J.A.
DATED:	JULY 13, 2017

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