Court 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**

APPELLANT
(Respondent)

- and -

**CANADIAN UNION OF POSTAL WORKERS**

RESPONDENT
(Appellant)

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# FACTUM OF THE INTERVENERS, DHL EXPRESS (CANADA), LTD., FEDERAL EXPRESS CANADA CORPORATION, PUROLATOR INC., TFI INTERNATIONAL INC. AND UNITED PARCEL SERVICE CANADA LTD.

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I - OVERVIEW AND STATEMENT OF FACTS

### (a) Overview

1. This matter involves a dispute between Canada Post Corporation ("CPC") and the Canadian Union of Postal Workers ("CUPW") concerning a decision of an Appeals Officer of the Occupational Health and Safety Tribunal of Canada ("Appeals Officer") appointed under the Canada Labour Code ("*Code*") involving section 125(1)(z.12) of the *Code*.

2. More specifically, CUPW sought judicial review of the decision of the Appeals Officer before the Federal Court, Trial Division. This application was unsuccessful. By a 2-1 majority, the Federal Court of Appeal reversed that result and quashed the decision of the Appeals Officer. CPC then obtained leave to appeal to this Honourable Court.

3. By Order dated August 31, 2018, this Honourable Court granted intervener status to DHL Express (Canada), Ltd., Federal Express Canada Corporation, Purolator Inc., TFI International Inc. and United Parcel Service Canada Ltd. (collectively the "Interveners"). The Interveners are, collectively, the dominant Canadian organizations engaged in the business of time-guaranteed express package shipping to businesses, organizations, institutions and individuals throughout Canada.

4. In its Memorandum of Argument, the Appellant Canada Post Corporation ("CPC") asserts that the decision of the Appeal Officer was reasonable and entitled

to deference. The Interveners will not directly address the decision of the Appeals Officer or make submissions from those administrative law perspectives.

5. Rather, the Interveners submit that, as a matter of *interpretive necessity*, Justice Nadon's interpretation of s. 125 falls outside the range of possible acceptable defensible outcomes. Using the Dunsmuir[1] nomenclature, it is not an "available" outcome, simply from a textual perspective.

6. The Interveners will also address, as does CPC, the impracticality of the "fact specific" interpretation of s. 125 adopted by Justice Rennie and now endorsed by CUPW. However, these submissions will be advanced from the perspective of Canada's five leading courier delivery companies, whose business operations are far more unpredictable and, therefore, even more incompatible with CUPW's interpretation than are those of CPC.

**(b) Statement of Facts**

7. In 2012, a CUPW health and safety representative filed a complaint under the *Code*, arguing that CPC was required to annually inspect its Burlington, Ontario letter carrier routes for hazards. A Health and Safety Officer investigated the complaint and held that letter carrier routes were "work places" for the purposes of s. 125(1)(z.12) of the *Code*. He ordered CPC to ensure at least annual inspections by the Local Joint Health and Safety Committee of each and every such postal route. The Appeals Officer reversed this decision, finding that the obligation to inspect did not apply to workplaces that were beyond the control of the employer.

[1] Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9 ["*Dunsmuir*"], para.47

8. CUPW's application for judicial review was dismissed. However, by three conflicting judgments, a majority of the Federal Court of Appeal overturned the application judge, restoring the obligation on CPC to ensure that each of its postal routes is inspected at least annually by a local health and safety committee.

9. CPC now appeals to the Supreme Court of Canada.

## PART II - STATEMENT OF QUESTIONS IN ISSUE

10. The issue in this appeal is the reasonableness of the decision of the Appeals Officer.

## PART III - STATEMENT OF ARGUMENT

11. Collectively, the Intervenors are the dominant Canadian organizations engaged in the business of time-guaranteed express package shipping to businesses, organizations, institutions and individuals throughout Canada. Cumulatively, they employ thousands of employees, operate over 200 different sortation and service facilities and own and operate thousands of transportation and delivery vehicles and aircraft.

12. As any Canadian businessperson would understand, the "courier" employees who make up the core work force of the Interveners perform most of their functions at locations and using routes that are neither owned nor controlled by their employers. The ultimate destinations for their deliveries include places of most every description imaginable in Canada where people live and work. These include private homes, commercial buildings, industrial facilities, banks, government

buildings and property, power stations, laboratories, office towers, retail outlets, factories, airport gateways, construction sites and hospitals. The deliveries may involve objects ranging from one-page documents to washing machines.

13. As with the postal service, some delivery destinations are visited on a regular (if not a daily) basis. However, other delivery destinations may be visited only once in the history of the delivering company. While doing their work, courier employees perform activities in or on roads and highways, gas stations, airport aprons and cargo conveyor belts, government-owned property, private property, sidewalks, bike lanes, bike parking areas, transit systems, internal and external footpaths, pedestrian overpasses, elevators, loading docks and delivery point courier rooms and any other area a courier may chose to travel upon, use or stop at on the way to his/her destination for each and every package.

14. Two main features distinguish CPC's delivery functions from the tasks of couriers employed by the Interveners. These are a) unpredictability and b) the integration of pickup and delivery functions.

15. Unlike the prescribed postal routes and methods established by CPC for its letter carriers, the selection of routes for the delivery of individual items to ultimate recipients by individual couriers by truck, car, bike or on foot, involves the exercise of ongoing discretion and judgment by the delivery employees of the Interveners. The delivery destinations for many couriers vary widely (if not totally) and unpredictably from day to day. Couriers employed by the Interveners regularly determine and revise their own routes without specific management direction as

their day unfolds. They respond to the exigencies of the day as well as to deliveries that may be called in while they are in the course of their planned deliveries, all depending upon circumstances and involving “work places” that are entirely beyond the control of the employee or the employer.

16. The complexities of these various *delivery* processes are combined with a simultaneous process through which cargo of every description is *picked up* by couriers, both from retail outlets operated by the Interveners and from sites owned and controlled by sending parties of all descriptions across the country, and then transported by courier for introduction into the delivery process described above. Unlike the letter carriers of CPC, “delivery” personnel engaged by the Interveners also double as their agents for the “pickup” of new cargo. Given the immediacy of service implicit in the time-guaranteed express package shipping industry, many of these pickup functions must be integrated daily on an a*d hoc* basis with the dynamic and changeable delivery processes described above.

### (a) The interpretation adopted by Justice Nadon is unavailable as a matter of interpretive necessity

17. The Interveners wish to emphasize, as a matter of statutory interpretation, the *textual necessity* of drawing distinctions within s. 125(1), applying some of the listed obligations but not others to a given situation based on the employer’s level of control over the issue. The introductory language of s. 125(1) 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,…

18. The interpretation adopted by Justice Nadon, holds that *all* of the listed obligations (including the obligation to conduct the annual inspections at issue) apply when ***either*** of two conditions are met:

> On a plain grammatical reading of the subsection, if one or the other circumstance is met [i.e., employer control over the workplace *or* over the activity], 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. [emphasis added][2]

19. This interpretation dictates an "all or nothing approach", where "all of the obligations set out in" the subparagraphs of subsection 125(1) are applicable "in respect of any workplace" that satisfies either of the two stated conditions – control of the workplace or control of the worker's activities.

20. Respectfully, this interpretation renders the expression "in respect of every work place controlled by the employer" entirely redundant and devoid of any practical impact. This is because "control" over the *activities* of employees *within* a "work place controlled by the employer" will always exist. The second stated condition – control over activities – will *always* apply when the first condition – control over the work place – is satisfied. The first condition is subsumed by the second.

21. Parliament could have achieved precisely the same result by omitting the phrase "in respect of every work place controlled by the employer", leaving the

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[2] Canadian Union of Postal Workers v. Canada Post Corporation, 2017 FCA 153 ["Federal Court of Appeal Decision"], at para. 48, Appellants Record, Vol. 1, Tab C

matter to be determined simply by reference to the issue of control over activities. The introductory words could simply have read:

> 125 (1) Without restricting the generality of section 124, every employer shall, in respect of every work activity carried out by an employee in a work place,
>
> (a) ensure that all permanent and temporary buildings and structures meet the prescribed standards;
>
> (b) install guards, guard-rails, barricades and fences in accordance with prescribed standards;…

22. Parliament clearly intended some of the forty-five obligations set out in s. 125 to apply where the employer exerts control over the workplace, while others were to apply where control is exerted only over the activities of the employees. The all or nothing approach adopted by Justice Nadon, is, as a matter of statutory interpretation, simply not available. It does not fall within a range of possible acceptable outcomes that are defensible in respect of the facts and law.[3]

23. Given the *interpretive necessity* of drawing distinctions within s. 125, the question before the Appeal Officer was straightforward – was the obligation in question (i.e., annual inspections) the kind of obligation that is triggered only when an employer's control over the workplace exists, or did it arise despite the fact that the employer exercises control only over the activities of the employees in question?

24. The Interveners submit that the decision of the Appeals Officer concerning the binary determination before him was reasonable. However, he reached this conclusion based upon textual and practical considerations. He did not recognize

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[3] Dunsmuir, supra, para.47

or reflect the *interpretive necessity* of categorizing the various obligations set out in s. 125. The Interveners wish to supplement the analysis on this point by emphasizing the interpretive *unavailability* of the approach of Justice Nadon.

### (b) The implications of the CUPW interpretation go beyond impracticality and rise to the level of impossibility

25. The submissions of CPC are directed towards the impact of s. 125(1)(z.12) of the *Code* on its prescribed "postal routes". In assessing the control of CPC over the work activities of its letter carriers, CUPW notes repeatedly that those work activities are controlled by CPC "right down to the way they hold their satchels and how they walk the routes".[4] Within this factual context, CPC argues that the impact of CUPW's interpretation of s. 125 is so impractical as to render it untenable.

26. Considered from the perspective of their particular business operations, the Intervenors submit that the issue of impracticality involves a comparison of the degree of control exercised by CPC over the activities of its letter carriers to that exercised by the Interveners over their delivery personnel. As compared to CPC's letter carriers, the delivery personnel of the Interveners are forced, by the dynamic nature of their jobs, to exercise, throughout their working days, independent judgment as to the "routes" they will follow.

27. The inspection obligations that would be required of CPC by CUPW's approach are daunting due to CPC's lack of physical control over what are at least predictable postal route "work sites". The problems facing the Interveners flow not

[4] CUPW Factum, paras. 9, 35 and 52

only from a *lack of control over sites*, but more directly from the *fundamental unpredictability* inherent in their pick up and delivery operations. It would simply be impossible for them to anticipate each and every conceivable route that each and every one of their couriers *might* elect to use in performing their daily job duties.

28. This challenge in simply *identifying* "work sites" can be acknowledged even before noting that, by statute, the *inspections* at issue require the involvement of *two* members (one management, one union) of the Joint Health and Safety Committee for *each and every* potential "work site".[5] The issue is not, as CUPW suggests in paragraph 89 of its factum, whether workplace parties should be "wholly relieved of considering what steps may be taken" to improve employee safety. The issue concerns the legal obligation to physically perform *annual joint inspections* of work places. Those are two very different things.

29. CUPW's interpretation would give rise to a health and safety inspection system that will, in the context of the Intervener's industry, collapse under its own weight. The Interveners take absolutely no comfort from CUPW's acceptance that the employer's inspection obligation may be "fact specific".[6] Rather, the Interveners face the prospect of unending uncertainty, controversy and, ultimately, litigation as the breadth of their daily delivery assignments, ranging from the highly predictable to the highly unexpected, are subjected to case-by-case analysis.

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[5] Code, s.125(1)(z.12) N.B., inspections by a single "health and safety representative" apply only in cases subject to s.136(1), i.e., workplaces of less than twenty employees.

[6] CUPW Factum, paras. 79-80 and 117-123

30. In paragraphs 16 and 29 of its factum, CUPW implicitly accepts "possibility" as a limiting feature of the interpretive process at hand. It would simply be impossible for any joint inspection system to predict, identify *and jointly inspect* the infinite number of "work places" involved in the daily work of the delivery personnel employed by the Interveners. Any interpretation of s. 125(1)(z.12) that applies an inspection obligation to all "work places" (i.e., delivery routes) must address that fact satisfactorily.

31. This manifest spectre of *impossibility* was not appreciated by the majority of the Federal Court of Appeal. The Interveners confront an industrial reality that exceeds even that faced by CPC in terms of complexity, unpredictability, impracticality and, ultimately, impossibility. We respectfully ask this Honourable Court to bear these concerns in mind as it addresses the issues in this appeal.

## PART VI - SUBMISSIONS CONCERNING COSTS

32. The Interveners ask that no costs be awarded to or against them.

## PART V - ORDER SOUGHT

The Interveners support the submissions of CPC in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF OCTOBER, 2018.

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## PART VI - TABLE OF AUTHORITIES

| Authority | | Paragraph(s) |
|---|---|---|
| **CASES** | | |
| 1. | Canadian Union of Postal Workers v. Canada Post Corporation, 2017 FCA 153 | 18 |
| 2. | Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9 | 5, 22 |

## PART VII - TABLE OF STATUTES AND RULES

| | |
|---|---|
| 1. | Canada Labour Code, R.S.C., 1985, c. L-2, s.125(1)(z.12)<br><br>***Specific duties of employer***<br><br>**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,<br><br>**(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;<br><br>***Obligations spécifiques***<br><br>**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 :<br><br>**(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; |

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Proceeding commenced at Ottawa

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