File No. 37787

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN:

CANADA POST CORPORATION

APPELLANT
(Respondent)

- and -

CANADIAN UNION OF POSTAL WORKERS

RESPONDENT
(Appellant)

(Style of cause continues inside cover page)

FACTUM OF THE INTERVENERS MARITIME EMPLOYERS ASSOCIATION, THE HALIFAX EMPLOYERS ASSOCIATION AND THE BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCATION

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

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MARITIME EMPLOYERS ASSOCIATION,
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FACTUM OF THE INTERVENERS
MARITIME EMPLOYERS ASSOCIATION, THE HALIFAX EMPLOYERS ASSOCIATION AND THE BRITISH COLUMBIA EMPLOYERS ASSOCIATION

PART I – OVERVIEW OF THE POSITION AND FACTS

1. This Appeal concerns an important health and safety obligation, which applies to all employers who fall under federal jurisdiction: the workplace inspection obligation provided at s. 125 (1) (z.12) of the *Canada Labour Code*[1] (the "**CLC**"). In the decision on appeal (the "**Decision**"), the majority for the Federal Court of Appeal (the "**Court**") ruled that such inspection obligation exists even in areas of the workplace over which employers have no control. The application of such obligation as interpreted by the Court is particularly problematic in the maritime transportation industry, hence the intervention of the Maritime Employers Association, the British Columbia Maritime Employers Association and the Halifax Employers Association (the "**Interveners**"). Given the nature of the operations of the employers which the Interveners represent (the "**Maritime Employers**"), it is highly unrealistic that any of them will be able to comply with the inspection obligation as interpreted.

2. In this regard, the Interveners submit the following:

(a) The practical implications of the Decision are such that compliance therewith is highly improbable in the maritime transportation industry;

(b) The Court erred in determining that there is only one reasonable interpretation of s. 125(1) (z. 12);

(c) The Court did not follow the principle that laws are presumed to have been adopted in a coherent and reasonable manner;

(d) The Decision is not consistent with the application of international maritime law.

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[1] RSC 1985, c. L-2.

PART II – QUESTION IN ISSUE

3. The issue in this appeal concerns the reasonableness of the Appeals Officer's decision to the effect that the workplace inspection obligation does not apply to areas over which employers do not have control.

PART III – STATEMENT OF ARGUMENT

A. Practical Implications

4. Given the submissions of the Respondent, it is important to bring to the attention of this Honorable Court certain critical pragmatic issues which illustrate the difficult application of the Decision in the maritime transportation industry.

5. As is the case with letter carriers, stevedores or longshore workers, who make up the majority of the employees working for the Interveners, do not work at a single establishment or even on company property for that matter.

6. Similarly, both letter carriers and stevedores work in some areas over which their employers have no physical control. The very definition of stevedore is one who loads and unloads cargo vessels. This evidently requires said employees to board these vessels while they are docked at the port. The stevedores employed by the Interveners are not assigned to perform tasks for the vessel owners but instead, for separate companies, the Maritime Employers, which provide the stevedoring services. The same is to be said for rail tracks and rail cars, the vast majority of them not being owned by the Maritime Employers. Therefore, the Maritime Employers who provide stevedoring services have no physical control over said vessels, rail tracks, rail cars, etc.

7. While the situation of letter carriers clearly illustrates the difficulty of implementing the Decision in practice, its application "on the ground" is uniquely challenging in the maritime transportation industry.

8. In its Factum, the Respondent focuses on the remedial nature of the provision in question and attempts to illustrate how the Appellant remedies certain hazards without having control over certain parts of the workplace. While it may be true that some hazards can be remedied indirectly

without modifying the physical aspect over which they do not have control, this does not mean that (a) all hazards can be avoided through indirect modifications or through modifying work processes and (b) the area which contains the hazard can, in fact, be inspected by the "work place committee or the health and safety representative" as required by the CLC.

9. For instance, thousands of vessels and rail cars pass through the ports each year. They come and go each day, never arriving or leaving at the same time or day. Most of them do not stay in the port for more than 72 hours, and may actually never return to the port. While some vessels might pass through the ports several times during a given year, some may pass only a couple of times a year, once a year or may never pass again in the future. The infrequent returns, coupled with a schedule that varies based on weather and other circumstances, makes it difficult to tell at the moment they first arrive at the port, if or when the vessel or rail car shall return.

10. This creates a unique difficulty in the maritime transportation industry when it comes to the inspection obligation. If the position of the Federal Court of Appeal stands, in order to comply with the inspection obligation, the Maritime Employers would be required to inspect, for example, each vessel and rail car, at least once per year. In that regard, it is important to note that the inspection mentioned in section 125(1) (z.12) is intended to allow the work place committee or the health and safety representative to identify potential hazards and bring modifications to the workplace to prevent accidents. These inspections take time, often three to four hours to complete.

11. As a result, if the Maritime Employers were to attempt to "ensure that the work place committee or the health and safety representative inspects <u>each month all or part of the work place, so that every part of the work place is inspected at least once each year</u>", they would basically have to be conducting inspections every day of the year. While the obligation is only to conduct inspections once a month and consequently the whole workplace at the end of a given year, monthly inspections simply would not suffice for Maritime Employers to comply with the obligation as interpreted by the Court given the number of ships and rail cars at port each day and the fact that they are not necessarily the same from one day to another.

12. Even if the work place committee or the health and safety representative were to conduct daily inspection, it is highly doubtful that they would be able to respect this obligation and inspect each and every ship and rail car each year. Not only is this unrealistic, but it would be highly

prejudicial to the industry. Maritime transportation costs are considerable and therefore, time is of the essence. The goal is to load and unload vessels in the most efficient way possible. Any additional time spent at the port costs all stakeholders and ultimately consumers, a considerable amount of resources. It could even, ultimately, lead ship owners and agents to use other port facilities, in the United States, to avoid delays and costs thereby affecting the Canadian economy as a whole.

13. This is not to say that Maritime Employers cannot ensure the safety of the workers even in workplaces over which they do not have control. This is where, in our view, the Federal Court of Appeal failed to consider a crucial distinction that can be made between the obligation of an employer to respond to a health and safety issue, even in a workplace that is not under its control, and the inspection obligation provided in section 125(1) (z.12). Whenever a maritime employer becomes aware of the existence of a safety hazard aboard a vessel, for example, the employer will assess the situation and take measures to ensure the safety of its workers. This includes, amongst other measures, pre-work checklists provided to vessels before they enter the port, ordering the workers to leave the vessel, requesting that the owner of the vessel take measures to remedy the situation and should the owner fail to do so, refuse to load or unload the vessel until the situation has been corrected, etc.

14. Whenever such issues arise, the Maritime Employers can and do intervene. However, this is completely different from forcing Maritime Employers to ensure that the work place committee or the health and safety representative conduct an inspection of all vessels, rail cars and other workplaces that are not under their control. As illustrated in paragraphs 9 to 12 of the present Factum, it is not only unrealistic to believe that such obligation can be accomplished but it would also cause serious harm to the industry as a whole.

15. The fact-specific approach upheld by Justice Rennie[2] and advanced by the Respondent[3] is also problematic, especially considering the penal consequences of non-compliance with the obligation. In the maritime transportation industry, would this mean that such an analysis would have to be conducted each time a new vessel enters the port? Who effectively decides whether or

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2 Decision on Appeal, at par. 80.
3 Respondent's Factum, at par. 118.

not the employer has control over the workplace? What happens in the event of a disagreement? When this question will have been decided, will the vessel still be in the port facility and will it even be seen again? Does this mean that s. 125 (1) (z.12) will be given a fluctuating interpretation only to be discovered ex-post facto? These questions illustrate the ambiguity and unreasonable nature of this test. Interpreting the term "control" should be clear and should not vary from one case to another.

B. There are Multiple Interpretations of s. 125 (1) (z.12)

16. The Interveners further submit that the Court erred in determining that there is only one reasonable interpretation of s. 125(1) (z.12) CLC. The drafting of the provision in question is undoubtedly unclear. The three judges who heard the case at the Federal Court of Appeal all had their own, distinct interpretations of the exact same provision. While Justice Rennie ended up agreeing on a factual level with Justice Nadon, they came to such conclusion despite their differing interpretations of the provision in question. If it was drafted in a manner wherein a single interpretation was evident, the Appeals Officer's decision would not have been appealed all the way to this Honorable Court. Therefore, the reason why this case exists is because of the ambiguous nature of the drafting of s. 125 (1) (z.12) CLC.

17. In this regard, in *C.U.P.E. v. N.B. Liquor Corporation*[4], this Honorable Court stated the following in a case in which the drafting legislative provision was clearly ambiguous and thus could be interpreted in many different ways: "I do not see how one can properly so characterize the interpretation of the Board. The ambiguity of s. 102(3)(a) is acknowledged and undoubted. There is no one interpretation which can be said to be right."[5]

18. Further, it is important to note that the Appeals Officer was interpreting his home statute and obviously came to a different conclusion than the Court due to their differing interpretations of the provision in question. In such circumstances, the reviewing court needs to show deference to the initial decision maker, as explained in *Giguère v. Chambre des notaires du Québec*[6] rendered by this Honorable Court, "When a tribunal acts within the limits of its jurisdiction, the

4 [1979] 2 S.C.R. 227.
5 *Id*., at p. 237.
6 2004 SCC 1.

reviewing court must show deference and accept that a regulatory provision may have more than one interpretation."[7]

19. In this regard, it is important to note that, as explained by Justice Rennie in *Bell Canada v. 7265921 Canada Ltd.*: "deference, which originated in the *application* of the law has migrated to the *interpretation* of the law".[8] The Federal Court of Appeal did not show deference to the Appeals Officers' decision.

20. In *Dunsmuir*, this Honorable Court explained that "*reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process*".[9] Therefore, if the initial decision is well reasoned and justified, what is important is whether "*the decision falls within a range of, acceptable outcomes which are defensible in respect of facts and law.*"[10] Further, in *Newfoundland and Labrador Nurses' Union*, this Honorable Court went on to explain that analysis to be made "*is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.*"[11]

21. The decision of the Appeals Officer is clearly reasonable as it is coherent and intelligible. And unlike the decision under appeal, it also takes into account the reality of federal employers. The Interveners thus submit that the aforementioned analytical framework was not respected by the majority for the Court. It adopted the view that only one reasonable interpretation of the statute in question could exist and as a result, it did not follow the "reasonableness" standard of review that it deemed was necessary to apply.

C. The Presumption of Rationality

22. Legislation is not to be interpreted in a manner which creates a result that is absurd or which makes compliance with the obligation in question tremendously difficult. This is why there exists

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7 *Id.*, at par. 70.
8 2018 FCA 174, at par. 90.
9 *Dunsmuir v. New Brunswick*, 2008 SCC 9, at par. 47.
10 *Id.*
11 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at par. 14.

a broadly accepted principle of interpretation to the effect that the legislator is presumed to have drafted legislation in a reasonable and coherent matter.

23. In this regard, the Interveners agree with Justice Near's explanation in his dissent that "*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*."[12]

24. By deciding in this manner, Justice Near applied the "Golden Rule" of statutory interpretation developed by Lord Wensleydale in *Grey v. Pearson*[13] in which he essentially states that the interpreter should adhere to the plain meaning of the words of the text, unless such an interpretation leads to an absurd result.[14] This principle was more recently confirmed in *Rizzo & Rizzo Shoes Ltd. (Re).*[15]

25. In addition, in the particular context of the interpretation of a public welfare statute, the Interveners echo the opinion of the Court of Appeal for Ontario in *Blue Mountain Resorts Limited v. Ontario (Labour).*[16]

> [26] This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.
>
> [27] One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by 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.

26. The Interveners submit that the interpretation upheld by the majority of the Court does in fact lead to an absurd result which is inconsistent with the rest of the provisions of the CLC. As explained by Justice Near, "*If the employer does not control the work place, it is not possible for the employer to ensure that the work place is inspected* […]".[17] This statement is further supported by the Intervener's allegations contained in section A of the present Factum.

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12 Decision on Appeal, at par. 21.
13 *Grey v. Pearson*, 1857 6 H.L.C. 61, Interveners' Book of Authorities, hereinafter "**I.B.A.**", **Tab 4**.
14 *Id*. at p. 106.
15 [1998] 1 S.C.R. 27.
16 2013 ONCA 75.
17 Decision on Appeal, at par. 19.

27. The result of such interpretation is even more problematic considering the penal consequences of non-compliance as provided in s. 148 CLC. The Interveners submit that it is the combination of the incredibly onerous interpretation of the provision in question, coupled with the inevitable consequences of non-compliance, which truly demonstrates the illogical nature of the Decision.

D. Conflict with International Maritime Law

28. While the impact and application of international maritime legislation was not discussed during any of the proceedings, for obvious reasons, their application in the maritime transportation industry is particularly important in this context as said legislation also concerns workplace health and safety obligations. Said international legislation deals with, amongst many other issues, who bears the responsibility of the health and safety of those working aboard vessels. As shall be illustrated below, the provisions of international law on this subject directly conflict with the inspection obligation provided for in the CLC as interpreted by the Court. Put simply, the Court's broad interpretation of s. 125(1) (z.12) CLC is incompatible with the application of international maritime legislation.

29. There are three particular pieces of international maritime legislation/instruments which highlight this conflict: (1) the *ILO Code of Practice - Safety and Health in Ports*[18] (the "**Code of Practice**") (2) the *Maritime Labour Convention 2006, as amended*[19] (the "**MLC**"), and (3) the *Port State Control Committee Instruction 48/2015/11*[20] (the "**PSCCI**").

30. The Code of Practice is an instrument from the International Labour Organization (the "**ILO**") that was designed to provide guidance as to how to ensure the health and safety workers at ports based on the "principles from the ILO's international labour standards"[21]. Pursuant to this document, the principle is clear: the ship owner is responsible for the health and safety of those

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18 *ILO Code of Practice - Safety and Health in Ports* (Revised 2016). International Labour Office, Geneva, 2018 [**Code of Practice**], **I.B.A., Tab 1**.

19 Adopted by the International Labour Conference at its 94th (Maritime) Session (2006), Amendments approved by the International Labour Conference at its 103rd Session (2014) [**MLC**], **I.B.A., Tab 2**.

20 Paris MoU, *Port State Control Committee Instruction 48/2015/11* [**PSCCI**], **I.B.A., Tab 3**.

21 Decision on Appeal, at p. vii.

working aboard the ship. Article 7.1 par. 5 of the Code of Practice provides the following in this regard: "It is the responsibility of the ship to provide conditions on board in which port work can be carried out without risk to health and safety […]". While there are certain exceptions to this rule which are explicitly listed therein, *a contrario*, all else falls within the general principle that the ship owner is responsible for the health and safety of workers on board.

31. The MLC, on the other hand, adopted in 2006 and later amended in 2014, was drafted in order to create a single and uniform instrument on maritime labour law and was intended to reflect the most up-to-date, internationally agreed upon standards on the subject. Canada ratified the MLC in June of 2010.

32. The MLC contains various provisions on ship owner's liability with regard to health and safety matters. It is clear from such provisions that the burden with regard to the protection of the health and safety of those working aboard a ship is on the ship owner, as is evidenced below:

> "**Regulation 4.2 - Shipowners' liability**
>
> 1. Each Member shall adopt laws and regulations requiring that shipowners of ships that fly its flag are responsible for health protection and medical care of all seafarers working on board the ships in accordance with the following minimum standards:"[22]

33. It is important to note that the term "seafarer" is defined rather broadly in the MLC as the term "means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies;".[23] Therefore, this term includes those who work for third parties aboard the ship, like the stevedores employed by the Interveners.

34. The PSCCI is even more relevant to the present matter as it directly relates to inspection and rectification of health and safety issues aboard vessels. Essentially, the PSCCI is a guidance document for Port State Control Officers ("**PSCO's**") as to how to inspect vessels in accordance with the MLC.

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22 PSCCI, *supra* note 20, **I.B.A., Tab 3**.

23 Code of Practice, s*upra* note 18, Preamble Article II 1 (f), **I.B.A., Tab 1**.

35. In the event that a violation of the MLC has occurred or regularly occurs, section 3.3.3 of the PSCCI clearly indicates that the shipowner, along with the master, is to develop a Rectification Action Plan and ensure that it is implemented.[24]

36. The above mentioned provisions clash with the inspection obligation as interpreted. It is internationally recognized and accepted that the ship owner is responsible for removing worker health and safety hazards, however, if we apply the Decision in this context, the Maritime Employers would be the ones responsible for inspecting the ships. This creates a rather obscure result and is not in keeping with the spirit of the international legislation.

37. A balance must be struck between national and international legislation. Canada ratified and/or agreed to adhere to the aforementioned international instruments with the presumed intention that the principles outlined therein were to be followed. The Decision simply leaves no room for such international maritime legislation to apply.

PART IV – SUBMISSION CONCERNING COSTS

38. The Interveners respectfully submit that no order of costs be made for or against it.

PART V – ORDER SOUGHT

39. By this Court's intervention order, the Interveners have been granted leave to make oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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[24] MLC, *supra* note 19, at art. 3.3.3, **I.B.A., Tab 2**.

Montréal, October 11, 2018

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PART VI –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence
