

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)

REPLY OF THE APPLICANT
(CANADA POST CORPORATION, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

Appeal Raises Issues of Public Importance

1. The Respondent's submissions only reinforce the issues of public importance raised in this appeal. The Respondent agrees with the Applicant that Part II of the *Canada Labour Code* (the "Code") is "undoubtedly legislation of broad application and significance."¹ It never asserts that the interpretation of s. 125(1) – and specifically the question of when and to what extent the provision applies to areas of the work place outside of employer control – is not an issue of national importance. Instead, the Respondent argues that the main issues in these proceedings are "highly fact specific," even though the case turns directly on the interpretation and application of an important federal statute. It also argues that a decision of the Federal Court of Appeal quashing a statutory interpretation of an administrative decision-maker's home statute is somehow devoid of precedential value, without citing any authority for that proposition.

2. These arguments are without merit. The issues in this case are broader than their factual context and have wide-reaching implications across federally regulated industries and beyond. The Federal Court of Appeal's decision creates binding and confusing precedent about the interpretation of a key federal statute. It also raises important questions of statutory interpretation and standard of review, all of which were central to that Court's ultimate determination.

3. The interpretation of s. 125(1) was the main – and, in the case of Justice Rennie, only – issue considered by the Federal Court of Appeal. The Appeals Officer found that some of the duties in s. 125(1) do not apply to areas of the workplace outside employer control, based on his interpretation of the Code. The Federal Court found his interpretation to be reasonable. The Federal Court of Appeal disagreed, finding it to be unreasonable.

4. Contrary to the Respondent's submission that the decision has no national impact, administrative decision-makers follow appellate court guidance. Interpretations found to be unreasonable are no longer open to administrative decision-makers. Both the jurisprudence and the extensive reactions across federally regulated industries demonstrate that the Federal Court of Appeal's decision will have and already has had a major national impact.

¹ Respondent's Response to Application for Leave to Appeal, filed 27 October 2017 ("Response"), para. 55.

5. The decision creates new, confusing, and potentially impossible obligations for federally regulated employers. The majority reasons provide divergent direction about how s. 125(1) should be interpreted. While both justices conducted a reasonableness review, their decisions indicate that for each justice, there is only one “reasonable” interpretation. Those interpretations are not the same. Employers are confused about their statutory duties. They are concerned they will be unable to comply with their obligations if the decision requires them to access or modify property outside their control. Labour adjudicators and courts will be forced to apply unclear and conflicting reasons interpreting a key federal statute, which only this Court can resolve.

Federal Court of Appeal’s decision turns on interpretation of a key federal statute

6. The Respondent argues that the decision turns on a factual question: whether Canada Post had the capacity to achieve the purpose of s. 125(1)(z.12) given that it “seeks to identify and resolve hazards at points of call as well as carry out route audits in certain areas.”² In fact, the Appeals Officer found, and Justice Nadon agreed, that Canada Post did not have the required control.³ CUPW challenged that factual finding on appeal, but it was not the pivotal issue for Justices Nadon and Rennie. On the contrary, their reasons focus mostly – and in Justice Rennie’s case, exclusively – on the interpretation of s. 125(1) of the Code.

7. Justice Nadon’s decision was based on his interpretation of s. 125(1): “the Appeals Officers’ approach to the subsection was clearly not open to him and constitutes an unreasonable interpretation... 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...” Justice Nadon’s remarks about the Appeals Officer’s factual findings were offered in the alternative as *obiter dicta*. According to Justice Nadon, his conclusion as to the only reasonable interpretation of s. 125(1) was “sufficient ... to determine this appeal.”⁴

8. Justice Rennie addressed only the question of statutory interpretation. His disagreement with Justice Nadon turned on the interpretation of s. 125(1). Justice Rennie noted that he was bound by the Appeals Officer’s factual findings; therefore, the only basis on which he could have quashed the Appeals Officer’s decision was the question of statutory interpretation. Justice

² Response, para. 49.

³ *Reasons of the Federal Court of Appeal*, para. 8, Application for Leave to Appeal, Tab 2C.

⁴ *Ibid.* at paras. 50, 57, 58 [emphasis added].

Rennie’s interpretation was based on “the clear intention of Parliament,” implying that he viewed his interpretation of s. 125(1) as the only reasonable one.⁵

Federal Court of Appeal’s decision has precedential and national impact

9. As the Federal Court of Appeal’s decision turned on the interpretation of s. 125(1), its precedential impact extends to all cases where that provision is at issue. Its interpretation “set the limits of the ‘range’ of acceptable interpretative outcomes” for s. 125(1) and the 45 duties enumerated therein.⁶ The Court held that the Appeals Officer’s interpretation was unreasonable. It offered divergent and conflicting interpretations about the “reasonable” interpretations available to administrative decision-makers. Appeals Officers are now bound by these limits.

10. The Respondent’s submission that the legal effect of the Federal Court of Appeal’s decision is restricted to the Canada Post depot in Burlington, Ontario is flawed for two reasons. First, it misunderstands the function of the court on judicial review. Second, it ignores the fact that Appeals Officers and labour adjudicators across the country follow the decisions of the courts that supervise them, including with respect to questions of statutory interpretation.

11. **Function of judicial review.** When a court allows an application for judicial review, it does not merely quash an administrative decision. Rather, through its reasons, the reviewing court defines the legal limits of administrative decision-making power in light of the enabling statute, the common or civil law, and the Constitution. This is the basic function of judicial review, whether under the reasonableness standard or the correctness standard.⁷ In this case, the Federal Court of Appeal defined the legal limits of the Appeals Officer’s decision-making power by holding that his interpretation of s. 125(1) was unreasonable. Its decision must be understood as “limiting the range of reasonable options” open to Appeals Officers when interpreting s. 125(1).⁸ Administrative decision-makers are “constrained by any rulings and guidance given by courts that govern the facts and issues in the case.”⁹ The Respondent’s implicit submission that an Appeals Officer would be free to adopt the interpretation of s. 125(1) that the Federal Court of

⁵ *Ibid.* at paras. 74, 77, 81.

⁶ Paul Daly, “Unreasonable Interpretations of Law” (2014) [66 Sup. Ct. L. Rev. 233](#) at para. 51.

⁷ *Dunsmuir v. New Brunswick*, [2008 SCC 9](#) at para. 28.

⁸ *Adamson v. Canadian Human Rights Commission*, [2015 FCA 153](#) at para. 31.

⁹ *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, [2016 FCA 257](#) at para. 41.

Appeal expressly rejected fails to recognize the purpose and effect of the Court’s decision: to limit the range of acceptable interpretive outcomes, in view of its function as a reviewing court.

12. **Effect of decision on Appeals Officers.** The decision of the Federal Court of Appeal will be applied by Appeals Officers and labour adjudicators across the country. They routinely follow the precedent created by appellate courts, as demonstrated most recently by the many labour adjudicators who have followed this Court’s guidance in *Wilson*.¹⁰ In addition, Appeals Officers meet regularly to discuss Federal Court decisions, “especially where an [Appeals Officer’s] decision has been quashed.”¹¹ Where the Federal Court has “determined” the meaning of a Code provision by quashing an unreasonable interpretation, such determinations constitute the “applicable” law for Appeals Officers and “have to” be followed.¹²

13. **Recognition of decision’s importance.** The public importance of these proceedings has already been recognized by the Federal Court of Appeal and federally regulated employers. At the Federal Court of Appeal, FETCO applied to intervene on the basis that the appeal would have “a direct impact” on federally regulated employers. In response to these submissions, the Court granted FETCO intervener status.¹³ The seven affidavits filed by the Applicant from employers across a wide range of industries – including telecommunications, media, aviation, and more – demonstrate the scale and impact of this decision on federally regulated employers. Those employers clearly understand their obligations to be shaped by this decision.

14. **Statutory interpretation and standard of review issues.** Contrary to the Respondent’s submissions, the statutory interpretation and standard of review issues identified by the

¹⁰ See, for example, *McLeod and Peepeekisis Cree Nation, Re*, [2016 CarswellNat 5975](#) at para. 18; *Randhawa and Bank of Nova Scotia, Re*, [2017 C.L.L.C. 210-026](#) at para. 105; *Roberts and High Prairie Seed Cleaning Co-op Ltd., Re*, [2017 CarswellNat 4281](#) at para. 40; *Bilesky and Fox Flight Inc., Re*, [2017 CarswellNat 3575](#) at para. 23 (Can. Adjud. (CLC Part III)).

¹¹ *Bartakovic and Canada (Treasury Board - Border Services Agency), Re*, [2008 CarswellNat 6648](#) at para. 113 (Can. Lab. Code App. O.).

¹² See, for example, *Seaspan Marine v. International Longshore and Warehouse Union Local 400*, [2017 OHSTC 10](#) at paras. 43, 46-47; *Canada Post Corporation v. Vivian and Beeton*, [2014 OHSTC 6](#) at para. 37; *Nelson Hunter v. Canada (Correctional Service)*, [2013 OHSTC 12](#) at para. 180; *Damian Azeez and Canada Border Services Agency*, [2013 OHSTC 8](#) at paras. 59-61; *Morrison and Canada Post Corp., Re*, [2009 CarswellNat 6830](#) at paras. 171-173 (Can. Lab. Code App. O.).

¹³ Written Representations of the Proposed Intervener, FETCO Inc., dated 2 November 2016, **Tab 2A**; Order of Nadon J.A., dated 24 November 2016, in Court File No. A-94-16, **Tab 2B**.

Applicant are properly before this Court. Each of these points was raised in argument in front of the Federal Court of Appeal and was relevant to its final determination.¹⁴ The Federal Court of Appeal's decision constitutes binding appellate authority on each of these issues.

Federal Court of Appeal's decision creates confusion that requires clarification

15. The interpretation of a key federal statute is now uncertain. The decision creates new, potentially impossible, and confusing obligations. Section 125(1) now presumptively applies to areas outside employer control; any other finding is now unreasonable. To further complicate matters, the majority reasons each suggest that there is only one "reasonable" interpretation, even though those reasons advance divergent interpretations. Employers across federally regulated industries are required to apply a judgment which requires them to access and modify private property outside their control, with conflicting guidance on when and to what extent they must do so. When decision-makers apply s. 125(1), they will not know whether to follow "the only reasonable interpretation" of Justice Nadon, or the interpretation of Justice Rennie which purports to give effect to "the clear intention of Parliament." The constant spectre of judicial review would defeat the objective of certainty and finality underlying s. 146.3 of the Code.

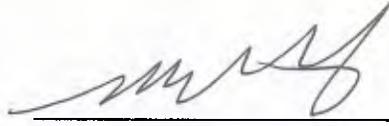
16. The Respondent suggests that "a lack of specificity" is "productive," but cites no authority for the view that legislative uncertainty is desirable.¹⁵ It is not. This Court's decision in *Wilson* does not assist the Respondent. A central issue in *Wilson* was whether conflicting lines of jurisprudence justify the imposition of a correctness standard. That issue is distinct from the present case, where an appellate court has provided two competing interpretations of the same statutory provision, each purporting to be the only reasonable interpretation.

17. The decision also creates uncertainty and requires clarification regarding: how, and to what extent, courts are required to apply the presumption that Parliament does not intend to produce absurd results; whether "ainsi que," like "and," can be read disjunctively (an issue that has implications for thousands of federal provisions); and the unresolved problems with applying the principles of statutory interpretation in a reasonableness review.

¹⁴ Although the parties did not make submissions about "ainsi que," they made submissions about how "and" can be read disjunctively.

¹⁵ Response, para. 62.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF NOVEMBER, 2017.

A handwritten signature in black ink, appearing to be 'John Terry and Aria Laskin', written over a horizontal line.

FOR

John Terry and Aria Laskin
Counsel for the Applicant,
Canada Post Corporation

TABLE OF AUTHORITIES

CASES	
Name	Cited in paras.
<i>Adamson v. Canadian Human Rights Commission</i> , 2015 FCA 153 , 474 N.R. 136.	11
<i>Bartakovic and Canada (Treasury Board - Border Services Agency)</i> , Re, 2008 CarswellNat 6648 (Can. Lab. Code App. O.) (WL Can).	12
<i>Bilesky and Fox Flight Inc.</i> , Re, 2017 CarswellNat 3575 (Can. Adjud. (CLC Part III)) (WL Can).	12
<i>Canada (Attorney General) v. Bri-Chem Supply Ltd.</i> , 2016 FCA 257 , 409 D.L.R. (4th) 751.	11
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<i>Damian Azeez and Canada Border Services Agency</i> , 2013 OHSTC 8 .	12
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9 , [2008] 1 S.C.R. 190.	11
<i>McLeod and Peepeekisis Cree Nation</i> , Re, 2016 CarswellNat 5975 (Can. Adjud. (CLC Part III)) (WL Can).	12
<i>Morrison and Canada Post Corp.</i> , Re, 2009 CarswellNat 6830 (Can. Lab. Code App. O.) (WL Can).	12
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<i>Randhawa and Bank of Nova Scotia</i> , Re, 2017 C.L.L.C. 210-026 (Can. Adjud. (CLC Part III)) (WL Can).	12
<i>Roberts and High Prairie Seed Cleaning Co-op Ltd.</i> , Re, 2017 CarswellNat 4281 (Can. Adjud. (CLC Part III)) (WL Can).	12
<i>Seaspan Marine v. International Longshore and Warehouse Union Local 400</i> , 2017 OHSTC 10 .	12
<i>Wilson v. Atomic Energy of Canada Ltd.</i> , 2016 SCC 29 , [2016] 1 S.C.R. 770.	12, 16
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Paul Daly, “Unreasonable Interpretations of Law” (2014) 66 Sup. Ct. L. Rev. 233 (QL).	9

STATUTORY PROVISIONS

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

Code canadien du travail, L.R.C. (1985), ch. L-2

Definitions

[122 \(1\)](#) In this Part,

...

work place means any place where an employee is engaged in work for the employer's employer; (*lieu de travail*)

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.

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,

(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;

(c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer;

(d) post in a conspicuous place accessible to every employee

(i) a copy of this Part,

Définitions

[122 \(1\)](#) Les définitions qui suivent s'appliquent à la présente partie.

...

lieu de travail Tout lieu où l'employé exécute un travail pour le compte de son employeur. (*work place*)

Obligation générale

[124](#) L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.

Obligations spécifiques

[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 :

a) de veiller à ce que tous les ouvrages et bâtiments permanents et temporaires soient conformes aux normes réglementaires;

b) d'installer des dispositifs protecteurs, garde-fous, barrières et clôtures conformes aux normes réglementaires;

c) selon les modalités réglementaires, d'enquêter sur tous les accidents, toutes les maladies professionnelles et autres situations comportant des risques dont il a connaissance, de les enregistrer et de les signaler aux autorités désignées par les règlements;

d) d'afficher à un endroit bien en vue, accessible à tous les employés :

- (ii) a statement of the employer's general policy concerning the health and safety at work of employees, and
 - (iii) any other printed material related to health and safety that is prescribed or that may be directed by the Minister;
- (e) make readily available to employees for examination, in printed or electronic form, a copy of the regulations made under this Part that apply to the work place;
- (f) if a copy of the regulations is made available in electronic form, provide appropriate training to employees to enable them to have access to the regulations and, on the request of an employee, make a printed copy of the regulations available;
- (g) keep and maintain in prescribed form and manner prescribed health and safety records;
- (h) provide prescribed first-aid facilities and health services;
- (i) provide prescribed sanitary and personal facilities;
- (j) provide, in accordance with prescribed standards, potable water;
- (k) ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed standards;
- (l) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;
- (m) ensure that the use, operation and maintenance of the following are in accordance with prescribed standards:
- (i) boilers and pressure vessels,
 - (ii) escalators, elevators and other devices for moving persons or freight,
- (i) le texte de la présente partie,
 - (ii) l'énoncé de ses consignes générales en matière de santé et de sécurité au travail,
 - (iii) les imprimés réglementaires concernant la santé et la sécurité et ceux que précise le ministre;
- e) de mettre à la disposition des employés, de façon que ceux-ci puissent y avoir effectivement accès sur support électronique ou sur support papier une copie des règlements d'application de la présente partie qui sont applicables au lieu de travail;
- f) lorsque les règlements d'application de la présente partie sont mis à la disposition des employés sur support électronique, de veiller à ce que ceux-ci reçoivent la formation nécessaire pour être en mesure de les consulter et de mettre à leur disposition, sur demande, une version sur support papier;
- g) de tenir, selon les modalités réglementaires, des dossiers de santé et de sécurité;
- h) de fournir les installations de premiers soins et les services de santé réglementaires;
- i) de fournir les installations sanitaires et personnelles réglementaires;
- j) de fournir, conformément aux normes réglementaires, de l'eau potable;
- k) de veiller à ce que les véhicules et l'équipement mobile que ses employés utilisent pour leur travail soient conformes aux normes réglementaires;
- l) de fournir le matériel, l'équipement, les dispositifs et les vêtements de sécurité réglementaires à toute personne à qui il permet l'accès du lieu de travail;

- (iii) all equipment for the generation, distribution or use of electricity,
- (iv) gas or oil burning equipment or other heat generating equipment, and
- (v) heating, ventilation and air-conditioning systems;
- (n) ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;
- (o) comply with prescribed standards relating to fire safety and emergency measures;
- (p) ensure, in the prescribed manner, that employees have safe entry to, exit from and occupancy of the work place;
- (q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work;
- (r) maintain all installed guards, guard-rails, barricades and fences in accordance with prescribed standards;
- (s) ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works;
- (t) ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed health, safety and ergonomic standards and are safe under all conditions of their intended use;
- (u) ensure that the work place, work spaces and procedures meet prescribed ergonomic standards;
- (v) adopt and implement prescribed safety codes and safety standards;
- m) de veiller à ce que soient conformes aux normes réglementaires l'utilisation, le fonctionnement et l'entretien :
 - (i) des chaudières et des réservoirs sous pression,
 - (ii) des escaliers mécaniques, ascenseurs et autres dispositifs destinés au transport des personnes ou du matériel,
 - (iii) de l'équipement servant à la production, à la distribution ou à l'utilisation de l'électricité,
 - (iv) des brûleurs à gaz ou à pétrole ou autres appareils générateurs de chaleur,
 - (v) des systèmes de chauffage, de ventilation et de conditionnement de l'air;
- n) de veiller à ce que l'aération, l'éclairage, la température, l'humidité, le bruit et les vibrations soient conformes aux normes réglementaires;
- o) de se conformer aux normes réglementaires en matière de prévention des incendies et de mesures d'urgence;
- p) de veiller, selon les modalités réglementaires, à ce que les employés puissent entrer dans le lieu de travail, en sortir et y demeurer en sécurité;
- q) d'offrir à chaque employé, selon les modalités réglementaires, l'information, la formation, l'entraînement et la surveillance nécessaires pour assurer sa santé et sa sécurité;
- r) d'entretenir, conformément aux normes réglementaires, les dispositifs protecteurs, garde-fous, barrières et clôtures qui y sont installés;
- s) de veiller à ce que soient portés à l'attention de chaque employé les risques

(w) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing;

(x) comply with every oral or written direction given to the employer by the Minister or an appeals officer concerning the health and safety of employees;

(y) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;

(z) ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer;

(z.01) ensure that members of policy and work place committees and health and safety representatives receive the prescribed training in health and safety and are informed of their responsibilities under this Part;

(z.02) respond as soon as possible to reports made by employees under paragraph 126(1)(g);

(z.03) 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 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;

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation

connus ou prévisibles que présente pour sa santé et sa sécurité l'endroit où il travaille;

t) de veiller à ce que l'équipement — machines, appareils et outils — utilisé par ses employés pour leur travail soit conforme aux normes réglementaires de santé, de sécurité et d'ergonomie, et sécuritaire dans tous les usages auxquels il est destiné;

u) de veiller à ce que le lieu de travail, les postes de travail et les méthodes de travail soient conformes aux normes réglementaires d'ergonomie;

v) d'adopter et de mettre en oeuvre les normes et codes de sécurité réglementaires;

w) de veiller à ce que toute personne admise dans le lieu de travail connaisse et utilise selon les modalités réglementaires le matériel, l'équipement, les dispositifs et les vêtements de sécurité réglementaires;

x) de se conformer aux instructions verbales ou écrites qui lui sont données par le ministre ou l'agent d'appel en matière de santé et de sécurité des employés;

y) de veiller à ce que la santé et la sécurité des employés ne soient pas mises en danger par les activités de quelque personne admise dans le lieu de travail;

z) de veiller à ce que les employés qui exercent des fonctions de direction ou de gestion reçoivent une formation adéquate en matière de santé et de sécurité, et soient informés des responsabilités qui leur incombent sous le régime de la présente partie dans la mesure où ils agissent pour le compte de l'employeur;

z.01) de veiller à ce que les membres du comité d'orientation, ainsi que les membres du comité local ou le représentant, reçoivent la formation réglementaire en matière de santé et de sécurité, et soient informés des responsabilités qui leur incombent sous le régime de la présente partie;

with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards;

(z.05) consult the policy committee or, if there is no policy committee, the work place committee or the health and safety representative to plan the implementation of changes that might affect occupational health and safety, including work processes and procedures;

(z.06) consult the work place committee or the health and safety representative in the implementation of changes that might affect occupational health and safety, including work processes and procedures;

(z.07) ensure the availability in the work place of premises, equipment and personnel necessary for the operation of the policy and work place committees;

(z.08) cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part;

(z.09) develop health and safety policies and programs in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative;

(z.10) respond in writing to recommendations made by the policy and work place committees or the health and safety representative within thirty days after receiving them, indicating what, if any, action will be taken and when it will be taken;

(z.11) provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of any report on hazards in the work

z.02) de répondre sans délai à tout rapport fait au titre de l'alinéa 126(1)g);

z.03) en consultation avec le comité d'orientation ou, à défaut, le comité local ou le représentant, d'élaborer et de mettre en oeuvre un programme réglementaire de prévention des risques professionnels — en fonction de la taille du lieu de travail et de la nature des risques qui s'y posent —, y compris la formation des employés en matière de santé et de sécurité, et d'en contrôler l'application;

z.04) relativement aux risques propres à un lieu de travail et non couverts par un programme visé à l'alinéa z.03), en consultation avec le comité d'orientation ou, à défaut, le comité local ou le représentant, d'élaborer et de mettre en oeuvre un programme réglementaire de prévention de ces risques, y compris la formation des employés en matière de santé et de sécurité relativement à ces risques, et d'en contrôler l'application;

z.05) de consulter le comité d'orientation ou, à défaut, le comité local ou le représentant, en vue de planifier la mise en oeuvre des changements qui peuvent avoir une incidence sur la santé et la sécurité au travail, notamment sur le plan des procédés et des méthodes de travail;

z.06) de consulter le comité local ou le représentant pour la mise en oeuvre des changements qui peuvent avoir une incidence sur la santé et la sécurité au travail, notamment sur le plan des procédés et des méthodes de travail;

z.07) de mettre à la disposition du comité d'orientation et du comité local les installations, le matériel et le personnel dont ils ont besoin dans le lieu de travail;

z.08) de collaborer avec le comité d'orientation et le comité local ou le représentant pour l'exécution des

place, including an assessment of those hazards;

(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.13) when necessary, develop, implement and monitor a program for the provision of personal protective equipment, clothing, devices or materials, in consultation, except in emergencies, with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative;

(z.14) take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place;

(z.15) meet with the health and safety representative as necessary to address health and safety matters;

(z.16) take the prescribed steps to prevent and protect against violence in the work place;

(z.17) post and keep posted, in a conspicuous place or places where they are likely to come to the attention of employees, the names, work place telephone numbers and work locations of all of the members of work place committees or of the health and safety representative;

(z.18) provide, within thirty days after receiving a request, or as soon as possible after that, the information requested from the employer by a policy committee under subsection 134.1(5) or (6), by a work

responsabilités qui leur incombent sous le régime de la présente partie;

z.09) en consultation avec le comité d'orientation ou, à défaut, le comité local ou le représentant, d'élaborer des orientations et des programmes en matière de santé et de sécurité;

z.10) de répondre par écrit aux recommandations du comité d'orientation, du comité local ou du représentant dans les trente jours suivant leur réception, avec mention, le cas échéant, des mesures qui seront prises et des délais prévus à cet égard;

z.11) de fournir au comité d'orientation, ainsi qu'au comité local ou au représentant, copie de tout rapport sur les risques dans le lieu de travail, notamment sur leur appréciation;

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;

z.13) selon les besoins, d'élaborer et de mettre en oeuvre, en consultation — sauf en cas d'urgence — avec le comité d'orientation ou, à défaut, le comité local ou le représentant, un programme de fourniture de matériel, d'équipement, de dispositifs ou de vêtements de protection personnels, et d'en contrôler l'application;

z.14) de prendre toutes les précautions nécessaires pour que soient portés à l'attention de toute personne — autre qu'un de ses employés — admise dans le lieu de travail les risques connus ou prévisibles auxquels sa santé et sa sécurité peuvent être exposées;

z.15) de tenir au besoin avec le représentant des réunions ayant pour objet la santé et la sécurité au travail;

place committee under subsection 135(8) or (9) or by a health and safety representative under subsection 136(6) or (7); and

(z.19) consult with the work place committee or the health and safety representative on the implementation and monitoring of programs developed in consultation with the policy committee.

z.16) de prendre les mesures prévues par les règlements pour prévenir et réprimer la violence dans le lieu de travail;

z.17) d'afficher en permanence dans un ou plusieurs endroits bien en vue et fréquentés par ses employés les nom, numéro de téléphone au travail et lieu de travail des membres des comités locaux et des représentants;

z.18) de fournir, dans les trente jours qui suivent une demande à cet effet ou dès que possible par la suite, les renseignements exigés soit par un comité d'orientation en vertu des paragraphes 134.1(5) ou (6), soit par un comité local en vertu des paragraphes 135(8) ou (9), soit par un représentant en vertu des paragraphes 136(6) ou (7);

z.19) de consulter le comité local ou le représentant pour la mise en oeuvre et le contrôle d'application des programmes élaborés en consultation avec le comité d'orientation.

Decision final

[146.3](#) An appeals officer's decision is final and shall not be questioned or reviewed in any court.

Caractère définitif des décisions

[146.3](#) Les décisions de l'agent d'appel sont définitives et non susceptibles de recours judiciaires.

FEDERAL COURT OF APPEAL

B E T W E E N :

CANADIAN UNION OF POSTAL WORKERS

Appellant

- and -

CANADA POST CORPORATION

Respondent

**WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER,
FETCO INC. (FEDERALLY REGULATED EMPLOYERS –
TRANSPORTATION AND COMMUNICATIONS)**

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FETCO Inc. (Federally Regulated Employers –
Transportation and Communications)

PART I - THE FACTS

Overview

1. In this appeal, the Appellant argues that subsection 125(1)(z.12) of the *Canada Labour Code*, R.S.C. 1985, L-2 (“Code”) requires a federal employer to ensure that a health and safety committee or representative inspects locations that are *not* under the “control” of the employer. The interpretation and application of this provision is the central issue in this appeal.
2. FETCO Inc. (Federally Regulated Employers - Transportation and Communication) (“FETCO”) seeks leave to intervene in this appeal to provide this Honourable Court with the perspective of the employers who will be directly affected by the outcome of this appeal.
3. FETCO is the *principal representative* of employers in Canada’s federal sector. Together, FETCO members employ approximately 450,000 persons, who comprise a large majority of the federally regulated workforce outside of the federal public service.
4. FETCO has a genuine interest in this appeal, and it is in the interests of justice that FETCO be permitted to intervene. In particular, the outcome of this appeal will have a direct impact on FETCO members’ legal obligations and day-to-day practices concerning workplace health and safety. FETCO also has the knowledge, skills, and resources to assist the Court in its consideration of the appeal.
5. If granted leave to intervene, FETCO will make submissions that are different from those of the parties and that will be valuable to this Honourable Court. FETCO’s submissions will address the central question on which this appeal turns: does the health and safety inspection duty imposed by subsection 125(1)(z.12) of the *Code* extend to locations that are *not* under the control of the federal employer in question?

6. FETCO is uniquely situated to make these submissions. Also, FETCO's intervention will not disrupt or delay the determination of this appeal.

7. FETCO requests that it be granted intervener status, be permitted to file a memoranda of fact and law no longer than 10 pages, and be permitted to make an oral submission at the hearing of this appeal on terms granted by the panel hearing the appeal.

FETCO's Background and Role

8. Since its formation in 1982, FETCO has been the principal representative of federal employers across industry lines in the development of public policy, legislation, and regulation. FETCO has represented the interests of its members and provided the employer perspective on potential changes to federal labour, employment, human rights, and health and safety law in the courts, before Parliament, and as a stakeholder advisor on these issues.

Affidavit of Derrick Hynes (affirmed November 1, 2016), FETCO's Motion Record, Tab 2 ("Hynes Affidavit"), para. 8

9. FETCO members provide services that are important, and often essential, to the functioning of Canada's national economy and to Canadian participation in international economic life. For example, FETCO members provide: airline, civil air traffic control, interprovincial rail, interprovincial courier, and postal services within Canada and abroad; longshoring services and grain handling services needed for international trade; armoured car services to Canada's entire financial services industry and infrastructure, as well as many large retailers and other economic entities that are critical to the growth of the national economy; and the telecommunications and broadcasting services that are indispensable for Canada's economy and society.

Hynes Affidavit, para. 3

10. Together, FETCO members employ approximately 450,000 persons, who comprise a large majority of the federally regulated workforce outside of the federal

public service. All FETCO members are subject to the *Code*, which is the statute at issue in this appeal.

Hynes Affidavit, paras. 5 - 6

11. FETCO has significant advocacy experience, including as an intervener on appeals.

12. For example, FETCO has intervened on behalf of its members in significant cases, including *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, [2006] 1 S.C.R. 3, 2006 SCC 1, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, *Canadian National Railway v. Seeley*, 2014 FCA 111 and *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

13. Notably, FETCO was granted intervener status in *Canadian National Railway v. Seeley, supra*, and *Wilson v. Atomic Energy of Canada Ltd., supra*, despite the fact that a federal employer was already a party to the proceeding. Further, at the time of FETCO's intervention in *Canadian National Railway v. Seeley, supra*, the federal employer - Canadian National Railway - was a FETCO member.

Hynes Affidavit, paras. 9 - 11

14. Like this appeal, *Wilson v. Atomic Energy of Canada Ltd., supra*, addressed the proper interpretation of provisions in the *Code*.

PART II - THE ISSUE

24. The only issue to be determined is whether FETCO should be granted leave to intervene in this appeal.

PART III - STATEMENT OF SUBMISSIONS

FETCO Should Be Granted Intervener Status

25. The factors to be considered on an intervention motion were recently reaffirmed in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44. There, this Honourable Court also emphasized that every intervention is different. As such, the Court should employ a flexible approach that allows it to ascribe the weight that it wishes to a given factor on a case-by-case basis.

Sport Maska Inc. v. Bauer Hockey Corp., 2016 FCA 44, FETCO's Motion Record, Tab 7 ("*Sport Maska*"), paras. 37 - 43, 70 - 76

26. In this case, the factors weigh in favour of granting FETCO intervener status.

FETCO is Directly Affected By The Outcome of the Appeal

27. FETCO will be directly affected by the outcome of this appeal.

28. The central issue in this appeal is the interpretation of subsection 125(l)(z.12) of the *Code*, which imposes a duty on employers to ensure that a workplace health and safety committee or representative inspects a workplace(s). It is a provision of general application that applies to all federal employers, not just Canada Post.

29. As described above, FETCO is the *principal representative* of the federal sector employers who are subject to this provision. As a consequence, the outcome of the appeal will have a *direct* impact on FETCO members' legal obligations and practices connected to this provision.

Hynes Affidavit, paras. 14 - 15

30. Indeed, this appeal may determine FETCO members' legal obligations under the *Code* in relation to workplace health and safety. For example, if this appeal is allowed, FETCO members' obligation concerning the inspection of a workplace(s) could be expanded to include locations that they do *not* control.

Hynes Affidavit, para. 16

There is a Justiciable Issue and a Veritable Public Interest

31. There is clearly a justiciable issue in this case. This is an appeal of a judicial review decision. If there were no justiciable issue, then the application for judicial review would have been struck out.

Prophet River First Nation v. Canada (Attorney General), 2016 FCA 120, FETCO's Motion Record, Tab 6 ("*Prophet River*"), para. 11

32. There is also a strong public interest element to this case.

33. As noted above, the provision of the *Code* at issue in this appeal applies generally to the federal employers who are FETCO's members. As a result, the outcome of the appeal will impact FETCO members' legal obligations and health and safety practices.

Hynes Affidavit, para. 15

34. In this way, this appeal has an importance that extends beyond the narrow dispute between the Appellant and Canada Post to federal employers as a whole.

35. In turn, the fact that federal workplaces are diverse in their structures, activities, and geographic reach lends this appeal significant complexity. It is *not* simply about letter carrier routes and points of call serviced by Canada Post employees; it has implications for the federal sector as a whole.

Hynes Affidavit, paras. 22 - 23

FETCO Will Offer a Different and Valuable Perspective Not Otherwise Before the Court

36. In most cases, an appeal can be decided without the participation of an intervener. The more salient question is: will the proposed intervener bring further, different, and valuable insights that will assist this Honourable Court in deciding the appeal?

Sport Maska, para. 40

37. A related question is whether the proposed intervener's position will be adequately defended by one of the other parties to the case. Again, this question calls upon the Court to consider whether the proposed intervener will offer further, different, and valuable insights and perspectives.

Prophet River, para. 6

38. FETCO will offer such further, different, and valuable insights and perspectives that will be of great assistance to the Court as it considers the appeal.

39. This appeal hinges on a single question: does the health and safety inspection duty imposed by subsection 125(1)(z.12) of the *Code* extend to locations that are *not* under the control of the federal employer in question?

Reasons of Justice J. Gleason, February 26, 2016, Appeal Book, Tab 2, p. 19, para. 42.

Memorandum of Fact and Law of the Appellant, para. 3, Appendix A

40. Neither of the current parties to this appeal can present the perspective of federally-regulated employers on this question. As the principal representative of the federal employers who are subject to the *Code*, FETCO is uniquely situated to make submissions in this regard.

Hynes Affidavit, paras. 19 - 21

41. If granted leave to intervene, FETCO intends to submit that extending subsection 125(1)(z.12) of the *Code* to locations that are *not* under the control of a federal employer

would have profound and negative consequences. Subject to the undertakings not to repeat any of the submissions of the Respondent or to adduce new evidence, FETCO intends to make the following principal submissions in support of this position:

1. The case law of this Honourable Court and other adjudicators clearly demonstrates that federal employers' activities extend across, *and into*, a vast range of locations that are *not* under their control, including private homes and locations outside of Canada. Under the Appellant's argument, federal employers' inspection duties would extend to these locations. This is absurd and unreasonable;
2. Related to this, it is settled law that the *Code* can apply extra-territorially. As a result, allowing this appeal has legal implications for federal employers' and employees' activities, obligations, and interests *outside of Canada*; and,
3. The Appellant's argument that subsection 125(1)(z.12) of the *Code* extends to locations that are *not* under an employer's control is at odds with subsections 135(1), 135(7)(k), 136(1) and 136(5)(j) of the *Code*. In combination, these subsections of the *Code* expressly limit the inspection duties of a workplace health and safety committee or a health and safety representative to only those workplace(s) that are *controlled by the employer*. Accordingly, and contrary to the Appellant's submissions, the decisions below are *not* inconsistent with the scheme of the *Code* or the plain wording of its provisions.

Hynes Affidavit, para. 26

42. These submissions will be valuable to this Honourable Court when it considers whether the scope of subsection 125(1)(z.12) of the *Code* extends to locations that are *not* under the control of the federal employer in question.

43. On its own, Canada Post cannot provide the perspective of federally regulated employers on this issue. Canada Post is a Crown Corporation operating in a single field - the postal service. It cannot offer the complete perspective of the range of *private sector* federal employers who are subject to the *Code*, or represent their interests in this appeal. *Only FETCO can provide this perspective.*

Hynes Affidavit, para. 21

44. As well, unlike Canada Post, some FETCO members' employees perform their duties *inside* private homes, at locations outside of Canada, and other locations that are very different from letter carrier routes and points of call.

Hynes Affidavit, para. 22

45. Because FETCO represents the range of federal employers across a variety of industries and geographic territories, FETCO is able to provide submissions on federally regulated workplaces as a whole, and to represent the interests of federal employers broadly speaking.

Hynes Affidavit, para. 23

46. In doing so, FETCO is uniquely able to provide this Honourable Court with important context concerning the full range of federal workplaces that are impacted by this appeal.

Hynes Affidavit, para. 24

47. The proposed submissions set out above are *not* made by Canada Post in its Memorandum of Fact and Law.

48. On this basis, FETCO's proposed submissions will be different from those of the other parties and valuable to this Honourable Court.

FETCO's Intervention Will Serve the Interests of Justice

49. In *Prophet River*, this Honourable Court stated that the factors discussed in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (“*Pictou Landing*”), can be considered to determine whether the interests of justice would be better served by a proposed intervention.

Prophet River, para. 6

50. *Pictou Landing* set out the following factors:

1. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized?
2. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
3. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court’s determination of the matter?
4. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
5. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing “the just, most expeditious and least expensive determination of every proceeding on its merits”? Are there terms that

should be attached to the intervention that would advance the imperatives in Rule 3?

Pictou Landing, FETCO's Motion Record, Tab 4, para. 11.

51. FETCO's proposed intervention fulfills each of these requirements. In addition to the facts set out above, the following points are noteworthy.

FETCO Has Complied With Rule 109(2) and Detailed its Intervention

52. FETCO has complied with the requirements of Rule 109(2). Specifically, FETCO's Notice of Motion (1) sets out FETCO's and its lawyers' names and addresses; and (2) describes in significant detail how FETCO wishes to participate in this appeal.

FETCO Notice of Motion, FETCO's Motion Record, Tab 1

53. As well, as described above FETCO's Notice of Motion and the supporting Affidavit of Mr. Derrick Hynes describe in significant detail FETCO's proposed participation in the appeal, how its proposed submissions are relevant to the central issue in the appeal, and how its participation will be different from those of the parties and valuable to the Court.

FETCO Has A Genuine Interest in the Appeal

54. FETCO has a genuine interest in this appeal.

55. In addition to the direct impact this appeal will have on FETCO's members, FETCO also has significant knowledge, skills, and resources in the area of federal labour, employment, and health and safety law. This is reflected in FETCO's intervener experience, including its recent intervention before the Supreme Court in *Wilson v. Atomic Energy of Canada Ltd.*, *supra*.

Hynes Affidavit, paras. 9 - 12

56. Also, as the principal representative of federal sector employers, FETCO's mandate is directly engaged by this appeal. FETCO is the only party that can provide the perspective of the range of federally regulated employers regarding the issues at stake in this case.

Hynes Affidavit, para. 17

FETCO's Intervention is Consistent with the Imperatives in Rule 3

57. FETCO's intervention is consistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits."

58. FETCO seeks leave to file a memorandum of fact and law of no more than 10 pages, and will do so within 10 days of the Order granting it intervener status, or such other period of time ordered by this Honourable Court.

59. FETCO will not make any submissions that duplicate those of another party and, specifically, those of Canada Post.

60. FETCO will not add to the record currently before the Court and will rely solely on that record, the *Code*, and case law that can properly be included in a Book of Authorities.

61. In any event, FETCO will abide by any terms imposed by this Honourable Court to ensure that its intervention does not disrupt or delay the hearing of this appeal.

62. Canada Post has consented to FETCO's proposed intervention.

Hynes Affidavit, para. 27 - 32

PART IV - ORDER REQUESTED

63. FETCO respectfully requests that this Court order that FETCO be granted leave to intervene in this appeal on the following terms:

1. FETCO shall file a memorandum of fact and law limited to ten (10) pages in length within 10 days of the date of the Order granting intervener status;
2. FETCO shall not duplicate the submissions of the other parties;
3. FETCO shall not add to the evidentiary record before the Court;
4. FETCO shall not be permitted to seek costs nor be liable for costs; and,
5. FETCO may make oral submissions at the hearing on terms granted by the panel hearing the appeal.

64. FETCO does not seek costs on this motion and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, the 2nd day of November, 2016.



Christopher D. Pigott / Deanah Shelly

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161124

Docket: A-94-16

Ottawa, Ontario, November 24, 2016

Present: NADON J.A.

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Appellant

and

CANADA POST CORPORATION

Respondent

ORDER

UPON notice of motion by FETCO Inc. (Federally Regulated Employers – Transportation and Communications) for an order granting it leave to intervene in this appeal, to file a memorandum of fact and law limited to 10 pages in length, and to make oral submissions at the hearing on terms granted by the panel hearing the appeal;

UPON the affidavit of Derrick Hynes affirmed on November 1, 2016;

UPON the motion record of the appellant in response to FETCO's notice of motion; and

UPON FETCO's reply to the appellant's responding record;

THE COURT ORDERS:

1. Leave to intervene is granted subject to the following conditions:
 - a. The intervenor shall be bound by the record as agreed to by the parties or as determined by the Court under Rule 343. It may not introduce new evidence nor raise issues not raised by the parties.
 - b. The intervenor's memorandum of fact and law may not exceed 10 pages and must be filed no later than Wednesday, November 30, 2016.
 - c. The appellant shall have until Tuesday, December 6, 2016 to file a memorandum of fact and law in reply to the intervenor's memorandum of fact and law.
 - d. The intervenor may address the Court at the hearing of the appeal, but subject to further direction from the panel hearing the appeal, its oral submissions shall not exceed 20 minutes.
 - e. No costs shall be awarded in favour of or against the intervenor.
2. It is further ordered that the style of cause in all further proceedings be the following one:

CANADIAN UNION OF POSTAL WORKERS

Appellant

– and –

CANADA POST CORPORATION

Respondent

– and –

**FETCO INC. (FEDERALLY REGULATED EMPLOYERS –
TRANSPORTATION AND COMMUNICATIONS)**

Intervenor

"M. Nadon"

J.A.