“Workplace” Under Part II Of The Canada Labour Code Includes Work Activities Performed In Workplaces Not Controlled By The Employer

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In our bulletin of March 31, 2016, we discussed a Federal Court judgment issued in February 2016, in which the Court endorsed an Appeals Officer's decision who limited the definition of "workplace" for the purposes of inspection under Part II of the *Canada Labour Code* (the "Code") to workplaces where the employer exercises control: *Canadian Union of Postal Workers v. Canada Post Corporation*, 2016 FC 252.

In a judgment issued on July 13, 2017, the Federal Court of Appeal reversed the Appeals Officer's decision: *Canadian Union of Postal Workers v. Canada Post Corporation*, 2017 FCA 153.

The facts are as follows. A complaint was filed by an employee member of a local joint health and safety committee, represented by the Canadian Union of Postal Workers, alleging that Canada Post should not only be inspecting its physical building in Burlington, Ontario, but also the letter carrier routes.

In 2012, the Health and Safety Officer issued a direction, finding that Canada Post had failed to ensure that the entirety of the workplace was inspected annually in contravention of paragraph 125(1)(z.12) of the Code. Canada Post appealed the direction and the Appeals Officer rescinded the contravention of paragraph 125(1)(z.12) of the Code. The Appeals Officer concluded that the inspection obligation did not apply to any place where a letter carrier is engaged in work outside of Canada Post's physical building in Burlington, given that the employer does not exercise control over these workplaces. In the Appeals Officer's view, the inspection obligation only arises where the employer controls the workplace as the purpose of the inspection is the identification and opportunity to fix hazards. The Appeals Officer concluded that Canada Post has no physical control over the points of call and lines of route and, therefore, cannot fix hazards.

In its judgment issued last year, the Federal Court determined that the Appeals Officer's interpretation, which draws a distinction between control over the "workplace" and control over the "work activity", was reasonable. The Federal Court found that it was not

unreasonable for the Appeals Officer to conclude that Canada Post could not fulfill the purpose of the inspection obligation without control over the workplace.

Last July, the Federal Court of Appeal allowed the appeal in a divided judgment. Both Nadon J.A. and Rennie J.A. concurred on the result, but based on different reasoning. Justice Near, who wrote dissent reasons, would have dismissed the appeal and confirmed the Appeals Officer's decision.

Justice Nadon held that the Appeals Officer's interpretation was unreasonable for two reasons. First, he held that the Appeals Officer's interpretation constitutes a redrafting of paragraph 125(1)(z.12). Second, he found unreasonable the finding of the Appeals Officer's that the inspection obligation set out in paragraph 125(1)(z.12) could not be fulfilled by Canada Post.

Based on the wording of the legislation, Nadon J.A. first held an employer must comply with all obligations set out in 125(1) of the Code when the employer controls the workplace **and** when the employer does not control the workplace but controls the work activity of the employees in that workplace. Justice Nadon found that the Appeals Officer read out one of the two circumstances set out in subsection 125(1), *i.e.*, where the employer does not control the workplace but controls the work activities, an avenue that was not open to him. Justice Nadon added that the fact that the provision may pose difficulties for Canada Post or any other employer, in regard to complying with the inspection obligation, is not a valid reason to depart from the clear intent of the legislation. If there are any such difficulties, it is up to Parliament, not the courts, to remedy the matter.

In respect of the second reason, Nadon J.A. held that the Appeals Officer's finding that the obligation found at paragraph 125(1)(z.12) could not be fulfilled by Canada Post was unreasonable. Based on the evidence, Nadon J.A. was satisfied that Canada Post was fully able to identify and address hazards to employee health and safety on letter carrier routes and points of call. Canada Post already has a policy entitled "*Hazards and Impediments to Delivery Enroute*", which outlines a process for employees to identify hazards and impediments to delivery and the attempts that are to be made to resolve issues with customers following identification of the hazards and impediments. Hence, this policy permits supervisors to divert or suspend mail delivery to a location until the hazard or impediment is removed or prevented. In light of that evidence, Nadon J.A. concluded that it was unreasonable for the Appeals Officer to say that Canada Post is unable to identify and fix hazards encountered on the letter carrier routes and points of call because it does not have exclusive access to private properties. Justice Nadon recognized that the protocol may have to be changed to ensure annual inspection and identification of hazards by the workplace committee, rather than by employees.

Although Rennie J.A. concurred with Nadon J.A.'s disposal of the appeal, he took his analysis one step further. In his view, once it is determined that the employer controls the work activity, it is necessary to assess the extent to which the employer controls the activity. According to Rennie J.A., the scope of the inspection obligation is informed by the extent of control over the activity. He stated the following:

[79] It is true that Canada Post controls many aspects of how the mail is delivered — the choice and design of the route, how it is walked or driven, how the satchel is carried and so forth, **but I do not agree that the inspection obligation invariably follows**

each aspect along with it without any variance in the extent of application. In my view, simply because Canada Post may control aspects of the activity, *i.e.,* it may direct the postal worker to take public transit to return to the post office at the end of the route rather than a taxi, it does not follow that the inspection obligation applies to the fullest extent, for example, to the safety of public transit, as appears to be urged by the appellant. Similarly, Canada Post may give instructions as to how to deal with dangerous dogs, but this does not necessarily mean that the inspection obligation extends to an assessment of the risk posed by the dog. **Canada Post may tell postal workers how to navigate icy sidewalks and provide them with cleats, but this does not mean that there is an obligation to inspect all of the sidewalks in a city or check on the effectiveness of city sidewalk snow clearing and sanding operations**. *(our bolding)*

Ultimately, Rennie J.A. held that an analysis of the activity and the parameters of the employer's control over it is required in each case to assess the scope of the inspection obligation. In that case, the Appeals Officer had found that Canada Post has control over the activity and hence, being bound by that factual finding, he concurred with Justice Nadon's disposal of the appeal.

In our view, this conclusion is likely to lead to debate in the various federally-regulated workplaces based on differences of opinions regarding the assessment of the work activities and the type and extent to which the work activities are controlled by the employer. We will follow developments in that regard.

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