

Case No.: 2007-14  
Decision No.: CAO-07-024 (S)

***Canada Labour Code***  
**Part II**  
**Occupational Health and Safety**

Canada Post Corporation  
*appellant*

and

Canadian Union of Postal Workers (CUPW)  
*respondent*

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July 26, 2007

Appeals Officer: Richard Lafrance

Submissions were received from the parties during a teleconference held on July 19, 2007.

**For the appellant**

Stephen Bird

Counsel for Canada Post Corporation

**For the respondent**

David Bloom

Counsel for Canadian Union of Postal Workers (CUPW)

- [1] This decision concerns the request for a stay of a direction issued to Canada Post Corporation (Canada Post) under Paragraph 145(2)(a) of the *Canada Labour Code* (*Code*) by health and safety officer (HSO) Jane Shimono. Canada Post requested as well a stay of the direction issued under the same circumstances to its employees under subsection 145.(2.1) of the *Code*.
- [2] The direction was issued following the investigation by HSO Shimono of a hazardous occurrence involving Rural Service Mail Carrier (RSMC) Dale Salter.
- [3] The direction issued to Canada Post states:

The said health and safety officer considers that the performance of the activity by an employee constitutes a danger to the employee while at work:

A danger exists to employees when they are required to make rural mail delivery stops where the shoulders of the road are too narrow or non-existent, such that they cannot pull their vehicles completely off the traveled part of the roadway, and a solid yellow line(s) is marked on the pavement directly to the left of the RSMC vehicle's lane (13245 Torbram Road). As a result, employees are being exposed to the hazard of being struck by other vehicles on the same roadway.

Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145.(2)(a) of the *Canada Labour Code*, Part II, to take measures to protect any person from the danger **immediately**.

- [4] The direction to the employee gives the same description of the activity and directs the employees to :

[ ] ..discontinue the above activity until your employer has complied with the Direction issued under paragraph 145.(2)(a) of the *Canada Labour Code*, part II, to take measures to protect any person from this danger.

- [5] The arguments for a stay of the directions were received based on the Metropolitan Store<sup>1</sup> Supreme Court decision. In that decision the Supreme Court adopted a three-part test for either a stay or an interlocutory injunction. That is:

- i. Serious issue to be tried.
- ii. Irreparable harm.
- iii. Balance of inconvenience.

- [6] In time, an additional criterion was requested by Appeals Officers and that is:

What in the alternative of complying with the direction, does the appellant intend to do to protect the health and safety of the employees or any person from the perceived danger?

- [7] Stephen Bird contends that Canada Post meets the first test, that of serious issue to be tried. He argues that the question is neither frivolous nor vexatious and that similarly to other cases decided by Appeals Officers<sup>2</sup>, the health and safety of employees is always a serious question to be tried.

- [8] Regarding the second test: that of irreparable harm, S. Bird pointed out that although the directions seems to be specific to one mail box in particular, the implications are broader than it appears. He argued that in fact the direction may have an impact on thousands of boxes in Ontario, if not across the country.

- [9] S. Bird's argument is that based on the HSO's report, one can easily see that HSO Shimono does not accept the validity of the Traffic Safety Assessment (TSA) tool that

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<sup>1</sup> Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. [1987] S.C.R. 110

<sup>2</sup> Canada (Correctional Service) and Union of Canadian Correctional Officers – CAO, No. 2005-45 (Lafrance)

was developed by Canada Post in consultation with and accepted by the employees union; Canadian Union of Postal Workers (CUPW). S. Bird pointed out that HSO Shimono noted in her report that it was evident that the accident occurred because the vehicle was impeding vehicular traffic.

- [10] S. Bird stated that it was further evident that HSO Shimono doubted the accuracy of the TSA tool when she indicated in her report that she found it disturbing that the assessment of the site that was conducted after the accident deemed the site safe.
- [11] S. Bird argued that if HSO Shimono applies that same logic to other situations, and the added potential that other HSO's around the country of doing the same, the implications of such directions would cause irreparable harm to Canada Posts ability to deliver mail in rural communities.
- [12] With regard to the third and fourth tests, Canada Post has already stopped deliveries to the address in question until an Appeals Officer renders a decision on the issue. Consequently, the employees will not suffer any harm and will not be exposed to the purported danger.
- [13] David Bloom replied that the Code is specific with regard to an appeal or a request for a stay of a direction. Section 146 states that an appeal is specific to a direction, and not to speculations of future directions. In this case, the direction applies to one address only, 13245 Torbram Road, and not to speculative future directions at other places. He articulated as well that the corrective measures apply to that one specific location.
- [14] D. Bloom argued that in the Pollard decision<sup>3</sup> the Court indicated that the irreparable harm cannot be speculative. He asserted that it is clear in this case that what Canada Post implies is speculative at best.
- [15] Because of this, D. Bloom argues that the test of irreparable harm is not met, and therefore, the request for a stay should be rejected.
- [16] Finally, regarding the suggestion by Canada Post that mail delivery will be curtailed, D. Bloom indicated that mail delivery for the said address is still taking place in a community mail box; hence no one suffers any harm.
- [17] Consequently, D. Bloom argues that the stay should not be granted on the basis that the appellant did not meet the required test.
- [18] S. Bird replied that the issue is not speculative as HSO Shimono believes that all four wheel of the vehicle must be off the road in order to be safe. He affirmed that she exceeded her jurisdiction by deciding that there should be a double solid line on the road at the place where the accident occurred. This is a clear indication that she will not accept the validity of the TSA tool and will not accept future assessments in other similar cases.

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<sup>3</sup> Canada Post Corporation and Attorney General of Canada and Carolyn Pollard Docket: T-1428-06, Citation 2006 FC 1011.

## Analysis and decision

- [19] The issue in this case is whether or not to grant a stay of direction pursuant to subsection 146(2) of the Code which reads as follows:

146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

- [20] As indicated in the *RJR-MacDonald* decision<sup>4</sup>, all the elements of the three-part test set in the *Metropolitan* decision *supra*, must be proven, if one of them is not met, the stay is not granted.
- [21] I am of the opinion that the question is not frivolous or vexatious and that there is a substantial question to be tried as it deals with the health and safety of employees. In addition the appellant must, in all fairness, have the opportunity to present its case to the tribunal. I believe that Canada Post has met the test of a serious question to be tried.
- [22] The second test deals with the irreparable harm that the appellant may sustain if the stay is not granted. Canada Post argued that it will suffer irreparable harm if the stay is not granted because HSO Shimono is of the mind that the safety assessment is incorrect, and will rule in the same fashion in dealing with future similar circumstances.
- [23] Similar to the *Pollard* case, Canada Post relies on the speculations that the decision and direction could be given broader application by HSO Shimono and perhaps other HSO's and renders it unmanageable.
- [24] By moving the deliveries to the said address to a community mail box, Canada Post continues to meet its legal obligations of delivering the mail and no curtailment of mail delivery occurs. As well, the employees are protected from the danger described in the direction.
- [25] Therefore, Canada Post did not demonstrate that it would suffer irreparable harm if I reject the request for a stay of the directions.
- [26] With regard to the supposition that HSO Shimono or other HSO's may interpret the TSA tool in a similar fashion and issue directions at large across the country and render the situation untenable, I find that, in this particular case, the directions address one specific address with regard to one specific employee and therefore is limited to the one place identified in the directions and as such do not constitute irreparable harm to Canada Post.
- [27] In the *Pollard supra* decision, the honorable judge clearly indicated in paragraph 52 of his decision: "[...] evidence of harm that is merely speculative, or is indirect evidence of harm, is insufficient."

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<sup>4</sup> *RJR MacDonald Inc v. Canada (Attorney General of Canada)*, [1994] 1 S.C.R. 311

- [28] I find that Canada Post relies on the speculation that HSO Shimono or other HSO's may decide and issue directions in the same fashion in the future. It is clear that I cannot grant a stay on the speculation of what a health and safety officer may or may not decide to do in the future. In view of this, perhaps, Canada Post should meet with Labour Program Officials to discuss and explain the TSA tool.
- [29] As mentioned above, all the elements of the three-part test must be proven, if one of them is not met, the stay is not granted. Because Canada Post failed to meet the test of irreparable harm, I see no reason to continue with the analysis of the other test.
- [30] In conclusion, the motion for a stay of the directions issued by health and safety officer Shimono is rejected.

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Richard Lafrance  
Appeals Officer

## Summary of Appeals Officer's Decision

**Decision No.:** CAO-07-024 (S)

**Appellant:** Canada Post Corporation

**Respondent:** Canadian Union of Postal Workers

**Provisions:** *Canada Labour Code*, Part II, 145(2)(a)

**Keywords:** Stay, Rural Service Mail Carriers, rejected, *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. [1987] S.C.R. 110*

### Summary:

Canada Post applied for a stay of two directions issued by health and safety officer Shimono. The directions were issued further to the investigation of an accident that occurred to an employee of Canada Post and dealt with traffic safety issues.

Canada Post argued that the stay should be granted on the basis that they believed that the HSO misinterpreted the Traffic Safety Assessment (TSA) developed by Canada Post to assess the safety of rural mail boxes along a road.

The Appeals Officer rejected the request on the basis that the reasons given for irreparable harm that Canada Post could suffer was speculative in nature and therefore did not meet the required test to grant a stay of a direction.