

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2006 - 13 a), 2006 - 13 b)  
Decision No.: OHSTC-09-032

**CANADA LABOUR CODE  
PART II  
OCCUPATIONAL HEALTH AND SAFETY**

D. Morrison et al.  
C. McDonnell et al.  
*appellants*

and

Canada Post Corporation  
*respondent*

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September 3, 2009

This appeal has been decided by Appeals Officer Richard Lafrance.

Sittings of the Tribunal were on:

- January 30 to February 2, 2007,
- April 9 to April 13, 2007,
- July 30 to August 3, 2007,
- February 18 to February 21, 2008,
- Final written arguments received on April 3, 2008,
- Supplementary arguments in November, 2008,
- Supplementary arguments in February 2009.

**For the appellants**

Mr. D. Bloom, Counsel

**For the respondent**

Mr. S. Bird, Counsel

**Canada**

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## Appeal

- [1] This decision concerns two appeals filed pursuant to subsection 129.(7) of the *Canada Labour Code*, Part II (Code) against two decisions of absence of danger rendered by health and safety officer (HSO) Lance Labby.
- [2] A first appeal was filed by Rural and Suburban Mail Carriers employed by Canada Post Corporation based in Abbotsford, B.C.. Those employees exercised their right to refuse to work based on ergonomic motives.
- [3] The second appeal was filed by other Rural and Suburban Mail Carriers of Canada Post based in Maple Ridge B.C.. Those other employees exercised their right to refuse to work based on ergonomics as well as vehicular traffic motives. On January 19, 2006, HSO Labby investigated the work refusals of five Rural and Suburban Mail Carriers in Abbotsford, B.C. and concluded that danger did not exist. Subsequently, on January 31, 2006, he investigated the work refusals of four Rural and Suburban Mail Carriers in Maple Ridge B.C. and concluded as well that danger did not exist with regard to the ergonomic issue.
- [4] The appeals were joined at the request of and with the agreement of both parties, since both cases dealt with the same issues and had been investigated by the same health and safety officer over a relatively short period of time. Consequently, this decision will apply to both cases.
- [5] The appeals were recorded in two separate files under the Tribunal file numbers 2006-13a - G. Manson and CUPW and Canada Post and 2006-13b, - G. Manson and CUPW v. Canada Post. These two files deal with an appeal filed by G. Manson, president of the Royal City Local of the Canadian Union of Postal Workers (CUPW) on behalf of the nine refusing employees employed as Rural and Suburban Mail Carriers (RSMCs) by Canada Post Corporation.
- [6] Case number 2006-13a deals with the work refusals that occurred in Abbotsford, British Columbia on January 16, 2006. Case number 2006-13b, deals with the work refusals that occurred on January 25, 2006, in Maple Ridge, British Columbia.
- [7] Mr. Bird, counsel for Canada Post, requested that the style of cause of both cases be amended to identify every appellant in each case. As indicated in his request, the Canadian Union of Postal Workers (CUPW) is not a party to these proceedings. As well, at the outset of the hearing, Mr. Bloom, counsel for the appellants, indicated that two of the refusing employees had withdrawn their appeals, thus leaving a total of seven employees as appellants. For the Abbotsford case (2006-13a) the appellants are: D. Morrison, L. Friesen, B. Poirier and P. Hamilton. For the Maple Ridge case (2006-13b) the appellants are: C. McDonnell, G. Chartier and S. Hart. In both cases, the employees have retained Mr. Bloom as their counsel.

- [8] Consequently, I am changing the style of cause for the Abbotsford case to: (2006 -13a) D. Morrison et al and Canada Post Corporation. As for the Maple Ridge case, it will now be recorded as: (2006 -13b) C. McDonnell et al and Canada Post Corporation. For ease of reference in this decision, I will refer to the cases as either the Abbotsford or the Maple Ridge case whenever a need arises to specifically situate the circumstances.

## Background

- [9] Rural and Suburban Mail Carriers (RSMC) ratified their first collective agreement with Canada Post Corporation (Canada Post) on September 30, 2003. Before that date, Canada Post would obtain the services of RSMCs to deliver mail in the rural and suburban areas in Canada through individual contracts. As such, Canada Post considered them independent and self-employed contractors and thus not employees.
- [10] Starting in January 2004, in accordance with their new collective agreement, RSMCs became Canada Post employees and consequently subject to the *Canada Labour Code*, Part II (Code).
- [11] There followed steps by Canada Post to formally advise RSMCs that it would no longer tolerate RSMCs delivering mail to rural mail boxes by driving on the wrong side of the road. As a result, they would not be allowed to deliver mail through the driver side window of their delivery vehicles. Until then, driver side delivery had been considered a common delivery practice.
- [12] Starting in October 2005, an increasing number of RSMCs across Canada exercised their right to refuse to do unsafe work based on two aspects of their work. These work refusals were based on "ergonomics issues" or motives, an expression used by both counsels to describe the repetitive movements of twisting, reaching and sliding required to deliver the mail through the passenger side window of the RSMCs' vehicles.
- [13] Some of the RSMCs also raised "traffic issues" or motives, as worded by both counsel, to describe adverse conditions created by the physical location of the mail boxes in relation to the road, road shoulder, volume, type and speed of the vehicular traffic.
- [14] On January 16, 2006, five Rural and Suburban Mail Carriers (RSMCs)<sup>1</sup> from Abbotsford B.C. refused to perform the activity of delivering mail to Rural Mail Boxes (RMBs). They claimed in general that the repetitive movements of stretching, twisting and reaching out to deliver mail through the passenger side window of their vehicles created a danger to their health.

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<sup>1</sup> D. Morrison, L. Friesen, B. Poirier, P. Hamilton and J. Friesen

- [15] On January 25, 2006, four RSMCs<sup>2</sup> from Maple Ridge B.C. refused to perform the activity of delivering mail to RMBs, generally claiming that traffic conditions on their delivery routes rendered the performance of that activity dangerous for them.
- [16] In Maple Ridge, the "Ergonomics" motive was also raised by S. Hart relative to her having to climb over the console of her vehicle to deliver the mail from the passenger side window of said vehicle as required by the Canada Post delivery Safe Work Procedures (SWP).
- [17] In brief, the RSMCs from Maple Ridge were of the view that they could be injured or even killed in a vehicle accident while delivering mail to rural mail boxes. They believed the location of certain RMBs to be such that a vehicle accident could not be prevented under certain particular circumstances. Some of those circumstances were identified as: the lack of shoulder to pull off the road during delivery and a too short line of sight for other vehicles caused by curves, hills and blind intersections. Other circumstances such as type, speed and volume of traffic were also identified. As well, the location of certain other RMBs bordering on deep eroding ditches and general positioning and maintenance of the RMBs were also factors motivating their work refusals.
- [18] W. Lynd, health and safety officer for Canada Post, investigated the Abbotsford work refusals. He stated in his reports that Canada Post Corporation did not agree that the ergonomics situation described by the employees met the definition of danger found in the Code. As well, he indicated that since local management had acted on the traffic issue, he did not believe that this was part of the work refusals.
- [19] The Maple Ridge work refusals were investigated by G. Brewer and J. Taylor, health and safety officers for Canada Post. Their reports noted conditions such as deep ditches in some areas and slippery road conditions in other areas. Also noted was the suggestion of right hand drive vehicles by employees to solve the ergonomics issue. Blind hills and blind corners were also motives raised by the RSMCs.
- [20] In both cases, as the employer disagreed that a danger existed, a health and safety officer designated by the Minister of Labour pursuant to the Code was called to investigate the continued refusals.
- [21] The two work refusals dealt with in the present decision were investigated in accordance with the Code by health and safety officer (HSO) Lance Labby who did so in the presence of the employees and a member of the work place health and safety committee. As well, an employer representative was present.
- [22] HSO Labby noted the following facts in his Abbotsford investigation report:

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<sup>2</sup> C. McDonnell, G. Chartier and S. Hart and C. Klein

- All RSMCs<sup>3</sup> had purchased their own automobiles to perform their duties.
- All RSMCs were contractors hired by Canada Post prior to January 1, 2004. After this date they all became employees of Canada Post.
- The employer sent out Safe Work Procedures (SWP) to all of the RSMCs and all RSMCs did acknowledge they had received a copy of the SWP prior to being a Canada Post employee.
- There was no education given on SWPs for the RSMCs.
- Most of the RSMCs did receive job training by their previous employer whose position was contracted out by Canada Post. One RSMC had not received any training by his previous employer, however he learned the job by watching others and was coached by other employees as well.
- Each route has a different amount of RMBs, CMBs and GMBs. These routes vary from 75 to 350 RMBs.
- Not all of the RMBs are delivered consecutively as the RSMCs do have to stop at some GMBs, and CMBs.
- RMBs are positioned at different heights as measurements taken indicated.
- Some RMBs are in groups of two to four and some stand alone.
- RMBs are not equally spread out. Therefore, there is always a different amount of time for rest/recovery for the body in between each RMB delivery.
- None of the RSMCs has ever reported an injury to first aid attendants, filed for a WCB/GECA claim or lost any time from work from an injury caused by the movement from the driver seat to the passenger seat to deliver the mail through the passenger side window.
- None of the RSMCs had reported a danger to their employer at any time prior this refusal.
- The work experience of RSMCs varies between 3 to more than 20 years.
- The job for the RSMC has not changed in the last 5 years.
- RSMCs always have the responsibility to pull up as reasonably close as possible to the RMBs to deliver the mail. There is always a different distance between the RMB and their automobile.

[23] With regard to the Maple Ridge case, HSO Labby repeated the same facts as in his report for the Abbotsford case and added the following:

- Jurisdiction of *the Canada Labour Code* Part II does not extend onto public roads and highways.

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<sup>3</sup> **Acronyms used in the report:** RSMC- Rural Service Mail Carrier, SWP- Safe Work Procedures, RMB- Rural Mail Boxes, CMB- Community Mail Boxes, WCB- Workers Compensation Board, GECA- Government Employees Compensation ACT

- All RSMC's place and stack all of the letter containers in their own vehicles in such a manner to ensure a timely delivery and route patterns.
  - One RSMC submitted to Canada Post an undated report on the "Suburban Services Delivery" of her route and provided a list of the current and possible problem areas including some possible remedies to the situation as well. In February 2000, Canada Post replied to the RSMC and sent a report to Maple Ridge superintendent of corrective actions with no completed target date.
  - Canada Post does have a system for handling "hazardous" situations such as relocating RMBs or removing RMBs and placing all of their clients to either a GMB or CMB.
- [24] With regard to the "ergonomics" issue, in both cases HSO Labby indicated that the RSMCs were of the view that the incessant requirement of having to move over the central console of their vehicle, added to the constant repetitive movements of stretching and twisting required to deliver the mail to the RMBs through the passenger side window, constituted a danger to their health.
- [25] On this subject, HSO Labby found that those did not constitute a danger as defined by the *Code*. Consequently, he concluded for both locations that there was no danger and that the employees had to return to work.
- [26] In the Abbotsford case, HSO Labby did not investigate the vehicular traffic issue as this had not been raised by the refusing employees. In the Maple Ridge case, that issue had been raised by the refusing employees. However, HSO Labby was of the opinion that the *Code* application did not extend to public roads and highways. Consequently, he concluded that he lacked jurisdiction to investigate the traffic issue any further.
- [27] In both cases, the RSMCs appealed the decisions of absence of danger rendered by HSO Labby.
- [28] As there are two distinct issues to be dealt with in these appeals and that both issues are very technical in nature, I chose to address them separately.

### **Ergonomics Issue**

- [29] Regarding the ergonomics issue, I have to determine:
- 1) Whether HSO Labby erred in concluding that the refusing RSMCs were not exposed to a danger by having to deliver the mail from the driver side seat through the passenger side window of the delivery vehicles.
  - 2) Should I find that a danger does exist, I then have to determine whether this danger constitutes a normal condition of employment,



and would therefore preclude the employees from exercising their right to refuse.

## **Evidence**

### **Vehicle view**

[30] During the hearing, in the presence of both parties, a view of vehicles used by the RSMCs was arranged where the RSMCs demonstrated the movements necessary to get the mail from the backseat of their vehicle and then make deliveries from the passenger side window. I noted that the RSMCs used a variety of vehicles, ranging from a subcompact to a full size four by four and a van. In addition, most had a central console, with gear shifter and parking brake handle in the centre of the vehicle.

[31] The types of vehicles used by the RSMCs in the Abbotsford case were:

- P. Hamilton used a compact vehicle with bucket seats, standard shift and a central console.
- B. Poirier used a mid-size car with split benches and no central console.
- L. Friesen used a small 4 wheel drive vehicle with a central console incorporating a stick shift and emergency brake handle.
- D. Morrison used a van with bucket seats, no console.

[32] In the case of Maple Ridge case, the types of vehicles used were:

- C. McDonnell used a full size four wheel drive vehicle, with a central console, gear shift and emergency brake handle in the centre.
- S. Hart used a small vehicle with a central console.
- G. Chartier used a small vehicle with a central console and emergency parking brake handle in the centre.

### **The Safe Work Procedures**

[33] Mr. Bird indicated that following the first work refusals in the Province of Quebec, Canada Post had developed and implemented the Safe Work Procedures (SWP).

[34] In the present case, the HSO received a copy of the Safe Work Procedures when he investigated the work refusals. At the hearing, counsel for the respondent made use of the Safe Work Procedures to demonstrate that the employer had a procedure in place to deliver mail safely.

[35] The Safe Work Procedures address:

- 1) General safe driving rules;
- 2) Vehicle maintenance and safe working condition of the vehicles;
- 3) Adverse weather conditions;
- 4) Driving to points of delivery within the flow of traffic;
- 5) Pulling off the road to deliver the mail at the RMBs;
- 6) Serving the Rural Mail Box;
- 7) Re-entering roadway traffic.

On each of those points, the procedure mentions possible hazards as well as the precautions to take with regard to those possible hazards.

[36] Item 6 is of particular interest in that it deals with Serving the Rural Mail Box, warns RSMCs about possible hazards and lists precautions to take as follows:

Possible Hazard	Precautions
<ul style="list-style-type: none"> <li>• distance of the receptacle from window</li> <li>• Reaching to the receptacle</li> <li>• Weight of the mail</li> </ul>	<ul style="list-style-type: none"> <li>• Pull as close to the left of the Rural Mail Box as possible while still allowing enough space to open the receptacle.</li> <li>• Turn on four way emergency flashers.</li> <li>• Remove seat belt.</li> <li>• Select a suitable amount of mail to be placed in the receptacle (if there is a large volume of mail for one receptacle, several bundles should be transferred).</li> <li>• Move to the right passenger seat, lower the window, open Rural Mail Box, retrieve any outgoing mail and deposit mail for delivery, close box, raise window, return to driver position, and reattach seatbelt.</li> <li>• (NB: The RSMC is not to exit the vehicle to serve a Rural Mail Box. This delivery is to be made through the right</li> </ul>

	hand passenger window. If the approach to the Rural Mail Box is impeded, retain the mail and continue your route. Upon return to the depot, immediately inform your Supervisor of the problem.
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### **The Eady and Human Factor North Reports**

[37] The parties jointly filed in evidence a number of documents. Among those, I retained in particular the following:

- Ergonomic Review of RSMC Rural Mail Box Delivery (C. Eady)
- Rural Mail Box Delivery Ergonomic Risk Assessment (K. Kawaja, Human Factor North)

[38] In April 2006, the employer received a report on an ergonomic assessment conducted by C. Eady, an employee of Canada Post specialized in ergonomics. The assessment was conducted shortly after the first few work refusals in Vaudreuil-Dorion, which occurred prior to the work refusals of concern in this case.

[39] A second assessment was conducted shortly after by Human Factors North. Inc. (HFN), to confirm, according to J. Fraser, the findings of the Eady report. This report, dated December 15, 2006, was prepared for the Canada Post National Joint Health and Safety Committee. While the parties did not deal with the particulars of the reports, my reading of those proved to be most informative and very significant as regards the description of the hazards specified by the RSMCs. As well, no evidence was adduced or expert testimony offered to contradict those two assessments.

[40] The purpose of the Eady review was the conduct of an ergonomic safety analysis of RSMC in-vehicle RMB delivery for three different delivery techniques:

- 1) Delivery from the passenger seat (movement from driver seat to passenger seat) in a vehicle with a bench seat, bucket seats and no central console or bucket seats with a central console.
- 2) Delivery using a reaching device from driver seat out the passenger window.
- 3) Delivery out of the driver side window (right hand drive).

In addition, options for reducing and/or eliminating any identified ergonomic risk factor were to be noted.

- [41] The report states that long term injury implications are unknown due to the limitations in the scientific literature and the uniqueness of this task.
- [42] Moving across the seat to the passenger side was found to be of concern at higher rates of delivery. The report found reaching to RMBs at the higher rates of delivery to be of concern as it increased the number of non-neutral right shoulder motions. Noted as well as an additional concern were winter conditions, because of the necessity to reach further due to the accumulation of snow between the road and the RMB.
- [43] In the case of trucks with bench seats, the report indicated that while the risk of injury was low at a delivery rate of less than 37 RMBs per hour, as the rate of RMBs per hour increased, so did any associated concerns for all delivery methods observed.
- [44] The short term recommendation for this type of vehicle (truck with bench seat) was to develop a best ergonomic practice of shuffling across the bench seat, manipulating the letterainers<sup>4</sup>, and reaching the RMB. For the long term, the report recommended investigating alternative delivery modes that do not require RSMCs to move across their vehicle in order to reduce exposure to ergonomics risk factors.
- [45] Regarding vans with bucket seats, the report indicated concerns along the same line, although at rates of delivery slightly higher at 40 RMBs per hour. Otherwise, the same recommendations were made as above.
- [46] Concerning cars with bucket seats and central consoles, the report stated that this was the worse delivery method as the magnitude of ergonomics risk factors presented an unacceptable safety hazard. The conclusion was based on:
- a) observations that extreme low back postures occur frequently,
  - b) that significant upper and lower limb force is required to mount and/or climb over the central console, and
  - c) that it is likely that some operators would be unable to perform this task because of anthropometric and/or flexibility issues.

The writers of the report advised that they had significant concerns with these types of vehicle at any of the RMB rates due to extreme low back postures.

- [47] The short term recommendation was that Canada Post take steps to identify RSMCs driving cars with central consoles and cease delivery in situations where the RSMC is delivering alone. The long term

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<sup>4</sup> "letterainers" as explained at the hearing, those are containers that the RSMCs use to carry the mail from the mail depot and used to transport outgoing as well as incoming mail on the backseat of their vehicle.

recommendation concerned the use of other types of vehicles, that is, investigate alternate modes of delivery that do not require RSMCs to move across their vehicle and reduce exposure to ergonomic risk factors.

[48] With regard to the use of hand held reaching devices, the recommendation in the report was that this idea should not be pursued further, as such devices increase ergonomic risk factors by a factor of 2 and needed grip strength is too high.

[49] On the subject of right hand drive vehicles, the analysis demonstrated that the risk of injury increases as well with the rate of RMBs served, although this may prove a concern at rates of more than 50 deliveries per hour. Nonetheless, the recommendation was that if Canada Post selected such type of vehicle, a more thorough ergonomic analysis should be conducted to verify ergonomic concerns at the higher rates of distribution.

[50] In the case of the second ergonomic assessment, this one done by Human Factor North (HFN), the report indicates that the ergonomic risk assessment bore on the essential in-vehicle duties of RSMCs. The assessment included:

- Taking off and putting on the seatbelt.
- Accessing mail from inside the vehicle.
- Moving across the interior of the vehicle from the driver to the passenger seat/side.
- Delivering the mail from the passenger seat out the passenger window (assistant) or from the driver side seat out the driver window.

[51] HFN indicated in their report that they resorted to a systematic problem solving process that defines the problems and solutions in a system context. They specified that data was collected using various measuring tools and devices to describe the problems. It is noted that the advantage of a system analysis approach is that it includes more than the workplace components and considers all aspects of the environment, including job characteristics, organizational context, technology and psychosocial variables.

[52] For ease of understanding, I adopted the following definitions found in the HFN Report:

- "Ergonomics" is defined as the scientific discipline concerned with the understanding of interaction among humans and other elements of a system, and the profession that applies theory, principles, data and method to design in order to optimize human well-being and overall performance.

- “Physical ergonomics” is defined as a domain specialization in the field of ergonomics concerned with human anatomical, anthropometric, physiological and biomechanical characteristics as they relate to physical activity. (Relevant topics include working posture, materials handling, repetitive movements, work related musculoskeletal disorders, work place layout, safety and health.)
- “Musculoskeletal disorders” (MSDs) or Injury is defined as injuries and disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal disks; examples include carpal tunnel syndrome, rotator cuff tendonitis, and tension neck syndrome. MSDs may occur after hours, days, months or years of exposure. The symptoms of these disorders may appear to have a sudden onset or they can begin slowly and develop over a long period of time.

- [53] The report states that MSD issues arise in workplaces in which the demands of the job exceed the capabilities of the person doing the job. It indicates that jobs are not designed for a variety of workers – they do not take into account what is known about the variation of people’s size strength, endurance etc. and this puts some workers at a greater risk of developing MSDs than others. It is clear that there is a strong link between exposure to certain physical factors/hazards in a workplace and the development of MSDs. Exposure to these physical hazards can cause damage to the muscle, tendons nerves etc..
- [54] HFN indicated in their report that the majority of ergonomics-related injuries can be categorized as musculoskeletal disorders (MSDs). These are injuries and disorders in which exposure to various risk factors present in the workplace may either contribute to the disorders development or aggravate pre-existing conditions. In addition, they specified that while a number of factors can increase MSD risk, the primary MSD hazards are force, repetition, and fixed or awkward postures. (my underline)
- [55] HFN reported that the main source of evidence of an ergonomic problem came from the detailed risk assessment of eight RSMCs that was carried out as they were engaged in typical delivery tasks, thereby providing results representative of real-life conditions.
- [56] As well, a confidential questionnaire was sent to all RSMCs to assist in the development of the assessment. More than 58% of the RSMCs responded, thus founding confidence in the findings that there were substantial ergonomics concerns relative to the task of RSMCs in-vehicle delivery to rural mail boxes. A total of 58% of the respondents indicated experiencing discomfort while delivering mail.

[57] This assessment revealed many substantial workplace hazardous conditions capable of causing musculoskeletal injuries:

- Vehicle design issues such as the large variability in the interior design of the vehicle and delivery height in relation to the RMB. For example, an RSMC in a low vehicle such as a car with a central console delivering to a high rural mail box faces increased physical demands and added awkward postures compared to other vehicle designs.
- Variability in the mail box height, location and maintenance which affects the physical demands required to deliver, especially at the shoulder. For example, a lift-up mail box door requires one hand to hold the door open while the other hand delivers, whereas a pull down mail box door can be serviced using only one hand.
- RSMC heights which affect reach distance, and overall physical condition which affects strength and flexibility.
- Design and layout of the rural route which has an impact on the number of RMBs delivered and how the mail boxes are spaced. For example, a route with a high number of RMBs and low kilometres is likely to have more mail box clusters and/or shorter distances between mail boxes, thus affecting the repetitive nature of the work and the physical recovery time between deliveries.
- Work practice issues such as the hand typically used to deliver mail, the delivery technique adopted, preference of the hand used to access and buckle the seatbelt, and work methods used to access mail in the vehicle from a seated posture.
- Environmental issues such as cold or hot temperatures which can affect muscle function, and whole body vibration which is strongly linked to lower back pain.
- Equipment, machinery and hand held tools issues such as a mail container design in relation to the route size and interior vehicle design, vehicle wear and tear, and the need for a hand held tool to remove ice from mail boxes and raise the flag in worst case scenarios.
- Psychosocial issues such as minimal supervision of the route and the RSMC which can affect customer compliance with RMBs responsibilities, RSMC dedication to the route and the customers which may affect work practices.

- Ergonomics issues associated with the task of driving that result in discomfort and high risk postures. For example, seatbelt discomfort in the neck and chest area in addition to awkward postures associated with repeated and rapid vehicle deceleration, backing up the vehicle and operating driving controls while seated in the middle of the vehicle.

- [58] With regard to the RMB rate, HFN indicated that dynamic shoulder movements, occurring more frequently than 2.5 per minute, are considered high risk for the development of musculoskeletal disorders. This threshold is further modified, and considered to be very high risk in the presence of a number of factors, including but not limited to extreme posture, long duration of repetitive work, high external force, high static load and/or lack of training. In addition to repeated movements at the shoulder joints, RSMCs exhibited awkward and extreme shoulder postures. HFN concluded that, taking into consideration a number of possible scenarios, they estimate the acceptable rate of deliveries per hour to vary from 12.5 per hour for the delivery technique of driver out the passenger side window to 50 per hour for an assistant delivering mail through the passenger side window. (my underline)
- [59] The report states that what HFN considered an acceptable rate is the threshold at which an RSMC would be considered at high risk for a shoulder injury. The report states that, in their assessment, they found that generally RSMCs make deliveries at a rate of 67 RMBs per hour.
- [60] HFN cautions the readers because of the variety of potential variables affecting the frequency, severity and number of shoulder postures required to complete the task of in-vehicle delivery. Such variables include work practice, distribution or number of RMBs on the route (i.e. clustering and spacing of RMBs along the delivery route). As well, vehicle design, RSMC anthropometry, RMB design (including location and maintenance) and seasonal variations should be taken into account.
- [61] In addition, HFN states that the RMB rates per hour estimation they arrived at is based on allowable shoulder movements for a healthy population and that applying these rates to an injured population should be done with caution as it may aggravate their condition.
- [62] In view of the significant risk factor in the task of in-vehicle deliveries that it found in its assessment, HFN recommended that the repetitive nature of the job be addressed as well as the awkward and, at times, extreme shoulder postures and the tremendous variability in worker, job and workplace factors.
- [63] In concluding, HFN stated that it was evident from the study findings that the RSMCs did not currently have the right equipment (vehicle) to effectively and safely perform their primary job function of delivering mail from the vehicle to the RMBs and stated that there was an urgent need to find a solution to the problem.



- [64] HFN recommended that vehicle retrofits be considered for different vehicle designs so that bench-style seating is available. They recommended as well that RSMCs be provided with a list of recommended vehicle features that would assist in making their job more comfortable, efficient and safe. Finally, their recommendation was that a risk assessment of right hand vehicles be conducted. Right hand drive vehicles that have been designed for seated mail delivery feature a larger driver side window that extends below seated elbow height and allows for improved shoulder position. Other features such as a rack or table system to place the mail in the vehicle or alternate seat belt design should also be assessed.

#### **Appellants' evidence**

- [65] As stated at the beginning of this decision, nine employees filed an appeal, but only seven acted on their appeal.
- [66] The seven remaining appellants testified at the hearing. I will not reproduce their whole testimony. However, a summary of such testimony is recounted below with pertinent individual segments noted as required.

#### **Abbotsford Case**

- [67] In the Abbotsford case, after being told by Canada Post that the mail had to be delivered from the passenger side window, the four RSMCs<sup>5</sup> refused to work because they generally feared that the constant movements of sliding, twisting, stretching and reaching out to deliver that mail through the passenger side window was harmful to them.
- [68] All four indicated that before becoming employees of Canada Post in 2004, they delivered the mail through the driver side window. While this was not officially approved by Canada Post, the employees testified that local management was aware of how the deliveries were being made and generally turned a blind eye to this practice, as long as the mail was being delivered. All refusing employees, save one, stated that they knew nothing about the Safe Work Procedures, and had received no training whatsoever regarding a safe procedure to deliver mail through the passenger side window.
- [69] At the time of the refusals, P. Hamilton was delivering mail to more than 300 RMBs, B. Poirier was delivering to approximately 250 RMBs and D. Morrison had more than 300 RMBs on his delivery route. Generally speaking, delivery was being completed in approximately 3 to 4 hours. The last appellant, L. Friesen had 75 RMBs on her route and delivery required approximately one hour.
- [70] All four employees testified that at the time of their refusal, they were interviewed by W. Lynd, health and safety officer for Canada Post, and were asked about their reasons for such action. In the end, they were

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<sup>5</sup> D. Morrison, L. Friesen, B. Poirier, P. Hamilton

informed that Canada Post did not agree that they were exposed to a danger.

- [71] According to the four RSMCs, when HSO Labby investigated their work refusals, he only viewed a few of the RMBs concerned. He had a look at their vehicles and took a few measurements with regard to how high and how far the RMBs were from the vehicles, as well as how far some employees could reach.
- [72] Each RSMC confirmed that they select the vehicle they use for the delivery of rural mail. The only standard they have to comply with is stated in their route delivery schedule. This standard, established by Canada Post, deals only with the size of the needed vehicle, such as a compact car or van, and specifies a minimum cargo space requirement in cubic feet.
- [73] Although all of them realized that their vehicle, for the most part, was not suited for the work they did, they contended that it could not be changed or modified as it would be too costly.
- [74] Furthermore, the RSMCs were of the view that even with a full seat, they would still have to twist and reach in the back to get the mail from the mail bins on the back seat and then have to stretch out to get to the mail box. This would have to be done hundreds of times each day and would still require extreme repetitive movements that, they believed, would result in injuries.
- [75] By comparison, they maintained that driver side delivery was easier on their body, as they could put the mail beside them on the passenger seat and thus not have to twist and reach in the back to get it. However, they also acknowledged that the delivery schedule is designed so that delivery can be effected on the right side of the road. They recognized as well that the Safe Work Procedures document tells them to deliver mail through the passenger side window.
- [76] None of the RSMCs ever reported injuries to their employer or claimed workers compensation, and as new employees of Canada Post, they asserted they had not been aware of their right to do so, nor had they been aware of their right to refuse until it became known that other RSMCs in Canada were refusing to work and this was eventually discussed at work between fellow RSMCs.
- [77] RSMC B. Poirier indicated that because she has a very short reach, she has to get on her hands and knees in order to reach the mail in the back of her vehicle and to reach the mail box on the passenger side. She believes that such constant repetitious movement would eventually hurt her.
- [78] All stated having received no training on how they could deliver mail through the passenger side window in a safe manner. They indicated as well that they were never told or trained on how to load their vehicles. They

load their own vehicle with the mail to be delivered and it is left to them to decide how to do so.

- [79] RSMC Morrison testified that he has never even tried to do passenger side deliveries as he believes that it is unsafe. The other RSMCs tried passenger side deliveries at various times.
- [80] P. Hamilton felt it was safer to drive on the right hand side of the road than on the wrong side of the road. However, she testified that she stopped doing so because she suffered bruising to her hip and her whole right side as a result of having to climb over the console to complete her deliveries. She indicated having tried using a folded blanket over the console to protect herself, but this only resulted in more bruises and more complications when climbing over the console.
- [81] L. Friesen tried delivering mail from the passenger side, but resumed driver side deliveries after suffering health problems that resulted in chiropractic treatments.
- [82] The RSMCs confirmed that in temporarily dealing with their ergonomics concerns pending a decision by an Appeals officer in the case, Canada Post was providing them with an assistant to effectuate deliveries through the passenger side window of their vehicles.

#### **Maple Ridge Case**

- [83] In the Maple Ridge case, the three refusing RSMCs<sup>6</sup> stated that they refused to work after being ordered to deliver mail through the passenger side window of their vehicles on pain of being disciplined if they continued to make deliveries as they did in the past.
- [84] All three RSMCs were interviewed by Canada Post health and safety officers W. Lynd and J. Taylor, who were also accompanied by a CUPW health and safety officer.
- [85] All three RSMCs declared that they had never been trained by Canada Post on safe delivery methods. Furthermore, they all affirmed that up until the refusals and the subsequent investigation by Canada Post, they had never seen the SWP prepared by Canada Post.
- [86] At the time of their refusals, S. Hart was delivering mail to 189 RMBs, G. Chartier to 165 RMBs and C. McDonnell to 250 RMBs. The average delivery completion time was three hours.
- [87] All three confirmed that mail delivery through the driver side window had never been an issue until they became Canada Post employees and were then told that they could no longer do it in this manner. None of them has ever been reprimanded or disciplined for this, even though the employer has always known that this was the traditional way of delivering mail.

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<sup>6</sup> C. McDonnell, G. Chartier and S. Hart

- [88] C. McDonnell and G. Chartier testified that they refused to work for the reason that after having tried to do deliveries through the passenger side window, they ended up with bruises on their legs and sides because they had to climb over the consoles, gear shifts and brake handles and stretch out to deliver the mail.
- [89] S. Hart stated that she never tried to deliver the mail in the manner presently required because she could not even reach across her vehicle to unlock the passenger door, let alone deliver mail from that side.
- [90] C. McDonnell explained that because they had to deliver mail through the passenger side window, they could not have the mail bins beside them on the passenger seat. Those bins had to be placed on the backseat and the constant twisting required to recover the mail from the back seat, added to the physical exertion that climbing over the console and reaching out to recover or put mail in the RMBs required constituted, in her opinion, a danger to her health.
- [91] All RSMCs stated that the only vehicle requirements determined by Canada Post are outlined in their route delivery schedule. Those concern only the size of the required vehicles, such as compact or mid size or van. In addition, a minimum cargo space requirement is stated in cubic feet. No other guidelines are formulated for the inside configuration of the vehicles.
- [92] All three RSMCs recognized that their vehicle was inappropriate for delivering mail through the passenger side window. Be that as it may, all three confirmed that at no time were they ever told by the employer that the interior configuration of their vehicle rendered it inappropriate to do mail deliveries.
- [93] G. Bossenberry testified as a reply witness on behalf of the appellants. She is the National Health and Safety Representative of CUPW and the co-chair, employee representative, of the National Joint Health and Safety (NJHS) Committee. She stated that the NJHS Committee was never involved with the Eady study and its report. In addition she stated with regard to the Eady report that Canada Post never dealt with the findings and recommendations of the said report concerning vehicles with bucket seats and central consoles.
- [94] With regard to the HFN report, she further testified that although the NJHS Committee had asked for further ergonomics assessments on the identified problems in the Eady report, Canada Post had refused to have any more assessments made.

#### **Respondent's evidence**

##### **Abbotsford and Maple Ridge**

- [95] A total of four witnesses testified for the respondent. In the same manner as with the Appellants witnesses, a summary of their testimony is recounted below, with pertinent individual segments noted as required.

- [96] J. Taylor testified that to her knowledge, no one had ever reported an "ergonomics" problem prior to the refusals. However, having participated in parts of the investigation of those work refusals and having been made aware of the reasons for the other work refusals, she agreed that the central issue for those refusals was the "ergonomics" issue.
- [97] Ms. Taylor further stated that following the refusals, Canada Post's national directive regarding training relative to ergonomics was that every RSMC was to be trained in the use of the Safe Work Procedures.
- [98] Concerning the matter of ergonomics, she confirmed that a study had been conducted by Human Factors North (HFN). She was a member of the committee that worked with HFN along with a Union representative, G. Bossenberry.
- [99] J. Fraser, Canada Post Manager for Health and Safety, confirmed that prior to 2004, RSMCs were not considered employees and were left to themselves regarding health and safety matters.
- [100] He confirmed that once RSMCs became employees in January 2004, Canada Post took steps to ensure that the passenger side mail delivery policy was adhered to. He stated that the RSMCs' job had remained unchanged for at least five years and that it was Canada Post's position that deliveries should always have been made from the passenger side window. Be that as it may, in early 2004, Canada Post sent letters to all RSMCs. The letter reminded them that driving on the wrong side of the road was a violation of traffic laws, and that driver side deliveries would no longer be tolerated and be subject to progressive disciplinary measures if necessary.
- [101] On the subject of ergonomics, he confirmed that any RSMC who refused to work based on ergonomics concerns is provided with a paid assistant to help deliver mail through the passenger side window. However, he maintained that this did not constitute an admission of danger. Rather, this was a way of making sure that the delivery of mail would continue without interruption until the issue could be resolved permanently.
- [102] Although the Eady paper had been prepared before he occupied his current position, J. Fraser confirmed that the subsequent HFN study was conducted to confirm the findings of the Eady report. The study looked at a variety of issues, such as passenger side delivery, vehicles, and routes design to name a few. Further studies of right hand drive vehicles have yet to be initiated.
- [103] Mr. Fraser commented that the Safe Work Procedures (SWP) are still under review by the National Joint Health and Safety (NJHS) Committee and that they would undergo substantial modifications.

- [104] W. Hackett, RSMC supervisor, testified that in the ten years he has been a supervisor, he has never received a complaint pertaining to "ergonomics" issues.
- [105] RSMC Supervisor R. Sawatsky acknowledged that RSMCs use their own vehicles to deliver the mail. He also confirmed that the sole vehicle requirements are that they comply with vehicle size such as compact, midsize or van and loading volume capacity.
- [106] He maintained that delivery routes have always been designed for deliveries to be made from the passenger side windows. In January 2004, no change occurred with respect to the policy, save for a strong reminder to the employees that they had to observe said policy.
- [107] In the past, he observed RSMCs perform deliveries from the driver side and whenever this happened, he reminded the employee of the policy of having to do deliveries from the passenger side.
- [108] As regards the delivery vehicles, he only looked at whether vehicles met the requirements of size and volume capacity. He never advised RSMCs on the make, type or other features of a vehicle.
- [109] Mr. Sawatsky confirmed that in all his years as a supervisor, he has never disciplined an employee for not following the delivery policy. Furthermore, he has never heard of an employee being disciplined by a superintendent for that same reason.

## Arguments

### Appellants' arguments

- [110] Mr. Bloom, citing the *Verville*<sup>7</sup> decision, argues that the definition of danger does not require that the condition or activity be expected to cause injury or illness every time that it occurs, but rather that it be capable of causing injury at any time but not every time.
- [111] He further argues that in accordance with the *Douglas Martin*<sup>8</sup> decision, the task of the tribunal is to weigh the evidence to determine whether it is more likely than not that what the applicant is asserting will take place in the future.
- [112] Mr. Bloom asked that the Tribunal take notice of the following:
- a) The Canada Post Safe Work Procedures require delivery only through the passenger side window of the delivery vehicles. Canada Post approved either expressly or

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<sup>7</sup> *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940. (Paragraph 35)

<sup>8</sup> *Martin v. Canada (Attorney General)* (F.C.A.), [2005] 4 F.C.R. 637, [2005] F.C.J. No. 752, 2005 FCA 156, No. A-491-03, May 6, 2005 (Paragraph 37)

tacitly the delivery vehicles used by the Appellants. The evidence establishes that passenger side window delivery to the RMBs would have required each of the appellants to engage in a series of repetitive awkward movements due to the configuration of their vehicles which resulted or likely would have resulted in both physical discomfort and injury. Injury was foreseeable due to the nature of the repetitive, awkward movements and/or the constant contact with the steering wheel, console or parking brake. In each of these cases, the RSMC would have been required to do significantly more than the 12.5 RMBs per hour estimated as safe in the Human Factors North Report.

- b) All of the Appellants used vehicles that had been approved (expressly/tacitly) by Canada Post and which complied with the requirements set out by Canada Post. Canada Post did not provide guidelines on vehicle selection. In this context, the delivery vehicles must be taken as given and Canada Post cannot rely on the employees' choice of vehicles to relieve it of its obligation to ensure the health and safety of its employees. The decision of AO Malanka in *Pollard*<sup>9</sup> upheld by the Federal Court clearly disposes of this issue in favour of the Appellants. At paragraph 94, AO Malanka stated that:

[94]... Under section 124 of the Code, the employer is responsible for ensuring the health and safety of all its employees. Therefore, if injury was preventable through options relative to the selection of a vehicle or the work procedures, CPC had the duty under Part II to inform its employees of these options and to provide the necessary training to them.

- c) Five of the Appellants used vehicles with central consoles (Hamilton, Friesen, McDonnell, Chartier and Hart). The Eady Report initiated by Canada Post states at page 10:

"It is recommended that CRC take steps to identify RSMCs with centre consoles and cease delivery in situations where the RSMC is delivering alone, in a vehicle with a centre console between the driver and the passenger seat."

- d) Additionally, Canada Post's own protocol for the provision of assistants recognizes the safety problem caused by a requirement of passenger side window

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<sup>9</sup> *Carolyn Pollard and Canada Post Corporation*, Canada Appeals Office on Occupational Health and Safety, Decision No. 06-022, July 14 2006

delivery over a console. Insofar as Canada Post was not required by the decisions of HSO Labby to make any modification to the delivery methods, the provision of assistants should be viewed as an acknowledgement of the significant risk associated with this delivery method.

[113] Regarding ergonomics, Mr. Bloom submitted that the evidence shows that the physical requirements of passenger side window delivery constitute an unreasonable risk for the employees and amount to a danger within the meaning of the Code.

[114] Having regard to all of the evidence, it was Mr. Bloom's submission that the Appeals Officer quash the decisions of HSO Labby dated February 10, 2006, and February 17, 2006, and find a danger based on the physical requirements of passenger side window delivery.

#### **Respondent's arguments**

[115] On the matter of ergonomics, Mr. Bird asserts in his final arguments that the following are not in dispute:

- all RSMCs complained about reaching, stretching and bending but none identified a specific motion that is considered a danger;
- none of the RSMCs have ever complained before or claimed an injury or made a WCB claim;
- RSMCs are required to sort and transport mail to their vehicles. All these activities require ergonomic lifts, twists, stretches and bends, which appear to be of no apparent consequence; and
- all RSMCs were delivering out the driver side window prior to the refusal — again requiring reaching, bending, stretching in different degrees.

[116] Mr. Bird claims that passenger-side delivery is a "Normal Condition of Employment" under subsection 128(2) of the Code, which removes the right of a worker to refuse to perform work if such activity is a "normal condition of employment".

[117] With regard to this last claim, Mr. Bird asserts that the evidence shows that:

- RSMCs are required to sort and deliver mail within specified routes, as outlined in their work description, thus delivery is a normal condition of employment;
- the placement of mail into the RMB by driving up to it and manually placing the mail into the RMB is also a normal condition of employment;
- a "normal" condition must be the "generally accepted norm" otherwise any aberrant behaviour by an individual employee would deprive the section of the Code of all meaning.



Passenger-side delivery is a normal condition of delivery and thus employment. It is clear that most of the appealing RSMCs were not delivering mail in this manner.

[118] Mr. Bird argues that while the majority of RSMCs in these proceedings were not delivering through the passenger side window, all confirmed that:

- they knew that they were supposed to be delivering in this manner, and that Canada Post did not condone driver side delivery;
- all their routes were laid out for passenger-side delivery, as demonstrated by the delivery schedules.
- it is suggested that I should take into consideration the HRSDC Labour Operations Program Directive No. 905-1-IPG-070 presented at the hearing. This Directive sets out HSO review criteria for Normal Condition of Employment. By applying those criteria, Mr. Bird believes that I would determine that passenger side RMB delivery is a normal condition of employment for the purposes of the Code.

[119] Mr. Bird submits that there can be no finding of danger when the cause of the ergonomics concerns raised by the RSMCs is the vehicle that they selected to make the mail deliveries. He argues that it is clearly established in the RSMC's work description that it is their obligation to select a "vehicle appropriate for the route".

[120] Mr. Bird argues that the RSMCs are informed of what is expected of them upon being hired: they are required to get the appropriate tool for their work. He points out that not only did the RSMCs not provide a vehicle to facilitate passenger side delivery, they did not try to replace their vehicle with an appropriate vehicle to facilitate passenger side delivery.

[121] Mr. Bird did not agree with the claim by Mr. Bloom that Canada Post, by only specifying vehicle capacity and not rejecting inside vehicle configurations, had expressly or tacitly approved such vehicles. According to counsel Bird, the situation was the opposite since no vehicle considered unfit for deliveries or with inside configurations thought susceptible to cause injury was even approved or even considered by anyone at Canada Post.

[122] He argues that Canada Post could not issue directives on this as it was never informed by the RSMCs that they were experiencing difficulties in effecting deliveries to RMBs because of vehicle configurations.

[123] Mr. Bird submits that the evidence shows that passenger side delivery was mandated by law and that in the RSMC's work description, Canada Post required that the RSMCs provide vehicles suitable for the job at hand.

[124] According to Mr. Bird, it is not the responsibility of Canada Post to specify and approve the interior design of the required delivery vehicles. He asserts that under paragraph 126.(1)(c) of the Code, it is the responsibility of the RSMCs to acquire vehicles that are safe for the tasks that they have to execute.

- [125] It is Mr. Bird's position that even if the Tribunal decides that Canada Post has the overall responsibility to ensure that the RSMCs report to work with a vehicle that is satisfactory for the job, failure to do so will not mean that this meets the definition of "danger" in the Code.
- [126] Mr. Bird further submits that there is no evidence in this case that would establish that any particular motion/movement is hazardous. He contends that the reasoning of the HSO was sound, and furthermore, that the contention that the problematic "ergonomic" movements were a danger is baseless because this does not meet the definition of "danger" as the immediacy element is missing.
- [127] On training, Mr. Bird submits that the Safe Work Procedures developed by Canada Post address that requirement. These procedures outline the safe method of passenger side delivery. While recognizing that the procedures did not mention specific ergonomic movements, he stressed however that no specific movement was identified as being problematic. He further argued that the employees can select the movements needed to work safely, and that it is their responsibility to do so.
- [128] Mr. Bird admits that the Eady and HFN reports state that there are increased risks based on the frequency of delivery and methodology, although neither says that the act of delivering mail to RMBs *per se* constitutes a danger.
- [129] According to Mr. Bird, there is no clear indication that a danger exists in the two ergonomics reports presented to the Tribunal. Both reports indicate that risk increases with repetition. The Eady report offers no threshold at which a hazard could be specifically identified.
- [130] He pointed out that although the HFN report also warns that risk increases with repetition, the report nonetheless advises that caution should be used in applying delivery rates to assess the hazard.
- [131] Mr. Bird argues that the case law establishes that a finding of danger cannot be made when the cause of the problem is the personal underlying condition of an employee such as with L. Friesen and B. Poirier.
- [132] In this, Mr. Bird alludes to L. Friesen's back problem that predates her employment as an RSMC. As well, he refers to the slight body stature of B. Poirier, stating that this condition makes the job more ergonomically challenging for her. This, however, does not mean that the activity is dangerous, although, according to counsel, it may mean that the employee requires accommodation.
- [133] Concerning the "ergonomics" issue, it was the position of counsel Bird that HSO Labby should have determined that any or all of the activities came within the purview of subsection 128.(2) of the Code, thus equating to a normal condition of employment and consequently amounting to a finding of absence of danger.
- [134] Mr. Bird argued that passenger side delivery constitutes a normal condition of employment because:

- RSMCs are required to sort and deliver mail within specified routes outlined in their work description.
- The placement of mail in the Rural Mail Boxes by driving up to it and manually placing the mail in the box is also a normal condition of work.
- Passenger side delivery is a normal condition of employment as it is required by Canada Post policies and delivery routes are designed for this.

[135] Mr. Bird further argued that a normal condition of employment is the normal task, as indicated above, and does not become something other simply because there may be alternative ways of executing said task, such as saying that armoured car delivery is not a normal condition of employment because the customers could pick up the valuables themselves. He went on to suggest that the Federal Court misconstrued this aspect of the case in the *Pollard* decision<sup>10</sup> (paragraphs 96 to 101).

[136] On both issues, Canada Post requests that the appeals be dismissed.

#### **Rebuttal arguments**

[137] In reply to respondent's arguments, Mr. Bloom stated that the conclusion of the Eady report clearly specifies that deliveries by RSMCs from vehicles with floor consoles and without a helper should not be permitted.

[138] Furthermore he argued that the HFN report concluded that there was a high risk of shoulder injuries for RSMCs who followed the Safe Work Procedures developed by Canada Post.

[139] Regarding the contention by Mr. Bird that no specific motions were identified by the RSMCs in relation to the ergonomics issue, Mr. Bloom notes that when testifying, the RSMCs clearly described and demonstrated the movement required to deliver the mail from the passenger side window. He indicated as well that in the Federal Court decision in *Pollard* (*supra*), Justice Dawson stated:

“.. To require an employee to provide a more technical description of the movement said to give rise to a danger would place an onerous burden on an employee, and in my view, frustrate the objective of Part II of the Code.”

[140] Concerning subsection 128.(2) of the Code, Mr. Bloom stated that Canada Post selected the delivery method without even considering alternative delivery methods, possibly including the use of right hand or dual drive vehicles or the use of assistants to deliver the mail safely. He argues that as determined by the *Verville* decision (*supra*), the work method is not an

<sup>10</sup> Canada Post Corporation v. Carolyn Pollard and Attorney General of Canada, 2007 FC 1362

essential characteristic of the job, and therefore does not fall within the meaning of subsection 128.(2) of the Code.

### **The decision of the Federal Court of Appeal in Pollard <sup>11</sup>**

- [141] The Federal Court of Appeal rendered its decision in the appeal from the decision of the Federal Court in the *Pollard* case(supra) on October 13, 2008.
- [142] The *Pollard* case concerned a *decision*<sup>12</sup> rendered by Appeals Officer D. Malanka on July 14, 2006. That decision concerned the refusal by a rural and suburban mail carrier (RSMC) to deliver mail to rural mail boxes (RMBs) on her route.
- [143] She complained that delivering mail through the passenger side window of her vehicle could cause her injury due to the stretching and twisting involved in reaching into the mailbox and afterwards raising the flag.
- [144] The health and safety officer who investigated her refusal to work looked into her ergonomic concerns relative to mail delivery through the passenger side window of her vehicle and decided that a danger did not exist for the RSMC.
- [145] At appeal, the Appeals Officer considered the numerous circumstances connected with RSMC delivery to RMBs, including an ergonomic study conducted by Canada Post Corporation subsequent to the health and safety officer's decision. The Appeals Officer decided that a danger existed for the RSMC with regard to the ergonomic hazards. The Appeals Officer directed Canada Post Corporation to take appropriate and immediate measures to correct the hazard that constituted a danger and, in the meantime, to cease mail delivery carried out by the employee.
- [146] On October 13, 2008, the Federal Court of Appeal dismissed the appeal by Canada Post against the decision by the Federal Court in the aforementioned *Pollard* decision by Appeals Officer D. Malanka dealing with ergonomics in relation to the concepts of "danger" and normal condition of employment". In view of this, the parties were afforded an opportunity to present additional written arguments.

### **Appellants' submissions**

- [147] According to Mr. Bloom, the Court found that the decision of Appeals Officer Malanka, based on the *Verville* decision (supra), was reasonable when he decided that the method of delivery through the passenger side window was not a normal condition of employment.

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<sup>11</sup> Canada Post v. Pollard 2008 FCA 305

<sup>12</sup> Carolyn Pollard and Canada Post Corporation, Canada Appeals Office on Occupational Health and Safety, Decision No. 06-022, July 14 2006

[148] He further stated that the Court endorsed the reasoning of Justice Dawson from the Federal Court that said:

[100] In light of the evidence, it was not, in my view, patently unreasonable for the appeals officer to find that the "danger" was not an essential characteristic of rural mail delivery and therefore paragraph 128(2)*b* of the Code did not apply. The "danger" arose from the methodology of requiring RSMCs to drive on the right hand side of the road, delivering mail through the front passenger-side window without a helper.

[149] Mr. Bloom made reference to the fact that the Court rejected the suggestion that sections 15 and 16 of the *Mail Receptacles Regulations*<sup>13</sup> prescribed the delivery method. He argued that the Court asserted that section 15 only states that the mail may be delivered by means of deposit in rural mail boxes, and that section 16 says where the boxes are to be located that is, on the right hand side of the road according to the couriers line of travel.

[150] Mr. Bloom indicated as well that the Court rejected the arguments by Canada Post that there could be no "danger" because the required movements to deliver the mail were within the control of the employee and therefore no training was required for common sense ergonomic movements. He stated that the Court indicated that Canada Post's own internal study recommended that the employer develop best ergonomic practices for delivering the mail and inform as well the employees about vehicle configurations that would be more ergonomical.

[151] Mr. Bloom maintains that the present work refusals, as in the *Pollard* case (supra), deal with passenger side delivery recognized by Appeals Officer Malanka and the Courts as work methods and consequently not to be considered normal conditions of employment.

#### **Respondent's submissions**

[152] In reply to Mr. Bloom's submissions, Mr. Bird maintained that the *Pollard* case (supra) does not alter the law and the Appeals Officer still has to determine whether the four elements of the definition are met. If they are not, then there can be no finding of danger.

[153] As to the ruling by the Court on the notion of "normal condition of employment", Mr. Bird insists that the Court left the door open by saying that a different decision might be arrived at on different facts. He believes that the Court recognized that different circumstances might lead to a different conclusion and therefore Canada Post states that the complaints before this Tribunal raise just such different circumstances.

[154] On the question of "movements in the control of the employee" Mr. Bird argued that although the Court decided that the decision of Appeals Officer Malanka in *Pollard* (supra) was reasonable, it did not say that it was the

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<sup>13</sup> Enacted under the *Canada Post Corporation Act* (SOR/83-743)

only decision available. He requests that this aspect of the case, the appropriateness of vehicle and the normal conditions of employment, be analyzed in light of the Labour Program's Interpretation and Guidelines.

[155] Mr. Bird argued that although the HRSDC Labour Program Guidelines have no force of law, the fact remains that those guidelines, which were not available at the time of the *Pollard* case, direct the health and safety officer to make a determination of danger or normal condition of employment based upon the facts before the officer and thus, Canada Post simply asks that the Appeals Officer do the same in this case.

[156] In conclusion, Mr. Bird submitted that while the *Pollard* decision (*supra*) may be of assistance in the analysis of the present cases, it does not compel this Appeals Officer to arrive at the same conclusion.

#### **The decision of the Federal Court in *Union of Canadian Correctional Officers*<sup>14</sup>**

[157] On January 5, 2009, I requested additional submissions from both parties regarding the effectiveness of the measures put in place by the employer regarding the reported ergonomics problems. This request was motivated by what Justice O'Keefe stated at paragraph 34 of the *Union of Canadian Correctional Officers* decision (*supra*):

...[It is not sufficient for the appeals officer in assessing whether or not the first part of his "danger" test is met, to simply look at the measures taken by the CSC to reduce the danger. The test requires that the appeals officer not only look at the actions of CSC, but also the success of those actions in eliminating, or controlling the hazard, condition, or activity. ] ...

(My underline)

#### **Appellants' submissions**

[158] Mr. Bloom opined that the said Federal Court decision would be of limited assistance in the present case where there is no decision of danger that would call for action on the part of the employer.

[159] He asserts that the employer took no immediate measure to address the ergonomic hazards once recognized and only put in place the interim measure of providing assistants to the couriers pending determination of the instant case.

[160] Mr. Bloom further argued that the evidence is to the effect that there were no measures in place and that no instructions or directions were given to the RSMCs as to how passenger side delivery could be effected safely using their own, tacitly approved, vehicles.

[161] Regarding the reports from managers and the statistics reported by Mr. Bird to the effect that there were few reported incidents relative to

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<sup>14</sup> *Union of Canadian Correctional Officers and Attorney General of Canada*, 2008 FC 542

ergonomics, Mr. Bloom contended that a lack of complaints is not surprising given the method of delivery utilized by the RSMCs (driver side delivery) and the evidence that suggests a low level of awareness on the part of RSMCs regarding health and safety rights prior to the work refusals.

[162] Mr. Bloom argued that reliance by Canada Post on the interim measure of providing assistants to the RSMCs only supports the conclusion that passenger side delivery poses an ergonomic danger.

### **Respondent's submissions**

[163] Counsel Bird replied that this decision must be looked at in the context of the present case. He stated that under the present circumstances, the HSO found no danger and identified no hazardous situation. Accordingly, Canada Post's response must be considered not only for what it did, but also for what it could have done to address a hazardous situation so as to prevent it from being classified as a "danger". He further replied that it is the principle of the decision that must be examined in light of the facts in the present appeals.

[164] Having regard to the ergonomics issue, Mr. Bird stated that Canada Post has received incident reports only since 2004, when the RSMCs became employees of Canada Post. Since then, nationally, there have been 26 reported ergonomic injuries due to the delivery to RMBs through the passenger side window. In contrast, there were 406 claims of injury under the Manual Material Handling and over-exertion classification – ergonomics related complaints constituting 6.4% of all claims of injury.

[165] According to counsel, Canada Post instituted a national program to address complaints related to ergonomics in February 2006. Whenever an RSMC complains about an ergonomics problem in delivering mail from the passenger side window, an assistant is to be provided as an interim measure.

[166] Furthermore, Mr. Bird asserted as well that alternate delivery methodologies are available to RSMCs to address, reduce or eliminate any potential hazard. The RSMCs could:

- Provide their own assistants.
- Modify their vehicle to reduce the impact of the console, or
- Substitute a more appropriate vehicle for their vehicle.

He commented that in fact, the RSMCs did not even consider any of those options, and in fact testified that the vehicles they used to work were in their own view unsuitable for the mode of delivery required of them.

[167] Counsel pointed out that out of 4,400 RSMCs, only 685 were receiving the help of paid assistants at the time of the hearing.

[168] Mr. Bird contends that had HSO Labby found a potential ergonomic hazard, Canada Post had in place suitable effective mechanisms, which he later clarified as being the "Safe Work Procedures", to deal with the hazard in such a manner that injury would not reasonably be expected to occur "before the hazard could be corrected" within the meaning of the definition of "danger" in the Code.

## Analysis

[169] In order to decide on the ergonomic question, I have to determine whether at the time of the refusals, the appellants were exposed to a danger as that term is defined in subsection 122(1) of the *Canada Labour Code*, Part II (Code).

[170] The Code defines "Danger" as follows:

122.(1) In this Part,  
"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[171] The Federal Court and the Federal Court of Appeal in *Verville* (supra) and *Martin*<sup>16</sup>, determined that to find that a "danger" exists:

1. There has to be a condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the condition or activity is altered.
2. The definition does not require that the "danger" cause an injury every time the condition or activity occurs. The French version, "susceptible de causer" indicates that it must be capable of causing injury at any time but not necessarily every time.
3. It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will

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<sup>16</sup> *Martin v. Canada (Attorney General)* 2003 FC 1158, *Martin v. Canada (Attorney General)*, 2005 FCA 156



occur in the future, not as a mere possibility, but as a reasonable one.

[172] Furthermore, Madame Justice Gauthier, in the Federal Court *Verville* decision(supra), noted that:

Reasonable expectation of injury cannot be based on hypothesis or conjecture, but if a hazard or condition is capable of coming into being or action, then it should be covered by the definition.

There is more than one way to establish that one can reasonably expect a situation to cause injury. It is not necessary to have proof that someone else has been injured in exactly the same circumstances; a reasonable expectation could be based on expert opinions or even the opinion of ordinary witnesses having the necessary experience.

A reasonable expectation of injury could even be established through an inference arising logically or reasonably from known facts.

[173] Consequently, to determine whether a danger existed for the refusing RSMCs, I will have to ask myself whether the movements required to deliver the mail from the driver seat through the passenger side window can reasonably be expected to cause an injury.

[174] I note that Mr. Bird suggested that the RSMCs had not described a single movement that was hazardous to their health and safety. However I shall take into consideration what Madame Justice Dawson said at paragraph 88 of the *Pollard*<sup>17</sup> decision;

“... to require an employee to provide a more technical description of the movement said to give rise to a danger would place an onerous burden on an employee, and in my view, frustrate the objective of Part II of the Code.”

[175] I retain from the testimony of the RSMCs that to deliver mail through the passenger side window, as required by Canada Post's Safe Work Procedures, they have to:

Remove their seat belt, move to the passenger side window, open the window, reach out to open the mail box, take out the outgoing mail, put the outgoing mail in a lettertray on the back seat of the vehicle, recover ingoing mail from the back seat, reach out to place the mail in the mail box, close the cover of the

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<sup>17</sup> Canada Post v. Caroline Pollard 2007 FC 1362

mail box, raise the flag, move back to the driver side, attach their seatbelt, drive on to the next box.

Consequently, I consider that the RSMCs aptly described the movements regarding the issue to be resolved in the present cases.

[176] Since the SWP does not take into consideration any ergonomic element, I based my analysis partly on the opinion of the RSMCs, and partly on the Eady and Human Factor North reports which both assessed the movements required to deliver the mail as per the SWP.

[177] I see no reason to refrain from giving considerable weight to the testimony of the RSMCs. As stated by Madame Justice Gauthier in *Verville* (supra),

[51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts. (my underline)

As such, the RSMCs all had a lengthy experience of the work they do and testified, in my opinion, factually and as to what they experienced.

[178] I also give considerable weight to the two ergonomic assessments as this was the only evidence presented regarding the hazard analysis of the ergonomics question. No contrary evidence was adduced by either party.

[179] It is to be noted that these two assessments were not available to the health and safety officer at the time of his investigation. However, this appeal being *de novo*, I can take them into consideration.

[180] I find that the conclusions of both assessments were clear: Delivering mail from the passenger side window was putting the RSMCs at a very high risk of developing musculoskeletal injuries.

[181] In the ergonomic assessment report done by HFN, I note and retain as well that the majority of ergonomic-related injuries could be categorized as musculoskeletal disorder. "Musculoskeletal disorders" (MSDs) or Injury are defined in the HFN report as: injuries and disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal disk. Examples include carpal tunnel syndrome, rotator cuff tendonitis, and tension neck syndrome. MSDs may occur after hours, days, months or years of exposure. The symptoms of these disorders may appear to have a sudden onset or they can begin slowly and develop over a long period of time.

[182] I retain as well that these are injuries and disorders where exposure to various risk factors present in the workplace may either contribute to the disorder's development or aggravate pre-existing conditions. Furthermore, the HFN report specified that while a number of factors can increase MSD risk, the primary MSD hazards are force, repetition, and fixed or awkward postures.

[183] I note that the report states that MSD issues arise in workplaces in which the demands of the job exceed the capabilities of the person doing the job. The report indicated that jobs are not designed for a variety of workers – they do not take into account what is known about the variation of people's size, strength, endurance etc. and this puts some workers at a greater risk of developing MSDs than others. The report also stated that it was clear that there was a strong link between exposure to certain physical factors/hazards in a workplace and the development of MSDs. Exposure to these physical hazards can cause damage to the muscles, tendons, nerves etc.

[184] I also take into consideration that the assessment revealed other substantial workplace hazardous conditions that may cause musculoskeletal injuries. Those conditions are listed at paragraph 57 above.

**Can the movements required to deliver mail from the driver seat through the passenger side window be reasonably expected to cause injury?**

In light of the evidence presented to me, my analysis of the ergonomics question will focus on the particular circumstances surrounding the task of passenger side delivery. Primarily, I will address the two circumstances that were identified by the Eady and Human Factor North reports as being hazardous to the health and safety of the employees, that is: 1) the interior configuration of the delivery vehicles and 2) the rate/frequency of deliveries.

**The interior configuration of the delivery vehicles:**

[185] I retain from the Eady report that in the case of vehicles with bucket seats and central consoles, this was the worse delivery method as the magnitude of ergonomic risk factors posed an unacceptable safety hazard. The writers of the report advised that they had significant concerns with these types of vehicles at any of the RMB rates due to extreme low back postures. Their conclusion was based on observations that extreme low back postures occur frequently, and that significant upper and lower limb force is required to mount and/or climb over the central console, and it is likely that some operators would be unable to perform this task because of anthropometrics and/or flexibility issues. (my underline)

[186] I retain that the HFN assessment revealed that vehicle design issues such as the large variability in the interior design of the vehicle and delivery height in relation to the RMB added to the risk of MSD. For example, an

RSMC in a low vehicle such as a car with a central console delivering to a high rural mail box faces increased physical demands and added awkward postures compared to other vehicle designs.

- [187] As well, I noted that HFN recommended that RSMCs be provided with a list of recommended vehicle features that would assist in making their job more comfortable, efficient and safe. Finally, their recommendation was that a risk assessment of right hand vehicles be done. Right hand drive vehicles that have been designed for seated mail delivery feature a larger driver window that extends below seated elbow height and allows for improved shoulder position. Other features such as a rack or table system to place the mail in the vehicle as well as alternate seat belt design should also be assessed.
- [188] Regarding this issue, I retain that the HFN report stated that the study findings clearly show that the RSMCs did not currently have the right equipment (vehicle) to effectively and safely perform their primary job function of delivering mail from the vehicle to the RMBs and stated that there was an urgent need to find a solution to the problems.
- [189] I have no reasons to doubt the testimonies of RSMCs that they suffered bruises on their legs and sides because they had to climb over the consoles, and other impediments, after having tried for a short while to deliver mail through the passenger side window as required.
- [190] I retain that the Eady report recommended that Canada Post take steps to identify RSMCs driving cars with central console and cease delivery in situations where the RSMC is delivering alone. The long term recommendation was for the use of other types of vehicles, that is: investigate alternate modes of deliveries that do not require RSMCs to move across their vehicle and reduce exposure to ergonomic risk factors. (my underline)
- [191] Furthermore, I retain that C. McDonnell explained that because they had to deliver mail through the passenger side window, they could no longer have the mail bins beside them on the passenger seat. The mail bins had to be placed on the backseat and the constant twisting required to recover and place the outgoing mail on the back seat in addition to the physical exertion required to climb over the console, and reaching out to recover or put mail in the RMB, was in her mind, a danger to her health.
- [192] During the site viewing, I noted that 5 of the appellants used vehicles with buckets seats or central consoles.
- [193] From my observations of the RSMCs in their vehicles, and taking into consideration the findings of both ergonomic assessments, I am convinced that moving from the driver seat to the passenger side window, especially for vehicles with a central console, requires extremely awkward movements that will most likely result in some type of MSD. As well I find that having to twist and reach to the back seat to handle the mail and then stretch out to

open, hold the cover, and manipulate the mail requires again a multitude of awkward and extreme movements. One has to remember that all this is done hundreds of times a day, 5 days a week, year round.

[194] Therefore, based on the above, I find that the continuous repetition of the extreme and awkward movements required inside the delivery vehicle to manipulate and deliver the mail through the passenger side window can reasonably be expected to cause injury to the RSMCs.

#### **The rates/frequency of deliveries**

[195] On the subject of RMB delivery rates, I retain from the HFN report that dynamic shoulder movements, occurring more frequently than 2.5 times per minute, are considered high risk for the development of musculoskeletal disorders. As well I note that this threshold is further modified, and considered to be very high risk in the presence of a number of factors including, but not limited to extreme posture, long duration of repetitive work, high external force, high static load and/or lack of training. HFN concluded that, taking into consideration a number of possible scenarios, they estimate the acceptable rate of deliveries per hour to vary from 12.5 per hour for the delivery technique of driver out the passenger side window to 50 per hour for an assistant delivering mail through the passenger side window. (my underline)

[196] Testimony of the appellants established that they made deliveries at an average of 63 to 83 times per hour, 3.5 to 4 hours per day, five days a week, year round. Accordingly, they delivered mail at rates that were 5, 6 or 7 times the acceptable rate of deliveries per hour. Both assessments maintained that the rate of delivery had to be much lower than what it was at the time. (my underline)

[197] The recommended safe rate of delivery by HFN is based on what is considered an acceptable rate that is the threshold in excess of which a RSMC would be considered at a high risk for a shoulder injury.

[198] In reading the report, I found that HFN does caution the readers about using delivery rates because of the variety of potential variables affecting the frequency, severity and number of shoulder postures required to complete the task of in-vehicle delivery. Such variables include work practices, distribution or number of RMBs on the route (i.e. clustering and spacing of RMBs along the delivery route). As well vehicle design, RSMC anthropometry, RMB design (including location and maintenance) and seasonal variations should be taken into account.

[199] Nonetheless, I find that the repetitive movements required to deliver the mail from the driver's side seat through the passenger side window at any delivery rate over and above the acceptable rate of 12.5 deliveries per hour can reasonably be expected to cause an injury to the RSMCs.

[200] The potential for musculoskeletal injuries is increased by the rates of deliveries and the interior design of the vehicles, such as bucket seats, central consoles and the presence of other impediments such as gear shifters and emergency brakes. One does not have to be a specialist, but a person that does it every day, to realize that having to cross over a console, gear shifter and brake handle hundreds of times per day within the confines of a vehicle will only result in bruises and most likely some form of MSD.

### **Conclusions**

[201] In view of the significant risk factors in the task of in-vehicle delivery that it found in its assessment, HFN recommended that the repetitive nature of the job be addressed as well as the awkward and, at times, extreme shoulder postures and the tremendous variability in worker, job and workplace factors. In the presence of extreme posture, long duration of repetitive work, the RSMCs are considered to be at a very high risk of suffering MSDs.

[202] I note that MSDs may occur after hours, days, months or years of exposure. The symptoms of these disorders may appear to have a sudden onset or they can begin slowly and develop over a long period of time. Consequently, the evidence is clear that the injuries may not happen immediately upon exposure, but nonetheless the evidence is also clear that those repetitive movements are capable of causing injuries, although, not necessarily every time.

[203] Taking into consideration the fact that ergonomic based injury occurred elsewhere in similar circumstances, I am of the opinion that the risk of being injured in the above described hazardous conditions is not hypothetical or speculative. The evidence indicates that such injuries have occurred elsewhere. As reported by Mr. Bird, 26 instances have been recorded in Canada.

[204] Based on the above, I find that it is reasonable to believe that it is more than likely that the repetitive movements required to deliver mail from the driver position through the passenger side window by the refusing RSMCs, can reasonably be expected to cause musculoskeletal injuries to the RSMCs.

[205] I find that the hazardous condition, caused by a method of delivery that requires excessive, repetitive awkward movements caused by the interior design of the vehicles, along with the repetitive use of incorrect ergonomic movements required to deliver the mail through the passenger side window, is not only capable of occurring, but actually occurs.

[206] Finally, as previously stated, regarding the interior configuration of the delivery vehicles, the evidence clearly shows that deliveries made with vehicles with central consoles and bucket seats at any delivery rate pose an unacceptable safety hazard. The evidence also shows that with respect

to the frequency of deliveries, the refusing RSMC's have to make deliveries at rates that are well over the recommended rates. Each of these two circumstances, taken separately, clearly demonstrates a risk for the health and the safety of the employees. Consequently, there is no doubt in my mind that the frequency of delivery coupled with the interior configuration of the delivery vehicle can reasonably and certainly be expected to cause musculoskeletal injuries to the RSMCs exposed to it.

- [207] Therefore, I find that RSMCs D. Morrison, L. Friesen, B. Poirier, and P. Hamilton, C. McDonnell, G. Chartier and S. Hart were exposed to a danger at the time of the work refusals.
- [208] With regard to the issue raised by Mr. Bird to the effect that employees cannot refuse to work because of a pre-existing medical condition, I find that the Code states at section 122.1 that the purpose of the Code is to prevent accident and injury arising out of, linked with or occurring in the course of employment. Consequently, it is evident that there has to be a relationship between the injury to health and the activity being accomplished in the course of employment. However, while the employer may not be responsible for the consequences of a condition from an injury that occurred before the person became an employee, the employer, in this occurrence Canada Post, has nonetheless the duty under section 124 of the Code, to make sure that the health and safety of the employee is protected, and this I take to mean that the employer has the duty to ensure that the said pre-existing condition is not aggravated by the duties imposed on the said employee. (my underline)
- [209] Regarding the question of the immediacy of the danger raised by Mr. Bird on a few occasions during the hearing as well as in his closing argument, it is to be noted that the immediacy or eminency concept was removed from the Code when it was amended in September 2000. Consequently, the danger does not have to be imminent as the Code now takes into consideration potential hazards or conditions or any current or future activity that could reasonably be expected to cause injury or illness.

#### **Selection of vehicle**

- [210] Regarding the selection of vehicles, it was argued by Mr. Bird that it was not the responsibility of the employer to select the vehicles, I find that while the employees do have a duty under paragraph 126.(1)(c) of the Code to take all reasonable and necessary precautions to ensure their health and safety while at work, the employer cannot delegate or be relieved of its duty under section 124 to ensure the health and safety of its employees, as stated at subsection 126(2) at the Code.
- [211] As well, under paragraph 125.(1)(s) of the legislation, the employer has to ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works.

- [212] To this effect, I find that the Safe Work Procedures address very few potential hazards and do not address any present or potential ergonomic or other hazard with regard to the movements required to deliver the mail through the passenger side window and/or the impediments caused by the interior design of the delivery vehicles.
- [213] Taken as a whole, I take this to mean that an employer is ultimately responsible for the health and safety of its employees and the responsibility cannot be delegated down to the employees. I am of the opinion that if the employer requires an employee to provide his /her own tools to do a job, as in this case RSMCs are required to provide their own vehicle to make the deliveries, then the employer has the duty to make sure that the tool(s) is safe to do the required job, that is, the employer has to make sure that the vehicle used by the RSMCs is mechanically and operationally sound, and that nothing in it, such as the interior design, will create a hazard or condition that may injure the employees. Under the circumstances, I find that it is the duty of Canada Post to provide the employees with the information regarding every known or foreseeable health and safety hazard that may be caused by the interior configuration of the vehicles.
- [214] In this case I find that the employer never informed the employees about the potential ergonomic hazards, although it knew about them, as there had already been multiple work refusals on the same issue in the past. As well the employer, other than giving guidelines for cargo space, never gave guidelines to the employees with regard to the delivery vehicles, that is: type of vehicle, interior configuration and the potential hazards tied in with the various types of vehicles involved as it should have done.
- [215] Regarding the selection of other alternate modes of delivery by the RSMCs, as argued by Mr. Bird, my opinion is the same as above: the employer is not relieved of any of its duties by implying that it is the employee's responsibility to ensure his or her own health and safety.
- [216] I find that the employer provided a "Safe work Procedures" to which the employees have a duty to adhere under paragraph 126(1)(b) of the Code. It is not, in my opinion, up to the employees to develop or modify a safe work procedure but to the employer, who has the responsibility under section 124 of the Code to ensure the health and safety of all its employees, and it has to do so in line with the purpose of the Code, which is to prevent accidents and injuries to health arising out of, linked with or occurring in the course of employment (section 122.1).

### **Is the danger a normal condition of employment?**

Having determined that a danger exists, I now have to determine if the said "danger", is a normal condition of employment, and would therefore preclude the employees from exercising their right to refuse to work in accordance with paragraph 128(2)(b) of the Code.

- [217] Paragraph 128(2)(b) of the Code reads as follows:



128(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(b) the danger referred to in subsection (1) is a normal condition of employment

[218] In 2008, the Federal Court of Canada upheld a decision<sup>18</sup> of this Tribunal regarding the application of paragraph 128(2) b) of the Code. The relevant extract of the Tribunal decision defines the concept of normal condition of employment as follows:

[152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.

[153] Once all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.

[154] For the purpose of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[219] To summarize, a danger that constitutes a normal condition of employment is residual in nature, i.e. it is the danger that remains after the employer has taken all the necessary steps to eliminate or control the hazard, condition, or activity.

[220] It follows that for a danger to be deemed to constitute a normal condition of employment, that danger must be one that cannot be controlled through the protective measures set out under the Code. Such a danger would not justify invoking the right of refusal. An analysis of the evidence should enable me to decide whether the measures taken by the employer to protect the RSMCs minimized the reasonable possibility of injury.

[221] After a careful consideration of all the evidence put before me, I cannot conclude that Canada Post implemented safety measures or developed measures to reduce or control the hazard.

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<sup>18</sup> P&O Ports Inc. & Western Stevedoring Co. Ltd v. International Longshoremen's Union CAO 07- 030 and P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500, 2008 FC 846

[222] I am mindful of the fact that Canada Post provided the refusing RSMCs with assistants and that is clearly within the spirit of the Code. However, counsel for Canada Post specified that this was done on a temporary basis with a view to maintain the level of service and without a recognition that a danger existed. I would like to mention at this point that in *Pollard* (supra), the Federal Court upheld a decision of this tribunal that a danger existed for RSMCs with respect to the ergonomics issue.

[223] Consequently I find that the danger identified above is not a normal condition of employment under paragraph 128(2)(b) of the Code.

### **Decision**

[224] For these reasons, I hereby rescind HSO Labby's decision of absence of danger with respect to the workplaces of Abbotsford and Maple Ridge. I am now directing Canada Post Corporation to immediately take measures to protect the seven above named RSMCs from the danger described above as per the attached directions in Annex I and II of this decision.

### **Traffic Issue**

[225] Even though HSO Labby has decided not to intervene in Maple Ridge with respect to the traffic issue, this matter was raised by the refusing RSMCs in the context of their work refusals. Moreover, both parties adduced evidence and provided me with abundant and detailed submissions on the said matter. Given the HSO's intervention in Maple Ridge and the fact that the RSMCs' refusals to work were related to traffic safety concerns, I will proceed with the examination of the matter, as did my colleague Malanka in *Pollard* (supra).

[226] HSO Labby's decision not to look into the traffic issue because the Code does not apply to roads was incorrect. The Code applies to Canada Post as an employer under federal jurisdiction pursuant to subsection 123(1) of the Code. Furthermore, HSO Labby should have known that under subsection 125(1), the Code applies to every work place controlled by the said 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. In this case the employer controls the activity of delivering mail to RMBs and controls to a certain extent, as explained above, the activity inside the vehicle used to make the delivery.

[227] As a result, the HSO should have exercised his authority and investigated the activity related to the "traffic issue". However, in my role of inquiring into the circumstances of the decision rendered by a health and safety officer under section 146 of the Code, as a Tribunal acting in a *de novo* capacity, I have reviewed all the evidence from both parties for the purpose of rendering an informed decision on the said matter.

[228] Mr. Bird contends that with respect to Abbotsford , the matter of traffic is not properly before this Tribunal for the following reasons:

- There is no mention of traffic safety in any investigation in Abbotsford.
- Abbotsford RSMCs all confirmed that their refusals were only related to ergonomic issues.
- A health and safety officer must address the reasons for the refusals given by the employees and is not entitled to go on a fishing expedition to find other problems.
- In the Abbotsford complaints, there was no evidence that could have led HSO Labby to conclude that the refusals were based upon traffic safety issues.

[229] I agree with Mr. Bird on this point. It is clear that the refusals in the Abbotsford case were directed solely at the ergonomics question.

## **Issues**

On the matter of "traffic", I have to determine:

- 1) whether the refusing RSMCs were exposed to a danger due to the physical locations and conditions of the RMBs.
- 2) If I find that a danger did exist, I then have to determine if this danger constitutes a normal condition of employment, and would therefore preclude the employees from exercising their right to refuse to work.

## **Evidence**

### **Site Viewing**

[230] A site view of the delivery routes was arranged. Both parties took part and upon returning from the viewing, both counsels commented on what was observed.

[231] Mr. Bloom, counsel for the appellants, indicated that as observed, it was very difficult to correctly estimate the distance to the mail boxes so as to drive close enough without hitting said box in order to deliver the mail from the passenger side. The difficulty becomes greater when the box is situated close to a deep ditch and the driver has to drive as close as possible to the box and the edge of the ditch, without really seeing the edge of that ditch.

[232] He noted that on C. McDonnell's route, a number of boxes were situated very close to corners, rendering the sites hazardous, if not dangerous, because of the short line of sight for other vehicles caused by the corner. There were also a number of boxes situated on the edge of ditches where there was insufficient road shoulder to get the vehicle completely off the road, consequently making it very hazardous to stop at those boxes.

- [233] He observed as well, as indicated in C. McDonnell's testimony, that large farm equipment as well as large dump trucks circulated in the area.
- [234] On G. Chartier's route, he pointed out six to ten boxes that were observed to be situated in places where it would be difficult for approaching vehicles to see the RSMC's parked vehicle.
- [235] Mr. Bloom argued that it was clear, even with only this small sampling of delivery routes, that there were hazardous situations that would have been revealed, had the HSO and Canada Post done a better investigation.
- [236] Mr. Bird, counsel for Canada Post, acknowledged that the topography of the area varied a lot and in some cases allowed for a very short line of sight.
- [237] He recognized as well that there was no consistency in the distribution of boxes, the type of boxes, their height or even their design. He noted as well that although most boxes were in good repair, many required upkeep.
- [238] Mr. Bird noted that as observed, the traffic situation was not entirely as reported by the RSMCs. While some farm machinery may have been observed on the road, large vehicles, such as dump trucks, were few. He noted as well that no horses had been observed anywhere on the roads.
- [239] He concluded by saying that I should note that many of the boxes pointed out by Mr. Bloom were no longer in service. This being said, he stated that although many boxes were observed in unusual situations, I should draw no early conclusion and wait for the final arguments before making my mind on whether a danger existed for the RSMCs.

#### **Appellants' evidence**

- [240] All three RSMCs<sup>19</sup> from Maple Ridge confirmed that the Canada Post health and safety officers asked for only a few examples of addresses of what they considered dangerous locations.
- [241] G. Chartier indicated that she has had a few near misses while delivering mail. She recalled at least two incidents. She was once nearly hit by a fire truck in front of the fire hall and on a second occasion, she was nearly hit by a car coming out of a driveway.
- [242] C. McDonnell indicated that in 2000, she provided the Regional Deliveries Services with a six pages list of hazards on her route. Although this was recognized by the Regional Deliveries Services, management did not agree with the concerns raised and not much was done about it.
- [243] The RSMCs testified as well that they did raise the traffic issues with their employer in the past as well as at the time of the refusals, as indicated in

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<sup>19</sup> C. McDonnell, G. Chartier and S. Hart

the HSOs personal notes<sup>20</sup>. Those concerns were: blind hills, blind corners, dump trucks, the presence of children and horses on the road, insufficient road shoulder to pull completely off the road. They expressed concern about getting hit by another vehicle when having to pull back onto the road after the delivery and not be seen because of those blind hills and corners, especially on some high traffic volume roads. Another concern was that they feared being hit by another vehicle while parked on the side of the road and, according to Canada Post Safe Work Procedures, not having a seat belt on.

[244] While testifying, each RSMC went through his or her delivery schedule and indicated addresses that he or she considered dangerous.

[245] The RSMCs confirmed that following the work refusals, Canada Post inspected the delivery roads utilizing the tool developed by NRC and a fair number of RMBs were removed, or moved elsewhere.

[246] G. Bossenberry confirmed that the NJHS Committee eventually endorsed the Traffic Safety Assessment Tool (TSAT), even though they had some reservations about the seasonal variances, which were not included in the analysis.

[247] G. Bossenberry stated that even after having requested detailed information on the assessed routes, Canada Post only provided aggregated information in the form of the numbers of the route assessed, the number of boxes assessed and the number of boxes that failed the assessment. No detailed information was provided, as it should have been. She believes the assessment concerns the health and safety of the employees, and therefore the employees, through their work place committee, should know why boxes failed or passed the assessment or what remedial actions were taken, if any.

[248] Finally, G. Bossenberry commented on the fact that Canada Post never consults or involves the NJHS Committee, nor the work place committee, regarding any disagreement an employee could have relative to assessed boxes. She believes that this is part of a health and safety inspection or investigation and the Committees ought to be involved as required in the Code.

### **Respondent's evidence**

[249] J. Taylor, health and safety officer from Canada Post confirmed that at the time of the refusals, there was a procedure in place to be used by RSMCs to report any problems with RMBs.

[250] Once a problem RMB was reported, she, as a safety officer, discussed the report with the employee to determine the exact problem. If a hazard was identified, she informed the local manager and he met with the owner of the RMB to have the problem fixed and/or, if necessary, have the box relocated

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<sup>20</sup> HSOs personal notes: Doc D-3, pages 51 to 63 of 98.

to a safe location or in a regional or community box. The employee was then informed of what was done.

- [251] As well she was aware that there were concerns with traffic issues such as blind corners, hills, horses.
- [252] J. Taylor explained that during her investigation of the Maple Ridge refusals, she visited some sample sites to inspect the RMBs with regard to issues such as blind corners, leaning RMBs and took pictures of the sampled areas. She submitted her report and the local manager was tasked with dealing with the hazardous RMBs that she found. Sometime afterward, she followed up and inspected approximately 75% of the boxes and found that the problem boxes had been corrected.
- [253] After the refusals, she made sure that all zone managers would hold floor and tail gate meetings with employees to discuss any health and safety issues raised by the employees. They were required to ask employees about problem points of call so that it could be followed up.
- [254] Some time after the refusals, J. Taylor used an evaluation tool developed by the National Research Council of Canada (NRC)<sup>21</sup> to assess the RMBs. Among other things, the assessment consisted in an evaluation of the vehicular traffic by counting the number of cars in a given period as well as taking measurements on the location of the RMBs with regard to the center and shoulder of the road.
- [255] J. Taylor testified that soon afterward, a better evaluation tool was used to assess the RMBs. This tool was developed by ITrans Consulting Inc. and is called the Traffic Safety Assessment Tool (TSAT). A copy of the "Rationale for Safety Assessment Tool"<sup>22</sup> was presented in evidence. I will comment on this further in this decision.
- [256] She confirmed that the tool is now used to assess all rural mail boxes (RMBs) in the country. Priority is given to where complaints occur, and otherwise, all routes will eventually be assessed. As well she indicated that Canada Post now trains all RSMCs on the Safe Work Procedures developed by Canada Post.
- [257] J. Taylor stated that Canada Post's position was that where a RMB fails an assessment, it does not mean that there is a danger, only that the risk is at an unacceptable level.
- [258] She pointed out that recommendations made by the NRC project, such as providing strobe lights for the vehicles as well as road design issues, were acted upon to correct problem areas initially identified.

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<sup>21</sup> NRC/CNRC Review of Rural and Suburban Mail Carriers Operation –Preliminary report (February 1, 2006)

<sup>22</sup> Rational Behind the RMB Traffic Safety Assessment Tool, September 12, 2006. ITrans Consulting Inc.

- [259] J. Fraser, Manager of health and safety for Canada Post, confirmed that the NRC study was replaced in September 2006 by the Traffic Safety Assessment Tool (TSAT). He pointed out that this study was conducted by experts in the traffic control domain and was based on driver behaviour and road design. The tool developed by these experts measures the extent to which the level of risk is acceptable. He stipulated that failure to meet the set criteria meant that the level of risk of an accident was deemed unacceptable by Canada Post and not a danger.
- [260] Mr. Fraser specified that although the NJHS Committee was not involved in the selection of the expert firm, or the development of the assessment tool, they were kept informed. Further to the development of the tool, clarifications were made vis-à-vis concerns expressed by the committee relative to certain aspects of the TSAT tool and it was eventually accepted by the Committee as well as the Union.
- [261] J. Fraser recognized that according to the assessment reports, there was a substantially high number (more than 57%) of boxes that initially failed the assessment. He believes this is because, at the present time, they assess mostly boxes or routes that have been identified as presenting problems. Nonetheless, the intent is to eventually assess all of the 843,000 RMBs across Canada.
- [262] J. Fraser maintained that Canada Post does not have to provide the NJHS Committee with the results of the TSAT assessment of any delivery road. He is of the view that the only obligation under the Code for Canada Post is to provide the result and the status of an investigation. J. Fraser maintained that Canada Post is not required to provide any detail about the findings concerning failed boxes and how and when the problem was resolved.
- [263] He stated that presently, Canada Post informs the work place committee about the results of the assessment and the corrective measures.
- [264] W. Hackett, RSMC supervisor, stated that as part of his duties he regularly inspects delivery routes as well as any particular RMB that is the subject of a complaint by an RSMC. The process is well known to RSMCs and usually the problems deal with broken or leaning boxes. However, these complaints are infrequent.
- [265] W. Hackett stated that once in a while he would receive complaints from RSMCs about boxes being situated near blind corners or hills. On those occasions he would meet with the clients and good common sense would prevail in settling the issue.
- [266] Mr. Hackett acknowledged that whenever he conducts an annual delivery route inspection, he only looks at the amount of work required and the allowable time needed to do it. He will ask the RSMC about any problem areas and discuss it with the RSMC, and with the clients if necessary. He confirmed that while RSMCs have no official time to finish work, they do

however have to be back at the station by 18:00 to meet the 18:30 Vancouver dispatch.

[267] R. Sawatsky remembered one traffic accident where a RSMC was injured while on duty. However, he was not aware of the particulars of the accident, since at that time, it was the responsibility of the contractor to deal with the accident.

### **Traffic Safety Assessment Tool (TSAT)**

[268] A copy of the Traffic Safety Assessment Tool (TSAT) was filed in evidence. This assessment was presented by the employer to explain what they were doing to assess all RMBs as well as what remedial actions are taken to correct situations where the employer believed that based on TSAT assessment, the risk for an accident was unacceptable. This assessment was being conducted by ITrans Consulting which, according to their website, is one of the largest Canadian consulting firm specializing in transportation planning and traffic engineering.

[269] The report indicates that the Panel considered it reasonable that safety could be linked to providing drivers with adequate time and distance to complete tasks. The consultants indicated that drivers were found to be adaptable and as the gaps between successive vehicles becomes smaller, drivers can, for example, accelerate more quickly, or other drivers can slow down to accommodate the merging driver.

[270] They noted however that this was not necessarily the case, that once the available distance or time fell below a threshold, a collision would occur. In fact, they found that drivers tend to increase their efforts as necessary to accommodate the inadequacy of time and distance. However, the likelihood of collision also gradually increases at the same time.

[271] The following was taken from the report entitled "Rationale Behind the RMB Traffic Safety Tool"<sup>23</sup> which, I believe, summarizes well what was considered in the assessment tool and why.

"The Panel considered the driving task requirements that arise due to an RSMC decelerating to stop at a rural mailbox and merge back into traffic. Specific requirements considered where:

- For the RSMC, the time required to merge into traffic from a stopped position, whether on or off the roadway.
- For other drivers encountering a stopped RSMC vehicle, the time required to detect the stopped RSMC vehicle on the roadway and for other drivers to respond appropriately by stopping, or changing lanes and passing the stopped vehicle, potentially in the face of oncoming traffic.

<sup>23</sup> Exhibit D-39, Executive Summary, October 10, 2006



Specific information on the time requirements for a driver to accept a gap into traffic from a stopped position on the side of the road is not available. Therefore, information based on analogous situation was used to provide time requirements for merging. The analogous situation was a right hand turn made from a stopped position. Based on the data, the 85 percentile gap required to turn right was 9 seconds. That is, when a gap of 9 second was available, in 85% of cases drivers would accept it.

An additional requirement to consider is how long the RSMC will have to wait for suitable 9-second gaps. The higher the traffic volume, the longer the time the drivers must wait for a suitable gap. Drivers that have to wait more than 30 seconds begin to take risks by accepting smaller gaps. Therefore, the impact of traffic volume on the availability of 9-second gaps was considered by the Panel by recognizing that RSMCs, who must merge more frequently than the average driver, may take smaller gaps. A wait time of 25 seconds was adopted which equates to a qualitative design measure called a Level of Service (LOS) C, where C is generally an acceptable traffic condition for future planning.

Time requirements were also determined for approaching drivers who must safely respond to a stopped RSMC if the RSMC is partially or fully obstructing the road. On the basis of research into detection and recognition, as well as decision and response initiation, an 11-second time gap requirement was concluded to be a reasonable time gap. This requirement means that if the RSMC vehicle is partially blocking a lane, the approaching vehicle needs to have a decision sight distance equivalent to at least 11 seconds ahead of the rear of the RSMC vehicle. The 11 second allows the driver of the approaching vehicle sufficient time to respond appropriately, whether by stopping behind the RSMC vehicle or moving into the opposing lane and passing.

Time requirements for passing a stopped vehicle were developed using the model for determining passing sight distance requirements for two-lane highways. In conclusion, the time required beyond the stopped RSMC vehicle is 14 seconds, as providing a level of safety similar to that provided by the threshold values for merging (9 seconds) and for an approaching vehicle encountering a stopped vehicle in the lane (11 seconds)."

[272] Further on, it was stated that having determined driver time requirements, the Panel then established what levels of traffic volume would provide the conditions to meet those requirements. These volumes were determined using mathematical equations developed for the purpose of estimating delay and acceptable gaps.

[273] The traffic volumes were established in relation to the number of traffic lanes of the road where the RMBs were situated as well as where the RSMC was in relation to the road. The threshold volumes also incorporated other input parameters such as: time of day (off-peak) and the proportion of heavy vehicles in the traffic mix.

[274] In addition, there was a fairly extensive list of criteria to be used by the assessors in determining the types of road, on or off road locations as well as passing limits on roads. The following table was included in the report:

Scenario	Number of Lanes	Position of RSMC Vehicle at RMB in relation to the road	Wait time for a suitable gap or delay (sec)	Gap acceptance or critical Gap (sec)	Threshold Volume (Vehicles per 15 min off peak period)
1	2	Off	25	9	130 (two way)
2	2	On	25	14	40 (two way)
3	4	Off	25	9	130 (one way)
4	4	On	25	11	80 (one way)

[275] I noted as well the following in the RMB Traffic Assessment Tool document<sup>24</sup>. This has to do with the fact that the location of an RMB "remains" because it has successfully met all the assessment criteria.

"Does the "remain" mean that delivery to that RMB is safe?"

- Driving is an inherent risky task. Each year, there are over 2,500 fatal traffic collisions and 240,000 hospitalizations in Canada due to traffic collisions.
- The traffic count criteria used in the assessment are based on typical time requirements for drivers to perform maneuvers, such as changing lane, merging into traffic or passing a stopped vehicle on the road. When time available is inadequate, drivers may take risk that they would not take under lower volumes. However, even driving in low volume roads has some level of risk.
- "Remain" means that the location of the RMB presents a low risk for potential injury to the delivery employee."

## Arguments of the parties

### Appellants' arguments

[276] Mr. Bloom submitted that the evidence clearly establishes that delivery to certain RMBs on the routes of Sally Hart, G. Chartier and Cindy McDonnell amounted to a danger because of their location and condition, i.e. the absence of shoulders and limited visibility due to hills and curves. He pointed out that that general problem was evident from the onsite observations during the hearing process.

[277] Mr. Bloom maintained that in addition, the Maple Ridge applications of the Traffic Safety Assessment Tool (TSAT) put forward by Canada Post indicate that numerous boxes on these routes failed the TSAT (i.e. are unsafe) and should be modified. He asserted that Canada Post (as indicated in the evidence of Jeff Fraser) refuses to recognize the TSAT

<sup>24</sup> Exhibit D-9, RMB Traffic Assessment Tool, page 10 of 13; dated August 2006

applications as "investigations, studies and inspections" pertaining to the health and safety of employees.

[278] Mr. Bloom affirmed that in all these circumstances, it is appropriate for the Appeals Officer to make a finding of danger and to direct safety assessments in accordance with the Code including a direction to Canada Post to allow the work place committees to participate in the assessment process in accordance with the Code.

[279] Regarding the contention by Canada Post that the applicants did not have the right to refuse because the said danger is a normal condition of employment, Mr. Bloom submitted that this should be rejected for the same reason as in the *Pollard* (supra) decision, that is, the danger was not an essential characteristic of rural mail delivery and therefore paragraph 128(2)(b) of the Code did not apply.

[280] Mr. Bloom submitted that the Appeals Officer should make a finding that the delivery of mail to certain RMBs on the routes of some of the RSMCs constitutes a danger due to the physical location and condition of the RMBs.

#### **Respondent's arguments**

[281] With regard to the safety of specific boxes such as "leaning boxes" and "low shoulders", Mr. Bird argued that there could not be a danger with the specified boxes mentioned during the hearing because all the RMBs were being delivered to prior to the refusals. Furthermore, he submitted that even if this represented a hazard, there is a well known procedure in place for RSMCs to report those boxes which could lead to cutting service to said boxes if the problems with the boxes are not corrected by the client. Consequently, the hazard could be removed before an injury could occur.

[282] Mr. Bird acknowledged that some of the boxes did pose an unacceptable risk with regard to line of sight. However, he asserted that it is not possible to conclude that there is an impending element of risk or injury before a correction can be made. He argued that there is no evidence that a collision ever occurred in the present locations of concern with these cases.

[283] He stated that at the time of the refusals, there was no criteria to determine if a hazard could exist or not. However, he claimed that now with the TSAT tool, the risk can be measured. Mr. Bird asserted that this tool provides the best methodology for assessing relative and acceptable risk. He maintained that this tool is generally accepted by the parties, subject to a few specific issues.

[284] Counsel argued however that failure to pass the TSAT evaluation does not mean that the location of the box is a danger. It merely means that the box may have to be moved to a location that meets that level of hazard that Canada Post considers acceptable, based on the criteria set in the TSAT assessment tool.

- [285] Mr. Bird further argued that nowhere in the document did ITrans say that there was danger to deliver mail to RMBs, even when the RMB doesn't meet the requirements of the assessment.
- [286] Mr. Bird maintained that if the Tribunal finds that it is the act of delivery that constitutes a danger, then no RMB can be serviced. He further argued that if the "danger" only arises in the circumstances described by the appellants, this begs the question as to what it is exactly about those particular circumstances that constitutes the "danger"?
- [287] Mr. Bird argued as well that since there is a specific process in the Code for the involvement of the work place committee, there is no reason for an Appeals Officer to issue a direction with regard to the request from Mr. Bloom of providing the work place committee with the results of the ergonomic assessment.
- [288] Counsel maintained that there is also no need to issue a direction to have the employer take steps to prevent/correct any unsafe conditions, as the Code already specifies a process for any unsafe conditions which may be observed.
- [289] On the last remedy requested by the appellants, Mr. Bird contended that there is no need to order that a detailed traffic safety assessment be made as this has already been done using the TSAT assessment tool. He affirmed that the Code certainly does not contemplate the involvement of Unions in any of these assessments.
- [290] In conclusion, Mr. Bird stated that although HSO Labby erred with respect to the extent of his jurisdiction, he nonetheless arrived at the right conclusion that danger did not exist.
- [291] Consequently, Mr. Bird asked that the appeals be dismissed.

**The decision of the Federal Court in Union of Correctional Officers<sup>25</sup>**  
**Appellants' submissions**

- [292] In reply to Mr. Bird's submission that the measures in place were sufficient to prevent any danger, Mr. Bloom argued that it was evident during the site visit that there were RMBs still situated in locations which had showed that there existed a "danger" before the assessments were made.
- [293] Mr. Bloom further argued that at the time of the refusals, there had been no measures in place to deal with the traffic issue. It is only almost a year later that TSAT became available to evaluate the RMBs.
- [294] Mr. Bloom submitted that even though Canada Post argued that failed locations did not represent a danger, they nonetheless modified locations

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<sup>25</sup> Union of Canadian Correctional Officers v. Canada (Attorney General) 2008 FC 542 Date: April 28, 2008

that had failed the assessments, therefore supporting the conclusion that RMBs that pose an unacceptable risk do amount to a danger.

[295] He indicated as well that a fairly large number of RMB locations in Maple Ridge were modified after the TSAT assessment.

### **Respondent's Submissions**

[296] Mr. Bird indicated that at the last National Joint Occupational Health and Safety Committee meeting, it was noted in the report that the TSAT itself was not at issue, but rather the process associated with it. As well he stated that since the implementation of TSAT in 2006, HRSDC health and safety officers have regularly accepted the results of the TSAT assessments.

[297] Mr. Bird recognized that nationally, there have been five reported accidents in the last five years involving a collision with a RSMC's vehicle while mail was being delivered through the passenger side window. However, none occurred in the Province of B.C.

[298] Mr. Bird contended that given the existence of a mechanism to determine the relative risk of delivery to individual RMBs and that there had been no incident reported in B.C., there was no immediate threat of injury to RSMCs even if a hazardous situation was determined to exist.

[299] Mr. Bird contended that had the HSO found a potential traffic safety hazard regarding delivery to any particular RMB on any of the complainants' route, Canada Post had a suitable effective mechanism in place to deal with the hazard, such that injury would not reasonably be expected to occur "before the hazard could be corrected" within the meaning of the definition of "danger" in the Code.

[300] Mr. Bird asserted that Canada Post had in place procedures to deal with the risks involved in RMB delivery. He affirmed that the facts before this Tribunal indicate the successful implementation of protocols and assessments (TSAT) which have all but eliminated immediate risk.

[301] Mr. Bird stated that at the time of the hearing, the failing rate for assessed RMBs was in the order of 60%, but that the assessments were then being conducted in areas that Canada Post considered to be of higher potential risk. Since then, more than 205,300 RMBs have been assessed with a failing rate of 39%. Of those, service was maintained by relocating the boxes in 80% of the cases.

## Analysis

**Do the circumstances described by the RSMCs present an existing or potential hazard or condition that could reasonably be expected to cause injury before the hazard or condition can be corrected.**

[302] The traffic issue deals with the location of RMBs along an established delivery route where certain RMBs are situated near blind corners, blind hills, ditches, narrow or non existing road shoulders, accounting at the same time for the type, volume and speed of the traffic on the said delivery route. In reviewing the evidence, I find that the RSMCs indicated three types of circumstances, in relation to the said "traffic" issue, where they believed to be exposed to a "danger".

- 1) The presence on the road of children, horses, farm equipment and large trucks.
- 2) The presence of deep ditches and the general condition of repair of the RMBs as well as their location in relation to the ditches or if they were leaning over the ditches.
- 3) Finally, the location of RMBs near blind hills and blind corners in addition to elevated number of vehicles, the speed of traffic as well as the width of the road and road shoulders.

### Circumstance 1

**The presence on the road of children, horses, farm equipment, and large trucks.**

[303] Is the presence of children, horses, farm equipment, and large trucks on the road a danger to RSMCs? While it could be argued that such presence on the road could potentially be the cause of an accident, most likely resulting in injuries to an RSMC involved in such an accident, I find that there is nothing in this that would be under the control of the employer.

[304] The employer has a duty pursuant to the Code to protect the employees where the employer controls the work place and/or the activities of the employees. However, in the present situation, the employer has no control over who, what, where or when someone or something can or cannot be on the road. I fail to find anything in the Code that an HSO or Appeals Officer could direct an employer to do to protect the employees against such potential hazard other than stopping the activity of delivering mail to RMBs. Nothing was adduced in evidence by the appellants to convince me otherwise.

### Circumstance 2

**The presence of deep ditches and the general condition of repair of the RMBs as well as their location in relation to the ditches or if they were leaning over the ditches.**

- [305] Regarding those circumstances outlined by the RSMCs, I have to determine whether the presence of deep ditches and the general condition of repair of the RMBs as well as their location in relation to the ditches present an existing or potential hazard or condition that could reasonably be expected to cause an injury before the hazard or condition is corrected.
- [306] The hazard according to the RSMCs is that they could slide into the ditch and be injured in the process. The reason the RSMCs believed this could happen is that as they drive a left hand drive vehicle, they cannot see how close they are to the RMBs that are situated on the right hand side of the road, in some cases are leaning over the ditch, or are just too close to the deep ditch in which they could slide.
- [307] During the site visit, I viewed some of those circumstances where this could occur. However, I was told by Canada Post that even though those RMBs were still in place, service had been suspended. This was not refuted by the appellants.
- [308] Canada Post presented evidence that they have a procedure in place, one that all RSMCs are familiar with, to report any deficiencies of the sort to their supervisor and clients, and no deliveries are made to the RMBs until the problem is corrected. The responsibility to correct the situation lies with the owner of the RMB. The only thing that Canada Post can do is inform the client of the situation and discuss with him the ways it can be corrected. In the meantime, Canada Post suspends delivery until the situation is corrected.
- [309] In the circumstances described by the RSMCs, I agree that there is a potential for an accident to occur, that is, slide into the ditch, and that the driver is at risk at that time of being injured. However, the driving of the vehicle remains under the control of the RSMC, and it is up to the RSMC to decide how close they can bring their vehicle to the edge of the ditch and drive accordingly. Canada Post's procedure allows for the RSMC to forego delivering the mail to RMBs that do not, in their opinion, appear safe. I find that this comes under the direct control of the RSMCs, that it is the responsibility of the RSMCs to determine how close they can get to a box situated near the edge of a ditch and decide whether to make the delivery or not.
- [310] Consequently, in these circumstances, I find that the RSMCs can avoid the "danger" by adhering to the employer procedure of not delivering the mail to a potentially hazardous location and reporting it to the manager. Therefore the perceived "danger" can be corrected before the accident can happen. As a result, this does not meet the definition of "danger", and in such cases the RSMCs are not exposed to a danger.

[311] In their testimonies, some of the RSMCs stated that they were not comfortable reporting potentially hazardous RMBs, as they did not want to upset their clients. The Code however is clear in these circumstances. Under paragraph 126(1) (c), the employee while at work is to take every reasonable and necessary precaution to ensure his/her health and safety. As well, under paragraph 126(1) (g), the employees are compelled to report to the employer any thing or circumstance in a work place that is likely to be hazardous to their health and safety or that of another employee. Consequently, it is not a question of not pleasing a customer, but a question of their own safety, and they have the duty to protect themselves.

[312] Consequently, I find that under these described circumstances, the RSMCs are not exposed to a "danger" as the accident can be avoided by reporting the hazardous condition before any injury occurs.

### **Circumstance 3**

**The location of RMBs near blind hills and blind corners in addition to elevated number of vehicles, the speed of traffic as well as the width of the road and road shoulders.**

[313] The "Rationale behind the RMB Traffic Assessment Tool" was presented in evidence at the hearing. I find that the tool was developed based on a driver behaviour approach, that is, incorporating safety and the RSMC driver task requirements, as well as safety and the driving task of other drivers who encounter a stopped or merging RSMC vehicle, for the roads on which the RSMCs operate. As well, I found that relevant legal restrictions were included in the Assessment tool.

[314] As indicated at the beginning of this decision, the *de novo* nature of the process allows the Tribunal to receive and take into consideration all the evidence that the parties can present to the Tribunal, whether or not it was considered or available to the HSO at the time of his or her investigation. Consequently, in deciding whether the RSMCs were exposed to a danger, I give considerable weight to the TSAT document. This is particularly the case here since the appellants put forth no argument against the TSAT, other than the fact that the tool in question does not take into consideration seasonal changes. This will be taken into consideration later on in this decision.

[315] Taking all of the above into consideration, this knowledge can now be applied to answering the original question, which was:

Do the circumstances described by the RSMCs present an existing or potential hazard or condition that could reasonably be expected to cause injury before the hazard or condition is corrected?

[316] I retain from the TSAT document that for a location to pass the assessment, there had to be acceptable time requirements for a vehicle driver to react to the other vehicles' position and/or action. This is required



because, based on driver behaviour, there needs to be adequate time for a person to react when faced with another vehicle that is merging back into traffic or, when coming up suddenly on a stopped vehicle that is partially blocking the roadway. This time is required for the driver to decide if he is going to stop, or avoid the vehicle by passing it on the left. This decision needs to be taken while accounting for the stopped or merging vehicle, oncoming traffic, speed of travel, speed of other vehicles and number of vehicles on the road.

- [317] As well, the RSMC sitting in his vehicle needs to have an adequate time gap to decide to merge back into traffic, and it was found that there are limits as to how long a person will wait for an adequate time "space" to merge back. Passed that time, the person takes shorter and shorter intervals to make a move to merge back into traffic.
- [318] Based on my reading of the TSAT document, I find it logical to need a time gap to react to any conditions. I believe that some people may react more quickly than others, but I find that ITrans selected time gaps based on the average reactions of multiple drivers.
- [319] At the present time, the evidence shows that the time gaps established by ITrans, as well as the other criteria used to assess a location, are reasonable, in my opinion, to assess the locations of RMBs and make sure that the risk of collision is mitigated to a minimum. When a location passes the assessment, the risk of collision under the above described circumstances is consequently reduced to an acceptable level. I understand however, that the risk of collision is not totally eliminated.
- [320] In reading the document, I understand that for an RMB to be declared safe, all criteria of the assessment have to be met. If one of the criteria is not met, then the location of the RMB has to be modified. Consequently, the RMB has to either be moved to a safer location down the road, or it may mean the elimination of that location altogether.
- [321] Accordingly, locations that do not pass the TSAT assessment are moved to a location that passes the TSAT assessment.
- [322] Consequently, based on the above, I find that the RSMCs are always exposed to the risk of a collision under the described circumstances, which is not potential or future, but present at different levels based on the specific locations of the RMBs. On this, even though Mr. Bird argued that delivery had been stopped at those locations, I noted during the site visit that there existed places where RMBs were located in blind spots near hills and corners, and that in certain places the width of the road prevented the RSMC being completely off the travelled portion of the road.
- [323] The condition created by delivering mail to RMBs in such described circumstances, such as blind spots, narrow road shoulder and speed of traffic, constitutes in such a case exposure to a collision with another vehicle before the condition can be altered.

[324] Collision is defined in the dictionary<sup>26</sup> as being "a violent impact of a moving body, especially a vehicle, with another or with a fixed object". I find it more than likely that a person involved in a collision, "a violent impact" between two vehicles, will be injured in the process. Based on the said circumstances the collision will likely occur because there will not be sufficient time or space to avoid the collision, therefore the condition cannot be altered before injury occurs.

[325] I agree that injuries may not be sustained every time a collision occurs, as recognized by Justice Gauthier in the *Verville* decision (*supra*). However, the collision does not have to cause an injury every time the person is exposed to the danger. It must only be capable of causing injury. As indicated above, I find that it is reasonable to expect that a vehicle collision will cause an injury to any person involved in it.

[326] Mr. Bird confirmed that in the four years that Canada Post has been keeping statistics, 5 accidents have occurred while mail was being delivered to RMBs, although none occurred in B.C., and near misses were reported in testimony by some of the RSMCs. As well the TSAT document indicated that each year, there are over 2,500 fatalities and 240,000 hospitalizations in Canada due to traffic collisions. Following this, I find that it is neither hypothetical nor speculative to say that there is a reasonable possibility that collisions can happen under those circumstances before the drivers can correct the situation.

[327] Based on the above, I am of the opinion, that under the described circumstances, as they existed at the time of the work refusals, it is logical and reasonable to conclude that the RSMCs are more than likely to be involved in a collision at any time while delivering mail to RMBs situated in those places described by the RSMCs.

[328] Nonetheless, based on the number of accidents that Canada Post recorded, it is evident that the frequency of accident is low. On this, Justice Gauthier in *Verville (supra)*<sup>27</sup>, stated:

...the risk of assault is of low frequency but high severity... and

...if those assaults could reasonably be expected to cause injury, they will come within the definition of danger. However, if that danger constitutes a normal condition of his employment, the employee will not have the right to refuse to work.

[329] Consequently, within the context of this case, even though the risk of a collision may be low, it is nonetheless always present. I find that it is reasonable to conclude that in a collision between two vehicles, the consequences may be high in severity, and that it is reasonable to expect that the persons inside the vehicle will suffer injuries.

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<sup>26</sup> Canadian Oxford Dictionary, Second Edition, 2004

<sup>27</sup> *Verville*- paragraphe 42, 43

- [330] Delivery at the said locations does not mean that a collision would occur every time a delivery is made, or even that injuries would be sustained every time a collision occurs, but because of those circumstances, it is highly susceptible of happening in the future.
- [331] In conclusion, based on the above, I find that at the time of the refusals, the refusing RSMCs from Maple Ridge were, under the described conditions, exposed to a danger as it is defined in Part II of the Code.
- [332] My analysis deals with the hazardous conditions created by the location of certain RMBs, and does not identify the specific locations where the hazardous conditions are believed to be encountered by the RSMCs. Unfortunately, the employer's investigation did not identify all the locations, as only a sample of locations was requested from the employees.
- [333] Taking this into account and as previously indicated, because the right to refuse deals with, among other things, **a condition** that exists in **a place**, the refusal has to be specific enough to identify the specific hazardous condition and the specific place where the employee has reasonable cause to believe that a danger exists. (my emphasis)
- [334] Nonetheless, during their testimony, the RSMCs identified the potential hazardous locations as they went through their delivery routes. I do not believe that it is necessary to identify those precise locations at this time as those delivery routes have now been assessed with the TSAT, and the hazardous locations have either been eliminated or moved elsewhere to a safer place. As an indication of this, Mr. Bloom in his final arguments noted that there were no assessment criteria to determine danger at the time of the refusals and that those criteria came out at a later date in the NRC document. Since then, he commented to the effect that a large number of RMBs had required modifications after having been assessed utilizing the TSAT.

### **Is the "Danger" a normal condition of employment?**

- [335] Having determined that a danger exists for the refusing RSMCs at Maple Ridge in regards to the third circumstance, I now have to determine whether the said "**danger**" constitutes a normal condition of employment, and would therefore preclude the employees from exercising their right to refuse to work.
- [336] To conclude that a danger is a normal condition of employment, one has to be convinced that the danger is one that cannot be controlled and for which no direction can be issued under the Code to protect the employees any further. As I have already explained earlier in this decision, I am of the opinion that the employer must have met all of his duties regarding the control or elimination of the said "danger" before being able to finally determine if subsection 128(2) applies.

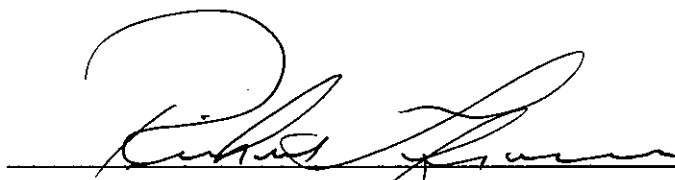
- [337] I have commented on the exception created by paragraph 128.(2)(b) and explained the test used by the Tribunal in an analysis of normal condition of employment. Please refer to paragraphs 218 to 220.
- [338] At the time of the refusals, the evidence is that the employer had done nothing to identify the hazards connected with the traffic issue in Maple Ridge, let alone eliminate or mitigate the "danger".
- [339] Therefore under the described circumstances, at the time of the work refusals, Canada Post had not met all of its duties regarding the control or elimination of the said "danger". Consequently, I find that the exception under 128(2)(b) did not apply and that the danger was not a normal condition of employment.
- [340] Normally, in deciding that a danger exists at the time of the refusal(s) and that the said danger does not constitute a normal condition of employment, I ought to issue a direction to the employer to protect the RSMCs against the said danger.
- [341] However, since the refusals, as indicated by Mr. Taylor, Canada Post has assessed most RMBs that were the subject of work refusals, including those in Maple Ridge and apparently corrected the condition of the locations that failed the assessment. I note as well that although the appellants indicated that some RMBs were still present on some of the problematic locations, there has been no delivery service at those boxes.
- [342] Although I had requested submissions from the parties on the effectiveness of the measures put in place by the employer regarding the reported problems with certain RMBs, as well as with the success of the TSAT assessment tool, Mr. Bloom argued that evidence showed that danger existed at the time of the work refusals and yet, he also indicated that a substantial amount of RMB locations had now been modified after the controversial locations were assessed with TSAT more than a year later.
- [343] In view of this, I can only conclude that the employer has, at the present time, met its obligations and identified the potential danger locations, corrected those locations accordingly and reduced the danger to a minimum.
- [344] Since the employer has now, to the extent reasonably practicable, implemented measures to minimize the danger, any residual danger that may remain, as explained above, becomes a normal condition of employment.
- [345] However, as indicated in the *P&O Ports* decision (*supra*), should any change be incurred by this normal employment condition, a new analysis of that change must take place in conjunction with the normality of working conditions. In this case this would encompass the seasonal changes, where the amount and type of traffic may change, or where something such as an overgrown bush, or a snow bank, blocks the line of sight, therefore

decreasing the established time gaps necessary to safely merge or park on the road. If any of the assessed conditions change, then the "danger" condition is back.

### Decision

[346] Based on the above, I find that at the time of the work refusals, the RSMCs were exposed to a danger, as defined by the Code, due to the hazardous conditions created by the location of certain RMBs.

[347] However, as the employer has implemented the TSAT measure to mitigate the danger to a minimum, I consider that any remaining danger becomes a normal condition of employment and the employees are therefore precluded from exercising their right to refuse to work as stated at paragraph 128(2)(b) of the Code.



Richard Lafrance  
Appeals Officer



**IN THE MATTER OF THE CANADA LABOUR CODE  
PART II – OCCUPATIONAL HEALTH AND SAFETY**

**DIRECTION TO THE EMPLOYER PURSUANT TO PARAGRAPHS 145(2)(a)  
and (b)**

On January 19, 2006, health and safety officer Lance Labby conducted an investigation into the refusal to work of rural and suburban mail carriers (RSMC) D. Morrison, L. Friesen, B. Poirier and P. Hamilton, who had to deliver mail to rural mail boxes (RMB) on different rural roadways in Abbotsford, British Columbia. The said RSMCs were employed by Canada Post Corporation (CPC), an employer subject to the *Canada Labour Code*, Part II, doing business at 34377 Marshall Road, Abbotsford, British Columbia, V2S 6Y3, the said business known as Canada Post Mail Processing Plant.

The four RSMCs appealed under subsection 129.(7) of the *Canada Labour Code*, Part II, the decision of absence of danger made by health and safety officer Labby following his investigation.

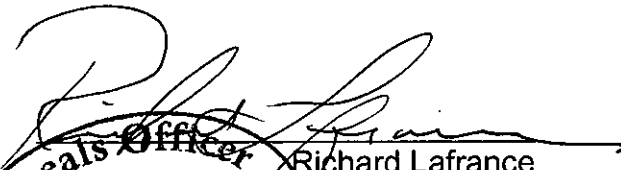
Following my inquiry into the circumstances of that decision, I find that in-vehicle mail delivery to RMBs from the driver side position through the passenger front side window in the circumstances in place at the time of the work refusals constituted a danger for RSMCs D. Morrison, L. Friesen, B. Poirier and P. Hamilton.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take appropriate and immediate measures to correct the hazards or conditions, or alter the activity that constitute the danger and to protect these employees from the said danger.

Furthermore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to cease in-vehicle RMB delivery activity as carried out by G. Morrison, L. Friesen, B. Poirier and P. Hamilton at the time of the work refusals until such time as you have complied with the present direction, which does not prevent you from taking all measures necessary for the implementation of this direction.

Ottawa, September 3, 2009

Canada Post Corporation  
34377 Marshall Road  
Abbotsford, British Columbia  
V2S 6Y3

  
Appeals Officer  
OHSTC 04-005  
TSSTC  
Agent d'appel  
Richard Lafrance  
Appeals Officer

**IN THE MATTER OF THE CANADA LABOUR CODE  
PART II – OCCUPATIONAL HEALTH AND SAFETY**

**DIRECTION TO THE EMPLOYER PURSUANT TO PARAGRAPHS 145(2)(a)  
and (b)**

On January 31, 2006, health and safety officer Lance Labby conducted an investigation into the refusal to work of rural and suburban mail carriers (RSMC) C. McDonnell, G. Chartier and S. Hart, who had to deliver mail to rural mail boxes (RMB) on different rural roadways in Maple Ridge, British Columbia. The said RSMCs were employed by Canada Post Corporation (CPC), an employer subject to the *Canada Labour Code*, Part II, doing business at 20800 Lougheed Highway, Maple Ridge, British Columbia, V2X 2R0, the said business known as Canada Post Mail Processing Plant,.


The three RSMCs appealed under subsection 129(7) of the *Canada Labour Code*, Part II, the decision of absence of danger made by health and safety officer Labby following his investigation.

Following my inquiry into the circumstances of that decision, I find that in-vehicle mail delivery to RMBs from the driver side position through the passenger front side window in the circumstances in place at the time of the work refusals constituted a danger for RSMCs C. McDonnell, G. Chartier and S. Hart.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take appropriate and immediate measures to correct the hazards or conditions or alter the activity that constitute a danger and to protect these employees from the said danger.

Furthermore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to cease in-vehicle RMB delivery activity as carried out by C. McDonnell, G. Chartier and S. Hart at the time of the work refusals until such time as you have complied with the present direction, which does not prevent you from taking all measures necessary for the implementation of this direction.

Ottawa, September 3, 2009

  
Richard Lafrance  
Appeals Officer



To: Canada Post Corporation  
20800 Lougheed Highway  
Maple Ridge, British Columbia  
V2X 2R0

## Jurisprudence

### Appellant

1. *Carolyn Pollard and Canada Post Corporation*, Canada Appeals Office on Occupational Health and Safety, Decision No. 06-022, July 14, 2006
2. *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940, 2004 FC 767, Docket T-1207-02, May 26, 2004
3. *Martin v. Canada (Attorney General)* (F.C.A.), [2005] 4 F.C.R. 637, 2005 F.C.J. No. 752, 2005 FCA 156, No. A-491-03, May 6, 2005
4. *Lever and Treasury Board (Health and Welfare Canada)*, [1988] C.P.S.S.R.B. No.350, (1988) 14 PSSRB Decisions 11 (Digest), PSSRB File No. 165-2-58, December 8, 1988
5. *Doell and Canada (Correctional Service)*, [2004] C.L.C.A.O.D. No. 15, Decision No. 04-014, March 19, 2004
6. *Dawson and Canada Post Corp.*, [2002] C.L.C.A.O.D. No.22, Decision No.02-023, October 23, 2002
7. *Raymond Tremblay*, 79 di 1, CLRB Decision No. 764, Board File 950-125, November 30, 1989
8. *Leclair and Canada (Correctional Services)*, [2001] C.L.C.A.O.D. No. 25, Decision No. 01-024, November 19, 2001
9. *Welbourne and Canadian Pacific Railway Co.*, [2001] C.L.C.A.O.D. No. 9, Decision No. 01-008, March 22, 2001

### Respondent

1. *Martin v. Canada (Attorney General)* (F.C.), [2004] 1 F.C.R. 625 (T.D.).
2. *Martin v. Canada (Attorney General)*, [2005] F.C.J. No. 752 (C.A.).
3. *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940.
4. *Robitaille and VIA Rail Ltd.*, [2005] C.L.C.A.O.D. No. 54.
5. *Canadian National Railway Co and Tetley*, [2001] C.L.C.A.O.D. No. 21.
6. *Carolyn Pollard and Canada Post Corporation*, (Malanka), Decision No. 06-022 (July 14, 2006).
7. *Canada Post Corporation v. Carolyn Pollard and Attorney General of Canada*, 2007 FC 1362.
8. *United Electrical, Radio and Machine Workers of Canada (Re)*, [1987] O.O.H.S.A.D. No. 11.

### Supplemental

- *Canada Post Corporation v. Carolyn Pollard* 2008, FCA 305



- *Dunsmuir v. New Brunswick* (Supreme Court of Canada) , 1 R.C.S. 190, 2008 SCC 9
- *P&O Ports Inc. & Western Stevedoring Co. Ltd. and International Longshoremen's and Warehousemen's Union, Local 500*, CAO-07-030, August 31, 2007
- *P & O Ports Inc. and Western Stevedoring Co. Ltd. And International Longshoremen's and Warehousemen's Union, Local 500*, 2008 F.C. 846
- *Union of Canadian Correctional Officers and Attorney General of Canada*, 2008 F.C. 542