Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-04

Preliminary decision
Decision No.: OHSTC-08-029 (I)

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Canada Post Corporation
appellant

and

Doreen J. Radcliffe
respondent

and

Canadian Union of Postal Workers
applicant for authorization to take part in the hearing of the appeal

November 5, 2008

For the appellant
Stephen Bird, Counsel

For the respondent
Heather D. Neun, Counsel

For the applicant
Heather D. Neun, Counsel

[1] On February 21, 2008, Stephen Bird, counsel for Canada Post Corporation (Canada Post), filed an appeal, pursuant to subsection 146(1) of the *Canada Labour Code, Part II* (*Code*), against a direction issued on January 28, 2008, by health and safety officer (HSO) Betty Ryan. Mr. Bird maintained that one of the two persons affected by the said direction – in this instance a rural and suburban mail carrier (RSMC) helper, a non-unionised employee, Doreen (Jan) Radcliffe – was not an employee of Canada Post within the meaning of the *Code*.

[2] During preparatory steps to arrange for proceeding to hear this appeal, S. Bird raised an issue relative to the style of cause formulated by the Tribunal[2] to identify this case. The said style of cause read: "Canada Post Corporation v. Canadian Union of Postal Workers".

[3] As a result, the style of cause was modified to read: "Canada Post Corporation v. Doreen Radcliffe".

[4] Following this modification, the Canadian Union of Postal Workers (CUPW) filed an application in relation to its standing in the present appeal.

[5] This decision deals with CUPW's application for authorization to take part in the hearing of this appeal.

The facts

[6] On November 15, 2007, while working as an RSMC helper, D. Radcliffe was injured at the Canada Post depot in Parksville, British Colombia (BC), after being struck by a cart. At the time of the accident, Eric Christopher Adams, an RSMC and a member of CUPW, came to the assistance of D. Radcliffe in seeking to remove the cart that was on top of her. On that occasion, Mr. Adams was also injured.

[7] On December 3, 2007, HSO Marlene Yemchuk initiated an investigation into the aforementioned accident. The investigation revealed the following:

- the hazardous occurrence that resulted in a disabling injury to both D. Radcliffe and E. C. Adams had not been reported by Canada Post to a health and safety officer;
- the health and safety representative for the work site had not been involved in any employer hazardous occurrence investigation concerning the said hazardous occurrence;

[2] Occupational Health and Safety Tribunal Canada

- no hazardous occurrence investigation report for both D. Radcliffe and E. C. Adams accidents had been submitted by Canada Post to a health and safety officer.

[8] On December 4, 2007, Andrew Johnston, safety officer with Canada Post, Pacific Division, told HSO Yemchuk that RSMC helpers were not considered employees of Canada Post. Therefore, D. Radcliffe not being a Canada Post employee, Canada Post was not bound by the requirements of the *Code* relative to reporting and submitting an investigation report to a health and safety officer concerning D. Radcliffe's accident.

[9] Because of the complexity of the aforementioned specific issue, the matter was referred to HSO Betty Ryan on December 7, 2007.

[10] Upon completion of an analysis concerning D. Radcliffe's employer/employee relationship with Canada Post, HSO Ryan concluded that RSMC helper D. Radcliffe was an employee of Canada Post for the purposes of the *Code*. Consequently, she requested Canada Post safety officer A. Johnston (Pacific region) to conduct an investigation into D. Radcliffe's accident on behalf of Canada Post. She also requested that a copy of the required investigation report of that accident be sent to her.

[11] Despite several e-mails sent to Dale Versfelt, Regional Manager, Occupational Health, Safety and Environment, Pacific Division, Canada Post, HSO Ryan received no response to her two aforementioned requests.

[12] As a result, on January 28, 2008, she issued a direction to Canada Post under subsection 145(1) of the *Code* , advising them that she was of the opinion that paragraph 125(1)(*c*) of the *Code* and paragraphs 15.5(*c*), 15.8(1)(*a*), 15.8(2)(*b*) of the *Canada Occupational Health and Safety Regulations* (*COHSR*), derived from that provision, had been contravened and ordered that Canada Post terminate these violations no later than February 8, 2008.

[13] HSO Ryan's direction reads in part as follows:

> [...]
> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> No. 1
> Paragraph 125(1)(*c*) Canada Labour Code Part II, and paragraph 15.5(*c*) – Canada Occupational Health and Safety Regulations
>
> The employer failed to report within 24 hours the hazardous occurrence

that resulted in a disabling injury to two employees. This accident occurred on November 16, 2007 to Rural and Suburban Mail Carrier (RSMC) Eric Christopher, and RSMC helper Doreen (Jan) Radcliffe at Parksville, BC.

No. 2
Paragraph 125(1)(*c*) Canada Labour Code Part II, and paragraph 15.8(1)(*a*) – Canada Occupational Health and Safety Regulations

Canada Post Corporation did not complete a Hazardous Occurrence Investigation Report, or other form containing the required information regarding Ms. Radcliffe's accident on November 16, 2007.

No. 3
Paragraph 125(1)(*c*) Canada Labour Code Part II, and paragraph 15.8(2)(*b*) – Canada Occupational Health and Safety Regulations

The employer failed to submit a complete hazardous occurrence investigation report for Ms. Radcliffe's accident on November 16, 2007, within 14 days of the occurrence.

The Rural and Suburban Mail Carrier (RSMC) helpers are employees for the purposes of the *Canada Labour Code*, Part II and the hazardous occurrence reporting and investigating requirements apply.
[...]

Applicant and respondent's submissions

[14] In her submission, Heather D. Neun, counsel for CUPW, pointed out that there are two conditions that have to be met for an applicant to be granted standing in the appeal proceeding.

[15] These two conditions are specified under paragraph 146.2(*g*) of the *Code* as follows:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may:
> [...]
> (*g*) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion, has substantially the same interest as one of the parties and could be affected by the decision.
> [underline added]

[16] H. D. Neun, who is also counsel for D. Radcliffe, stated that D. Radcliffe has a dual interest in the present instance, which is to ensure that:

- the causes of her accident are investigated on the basis of the reporting and investigation requirements under the *Code* and its regulations;

- in future instances, Canada Post comply with these requirements whether accidents or hazardous occurrences involve replacement RSMCs, regardless of whether the individual directly affected is a union member or employee under the *Code*.

H. D. Neun indicated that she would argue not only that D. Radcliffe is an employee for the purposes of the *Code* but also that the status of "employee" under the *Code* is not necessary to trigger the application of the *Code* requirements in relation to an employer.

[17] H. D. Neun, on behalf of CUPW, stated that CUPW has substantially the same second interest as that of D. Radcliffe because CUPW seeks in this instance to ensure that all accidents involving RSMC replacements and helpers that occur in Canada Post work places be investigated to ensure the protection of all workers, including CUPW members who work in these work places.

[18] She added that the protection and advancement of health and safety at the Canada Post work sites through reporting, investigation and implementation of corrective measures is at the heart of CUPW's core interests and it would be affected by any decision that limits the employer's obligations in that respect. In that sense, in H. D. Neun's opinion, the decision that will be rendered in the present case could potentially affect CUPW members, a matter which is of direct concern to CUPW.

[19] H. D. Neun also stated that the fact that she is counsel for both D. Radcliffe and CUPW is not an abuse of process nor does it raise logistical concerns. She added that, as the interests of D. Radcliffe and CUPW are substantially similar but not identical, their submissions will be different and the fact that she is counsel for both D. Radcliffe and CUPW guarantees that there will be no replication of their submissions.

Appelant's submissions

[20] S. Bird, on behalf of Canada Post, argued that even if an applicant for standing has a similar interest and can potentially be affected by the decision, the granting of standing is still discretionary for the appeals officer. As a result, he contended that in determining whether CUPW should be granted standing in this proceeding, I must take into consideration the common law test for public interest standing established by the Supreme Court of Canada in *Finlay v. Canada (Ministry of Finance)*[3].

[3] *Finlay v. Canada (Ministry of Finance)*, [1986] 2 SCR 607

[21] The Supreme Court in *Finlay* determined that the three criteria for the discretionary recognition of public interest standing are:

- whether the action raises justiciable issues;
- whether the issues are serious ones and the applicant has a genuine interest in them;
- if standing were denied, there would be no other way in which the issues could be brought before a court.

[22] S. Bird stated that with this appeal, Canada Post does not question its obligations under the *Code* in respect of any of its employees, but rather that D. Radcliffe is not an employee of Canada Post that would trigger these obligations. For that reason, he alleged that the only issue in this appeal is whether Canada Post had a duty to report an injury to a non-employed with Canada Post to a health and safety officer. He subsequently argued that other issues such as whether a report is made in respect of non-employees or in maintaining safe work places for not only CUPW members but also replacements and helpers cannot be issues for D. Radcliffe in this appeal. As a result, in counsel Bird's opinion, the issue raised by CUPW is not the subject matter of the present appeal and consequently, is not a judiciable issue.

[23] Bearing in mind that D. Radcliffe is not a CUPW member and the limited scope of the case, S. Bird also argued that CUPW cannot claim an interest in the outcome of the decision in terms of how similar accidents to union members will be investigated and how corrective measures will be implemented. Therefore, the decision in this proceeding cannot, in the latter's opinion, directly or indirectly impact or affect CUPW members.

[24] In addition, S. Bird stated that RSMCs are required to provide their own "replacement" when unable to perform deliveries themselves. He also pointed out that article 14.02 of the CUPW / Canada Post collective agreement states that the person who covers such an absence "shall not be considered an employee of the Corporation while performing such work" and that CUPW has contractually agreed that replacement workers are not employees for the purposes of CUPW's representation rights.

[25] S. Bird also indicated that, under Part I of the *Canada Labour Code*, the Canadian Industrial Relations Board has consistently held, in the case *PCL, Constructors Northern Inc.*[4], that it has the sole authority to determine the scope of the appropriate bargaining units and that it is not bound by the parties' agreement that may vary the bargaining unit whether through collective bargaining or otherwise. Consequently, an

[4] *PCL, Constructors Northern Inc*, [2004] CIRBD

appeals officer does not have the authority to determine whether the replacement workers are members of the bargaining unit under the collective agreement for the purposes of Part I of the *Canada Labour Code*.

[26] Based on what precedes, S. Bird argued that a finding that D. Radcliffe is an employee for the purposes of Part II of the *Code* would not give CUPW representation rights or any material interest in D. Radcliffe's health and safety status, other than as a concerned outsider and consequently, CUPW has raised no genuine issue forming part of the present appeal or that would directly affect them as a representative of a different class of employees.

[27] Because D. Radcliffe has been determined to be a Canada Post employee by HSO Ryan, as the directly aggrieved individual, in the opinion of S. Bird, she is the only appropriate person to participate in the appeal process and the only one who will be required to reasonably and effectively address her interests in this forum.

[28] S. Bird added that the addition of CUPW as a party in this matter would only serve to duplicate D. Radcliffe's submissions with respect to the reporting of the accident and would complicate the proceeding by pursuing CUPW's own unrelated interest to enlarge its bargaining unit coverage without making the proper application to the CIRB to arrive at that result.

[29] S. Bird added that, in the event I conclude that CUPW has a similar and material interest in this case, I should exercise my discretion to nonetheless refuse to grant standing for the following reason.

[30] Because both D. Radcliffe and CUPW are represented by the same counsel, this means that CUPW will be involved anyway in the carriage of the appeal and that any issue that CUPW would like to add can be addressed by H.D. Neun on behalf of D. Radcliffe.

[31] S. Bird added that because I have given D. Radcliffe an opportunity to respond to CUPW's submissions, given that this reply will be written by H.D. Neun who is also the counsel for CUPW, the receipt and consideration of her submission would constitute, in his opinion, an abuse of process.

Analysis and decision

[32] Counsel for Canada Post has objected to CUPW being added as a party to the proceeding essentially on the basis that CUPW raised neither justiciable or serious issues nor did it establish a genuine interest in those, thereby not meeting the main common law test for public interest standing

established by the Supreme Court of Canada in *Finlay*, *supra*. S. Bird argued that the issue in this appeal is to determine whether D. Radcliffe is an employee of Canada Post that would trigger the employer's duties pursuant to the *Code* and that this issue involved only D. Radcliffe, a non CUPW member. For these reasons, the two issues raised by H. D. Neun – the first one, put forth on behalf of D. Radcliffe, to ensure in future instances that Canada Post will investigate all accidents or hazardous occurrences involving replacement RSMCs, either because replacements are Canada Post employees or regardless of their status, the second one, put forth on behalf of CUPW, to ensure that all accidents involving RSMC helpers or replacements would be investigated in the future for the protection of all workers, including CUPW members, present in the work places – are neither serious nor legitimate issues in the present appeal and cannot constitute a legitimate interest for CUPW in this case. S. Bird also raised some concerns for the proceeding relating to the fact that D. Radcliffe and CUPW are represented by the same counsel.

[33] I would comment as follows on the objection raised by the employer.

[34] Paragraph 146.2(*g*) of the *Code* authorizes me to add any group that, in my opinion, has met the conditions set by this provision. In that respect, to not accept the participation of CUPW in this proceeding because they advance issues and interests that differ from those raised by the appellant would, in my opinion, put an overly restrictive interpretation on this provision especially when CUPW's interest is related to the general purpose of the *Code* which is the protection of the health and safety of all employees while at work and which must guide my interpretation of any provision of the statute. In addition, based on the evidence that firstly, in the present instance, D. Radcliffe was working as an RSMC helper and secondly, her accident occurred in a Canada Post work site where Canada Post employees, who are also CUPW members, work, I find that the aforementioned respondent's second interest in this appeal, as described by her counsel, is relevant and linked with CUPW's general interest.

[35] In addition, paragraph 146.2(*g*) of the *Code* sets two conditions to be met for an application for authorization to take part in the appeal proceeding before an appeals officer. Pursuant to this provision, a person or group seeking standing must first have substantially, in the appeals officer's opinion, the same interest as one of the parties. The use of the word "substantially" indicates that the person or group seeking standing need not have exactly the same interest as one of the parties, but one that, in my opinion, closely associates with the interest of one party. In addition, paragraph 146.2(*g*) requires that the person or group seeking standing with such substantially same interest could be affected by the decision to be rendered in the appeal.

[36] Nevertheless, as mentioned by S. Bird, case law has established other criteria for allowing intervention by way of granting standing. I would refer here to the recent decision by Appeals Officer Jean-Pierre Aubre in *Canadian National Railway Company (CN Rail) and James Poirier and Teamsters Rail Canada Conference*[5] in which Appeals Officer Aubre had to decide on applications for authorization to intervene in an appeal. In paragraphs 41 to 47 of his decision, Appeals Officer Aubre examined and commented on relevant case law related to this matter as follows:

> [41] The case law of most jurisdictions has been fairly consistent over the years in retaining as a rule for allowing intervention by way of granting standing the necessity of the party seeking standing to have a valid and direct interest in the litigation, not merely a passing or superficial one, and risk being directly affected by the decision. As such, in Rothmans of Pall Mall Canada Limited v. Canada (Minister of National Revenue-M.N.R., (1976) 2 F.C. 500, Mr. Justice Ledain of the Federal Court of Appeal stated that the rule for recognition of status or *locus standi* requires that the party seeking such should have a genuine grievance entitling the challenge of the lower level interpretation, such interpretation being capable of adversely affecting the latter's legal rights or impose on the party additional legal obligations, with the direct possibility of causing direct prejudice to the interests of that party. In William (Billy) Soloski v. The Queen, (1978) 1 F.C. 609, Heald J. reiterated and endorsed the same test formulated by Ledain J. in the Rothmans case, adding however that one needs more than being merely interested or concerned to be granted status. He stated: "However, a well motivated concern and interest in the outcome of a particular proceeding before the Court is not, per se, a legal reason for permitting intervention and participation in that proceeding".
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> [42] In Schofield and Minister of Consumer and Commercial Relations, (1980) O.J. No.3613, Wilson J. of the Ontario Court of Appeal referred to Ledain J. in the Rothmans case above, as well as to an earlier decision by Chief Justice Jackett in R. v. Bolton (1976) 1 F.C. 252, to reformulate the test as follows:
>
> > It seems to me that the Bolton and Soloski decisions stand for the proposition that, in order to obtain standing as a person "interested " in litigation between other parties, the applicant must have an interest in the actual lis between those parties.
>
> [43] The Federal Court of Appeal essentially adopted the same position in Canadian Transit Co. v. Canada (Public Service Staff Relations Board, (1989) 3 F.C. 611, taking the position that the "mere interest in the eventual outcome of a proceeding before a tribunal whether financial or otherwise, is not in itself sufficient to give an individual a

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[5] *Canadian National Railway Company (CN Rail) and James Poirier and Teamsters Rail Canada Conference*, Decision OHSTC-08-018 (1), July 31, 2008

right to participate therein. To be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* principle, an individual must be directly and necessarily affected by the decision to be made. His or her interest must not be merely indirect or contingent, as it is when the decision may reach him or her only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved."

[44] However, while intervention may be based on whether sufficient interest is present or not, it cannot go unqualified as an intervenor may not have the same or as complete interest as a party of direct interest, at least in most instances. As such then, there is the need to recognize that the degree of interest may not be the same. This was recognized by the British Columbia Court of Appeal in Canada (Attorney General) v. Aluminum Co. of Canada Ltd, 35 D.L.R. (4th) 495, where Seaton J., recognizing the need for imposing limits to such right of intervention, stated: "When we consider whether to allow intervention, we must consider the scope of that intervention. We must adopt restrictions, probably like those adopted in the United States, if we are to have the benefit of more frequent interventions. Intervenors should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others. (underline added)

[45] There is a balance to be maintained between the interests of those seeking to intervene and those who, as central or parties of direct interest, are seeking the resolution of the issue or situation that affects them directly. On this, the Federal Court, through Rouleau J., quite succinctly put it this way: "The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties (Rothmans, Benson & Hedges Inc. v. Canada (Attorney General (T.D.), (1990) 1 F.C. 74)

[46] Beyond the question of the interests of the parties in presence, be they those seeking to intervene or those that would be the immediate parties to the issue, the question of the potential contribution by the intervenor(s) to the resolution of the central issue must also be looked at in terms of the assistance it can bring to the decision maker. In Papaschase Indian Band v. Canada (Attorney General), 2005 ABCA 320, Fraser C.J.A. of the Alberta Court of Appeal, invoking the Supreme Court of Canada in R. v. Morgentaler, stated:

> It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in R. v. Morgentaler,

(1993) 1 S.C.R. 462 at para 1: "(t)he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal".

[47] Taking all of what precedes into account brings one to formulate a number of questions that need to be answered in order to decide whether to grant standing to an applicant, although clearly an affirmative answer is not required to each and every one of those in order to reach a decision. Those could be formulated as follows:

- whether the intervenor can assist in the resolution of the matter;
- whether the intervenor can bring a different perspective to the issue;
- whether the intervenor can make a useful contribution to the proceedings;
- whether the intervenor has relevant expertise that otherwise would not be available to the tribunal;
- whether the intervenor's participation would cause injustice to the other parties;
- whether the intervenor has a real, substantial and identifiable interest in the matter;
- whether the intervenor's interest is greater than that of a member of the general public;
- whether the intervenor is in a unique position that is different from that of the parties;
- whether the interests of the intervenor will or would be affected by the outcome of the hearing;

[...]

[37] Because all the questions formulated above are based on an exhaustive review of the relevant case law related to the present issue, I will examine CUPW's justifications to take part in this appeal on that basis.

[38] CUPW has presented its justifications for seeking standing as representing its members who are Canada Post employees working with RSMC helpers who can be involved, as supported by the evidence, in accidents occurring in Canada Post work sites that could also affect, as supported by the evidence, CUPW members. I find that CUPW's interest, as formulated by its counsel, is a real, substantial and identifiable interest and constitutes a different as well as a relevant perspective to the issue in light of the group of employees CUPW represents. In this regard, I am of the view that CUPW can make a useful contribution to the proceeding, given the purpose of the legislation, and that their interest is certainly greater than that of a member of the general public and could be affected by the outcome of this appeal. Furthermore, I am satisfied that CUPW meets the dual test set at paragraph 146(2)(*g*) of the *Code*, in that it convinced me that it has not the same second D. Radcliffe's interest but one that approximates it, and that CUPW's interest is related to the group

of employees it represents who also can be affected by the decision in the present case in regard to the said interest.

[39] I add that I do not find that the participation of CUPW has or will cause an injustice to Canada Post's position because of the fact that D. Radcliffe and CUPW are or will be represented by the same counsel. The fact is that S. Bird received at the same time as the undersigned H. D. Neun's written representations concerning both D. Radcliffe and CUPW in regard to the present issue and before S. Bird formulated, on behalf of Canada Post, his reply. This means that S. Bird has had all the information related to the matter before formulating and submitting his reply. In addition, the last written arguments that I received were the ones formulated by CUPW in response to S. Bird's written reply. I add that I do not find that to give an opportunity to the respondent to reply to the applicant seeking standing was an abuse of process. In my opinion, this proceeding has ensured for each party full opportunity to make their representations in consideration of all the information related to the matter.

[40] For all the above reasons, I grant intervenor status to CUPW in this appeal.

Katia Néron
Appeals Officer