Date: 20071221

Docket: T-1428-06

Citation: 2007 FC 1362

Ottawa, Ontario, December 21, 2007

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

CANADA POST CORPORATION

Applicant

and

CAROLYN POLLARD and
ATTORNEY-GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Prior to 2004, it was not uncommon in rural or semi-rural areas to see vehicles delivering mail while driving on the wrong, or left, side of the road. This practice allowed the driver to reach through the driver-side window in order to pick-up or deposit mail in a rural mailbox (RMB). In June of 2004, Canada Post Corporation (Canada Post) advised its delivery personnel that they were no longer permitted to drive on the left shoulder of roadways to deliver mail because this violated highway traffic laws. Delivery routes were restructured in order to ensure that a Rural and Suburban Mail Carrier (RSMC) was not required to deliver mail on the left shoulder of a roadway.

[2] This was the genesis of this application for judicial review.

[3] In November of 2004, Carolyn Pollard was employed by Canada Post as a RSMC in Brampton, Ontario. After her delivery route was restructured and she was instructed to drive on the right side of the road and deliver mail through the front passenger-side window of her vehicle, Ms. Pollard, without attempting to perform her duties, exercised her right under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code), to refuse dangerous work. She explained her refusal in the following way:

> *The main safety concern is that the route is absolutely impossible to deliver from the driver's side across my flyers, my parcels and my tray of mail out the window and open the door to the mailbox put the mail in and lift the flag. I cannot get my legs even out from under the steering wheel to lift myself up and over mail. Also to undo my seatbelt I am at risk. I deliver to 740 homes by one day I would be in pain never mind every day. Also in the window slipping on the mail when it gets wet changing it from back to front and when the winter you cannot even get close to the boxes.*

[4] A Health and Safety Officer (HSO) designated under the Code investigated Ms. Pollard's refusal to work and determined, pursuant to subsection 129(4) of the Code, that no danger existed for Ms. Pollard. The HSO did, however, direct Canada Post to complete a hazard assessment of the work of all RSMCs who worked alone under the authority of the Brampton Hale Road Postal Station in order to determine any known or foreseeable safety hazards the RSMCs might be exposed to while delivering or picking-up mail. Canada Post was also instructed to develop safe work procedures and to train relevant employees in those procedures.

[5] Ms. Pollard appealed the finding of no danger to the Canada Appeals Office on Occupational Health and Safety (CAOOHS) and a hearing proceeded before an appeals officer. The appeals officer allowed the appeal and rescinded the decision of the HSO. Specifically, the appeals officer found that a danger existed for Ms. Pollard in connection with the in-vehicle RMB

deliveries and pick-ups made through the front passenger-side window of her delivery vehicle in the following two circumstances:

> First, C. Pollard has to stretch and twist her body to reach from her driver's seat through the front passenger side window of her vehicle to deliver mail to approximately 700 RMBs stops per day, 5 days a week, without having received instruction and training in an ergonomic work procedure appropriate to her physical condition, the conditions of her vehicle and the conditions of the different delivery and pick-up work places (the mail boxes' positions). In addition, several of the RMBs along her route are not in compliance with [Canada Post] positioning and placement specifications, such that the distance to deliver mail to the RMBs is greater.
>
> Secondly, a danger exists when C. Pollard has to make rural mail delivery stops where the shoulders of the road are too narrow or non-existent due to curbs, such that she cannot pull her vehicle off the traveled part of the roadway. Also, a danger exists because her vehicle is not equipped with warning devices to warn other drivers that her mail vehicle is stopped on the shoulder of the roadway for mail delivery. As a result, she is exposed, in fair and inclement weather, to the hazard of being struck by other cars and heavy trucks on roadways where speed can vary between 40 and 80 kilometres per hour.

[6] In consequence, the appeals officer issued a direction to Canada Post in the following terms:

> Therefore, you are HEREBY DIRECTED, pursuant to subparagraph 145(2)(*a*)(i) of the *Canada Labour Code,* Part II, to take appropriate and immediate measures to correct these two hazards that constitute a danger.
>
> Furthermore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code,* Part II, to cease RSMC in-vehicle RMB delivery activity carried out by C. Pollard 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 the direction.

[7] Canada Post brings this application for judicial review of that decision and direction. The Attorney General of Canada did not participate in this proceeding.

The issues to be determined

[8] In their memoranda of argument, the parties raised a number of issues. In my view, four substantive issues must be resolved. They are:

1. Did the appeals officer err by giving no weight to a settlement agreement signed by Ms. Pollard in which she agreed to withdraw her appeal to the CAOOHS?

2. Did the appeals officer exceed his jurisdiction by considering issues of traffic safety?

3. Did the appeals officer breach the duty of fairness that he owed to Canada Post by failing to provide it with an opportunity to adduce evidence and make submissions about two issues raised in his decision?

4. Did the appeals officer err by finding that the ergonomic hazards faced by Ms. Pollard constituted a danger under Part II of the Code?

Summary of the Court's conclusions

[9] In these reasons, I find that:

1. The appeals officer did not err by giving no weight to the settlement agreement signed by Ms. Pollard in which she agreed to withdraw her appeal to the CAOOHS.

2. The appeals officer did not exceed his jurisdiction by considering traffic safety issues.

3. The appeals officer breached the duty of fairness that he owed to Canada Post in one respect only. The officer failed to provide Canada Post with an opportunity to adduce evidence and make submissions about issues of traffic safety.

4. The appeals officer did not err by finding that the ergonomic hazards faced by Ms. Pollard constituted a danger under Part II of the Code.

5. No costs are awarded to any participating party because success was divided on the application.

[10] Throughout these reasons, reference is made to provisions of the Code. Various relevant provisions are set out in Schedule A to these reasons.

Standard of review

[11] The standard of review applicable to a substantive decision of an administrative tribunal is determined by resort to the pragmatic and functional analysis, which considers the presence of a privative clause, the purpose of the governing legislation, the nature of the question under review, and the expertise of the decision-maker. The Supreme Court of Canada has cautioned that "reviewing courts must be careful not to subsume distinct questions into one broad standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach." Given that the

presence or absence of a privative clause is likely to be the same for all aspects of an administrative decision, the possibility of more than one standard of review will "largely depend on whether there exist questions of different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways." See: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at paragraph 19.

[12] I now turn to the elements of the pragmatic and functional analysis.

a. The existence of a privative clause

[13] The Code contains two privative causes in respect of appeals officers. They are contained in sections 146.3 and 146.4, which provide as follows:

146.3 An appeals officer's decision is final and shall not be questioned or reviewed in any court.	146.3 Les décisions de l'agent d'appel sont définitives et non susceptibles de recours judiciaires.
146.4 No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.	146.4 Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'agent d'appel exercée dans le cadre de la présente partie.

[14] These provisions have been described as "strong privative causes", and they reflect Parliament's intent that great deference be paid to the decisions of appeal officers. See: *Martin v. Canada (Attorney General)*, [2005] 4 F.C.R. 637 at paragraph 16 (C.A.) (*Martin* C.A.).

b. Purpose of the governing legislation

[15] The purpose of Part II of the Code is set out in section 122.1 of the Code: to prevent accidents and injuries in the workplace. The provisions of the Code relating to appeals officers give the officers broad investigative powers to determine whether a situation of danger exists and, if required, give appeals officers extensive remedial powers. See: section 145.1, subsection 146.1(1), and section 146.2 of the Code.

[16] As the purpose of the legislation is to protect employees, greater deference should be shown to decisions of appeals officers. See: *Martin v. Canada (Attorney General)*, [2004] 1 F.C.R. 625 at paragraph 36 (T.D.) (*Martin* F.C.).

c. The nature of the question

[17] Three questions put in issue by Canada Post attract the application of the pragmatic and functional analysis.

[18] The first question puts in issue the officer's decision to give no weight to the settlement agreement signed by Ms. Pollard. Canada Post argues that this issue required the officer to interpret the settlement agreement, which raises a question of law. On the other hand, Ms. Pollard argues that the question before the officer was whether she properly rescinded the settlement agreement. I agree that the appeals officer was required to hear and consider evidence concerning the agreement, its purported rescission, and the conduct of the parties. Thus, the question of whether, notwithstanding the settlement agreement, the appeal should have proceeded before the appeals officer is one of mixed fact and law.

[19] The second question of whether the appeals officer had jurisdiction to address the traffic safety issues is said by Canada Post to be a jurisdictional issue. However, such characterization is not, in my view, helpful. What is in issue is the appeals officer's finding that Ms. Pollard did raise traffic safety concerns as part of her work refusal. That finding is one of fact.

[20] Finally, the question of the existence of a danger under the Code is a question of mixed fact and law.

d. The expertise of the decision-maker

[21] The question of the effect of the settlement agreement has a legal component and, in my view, an appeals officer does not have greater expertise than the Court when applying general principles of contract law. To the extent that the officer was required to consider evidence about the rescission of the agreement, evidence of this sort strays from the core competence of an appeals officer, whose expertise relates primarily to workplace health and safety.

[22] The question of whether the traffic safety issues were properly before the appeals officer is intensely fact driven. Appeals officers are required to consider work refusals and to administer the health and safety provisions of the Code. They are granted broad investigative and remedial powers. An appeal before an appeals officer is *de novo*. See: *Martin* C.A., cited above, at paragraph 28. On this basis, I find that an appeals officer's expertise is greater than that of the Court when determining what hazards or dangers are put in issue when an employee refuses to work.

[23] The determination of whether circumstances in a workplace constitute a danger as defined in the Code engages the expertise of appeals officers. They are able to assess firsthand the workplace and their expertise is superior to that of the Court on questions of this kind.

e. Conclusion with respect to the standard of review

[24] The question of the effect of the settlement agreement is one of mixed fact and law, and lies outside of the core competence of an appeals officer. Weighing those factors against the existence of the privative clauses and the purpose of the Code, I find that this issue should be reviewed on the standard of reasonableness.

[25] The appeals officer's decisions with respect to whether the issue of traffic safety was properly before him and whether a danger existed under Part II of the Code were fact-based, and they fell within the officer's area of expertise. When this is considered together with the privative clauses present and the purpose of the legislation, I believe that these findings should be reviewed on the standard of patent unreasonableness.

[26] Finally, no pragmatic and functional analysis is required with respect to the issue of the alleged breaches of procedural fairness. It is for the Court to determine whether, in the specific circumstances of this case, the appeals officer complied with the requirements of fairness. No deference is owed to the appeals officer on this issue.

[27] Having identified the appropriate standards of review to be applied to the decision of the appeals officer, I turn to the specific errors asserted by Canada Post.

Did the appeals officer err by giving no weight to the settlement agreement signed by Ms. Pollard in which she agreed to withdraw her appeal to the CAOOHS?

[28] I have chosen to deal with this issue first because, logically, it is capable of being dispositive of the entire application. I note, however, that neither party strenuously pursued this issue in significant detail in their oral or written submissions.

[29] The parties agree that, prior to the hearing before the appeals officer, Ms. Pollard, her union, and Canada Post signed a settlement agreement in which she agreed to withdraw her appeal from the decision of the HSO. Canada Post raised the issue of the settlement agreement at the appeal hearing, advising at the outset that it would be pursuing the issue in the course of the hearing but that it was "content with that [issue] going through evidence."

[30] The appeals officer gave no weight to the agreement because, in his opinion, "the agreement was inadequate for [Canada Post] to meet its duties under Part II and it is therefore to be ignored."

[31] It is, I believe, well-settled law that a tribunal is not bound to accept the terms of a settlement negotiated between the parties, particularly where the tribunal's constituting legislation imposes upon it a broad statutory mandate. See, for example, *Re Consumers' Distributing Co. Ltd. and Ontario Human Rights Commission et al.* (1987), 36 D.L.R. (4th) 589 (Ont. Div. Ct.).

[32] In this case, the Code grants a broad mandate to CAOOHS to further the purpose of the prevention of accidents and injuries in the workplace. The settlement agreement appears to be confined to the redress of Ms. Pollard's various grievances. While the agreement does refer to

training to be provided to Ms.Pollard, it does not address or resolve the broader safety issues raised by Ms. Pollard in her appeal from the HSO's decision. That fact distinguishes the circumstances of this case from those in *Walton and Canada (Correctional Service)*, [2005] C.L.C.A.O.D. No. 7 (QL), relied upon by Canada Post.

[33] In my view, because the settlement agreement did not resolve the broader safety issues, the appeals officer's decision that the settlement agreement did not meet all of Canada Post's duties under Part II of the Code withstands a somewhat probing examination. It was not, therefore, unreasonable.

[34] In the event that I erred in determining the proper standard of review to be applied to this question and the proper standard of review is patent unreasonableness, because the decision withstands scrutiny on the reasonableness standard, it follows that it also withstands scrutiny on the more deferential standard of patent unreasonableness.

[35] Finally, and in any event, the evidence before the appeals officer included a letter dated September 20, 2005, from the CAOOHS to Ms. Pollard. This letter acknowledged receipt of the settlement agreement, but noted that Ms. Pollard's right to appeal the decision of the HSO was a personal right and that the settlement agreement expressed what the CAOOHS characterized to be "an, as yet, unfulfilled intent" to withdraw the appeal. The CAOOHS therefore advised that it required Ms. Pollard to supply her written confirmation of withdrawal of the appeal before it would proceed to close the file. Ms. Pollard replied by letter dated September 26, 2005, advising that she felt that she was coerced into signing the agreement and that she wanted to proceed with the appeal.

[36] When questioned at the hearing by counsel for Canada Post about the settlement agreement, Ms. Pollard testified that the settlement "was cancelled" and that she had "a letter from Mr. Gilbert [of Canada Post] stating that the memorandum was cancelled." Ms. Pollard agreed that this letter was sent by Canada Post after she had notified the CAOOHS that she did not intend to be bound by the settlement agreement. No contrary evidence on this point was adduced before the appeals officer by Canada Post.

[37] This uncontradicted evidence that the settlement agreement was cancelled or rescinded supports the reasonableness of the officer's conclusion not to give any weight to the agreement.

Did the appeals officer exceed his jurisdiction by considering traffic hazards?

[38] As set out above at paragraph 5 of these reasons, the appeals officer found that a danger within the meaning of Part II of the Code existed for Ms. Pollard in respect of both the ergonomic and traffic hazards related to her work. Canada Post says that Ms. Pollard's refusal to work, the HSO’s investigation, and the appeal of the HSO’s decision were limited to Ms. Pollard's refusal to deliver mail to RMBs due to ergonomic issues. It follows, Canada Post argues, that the appeals officer's decision that he had jurisdiction to consider traffic safety issues was patently unreasonable and that he exceeded his jurisdiction.

[39] The appeals officer's reasons on this point begin at paragraph 79 of his decision. In brief, the officer found, as a fact, that the refusal to work was not related only to the ergonomic hazards associated with rural mail delivery and that, in any event, he had jurisdiction to consider the issue of traffic safety even if it was not raised in Ms. Pollard’s refusal to work complaint.

[40] In order to find that traffic safety concerns were part of the basis of Ms. Pollard's refusal to work, the appeals officer relied upon:

(i) Exhibit D-6, which included Ms. Pollard's letter of October 6, 2004, to the HSO that enclosed correspondence between Ms. Pollard and Canada Post. The correspondence confirmed that Ms. Pollard's concerns dealt with both ergonomic and highway traffic hazards.

(ii) Exhibit D-5, which included the HSO's notes of a meeting held on November 25, 2004, to investigate Ms. Pollard's refusal to work. The notes confirmed that both ergonomic and traffic hazards were discussed.

(iii) Exhibit D-5, which included Ms. Pollard's refusal to work registration form, quoted above at paragraph 3 of these reasons. This form recorded the following concern: "[A]lso to undo my seatbelt I am at risk."

(iv) Exhibit D-4, which included the HSO's investigative report, decision, and direction to Canada Post. The decision recorded the HSO's finding that there was no evidence regarding formal safe work procedures on issues such as signage on delivery vehicles, the use of four-way lights, and whether a RSMC should get out of the delivery vehicle while stopped on the shoulder of the road. The direction issued

by the HSO required Canada Post to complete a hazard assessment in respect of both health and safety hazards.

(v) Exhibit D-1, which included the notice of appeal from the HSO's decision. In the notice of appeal, Ms. Pollard stated "[i]f I am involved in an accident while not being in the correct seated safety belted position this could result in serious bodily injuries or death … ."

[41] From this evidence, the appeals officer concluded that Ms. Pollard's refusal to work related to traffic safety concerns (as well as ergonomic concerns) and that the HSO ought to have been aware that Ms. Pollard's health and safety concerns related to both ergonomic and traffic-related hazards.

[42] A patently unreasonable decision is one based upon an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the decision-maker. See: paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. As Mr. Justice Binnie, writing for the majority, explained in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 164:

> [L]ike the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one that means that there could have been many appropriate answers, but not the one reached by the decision maker.

[43] Applying that standard of review to the appeals officer's decision, I have verified that the evidence was as stated by the officer. I find that such evidence supported the officer's conclusions

that traffic safety issues were identified by Ms. Pollard and that the HSO ought to have been aware of this. In the result, the officer's conclusions were open to him and they cannot be said to be patently unreasonable.

[44] It is not, therefore, necessary for me to consider the appeals officer's alternate finding that he could have dealt with the traffic safety issues even if they were not raised in Ms. Pollard's refusal to work complaint.

Did the appeals officer breach the duty of fairness by failing to provide Canada Post with an opportunity to deal with two issues raised in his decision?

[45] Canada Post asserts that the appeals officer breached the duty of fairness in two respects:

(a) Canada Post argues that the officer erred by failing to provide it with an opportunity to make submissions and adduce evidence in respect of the officer's reliance upon the provisions Part XIV (Materials Handling) of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (Regulations). Canada Post says that the relevant provision was not raised by the parties or the appeals officer during the hearing.

(b) Canada Post argues that the officer erred by failing to provide it with an opportunity to make submissions and adduce evidence in respect of traffic safety issues, which were found to form part of the officer's inquiry. Canada Post says that the appeals officer specifically advised that it would be afforded such an opportunity.

[46] The Supreme Court of Canada considered the nature of the participatory rights required by the duty of fairness in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. At paragraph 30 of its reasons, the majority explained that the heart of this analysis is "whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."

[47] In the present case, it is accepted by the parties that the appeals officer owed a duty of fairness to the parties and that this duty included the right to be informed of the case to be met and the right to adduce evidence and make submissions on relevant issues.

[48] What is at issue is whether the appeals officer deprived Canada Post of a meaningful opportunity to present its case fully and fairly. I turn to each instance of alleged unfairness.

a. The Regulations

[49] With respect to the Regulations, Canada Post had argued at the hearing that Ms. Pollard had an existing back injury so that any danger she would experience was the result of her own personal health situation. The appeals officer, on the evidence, rejected the submission that Ms. Pollard had an ongoing health problem that required formal job accommodation. The appeals officer went on, at paragraph 97 of his reasons, to find that the "average person" concept contemplated a range of physical and mental frailties normal to the human condition. The appeals officer found further support for this view in section 14.48 of the Regulations.

[50] Canada Post complains that the appeals officer failed to advise the parties that he was considering the application of this provision, thereby denying Canada Post of the opportunity to make submissions as to its applicability in this case.

[51] In my respectful view, the appeals officer did not breach the requirements of procedural fairness by referring to section 14.48 of the Regulations. This is so because it was proper and foreseeable that the appeals officer would have regard to regulations enacted pursuant to the legislation that he was charged with administering. Moreover, the officer's reference to the Regulations was incidental to the officer's decision that an ergonomic danger existed. The Regulations were relied upon by the appeals officer only to buttress his opinion that any danger that Ms. Pollard faced was not the result of her personal health situation.

[52] In this context, the failure of the appeals officer to advise the parties that he intended to mention a particular regulatory provision in his reasons did not deprive Canada Post of a meaningful opportunity to present its case fully and fairly.

b. Traffic Safety Issues

[53] Canada Post argues that, during the course of the hearing, its counsel expressed concern as to the relevance of evidence received by the appeals officer concerning traffic safety. It says that "on virtually every occasion when Counsel for Canada Post raised its concerns, the Appeals Officer clearly stated that if he considered that the issue of traffic safety would be a material consideration in his deliberations, he would so advise the parties and provide them with an opportunity to present evidence and argument on the issue". Subsequently, the appeals officer rendered his decision and a

direction on traffic safety. Canada Post asserts that it was not provided with an opportunity to adduce evidence and make submissions on the traffic safety issues and that this constitutes a breach of procedural fairness.

[54] Ms. Pollard responds that no breach occurred because:

(i) she and her representative raised traffic safety issues at the appeal hearing and led evidence relating to traffic hazards;

(ii) in considering whether to admit this evidence, the appeals officer stated on a number of occasions during the hearing that he would have to determine whether his appeal mandate extended to consideration of traffic safety issues;

(iii) on April 25, 2006, during the hearing, the appeals officer gave notice to the parties that he considered the traffic safety issues to be relevant and indicated that they needed to be considered; and

(iv) the appeals officer invited the parties to make submissions on the traffic safety issues.

[55] Ms. Pollard also argues that a number of references to the transcript relied upon by Canada Post in support of it submission do not relate to the traffic safety issues (for example, the exchange on page 38 of the transcript of the hearing on April 26, 2006, which is found at page 708 of the applicant's record).

[56] A review of the transcript reveals that, throughout the hearing, there was a tension between the parties as to the proper scope of inquiry before the appeals officer. To illustrate, Ms. Pollard, in her opening statement, sought to raise a number of matters that were outside the jurisdiction of the appeals officer (see pages 23 through 29 of the transcript of the hearing on February 16, 2006, which are found at page 544 of the applicant's record and following). By contrast, Canada Post argued that a narrower focus was appropriate, stating that the appeals officer was to put himself in the shoes of the HSO in order to determine whether the HSO's decision was sound in law.

[57] The tension was elevated because, while Canada Post was represented by counsel, Ms. Pollard was not. She was represented by a union representative, who candidly admitted to his lack of familiarity with the process. As a result, Ms. Pollard was not always clear on the nature of the issues she was raising before the appeals officer. For example, at one point, her representative described the act of stretching while not wearing a seatbelt to be an ergonomic issue (see pages 135 through 136 of the transcript of the hearing on February 16, 2006, which is found at page 572 of the applicant's record).

[58] The tension was also compounded by the appeals officer's desire to provide a degree of latitude to Ms. Pollard and her representative, and by his failure to make a definitive ruling during the hearing on the scope of the issues properly before him. These matters are reflected, I believe, in Schedule B to these reasons. Schedule B is a brief survey of the evidence and submissions at the hearing concerning the issues of traffic safety and procedural fairness.

[59] Dealing more specifically with the evidence, the hearing proceeded on February 16, April 25, and April 26, 2006. On February 16, 2006, counsel for Canada Post objected to the relevance of certain documents referred to during Ms. Pollard's direct examination (particularly a list of mailboxes that were said to be unsafe for delivery). The documents were received by the appeals officer, notwithstanding that, with respect to the list of unsafe mailboxes, he was "uncertain, still in my mind, what this is relating to and what is relevant" (page 153 of the transcript of February 16, 2006). The appeals officer went on to advise the parties that:

> **THE CHAIRPERSON**: Exactly. But given that I'm authorized by the Code to issue a direction pursuant to 145.2, it leaves the question in the Tribunal's mind as to what is their responsibility should in the evidence they become aware of a hazard in connection with essentially the issue that they're looking at.
>
> In other, in evidence, if I suddenly am convinced that a danger existed with regard, I'll be specific, with regard to somebody smashing into the back of a vehicle.
>
> I'll leave it for your argument as to what I should be doing with that in terms of should I be looking at it? Should I interpret my powers under the Code, to address it?
>
> Now, to try and make certain that we don't leave parties with a sense of unfairness, often in a case, once I've heard it, if I feel that I'm going to be going into another area that would not have necessarily come to the understanding of the parties during the hearing, then what I'll do is reconvene the hearing and I'll be saying to you, I am considering something that perhaps you didn't appreciate and therefore I'll take an opportunity to give you time to give evidence and argumentation with that.
>
> We're not at that stage but I'm just going to indicate to you that when I'm deciding whether to take a document, part of it is so that I have [a] picture of the complete situation so that, at the end of it, I can say to myself, I'm satisfied that I looked at all of the aspects of the hazards that were involved in the circumstance and that if I have concerns, then I'll raise it with parties.
>
> And I think when I repeat the phrase from time to time, that you'll have an opportunity to argue its weight in summation, that I'm

> taking you into an area that I think that you may not have fairly anticipated, then I give you a full opportunity to readdress it.
>
> I don't know how much more I can say than that. In fact, one of the challenges in a hearing where you have a party that's unrepresented by counsel is that you help with the process but you not wander into the case and it's a tightrope and I think I walked it as far as I want to. [underlining added]

[60] On April 25, 2006, counsel for Canada Post again objected that evidence with respect to traffic safety was not relevant (page 70 of the transcript of April 25, 2006). The appeals officer responded as follows:

> **THE CHAIRPERSON**: I will certainly agree with you that there is an issue that I'm going to have to resolve in my decision, and that's with regard to the matters of the other – about the safety concerns off the road.
>
> Certainly, Health and Safety Officer Manella had concerns that he ended up issuing a direction. He found no danger but he still issued a direction and I'm satisfied by his direction that he was looking at other things than just the ergonomics. He simply decided that that didn't constitute a danger.
>
> Now, one of the things that I think you have an opportunity in arguing this is to address that very thing as to what consideration I should be giving to that.
>
> I think given that the review by an appeal officer is (inaudible) and I certainly accept the fact that what precipitated the appeal is an appeal under Section 129(7), which is the refusal to work and not the direction issued under 145(1) of the Canada Labour Code.
>
> But at the same time, there is a totality of circumstance here that I just feel, at least in gathering evidence here that I have to listen to, and certainly make some decision in my final decision with regard to whether I should be venturing in on those other aspects.
>
> Certainly one of the things, whenever there is a review pursuant to Subsection 129(7) is to decide if the danger existed and

> what direction ought to have been, and what direction is required, if there is a finding of danger.
>
> And I certainly, just sitting here, I'm kind of thinking that I would want to hear the evidence with regard to the total situation so that I can decide later in my mind whether or not the danger did extend to the things that Health and Safety Officer Manella perhaps had not properly reviewed, or given weight.
>
> I'm not quite sure where I'm going with it, but it certainly strikes me that I should hear the evidence and hear the arguments from both parties as to my mandate under the code, under my review here as to whether or not I should be looking beyond the ergonomic issue.
>
> I'm certainly willing to take your argument on that but I will give you advance notice that I'm considering it. It's an issue that I think needs to be considered.
>
> And I'm saying that to an extent too because some of the evidence that was provided by way of documents and the reports, the various reports, certainly indicate that Health and Safety Officer Manella was aware of some other issues ongoing. And so as I say, I just think I have to look at the evidence and then make some decision as to where my mandate is with the final decision on this. [underlining added]

[61] Later that day, the appeals officer repeated his uncertainty as to the proper scope of the hearing in the following terms:

> **THE CHAIRPERSON:** Okay. As I've indicated to Mr. Bird already, I have some question in my mind as to whether or not my mandate for reviewing an appeal under Section 129(7), Ms. Pollard's appeal, includes all of the evidence that I'm going to receive with regard to safety issues around that situation.
>
> I know that, and I can't cite a case, but I know the federal court has said in the past that safety officers cannot be expected to go in and essentially do fishing expeditions. If an employee were to say there's a danger here and not really identify what the danger is, just say I'm not sure but I'm certain that there's a danger here.
>
> The federal court has said, no, you can't turn it as that vague.

> They have not come up with anything that goes to the opposite, which would be employee complains about a danger, a safety officer goes in, there are several dangers around them, they focus only on the one that the employee raises with them and leaves.
>
> Whether or not that is, whether or not the federal court would be saying, or whether or not any review body would say well, you ought to have looked at it and not just been limited to what the employee said. It's something that's there and you could see that it was a contravention or even more seriously, a danger, then I'm not so certain that anybody, if it ever was reviewed in a court, would say no, you shouldn't have looked at that.
>
> It goes a little bit to that. It goes a little bit to exactly what the issue is before me, and that is how Safety Officer Manella was, as I'm saying, from the evidence, was made aware of a certain situation that was evolving, suggested a solution, which was internal complaint resolution, and then, upon her refusal, decided one matter was not constituting a danger and felt obligated to issue a direction in the other.
>
> Since my review brings me into face with all the facts, the question I have to ask myself is would anybody expect me not to look at other areas that through the evidence I'm receiving that might constitute a danger, even though Health and Safety Officer Manella did not. [underlining added]

[62] During final argument, counsel for Canada Post reiterated its position that Ms. Pollard's complaint dealt strictly with ergonomic issues. After hearing the final arguments of both parties, the appeals officer made the following comments:

> **THE CHAIRPERSON**: All right then.
>
> With that, we have completed this portion, this part of the appeal process.
>
> As I indicated, what I'll do now is I'll return to my office and I'll be going over the material and making my analysis.
>
> If I have any questions I'll relay them through Madame Paris or <u>if there are issues that I wish to, that I am going to indicate</u>

> to parties that I'll be pursuing in my direction, then I will certainly, as I indicated to Mr. Bird earlier, provide parties with an opportunity to provide new evidence on that. [underlining added]

[63] A fair reading of the transcript shows, in my view, that the appeals officer, during the course of the hearing, advised the parties that:

- he had not resolved in his own mind whether the traffic safety issues were properly before him;
- he wanted to receive evidence from Ms. Pollard so that he could later decide whether the danger extended traffic safety issues;
- after hearing the evidence and argument as to his mandate, he would consider whether he should be looking beyond the ergonomic issue; and
- if he decided that he would deal with the traffic safety issues, he would reconvene the hearing and allow the parties to adduce evidence.

[64] With the benefit of hindsight, it would have been prudent for Canada Post to adduce at least some evidence about traffic safety. Nevertheless, by concluding only in his final decision that the issue of traffic safety was properly before him, without advising Canada Post of that conclusion and allowing it to adduce evidence as to traffic safety, the appeals officer deprived Canada Post of the opportunity to present its case fully and fairly. In so doing, the officer breached the duty of procedural fairness that he owed to Canada Post.

Did the appeals officer err by finding that the ergonomic hazards faced by Ms. Pollard constituted a danger under Part II of the Code?

[65] For the purpose of Part II of the Code, "danger" is defined in subsection 122(1) in the following terms:

"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;	«danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

[66] As a matter of law, in order to find that an existing or potential hazard constitutes a "danger" within the meaning of Part II of the Code, the facts must establish the following:

(1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;

(2) an employee will be exposed to the hazard, condition, or activity when it presents itself;

(3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and

(4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.

[67] The final element requires consideration of the circumstances under which the hazard, condition, or activity could be expected to cause injury or illness. There must be a reasonable possibility that such circumstances will occur in the future. See: *Verville v. Canada (Correctional Services)* (2004), 253 F.T.R. 294 at paragraphs 33-36.

[68] In *Martin* C.A., cited above, the Federal Court of Appeal provided additional guidance on the proper approach to determine whether a potential hazard or future activity could be expected to cause injury or illness. At paragraph 37 of its reasons, the Court observed that a finding of "danger" cannot be grounded in speculation or hypothesis. The task of an appeals officer, in the Court's view, was to weigh the evidence and determine whether it was more likely than not that the circumstances expected to give rise to the injury would take place in the future.

[69] In the present case, the appeals officer concluded that the ergonomic hazards faced by Ms. Pollard constituted a danger. The following evidence was before the officer:

- Canada Post required that all RSMCs deliver mail from the right-hand side of the road and instructed Ms. Pollard that delivery was to be made through the front passenger-side window of her vehicle;

- Ms. Pollard testified that, working alone, she would have to stretch and twist from her seat in order to deliver mail through the front passenger-side window of her vehicle;

- Ms. Pollard testified that the stretching and twisting required would cause wear and tear on her back, arm, shoulder, and hip;

- Ms. Marsh, a RSMC who had delivered mail on Ms. Pollard's rural mail route, testified that delivering mail from the right-hand side of the road put a lot of strain on her upper back, lower back, the right side of her arm and the left side of her body, which generally corroborated Ms. Pollard’s testimony;

- Ms. Pollard indicated that she twisted her back and bruised her leg on the one occasion that she tried to deliver mail through the front passenger-side window of her vehicle;

- Ms. Pollard’s doctor provided a note that indicated that she would not be fit to deliver mail through the front passenger-side window of her vehicle due to the twisting involved;

- Ms. Pollard testified that she delivered to approximately 675 mailboxes each day and that it took her approximately four hours to complete delivery of her route;

- An ergonomic study, which was conducted by Canada Post's internal ergonomist, concluded that ergonomic concerns faced by RSMCs increased as the delivery rate increased;

- The ergonomic study expressed concern that there were long-term injury implications where the delivery rate exceeded 37-40 mailboxes per hour;

- A video-tape confirmed that a number of RMBs along Ms. Pollard's route were leaning away from the roadway; and

- Documentary evidence indicated that, in order to meet Canada Post's standards, a RMB must be positioned where the RSMC can reach it, and the post of the mailbox must be fixed at such a point to ensure that the opening of the mailbox is at the outside edge of the shoulder of the road.

[70] When the above-noted facts are considered in light of the requirements for finding that a danger exists under Part II of the Code, it is my view that the determination made by the appeals officer was open to him on the evidence and was therefore not patently unreasonable.

[71] I now turn to the errors asserted by Canada Post. They may be summarized as follows:

a. The appeals officer erred by determining that a finding of danger could be made based upon an ergonomic movement that was within the total control of the employee.

b. The appeals officer erred by determining that a finding of danger could be made on the basis that Canada Post had a duty under Part II of the Code to inform its employees of the options to perform the work in question and to provide them with the necessary training.

c. The appeals officer erred by finding that there was an inherent risk of injury for delivery frequencies in excess of 40 RMBs per hour to the point that it constituted a danger under any and all potential circumstances.

[72] Each asserted error is considered in turn.

a. Did the appeals officer err in law by determining that a finding of danger could be made based upon an ergonomic movement that was within the total control of the employee?

[73] Canada Post submits that, given the following circumstances, the appeals officer erred:

(i) the work environment, body positioning, and type of ergonomic movement performed were solely within the discretion of the employee;

(i) Ms. Pollard's inability to complete the duties of her position was caused by a medical condition specific to her;

(iii) Ms. Pollard did not specify which movement or motion constituted a "danger"; and

(iv) the ergonomic movements constitute a "normal condition of employment" and are therefore exempt from the provisions related to dangerous work pursuant to paragraph 128(2)(*b*) of the Code.

[74] Each circumstance is considered in turn.

i. Ergonomic movement within the discretion of the RSMC

[75] Canada Post relies upon the decisions of *Canadian National Railway Co. and Tetley*, [2001] C.L.C.A.O.D. No. 21 (QL), and *Johnson and Canadian National Railway Company*, [1999] C.I.R.B.D. No. 41 (QL), to argue that there was no danger for Ms. Pollard because she controlled her environment and decided what body positions or movement to use in order to effect delivery. Canada Post also says that Ms. Pollard controlled the type of vehicle and vehicle options that she used for her route.

[76] The appeals officer rejected this submission for the following reasons:

> [94] In my decision, I give no weight to [counsel for Canada Post's] argument that C. Pollard could have avoided injury because she had the option of buying any vehicle she wished. Nor do I give weight to his argument that she could have altered the methodology of delivery relative to the mail trays. At the time of her refusal to work, C. Pollard was employed by [Canada Post] as an indeterminate employee and not as an independent contractor. 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, [Canada Post] had the duty under Part II to inform its employees of these options and to provide them the necessary training on them. For reference, section 124 reads:

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
>
> [95] In connection with this, I note that the ergonomist in the [Canada Post] ergonomic 4 study recommended the following measures in line with this to reduce RSMC exposure to ergonomic risk factors:
>
> - in the short term, [Canada Post] should develop best ergonomic practices for shuffling across the seat, manipulating the letter containers and reaching RMBs. [Canada Post] should deem any situation where a RSMC cannot park within 25 inches of the RMB to be an impediment to mail delivery. Additionally, [Canada Post] should inform RSMC drivers about vehicle features that are advantageous from an ergonomic point of view; and
>
> - in the long term, [Canada Post] should investigate alternative delivery modes that do not require RSMCs to slide across their vehicles.

[77] The appeals officer had heard the evidence of Ms. Pollard and Ms. Marsh about the strain and risk of injury inherent in delivering mail through the front passenger-side window. In my view, the appeals officer did not err by concluding that, if there was any way that injury could be avoided through the use of different movements or vehicles, Canada Post had a duty to inform Ms. Pollard of those options and to provide any necessary training.

[78] To the extent that Canada Post argues that Ms. Pollard controlled her delivery environment, I note that passenger-side delivery was the method of delivery required by Canada Post at the relevant time. Canada Post has not pointed to any contrary evidence to suggest that this method of delivery could have been done safely by Ms. Pollard from an ergonomic standpoint.

[79] Finally, I accept Ms. Pollard’s submission that the *Tetley* case, cited above, is distinguishable on its facts and that the *Johnson* case, cited above, is distinguishable because it turned on a pre-2000 definition of “danger”. It is, however, relevant to note that, in *Johnson*, the member did note that the frequency of exposure to a hazard could result in a situation evolving into one of danger.

ii. Ms. Pollard's inability to complete her duties was caused by her medical condition

[80] Canada Post submits that it was Ms. Pollard's underlying medical condition that made the activity difficult for her and that the work was not dangerous within the meaning of the Code. It follows, Canada Post argues, that the ergonomic impact of the work on Ms. Pollard's pre-existing medical condition is outside the ambit of Part II of the Code. Canada Post further submits that, while it may have had an obligation to accommodate Ms. Pollard pursuant to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, her complaint does not give rise to a danger because it relates to her medical condition.

[81] The appeals officer rejected this submission for the following reasons:

> [96] [Counsel for Canada Post] argued that C. Pollard had an existing back injury and so any danger she would experience was due to her own health situation. Therefore, he held that [Canada Post’s] only responsibility may have extended to “accommodate” C. Pollard. I do not assign any significant weight to this because I found reliable and credible C. Pollard’s testimony that she had an arthritic condition in her back, as opposed to an on-going back problem that required the formal job accommodation referred to by [counsel for Canada Post]. I further interpret from her physician’s note that the problem for C. Pollard was the twisting involved in delivering mail through the passenger side of her vehicle.

> [97] While I am not taking a position here relative to the application of the "average person" concept for interpreting the definition of danger in Part II, I would expect that the "average person" concept referred to by [counsel for Canada Post] includes a range of physical and mental frailties normal to the human condition. These physical and mental frailties typically may get magnified with age without requiring a formal job accommodation by the employer.
>
> [98] In this perspective, there is evidence in section 14.48 of Part XIV, Materials Handling, of the *Canada Occupational Health and Safety Regulations* that the employer is required to develop procedures that take into account the employee's capabilities. I see little difference in principle relativel [*sic*] to the handling of mail. Section 14.48 reads:
>
> > 14.48 Where an employee is required manually to lift or carry loads weighing in excess of 10 kg, the employer shall instruct and train the employee
> >
> > *(a)* in a safe method of lifting and carrying the loads that will minimize the stress on the body; and
> >
> > *(b)* in the work procedure <u>appropriate to the employee's physical condition and the conditions of the work place.</u>
>
> [99] Based on the evidence, I believe that the back problem referred to by C. Pollard's physician falls within the context of the "average person" and is not associated with a job accommodation obligation under another statute than Part II. [underlining in original]

[82] Thus, the appeals officer found as a fact that Ms. Pollard had an arthritic condition, as opposed to an ongoing back problem that required formal job accommodation, and that the central problem was the twisting motion involved in delivering mail through the front passenger-side window.

[83] Ms. Pollard's testimony was that she did not have ongoing back problems, but she would develop a back problem due to the twisting required to deliver mail through the front passenger-side window. Ms. Pollard's doctor also provided a note that attributed her difficulties to the twisting involved in delivering mail through the front passenger-side window of her vehicle. Ms. Marsh also testified that delivering mail through the front passenger-side window put a lot of strain on her upper and lower back. As a result, Ms. Marsh filed an injury report and refused to deliver mail because of health and safety issues.

[84] Therefore, the factual findings of the appeals officer were supported by the evidence and were not patently unreasonable. In my view, those findings justified the appeals officer's rejection of Canada Post's submission that any danger Ms. Pollard would experience was due to her personal medical condition.

iii. Specific movement

[85] Canada Post argues that Ms. Pollard did not specify which movement or motion constituted a danger and that no danger can be found in the circumstances of this case because there are nearly an infinite number of possible motions and positions available to effect delivery, but no evidence that any one of those positions has the potential to injure.

[86] Canada Post also argues that the definition of “danger” requires an impending element; that is, the injury or illness has to occur before the hazard or condition can be corrected or the future activity altered. It says, however, that there is no impending element with respect to the delivery of mail through the front passenger-side window.

[87] The appeals officer dismissed the first argument for the following reason:

> [100] In is my further opinion, there is no basis for [counsel for Canada Post's] contention that there can be no finding of danger because C. Pollard had not specified what movement would cause injury to her. To the contrary, C. Pollard indicated that she had to reach from six to eight feet to deliver mail to RMBs through the front passenger side window, to pickup mail from the RMBs and to raise the flag on the RMBs. She specified that the required stretching and twisting injured her back and leg. She complained that this was made worse by the fact that she made approximately 700 RMB stops each day, 5 days a week, and that her route took approximately 4 hours to complete.

[88] In my view, Ms. Pollard identified the activity in question with sufficient precision as to allow the appeals officer to evaluate her refusal to work, and the appeals officer did not err in rejecting Canada Post's submission. 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.

[89] As for the impending element, the appeals officer reviewed the applicable jurisprudence and concluded that the definition of danger "only requires that one ascertains in what circumstances the potential hazard could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one."

[90] The appeals officer then reviewed the evidence that:

- whereas the ergonomic study prepared for Canada Post cautioned that long-term injury was a concern where the rate of mailboxes exceeded 37-40 per hour, Ms. Pollard had to make 700 stops in approximately 4 hours;
- Canada Post had not provided Ms. Pollard with training to safely carry out deliveries through the front passenger-side window of her vehicle; and
- several mailboxes along Ms. Pollard's route leaned away from the road so that the distance she was required to reach was even greater than normal.

[91] The appeals officer went on to observe that the required impending element was confirmed by the following:

- there was no evidence that Canada Post had consulted with its health and safety committee regarding the change to the practice of delivering mail from the left shoulder of the road;
- the evidence showed that the complaint resolution process at Canada Post was inadequate;
- Ms. Pollard's route was not inspected on an annual basis as required by Canada Post's policy, and no action was taken to correct hazards on her route;
- Canada Post did not proactively consult its employees on health and safety studies as required by the Code; and
- contrary to the requirements of the Code, the manager who testified at the hearing on behalf of Canada Post had not received any training regarding her responsibilities.

[92] The officer then concluded as follows:

> [112] All of this suggests that the internal responsibility system at [Canada Post] was somewhat dysfunctional at the time. Based on this, and on the totality of the evidence, I find that it is reasonable in the circumstances to expect that C. Pollard would have been injured by exposure to the ergonomic hazards connected with delivering mail through the front passenger side window of her vehicle before the hazards could be corrected.

[93] In my view, the officer committed no error of law in setting out the applicable test and, on the evidence before him, did not err in concluding that there was an impending element to the danger faced by Ms. Pollard.

iv. Normal condition of employment

[94] Paragraph 128(2)(*b*) of the Code provides an exception with respect to a finding of danger where the danger is a normal condition of employment:

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	128(2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :
[…]	[…]
(b) the danger referred to in subsection (1) is a normal condition of employment.	b) le danger visé au paragraphe (1) constitue une condition normale de son emploi.

[95] Relying upon decisions such as *François Lalonde and Canada Post Corporation*, [1989] C.L.R.B.D. No. 731 (QL) [Translation] and *Robitaille and VIA Rail Ltd.*, [2005] C.L.C.A.O.D. No. 54 (QL), Canada Post argues that the requisite twisting and bending to deliver mail through the front

passenger-side window is a normal and inherent condition of a RSMC's work. Thus, these activities are said to be exempt from the right to refuse work under the Code.

[96] The appeals officer rejected this submission on the basis of this Court's decision in *Verville*, cited above. In that case, my colleague Madam Justice Gauthier considered what was contemplated by paragraph 128(2)(*b*) of the Code. At paragraph 55 of her reasons, she wrote:

> The customary meaning of the words in paragraph 128(2)(b) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car? [emphasis added]

[97] From this, the appeals officer concluded that "a normal danger is not a danger connected with the methodology that could usually be altered in order to eliminate or avoid the danger. This would apply in respect of C. Pollard."

[98] Canada Post has not argued that Justice Gauthier was in error when she interpreted paragraph 128(2)(*b*) to exclude from the concept of "normal condition of employment" a risk that is not inherent, but rather depends upon the method used to perform a job. I find no error in the appeals officer's interpretation of Justice Gauthier's decision in *Verville*, cited above.

[99] Turning to the application of that principle to the evidence before the appeals officer, Ms. Marsh testified that, after she filed her injury report, Canada Post provided her with a helper

who sat in the passenger seat of her vehicle and delivered mail out the front passenger-side window. This avoided all ergonomic concerns raised by Ms. Pollard. There was also evidence that the use of community mailboxes or right-hand drive delivery vehicles were alternate methods of mail delivery that would avoid the ergonomic hazards.

[100] In light of that 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.

[101] Moreover, the evidence before the appeals officer established that, even following Ms. Pollard's refusal to work, her delivery route continued to include a number of mailboxes that did not meet Canada Post's specifications. I have difficulty accepting that delivery to mailboxes that do not comply with Canada Post's own policies is a normal condition of a RSMC's employment.

b. Did the appeals officer err in law by determining that a finding of danger could be made on the basis that Canada Post had a duty under Part II of the Code to inform its employees of the options to perform the work in question and to provide them with the necessary training?

[102] Canada Post submits that a "major area of concern" for the appeals officer was the lack of training provided to RSMCs with respect to delivery from right-hand side of the road. It further submits that implicit in the appeals officer's reasoning is that, if an employee can choose to perform an ergonomic movement in a safe or an unsafe manner, a danger will be found to exist if Canada

Post does not provide training "in respect of what amounts to [be] common sense every day movements." Canada Post also complains that the effect of the decision is to require it to train employees in a series of movements that will vary according to the configuration of each RSMC's vehicle.

[103] On this point, the appeals officer wrote:

> [103] Added to this, [Canada Post] had not provided C. Pollard with training on the delivery of rural mail from the right-hand shoulder of roadways that was appropriate to her physical condition and work environment when it advised her on November 24, 2004, that her deliveries had to be carried out in this manner. In fact, [Canada Post] did not provide her with any training. The absence of training was not surprising because it appeared that [Canada Post] has not considered the need to revise its RSMC in-vehicle RMB delivery procedures in conjunction with its notices to RSMC's that delivery on the left-hand shoulder of roadways was no longer permitted.

[104] I question Canada Post's characterization of this as a "major area of concern" for the appeals officer. Rather, it appears to me that the officer was dealing with Canada Post's arguments that Ms. Pollard could have avoided injury by buying a different vehicle or altering her method of delivery. In that context, the appeals officer did not err by noting that, if the injury was preventable through options relating to the selection of a vehicle or work procedures, Canada Post had a duty to inform employees of those options and to provide necessary training. This conclusion was supported by section 124 and paragraph 125(1)(*q*) of the Code.

c. Did the appeals officer err in law by finding, in the absence of evidence, that there was an inherent risk of injury for delivery frequencies in excess of 40 RMBs per hour, to the point that it constituted a danger under any and all potential circumstances?

[105] Canada Post's submissions on this point are as follows:

> 53. Canada Post submits that in the absence of any evidence on the record to support a conclusion that there was an inherent risk of injury for delivery frequencies in excess of 40 rural mail boxes per hour, the [appeals officer's] decision is patently unreasonable. A key factor in the [appeals officer's] decision was the ergonomic study performed by Canada Post's internal ergonomist, Chris Eady. The study was not statistically relevant, dealing with a limited number of evaluations. Although the study concluded that there were ergonomic issues of concern, it concluded that there was no immediate risk to RSMCs.
>
> 54. The [appeals officer] accepted the ergonomist's findings, but refused to accept this conclusion. Indeed, the [appeals officer] concluded, based upon the report, that there was an inherent risk of injury for delivery frequencies in excess of 40 rural mailboxes per hour, notwithstanding the fact that the report indicated only that there might be long term implications above that frequency. There was no other objective evidence upon which the [appeals officer] could support this conclusion. The [appeals officer's] conclusions were stated in very definitive terms, indicating that:
>
> "in the short term, [Canada Post] should develop best ergonomic practices for shuffling across the seat, manipulating the letter containers and reaching RMBs. [Canada Post] should deem any situation where a RSMC cannot park within 25 inches of the RMB to be an impediment to mail delivery. Additionally, [Canada Post] should inform RSMC drivers about vehicle features that are advantageous from an ergonomic point of view"; and
>
> "in the long term, [Canada Post] should investigate alternative delivery modes that do not require RSMCs to slide across their vehicles."

> 55. In respect of this ergonomic report, the [appeals officer] further stated:
>
> “The [Canada Post] ergonomic report concluded that associated ergonomic concerns increased across all observed delivery methods as the rate of RMBs per hour increased. The report suggested that there was no immediate risk of injury in delivering mail from the truck or vans tested in the study, but cautioned that long term injury implications were a concern where the rate of RMBs per hour exceeded 37-40. In this case, C. Pollard had to make 700 RMB stops in approximately 4 hours. To stay within 40 RMBs per hour, C. Pollard would take more than 17 hours every day to complete her route. Thus her actual RMB delivery rate exceeded four times the rate of 40 RMBs per hour. Based on this, and that fact that the ergonomic study looked only at 45 RMB stops per scenario, **I give little weight to the suggestion in the report that there might not be an immediate risk to RSMCs associated with the work.”** [emphasis in original and references to the evidence are omitted]
>
> 56. Accordingly, the [appeals officer’s] conclusion with respect to the report is patently unreasonable given the lack of evidence to support such a conclusion.

[106] At the outset, I note that, at paragraph 54 of its written submissions, Canada Post purports to set out certain conclusions of the appeals officer that are said to be "stated in very definitive terms". In fact, review of paragraph 95 of the officer's reasons shows that the officer reached no such conclusions. Rather, the officer was quoting two recommendations from the ergonomic study prepared for Canada Post about the need to inform and train its employees.

[107] The portion of the appeals officer's reasons quoted at paragraph 55 of Canada Post's written submissions is found at paragraph 102 of the decision, where the officer was discussing the required impending element to the definition of danger.

[108] Reading the appeals officer's decision fairly, I do not accept Canada Post's submission that the officer found that there was an inherent risk of injury for delivery frequencies in excess of 40 RMBs per hour. Instead, the officer noted that ergonomic concerns increased as the delivery rate increased, that long-term injury implications become a concern where the delivery rate exceeded 37-40 per hour, and that Ms. Pollard's delivery rate was far in excess of that rate. This evidence was relevant to the application of the definition of "danger" as explained in *Verville* and *Martin* C.A., both cited above.

[109] To the extent that the appeals officer relied, in part, upon an inference drawn from the ergonomic study to conclude that the hazard arising from the stretching and twisting required in order to deliver mail through the front passenger-side window could reasonably be expected to cause injury to Ms. Pollard, such an inference was not patently unreasonable.

[110] The officer's decision to give little weight to the suggestion in the ergonomic study that there might not be an immediate risk to RSMCs was also not patently unreasonable in view of the delivery rate considered in the study.

Conclusion and Costs

[111] For the above reasons, the application for judicial review is allowed in part. The decision and the direction of the appeals officer with respect to the traffic safety issues are set aside. The application for judicial review is dismissed in respect of the officer's decision and direction with respect to the ergonomic issues.

[112] As to the relief to be granted in consequence of the breach of procedural fairness, the parties agree that the decision about the traffic safety issues is severable from the decision about the ergonomic issues. For this reason, the decision and direction about the ergonomic issues may be upheld while the decision and direction about the traffic safety issues may be set aside.

[113] In supplemental written submissions, Canada Post submitted that, in such an event, the appropriate relief would be to simply quash the decision on traffic safety without referral back to the CAOOHS. In Canada Post's view, "[m]uch has changed since the date of the original refusal [to work], both in terms of the route and the assessment tools/methodology related to RSMC traffic safety." Thus, Canada Post argues that the parties would be better served if this matter was dealt with by the parties pursuant to Part II of the Code. Canada Post notes that, after that process is completed, recourse would still exist to an appeals officer.

[114] In the alternative, Canada Post submits that the matter should be remitted to a different appeals officer because the original appeals officer "has already expressed a conclusion on the traffic safety issue and will have had his decision overturn [*sic*] by the Court on the basis of procedural error."

[115] Ms. Pollard submits that the matter should be remitted back to the original appeals officer because he "is familiar with the case and it would be more efficient for him to resume the hearing on this issue." Ms. Pollard observes that Canada Post did not suggest that the original officer would be biased or unable to render a fair decision.

[116] I am not prepared to simply quash the decision and direction in respect of traffic safety without referral back to the CAOOHS. This is not relief originally sought by Canada Post and there is no evidence before the Court about what, if anything, has changed since the original decision of the appeals officer. Moreover, there is, in my view, a significant possibility that such a course would lead to further delay.

[117] As to whether the traffic safety issues should be remitted to the original appeals officer, as matter of law, a matter may be remitted back to the original decision-maker so long as there is no reasonable apprehension that the decision-maker is not likely to determine the matter objectively.

[118] Sara Blake, in her text Administrative Law in Canada (4th edition), notes at page 220 that it is preferable that a "re-hearing be by the same tribunal panel, especially if only one part of the proceeding is quashed and referred back, since it is familiar with the matter."

[119] A decision-maker may redetermine a matter after its original decision has been set aside, even where the first decision was quashed for a breach of the duty of fairness. See: *Deigan v. Canada (Industry)* (2000), 258 N.R. 103 (F.C.A.), and *Gale v. Canada (Treasury Board)* (2004), 316 N.R. 395 (F.C.A.).

[120] In the present case, there is no evidence of bias or a reasonable apprehension of bias. Having carefully reviewed the transcript of the original hearing, I have no reason to believe that

the original appeals officer would not determine the traffic safety issues objectively after hearing all of the evidence.

[121] The matter will therefore be remitted to the CAOOHS for redetermination by the original appeals officer unless he is not reasonably available.

[122] With respect to costs, counsel were agreed that costs should follow the event. If success was divided, costs were left to the discretion of the Court.

[123] Success was divided and, in all of the circumstances, I conclude that there should be no award of costs. Each side shall therefore bear their own costs on the application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed in part. The decision and the direction of the appeals officer with respect to the traffic safety issues are hereby set aside.

2. The issue of the existence of any traffic safety hazards and whether they constitute a danger is remitted to the CAOOHS for redetermination by the original appeals officer, Mr. Malanka, unless he is not reasonably available. In that event, the matter may be determined by a different appeals officer.

3. The application for judicial review is dismissed in respect of the decision and direction of the appeals officer with respect to the ergonomic issues.

4. No costs are awarded.

"Eleanor R. Dawson"
Judge

SCHEDULE A

Set out below are sections 122(1), 122.1, 124, 125(1)(*q*), 128(1) and (2), 129, 145(1) and (2), 145.1, 146.1(1) and (2), 146.2, 146.3, and 146.4 of the *Canada Labour Code*, R.S.C. 1985, c. L-2:

122(1) "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,	122(1) «danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée

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;	toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.
[…]	[…]
122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.	122.1 La présente partie a pour objet de prévenir les accidents et les maladies liés à l'occupation d'un emploi régi par ses dispositions.
[…]	[…]
124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.	124 L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.
[…]	[…]
125(1)(*q*) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work;	125(1)*q*) d'offrir à chaque employé, selon les modalités réglementaires, l'information, la formation, l'entraînement et la surveillance nécessaires pour assurer sa santé et sa sécurité;
[…]	[…]
128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	128(1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :

(*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

(*b*) a condition exists in the place that constitutes a danger to the employee; or

(*c*) the performance of the activity constitutes a danger to the employee or to another employee.

a) l’utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;

b) il est dangereux pour lui de travailler dans le lieu;

c) l’accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

(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

(*a*) the refusal puts the life, health or safety of another person directly in danger; or

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

(2) L’employé ne peut invoquer le présent article pour refuser d’utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d’accomplir une tâche lorsque, selon le cas :

a) son refus met directement en danger la vie, la santé ou la sécurité d’une autre personne;

b) le danger visé au paragraphe (1) constitue une condition normale de son emploi.

[…]

[…]

129(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to

129(1) Une fois informé, conformément au paragraphe 128(13), du maintien du refus, l’agent de santé et de sécurité effectue sans délai une enquête sur la question en présence de l’employeur, de l’employé et d’un membre du comité local

investigate the matter in the presence of the employer, the employee and one other person who is

(*a*) an employee member of the work place committee;

(*b*) the health and safety representative; or

(*c*) if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee.

ayant été choisi par les employés ou du représentant, selon le cas, ou, à défaut, de tout employé du même lieu de travail que désigne l'employé intéressé, ou fait effectuer cette enquête par un autre agent de santé et de sécurité.

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

(2) Lorsque plusieurs employés maintiennent leur refus, ils peuvent désigner l'un d'entre eux pour agir en leur nom dans le cadre de l'enquête.

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

(3) L'agent peut procéder à l'enquête en l'absence de toute personne mentionnée aux paragraphes (1) ou (2) qui décide de ne pas y assister.

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

(4) Au terme de l'enquête, l'agent décide de l'existence du danger et informe aussitôt par écrit l'employeur et l'employé de sa décision.

(5) Before the investigation and decision of a health and safety

officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

(*a*) the other employee is qualified for the work;

(*b*) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and

(*c*) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

(5) Avant la tenue de l'enquête et tant que l'agent n'a pas rendu sa décision, l'employeur peut exiger la présence de l'employé en un lieu sûr proche du lieu en cause ou affecter celui-ci à d'autres tâches convenables. Il ne peut toutefois affecter un autre employé au poste du premier que si les conditions suivantes sont réunies :

a) cet employé a les compétences voulues;

b) il a fait part à cet employé du refus de son prédécesseur et des motifs refus;

c) il croit, pour des motifs raisonnables, que le remplacement ne constitue pas un danger pour cet employé.

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

(6) S'il conclut à l'existence du danger, l'agent donne, en vertu du paragraphe 145(2), les instructions qu'il juge indiquées. L'employé peut maintenir son refus jusqu'à l'exécution des instructions ou leur modification ou annulation dans le cadre de la présente partie.

(7) If a health and safety officer decides that the danger does not exist, the employee is not

entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

(7) Si l'agent conclut à l'absence de danger, l'employé ne peut se prévaloir de l'article 128 ou du présent article pour maintenir son refus; il peut toutefois — personnellement ou par l'entremise de la personne qu'il désigne à cette fin — appeler par écrit de la décision à un agent d'appel dans un délai de dix jours à compter de la réception de celle-ci.

[…]

145(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

(*a*) terminate the contravention within the time that the officer may specify; and

(*b*) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

[…]

145(1) S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner à l'employeur ou à l'employé en cause l'instruction :

a) d'y mettre fin dans le délai qu'il précise;

b) de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.

[…]

145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an

[…]

145(2) S'il estime que

employee while at work,

(*a*) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

(i) correct the hazard or condition or alter the activity that constitutes the danger, or

(ii) protect any person from the danger; and

(*b*) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

l'utilisation d'une machine ou chose, une situation existant dans un lieu de travail ou l'accomplissement d'une tâche constitue un danger pour un employé au travail, l'agent :

a) en avertit l'employeur et lui enjoint, par instruction écrite, de procéder, immédiatement ou dans le délai qu'il précise, à la prise de mesures propres :

(i) soit à écarter le risque, à corriger la situation ou à modifier la tâche,

(ii) soit à protéger les personnes contre ce danger;

b) peut en outre, s'il estime qu'il est impossible dans l'immédiat de prendre les mesures prévues à l'alinéa *a*), interdire, par instruction écrite donnée à l'employeur, l'utilisation du lieu, de la machine ou de la chose ou l'accomplissement de la tâche en cause jusqu'à ce que ses instructions aient été exécutées, le présent alinéa n'ayant toutefois pas pour effet d'empêcher toute mesure nécessaire à la mise en oeuvre des instructions.

[…]

145.1(1) The Minister may designate as an appeals officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.

(2) For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.

[…]

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(*a*) vary, rescind or confirm the decision or direction; and

(*b*) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

(2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union

[…]

145.1 (1) Le ministre peut désigner toute personne compétente à titre d'agent d'appel pour l'application de la présente partie.

(2) Pour l'application des articles 146 à 146.5, l'agent d'appel est investi des mêmes attributions — notamment en matière d'immunité — que l'agent de santé et de sécurité.

[…]

146.1 (1) Saisi d'un appel formé en vertu du paragraphe 129(7) ou de l'article 146, l'agent d'appel mène sans délai une enquête sommaire sur les circonstances ayant donné lieu à la décision ou aux instructions, selon le cas, et sur la justification de celles-ci. Il peut :

a) soit modifier, annuler ou confirmer la décision ou les instructions;

b) soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.

concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[…]

146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may

(*a*) summon and enforce the attendance of witnesses and compel them to give oral or written evidence under oath and to produce any documents and things that the officer considers necessary to decide the matter;

(*b*) administer oaths and solemn affirmations;

(*c*) receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law;

(*d*) examine records and make inquiries as the officer considers necessary;

(*e*) adjourn or postpone the proceeding from time to

(2) Il avise par écrit de sa décision, de ses motifs et des instructions qui en découlent l’employeur, l’employé ou le syndicat en cause; l’employeur en transmet copie sans délai au comité local ou au représentant.

[…]

146.2 Dans le cadre de la procédure prévue au paragraphe 146.1(1), l’agent d’appel peut :

a) convoquer des témoins et les contraindre à comparaître et à déposer sous serment, oralement ou par écrit, ainsi qu’à produire les documents et les pièces qu’il estime nécessaires pour lui permettre de rendre sa décision;

b) faire prêter serment et recevoir des affirmations solennelles;

c) recevoir sous serment, par voie d’affidavit ou sous une autre forme, tous témoignages et renseignements qu’il juge indiqués, qu’ils soient admissibles ou non en justice;

time;

(*f*) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;

(*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;

(*h*) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

(*i*) decide any matter without holding an oral hearing; and

(*j*) order the use of a means of telecommunication that permits the parties and the officer to communicate with each other simultaneously.

d) procéder, s'il le juge nécessaire, à l'examen de dossiers ou registres et à la tenue d'enquêtes;

e) suspendre ou remettre la procédure à tout moment;

f) abréger ou proroger les délais applicables à l'introduction de la procédure, à l'accomplissement d'un acte, au dépôt d'un document ou à la présentation d'éléments de preuve;

g) en tout état de cause, accorder le statut de partie à toute personne ou tout groupe qui, à son avis, a essentiellement les mêmes intérêts qu'une des parties et pourrait être concerné par la décision;

h) fixer lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie la possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

i) trancher toute affaire ou question sans tenir d'audience;

j) ordonner l'utilisation de modes de

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

146.4 No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.

télécommunications permettant aux parties et à lui-même de communiquer les uns avec les autres simultanément.

146.3 Les décisions de l'agent d'appel sont définitives et non susceptibles de recours judiciaires.

146.4 Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'agent d'appel exercée dans le cadre de la présente partie.

SCHEDULE B

Page	Description	Speaker	Details
539(1)	Hearing Convened		February 16, 2006
539(1)	Introduction	Chairperson	The Chairperson framed the issue before him as whether or not the Health and Safety Officer, Ken Manella, erred when he made his decision that a danger did not exist for Ms. Pollard at the time of his investigation.
540(5)	Introduction	Chairperson	"The process that I'm following is quasi-judicial in nature. By that, I am required to ensure that a fair and impartial hearing is held here. … It is quasi-judicial, so it's a serious matter; but just to make the point that I can have my hearings as formal or as informal as I think is appropriate. I always like to try and keep it as less formal and less legal, following what you would normally see in a court, as is possible."
540(7)	Introduction	Chairperson	"[O]nce we're done here, then I'll have an opportunity to go

Page	Description	Speaker	Details
			back to my office. When I'm considering the case, if there's anything that I'm not clear on, that I'm uncertain on, I can call the parties and seek further information."
544(23)	Opening Statement	Mr. Nash, on behalf of Carolyn Pollard	Mr. Nash canvassed a number of issues in his opening remarks, including the compensation owed to Ms. Pollard for the loss of her mail routes, the removal of grievances contained in Ms. Pollard's file, and the existence of a labour board decision from Quebec that found rural mail delivery to be unsafe.
544(26)	Opening Statement	Mr. Bird, on behalf of Canada Post	Mr. Bird disagreed with Mr. Nash's understanding of the relevant issues, suggesting that the Chairperson was to put himself in the shoes of the Health and Safety Officer on the date of the refusal to work and determine whether the Officer's decision was sound.
545(26)	Opening Statement	Mr. Bird, on behalf of Canada Post	"Mr. Nash has raised a great number of other issues, many of which, the bulk of which are labour relations issues. The proper forum for that is under the collective agreement and adjudication is under Part I of the Code. You have no jurisdiction to inquire into that area or grant any remedies."
545(27)	Comment on Opening Statements	Chairperson	"Normally I don't comment after opening statements but I am compelled to. With regard to your opening statement, Mr. Nash, Mr. Bird is quite right."
545(28)	Comment on Opening Statements	Chairperson	"I'm looking to decide whether or not the Health and Safety officer erred … . And not more than that. All the other matters, then, you're just going to have to deal with somewhere else."
546(30)	Statement of Health and Safety Officer	Ken Manella	Mr. Manella read the report that he prepared in respect of Ms. Pollard's complaint.
550(46)	Cross-Examination of Health and Safety Officer	Mr. Nash, on behalf of Carolyn Pollard	Mr. Nash questioned Mr. Manella regarding his investigation. Mr. Manella acknowledged that he felt that Ms. Pollard's complaint focused on the physical process of delivering the mail as opposed to issues of traffic-safety. Ms. Pollard also questioned Mr. Manella about the need for vehicle signage. When Mr. Nash sought to introduce other decisions made under Part II of the Canada Labour Code regarding rural mail delivery, Mr. Bird raised an objection.
555(65)	Objection to Introduction of Health and Safety Decisions from other Provinces	Mr. Bird, on behalf of Canada Post	"[A]gain, Mr. Chairman, I'm not going to be objecting very often to Mr. Nash's presentation to you. … I am not sure how familiar Mr. Nash is with this process. He'd indicated it was his first one. Obviously, you're prepared to give him a great deal of latitude. I'm prepared to do the same. But at the end of the day, we do have a focus here and much of the information that is being put to this witness in the questioning is unfocused to the events before us … ."
555(66)	Comment in Response to Objection	Chairperson	"[W]here I'm facing a hearing where we have, for example, one person represented by counsel and someone else who is indicating not much experience with this process, I have

Page	Description	Speaker	Details
			somewhat of a duty to level the playing field … .”
556(70)	Comment about Fairness Concerns	Chairperson	“[B]ecause I can’t anticipate where you’re going and what you are doing … . I think we’re just going to have to operate as we said. … Just go ahead and if there’s a problem with it that deals with fairness, then Mr. Bird will raise it.”
556(72)	Cross-Examination of Health and Safety Officer	Mr. Bird, on behalf of Canada Post	Mr. Bird inquired into Mr. Manella’s experience, his investigation, and the circumstances surrounding his finding that no danger existed.
562(93)	Re-examination of the Heath and Safety Officer	Mr. Nash, on behalf of Carolyn Pollard	Before Mr. Nash began his re-examination of Mr. Manella, Mr. Bird asked that the Chairperson remind Mr. Nash of the limited scope of questioning on re-examination.
562(93)	Comment on Scope of Re-examination	Chairperson	“[Y]ou’re limited to whatever matters that Mr. Bird has raised. However, having said that, because again we have a situation of a party represented by counsel and one not and one is admittedly saying he’s not familiar with this process, I’m going to give him latitude. If he strays into another area, I’ll give you an opportunity to respond to it.”
564(102)	Examination of Carolyn Pollard	Mr. Nash	Mr. Nash questioned Ms. Pollard regarding the circumstances leading up to her refusal to work. When Mr. Nash sought to introduce a package of documents that Ms. Pollard had prepared and taken to the hearing, Mr. Bird raised an objection. The discussion focused primarily on a document prepared on September 19, 2005, which purported to list “unsafe” mailboxes on Ms. Pollard’s route.
571(129)	Objection to Documents Tendered by Carolyn Pollard	Mr. Bird, on behalf of Canada Post	“I may have some problems with some of this documentation, Mr. Chairman.”
571(131)	Submission regarding the List of Unsafe Mailboxes prepared by Carolyn Pollard	Mr. Bird, on behalf of Canada Post	“Whatever the concerns with respect to individual boxes approximately a year after the event, even if boxes were before you, which from what we’ve heard so far, is not, is a matter that’s just totally irrelevant to these proceedings.”
572(133)	Exchange as to the Meaning of the List of Unsafe Mailboxes	Carolyn Pollard	MS. POLLARD: “… I was concerned about these mailboxes that were unsafe to deliver, and not one time did they send out anyone to check these boxes. Not one time did they come back to me and ask me if they were still unsafe.” THE CHAIRPERSON: “What was the nature of unsafe?” MS. POLLARD: “Unsafe was meaning that I couldn’t pull up to them properly without being in the line of traffic because they were telling us that our vehicle could not be in the line of traffic whatsoever. It had to be pulled over on a shoulder.” THE CHAIRPERSON: “How does that relate to the

Page	Description	Speaker	Details
			ergonomic issue you're talking about?" MS. POLLARD: "Well that, again, is delivering the mail to myself. When I was delivering the mail, they had brought up the fact of making sure that we stayed on the shoulder. I took the information and went out and looked at it every time I delivered because I never paid any attention. I've just always delivered my route and I realized how many mailboxes I was over the shoulder, out into the main traffic of the road. That's why I wrote this down. Not that I couldn't deliver, but safety-wise, it was unsafe. That's why I wrote that up."
572(136)	Submission regarding the List of Unsafe Mailboxes prepared by Carolyn Pollard	Mr. Nash, on behalf of Carolyn Pollard	THE CHAIRPERSON: "Mr. Nash, do you have any comment with regard to the question of relevance that Mr. Bird has raised?" MR. NASH: "[I]f you're out of your seatbelt and somebody hits you, you're off the side of the road or you're not off the side of the road, you're impeding the traffic, people having to go around you … that's what the ergonomic issue actually is, sir." THE CHAIRPERSON: "And your argument is that all this material is relevant to the issue before me?" MR. NASH: "For the most part, sir. …"
573(137)	Submission	Mr. Bird, on behalf of Canada Post	"Again, I guess we go back to what is the nature of the complaint before you … . If we go back to … the registration form that we showed to Mr. Manella, it certainly doesn't speak of any of the events with respect of box location. … However, what we're doing here today, as I understood it, is we'll review the events as they occurred on November 24th, 2004 as limited by the particular work refusal."
573(137)	Submission	Mr. Bird, on behalf of Canada Post	"I have no doubt that Ms. Pollard has a great degree of passion with respect to her work and the safety issues, as she rightly should. … But, indeed, the purpose of these proceedings has a narrower focus."
573(139)	Comment on Mandate	Chairperson	"In terms of the mandate that I have, you're quite right. The focus is the decision that Health and Safety Officer Manella made. … Essentially we're looking at a potential hazard that could have constituted a danger. … What I'm trying to say is I'm not frozen in time."
574(141)	Submission	Mr. Bird, on behalf of Canada Post	"I think what we're doing is we're losing focus as to what the actual issue on the appeal is with respect to the boxes."
574(142)	Comment on Mandate	Chairperson	"Well, if I can, and I'll engage in some exchange here because I want to make sure I have all the facts here. … This is probably good that I'm looking at this because it's going to cause me to consider the scope here, in a sense. … I'm starting to sense from some of the evidence that's exchanged that I'm being expected to look rigidly at the complaint that was on the complaint form, that it was only the ergonomic,

Page	Description	Speaker	Details
			that I'm not going to look at how close the vehicle was to the post or how close she could get to the post, whatever. … [I]t would seem to me that when I'm looking at what is ergonomically involved, I can't see how the distance that can be achieved, the vehicle to the post, can't be relevant."
574(146)	Comment regarding Issue to be Decided	Chairperson	"The decision that I have to make is whether or not I'm going to accept this as a document."
575(148)	Submission	Mr. Bird, on behalf of Canada Post	MR. BIRD: "I'm just seeing that this hearing will evolve into something far more lengthy than perhaps it ought, given what I perceive to be the limitations of your analysis. … What we do need to focus, though, is on the issue in question. And to the extent that this information relates to things that are other than the issue in question in November of 04 – " THE CHAIRPERSON: "Okay." MR. BIRD: " – they-re not properly received by it. … So I leave it to you to give us some guidance and, if necessary, I can make argument at the end of the day."
576(150)	Ruling	Chairperson	"What I am going to do is I'm going to accept this document, but I certainly accept that you may wish to respond to it by evidence or you may wish to address it in your final submission and argument."
576(152)	Ruling	Chairperson	"Before we recessed for lunch, there was this package that I had to consider, and I really haven't completely come to a decision on it. … [T]here's a little bit of the document with regard to the list of unsafe mailboxes. I'm uncertain, still in my mind, what this is relating to and what is relevant."
577(154)	Ruling	Chairperson	"So part of the difficulty I'm having with the document is exactly what they're being submitted for and what they're supposed to be telling me."
578(159)	Comment on Fairness	Chairperson	"[I]f I suddenly am convinced that a danger existed with regard, I'll be specific, with regard to somebody smashing into the back of a vehicle. I'll leave it to your argument as to what I should be doing with that in terms of should I be looking at it? Should I interpret my powers under the Code, to address it? Now, to try and make certain that we don't leave the parties with a sense of unfairness, often in a case, once I've heard it, if I feel that I'm going to be going into another area that would not have necessarily come to the understanding of the parties doing the hearing, then what I'll do is reconvene the hearing and I'll be saying to you, I am considering something that perhaps you didn't appreciate and therefore I'll take an opportunity to give you time to give evidence and argumentation with that."
578(160)	Comment on Accepting Evidence	Chairperson	"I'm just going to indicate to you that when I'm deciding whether to take a document, part of it is so that I have [a] picture of the complete situation so that, at the end of it, I

Page	Description	Speaker	Details
			can say to myself, I'm satisfied that I looked at all of the aspects of the hazards that were involved in the circumstances and that if I have concerns, then I'll raise it with the parties."
582(173)	Question	Chairperson	THE CHAIRPERSON: "If I could, before you go on then – and it's a question that came up in that exchange – and if I didn't write it down and it was said, forgive me then. What was the alleged unsafe features of the box?" MS. POLLARD: "Because the safety way to deliver the mail to a rural route is your vehicle is supposed to be right on the shoulder with no tires on the road whatsoever. So you're not impending [sic] any traffic coming behind you. I don't know if that's the right word. So that was why, because all these boxes that I've written down, I'm against the side, on the shoulder, but my tires are still on the main road. There's not enough shoulder space for me to – "
587(196)	Cross-examination of Carolyn Pollard	Mr. Bird, on behalf of Canada Post	At the outset of Mr. Bird's cross-examination of Ms. Pollard, the Chairperson noted that a document contained in the package prepared by Ms. Pollard had not been canvassed. That document purported to be a petition signed by a number of rural mail carriers that shared Ms. Pollard's view that the mail routes were unsafe. Mr. Bird reiterated his concern about the Chairperson receiving the package of documents.
583(202)	Submission	Mr. Bird, on behalf of Canada Post	MR. BIRD: "[W]e're beginning to get to a part of the proceedings where I'm having concerns about the documentation that you're receiving." THE CHAIRPERSON: "Okay. But just to confirm, I'm accepting this because it has relevance, because it deals with material that you have provided and I'll leave it up to Mr. Nash … through his arguments as to whether I should give this any weight or not and you have also the same opportunity."
595(225)	Question	Mr. Bird, on behalf of Canada Post	MS. POLLARD: "If I was to deliver it on the left-hand side, again my vehicle is out on the road." MR. BIRD: "I was going to ask you that very question. It doesn't matter which side of the road you're on, you're still going to be on the roadway if it is too close to the shoulder or too close to the road." MS. POLLARD: "Right." MR. BIRD: "So there's no difference, left or right, on this." MS. POLLARD: "No."
595(226)	Question	Mr. Bird, on behalf of Canada Post	MR. BIRD: "Did you raise your concerns about any of these boxes in November of 2004?" MS. POLLARD: "When I put my safety, no. My concern was that I was delivering on the right-hand side, that it was impossible to do that. That was originally, that's what my whole case has been about. This came afterwards, in the

Page	Description	Speaker	Details
			fact of, I think, again it was stated about the safety thing of where your car's supposed to be on the road and that's why those came up too. By my case is about that it cannot be delivered on the right-hand side safely, one person. MR. BIRD: "And the reason for that is the stress and strain on your body in terms of the bending, twisting, leaning, stretching." MS. POLLARD: "And also because of the safety fact of where you're located on the road." MR. BIRD: "Okay, let me catch up with you on that one. Can you point out to me, in your text, where the vehicle location is a concern to you?" MS. POLLARD: "Where my vehicle concern is?" MR. BIRD: "The vehicle location." MS. POLLARD: "It's not – I haven't written that. …"
632(1)	Hearing Reconvened		April 25, 2006
632(2)	Issues Arising since Last Hearing	Mr. Nash, on behalf of Carolyn Pollard	At the outset of the hearing, Mr. Nash noted that Ms. Pollard had been contacted by Canada Post following the initial hearing. In the exchange that followed, the Chairperson reiterated that disciplinary action taken in response to a refusal to work was a matter of labour relations and not within his mandate.
633(8)	Comment on Mandate	Chairperson	"[I]t seems to me that this is in the area that you raised at the first hearing that we had … and that was questions of matters going on between Canada Post and Ms. Pollard, which were outside of my jurisdiction. I mean, I'm here, strictly looking at the decision that Health and Safety Officer Manella made and the direction that he issued."
635(13)	Re-examination of Carolyn Pollard	Mr. Nash	
639(32)	Examination of Kelly Marsh	Mr. Nash, on behalf of Carolyn Pollard	Mr. Nash confirmed that Ms. Marsh was a Rural and Suburban Mail Carrier, reviewed the conditions existing on Ms. Marsh's route, and then concluded by questioning Ms. Marsh about her experience with Ms. Pollard's route.
643(47)	Objection	Mr. Bird, on behalf of Canada Post	"I've heard nothing at this point in time which appears to be relevant to Ms. Pollard's complaint."
643(48)	Objection	Mr. Bird, on behalf of Canada Post	"We're hearing lots about road conditions, which is not part of this complaint. We're hearing about fear from being hit from behind, which is not part of this complaint. We're hearing about the speed limits, which is not part of this complaint. We're hearing about boxes, which is not relevant to the complaint. I don't know where Mr. Nash is going with this, but I'm really at a loss to see how this assists you in your inquiry."
647(63)	Cross-examination of	Mr. Bird, on behalf of Canada Post	Mr. Bird simply confirmed that Ms. Marsh was the person pictured in the photographs in evidence.

Page	Description	Speaker	Details
	Kelly Marsh		
648(66)	Re-examination of Kelly Marsh	Mr. Nash, on behalf of Carolyn Pollard	Following the re-examination of Ms. Marsh, there was discussion regarding a video depicting Ms. Pollard's delivery route. The video was said to show how far her vehicle was off the road at various points along the route. Mr. Bird reiterated that the focus of Ms. Pollard's refusal to work was the change in delivery method.
649(72)	Submission	Mr. Bird, on behalf of Canada Post	MR.BIRD: "Well again, maybe there's a misunderstanding as to what we're here for. … Change in delivery method. And in Ms. Pollard's narrative, her concern is delivering outside the driver's side, or the passenger side." THE CHAIRPERSON: "And what do you ascribe the statement also to undo my seatbelt?" MR. BIRD: "It's all ergonomics, Mr. Chairman. This is how she has to deliver out the passenger side window is what we've been hearing about the entire time. That's what the safety officer was investigating."
650(73)	Comment on Mandate	Chairperson	"I will certainly agree with you that there is an issue that I'm going to have to resolve in my decision, and that's with regard to the matters of the other – about the safety concerns off the road. … Now, one of the things that I think you have an opportunity in arguing this is to address that very thing as to what consideration I should be giving to that."
650(74)	Comment on Mandate	Chairperson	"But at the same time, there is a totality of circumstances here that I just feel, at least in gathering evidence here that I have to listen to, and certainly make some decision in my final decision with regard to whether I should be venturing in on those other aspects. … [J]ust sitting here, I'm kind of thinking that I would want to hear the evidence with regard to the total situation so that I can decide later in my mind whether or not the danger did extend to the things that the Health and Safety Officer Manella perhaps had not properly reviewed, or given weight. … I'm not quite sure where I'm going with it, but it certainly strikes me that I should hear the evidence and hear the arguments from both parties as to my mandate under the Code, under my review here as to whether or not I should be looking beyond the ergonomic issue."
650(75)	Comment on Mandate	Chairperson	"I'm certainly willing to take your argument on that but I will give you advance notice that I'm considering it. It's an issue that I think needs to be considered. … And so as I say, I just think I have to look at the evidence and then make some decision as to where my mandate is with the final decision on this."
651(80)	Submission	Mr. Bird, on behalf of Canada Post	"I need to advise that based on the comments that you made earlier, we are very concerned that this case is now taking a different direction and becoming one of traffic safety, which it wasn't when we went in earlier. … There's a lot of other

Page	Description	Speaker	Details
			things that Canada Post is doing with respect to traffic safety. We are not marshalling any of that. I'm not certain whether I will be in a position to complete the case … ."
652(84)	Examination of Carolyn Pollard on the Video	Mr. Nash, on behalf of Carolyn Pollard	Mr. Nash examined Ms. Pollard as to the content of the video. The focus of the examination was the traffic-related issues arising from Ms. Pollard's route, but Mr. Nash did conclude by touching on the stretching required to effect delivery.
654(91)	Cross-examination of Carolyn Pollard on the Video	Mr. Bird, on behalf of Canada Post	Mr. Bird questioned Ms. Pollard as to what solution she was looking for in terms of the ergonomic concerns. Ms. Pollard confirmed that she was looking for a helper, or a right-handed vehicle, or community mailboxes.
655(93)	Re-examination of Carolyn Pollard	Mr. Nash, on behalf of Carolyn Pollard	
656(99)	Examination of Catherine Janveau	Mr. Bird, on behalf of Canada Post	Mr. Bird reviewed Ms. Janveau's supervisory position at Canada Post. Ms. Janveau canvassed the layout of rural mail routes, Canada Post's requirements for rural mail delivery, and Canada Post's procedure for reporting unsafe mail boxes. When Mr. Bird sought to review a Memorandum of Agreement between Canada Post and the Canadian Union of Postal Workers, Mr. Nash questioned the relevance of the agreement because it was signed after Ms. Pollard's refusal to work.
662(122)	Comment on Mandate in response to Question raised by Mr. Nash	Chairperson	"As I've indicated to Mr. Bird already, I have some question in my mind as to whether or not my mandate for reviewing … Ms. Pollard's appeal, includes all of the evidence that I'm going to receive with regard to safety issues around that situation. I know that, and I can't cite a case, but I know the federal court has said in the past that safety officers cannot be expected to go in and essentially do fishing expeditions. If an employee were to say there's a danger here and not really identify what the danger is, just say I'm not sure but I'm certain that there's a danger here. The federal court has said, no, you can't turn it as that vague. They have not come up with anything that goes to the opposite, which would be employee complains about a danger, a safety officer goes in, there are several dangers around them, they focus only on the one that the employee raises with them and leaves. Whether or not that is, whether or not the federal court would be saying, or whether or not any review body would say well, you ought to have looked at it and not just been limited to what the employee said. It's something that's there and you could see that it was a contravention or even more seriously, a danger, then I'm not so certain that anybody, if it ever was reviewed in a court, would say no, you shouldn't have looked at that. It goes a little bit to that. It goes a little bit to exactly what the issue is before me, and

Page	Description	Speaker	Details
			that is how Safety Officer Manella was, as I'm saying, from the evidence, was made aware of a certain situation that was evolving, suggested a solution, which was internal complaint resolution, and then, upon her refusal, decided one matter was not constituting a danger and felt obligated to issue a direction in the other. Since my review brings me into face with all the facts, the question I have to ask myself is would anybody expect me not to look at other areas that through the evidence I'm receiving that might constitute a danger, even though Health and Safety Officer Manella did not. So given that I've said I'm hoping for your arguments on that, but by even raising it and giving some indication that I expect that the Code is telling me that I should be looking at everything that Manella looked at, the document in question here is certainly relevant because if I find that there was a danger on any of the health issues that are being raised in this hearing, and I find that there's a danger, then I'm somewhat obliged, although not specifically as health and safety officers are in the legislation."
667(143)	Cross-examination of Catherine Janveau	Mr. Nash, on behalf of Carolyn Pollard	Mr. Nash questioned Ms. Janveau as to Canada Post's inspection process for rural mailboxes. The focus of Mr. Nash's cross-examination was Canada Post's response, or lack thereof, to Ms. Pollard's complaints about the unsafe mailboxes on her route.
699(1)	Hearing Reconvened		April 26, 2006
669(1)	Examination of Catherine Janveau	Chairperson	At the outset of the hearing, the Chairperson posed a number of questions to Ms. Janveau. The questions related to Canada Post's management structure regarding issues of health and safety, Canada Post's involvement of its employees in the consultation process, the Memorandum of Agreement signed between Canada Post and the Canadian Union of Postal Workers, whether the delivery guidelines issued by Canada Post reflected provincial laws relating to highway safety.
703(17)	Examination of Catherine Janveau	Mr. Bird, on behalf of Canada Post	Mr. Bird reviewed the areas canvassed by the Chairperson.
704(23)	Cross-Examination of Catherine Janveau	Mr. Nash, on behalf of Carolyn Pollard	During the course of Mr. Nash's re-examination, Mr. Bird noted that Ms. Janveau had already answered questions in the areas raised by Mr. Nash. When Ms. Janveau completed her testimony, Mr. Bird sought direction from the Chairperson.
707(34)	Request for Direction from the Chairperson on Issues arising from	Mr. Bird, on behalf of Canada Post	"[I]f there are areas you have of concern, which are far reaching, which from your questions I have come concern you may have, but we may be in a position that we will need to bring in a lot more evidence to satisfy you."

Page	Description	Speaker	Details
	Questions		
707(34)	Request for Direction from the Chairperson on First Issue	Mr. Bird, on behalf of Canada Post	"[I]t appears from your questions that you may not understand that Part I responsibilities in terms of the representation rights of CUPW for the employees … . If you need evidence on that, I'm going to have to bring in somebody from national labour relations to explain to you the obligations under Part I."
707(34)	Request for Direction from the Chairperson on Second Issue	Mr. Bird, on behalf of Canada Post	"Similarly, I know you understand the Code Part II, but your questions of this witness … did not answer your questions. So in terms of the direct obligations under Part II … [w]e will need evidence before you to do that if that's a major concern, if that's going to be partly driving your decision-making process."
707(35)	Request for Direction from the Chairperson on Third Issue	Mr. Bird, on behalf of Canada Post	"Third of all, Mr. Nash keeps saying that if Mr. Nash's statements are accepted as evidence for you, that CUPW is dropping the ball nationally in respect of its responsibilities for this. … You may need to stop this process right at this point of time and make CUPW a party … ."
707(36)	Request for Direction from the Chairperson on Fourth Issue	Mr. Bird, on behalf of Canada Post	"The last issue is with respect to the applicability of the highway traffic accidents … . I can tell you that I have been involved in processes. The acts do not apply holus bolus to Canada Post."
708(37)	Submission on Requests for Direction	Mr. Bird, on behalf of Canada Post	"… I cannot leave this room, I cannot close with a case if there is any (inaudible) from you that these are issues that you need evidence and information on that they will materially affect your ruling. I realize this is sort of a precedent for me to ask you how important is this information for you, but I need to ensure that I'm doing both the best interest for the client and for you in terms of your decision-making process."
708(37)	Response to Request for Direction	Chairperson	THE CHAIRPERSON: "The normal process that I use would be to hear a case and return to my office and often during the analysis of that evidence, I may decide that there are other issues that I must address or I need to concern myself with, upon which I will advise the parties of that fact and advise you of my concern and provide you with an opportunity to give the evidence or whatever." MR. BIRD: "That would be quite satisfactory…"
708(38)	Response to Request for Direction	Chairperson	THE CHAIRPERSON: "… [I]f I decide I want to pursue them, then I certainly would advise you of that fact and give you every opportunity for you to present evidence." MR. BIRD: "… But I guess for the record, I have to say that we have no end of evidence to satisfy your concerns." THE CHAIRPERSON: "All right, I appreciate that and as I have indicated, I'm certainly aware that it would be improper for me to be making decisions where you were entitled to more information, to provide me with more information. … Then unless I need to broaden and to widen

Page	Description	Speaker	Details
			my investigation on this, then I'll simply take the evidence that you have provided me with and try and come up with a very fast decision."
709(41)	Summation	Mr. Nash, on behalf of Carolyn Pollard	"I'll let you know I'm a letter carrier by trade, I'm not a lawyer, so I hope you take that into consideration. I'll do the best that I can to put all this stuff forth."
709(41)	Summation	Mr. Nash, on behalf of Carolyn Pollard	After reminding the Chairperson that he was not a lawyer, Mr. Nash summarized the circumstances leading up to Ms. Pollard's refusal to work. Mr. Nash noted that, in addition to the ergonomic concerns about delivering to 600 to 700 points of call, there were also the concerns about impeding traffic and the positioning of Ms. Pollard's vehicle.
714(62)	Summation	Mr. Bird, on behalf of Canada Post	Mr. Bird reviewed the relevant caselaw on the definition of "danger" under Part II of the Canada Labour Code. Mr. Bird also reiterated his position that Ms. Pollard's complaint dealt with strictly ergonomic issues.
716(69)	Summation	Mr. Bird, on behalf of Canada Post	"Please bear in mind when we start talking about the ergonomic issues because that is truly the focus of this case."
717(76)	Summation	Mr. Bird, on behalf of Canada Post	"The truly disturbing thing about it is the what ifs have absolutely nothing to do with the ergonomic issues. They are where is the vehicle positioned relative to the shoulder? What happens if a car comes from behind and strikes the vehicle while you're attempting to deliver out the passenger window? There are so many hypotheticals here, none of which have to do with the issue before you."
722(93)	Summation	Mr. Bird, on behalf of Canada Post	"We're heard a great deal of evidence with respect to roadways. The boxes, how far to the shoulder? The final argument we heard about ditches and hills. This is not a case about any of those things. Are they important? Yes, they are. Is there a work refusal before you in respect of those issues? No, there is not."
723(97)	Summation	Mr. Bird, on behalf of Canada Post	"What is before you is a non-specific complaint on ergonomic issues where the employee is in total control of all ergonomic configurations. … Your area of focus is very narrow."
724(102)	Closing	Chairperson	"If I have any questions I'll relay them … or if there are issues that I wish to, that I am going to indicate to parties that I'll be pursuing in my direction, then I will certainly, as I indicated to Mr. Bird earlier, provide parties with an opportunity to provide new evidence on that."

FEDERAL COURT

SOLICITORS OF RECORD

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