



Occupational Health and Safety Tribunal Canada

Citation: David Laroche v. Canada Border Services Agency, 2012 OHSTC 11

Date: 2012-04-04
Case No.: 2009-16
Rendered at: Ottawa

Between:

David Laroche, Appellant

-and-

Canada Border Services Agency, Respondent

Matter: Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer

Decision: The decision of no danger is confirmed

Decision rendered by: Katia Néron, Appeals Officer

Language of decision: French

For the Appellant: James Cameron, Counsel
Raven, Cameron, Ballantyne & Yazbeck, LLP/s.r.l.

For the Respondent: Martin Charron, Counsel
Labour and Employment Law Group
Department of Justice Canada

REASONS

[1] This concerns the decision rendered by the Honourable Madam Justice Marie-Josée Bédard of the Federal Court on December 12, 2011 in *Laroche v. Canada (Attorney General)*.¹

[2] In her decision, Bédard J. allowed the application for judicial review filed by David Laroche of a decision I had rendered on September 29, 2010 in this case,² which concerned an appeal brought against a decision of no danger rendered by Health and Safety Officer (HSO) Jessica Tran following a refusal to work exercised by D. Laroche on March 13, 2009 under section 128 of the *Canada Labour Code*, RSC 1985, c. L-2 (the Code). The question at issue in this case was whether HSO Tran's decision of no danger was well founded. D. Laroche refused to work when he was assigned to act as a search agent for a police force in a search not under the jurisdiction of his employer, the Canada Border Services Agency (CBSA), but under that of the police force. Following the hearing and analysis of the evidence adduced by the parties, I upheld HSO Tran's decision of no danger.

[3] The application for judicial review was allowed with instructions for me to complete my analysis by reviewing certain evidence introduced by the parties during the hearing concerning the risk of one or more armed individuals entering the outside perimeter of the search area or the search location during the operation.

[4] In the interest of clarity and before resuming my analysis as instructed by Bédard J., I will reiterate the background, observations and evidence adduced by the parties in this case.

Background

[5] The following was taken from the testimony of HSO Tran and her investigation report and related documents, the testimony of D. Laroche and the testimony of Alain Surprenant, who at the time of the investigation was Chief, Marine and Rail Operations, Montréal Region, with the CBSA and who is now Acting Director, Québec Region, with the CBSA.

[6] On March 13, 2009, D. Laroche was assigned to act on a voluntary basis a few days later, that is, on March 17, 2009, as a search expert for a police force in a search falling not under the CBSA's mandate but under the police force's mandate. In addition to D. Laroche, two other search experts from the CBSA, including one dog handler, had been assigned to this task.

[7] These requests to the CBSA for assistance by search experts, falling outside the

¹ *Laroche v. Canada (Attorney General)*, [2011] FC 1454

² *David Laroche v. Canada Border Services Agency*, [2010] OHSTC 12

border legislation mandate, have been made by various police forces³ working in all parts of Canada for some 20 years. This situation can be explained by the fact that some searches these police forces are required to conduct under their own mandate, depending on the location or the things sought, call for the use of specialized tools or techniques that they do not always have. Given its particular mandate, the CBSA has these tools and teaches its officers the techniques for using them properly and conducting systematic searches of locations. As a result, over the years some of its officers, including D. Laroche and his co-workers, have become experts in this field.

[8] According to HSO Tran's investigation report, D. Laroche refused to respond to the request for assistance at that time because he was informed by his employer that in carrying out this work activity he would not be allowed to wear his defensive tools including pepper gas, his defensive baton and his service firearm. D. Laroche believed that, without that equipment, if he faced an armed individual who in his opinion could enter the location, he would be unable to defend himself adequately against that individual. D. Laroche also alleged that in case of attack he could be the main target, because during these operations police officers are often in civilian dress while CBSA officers must wear their uniform.

[9] Since CBSA representatives argued that there was no danger to D. Laroche's safety and since he maintained his refusal, the CBSA contacted the Labour Program, Human Resources and Skills Development Canada, in order to have a Health and Safety Officer investigate the situation.

[10] In her investigation, HSO Tran obtained the reasons cited by D. Laroche in support of his refusal. A. Surprenant then explained to HSO Tran the reasons cited by the CBSA in support of their position that a danger does not exist, as follows.

[11] The CBSA's decision to prohibit its officers from wearing their defensive equipment during assistance requested for searches falling outside the CBSA's mandate is based on a legal interpretation by its head office of certain provisions⁴ of the *Criminal Code*. The CBSA interprets these provisions to mean that, since these searches do not have to do with the application or enforcement of border legislation, during these operations CBSA officers are no longer acting in their capacity as peace officers. As a result, in the CBSA's opinion, if in the course of these operations an attack occurred that resulted in injury to the attacker, for example by a firearm used by one of its employees in self-defence, under the *Criminal Code* the CBSA could not justify the use of force by its employee.

[12] According to an occupational health and safety study conducted by the CBSA and entitled "Job Hazard Analysis – Phase 1" on special assignments for searches falling

³ Police forces that may call on CBSA search experts are the Royal Canadian Mounted Police (RCMP) at the federal level, the Sûreté du Québec (SQ), and any municipal police force such as the Service de Police de la Ville de Montréal (SPVM).

⁴ According to the CBSA "Policy on the Wearing of Protective and Defensive Equipment" and "Policy on the Use of Force," presented by A. Surprenant, this interpretation refers to sections 25, 26 and 117.07 and subsections 34(1), 34(2) and 37(1) of the *Criminal Code*.

outside the CBSA's mandate, the potential hazards related to this work activity are exposure to an armed client or criminal who resists arrest, gunshots, knife wounds or physical resistance that may cause injury.

[13] While it is aware of these hazards, the CBSA expects that each police force requesting assistance will manage and control these hazards for it. A. Surprenant described the way his local management asked police forces to ensure that these hazards were managed and controlled, as follows.

[14] Although A. Surprenant was unable to state whether this was done in the same way in all parts of Canada, before agreeing and then proposing that its officers provide assistance to a police force, his local management obtained the following information orally, by telephone: the name of the requesting agency, the location, the date, the type of operation and the name of the contact person at the location.

[15] On the basis of this information, an assessment of the request was made and a response provided depending on the availability and the safety of their employees.

[16] In order to ensure that their employees' safety was assured during these assignments, local management in the Montréal Region orally asked each police force requesting assistance:

- to secure the search location, before contacting their officers to notify them to attend at the location;
- to guard the location as long as CBSA officers were present there;
- to ensure that no person at the location, except for police officers, had weapons or access to weapons.

[17] In securing a location, each police force proceeds as follows.

[18] A team of police officers first enters the target location, inspects it and, if appropriate, makes the necessary arrests of persons found there.

[19] Only after the police officers have secured the location in this way do they contact the CBSA officers by telephone to notify them that they can attend at the location.

[20] In all those years, no incidents had occurred during searches under police forces' mandates performed by CBSA officers.

[21] Following her investigation, HSO Tran decided that there was no danger to D. Laroche's safety in carrying out the work activity concerned because, in her opinion, it was not reasonable, although it might be a possibility, to think that an individual would enter the location and attack him before the police officers at the location became aware of the situation, given that the police officers were to guard the location throughout the intervention.

[22] Following that decision, HSO Tran nevertheless received from the CBSA an Assurance of Voluntary Compliance that the following would be established by May 7, 2009:

- 1) a memorandum of understanding clearly defining the responsibilities of other law enforcement agencies during interventions with these other agencies falling outside the mandate;
- 2) a specific procedure for CBSA officers called upon to provide assistance to other law enforcement agencies.

Issue

[23] Was HSO Tran's April 22, 2009 decision that a danger does not exist for D. Laroche's safety well founded?

Preliminary objection raised by the respondent

[24] At the beginning of the hearing, on behalf of the respondent Mr. Charron raised an objection about the relevance of the evidence that Mr. Cameron wanted to present in terms of the testimony of D. Laroche and Luc Moreau, also an officer with the CBSA. In Mr. Charron's opinion, D. Laroche and L. Moreau do not have the experience required to present probative evidence in this case.

[25] I agreed to hear D. Laroche and L. Moreau, taking Mr. Charron's objection under advisement. Here is my decision with regard to that objection.

[26] Even though D. Laroche and L. Moreau carried out only six assignments of assistance during searches under police forces' mandates before March 13, 2009, I am of the opinion that they are appreciable witnesses about how these operations were carried out since they took part in them and at that time carried out the specific work activity concerned in this case. In my opinion, this experience is amply sufficient for me to attach particular importance to it.

Submissions of the parties

A) Appellant's submissions

[27] On behalf of the appellant, Mr. Cameron argued that the information requested from the police forces by the CBSA did not make it possible to conduct a case-by-case assessment of the hazard related to each search that could be conducted by its employees, and did not specify what concrete action was taken to ensure their protection. Mr. Cameron also argued that, in fact, CBSA officers are not always well guarded. For these reasons, Mr. Cameron argued that there was no guarantee that on March 17, 2009 D. Laroche's safety would be assured by the police force requesting his assistance. On that basis, Mr. Cameron alleged that there was a reasonable possibility that an armed

individual could be around or could enter the location where D. Laroche was assigned and could attack him before the police officers at the location prevented that hazard.

[28] For these reasons, Mr. Cameron alleged that at the time of HSO Tran's investigation there was a danger within the meaning of the Code for D. Laroche's safety. In support of this argument, Mr. Cameron referred to the following case law:

- *Verville v. Canada (Correctional Service)*;⁵
- *Martin v. Canada (Attorney General)*;⁶
- *Paul Chamard and Simon Ruel v. Correctional Service of Canada*;⁷
- *Éric V. et al v. Correctional Service of Canada*;⁸
- *Correctional Service Canada v. John Carpenter and Union of Canadian Correctional Officers, CSN*.⁹

[29] In support of his position, Mr. Cameron called as witnesses D. Laroche and L. Moreau, as well as Richard Groulx, a member of the Royal Canadian Mounted Police (RCMP) and also, since November 2006, an instructor of CBSA officers in the use of firearms. On this point, I retain the following from these persons' testimony.

[30] D. Laroche and L. Moreau stated that they have worked for CBSA Marine Customs Services for the port of Montréal for several years.

[31] D. Laroche and L. Moreau stated that before March 13, 2009 they acted as search experts for searches falling not under the CBSA's mandate but under police forces' mandates.

[32] D. Laroche stated that he had carried out four of these assignments: the first two in private homes, and the other two in shopping centres.

[33] L. Moreau stated that he had carried out two of these assignments: the first in a private home and the second at an outdoor location.

[34] D. Laroche stated that during these assignments his role is to lend his expertise to assist police forces in conducting a systematic search of the location, while the role of the onsite police officers is to secure the location.

[35] Although on these six assignments a team of police officers had first entered the location and made the necessary arrests and the persons arrested had been taken to the police station, D. Laroche and L. Moreau stated that little information was provided to

⁵ *Verville v. Canada (Correctional Service)*, [2004] FC 767.

⁶ *Martin v. Canada (Attorney General)*, [2005] FCA 156.

⁷ *Paul Chamard and Simon Ruel v. Correctional Service of Canada*, [2005] C.L.C.A.O.D. No. 4, Decision No. 05-004 rendered by Appeals Officer Michèle Beauchamp.

⁸ *Éric V. et al. v. Correctional Service of Canada*, [2009] Occupational Health and Safety Tribunal Canada, Decision No. OHSTC-09-009 rendered by Appeals Officer Serge Cadieux.

⁹ *Correctional Service Canada v. John Carpenter and Union of Canadian Correctional Officers, CSN*, [2005] C.L.C.A.O.D. No. 11, Decision No. 05-012 rendered by Appeals Officer Michèle Beauchamp.

them before they attended at the location and that the way the location was guarded by the police forces varied from one operation to another.

[36] D. Laroche and L. Moreau stated that, with regard to the searches conducted in private homes, they realized that their searches would take place in homes, and were informed by the police officers what was being searched for, only at the location. With regard to the search conducted at an outdoor location by L. Moreau, because he was informed that he was to bring a particular detection tool, he concluded that the search would be conducted under water.

[37] D. Laroche and L. Moreau stated that, with regard to the assignments carried out in private homes, when they arrived at the location they did not see any police officers posted at the outer perimeter or at the access doors to guard the home.

[38] D. Laroche and L. Moreau stated that throughout their searches in private homes they were alone in most of the rooms in which they worked, except the rooms in which there were already police officers. D. Laroche added that he worked alone in a basement with only one access door and that, when he found what was being searched for and called the police officers upstairs, several minutes elapsed before they joined him. With regard to the search at an outdoor location, L. Moreau stated that, because it was cold, throughout the search the two police officers on guard remained in their car and he was not provided with any close guard.

[39] L. Moreau stated that he never had the impression or the feeling that the police officers present at the location were there to protect him during his searches. According to L. Moreau, the police officers with whom he worked expected the CBSA officers to take care of themselves.

[40] D. Laroche stated that, with regard to the two assistance assignments in shopping centres, he and his co-worker were invited by the police force to a preliminary meeting. At that meeting, he and his co-worker were informed that a tactical intervention team would first enter, take over the location to be searched and arrest the suspects, while they were to wait one street corner away in their car for a call indicating to them that they could attend at the location. When he arrived at the location, D. Laroche noted that the doors had been locked and that a uniformed police officer had been posted there.

[41] D. Laroche and L. Moreau stated that no police officer escorted them from or to their car when they approached or left the private homes or the businesses. D. Laroche added that, during one of these searches, he had to leave and go to his car for detection tools and that no police officer escorted him.

[42] R. Groulx stated that he has been a member of the RCMP since February 1988. He worked first as an onsite patrol officer and then as a member of tactical intervention teams. As well, from 1998 until 2006, R. Groulx was an instructor in firearms tactics and handling for RCMP sharpshooters and tactical intervention teams. In addition, for 10 years he taught chief instructors and instructors of the tactical intervention program, designed to train officers to intervene in high-risk situations.

[43] R. Groulx stated that he carried out joint operations with the Sûreté du Québec (SQ), the Québec police force and the Ottawa police force, as a member of the RCMP and as a member of the RCMP tactical intervention team. He also worked with Parks Canada officers. During those interventions, his was the first team to enter the locations.

[44] R. Groulx stated that each intervention for searches is different and must therefore be planned on a case-by-case basis before being implemented. R. Groulx stated that for each of these interventions a risk assessment must be conducted, on the basis of which an intervention plan is drawn up, and that, similarly, the persons intervening should each be informed of their responsibilities so that they can avoid traps. R. Groulx stated that the factors to be taken into consideration in establishing protective measures for the safety of everyone intervening during these operations include the nature of the operation, the available information about the nature of the criminals who may be encountered (whether armed or under the influence of drugs, for example), knowledge of the terrain or the building and its extent and complexity, the number of police officers who will carry out the intervention, as well as the training, vigilance and professionalism of the police force managing the case.

[45] On behalf of the appellant, Mr. Cameron also argued that, given the dangerous and dynamic nature of these operations, the possibility of encountering an individual who is armed and dangerous to CBSA officers exists. As well, in Mr. Cameron's opinion, if such a situation were to arise, CBSA officers would not know how to react without their defensive tools. For these reasons, Mr. Cameron argued that the consequences for them in such a situation while not wearing their defensive tools could be serious or even fatal. Therefore, in Mr. Cameron's opinion, by taking these officers' defensive tools away from them, the CBSA is placing them in a dangerous situation. In support of this argument, Mr. Cameron called as witnesses D. Laroche, L. Moreau and R. Groulx. On this point, I retain the following from their testimony.

[46] Both in searches falling under the border legislation mandate and in those falling outside that mandate, D. Laroche and L. Moreau stated that, as search experts, they worked mainly with the SQ, the RCMP and the Service de Police de la Ville de Montréal (the SPVM).

[47] D. Laroche and L. Moreau stated that, in their work as customs officers, they regularly, at least twice a week for L. Moreau, carry out joint operations with police forces, mainly as search experts, for searches falling under the CBSA's mandate. D. Laroche and L. Moreau stated that they are allowed to wear their defensive tools in conducting these searches.

[48] D. Laroche and L. Moreau stated that, although the type of work is the same, is in locations that may be similar and is with the same police forces, for work under the police forces' mandates the CBSA no longer allows them to wear this equipment.

[49] D. Laroche and L. Moreau stated that the purpose of their work and the related hazards remain the same, that is, a systematic search for objects of high monetary value.

What is involved here, D. Laroche and L. Moreau stated, is money laundering and searching for diamonds, all sorts of drugs, narcotics, firearms and even explosives. According to D. Laroche and L. Moreau, this means that they are dealing with high-calibre criminals.

[50] D. Laroche and L. Moreau added that, for all these operations, the CBSA asks them to wear their bulletproof vests.

[51] D. Laroche stated that, for carrying out this work activity, taking away his officer's belt is psychologically like taking away his only means of defence.

[52] R. Groulx stated that, depending on the situation or the location, there is not always the option of protecting oneself behind an obstacle or moving away from the attacker. R. Groulx stated that, for example, an individual in good health who is threatening a person with a knife, with no intervening obstacles, can cover a distance of 25 feet in less than two seconds.

[53] R. Groulx stated that, even if an intervention plan is drawn up in advance in light of known or foreseeable hazards, it is still difficult to anticipate everything during searches because the main risk factor is the human factor, that is, not only the dynamic and dangerous nature of the individual who may be encountered, but also the possibility of human error.

[54] R. Groulx stated that, given this factor, everything can change in a few seconds. R. Groulx stated that, for example, although this incident occurred when the location was first entered, he had once encountered an individual hidden in an area of a location being searched, even after police officers had inspected that area of the location. R. Groulx noted, as an additional example, an incident during which an armed individual entered a location being searched, escaping the notice of the police officers posted at the outside perimeter of the location to guard it, an incident that resulted in the loss of human lives. R. Groulx stated that, since that incident, the procedures and training provided to members of the RCMP have been changed in order to avoid a recurrence.

[55] D. Laroche stated that he received tactical intervention training from his employer in order to ensure his safety, that of his co-workers, and that of the public if an attacker is encountered; an example is training on the use of force. D. Laroche added that he has been an instructor in techniques for the use of firearms at the CBSA since August 2008 and an instructor in the use of force as a defence and control tactic since February 2010. L. Moreau stated that he received his training on the use of a firearm in 2008.

[56] L. Moreau stated that, since receiving that training, he is more aware of hazardous situations that may arise as he carries out his activities and of the speed with which an attack may occur during the searches he carries out, whether under his own mandate as a customs officer or outside that mandate.

[57] R. Groulx stated that the purpose of the training he provides to CBSA officers is to allow them to assess and choose reasonable means of force and to use the most

responsible and the safest means possible; these means are, in order but depending on the situation, oral communication, the use of minimum force, bare-handed self-defence techniques, or their defensive tools.

[58] L. Moreau stated that the training provided by his employer conditioned him, if he encountered an attacker, to look for defensive tools in a specific order, depending on the circumstances, and starting with himself. L. Moreau stated that, even if a police officer was near him at such a time, his reflex, as learned, would be to look first for the equipment he normally wears for his work. According to the training he received, that fraction of a second would be enough for the attacker to close in and inflict injury on him quickly, before police officers, even near him, could prevent the attack.

[59] D. Laroche and L. Moreau stated that they received no training in fending off an attacker without their defensive tools.

[60] D. Laroche and L. Moreau stated that, without these tools, they did not know how to react in the most appropriate manner, as they had been taught, in order to fend off injury if they encountered an attacker.

[61] While admitting that the possibility of an armed individual being around, entering, or still being in the location and attacking him was slim, D. Laroche stated that if that happened while he was without his defensive tools the result for him would be disastrous.

[62] On the basis of this evidence, Mr. Cameron argued that D. Laroche was, without wearing his defensive tools, exposed to a danger within the meaning of the Code at the time of HSO Tran's investigation.

[63] For these reasons, Mr. Cameron requested that HSO Tran's decision of no danger be rescinded and that a danger direction be issued to the CBSA.

B) Respondent's submissions

[64] On behalf of the respondent, Mr. Charron argued that, for a danger within the meaning of subsection 122(1) of the Code to exist, there must be a reasonable possibility that the potential condition resulting in the hazard will occur. In support of this argument, Mr. Charron referred to the above-noted decisions by the Federal Court in *Verville* and by the Federal Court of Appeal in *Martin*. In Mr. Charron's opinion, it is not reasonable to believe that an individual would enter a location to be searched and would attack CBSA officers while they were carrying out their work activity when the location was previously secured by police officers and being guarded by them. In addition, Mr. Charron argued that, even if such a condition arose, the hazard would be removed by the police officers at the location before a CBSA officer could be injured, because they are responsible for guarding the location. In support of these arguments, Mr. Charron called as a witness A. Surprenant. I retain the following from his testimony.

[65] A. Surprenant stated that he has worked for the CBSA since December 1983. At

the time of HSO Tran's investigation, as is noted above, A. Surprenant was Chief, Marine and Rail Operations, Montréal Region, with the CBSA.

[66] A. Surprenant stated that, prior to 2007, the CBSA authorized its officers to wear their defensive tools in searches carried out under police forces' mandates, but that at that time their search experts were not trained to use a service firearm and thus carried only pepper gas, their defensive baton, and handcuffs.

[67] A. Surprenant stated that, after the present appeal was filed and pending my decision in the present appeal, the CBSA did not respond to requests for assistance by their search experts in searches falling outside the CBSA's mandate, with the exception of requests involving joint operations in which the CBSA was already involved. As A. Surprenant stated, the CBSA authorized its officers to wear their defensive tools for those two assignments.

[68] That said, A. Surprenant stated that in April 2010 there was a request for dog masters during a search in a bar for drugs and weapons that fell under the mandate of a police force. A. Surprenant stated that the location was secured by the police force before their officers attended at the location and that everything went well.

[69] A. Surprenant added that, as agreed with HSO Tran, requests made on the basis of the above-noted Assurance of Voluntary Compliance have been suspended until I render my decision in the present case.

[70] On the other hand, A. Surprenant presented the action plan drawn up by the CBSA and sent to HSO Tran in April 2010 in response to the Assurance of Voluntary Compliance. This action plan calls for a revision of all relevant policies and procedures and the development of a memorandum of understanding between the CBSA and the various police forces that request the assistance of its search experts. According to A. Surprenant, the CBSA's intelligence services were asked to develop the memorandum of understanding.

[71] A. Surprenant stated that the CBSA nevertheless developed the procedure entitled [translation] "call to assist another agency – procedures," which he presented. A. Surprenant stated that this procedure was drawn up on the basis of what his own local management was doing, at the time of HSO Tran's investigation, to determine whether to agree to a request for assistance. This document is dated May 2009.

[72] According to step one of the procedure, under "Questions," in addition to the information provided by A. Surprenant to HSO Tran at the time of her investigation, the superintendent or the director of each local management unit is to ask the requesting agency to identify the purpose of the search and whether a meeting will be held before the intervention takes place. A. Surprenant stated that this information must now be recorded on the document.

[73] A. Surprenant added that, according to this procedure, still at step one, under [translation] "explain our agency's limitations to the requesting agency," as was previously done by his local management, the superintendent or the director is then to

specify the CBSA's expectations of the police force for ensuring that its officers are protected. These expectations, set out in the document, read as follows:

- CBSA officers are to enter the location of the operation only after it has been inspected by the requesting agency.
- The requesting agency is responsible for securing and eliminating any possible danger to CBSA officers.
- CBSA officers are not to be part of the primary police team that will enter the location; the primary police team is to secure the location before the officers may enter it.
- The police force is to ensure that persons present do not have weapons or access to weapons. The police officers are to guard the location as long as CBSA officers are working there.
- CBSA officers are to attend only to inspect the designated location using their specialized tools.

[74] A. Surprenant stated that it was only after obtaining assurance, as was previously done by his local management, that the location would be secured and that the above-noted measures would be taken that the request would then be forwarded to the Chief, Operations, for approval. A. Surprenant stated that, in order to obtain that assurance, he asked questions.

[75] A. Surprenant stated that if the request is vague, if the police force cannot guarantee that the location will be secured or that their officers will have the necessary protection, he refuses the request. A. Surprenant stated that happened only once.

[76] A. Surprenant stated that next, before giving approval, the Chief, Operations, must consider whether these officers have the requested expertise and whether they can be freed up without hindering planned customs operations.

[77] A. Surprenant stated that after the officers are selected, each officer is to receive the information and instructions set out at step four of the form. This information and these instructions read as follows:

- Provide the CBSA officers with the information provided by the requesting agency;
- Explain to the CBSA officers the limitations of our mandate as described above;
- Remind the CBSA officers that they may not enter the location of the operation unless the conditions described above have been met;
- Notify the CBSA officers that, at any time during the operation, if these conditions are not met, they are to leave the location and call a superintendent;
- Remind the CBSA officers that they are to wear the protective vest and are not allowed to wear their defensive tools because we are providing assistance to another agency and thus have no legislative power to intervene since it does not fall under the CBSA's mandate;
- Remind the CBSA officers that they are to have a telephone with them at all times and are to notify a superintendent immediately if they must change their location;
- Remind the officers to take detailed notes on their inspections (where, when, how);

[78] A. Surprenant stated that as a result, if on arriving at the location a CBSA officer sees or suspects that the above-noted conditions have not been met, the officer must, as an officer had the possibility of doing at the time of HSO Tran's investigation, refuse to enter the location or refuse to perform the search. A. Surprenant stated that their officers could also, as they can still do today, speak with the person responsible at the location and, here again, if they had doubts, could withdraw, disengage, and call their manager.

[79] A. Surprenant stated that the CBSA does not force its officers to respond to these requests for assistance.

[80] A. Surprenant added that, if an incident occurs, their officers are notified to ensure their safety, to disengage and leave the location, and then to inform their manager in writing of the incident.

[81] A. Surprenant stated that he trusts the expertise of the police forces depending on their standards and their level of professionalism. According to A. Surprenant, they are the ones who are in a position to assess the hazards and to determine whether they need two or more police officers to guard a location.

[82] A. Surprenant stated that he agrees that the probability of an incident occurring during searches falling outside the CBSA's mandate and performed by CBSA officers is slim but that, if an incident occurs, the consequences for them can be serious.

[83] A. Surprenant stated that during his entire career, in 25 years of service, no incident had ever occurred during searches falling under police forces' mandates and performed by their experts.

[84] A. Surprenant stated that each year, in the Montréal Region, the CBSA receives approximately 7 requests for assistance by their search experts and approximately 10 requests for assistance by dog handlers.

[85] On the basis of this evidence, Mr. Charron argued that there was no danger within the meaning of the Code to D. Laroche's safety in carrying out the work activity concerned, while not wearing his defensive equipment, on March 17, 2009.

[86] On this ground, Mr. Charron asked that the decision that a danger does not exist rendered by HSO Tran be confirmed.

Additional evidence

[87] During a May 19, 2010 conference call, I shared with the representatives of both parties my interest in hearing one or more representatives of the police forces that had requested the assistance of CBSA search experts for searches falling outside the CBSA's mandate. With Mr. Cameron's agreement, Mr. Charron chose to call as a witness Yves Patenaude, a police officer with the SPVM. I retain the following from his testimony.

[88] Y. Patenaude stated that he works for the SPVM as a street drug trafficking investigator.

[89] Y. Patenaude stated that in order to seize evidence and drugs his team must perform searches. He added that most of these searches take place in apartments; his team first calls on their own canine unit for these searches, but when that unit is not available they contact the CBSA canine unit. He also stated that they request the assistance of that particular unit because it is recognized for its considerable expertise and its impeccable work. Y. Patenaude stated that he conducted joint operations with members of the CBSA canine unit for searches falling under the SPVM's mandate on approximately 10 occasions.

[90] Y. Patenaude stated that for each search conducted by a team of SPVM officers an intervention plan is first drawn up. The purpose of this plan is to protect the police officers' safety and, if possible, to avoid giving the occupants time to destroy evidence. The plan is drawn up on the basis of a risk assessment, taking into account all the information they have or can obtain about the configuration of the location, the occupants and their profiles, for example. If this risk assessment shows that the hazard to the police officers' safety in entering the location is high, the tactical intervention team is called in.

[91] Y. Patenaude stated that when the police officers first enter a location they check each room and corner to ensure that no one is still there. He added that only after the location has been made secure are the CBSA employees authorized to enter the location.

[92] Y. Patenaude stated that to his knowledge the intervention plan drawn up by the SPVM does not identify specific measures for the protection of CBSA officers after the location has been inspected and secured.

[93] Y. Patenaude stated that, when he communicates with dog handlers to notify them that they can attend at a search location, he arranges to meet them a few blocks away from the location and accompanies them to the location.

[94] Y. Patenaude stated that, if the outside perimeter of a search location is not well guarded, anyone can enter the location.

Analysis

[95] At issue in the present case is whether HSO Tran's decision of April 22, 2009 that a danger does not exist for D. Laroche's safety was well founded.

[96] Concerning the issues I already identified in my decision of September 29, 2010, noted above, Bédard J. concluded in paragraph 30 of her decision, noted above, the following:

[30] First, I believe that the appeals officer correctly identified the issues she had to decide to determine whether a danger existed. I do not share the applicant's opinion that the appeals officer should bypass or adjust the "reasonable possibility" criterion to take into account the seriousness of the consequences if the hazard were to occur. The definition of danger set out in subsection 122(1) of the Code does not permit a balancing in relation to the

seriousness of injury or illness. Once a hazard can reasonably be expected to cause injury or illness, it is a danger, regardless of the seriousness of the injury or illness. The definition of danger is established around the probability of the hazard occurring and not the seriousness of the consequences if the hazard occurs.

[97] Since Bédard J. concluded that I had correctly identified the issues to decide whether a danger existed for D. Laroche when performing his task, I will reiterate my analysis of the provisions of the Code and relevant case law, as well as the hazards associated with the task to be performed by D. Laroche before completing my analysis of these hazards as ordered by Bédard J.

[98] The term “danger” is defined as follows in subsection 122(1) of the Code:

“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;

[Emphasis added]

[99] With regard to the applicable test for determining the presence of an existing or potential hazard within the meaning of subsection 122(1) of the Code, Gauthier J. of the Federal Court, at paragraph 36 of her decision in *Verville* stated as follows (original version and translation):

[36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it 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.

[36] Sur ce point, je ne crois pas non plus qu'il soit nécessaire d'établir précisément le moment auquel la situation ou la tâche éventuelle se produira ou aura lieu. Selon moi, les motifs exposés par la juge Tremblay-Lamer dans l'affaire *Martin*, susmentionnée, en particulier le paragraphe 57 de ses motifs, n'exigent pas la preuve d'un délai précis à l'intérieur duquel la situation, la tâche ou le risque se produira. Si l'on considère son jugement tout entier, elle semble plutôt reconnaître que la définition exige seulement que l'on constate dans quelles circonstances la situation, la tâche ou le risque est susceptible de causer des blessures, et qu'il soit établi que telles circonstances se produiront dans l'avenir, non comme simple possibilité, mais comme possibilité raisonnable.

[Emphasis added]

[100] The refusal exercised by D. Laroche was based on the fact that on March 17, 2009 he was to perform, in a search location, a search falling under a police force's mandate without being allowed to wear his defensive tools. Thus, the basis of D. Laroche's refusal had to do with the fact that he was to carry out that work activity without that protective equipment.

[101] Following her investigation, HSO Tran concluded that there was no danger to D. Laroche's safety in carrying out that work activity on that day without that equipment.

[102] That, then is the decision I must analyze to determine whether it is well founded.

[103] In deciding whether by not wearing his protective equipment, D. Laroche was exposed to a danger and having in mind the definition of the term "danger" set out in the Code and the interpretation of that definition made by Gauthier J. in *Verville*, I must first consider the work activity that was to be carried at that time before considering whether that protective equipment could fend off a danger on March 17, 2009.

[104] In order to reach a conclusion of danger within the meaning of the decision by Gauthier J. and the definition of this term set out in the Code, I must:

- 1) identify the hazards associated with carrying out this work activity;
- 2) identify the circumstances in which it is reasonably possible that these hazards could cause injury to D. Laroche;
- 3) then determine whether these circumstances could have occurred, on March 17, 2009, not as a mere possibility but as a reasonable one.

1) The hazards associated with carrying out the work activity concerned

[105] The evidence presented established that the hazards related to searches performed in response to requests for assistance for searches falling outside the CBSA's mandate are exposure to an armed individual who resists arrest, gunshots, knife wounds, or physical resistance that could cause injury.

[106] The evidence presented also established that what is being sought in searches falling under police forces' mandates is large amounts of money. This involves money laundering and searching for diamonds, all sorts of drugs, narcotics, firearms and even explosives.

[107] Given the evidence, the above-noted court decision, the definition of the term "danger" set out in subsection 122(1) of the Code, and the issue to be determined in the present case, I must therefore decide whether, on March 17, 2009, there was a reasonable possibility that the above-noted hazards could cause injury to D. Laroche in carrying out his work activity before those hazards could be corrected.

2) The circumstances in which it is reasonably possible that these hazards could cause injury to D. Laroche

[108] Aside from the fact that he was not allowed to wear his defensive tools and was required to wear his bulletproof vest in carrying out his work activity, I have before me no further evidence of the conditions under which D. Laroche was to carry out that work activity on March 17, 2009.

[109] In endeavouring to understand the circumstances in which D. Laroche was to carry out that work activity on that day, I must rely on the evidence presented about the circumstances in which that work activity was carried out in the past.

[110] The evidence presented established that, before assigning its officers to respond to requests for assistance, CBSA managers in the Montréal Region asked police forces to take the following measures:

- to secure the search location, before contacting their officers to notify them to attend at the location;
- to guard the location as long as CBSA officers were present there;
- to ensure that no person at the location, except for police officers, had weapons or access to weapons.

[111] I am of the opinion that the implementation of these measures minimized the possibility of the above-noted potential hazards occurring.

[112] I am also of the opinion that, if these measures were taken on March 17, 2009, the possibility of D. Laroche being injured by an armed individual was reduced to a minimum.

[113] On the basis of the foregoing and the evidence presented, I understand that the following were the circumstances in which the above-noted hazards were likely to cause injury to D. Laroche on March 17, 2009:

- 1) if the location had not been properly secured beforehand and an armed individual was at the location;
- 2) if the police officers did not properly guard the location and an armed individual was within the outside perimeter of the location or managed to enter the location.

[114] To decide whether a danger existed for D. Laroche when performing his task, I must now determine whether these circumstances were not simply a mere possibility but also a reasonable possibility on March 17, 2009 in accordance with the instructions set out in the decision rendered by Bédard J.

3) Could these circumstances have occurred, on March 17, 2009, not as a mere possibility but as a reasonable one?

Circumstance 1: The location was not properly secured and an armed individual was at the location

[115] Bédard J. wrote the following in paragraph 36 of her decision:

[36] The appeals officer's finding regarding the first hazard seems entirely reasonable to me. She found, based on relevant evidence, that the possibility that the first circumstance could occur was reduced to a minimum.

[116] Since Bédard J. decided that my conclusion regarding the first circumstance associated with the hazards identified earlier was entirely reasonable, I will reiterate my analysis of the evidence I consider relevant to this hazard and my conclusion in this regard.

[117] The evidence shows that search areas are always carefully inspected by the police force following a detailed intervention plan drawn up beforehand and that persons arrested at the site are always taken away before CBSA officers enter. The evidence also shows that the police force always remind CBSA officers to only show up once they have secured the site in the manner described earlier.

[118] In light of this evidence, I find that on March 17, 2009, the odds of an armed individual being on the premises because it had not been properly secured were reduced to a minimum and that this was therefore not a reasonable possibility.

Circumstance 2: The police officers are not properly guarding the location and an armed individual is within the outside perimeter of the location or manages to enter the location

[119] I will now resume my analysis of this hazard as per the instructions of Bédard J. in paragraph 39 of her decision. This paragraph reads as follows:

[39] I am of the view that the appeals officer's decision does not make it possible to determine whether she considered the evidence that searches took place under dynamic circumstances that could change and develop during an operation. Her analysis was incomplete: she considered the circumstances that existed when the applicant arrived at the search location but not those that could develop during an operation. This component, which had been raised by the applicant, was just as relevant and it was overlooked by the appeals officer. Yet, several pieces of evidence were relevant to assessing and measuring the risk of injury associated with the possibility that one or more persons could enter the premises during the operation, in particular:

1. The nature of the sites where the searches were carried out.
2. The testimony of the applicant and his colleague L. Moreau who stated that during their searches of private homes they were alone in most of the rooms in which they worked.

3. The testimony of the applicant that he had been working alone in a basement with a single point of access and that when he found the object of the search and called the police officers working upstairs, several minutes went by before they came down to find him.
4. The testimony of the applicant that for a search conducted on an exterior site, the police officers stayed in their car and that he had been offered no close cover.
5. The testimony of L. Moreau that he had never felt or been given the impression that the police officers present at the location were there to protect him during his searches.
6. The testimony of the applicant and L. Moreau that no police officer escorted them from or to their vehicle as they approached and left the search location, and more specifically, the testimony of the applicant that he had once been obliged to return to his vehicle to collect some detection tools during one of the searches.
7. The testimony of R. Groulx, a member of the RCMP, regarding the dynamic nature of the operations and the possibility that the circumstances could change during an operation.
8. The testimony of the applicant and L. Moreau on the training they received to fend off attacks with their defensive equipment and their vulnerability if they were to be attacked when they did not have their defensive equipment.
9. The testimony of Y. Patenaude of the SPVM who stated that if the outside perimeter of a search location is not well guarded, anyone can enter the location.

[120] I understand that in my analysis, I must therefore take a closer look at these nine pieces of evidence to determine whether there was a reasonable possibility or a mere possibility of the second circumstance, noted above, occurring on March 17, 2009 in order to determine whether it was dangerous for D. Laroche to perform his task.

[121] Although D. Laroche and L. Moreau stated that the police officers never offered to escort them to and from their vehicles at the search location or back to their vehicles to pick up tools during the operation, they nevertheless both admitted that armed police officers guarded the premises at all times, in other words from the time they arrived at the location and the entire time they were performing their tasks.

[122] Moreover, although Y. Patenaude stated that anyone could enter the search location if its outside perimeter was not properly guarded, A. Surprenant stated that CBSA officers can always speak with the person in charge of surveillance at the location and refuse to enter or continue their tasks if they had doubts or noticed that the perimeter of the location was not properly guarded.

[123] Furthermore, while D. Laroche and L. Moreau stated that police officers were not present in every room they searched and that they would be vulnerable if attacked by an armed individual while not wearing their defensive tools, both admitted that the location where they worked was guarded at all times by armed police officers. I would add that Y. Patenaude stated that an operations plan is painstakingly drawn up beforehand on the basis of which each nook and cranny is checked before the arrival of the CBSA officers to make sure no suspicious or dangerous individual is lurking on the premises. Also, I would point out that although L. Moreau stated that the police officers remained in their

vehicle while he conducted a search outside the premises and did not offer to guard him more closely, he admitted that these same armed officers were always on site to ensure his safety.

[124] It is also quite clear, as stated by R. Groulx, that the circumstances during an operation can quickly change if an armed individual is lurking within the outside perimeter of the location or manages to enter the location and attacks a CBSA officer. However, A. Surprenant stated that such an incident had never occurred during searches conducted by CBSA officers of search locations under the jurisdiction and guard of the police force after the location was secured by the latter. Moreover, D. Laroche himself admitted that the odds were slim of an armed individual being around or entering a location he is searching and that is under guard by a police force.

[125] In light of the foregoing, it is my view that on March 17, 2009, the possibility that the location to which D. Laroche was dispatched to conduct his search was not properly guarded by the police force so as to ensure that no armed individual was within the outside perimeter or managed to enter the location while he was performing his task was a mere possibility and not a reasonable possibility.

[126] For these reasons, I am of the opinion that there was no danger, within the meaning of the Code, to the safety of D. Laroche on March 17, 2009.

[127] If I had concluded that there was a danger to D. Laroche's safety on March 17, 2009, it would have been necessary, in a second stage, to consider the effect that wearing his defensive tools might have had on his carrying out that work activity on that day. However, since my conclusion is that there was not a reasonable possibility that the circumstances in which injury could be caused would occur on March 17, 2009, there is no need to pursue my analysis, particularly since there is no expert evidence before me about the effect of wearing defensive tools on carrying out the work activity concerned at that time.

[128] That said, I would like to emphasize the following.

[129] The general duties of an employer under the Code, set out in section 124, are worded as follows:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[Emphasis added]

[130] As part of these general duties, subsection 125(1) of the Code also imposes specific duties on an employer in the two following circumstances:

- in respect of every work place controlled by the employer; and
- in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls

the activity.

[131] The evidence presented establishes that the training, tools and salaries provided to CBSA officers in order to carry out the work activity concerned fall entirely under the CBSA's authority.

[132] On the basis of this evidence and subsection 125(1) of the Code, I conclude that, although the work activities concerned were carried out by CBSA officers in locations not falling under the CBSA's authority, these work activities themselves fell under the CBSA's authority.

[133] Paragraph 125(1)(z.04) of the Code and subsections 19.1(1), 19.3(1), 19.4 and 19.6(1) of Part XIX of the accompanying *Canada Occupational Health and Safety Regulations* (COHSR) read as follows:

125(1) Without restricting the generality of section 124, every employer shall, in respect of [...] every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

[...]

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards [...];

[...]

(Canada Occupational Health and Safety Regulations)
Part XIX

19.1(1) The employer shall, in consultation with and with the participation of the policy committee, or, if there is no policy committee, the work place committee or the health and safety representative, develop, implement and monitor a program for the prevention of hazards, including ergonomics-related hazards, in the work place that is appropriate to the size of the work place and the nature of the hazards and that includes the following components:

[...]

- b) a hazard identification and assessment methodology;
- c) hazard identification and assessment;

[...]

19.3(1) The employer shall develop a hazard identification and assessment methodology, including an identification and assessment methodology for ergonomics-related hazards, taking into account the following documents and information:

[...]

- d) any results of work place inspections;

[...]

[...] *i) any other relevant information;*

19.4 The employer shall identify and assess the hazards in the work place, including ergonomics-related hazards, in accordance with the methodology developed under section 19.3 taking into account

[...] *a) the nature of the hazard;*

[...] *e) the preventive measures in place to address the hazard;*

[...] *g) any other relevant information.*

19.6(1) The employer shall provide health and safety education, including education relating to ergonomics, to each employee which shall include the following:

- a) the hazard prevention program implemented in accordance with this Part to prevent hazards applicable to the employee, including the hazard identification and assessment methodology and the preventive measures taken by the employer;*
- b) the nature of the work place and the hazards associated with it;*
- c) the employee's duty to report under paragraphs 126(1)(g) and (h) of the Act and under section 15.3; [...]*

[Emphasis added]

[134] In the present case, in my opinion there is no doubt that the police forces are in a better position to identify and assess the hazards related to each search location falling under their mandates and to determine the measures to be taken in order to secure these locations and to guard them properly, including the outside perimeter if necessary.

[135] On the other hand, referring to the above-noted provisions of the Code, I am of the opinion that this point takes nothing away from the fact that the CBSA has a duty to develop a hazard identification and assessment methodology that allows responsible managers each to decide, on the basis of knowledge of the measures taken to secure the location and to guard it properly, whether the request for assistance should be accepted.

[136] The evidence established that the method developed by local management of the CBSA, Montréal Region, at the time of HSO Tran's investigation, to identify and assess the hazard related to each request for assistance consisted of orally asking the requesting police force for the following information: the name of the requesting agency, the location, the date, the type of operation and the name of the contact person at the location.

[137] The evidence also established that, following the Assurance of Voluntary Compliance obtained by HSO Tran, the CBSA nevertheless developed the above-noted procedure. I have carefully read this procedure and I am not satisfied that it meets the spirit of the above-noted provisions of the Code.

[138] In fact, the evidence established that, under this procedure, the responsible

managers are now to request the following additional information: the purpose of the search, and whether a meeting with their officers will be held before the intervention takes place.

[139] In referring to the above-noted provisions of the Code, I am of the opinion that this information is still insufficient to allow the officers to ascertain precisely the circumstances surrounding each operation and the measures taken by each requesting police force to guard the location.

[140] Since the CBSA decided to suspend requests for assistance until I render my decision in the present case and intends to review all these procedures with regard to the work activity concerned, I recommend that in that process it review – in consultation and with the participation of its occupational health and safety guidance committee, and with the assistance of the police forces if necessary – step one of its procedure, so as to equip its managers better to assess each request for assistance on a case-by-case basis.

[141] Since the CBSA also intends to review all its policies following my decision, I strongly recommend that it review these policies so as to give its responsible managers the latitude to select, from among all possible options, the best possible means of protection for ensuring the safety of its officers depending on the level of hazard established for each request.

Decision

[142] For these reasons, HSO Tran's March 22, 2009 decision that a danger does not exist for D. Laroche's safety is confirmed.

Katia Néron
Appeals Officer