Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Canada Labour Code
Part II
Occupational Health and Safety

Correctional Service Canada (CSC)
Millhaven Institution
Appellant

and

Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada- CSN (UCCO-SACC-CSN)
respondent

Decision No. 06-026
August 10th, 2006

This case was heard by Appeals Officer Richard Lafrance, in Kingston, Ontario, on May 24 and 25, 2006.

Appearances

For the appellant
Richard E. Fader, Counsel, Justice Canada
Mike Ryan, Warden, Millhaven Institution, CSC
Brian Joyce, Acting Assistant Warden, Management Services, Millhaven Institution, CSC

For the respondent
Michel Bouchard, Union Advisor, CSN Ontario
Corinne Blanchette, CSN Union Advisor
Geoffrey Bennett, Social Program Officer
Paul Chaves, Social Program Officer
Robert Fynucan, Correctional Officer (CO)
Avery Knap, Steamfitter, Millhaven Institution, CSC
Howard Page, CO, Millhaven Institution, CSC

Health and safety officers (HSO)
Chris Mattson, Human Resources and Skill Development Canada (HRSDC), Labour Program, Toronto District
Bob Tomlin, HRSDC, Labour Program, Toronto District

[1] This case concerns an appeal made by Correctional Service Canada under section 146 of the *Canada Labour Code* (the *Code*), Part II, of a direction issued by health and safety officer C. Mattson on October 7, 2005, following his investigation of the work refusal initiated by correctional officer Howard Page on October 3, 2005.

[2] The direction stated:

> On 3 October 2005, the undersigned health and safety officer conducted an investigation following a refusal to work made by Howard Page in the work place operated by Correctional Service of Canada, being an employer subject to the *Canada Labour Code*, Part II at Millhaven Institution, P.O. Box 280, Highway # 33, 5775 Bath Road, Ontario, K0H 1G3, the said place being sometimes known as Correctional Services Canada.
>
> The said health and safety officer considers that a condition in a place constitutes a danger to an employee while at work:
>
> **Employees are continuing to be exposed to second hand smoke**.
>
> Refer: 125(1)(w) of the *Canada Labour Code*, Part II Occupational Health and Safety
>
> 12.1 of the Canada Occupational Health and Safety Regulations
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to protect any person from the danger.
>
> Issued at Millhaven, this 7th day of October, 2005

[3] On October 24, 2005, CSC applied for a stay of the direction until an Appeals Officer could hear the appeal of the direction.

[4] A stay[1] of the direction was granted on October 31st, 2005, conditional to improvements being made to the ventilation system as submitted by the employer and the implementation of a no smoking policy beginning on January 31, 2006.

[5] I retain the following from the testimony of HSO Mattson as well as from the witnesses and the documents submitted for the hearing.

[6] HSO Mattson was called in on October 3, 2005 to investigate a continued work refusal by CO Howard Page. The statement of refusal to work noted in the HSO's report is as follows: "I believe the second smoke [*sic*] in the institution and our work area constitute a danger."

[7] HSO Mattson decided that because he could smell tobacco smoke on the range[2], there was in fact exposure to second hand smoke.

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[1] *Correctional Service Canada and H. Page-UCCO-SACC-CSN*, Appeals Officer Richard Lafrance, Decision No. 05-045(S), October 31, 2005.

[8] Basing his opinion on information that he had read from Health Canada's website, HSO Mattson believed that exposure to second hand smoke was a danger in accordance with the Code. Consequently, he directed the employer to protect the employees against second hand smoke.

[9] Correctional officer Howard Page testified that normally, he has to walk the range on a regular basis to count and make a visual check of the inmates in their cells. This usually takes about ten minutes every hour. This time factor may change as conditions require, such as to accompany a nurse to deliver medication or to search cells, in which case his presence is required on the range for longer periods of time. This varies from shift to shift.

[10] H. Page further testified that at the time of his refusal, the inmates were allowed to smoke in their cells.

[11] According to Brian Joyce, Acting Assistant Warden, who at the time of the refusal was involved with the modifications to the ventilation system, the ventilation system was not always properly maintained and further adjustments and engineering studies could be done to improve the system.

[12] Because the ventilation system was more or less in the best possible working conditions, the tobacco smoke could drift towards the range. Optimally, the negative ventilation pressure in the cells should prevent the smoke from entering the range.

[13] Further to the issuance of the direction, CSC had some maintenance work done on the ventilation system to bring it to normal working conditions.

[14] However, it was found that the ventilation system could only provide for a neutral balance between the cells and the range and that tobacco smoke could still drift out of some cells onto the range. This occurs because the ventilation pressure is neutral and may vary if windows are opened somewhere and cell doors are not air tight.

[15] Nonetheless, Warden Mike Ryan affirmed that conditions have changed in Millhaven Institution since then, as CSC has instituted a no smoking policy in all its penitentiaries on January 31, 2006. Inmates and employees are not allowed anymore to smoke anywhere inside Millhaven Institution, but they may smoke outside in the courtyard.

[16] Warden Ryan testified that the no smoking policy was phased in over the end of 2005 and January 2006, to provide inmates and employees the opportunity to quit smoking before the policy came into force. As well, smoking cessation aids were provided to inmates and employees.

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[2] The range refers to the hallway and row of prisoner cells, according to the Correctional Administration Vocabulary : Public Works and Government Services Canada, Ottawa. Translation Services, 1994.

[17] Warden Ryan further indicated that the no smoking policy provides for progressive disciplinary actions against those, inmates as well as employees, who contravene the policy.

[18] Furthermore, correctional officers have the authority and the duty to direct inmates to stop smoking and can lay charges against them for contravening the policy.

[19] However, according to CO Page, by not banning tobacco inside the institution compound as requested by the health and safety committee, the inmates still have tobacco in their possession, which they bring with them when they go outside and come back in. Hence, some inmates still smoke in their cell or even in the gymnasium area. As a consequence, tobacco smoke can still be smelled occasionally on the range.

[20] H. Page testified that although he does not always lay charges against inmates smoking in prohibited areas, he has charged inmates in the past for smoking in those areas. In cross-examination, he declared that inmates normally comply with orders to stop smoking and that he has never been assaulted by inmates when issuing such orders.

[21] Paul Chaves, Social Program Officer, testified that although inmates usually do not smoke in front of correctional officers, he did find cigarette buts on the floor of the recreation area.

[22] However, in cross-examination, Paul Chaves acknowledged that he did not see any inmates smoking inside during his day shift.

[23] CO Robert Fynucan recognized that he kept a relaxed approach with regard to the application of the policy. He admitted that on some occasions, he did not report to the authorities inmates who refused to comply when ordered to stop smoking inside the building.

[24] CO Fynucan further testified that, in March 2005, when an official complaint was made to management with regard to second hand smoke, management never responded to the complaint.

[25] Finally, Warden Ryan made clear that in order to totally eliminate the possession of tobacco inside Millhaven Institution he was having drop boxes installed in the yard later this year. These boxes will be used by inmates to store their tobacco, lighter and matches in the recreational area. Therefore, no tobacco ought to be brought into the buildings once they are in place.

[26] CO Page believed that this measure will not prevent the inmates from smuggling tobacco inside their cells.

Appellant's arguments

[27] Counsel R. Fader opened his arguments by stating that in *Douglas Martin et al. v. Attorney General of Canada*[3], Justice Rothstein clearly affirmed that an appeal before an Appeals Officer is *de novo.*

[28] Because of this, the Appeals Officer may receive evidence that was not available at the time of the investigation made by the HSO. The procedure is a forward looking process and, therefore, the Appeals Officer must take into consideration the situation as it exists at the time of his inquiry.

[29] The situation has changed in federal penitentiaries since the direction was issued, as indicated by Warden Ryan. On January 31, 2006, CSC instituted a smoking ban in all federal institutions. As a result, inmates as well as employees are no longer allowed to smoke inside.

[30] R. Fader further argued that the issue of exposure to environmental or second hand smoke is largely compounded by the fact that, as demonstrated by the testimony of correctional officers, some of them do not enforce the no smoking policy.

[31] R. Fader conceded that as Warden Ryan testified, there were problems at the inception of the no smoking policy, but there are less and less as time goes by.

[32] Regarding the possibility of considering tobacco as contraband and banning it as such in the institution, as requested by the health and safety committee, R. Fader pointed out that it could not be done because CSC is governed by the *Corrections and Conditional Release Act* (CCRA). The CCRA gives a list of the products that are considered as contraband in penitentiaries, and tobacco is not on that list.

[33] With regard to the occasional smokes in cells, R. Fader indicated that Warden Ryan testified that drop boxes will soon be in place in the recreational area, and therefore the inmates will not bring tobacco in their cell. As a result, if the policy is enforced by the COs, smoking in cells will be limited to occasional tobacco smuggled in by the inmates.

[34] R. Fader maintained that the evidence showed that no correctional officer had been assaulted for enforcing the no smoking policy. In fact, COs have laid over 57 charges for smoking and have reported no assaults on them.

[35] Counsel Fader further contended that the employer had mitigated the hazard by instituting the no smoking policy; and will do more in the near future by installing drop boxes to store the inmates' tobacco.

[36] R. Fader argued that it is up to the employees to do their part with regard to health and safety by participating more in the program and by enforcing the employer's policies.

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[3] *Douglas Martin et al v. Attorney General of Canada*, Federal Court of Appeal, FCA 156, May 6, 2005, paragraph 28.

[37] Finally, R. Fader asked that the direction be rescinded because there was no need for it anymore since the employer had taken every possible measures to protect employees against second hand smoke exposure.

Respondent's arguments

[38] CSN advisor Corinne Blanchette affirmed that the direction issued by HSO Mattson should be confirmed because the employees were still being exposed to second hand smoke at their workplace and this constituted a danger to their health.

[39] C. Blanchette submitted a document from the American Society of Heating, Refrigerating and Air conditioning Engineers, Inc (ASHRAE)[4], according to which only a total smoking ban can provide the lowest achievable exposure for non-smokers and is the only effective control method.

[40] Also according to that document, scientific evidence indicates that adverse health effects from passive smoking can be felt throughout the life span, from before birth to adulthood. Furthermore, evidence supports the conclusion that passive smoking is a cause of lung cancer in non-smokers, as well as of other diseases and adverse health affect.

[41] In addition, the document stated that in the absence of a quantitative criterion for acceptable exposure, the only protective measure for effective control that has been recognised by cognisant authorities is an indoor smoking ban, leading to a near zero exposure.

[42] C. Blanchette referred to the Federal Court decision in *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent* [5], to argue that correctional officers were in a better position that the Warden to form an opinion that a danger existed in the workplace. In that regard, Justice Gauthier declared in paragraph 51:

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

[4] ASHRAE, *Position Document on Environmental Tobacco Smoke*, June 30, 2005, pp. 2, 4, 5.

[5] *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent*, 2004 FC 767, May 26, 2004.

[43] On this basis, C. Blanchette argued that the warden's testimony that exposure was basically non existent was based on the few visits he made during a week for a total of perhaps one to two hours. COs knew better because they were on the range eight hours a day and were being exposed to smoke during their shift.

[44] C. Blanchette further argued that while CSC asked that employees get more involved in occupational health and safety matters, the employer did not even take into consideration or responded to the recommendations made in reports submitted by the health and safety committee.

[45] In addition, C. Blanchette stated that the co-chair employee representative of the health and safety committee had to go through the access to information and privacy process to obtain documents dealing with health and safety issues, such as the engineering report on the ventilation system, contrary to what is stipulated in subsection 135(9) of the Code.

[46] However, even given the recommendations made in that ventilation report, C. Blanchette contended that ventilation was not a solution to second hand smoke issues. The only viable solution was a total elimination of smoking in the workplace and to obtain this, tobacco had to be completely banned and treated as contraband on the premises.

[47] As well, C. Blanchette pointed out that similar to an adjudicative decision made by the Ontario Ministry of Labour[6], the employer had the responsibility under section 122.2 of the Code to take the necessary preventive measures to protect its employees, and that CSC was not taking this responsibility seriously.

[48] Finally, C. Blanchette argued that ultimately, the real issue for the Appeals Officer was to decide if tobacco constituted a hazard in the work place.

Analysis and Decision

[49] In an appeal of a direction brought under subsection 146.1(1) of the Code, an Appeals Officer may vary, rescind or confirm the direction. In the present case, the CSC asked that I rescind the direction because the requirements of the direction were no longer necessary and the employer had taken every measure to protect its employees from the hazard of being exposed to second hand smoke.

[50] HSO Mattson issued his direction under paragraph 145(2)(*a*) of the Code. Therefore, he considered that there was a potential hazard, exposure to second hand smoke, that constituted a danger to an employee while at work.

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[6] *Ontario Public Service Employees' Union (Re) v. Ministry of Labour and Ministry of the Solicitor General and Correctional Services*, Adjudicator Robert Blair, [1996] OOHSAD No. 18, Decision No. OHS 96-19, File No. AP 93-79

[51] In order to determine if I will vary, rescind or confirm the direction as required by paragraph 146.1*(a)* of the Code, I must decide if a danger exists. To do this, I must take into consideration the definition of "danger" stipulated in the Code, the relevant jurisprudence as well as all the facts and circumstances of the case at hand.

[52] In the *Canada Labour Code*, Part II, subsection 122(1) defines "danger" as follows:

> "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[.]

[53] As well, the Code states in section 122.2 by what means prevention should be achieved:

> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[54] Looking at the jurisprudence given regarding the *de novo* issue; Federal Court Justice Rothstein clearly stated, in paragraph 28 of *Douglas Martin et al v. Attorney General of Canada*[7], that

> [a]n appeal before an appeals officer is de novo.

[55] As well, Madam Justice Gauthier explained in paragraph 32 of *Juan Verville and Service Correctionnel du Canada* [8], that

> [w]ith the addition of words such as "potential" or "éventuel" and future activity, the Code is no longer limited to specific factual situations existing at the time the employee refuses to work.

[56] For these reasons, an appeal before the Appeals Officer is a *de novo* proceeding and forward looking. Thus, this allows me to review the matter anew and to receive, in addition to the evidence gathered by the HSO, any evidence that the parties may submit, whether or not this evidence was or could have been available to the HSO conducting the investigation.

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[7] *Douglas Martin et al v. Attorney General of Canada, supra.*
[8] *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent, supra.*

[57] As well, in the *Juan Verville and Service Correctionnel du Canada supra* case, Justice Gauthier took into consideration the decision made by Justice Tremblay-Lamer in *Martin v. Canada (Attorney General)*[9] and wrote in paragraph 36:

> [36] …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.
>
> (My underline)

[58] Keeping in mind the above noted Code provisions and the findings of Justices Gauthier, I believe that a danger exists where the employer fails, to the extent reasonably practicable, to:

(a) eliminate a hazard, condition, or activity;

(b) control a hazard, condition or activity within safe limits; or

(c) ensure employees are personally protected from the hazard, condition or activity;

and one determines that :

(d) there are circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and that the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[59] CSC developed and implemented a no smoking policy inside Millhaven institution and:

- the policy applies to all inmates, all persons as well as all employees;
- it also includes monetary fines for inmates as well as for employees who contravene the policy;
- correctional officers have the duty and power to enforce the policy.

[60] I retain in addition that Warden Ryan assured me that to further protect employees from potential exposure to second hand smoke, he is to install drop boxes for the inmates to keep their tobacco, matches, lighter and other smoking paraphernalia locked up in the courtyard.

[61] C. Blanchette argued that according to the World Health Organisation, there are no safe limits for exposure to second hand smoke. However, the evidence presented could not be verified and questioned by the other party to validate its authenticity, the method of analysis used and the goal of the tests conducted to arrive at the said results. Unfortunately, no expert witness was brought in to testify one way or another on the issue. Therefore, I cannot give much weight to these arguments.

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[9] *Martin v. Canada (Attorney General)*, 2003 FC 1158, Justice Tremblay-Lamer, October 6, 2003.

[62] Even though C. Blanchette stated that there were no safe exposure limits to second hand smoke, I was not convinced under the circumstances that there was a reasonable possibility that such a low exposure would cause injury to the health of a healthy person in any foreseeable future.

[63] Consequently, I find that CSC has implemented measures to try to eliminate exposure to second hand smoke within the institution and to control the hazard within safe limits.

[64] As Justice Gauthier stated in paragraph 36 of the *Juan Verville and Service Correctionnel du Canada*[10] decision:

> [36] …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.
>
> (My underline)

[65] I believe that, under the circumstances, the reasonable expectation that this near zero exposure to second hand smoke will cause injury to the health of the employees is so remote that no danger exists for the employee.

[66] For these reasons, I am therefore rescinding the direction issued by HSO Mattson to CSC on October 7, 2005.

[67] It was evident throughout this whole proceeding that there is a definite lack of consultation, communication and cooperation between CSC on the one hand and the health and safety committee and correctional officers on the other.

[68] I will not issue a direction to rectify this situation at this time, given that I have not conducted an inquiry into this matter specifically. However, I strongly recommend to the parties to work closely together, as intended by the provisions of Part II of the *Canada Labour Code*, and to abide by the employer's and employees' duties. I am also confident that health and safety officers can and will assist the parties to develop and integrate an efficient internal responsibility system.

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Richard Lafrance
Appeals Officer

[10] *Juan Verville and Service Correctionnel du Canada, supra.*

Jurisprudence cited by parties

Darren Welbourne and Canadian Pacific Railway Co., Appeals Officer Serge Cadieux, Decision No. 01-008, May 22, 2001

Jack Stone and Correctional Service of Canada, Appeals Officer Serge Cadieux, Decision No. 02-019, December 6, 2002

Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent, 2004 FC 767, May 26, 2004

Douglas Martin et al v. Attorney General of Canada, Federal Court of Appeal, FCA 156, May 6, 2005

Carslton v. New Brunswick (Solicitor General), [1989] N.B.J. No. 449

Brent Johnstone et al.and Correctional Service Canada, Atlantic Institution, Appeals Officer Serge Cadieux, Decision No. 05-020, May 3, 2005

Regina Correctional Centre v. Saskatchewan (Department of Justice), [1995] S.J. No. 350, Q.B.G. No. 3917 of 1994 J.C.R.

Saskatoon Correctional Centre v. Government of Sakatchewan, [2000] S.J. No. 307, 2000 SKQB 204, Q.B.G. No. 799of 2000 J.C.S.

McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services), [1998] O.J. No. 2288, Court File No. 702/97

McCann v. Fraser Regional Correctional Centre, [2000] B.C.J. No. 559, Vancouver Registry No. L000576

Ontario Public Service Employees' Union (Re) v. Ministry of Labour and Ministry of the Solicitor General and Correctional Services, Adjudicator Robert Blair, [1996] OOHSAD No. 18, Decision No. OHS 96-19, File No. AP 93-79

Correctional Service Canada and John Carpenter- UCCO/SAAC/CSN, Appeals Officer Michèle Beauchamp, March 30, 2005

Correctional Service Canada and H. Page- UCCO-SACC-CSN, Appeals Officer Richard Lafrance, Decision No. 05-045(S), October 31, 2005.

Summary of Appeals Officer's Decision

Decision No.: 06-026

Applicant: Correctional Service Canada Millhaven Institution

Respondent: Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada- CSN (UCCO-SACC-CSN)

Provisions: *Canada Labour Code*, 146, 122, 145(2)(a),

Keywords: Direction, second-hand smoke, health hazard, no rectification.

Summary:

On October 3rd, 2005 health and safety officer (HSO) Chris Mattson conducted an investigation at the Millhaven Institution following a work refusal conducted by correctional officer Howard Page. The correctional officer refused to work because he believed that second hand smoke in the institution and his work area constituted a danger. On October 7th, 2007, HSO Mattson issued a direction to Correctional Service Canada (CSC) ordering them to protect any person exposed to second hand smoke. On October 24th, 2007, CSC applied for a stay of the direction. A stay was granted on October 31st, 2007, conditional to improvements to the ventilating system and the implementation of a non smoking policy. Further to the issuance of the direction, CSC had some maintenance work done on the ventilation system and on January 31st, 2006, CSC instituted a no smoking policy in all its penitentiaries.

The Appeals Officer determined that near zero exposure to second hand smoke will cause injury to the health of the employees is so remote that no danger exists for the employee. He rescinded the direction issued by HSO Mattson and recommended that the parties work closely together, as intended by the provisions of Part II of the *Canada Labour Code*, and to abide by the employer's and employees' duties. Also, he stated that the health and safety officers should work with the employers and employees to develop and integrate an efficient internal responsibility system.