

Canada Labour Code
Part II
Occupational Health and Safety

Correctional Service of Canada
applicant

and

Howard Page, Correctional Officer

Decision No.: 06-045(S)
December 8, 2006

This request for a stay was decided by Richard Lafrance, Appeals Officer, based on the written submissions and oral arguments provided by the parties on December 8, 2006.

For the applicant

Richard Fader, counsel, Justice Canada

For the respondent

John Mancini, counsel, Confédération des Syndicats nationaux (CSN)

Health and safety officer

Bob Tomlin, Labour Program, Human Resources and Skills Development Canada (HRSDC),
Toronto, Ontario

- [1] The present decision concerns a request for a stay in respect of the direction that health and safety officer (HSO) Bob Tomlin issued to Correctional Service of Canada (CSC) on November 8, 2006, under subsection 145(2)(a) of Part II of the *Canada Labour Code*, (the *Code*).
- [2] HSO Tomlin issued this direction following his investigation of a work refusal made, on September 8, 2006, by Correctional Officers; Batson, Chesbrough, O'Grady, Crispin, and Page working for Correctional Service Canada at the Millhaven Institution in Bath, Ontario.

[3] HSO Tomlin's direction states:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On 20 September 2006, the undersigned health and safety officer conducted an investigation following a refusal to work made by multiple employees represented by Correctional Officer Howard Page, in the work place operated by Correctional Service Canada, being an employer subject to the *Canada Labour Code*, Part II, at Millhaven Institution, P.O. Box 280, Highway # 33, 5775, Bath, Ontario, K0H 1G0, the said work place being sometime known as Correctional Services Canada.

The said health and safety officer considers that a condition in the work place constitute a danger to an employee while at work.

Employees continue to be exposed to second hand smoke.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition or alter the activity that constitute the danger or protect any person from the danger no later than 9 December 2006.

Issued at Millhaven, this 8th day of November, 2006.

- [4] The issue to be decided in the present case is whether or not there are substantive grounds justifying that I grant a stay of HSO Tomlin's direction to Correctional Service Canada.
- [5] To reach a decision, I have to consider the report of the health and safety officer and the arguments provided by both parties on the three fold tests to take into consideration on a stay application.
- [6] Those criteria based on the Metropolitan Stores decision¹ are: the seriousness of the issue to be tried; the irreparable harm resulting from not granting the stay and the balance of inconvenience on who will suffer the greater harm from the granting or refusal of a stay, pending the decision on the merit of the case.
- [7] Furthermore, I asked that a fourth test be met, and that is: what in the alternative of complying with the direction does the applicant intend to do to protect the health and safety of the employees or any person who could be exposed to the danger identified by the health and safety officer.

¹ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, Docket 19609

Applicant's arguments and respondents' rebuttal

- [8] With regard to the first test, R. Fader argued that the employer had a serious issue to be tried because CSC has created in conjunction with the national joint health and safety committee, a policy banning indoor smoking.
- [9] He argued as well that given the evidence that does not support a finding of "danger", based on a previous decision of a similar case by an Appeals Officer, the decision of the health and safety officer was incorrect and should be rescinded on appeal.

Irreparable harm

- [10] With regard to the second test, R. Fader stated that the direction that the health and safety officer issued was a direction without a direction.
- [11] He pointed out that the health and safety officer seems to ignore that CSC is enforcing a total ban on smoking. He further argued that Millhaven Institution is moving towards banning tobacco from inmates except in open-air areas. He indicated as well that a pilot project was instituted in the segregation unit where lock boxes have been put in place to store the inmate's tobacco products.
- [12] R. Fader finally argued that instituting a total ban of tobacco indoor and outdoor would jeopardize the safety and security of the Institution.

Balance of inconvenience

- [13] R. Fader maintained that the employer continues to make significant improvements towards implementing the total indoor smoking ban implement in January 31, 2006.
- [14] He argued that this was an ongoing exercise that required the support of management, employees and affected Unions.
- [15] He reiterated that he matter had already been before an Appeals officer and that it was then decided that here was no danger. CSC is dealing as well with this issue on a judicial review before the Federal Court.
- [16] Based on the arguments, R. Fader submitted that the balance of inconvenience favoured the employer.

Alternative to compliance with the direction

- [17] On the fourth test that I added as a condition to a grant of a stay of direction: R. Fader pointed out what was already in place, that is: the smoking ban, with its regulations and its penalty system if not respected. He indicated as well that the lock boxes should be in place by March 31, 2007.
- [18] Other than that, he indicated that he was at a lost as to what the employer could do to further protect the employees from exposure to second hand smoke.

[19] J. Mancini, other than arguing that the work place was still full of smoke, and that I relied on false representation by the employer's counsel that everything was alright in the penitentiaries, did not provide me with any other arguments as to why I should not grant a stay.

Analysis and decision

[20] With regard to the first test that there is a serious issue to be tried; I believe that there is a serious issue to be tried because this deals with people being exposed to second hand smoke. This in itself is a serious hazard whether or not it meets the definition of danger as understood under the Code.

[21] Regarding the second test; that of irreparable harm, I fail to see what irreparable harm Correctional Service can suffer. R. Fader talked about the inside smoking ban, the pilot project and the potential effect on the safety and security of the institution if a total outdoor ban was also implemented. I can only imagine the effect of a sudden total inside and outside smoking ban could have on the inmate population and its consequences. This may be the only identifiable harm at the present time.

[22] However, the direction does not direct to ban smoking outside, it directs the employer to protect its employees or any other person inside the institution from the hazard of exposure to second hand smoke. I'm convinced that until the appeal can be heard by an Appeals Officer on its merit, a stricter implementation of the policy or other alternative solution can be found to this problem. Consequently, I find no irreparable harm.

[23] On the third test, the balance of inconvenience; R. Fader did not convince me that Correctional Service would be more inconvenienced than the employees whose health may be at stake. Until the appeal can be heard by an Appeals Officer, there maybe some inconvenience to modify the work duties as suggested by the Correctional Officers or to provide them with surgeon style masks as suggested by HSO Tomlin. I find that the inconvenience for the employees to be exposed to second hand smoke is greater for their health than that of providing protection to the employees.

[24] On the fourth test; R. Fader could not come up with any alternative temporary solutions to further protect the employees until the appeal can be heard by an Appeals Officer and a decision rendered.

[25] Based on the health and safety officer's report and the comments from J. Mancini it is evident that inmates are still smoking inside the institution. After his investigation of the situation, the health and safety officer considered that because of this, a danger existed in the work place and until this can be debated at a hearing before an Appeals officer, I cannot contradict him.

[26] Therefore, for the reasons stated above, I am not granting the stay of the direction. The employer is to make every reasonable effort, to address this issue and protect the employees from being exposed to second hand smoke inside the work place.

[27] In *obiter* though J. Mancini insisted that a face to face hearing be conducted in order for him to present his arguments in person, it was explained that the hearing was presently being conducted, as he was advised the day before, and that his arguments had to be submitted by teleconference at the present time.

Richard Lafrance
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 06-045 (S)

Appellant: Correctional Service Canada

Respondent: Howard Page, Correctional Officer

Provisions: *Canada Labour Code*, Part II 145(2) (a)

Keywords: Stay request, second-hand smoke, ban, not granted

Summary:

On November 8, 2006 health and safety officer Bob Tomlin issues a direction to Correctional Service Canada (CSC), stating that a danger existed due to second-hand smoke. CSC submitted written arguments stating that Millhaven Institution has taken all precautionary measures that a smoking ban for the interior is in force. CSC failed to meet all four test outlined by the Appeals Officer. Therefore no stay was granted.