Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2022-03-08
File No.: 2018-22

Between:

Benoît Lachapelle, appellant

and

Correctional Service Canada, respondent

Indexed as: *Benoît Lachapelle* v. *Correctional Service Canada*

Case:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a delegated representative of the Minister of Labour.
Decision:	A direction is issued
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	French
For the appellant:	Ms. Catherine Sauvé, Laroche Martin, CSN Legal Department
For the respondent:	Mr. Karl Chemsi, Department of Justice Canada, Treasury Board Secretariat Legal Services
Citation:	2022 OHSTC 2

REASONS

Background

[1] This decision concerns an appeal filed on August 2, 2018, pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*) by Mr. Martin Bibeau, on behalf of the appellant Mr. Benoît Lachapelle, against a decision of no danger rendered on July 27, 2018, by ministerial delegate Ms. Jenny Teng, following her investigation into the appellant's work refusal in the workplace located at the Regional Reception Centre (RRC), Special Handling Unit (SHU), Sainte-Anne-des-Plaines Institution, Quebec, and the issuance of a direction as a result of the decision that danger existed, at which the undersigned appeals officer arrived after hearing the said appeal in *Benoît Lachapelle* v. *Correctional Service Canada*, 2021 OHSTC 2.

[2] The facts and circumstances in this case were fully set out in the aforementioned decision, and there is no need to reiterate them. Nevertheless, for precision, it should be mentioned that Benoît Lachapelle, employee and appellant, based his refusal to work on the claim, recognized by the Tribunal, that there was danger for a floor agent due to the increased power of the firearm recently deployed for use by the officers on the gallery monitoring the dayrooms without additional safety measures having been put in place, while also taking into account the fact that the windows of the dayrooms would not be strong enough to stop a projectile fired with the said firearm.

[3] In the above-mentioned decision on the appeal, I stated the following with respect to issuing a direction:

> [106] Having determined that a danger exists that is not a normal condition of employment, paragraph 146.1(1)(b) of the *Code* empowers me to issue such directions as I consider appropriate under subsection 145(2) or (2.1) of the legislation. I believe, however, given the considerable period of time that has elapsed since Mr. Lachapelle's work refusal and the decision of the ministerial delegate, that it would be more appropriate to allow the parties to arrive at a joint resolution of the matter. I therefore choose not to issue a direction at this time, but remain seized of the matter and have jurisdiction to issue any direction deemed appropriate if the parties fail to resolve the matter within 90 days of the date hereof and such request is made to me. In such a case, I may consider the parties' written submissions on an expedited basis.

[4] At the end of the aforementioned 90 days, the parties informed me that they were unable to resolve the matter and asked to confer with the undersigned to determine and be advised of the next steps. A conference call was held on November 8, 2021, during which the undersigned asked the parties to send him in writing and within a specified deadline the substance of the proposals for solution that each one had submitted to the opposing party. The objective was to allow the undersigned to determine whether each party had made a serious attempt, not to weigh the resolution or correction potential of each proposal. I also clearly indicated to the parties that this was my only objective and that, consequently, apart from the content of each one's proposals, there was no need for either party to make submissions regarding the other party's proposals or even addressing in any way the merits of the issue that the undersigned was asked to consider.

The Parties' Proposals

[5] The appellant sent the Tribunal the requested information on November 15, 2021, with nothing else, indicating briefly that he believed three measures could eliminate the danger at its source: changing the service firearm (C-8), changing the glazed partitions of the dayrooms or changing the ammunition used by the C-8 rifle. He stated that, pursuant to expert advice, his first choice would be to change the C-8 rifle for a lower-calibre firearm (9 mm), whereas throughout the appeal hearing, he had put the emphasis on the need for changing the glazed partitions of the dayrooms. The appellant described his proposed measures in greater detail as follows:

> [Translation]
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> First, the union stated that the desired solution would be to change the C-8 rifle for a firearm whose ammunition would not go through the glass. Before 2015, the weapon used on the gallery was a Colt 9 mm rifle and a weapon equivalent to the C-8; the .223 AR 15 was used only outside. Expert Guillaume Arnet tested the glass with a 9 mm weapon, and it appeared that the polycarbonate used for the dayrooms [translation] "was [...] an effective barrier to protect personnel in the corridor when the former service firearm was in operation." The union therefore suggested changing the C-8 for a 9 mm firearm. It seems there are several manufacturers for such weapons, including JR Carabine, Keltec and Beretta, to name just a few.
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> Second, the union reiterated the proposal to increase the ballistic capacity of the wall and windows. The union's concern was to ensure that the new windows were not too opaque because the detainees had to be properly watched at all times.

[6] In relation to his third proposal—to keep the C-8 service firearm but use different ammunition that would not go through the windows of the dayrooms—the appellant gave this explanation:

> [Translation]
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> […] Frangible ammunition would be an option. It seems that using good-quality, lightweight "frangible" ammunition, like one of 55 grains, could be effective. The projectile of the frangible ammunition is made up of an agglomeration of metal powder, so it does not ricochet back onto hard surfaces and would not go through the glass. The ammunition is mortal on soft tissue at short range, however, so it would be useful for the CX [correctional officers] on the gallery. However, tests may be needed to confirm the best deployment distance. It is also clear that the C-8 rifle reserved for the interior would have to be identified so that the chargers containing "frangible" ammunition would not be confused with hollow-point ammunition, which would be used exclusively outside. Different coloured electrical tape could do the job more cheaply.

[7] The respondent answered the Tribunal's request on November 22, 2021, listing two categories of measures it would consider establishing: immediate or very short-term measures

and medium- to long-term measures (more than six months); the respondent submitted an explanatory sketch.

[8] Among the immediate or very short-term measures, the respondent first suggests [translation] "removing the markings on the ground around the windows of the dayrooms (former safety zones) and informing the staff that the memo to that effect is no longer valid." A new safety zone is shown in an attached sketch. It details the related measures as follows:

> [Translation]
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> Change the post orders to notify all employees posted to the SHU that they are **never** to enter the new safety zone (shown in red on the sketch attached as Schedule A) when the "**incident**" alarm is ringing (Air Horn preceding an intervention). The post order will describe precisely the type of alarm to be used, by whom and in which circumstances (for incidents in SHU dayrooms). This immediate measure would eliminate the danger related to the presence of staff in the area should the C-8 be used.

[9] More specifically, the respondent goes on to identify the post orders (POs) that must be changed as part of this recommended immediate or short-term measure in order to eliminate the risk:

> [Translation]
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> **Changes to POs 609: SHU sector coordinator and 619A: ICA unit supervision:**
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> The post order will indicate that the sector coordinator is responsible for ensuring that, if an emergency occurs in a dayroom, **no civil and/or correctional employee will be in the new safety zone […]** until such time as the gallery officer has the situation under control. Since the gallery is the only place where interventions are possible in the dayrooms, no one should be in that area so as not to hinder interventions. In addition, the control station must **close the access grates […]**, **blocking access to the safety zone after it has been evacuated.** The Special Handling Unit sketch […] clearly shows the previous markings on the ground […] and the new safety zone […], which includes the former safety zone.
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> **Change to PO 619A: ICA SHU surveillance:**
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> The change to this post order will specify that, should an emergency occur in a dayroom, the officers on duty **must leave the new safety zone and stay behind the access grate […]** until such time as the gallery officer brings the situation under control and the sector coordinator authorizes the zone to be reopened.
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> **Change to PO 610A: ICA Gallery:**
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> Before any intervention, the post order will specify and remind the officers that they must always activate the Air Horn-type alarm before any intervention. In addition, before any use of the C-8 firearm, the officer will have to inform the other officers by radio—e.g., **NOVEMBER 23 to NOVEMBER, firearms operations in the SHU.**

The respondent explains that the implementation of that measure would last until the C-8 storage locker is installed because opening that locker would automatically set off an audio alarm.

[10] As stated earlier, the respondent's answer to the undersigned's request also deals with a medium- to long-term measure (more than six months) centred on installing a C-8 storage locker, which will automatically set off an audio and visual alarm when opened. The respondent explains the following:

> [Translation]
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> Store the firearms in a locker on the gallery. **An audio and visual alarm will go off automatically as soon as the C-8 weapon is taken out of the locker, notifying all SHU employees to immediately leave the safety perimeter that surrounds the SHU control station.** The visual alarm will create a visual impact by shining a very distinctive red light through the restricted area. Once the installation has been completed, all the post orders for officers working in the SHU will be changed to add procedures to be followed once this new alarm goes off. Briefing sessions will be provided to all staff members to inform them of the new procedure. The SHU sector coordinator will be responsible for making all SHU employees follow that procedure.

[11] With respect to its proposed measures, the respondent contends that this change of emergency operating procedures would allow a safety perimeter to be set up quickly and effectively, completely eliminating the risk associated with using the C-8 in the dayrooms. Believing that the implementation plan for installing a new storage space for the C-8 can be deployed rapidly, the respondent argues that opening the locker would set off both audio and visual alarms and trigger the evacuation of the safety perimeter around the SHU control station. With regard to the new safety zone, the respondent submits that it covers a much larger area than the previously marked ground space and covers all firing angles from the gallery; as a result, if no one is allowed to be in the area and the access grate is closed, the risks associated with having to fire the C-8 will be eliminated. Despite the fact that the undersigned had instructed the parties to limit their submissions to proposals for mitigating the danger identified by the Tribunal in its decision on the merits, the respondent decided to add comments on the appellant's proposals, with the predictable result that the appellant also wished to comment on the respondent's proposals, which led to the following comments from the undersigned.

[12] The *Code* and, to a certain extent, the case law developed by the Tribunal over the years clearly establish the limits of the Tribunal's jurisdiction in this matter, which can be briefly reduced to two elements. First, under section 146.1, the Tribunal inquires into the circumstances of the decision, whatever the decision is, which means it focuses on the circumstances at the time of the work refusal that led to the appeal before it. Second, when the Tribunal finds that danger existed at the time of the refusal, the *Code* authorizes it to give the directions it deems appropriate to correct the situation for the future, after its decision; the Tribunal is given the discretion to issue directions that go from the general to the specific.

[13] However, there is nothing in the legislation that allows the Tribunal to consider or rule on the future effectiveness or efficiency of a direction or measure to be implemented, whether general or specific, although with respect to the *Code*'s principal objective, the degree or level of

protection must take precedence over the difficulties and/or costs of implementing it. To borrow a descriptive figure of speech relating to the areas where the Tribunal can intervene, its jurisdiction should extend upstream and not downstream. It stands to reason, however, that specific directions should not be issued in a purely futile context where they could not be applied. That being said, the *Code* does contain clear mechanisms for making such an assessment. They range from a ministerial delegate examining the worksite on behalf of the Minister, either at the request of one party or periodically, to the work refusal procedure relating to the potential issuance of a direction, which would entail an investigation and assessment of its effect.

[14] I have kept the foregoing in mind when including each party's comments about the other party's proposals in this decision. It should also be noted that neither of the parties suggested that the other party's proposals were impossible to apply, only that applying them would entail serious difficulties or afford incomplete protection.

The Parties' Comments on Each Other's Proposals

[15] The respondent's comments are aimed at the appellant's proposals to change the weapon and ammunition and to install bullet-proof glass. With regard to the first proposal, the respondent points out that when the C-8 was chosen, the choice of ammunition was based on various ballistic expert reports and that, according to the RCMP's "Armoury" section, the use of frangible ammunition on a human target is not recommended due to the extensive and irreparable injuries it would cause (with a high risk of death). Noting that the Commissioner's Directive 567-5 states that, "[p]ursuant to section 25 of the *Criminal Code*, an aimed shot at an individual may be used to prevent death or grievous bodily harm when all lesser means are not available, have proven unsuccessful or are not the safest and most reasonable intervention given situational factors," the respondent notes that officers are taught during training that the intention is to stop the delinquent by a legitimate use of force and that the primary objective is not to inflict death. According to the respondent, this would make the ammunition proposed by the appellant inappropriate in a detention setting.

[16] With regard to changing the weapon itself, the respondent argues that multiple difficulties at several levels would prevent this from happening quickly. It would require reviewing the training component for correctional officers, recruits and "EUIs" as well as specialized training for national armouries. There would also be a budget component for purchasing weapons, replacement parts, ammunition and the overtime required for training officers. The respondent therefore estimates that it would take 24 to 36 months to introduce the criteria for a new weapon, put out tender calls (for firearms and ammunition) and update and deliver the content of training modules to officers.

[17] As for installing bullet-proof glass, the respondent submits that it would also have considerable impacts. According to the respondent, providing complete ballistic coverage based on established standards would require an assessment of the entire structure of the dayrooms (walls, door and window frames, doors, windows, etc.), entailing major work that could last longer than 24 months, starting with the assessment, tender calls and design of a solution and project plan through to the completion of the work. All that would cost an estimated $2 million,

more or less. It would be impossible to use the dayrooms while that kind of work was going on, which—given the current legislation and the detainees' rights—would require the detainees to be held elsewhere for the entire time. Since the SHU is a unique institution, the only one equipped to house the kind of detainees it holds, the respondent estimates that relocating them to other maximum-security institutions that do not have the same surveillance and control features as the SHU for a long time could result in a greater number of incidents.

[18] The respondent therefore concludes that, in light of the foregoing, its own proposals would be a better way of resolving the issue as required by the Tribunal.

[19] The appellant makes three points about the respondent's comments. First, he disputes the respondent's claim that the new safety zone covers all firing angles from the gallery. According to the appellant, the red area outlined by the employer completely disregards the areas between the dayrooms, while the floor officers often have to enter the corridor to search detainees who have to be escorted out of their sections to get to certain activities; the detainees have to stand on the ground markings in the corridor, which abut the windows and doors of the dayrooms. The said windows are covered with a frosted film that makes it harder to see people in the corridor.

[20] Second, the appellant notes that the employer did not seriously analyze the respondent's proposed new procedure because it does not deal with what is to be done with the detainees whom the correctional officers have to escort into the SHU corridors in the event of an incident. The procedure only states that the employees have to head to the secured area with the evacuated floor staff—consisting of CX1 and CX2 officers, nurses, parole officers, managers—while the escorted detainees can neither follow them into the secured corridor nor be left alone; the procedure would therefore be unworkable. On that point, the appellant states that the layout of the SHU's main corridor (that is, in a circle around the control station) means that when the siren signals an evacuation, there is a risk that several people responding to it will pass in front of the dayroom windows, which poses a problem in and of itself.

[21] Third, the appellant argues that this procedure does not eliminate the danger at its source since, among other things, the gallery officer would have to intervene rapidly to stop an altercation and preserve lives. The appellant also submits that the evidence has shown that SHU detainees have the skills required to make threats materialize, that there is no scaling of intervention and that everything can happen in a few seconds, possibly requiring the gallery officer to fire without even a warning shot; the appellant therefore implies that the respondent's proposed procedure could not be applied in a timely manner.

Decision and Direction

[22] The wording of section 146.1 of the *Code* in relation to issuing a direction could not be clearer. Section 146.1 reads as follows:

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

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

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

[23] The authority to issue a direction that this provision confers on an appeals officer is discretionary ("may"), and the content of any direction issued thereunder after danger has been found may be general or specific ("any direction that the Board considers appropriate"), whether it is under subsection 145(2) or (2.1) of the legislation. When paragraph 146.1(1)(b) refers to the said subsections, it is a clear indication that the direction must involve measures designed to correct the hazard or condition, alter the activity or protect any person from the previously identified danger.

[24] That wording therefore means that an appeals officer who has found that danger exists may issue one or more corrective directions of a general nature or one or more corrective directions of a specific nature in each case. The appeals officer would be able to order corrective measures specifically tailored to the circumstances of each situation in which danger has been found. That degree of discretion marks the difference between the authority of an appeals officer and the authority exercised by the Minister or the ministerial delegate who is obliged to ("shall") issue a direction under subsection 145(2) of the *Code* when danger has been found to exist in relation to any of the factors entitling employees to refuse to work.

[25] That said, directions cannot be issued in a vacuum and must follow certain specific provisions and obligations set out in the *Code*. Any action undertaken pursuant to the legislation, and particularly in the form of directions under the *Code*, must therefore take into account the purpose of the legislation, which is "to prevent accidents, [...] and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies" (section 122.1). That purpose goes much further than a declaration of principle because the prevention measures must be aimed at reducing all hazards from normal working conditions, requiring the application of a range of measures often described as a "hierarchy of controls" to first eliminate hazards, then reduce hazards and, finally, provide personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees (section 122.2).

[26] Apart from those provisions, and taking into account that in a case like this one, which concerns a finding of danger, the power of the appeals officer to issue a direction relates to the employer, certain particularly serious obligations imposed on the employer are set out in section 124 of the *Code*, which states generally that the employer must protect the health and safety of all its employees at work, and in section 125, which states that, in the context of the general obligation at section 124, the employer must comply with every oral or written direction given by the Minister or the appeals officer concerning the health and safety of employees in respect of every work place it controls and in respect of every work activity carried out by an employee in a work place that it does not control (paragraph 125(1)(x)).

[27] As noted earlier, the undersigned is of the opinion that the wording of paragraph 146(1)(b) and subsection 145(2) of the *Code* allows the Tribunal to issue specific corrective directions in each case, that is, directions specifically tailored to the circumstances of each situation in which danger has been found. It is obvious that, whether or not the employer controls the worksite

and/or the activities of its employees in their almost infinite variety, the Tribunal would have to master an enormous range of technical or non-technical knowledge or expertise that no individual appeals officer could have or aspire to have. Instead, the logical interpretation would be that once the Tribunal is seized of one or more situations, it decides whether a danger exists so that the parties at the worksite can then introduce voluntary or directed corrective measures; this would apply in particular to the party that controls the worksite and/or the employees' activities, which would be more familiar with the characteristics of the site, the tasks and how corrections could be made. As stated earlier, the effectiveness and efficiency of those corrections could subsequently be reviewed by way of requested or periodic inspections, decisions and/or directions from a ministerial delegate.

[28] That being the case, in view of the extreme complexity of the worksites to which the *Code* applies and over which appeals officers have jurisdiction, the Tribunal has followed the logical path outlined above and has limited itself over the years to issuing directions of a general nature ordering—as the *Code* prescribes—that measures be taken to correct the hazard or condition, alter the activity or protect any person from the identified danger, knowing that the measures taken may be subject to subsequent study and review, as stated earlier. My thoughts outlined above are supported by Justice Pratte of the Federal Court of Appeal in *Maritime Employers Assn.* v. *Harvey*, [1991] F.C.J. No. 325, at page 3:

> The applicant also contended that the directions given by the safety officer and upheld by the regional officer were too brief, in that they simply ordered the employer "to immediately take the necessary action to deal with the danger", without further specifying what the employer had to do. The applicant argued that, in order to perform his obligations under s. 145(2) (s), the safety officer should have specifically indicated what action the employer had to take to deal with the danger.
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> Though the Act does not say so expressly, it is clear that the directions given under s. 145(2) must be specific enough for it to be determined whether the employer has complied with them. **However**, for the directions to be specific enough **they do not have to specify what action the employer must take to deal with the danger** encountered by its employees; it will suffice if they indicate what result the employer must attain by clearly identifying the danger encountered by employees and imposing on the employer a duty to take the necessary action to deal with it. While it may be easy in some cases to say exactly what the employer must do to correct a danger, in other cases this may be difficult or even impossible. There may be a wide range of means of arriving at the desired result; or it may be impossible for a person who does not have specialized scientific knowledge to know how to achieve such a result. In such circumstances it is understandable that the employer should be left to choose what means it will take to attain the objective required of it.
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> [Emphasis added]

[29] In the case before us, the undersigned has been informed of the corrective measures suggested and exchanged by the parties—measures that they agree could correct the danger that the Tribunal found, although to varying degrees—and intends to follow the logical path described above, with no intention of deviating from established practice. Consequently, the Tribunal issues the following direction:

With respect to the Tribunal’s finding of danger on August 5, 2021, I hereby order the employer to take measures to protect Mr. Benoît Lachapelle, the employee who exercised his right to refuse to work, and every other person against the danger identified in the direction attached to this decision.

Jean-Pierre Aubre
Appeals Officer

SCHEDULE

Citations: 2021 OHSTC 2 and
2022 OHSTC 2
File number: 2018-22

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

DIRECTION TO EMPLOYER PURSUANT TO PARAGRAPH 146(1)(b)
AND SUBSECTION 145(2)

Subsequent to an appeal brought under subsection 129(7) of the *Code*, I conducted an investigation under section 146.1 of the *Code* in relation to the decision of no danger rendered by ministerial delegate Jenny Teng on July 27, 2018, following her investigation into Mr. Benoît Lachapelle's refusal to work. Mr. Benoît Lachapelle exercised his right to refuse to work at the Regional Reception Centre, Special Handling Unit (SHU), Sainte-Anne-des-Plaines Institution, Quebec, a workplace operated by Correctional Service Canada (CSC), the employer of the employee subject to the *Code*.

Based on my investigation, I found that there was a danger for Mr. Benoît Lachapelle, the employee who had exercised his right to refuse to work, due to the increased power of the firearm recently deployed for use by the officers on the gallery monitoring the SHU dayrooms without additional safety measures having been introduced, while also taking into account the fact that the dayroom windows are not strong enough to stop a bullet fired from the said firearm.

Consequently, you are HEREBY ORDERED under subparagraph 145(2)(a)(ii) of the *Code* to take measures to protect correctional officer Lachapelle and every other person against the above-noted danger.

You are ALSO ORDERED to report on the said measures to a ministerial delegate of the Quebec District of Employment and Social Development Canada's Labour Program within thirty (30) days of the date of this direction.

Issued at Ottawa on this 8th day of March, 2022.

Jean-Pierre Aubre
Appeals Officer

To: Correctional Service Canada
Regional Reception Centre
Special Handling Unit
Sainte-Anne-des-Plaines Institution