Federal Court Cour fédérale

Date: 20231205

Docket: T-725-22

Citation: 2023 FC 1628

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 5, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BENOÎT LACHAPELLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This application for judicial review concerns the decision *Benoît Lachapelle v Correctional Service Canada*, 2022 OHSTC 2 [Impugned Decision] made on March 8, 2022, by an appeals officer of the Occupational Health and Safety Tribunal Canada [the Tribunal]. The

applicant, Benoît Lachapelle, challenges the Appeals Officer's decision to issue, pursuant to paragraph 146.1(1)(b) of the *Canada Labour Code*, RSC 1985, c L-2 [Code], a corrective direction of a general nature to resolve a dangerous situation in his work place. The applicant argues that the failure to provide a specific direction renders the decision unreasonable. He also alleges that the Appeals Officer breached his duty of procedural fairness in that legitimate expectations were created by the administrative decision-maker, which were not realized in the decision under review.

[2] The Impugned Decision is the culmination of a long administrative process that began in 2018. In order to understand what is at stake in the case, it is necessary to give an overview of the facts that led to this decision.

II. Facts

[3] Mr. Lachapelle is a Correctional Service of Canada [CSC] officer who works in the Special Handling Unit [SHU] at the Regional Reception Centre at the Sainte-Anne-des-Plaines Institution in Quebec. The SHU is the only higher than maximum-security institution (commonly known as a "supermax" facility) in Canada. It is the institution that houses inmates considered to be the most dangerous and who cannot be managed safely in other maximum-security institutions.

[4] In May 2015, CSC replaced the firearms used by correctional officers at the SHU. The Colt 9mm carbine rifle, used inside the building, and the AR-15 calibre .223 rifle, used outside

the institution, were replaced by the Colt .556 rifle, commonly known as the C-8 rifle. Unlike the 9mm rifle, the C-8 rifle has long-range power.

[5] On July 16, 2018, Mr. Lachapelle sent a letter to the CSC in which he stated that he was exercising his right to refuse to work in case of danger, pursuant to subsection 128(1) of the Code. The refusal to work is motivated by the replacement of the 9mm rifle by the C-8 rifle as the weapon used inside the SHU. The applicant claims that this change, in the absence of additional safety measures, exposes correctional officers working on the floor of the SHU to mortal danger. Mr. Lachapelle is in this line of work. The glass walls surrounding the SHU's dayrooms are not resistant to the power of the C-8 rifle's ammunition. Thus, the applicant contends that if a correctional officer stationed on the overhanging walkway were to deploy his or her weapon during an incident, it would place the applicant in a life-threatening situation.

[6] On July 23, 2018, an official delegate of the Minister of Labour [the Ministerial Delegate] conducted an investigation into the applicant's refusal to work. On July 27, 2018, the Ministerial Delegate rendered a decision in which she concluded that there was no danger in the workplace.

[7] On August 2, 2018, Mr. Lachapelle appealed the Ministerial Delegate's decision to the Tribunal, pursuant to subsection 129(7) of the Code.

[8] On August 5, 2021, the Appeals Officer rendered a decision in which he concluded that "at the time of the refusal to work, there was a danger that did not represent a normal condition

of employment for the appellant" and, therefore, amended the decision issued by the Ministerial Delegate (*Benoît Lachapelle v Correctional Service Canada*, 2021 OHSTC 2 at para 105). However, he decided at this stage not to issue a direction to the employer under paragraph 146.1(1)(b) of the Code.

[9] On September 3, 2021, the Attorney General filed an application for judicial review of the August 5, 2021 decision. On December 23, 2022, the Federal Court dismissed this application for judicial review in a judgment rendered by Madam Justice Martine St-Louis (*Canada (Attorney General) v Lachapelle*, 2022 FC 1785). This left the question of the possibility of issuing directions.

[10] On October 27, 2021, following the breakdown of their negotiations on corrective measures, the parties sent a joint letter to the Tribunal requesting that the Appeals' Officer remain seized of the matter.

[11] On November 8, 2021, a conference call was held between counsel for the parties and the Appeals Officer to set deadlines for filing their written submissions. During the conference, the Appeals Officer explained that the purpose of this process was "to determine whether each party had made a serious attempt [at negotiation,] not to weigh the resolution or correction potential of each proposal" (Impugned Decision at para 4). The Appeals Officer stated that this was the only reason he accepted the submissions, and asked the parties not to comment on the solutions proposed by the opposing party.

[12] On November 15, 2021, the applicant's union submitted its written submissions in which it put forward three possible solutions to the danger in the workplace. First, it proposed changing the weapon used inside the SHU. Second, as an alternative, it proposed increasing the ballistic capacity of the SHU's walls and windows. Finally, as a second alternative, it proposed changing the ammunition used by correctional officers to frangible ammunition that could not penetrate the glass walls of the SHU, while keeping the C-8 rifle as the weapon.

[13] On November 22, 2021, CSC submitted its written submissions, in which it proposed a short-term solution and a medium- to long-term solution. First, the short-term solution consists of updating the safety zone markings around the glass walls and advising SHU employees to avoid this zone when the incident alarm is triggered. This includes a procedure for closing the access gates to this area during an incident. Second, the medium- to long-term solution is to stow C-8 rifles in a box on the bridge that triggers an audible alarm if a weapon is removed from the box. The alarm would trigger the procedure for evacuating personnel from the safety zone. In addition, training sessions would be offered to explain this new procedure to SHU personnel. Finally, despite the Appeals Officer's directions to the contrary, CSC commented on the viability of the applicant's proposed solutions, arguing that they would be impractical for budgetary and logistical reasons.

[14] On November 29, 2021, in response to the criticisms put forward by the employer, the applicant's union submitted additional written submissions commenting on the measures proposed by CSC. The letter argues that the employer's proposed solutions do not reflect the

reality of the danger Mr. Lachapelle faces at work and would fail to adequately address the dangerous situation.

[15] On March 8, 2022, the Appeals Officer rendered the Impugned Decision, in which he chose not to issue a specific direction to the employer. Instead, he followed the Tribunal's usual practice and decided to issue a general direction. This last decision is the subject of judicial review before this Court.

III. Impugned Decision

[16] The decision begins with an overview of the facts of the case. In particular, the Appeals Officer highlights the telephone conference that took place on November 8, 2021. He indicates that he explained to the parties that the only reason he was accepting their written submissions on the corrective measures they proposed during their negotiations was to see if they took the process seriously. Thus, he reiterates that the purpose of this process was not to assess the potential effectiveness of the proposed corrective measures.

[17] The Appeals Officer then reviews the written submissions of the parties. He describes the proposed solutions. He summarizes the comments made on the measures proposed by the opposing party. However, he prefaces this second section by explaining the limits of his jurisdiction on this subject. He explains that section 146.1 of the Code empowers him to investigate a work refusal situation and, if he concludes that a danger exists within the meaning of the Code, to issue any direction considered appropriate. However, nothing in the Code empowers him to comment on "the future effectiveness or efficiency of a direction or measure to

be implemented” (Impugned Decision, at para 13). Other mechanisms under the Code exist to assess the corrective measures put in place by an employer, such as a workplace inspection by a ministerial delegate at the request of a party, or periodic recourse by the employee to the right to refuse to work, which would trigger a new investigation into the effectiveness of the measures taken.

[18] The Appeals Officer then clarifies the powers conferred on him by subsection 146.1(1) of the Code. He asserts that an appeals officer has complete discretionary authority to issue a general or specific direction under subsection 145(2) or (2.1) of the Code.

[19] The Appeals Officer explains that “directions cannot be issued in a vacuum and must follow certain specific provisions and obligations set out in the *Code*” (Impugned Decision at para 25). He stresses the importance of ensuring compliance with section 122.1 of the Code, which states that the purpose of the Act is to “prevent accidents. . .and illnesses arising out of, linked with or occurring in the course of employment to which this Part applies”. He also points out that this purpose is more than a principle. In practice, it reflects the Code’s objective of reducing workplace hazards to the normal conditions for each job. The Appeals Officer explains that the hierarchy of control measures set out in section 122.2 of the Code must also be taken into account. Therefore, it is important to prioritize the elimination of hazards, then the reduction of hazards and, finally, the provision of personal protective equipment to mitigate them.

[20] Given the complexity and diversity of workplaces governed by the Code, the Tribunal has developed a practice of limiting itself to issuing directions of a general nature. Thus, as a

general rule, the Tribunal allows employers a great deal of leeway in choosing "the means. . .to prevent the danger" (*Maritime Employers v Harvey et al*, [1991] FCJ No 325 at 3, 134 NR 392 (FCA) [*Harvey*], cited in the Impugned Decision at para 28).

[21] The officer concludes that he will not depart from the Tribunal's practice. Thus, he issues an order with a general direction that CSC "take measures to protect correctional officer Lachapelle and every other person against the above-noted danger" (Impugned Decision at 11). He also orders CSC to report on the measures taken to a ministerial delegate within 30 days of the issuance of the decision.

IV. Issues

A. *Preliminary issue*

[22] The respondent raises a preliminary issue on the amendment of the style of cause. It submits that the applicant inappropriately named CSC as a respondent, despite the fact that government departments do not have legal personalities separate from the Crown. Thus, the Attorney General of Canada [AGC] should have been named as respondent (respondent's memorandum at paras 18–19, citing *Canada (Attorney General) v Zalys*, 2020 FCA 81, [2020] FCJ No 536 at para 25 [*Zalys*]; *Gravel v Canada (Attorney General)*, 2011 FC 832, [2011] FCJ No 1114 at para 6).

[23] This preliminary issue has not been challenged by the applicant and should be disposed of now. The respondent is right that the style of cause should be changed. CSC is a department within the meaning of paragraph 2(a.1) and column I of Schedule I.1 to the *Financial*

Administration Act, RSC 1985, c F-11. It does not have a separate legal personality and cannot be named as a respondent in an application for judicial review.

[24] According to subsection 303(2) of the *Federal Courts Rules*, SOR/98-106, “[w]here in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent”. Thus, the AGC should be named as respondent and the style of cause should be amended accordingly.

B. *Issues*

[25] This application for judicial review raises two issues, restated below:

1. Is the Tribunal’s decision to issue a general direction reasonable?

2. Was there a breach of the duty of procedural fairness owed to the applicant?

V. The legislative framework

[26] The *Budget Implementation Act, 2017, No. 1*, SC 2017, c 20, made significant changes to Part II of the Code, such as transferring the powers of the Tribunal’s appeals officers to the Canada Industrial Relations Board. These changes came into effect on July 29, 2019. However, these changes are not relevant to this application for judicial review. According to section 382 of the *Budget Implementation Act, 2017, No. 1*, “[t]he *Canada Labour Code*, as it read immediately before the day on which this section comes into force, applies with respect to any appeal made before that day under subsection 129(7) or 146(1) of that Act”. Thus, since the applicant

appealed the Ministerial Delegate's decision on August 2, 2018, his application for judicial review falls under the former Code regime.

[27] Part II of the Code deals with occupational health and safety for workplaces under federal jurisdiction. Section 122.1 describes the purpose of Part II, and section 122.2 describes the order of priority for measures to prevent hazardous occurrences in a workplace:

Purpose of Part	**Prévention des accidents et des maladies**
122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.	122.1 La présente partie a pour objet de prévenir les accidents et les maladies liés à l'occupation d'un emploi régi par ses dispositions.
Preventive measures	**Ordre de priorité**
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.	122.2 La prévention devrait consister avant tout dans l'élimination des risques, puis dans leur réduction, et enfin dans la fourniture de matériel, d'équipement, de dispositifs ou de vêtements de protection, en vue d'assurer la santé et la sécurité des employés.

[28] Subsection 128(1) of the Code creates a right for employees in workplaces governed by the Code to exercise a refusal to work in the face of a dangerous situation:

Refusal to work if danger	**Refus de travailler en cas de danger**
128 (1) Subject to this section, an employee may refuse to use or operate a machine or	128 (1) Sous réserve des autres dispositions du présent article, l'employé au travail

thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :
(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;	a) l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in the place that constitutes a danger to the employee; or	b) il est dangereux pour lui de travailler dans le lieu;
(c) the performance of the activity constitutes a danger to the employee or to another employee.	c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

[29] Paragraph 145(2)(a) of the Code requires the Minister, or his delegate, to issue directions in writing to an employer if he finds that a danger to an employee exists in a workplace. A direction must direct the employer to correct the hazard or condition or alter the activity that constitutes the danger, or protect its employees from the danger.

[30] Subsection 129(7) of the Code allows for an appeal of a decision if the Minister, or his delegate, concludes that there is no danger, that there is a danger but the refusal to work directly endangers the life, health or safety of others, or that there is a danger that is a normal condition of employment. Appeals are made to a Tribunal appeals officer:

129	**129**
…	…

Appeal	**Appel**
(7) If the Minister makes a decision referred to in paragraph 128(13) (b) or (c), the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within 10 days after receiving notice of the decision.	(7) Si le ministre prend la décision visée aux alinéas 128(13)b) ou c), l'employé ne peut se prévaloir de l'article 128 ou du présent article pour maintenir son refus; il peut toutefois — personnellement ou par l'entremise de la personne qu'il désigne à cette fin — appeler par écrit de la décision à un agent d'appel dans un délai de dix jours à compter de la réception de celle-ci.

[31] Subsection 146.1(1) of the Code empowers an appeals officer to inquire into a work refusal situation and, if he or she finds that a dangerous situation exists, to issue any direction that he or she considers appropriate under subsection 145(2) or (2.1).

VI. Arguments and analysis

[32] The problem presented to the Court by Mr. Lachapelle is twofold. The only decision to be examined is the decision of the Occupational Health and Safety Tribunal Canada [Tribunal] of March 8, 2022. The other decisions are no longer relevant, other than to place the decision under review in its context.

[33] Thus, the July 27, 2018 decision of the official delegate of the Minister of Labour concluding that there was no risk was the subject of an appeal heard by the Tribunal. The decision, dated August 5, 2021, and reported at 2021 OHSTC 2, amended the decision finding no

danger. Instead, the Tribunal determined that a danger that was not a normal condition of employment existed. This finding was challenged on judicial review before this Court (2022 FC 1785); the application for judicial review was dismissed on December 23, 2022. No appeal of that decision has been filed.

[34] It follows that the question of the danger posed by a firearm more powerful than the one available prior to the 2015 changes, for a floor officer at the Special Handling Unit at the Sainte-Marie-des-Plaines Institution, Quebec, is settled. There is no need to revisit it.

[35] This is what followed the decision on the existence of the danger that is the subject of this challenge on judicial review. Indeed, the Tribunal remained seized of the question of whether it should issue directions as to the measures to be taken to remedy the situation. In the penultimate paragraph of its decision of August 5, 2022, the Tribunal presented the situation as follows:

> [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.
>
> [Emphasis added.]

[36] Remaining seized of the question of whether it was appropriate to issue a “direction”, it is this last decision that is discussed on judicial review. It was issued on March 8, 2022 (2022 OHSTC 2).

[37] The two-part question involves the decision of the Tribunal to issue only one [TRANSLATION] “general direction”, which reads as follows:

> [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.

[38] The applicant, Benoît Lachapelle, submits before this Court that the Tribunal’s decision is unreasonable, within the meaning of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, and invokes the doctrine of legitimate expectations, which would mean that he was entitled to expect something other than a general direction. More specifically, the notice of application, which creates the framework within which the application for judicial review is situated, specifically states:

> [TRANSLATION]
>
> (2) The Tribunal failed to observe principles of natural justice or procedural fairness, in particular, and without limiting the scope of the foregoing, by:

(a) refusing to render a reasoned decision on the corrective measures submitted by the parties, when the latter had a legitimate expectation that this dispute would be arbitrated by the Tribunal, having itself clearly stated that it would consider the matter.

(b) contravening the sound administration of justice, in particular by rendering useless the process followed by the parties;

[39] In order to dispose of this application for judicial review, I am of the view that it is first necessary to clearly define the decision before the Court. As we have seen in paragraph 37 of these reasons, the order issued, the direction as it is called in the Code, is in general terms: the employer must take measures to protect the employee from the danger identified in the decision of August 5, 2021.

A. *The decision under review*

[40] Following paragraph 106 of the August 5, 2021 decision, the parties each offered different solutions to the danger posed by powerful firearms in the hands of correctional officers assigned to the Special Handling Unit. The parties stated that they were unable to agree on a solution, and reported as provided in paragraph 106 of the August 5, 2021 decision (reproduced in paragraph 35). Paragraph 106 noted that the Tribunal could issue such directions as it considered appropriate, but that it was more appropriate to allow the parties to issue any direction deemed appropriate. Remaining seized of the matter, the Tribunal stated that it had jurisdiction to issue any direction deemed appropriate if the parties fail to resolve the matter within 90 days of the date thereof. The Tribunal specifically stated that it could "consider the parties' written submissions on an expedited basis". However, the applicant would have seen in

this paragraph a sufficient indication to justify a legitimate expectation that not only would a general direction be issued, but that it would rule on a specific direction, deciding between the union's proposal and that of the employer.

[41] However, paragraph 4 of the decision under review clearly states that, since they were unable to reach an agreement, a conference call followed in November 2021. This conference call was at the request of the parties (letter signed by counsel for the applicant on October 27, 2021, Exhibit C of the Affidavit of Charlie Jacques Arseneault, vol. 1 of the applicant's record). This letter spoke of a timetable of steps to be taken and apparently sought guidance on the evidence to be adduced or [TRANSLATION] "whether the claims were exclusively on the record".

[42] While the applicant could have perceived indications of a debate to come, presumably about "directions" to be obtained, this ambition would not have been encouraged, since the administrative decision-maker insisted in his decision of March 8, 2022, that he only asked the parties in November 2021 to communicate to him "the substance of the proposals for solution that each one had submitted to the opposing party". He added in that same paragraph 4 that, "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". Indeed, the decision-maker went even further, specifying that he was not seeking submissions "even addressing in any way the merits of the issue that the undersigned was asked to consider".

[43] At the hearing on the application for judicial review, I asked whether the applicant contested this presentation of the facts. No challenge was offered. As I said then, it becomes

difficult to see in the Tribunal's words an invitation to a debate on the directions to be issued if the parties did not agree. As will be seen below, it is even more difficult to see how the applicant could reasonably expect that the dispute between the parties should have been the subject of an adjudication, even though the adjudicator did not want to hear the parties on the merits of their proposals.

[44] In its decision, the Tribunal acknowledges that the applicant complied with the request made on November 8, 2021, by presenting the following week the three measures that would, in his opinion, eliminate the danger at its source:

(a) by changing the service firearm for a less powerful one;

(b) by making the windows of the dayrooms more bulletproof;

(c) by changing the ammunition used with the service firearm.

[45] The Tribunal notes that while the preference expressed at the hearing leading to the August 5, 2021 decision had been for bulletproof glass, the proposals exchanged between the parties favoured the purchase of new service firearms for possible use inside the facility. This was because a new concern was emerging about the opacity of new bulletproof glass, which could make the ability to [TRANSLATION] "properly monitor inmates at all times" more uncertain. Different ammunition, the third possible solution put forward by the applicant, sounded more like a suggestion, since tests to validate the range of use might be required.

[46] The respondent, for his part, did not respect the Tribunal's wish that the proposals made by each be uncontested. He presented one proposal as a very short-term measure and another as a "medium- to long-term" measure. In both cases, the measure is presented as eliminating the risk.

[47] As indicated above, the first measure would consist of a directive prohibiting employees from entering a newly designated safety zone when an air horn alarm is triggered. The second measure would require that service firearms be stored in a secure container on the gallery. Opening the container to remove the firearm would automatically trigger an audible and visual alarm, warning employees to leave the premises immediately. According to the respondent's proposals, the safety zones would be much larger, thus eliminating the firing areas. The decision notes, at paragraph 11, that "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".

[48] The respondent did not confine himself to this and took the liberty of commenting on the applicant's proposals. Suffice it to add for our purposes that the use of different ammunition, known as "frangible", is contraindicated because of the considerable and irreparable injuries, possibly leading to death, that such ammunition involves. The use of a new firearm would not be possible for 24 to 36 months, owing to the training required for its use. In addition, there would have to be an acquisition process, and this proposal involves costs. Finally, the proposal to install bulletproof glass would require major work that could exceed 24 months, estimated at $2 M. Because the work would be of a certain scale, it was said that the inmates would have to be relocated to other institutions whose infrastructures are not designed with the same surveillance and control capabilities as the Special Handling Unit, which is unique.

[49] As the respondent had expressed his concerns about the applicant's proposals, the applicant felt entitled to present his own concerns about the respondent's proposals. For example, the new safety zone would be unsafe, since the angles of fire from the gallery would not be covered. Furthermore, the analysis is lacking in that no analysis seems to have been made of the need for escorts. Finally, the danger would not be eliminated at source, says the applicant. In addition, the speed with which an incident can occur would mean that the proposed procedure could not be used in a timely manner in the event of a violent incident.

[50] In short, a debate that the decision-maker refused to hold took place, or at least had begun: the administrative decision-maker had directed the parties not to do what they decided to do. Having criticized the proposals put forward on both sides, the applicant now claims a legitimate expectation that the administrative decision-maker should issue specific directions, and that the decision to stick to a general direction was unreasonable.

[51] The Tribunal considered the source of its power. Section 146.1 of the Code must be applied. This provision has not changed over the years, except to replace the appeals officer with the "Board" (Canada Industrial Relations Board):

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

(a) vary, rescind or confirm the decision or direction; and	**a)** soit modifier, annuler ou confirmer la décision ou les instructions;
(b) issue any direction that the Board considers appropriate under subsection 145(2) or (2.1).	**b)** soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.

This, says the administrative decision-maker, is a discretionary power.

[52] Furthermore, the direction may be general or specific. The direction is whatever is considered appropriate. Paragraph 146.1(1)(b) refers to subsections 145(2) and (2.1), which I reproduce below:

(2) If the Head considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,	**(2)** S'il estime que l'utilisation d'une machine ou d'une chose, qu'une situation existant dans un lieu ou que l'accomplissement d'une tâche constitue un danger pour un employé au travail, le chef :
(a) the Head shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the Head specifies, to take measures to	**a)** en avertit l'employeur et lui enjoint, par instruction écrite, de procéder, immédiatement ou dans le délai qu'il précise, à la prise de mesures propres :
(i) correct the hazard or condition or alter the activity that constitutes the danger, or	**(i)** soit à écarter le risque, à corriger la situation ou à modifier la tâche,
(ii) protect any person from the danger; and	**(ii)** soit à protéger les personnes contre ce danger;
(b) the Head may, if the Head considers that the danger or	**b)** peut en outre, s'il estime qu'il est impossible dans

the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the Head's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.	l'immédiat de prendre les mesures prévues à l'alinéa a), interdire, par instruction écrite donnée à l'employeur, l'utilisation du lieu, de la machine ou de la chose ou l'accomplissement de la tâche en cause jusqu'à ce que ses instructions aient été exécutées, le présent alinéa n'ayant toutefois pas pour effet d'empêcher toute mesure nécessaire à la mise en œuvre des instructions.
(2.1) If the Head considers that the use or operation of a machine or thing by an employee, a condition in a place or the performance of an activity by an employee constitutes a danger to the employee or to another employee, the Head shall, in addition to the directions issued under paragraph (2)(a), issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with the directions issued under that paragraph.	**(2.1)** S'il estime que l'utilisation d'une machine ou d'une chose par un employé, qu'une situation existant dans un lieu ou que l'accomplissement d'une tâche par un employé constitue un danger pour cet employé ou pour d'autres employés, le chef interdit à cet employé, par instruction écrite, en plus de toute instruction donnée en application de l'alinéa (2)a), d'utiliser la machine ou la chose, de travailler dans ce lieu ou d'accomplir la tâche en cause jusqu'à ce que l'employeur se soit conformé aux instructions données en application de cet alinéa.

The applicant concedes at the outset that subsection 145(2) that is applicable here. The direction that will be issued to the employer will involve taking "measures to correct the hazard or condition or alter the activity that constitutes the danger, or protect any person from the danger".

[53] The Tribunal therefore states that it has the power, once it has identified the danger (defined in section 122), as it has already done in this case, to issue a general direction or a specific corrective direction. In the latter case, the corrective measure is adapted to the particulars of each situation in which a danger has been identified. There may be more than one general or specific corrective direction.

[54] What about the case at hand? The Tribunal explains in paragraphs 27 and 28 of its decision that issuing specific directions requires it "to master an enormous range of technical or non-technical knowledge or expertise that no individual appeals officers could have or aspire to have. . .". The Tribunal notes the great complexity of workplaces where the Code applies, and refers to the case under consideration when it notes that corrective measures will depend on the worksites and employees' activities, with which the party exercising control over those worksites and activities will be more familiar.

[55] The Tribunal notes, not once but twice, that directives given in the form of directions may be subject to a subsequent assessment of their effectiveness.

[56] In support of its decision to issue only a general direction, the Tribunal cites the decision of the Federal Court of Appeal in *Harvey* (above at para 20). In that case, longshoremen at the Port of Montréal had stopped work on a rainy day when the job had become dangerous. The complaint was that the directions given 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. Paragraph 145(2)(a) was invoked in an attempt to force specific

measures to be ordered. The Court of Appeal recognized that a certain degree of precision was required to arrive at a determination that the employer had complied with the directions. But this is obviously only relative precision:

> 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..
>
> [Emphasis added.]

[57] On the basis of this analysis and the decision of the Federal Court of Appeal, the Tribunal issued a general direction to the applicant's employer. Here is the disposition:

> 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.

B. *The parties' arguments and their analysis*

[58] The applicant raises two arguments in support of his application for judicial review. The respondent contests both. I will first examine the argument relating to the applicant's legitimate expectation that the Tribunal would arbitrate the dispute between the parties. Understandably, the applicant complains that no specific directions were issued. Next, the applicant attacks the decision as unreasonable.

C. *Legitimate expectations*

[59] It must be said at the outset that if the administrative decision-maker has not created a legitimate expectation, the argument concerning the reasonableness of the decision is likely to have lost many of the arrows in its quiver.

[60] Neither in his memorandum of fact and law nor at the hearing on the application for judicial review did the applicant attempt to define the doctrine of legitimate expectations in administrative law. Instead, he argued that he had a legitimate expectation that the administrative decision-maker would impose a specific direction. Moreover, it is conceded that the expectation must come from a promise by the decision-maker. But despite this statement, the applicant still claims harm, in that the parties [TRANSLATION] "were not afforded a decision on the arbitration of their submissions" (memorandum of fact and law at para 47). This is because the applicant

states, rather than demonstrates, that the administrative decision-maker refused to issue a specific corrective direction, [TRANSLATION] "despite a promise to that effect" (memorandum of fact and law at para 48).

[61] Changing gears, but still allegedly within the framework of the legitimate expectation of a given procedure, the applicant falls back on a provision of the Code, repealed in 2017 but whose repeal did not come into force until 2019 (section 146.2), according to which, within the framework of the procedure set out in section 146.1, the appeals officer may determine the procedure to be followed. However, in doing so, the appeals officer, i.e. our administrative decision-maker, shall give an opportunity to the parties to be heard and shall consider the information contained relating to the matter. According to the applicant, the decision-maker in this case failed to comply with this obligation. Claiming a right to adjudication on a specific direction based on the "promise" allegedly made by the administrative decision-maker, the applicant criticizes the decision-maker for failing to justify [TRANSLATION] "why the evidence in the file and the submissions made are not relevant to the case".

[62] As for the respondent, he seeks to define the doctrine of legitimate expectations: the doctrine is animated by the principle that it would be unfair for administrative decision-makers to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights. In this regard, the respondent referred to paragraph 26 of the decision of the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

[63] According to the respondent, there was no expectation created by the administrative decision-maker. The letter of October 27, 2021, sought the Tribunal's support in finding a joint solution. As indicated in paragraph 4 of the decision for which judicial review is sought, the Tribunal requested very limited information during the conference call of November 8. There is no doubt that the information provided was considered, as it was noted in the decision under review. The Tribunal issued an order requiring measures to be taken to protect employees from the danger identified in its original decision. Such directions have been issued repeatedly over the years. The respondent lists a number of them (*MacNeal v Correctional Service Canada*, 2020 OHSTC 7; *Boone v Air Canada*, 2011 OHSTC 15; *Andrews, Dodds and Hanson v Air Canada*, 2012 OHSTC 19; *Gresty v Correctional Service Canada*, 2012 OHSTC 29; *Canadian Union of Postal Workers v Canada Post Corporation*, 2013 OHSTC 23).

[64] No one doubts the existence of the doctrine of legitimate expectations. It is recognized by the higher courts. But the scope that the applicant seeks to give it goes beyond the framework that has been laid out by the Supreme Court and recognized by the Federal Court of Appeal and this Court.

[65] The starting point is *Baker* (above). Indeed, the Supreme Court identified a series of factors that affect the nature of the duty of procedural fairness. The content of the duty of fairness will depend on the factors so identified. They are usefully summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650:

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the

> decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

[66] The applicant's argument focuses exclusively on legitimate expectation, which is a factor to be considered in the context of the procedural fairness owed to the parties, and which is defined as follows at paragraph 26 of *Baker*, which I reproduce without the case law cited therein:

> 26 Fourth, the legitimate expectations of the person challenging the decision may also <u>determine what procedures the duty of fairness requires in given circumstances</u>. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights. . . . As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. <u>If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness</u>. . . . Similarly, <u>if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded</u>. . . . <u>Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain</u>. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them <u>to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights</u>.
>
> [Emphasis added.]

[67] In this case, the applicant seems to be claiming that he was entitled to a decision on a specific corrective measure, rather than to receive the general direction for which judicial review is sought. This is questionable, and it seems to me that the expectation to which the applicant refers is not merely procedural. Whether the expectation relates to a certain procedure or a certain result, the remedy is the same: it is procedural rights that are said to be the appropriate remedy. Moreover, in my opinion, for this to be the case, the created expectation that a given result will be achieved must be legitimate. In our case, was it legitimate to consider that the administrative decision-maker had created a legitimate expectation that specific directions would be issued? I do not believe so, because the evidence is to the contrary. So, when is there a legitimate expectation?

[68] However, the law continued to develop after *Baker* and, in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, the Court narrowed the scope of the doctrine of legitimate expectations where the representations made are clear, unambiguous and unqualified. The decision-maker must live up to its undertaking:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.
>
> [69] Indeed it would be somewhat ironic if the government were able to insist on the sponsor living up to his or her undertaking to

> the letter while at the same time walking away from its own undertakings given in the same document. Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[69] The same theme is specifically endorsed in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 [*Agraira*]. The Court again refers to the need for clear, unambiguous and unqualified representations (at para 96). This is an important limit on the doctrine in that it cannot give rise to substantive rights. Therefore, it gives rise to "appropriate procedural remedies to respond to the 'legitimate' expectation" (from *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 131, and reproduced at para 97 of *Agraira*).

[70] Paragraphs 94 and 95 of *Agraira* are, in my view, particularly instructive. Paragraph 94 establishes that the remedy for representations about the procedure to follow is itself procedural. In other words, the procedure announced must be followed even if it is broader than what would be otherwise required. The Court stated the following in this respect:

> [94] . . .This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [Emphasis added.]

I note in passing that the applicant did not in any way allude to possible representations there could have been with respect to a "substantive result" that could require a procedural solution where a decision-maker makes a contrary decision.

[71] At paragraph 95, the Court endorses the specific conditions necessary to apply the doctrine, taken from *Judicial Review of Administrative Action in Canada*:

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis in original.]
>
> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

We must therefore look to the decision-maker's conduct to determine what could have given rise to a legitimate expectation. As can be seen, there needs to be some assurance from the decision-maker as to the procedures to be followed, or that a positive decision can be anticipated. An

established practice could create a legitimate expectation. But this is not the case here, since established practice includes issuing general directions.

[72] The need for a clear, unambiguous and unqualified promise that is unequivocal is very real. In *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56, [2015] 2 FCR 1006, the Federal Court of Appeal noted that the promise cannot be equivocal:

> [109] In my view, this may not qualify as the sort of "clear, unambiguous and unqualified" promise that is necessary for the procedural doctrine of legitimate expectations to apply: *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at paragraph 68; *Agraira*, *supra*. The website made it clear that the process, relatively new, was in flux. The Office was "interim" and "short-term." There were no guarantees.

In addition, the promise must come from the decision-maker. As the Federal Court of Appeal stated in *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, "[l]egitimate expectations can only arise as a result of an administrative tribunal's conduct or its representations" (para 57).

[73] The same rigor is applied in our Court. This is evidenced in a few recent decisions. In *Foster Farms LLC v Canada (International Trade Diversification)*, 2020 FC 656, the Court established the principles at paragraph 93:

> [93] As explained by the SCC in *Agraira*, the doctrine of legitimate expectations provides that, if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. While truly reasonable or legitimate expectations may affect what procedural fairness protections are required, an expectation will

> only meet that threshold if it is based on a decision maker's "clear, unambiguous and unqualified" representation, conduct or established practice (*Agraira* at paras 94-95; *Mount Sinai Hospital Center v Québec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*] at para 29). Furthermore, the doctrine of legitimate expectations does not create substantive rights, and it cannot hinder the discretion of a decision maker responsible for applying the law (*Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at pp 557-558; *Nshogoza* at paras 41-42). In addition, the representations must be within the scope of the government official's authority, they must be "procedural in nature" and they must "not conflict with the decision maker's statutory duty" (*Mavi* at para 68; *CUPE* at para 131; *Mount Sinai* at para 29).

What was lacking were the representations made to the applicant:

> [95] In the present case, there is no evidence of "clear, unambiguous and unqualified" representations made to Foster Farms, or that there was a conduct or established practice that could have caused them to have legitimate expectations of any specific process. On the contrary, there is a total absence of any representations made by the Minister or of a practice by GAC or CBSA officers.

[74] Similar comments were made in *Chen v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 425, where the Court resisted the attempt to give the doctrine of legitimate expectations a scope that it simply does not have (para 40). The conditions for applying the doctrine are strict.

[75] In *Burlacu v Canada (Attorney General)*, 2021 FC 863, this Court emphasized that the statements made by the administrative decision-maker to an individual have to be unequivocal for the individual to claim reliance on the doctrine:

> [33] A legitimate expectation must be based on a clear, unambiguous and unqualified representation to the applicant about the administrative process (i.e., the procedures) that the decision

> maker would follow: see *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at para 68; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, at para 95. Legitimate expectations may also arise from similarly clear, unambiguous and unqualified representations that a certain result will be reached, in which case more onerous procedures must be followed before backtracking or coming to a contrary result: *Baker* at para 26; *Agraira*, at para 94. Representations that could ground legitimate expectations must also be within the scope of the government official's scope of authority, and cannot conflict with the person's statutory duty: *Mavi*, at para 68. In *Agraira*, the Supreme Court has also confirmed the doctrine of legitimate expectations cannot give rise to substantive rights: *Agraira*, at para 97.
>
> [Emphasis added.]

The need for unequivocal representations is further emphasized, with the consequence that if the representations do not have the requisite quality, the doctrine will not be applied:

> [34] In the present case, the paragraphs identified by the applicant in the ODM's May 30 email did not make a clear, unambiguous and unqualified representation to the applicant about the procedures the ODM would follow in the investigation, nor that she would not change her position or the focus of her investigation (assuming that in fact occurred). In addition, the ODM's May 30 email concerned the employer's obligations to the "competent person" during a work place violence investigation, not the process to be followed or the outcome of the ODM's investigation of the Complaint.

[76] Most recently, similar comments were made in *Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 1166. In that case, this Court required more than a commitment by the Minister in a press release that was merely the expression of a policy or intention, with no details.

[77] The applicant has not persuaded me that there was any promise made by the administrative decision-maker, let alone that it was unequivocally clear, unambiguous and unqualified. In my view, the applicant tried to see a firm promise where none existed.

[78] Paragraph 106 of the original decision (August 5, 2021) leaves open the direction that might be given once the existence of the danger is established. But the decision-maker gives no indication of the content of the direction, even though he assumes jurisdiction to issue "any direction deemed appropriate". As stated in paragraph 106 (reproduced in para 35 of these reasons), the parties were afforded a period of time to resolve the matter. As we know, the parties could not agree.

[79] The applicant insisted on the letter of October 27, 2021, which informs the decision-maker that the parties were unable to reach an agreement. It is the parties, and in particular the applicant, who make a proposal to the decision-maker. There is a desire to make written submissions, without specifying their scope or purpose. A proposed timeline is submitted, and the decision-maker is asked whether evidence should be adduced or whether, on the contrary, arguments should be presented on the record. None of these indications in the letter of October 27 had been solicited by the decision-maker.

[80] Indeed, the response to the letter is found in the very decision from which judicial review is sought. In paragraph 4, the decision-maker states that, during a conference call held on November 8, a few days after the letter, he specifically asked the parties to send him the substance of the proposals "for resolution" that each one had submitted to the opposing party.

The decision-maker says that he clearly indicated to the parties that 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". According to the decision-maker, he had warned the parties that he did not wish to receive the substance of the proposals in order to "weigh the resolution or correction potential of each proposal". This is why he did not want to receive submissions regarding the various proposals.

[81] The content of the decision-maker's comments was not challenged. It follows that there was nothing resembling a promise or representation that had the minimum qualities required: the comments were neither clear, nor unambiguous nor unqualified about the procedures that would have led to any adjudication on a specific direction. The same obviously applies to any outcome. With all due respect, it is the exact opposite. The decision-maker was careful not to give the applicant any hope.

[82] The fact that the respondent chose not to comply with the administrative decision-maker's request by commenting on the applicant's proposals in his submission, with the result that the applicant did the same in reply, does not change the fact that the decision-maker made no clear, unambiguous or unqualified representation that could justify a legitimate expectation.

[83] It follows that the applicant's argument that the Appeals Officer (the administrative decision-maker, the Occupational Health and Safety Tribunal Canada) created any legitimate expectation must fail. However wise the administrative decision-maker may have been to seek

out the substance of the parties' proposals, he did not make unequivocal representations that are clear, unambiguous or unqualified and that could create legitimate expectations.

D. *The decision is unreasonable*

[84] The applicant also alleges that the decision rendered is unreasonable within the meaning of *Vavilov*. It should be recalled that the decision found that a directive, or direction, had been issued to the employer to take measures to protect the employee from the danger associated with the possible use of a high-powered firearm (I have reproduced the relevant provisions of the general direction to the employer at para 57).

[85] The applicant argues that the review of the reasons for the decision is subject to the standard of reasonableness. This is not at issue.

[86] It is alleged that the decision-maker evaded the object and spirit of the Code in its Part II entitled "Occupational Health and Safety". The difficulty with the applicant's argument is that it seems to try to have it both ways, by raising the reasonableness of the decision to issue a general direction and the legitimate expectations of the applicant, who in order to succeed must claim that the decision-maker made a clear, unambiguous and unqualified representation that he was going to adopt a given procedure (or that he made a representation regarding the formal outcome). These are two different things: indeed, the doctrine of legitimate expectations is part of procedural fairness, and judicial review is exercised under the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79) or, without dwelling on a

formal standard, in deciding questions of procedural fairness without any deference, it is, rather, necessary to determine whether the procedure was fair having regard to the circumstances of the case (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69). In both cases, no deference is owed and, in my view, the result is the same. Be that as it may, the two subjects are different and blurring the lines is undesirable. Thus, it is necessary to consider the argument made on the reasonableness of the decision without slipping into the doctrine of legitimate expectations.

[87] The applicant submits that the administrative decision-maker must issue an direction. One was issued. But the applicant argues that by doing so, the decision-maker has evaded the object and spirit of the Code. I disagree.

[88] As is now well established, an alleged error in law is subject to judicial review only to the extent that the error of law with respect to a decision-maker's interpretation of its home statute would be unreasonable (*Vavilov*, at paras 24–25, 71–72). This means that the burden is on the applicant to show that it is unreasonable (*Vavilov*, at para 100). There must be serious shortcomings, which are not superficial or peripheral to the merits of the decision.

[89] As has often been reiterated, the hallmarks of reasonableness are justification, transparency and intelligibility, with the decision having to be justified in relation to the relevant factual and legal constraints (*Vavilov*, at para 99). The applicant is therefore called upon to demonstrate that there are sufficiently serious shortcomings in the decision under review such that it cannot be said to exhibit the requisite degree of justification, intelligibility and

transparency (*Vavilov*, at para 100). The reasoning must therefore be rational and logical, and internally coherent, as expressly acknowledged by the applicant in his memorandum (at para 19).

[90] The applicant has chosen to submit that the decision-maker has evaded the object and spirit of the Code. In a way, he is saying that the administrative decision-maker was required to issue specific directions, which he failed to do.

[91] In arriving at this submission, the applicant aligns the provisions of the Code. Thus, he begins with section 146.1 (reproduced at para 51 of these reasons) which on appeal grants the power to vary, rescind or confirm the decision or direction under appeal and “may issue any direction that the Board considers appropriate under subsection 145(2) or (2.1)”. It is clear that not only did Parliament confer one power only, but the quality of the directions is that which is considered appropriate, i.e. discretionary.

[92] The reference to subsection 145(2) or (2.1) (reproduced at para 52 of these reasons) does not change the discretionary nature of the directions in that Parliament does not prescribe the quality of the directions. These directions are “directing the employer, immediately or within the period that the Head specifies, to take measures” to achieve a given result. Thus, Parliament specifies the type of result to be achieved, i.e. to correct the hazard or condition or alter the activity that constitutes the danger, or protect any person from the danger. However, it does not prescribe that directions specific to the danger are required. In the case at bar, the administrative decision-maker chose, for the reasons expressed, to direct the employer to take measures to correct the hazard or condition, in that it is ordered “to take measures to protect correctional

officer Lachapelle and every other person against the above-noted danger”. Furthermore, the administrative decision-maker ordered that a report be made to the Ministerial Delegate within 30 days of the date of the direction. The applicant had to satisfy the reviewing court that this was a serious shortcoming. It would have been necessary for the applicant to satisfy the Court that a specific measure was required, rather than a specific measure to correct the hazard or condition that was the subject of a control by the Minister 30 days from the decision imposing the taking of measures.

[93] The respondent notes that the reviewing court must exercise judicial restraint and adopt an attitude of deference towards an administrative decision-maker. This is as true for questions of fact as it is for questions of law. Unless the applicant establishes that the general direction cannot reasonably be issued on the basis of the statute, the reviewing court should not conclude that the decision is unreasonable.

[94] However, the text of subsection 146.1 of the Code provides a discretionary capacity, says the respondent. Indeed, not only does Parliament indicate with the use of “may” the ability to act (*Interpretation Act*, RSC 1985, c I-21, s 11), but it also provides that the Board may “issue any direction that the Board considers appropriate under subsection 145(2) or (2.1)”. This can only confer the possibility of issuing a general or specific direction. I agree, or at the very least, the applicant did establish how this reading does not meet the hallmarks of reasonableness. I would add that subsection 145(2) only reinforces this interpretation, since it suffices that the direction directs taking measures to correct the hazard or condition.

[95] In *Canada Post Corp v Canada Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, a case dealing with Part II of the Code, like the present one, the Supreme Court warned reviewing courts against transforming the reasonableness standard into the correctness standard. The Court criticized this interpretative slide concerning the Code in that case:

> [40] The administrative decision maker "holds the interpretative upper hand" (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 40). When reviewing a question of statutory interpretation, a reviewing court should not conduct a *de novo* interpretation, nor attempt to determine a range of reasonable interpretations against which to compare the interpretation of the decision maker. "[A]s reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28, quoted in *Vavilov*, at para. 83). The reviewing court does not "ask itself what the correct decision would have been" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 50, quoted in *Vavilov*, at para. 116). These reminders are particularly important given how "easy [it is] for a reviewing court to slide from the reasonableness standard into the arena of correctness when dealing with an interpretative issue that raises a pure question of law" (*New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53, 390 N.B.R. (2d) 203, at para. 30).

This is obviously a pitfall to be avoided. It was necessary to demonstrate that the reading made by the Appeals Officer was not internally coherent, or that it could not be justified in relation to the constraints imposed on him. I can only conclude that the administrative decision-maker considered the evidence and arguments in reaching his decision.

[96] It is far from irrelevant to note, as the respondent does, that the Federal Court of Appeal decided in *Harvey* (above) that a general direction may be issued and that this Court, in *P&O Ports Inc v International Longshoremen's and Warehousemen's Union, Local 500)*, 2008 FC 846, following the Court of Appeal decision binding on this Court in *Harvey*, stated that the

appeals officer "was not required to give specific directions as to what action the Employers were required to take to deal with the danger" (para 61). That is a legal constraint and I have difficulty seeing how the administrative decision-maker can be criticized for having acted in accordance with the earlier influential decision.

[97] General orders have commonly been issued over the years. The respondent lists some of them (see para 63 of these reasons). This practice is not without precedent. Indeed, it seems to be fairly common.

[98] The applicant suggested that the hierarchy of control measures found in sections 122.1 and 122.2 of the Code (reproduced in paragraph 27 of these reasons) would be a game changer. Quite simply, in the prevention of accidents (and illnesses), preventive measures are prioritized: they consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials.

[99] With respect, the applicant has not demonstrated how the hierarchy of control measures defeats a general direction, which is permitted by law and has been endorsed by the Federal Court of Appeal, this Court and numerous administrative decisions made since the adoption of these two sections. It should be noted that the Code provides for the possibility of issuing directions that the administrative decision-maker considers appropriate directing that the measures to be taken in a general direction must be to correct the hazard or condition or alter the activity that constitutes the danger, or protect any person from the danger. Simply put,

sections 122.1 and 122.2 of the Code do not support the applicant's case in that they do not change the context.

[100] Moreover, the administrative decision-maker duly noted sections 122.1 and 122.2 in his decision. He also pointed out that sections 124 and 125 of the Code refer to the employer's obligation to ensure the protection of its employees in matters of occupational health and safety, having to comply with the directions received from the Ministerial Delegate and the Appeals Officer. A measure directed at the employer, who controls the places where the work is to be performed, to take steps to protect the applicant and any person subject to the danger identified is what is required by the Code. It was up to the applicant to demonstrate that this decision was unreasonable. This was not done.

VII. Conclusion

[101] It follows that the decision for which judicial review is sought did not breach the principle of procedural fairness by failing to comply with the legitimate expectations of Mr. Lachapelle. The standard of review is correctness. There is no indication that the doctrine of procedural fairness, as it exists in administrative law, was contravened.

[102] Similarly, it was not demonstrated that the decision does not bear the hallmarks of reasonableness. It would have been necessary to demonstrate that it lacks the requisite justification, transparency and intelligibility and that it is not justified in relation to the relevant factual and legal constraints. This was not done as the decision to issue a directive was completely justified, transparent and intelligible, and justified by both the factual constraints

involving technical knowledge and the legal constraints, including judicial rulings and practice, which allow the issuance of a general direction.

[103] The respondent requested costs. I see no reason to refuse them.

JUDGMENT in T-725-22

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. The style of cause is amended to name the Attorney General of Canada as the respondent.
3. Costs are awarded to the respondent pursuant to rule 407.

"Yvan Roy"

Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-725-22
STYLE OF CAUSE:	BENOÎT LACHAPELLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MATTER HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 25, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	ROY J.
DATED:	DECEMBER 5, 2023

APPEARANCES:

Catherine Sauvé	FOR THE APPLICANT
Karl Chemsi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laroche Martin CSN Legal Services Montréal, Quebec	FOR THE APPLICANT
Treasury Board Secretariat Legal Services Ottawa, Ontario	FOR THE RESPONDENT