**Date: 20081007**

**Docket: T-2110-07**

**Citation: 2008 FC 1116**

**Montréal, Quebec, the 7th day of October 2008**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Applicant**

**and**

**ÉRIC VANDAL, JACQUES ST-PIERRE,**
**JOËL TURBIS AND PHILIPPE GOSSELIN**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

### I. Introduction

[1] This is an application for judicial review of the interlocutory decision of an appeals officer (AO) appointed under section 145.1 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (CLC). That decision dismissed the preliminary objection made by the applicant (the employer) to the AO's jurisdiction to hear an appeal by the respondents (the employees).

[2] The appeal was from the decision of a health and safety officer (HSO) designated under s. 140 of the CLC whom the employer had notified of the employees' refusal to perform an activity included in their work. In his decision, the HSO had concluded under paragraph 128(2)(*b*) that the danger on which the employees were relying to continue their refusal was a *normal condition of employment*.

[3] The employer argued that the HSO's conclusion was not a decision that could be appealed under subsection 129(7) of the CLC, which was why it objected to having the AO hear the employees' appeal.

[4] The respondents argued that the appeal provided for in subsection 129(7) of the CLC applied to their situation as employees whose right to continue their refusal to work under section 128 of the CLC had not been recognized by the HSO. According to the respondents, subsection 129(7) does not exclude *danger related to a normal condition of employment* under section 128.

[5] In dismissing the employer's preliminary objection, the AO found that the appeal mechanism in subsection 129(7) authorized him to hear the appeal pursuant to subsection 146.1(1) of the CLC. However, he reserved his decision on whether the conditions entitling him to exercise his jurisdiction had been met until after he heard the appeal.

## II. Facts

[6] The respondents are correctional officers in a penitentiary in the employer's Correctional Service.

[7] They refused twice to escort a high-profile inmate with a price on his head on the ground that the escorts were unarmed, which put their health and safety in danger.

[8] In support of their refusal, they relied on section 128 of the CLC, which authorizes employees to refuse to perform a work activity if they have reasonable cause to believe that the performance of the activity constitutes a danger.

[9] The employer did not agree that a danger existed. On being informed of the employees' refusal, the employer therefore notified the HSO designated under section 140 of the CLC, in accordance with subsection 128(13) of the CLC.

[10] After being notified of the continued refusal, the HSO conducted a summary investigation and concluded that the employees were not entitled under subsection 128(1) of the CLC to refuse to perform the requested activity because it was a normal condition of employment, which meant that, according to paragraph 128(2)(*b*), they could not rely on section 128 to continue their refusal.

[11] Dissatisfied, the respondents appealed the HSO's conclusion to an AO under subsection 129(7) of the CLC.

[12] When the hearing began, the employer informed the AO and the respondent employees that it objected to the AO's jurisdiction because, in its view, the HSO had not decided but merely concluded that the danger relied on by the employees was a normal condition of employment. Nonetheless, it was agreed that the AO would make his decision on both the objection and the merits at the end of his inquiry.

[13] However, the applicant changed her mind and, despite the agreement, insisted that the AO decide her objection before beginning his inquiry. Rather than confining himself to what he had wisely agreed on with the parties or simply taking the objection under advisement, the AO dismissed the objection and decided to hear the appeal.

[14] In his reasons for decision, the AO interpreted the right of appeal under subsection 129(7) of the CLC in relation to the right to refuse to perform a dangerous activity under section 128. He stated that the appeal mechanism in subsection 146.1(1) of the CLC authorized him to hear the employees' appeal within the procedure of refusal to perform dangerous work. He noted that, where such an appeal is brought, the AO must, in a summary way and without delay, inquire into the circumstances of the decision or direction and the reasons for it.

[15] Having understood his role under the CLC in this way, the AO dismissed the employer's preliminary objection and decided to begin his inquiry into the circumstances of the dispute in the

appeal before him. However, he reserved his decision on whether the conditions authorizing him to hear the case had been met until after the inquiry.

[16] The employer's application for judicial review is from that interlocutory decision by the AO.

## III. Issues

[17] This case raises the following issues:

a. Is the application for judicial review premature?

b. Did the AO err in concluding that the CLC gave him jurisdiction to hear the respondents' appeals?

## IV. Analysis

*Is the application for judicial review premature?*

[18] In its preliminary objection, the employer basically argued that the AO did not have the necessary jurisdiction to hear the appeal because the HSO had not decided that the danger did not exist. According to the employer, only such a decision by the HSO could authorize the employees to appeal to the AO under subsection 129(7) of the CLC and could therefore give the AO the necessary jurisdiction to hear the appeal.

[19] In his decision dismissing the employer's preliminary objection, the AO informed the parties that, despite that decision, he intended to return to the issue of his jurisdiction later, after conducting his inquiry and ascertaining whether the conditions required for the exercise of his jurisdiction had

actually been met. This implied that the AO had the right to make a second interlocutory decision on his jurisdiction, with the possibility of a second application for judicial review before the decision on the merits of the case.

[20] "[R]ulings made during the course of a tribunal's proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute." [*Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (F.C.A.), at paragraph 10; [2000] F.C.J. No. 678 (QL).]

[21] This rule has been reaffirmed by many courts, and it is a shame that it needs to be pointed out once again. For example, the rule was described clearly, in the colourful language of the late Justice Vallerand, in a unanimous decision of the Quebec Court of Appeal:

> [TRANSLATION]
>
> Grievance adjudication is a method devised to quickly resolve the day-to-day conflicts that arise under collective agreements. On the other hand, there is sometimes reason to believe that evocation is . . . a method devised to achieve the exact opposite, since it often represents a guerrilla war of attrition rather than justice.
>
> Be that as it may, the laudable referral of grievances together with the less laudable concept, as I said, of evocation seem to make it desirable that, except in obvious cases, we avoid considering, let alone allowing, preliminary exceptions to dismiss. This Court has already considered this question for interlocutory injunctions and ... for grievances I would, in principle, make no exception for any case

> (*lis pendens*, *res judicata*, being incapable, not having the necessary capacity, having no interest in the suit). . . . I would confine myself to obvious cases in which the action should be dismissed and, even then, only when there is the prospect of a lengthy trial that is not justified given that the right is clearly and undeniably unfounded. All other cases should get to the merits as quickly as possible and have everything decided in one go without running the risk of two evocations and two appeals. And guerrilla warfare be damned!
>
> [*Collège d'enseignement général et professionnel de Valleyfield v. Syndicat des employés de soutien S.C.F.P*, [1984] C.A. 633 (Que. C.A.), at page 634; [1984] J.Q. No. 576 (QL).]

[22] It would have been enough for the AO to simply take the objection under advisement and confine himself to the initial agreement with the parties rather than dismissing the objection and thus laying himself open to these proceedings by the employer. However, the fact that the AO stated in his decision that he intended to return to the issue of his jurisdiction after his inquiry and after he was better acquainted with the facts amounted to taking the objection under advisement so he could decide it later.

[23] Can the AO be blamed for making that decision when the parties could not even agree on the subject matter of the appeal? The employer argued that the HSO had not made any decision on the alleged danger, while the employees argued the contrary and reproached the HSO for not issuing any direction to minimize the danger they alleged.

[24] Let us not forget that this was an appeal under subsection 129(7) of the CLC. Where such an appeal is brought, subsection 146.1(1) of the same code requires the AO to inquire into the circumstances of the dispute in a summary way and without delay. It is not until after the inquiry,

once the AO is better acquainted with the facts that gave rise to the dispute, that the AO may logically vary, rescind or confirm the decision or direction and issue any direction that the AO considers appropriate (paragraphs 146.1(1)(*a*) and (*b*)). But the AO must be given time to conduct the inquiry and must be allowed to decide later, on an informed basis, what the AO is responsible for deciding under the CLC.

[25] In his decision, the AO merely interpreted the appeal procedure from which his jurisdiction arose, and he was perfectly entitled to do so. He decided that that procedure authorized him to hear the appeal, but this does not mean that he made a decision concerning his jurisdiction over the parties' dispute. On the contrary, the AO reserved his decision on the issue of his jurisdiction, saying that he would return to this issue only after inquiring into the circumstances of the dispute in a summary way, as required by the appeal procedure. The employer's proceedings result from a restrictive, literal view of certain sections of the CLC and of the role the CLC gives the appeals officer in the context of the parties' conflict.

[26] The Court cannot support such a view. The appeal procedure provided for in the CLC must be interpreted liberally so the employees can make their arguments. To this end, we should let the AO conduct his inquiry and then decide what the AO is responsible for deciding.

[27] While it is up to the AO to decide this, it should nonetheless be noted that the appeal provided for in subsection 129(7) seems to relate to the situation in which the HSO has not recognized an employee's right to continue to refuse to work under section 128, which appears to be the case here.

However, that section does not exclude danger related to a normal condition of employment under section 128 of the CLC.

[28] The record shows that, after being notified by the employer of the employees' refusal to perform the activity at issue, the HSO noted on a form that the activity being required of them departed only minimally from their normal conditions of employment. The HSO halted his investigation there, withdrew from the refusal to work procedure and concluded that the refusal to work was not authorized by the CLC.

[29] Did that note on a form amount to a decision that could be appealed? Should the HSO have continued his investigation and issued directions rather than withdrawing from the procedure? Did the HSO's withdrawal amount to a refusal to act? Does the AO's inquiry show that the conditions required for his intervention were met?

[30] These are a few of the many questions the officer will have to decide following his inquiry. It is up to the officer, if he can, to propose a remedy that can resolve the conflict.

[31] For the moment, it is enough to note that a risk characterized as a "normal condition of employment", which appears to be what the HSO concluded here, may also be a "danger" for the purposes of the CLC, which may justify HSOs and the Treasury Board of Canada in issuing directions to protect employees (*Walton and Treasury Board (Correctional Service Canada)*, [1987] C.P.S.S.R.B. No. 216 (QL)).

[32] The AO's decision takes nothing away from the applicant's rights and claims, since, if it is correct, it loses nothing by learning this later. In the opposite case, the procedure provided for in the CLC will not have been needlessly delayed.

[33] For these reasons, therefore, it must be concluded that the judicial review proceedings are premature. Rather than pushing the AO into dismissing its objection, the employer should have stuck to the initial agreement and waited for the AO to decide that objection after his inquiry, as stated in the decision challenged in these proceedings. This finding that the proceedings are premature means that the application for judicial review must be dismissed without the Court having to decide the other issue. It will be up to the AO to decide that issue after having reserved his decision on it.

[34] The parties informed the Court that the appeal was fortunately able to continue, thus allowing the AO to complete his inquiry without waiting for the instant decision. While the impact of these proceedings has not been too great in terms of the delays caused, the same cannot be said of the costs.

## V. Conclusion

[35] For these reasons, the application for judicial review will therefore be dismissed as premature, and the applicant will pay the costs of the application.

**JUDGMENT**

**FOR THESE REASONS, THE COURT:**

**DISMISSES** the application for judicial review

**WITH COSTS** against the applicant.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Brian McCordick, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2110-07 |
| **STYLE OF CAUSE:** | HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. ÉRIC VANDAL ET AL. |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | September 12, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | LAGACÉ D.J. |
| **DATE OF REASONS:** | October 7, 2008 |

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| Marie Pepin | FOR THE RESPONDENTS |

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