

Federal Court



Cour fédérale

Date: 20100303

Docket: T-1496-08

Citation: 2010 FC 245

Ottawa, Ontario, March 3, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CUPE, AIR CANADA COMPONENT

Applicant

and

AIR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This application challenges a Health and Safety Officer's determination of a "normal condition of employment" in the absence of an investigation under section 129 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the Code).

[2] The applicant seeks:

1. An order in the nature of *certiorari*, quashing and setting aside the Health and Safety Officer's decision;
2. Its costs of this application; and
3. Such further and other relief as counsel may advise and this Honourable Court may permit.

Introduction

[3] The primary issue in dispute is whether a Health and Safety Officer (HSO) can conclude, without an investigation under section 129 of the Code, that the circumstances of a work refusal constitute a normal condition of employment.

Background

[4] On the evening of August 24, 2008, Mr. Erick Brouillette and three other cabin personnel scheduled to operate a flight that evening exercised their right to refuse to work under Part II of the Code. Their refusal was based on information the in-charge flight attendant had shared with them. The in-charge flight attendant, who had booked off sick, had told them that on a previous flight with the same pilot, the pilot had indicated that he was going to “ditch” the plane and that he had “nothing to lose”.

[5] The flight attendants went to the crew resource center, where they were joined by an employee representative of the Health and Safety Committee, Ms. Sally Fouineteau and Air Canada, Occupational Health and Safety Manager, Ms. Kathleen Mackenzie.

[6] In the meantime, a replacement crew was assembled and the flight left.

[7] Transport Canada was advised of the work refusal. Shortly thereafter, a Health and Safety Officer (the HSO) from Human Resources and Social Development Canada came to the airport and proceeded with an on-site assessment of the matter.

[8] The flight attendants informed the HSO of the reason for their refusal and gave the HSO a completed employee safety and health concern form which included a detailed handwritten explanation. It read in part:

[Hugh Bouchard, In Charge flight attendant] advised us that he had an inflight incident where the captain had threatened to ditch the plane in the Atlantic. Hugh said that the captain had said he had nothing to lose as he was being fired anyway. ... The captain 880/24 Aug 08 arrived and Hugh said, "That's him, I'm not working with him".

[9] Ms. Mackenzie completed a form entitled National Labour Operations Resources (HRSDC) and provided it along with excerpts from Air Canada's In-flight Safety Manual entitled Crew Resource Management to the HSO. Air Canada's position was that the work refusal was not permitted because as answered at question 10 of the form, the circumstance on which the work refusal was based was a normal condition of employment as:

...crew and personal conflicts can arise at anytime and we have a crew conflict resolution process for this type of situation.

[10] During the on-site assessment, the HSO also went around and talked to the flight attendants, the representatives and managers, other people who knew the captain in question, including the operations manager who had just spoke to the captain about the work refusal. She also spoke privately with Hugh Bouchard, the in-charge flight attendant who had been the most vehement about not working with the captain. She made some notes of these discussions. Aside from the flight attendants in question, no one commented negatively about the captain, and everyone stood by his ability to do his job.

Decision of the Health and Safety Officer

[11] On August 27, 2008, the HSO released her initial decision along with the Preliminary Inquiry Report regarding the work refusal of August 24, 2008. The decision reads:

You will find enclosed the document entitled "Preliminary Inquiry Report" pertaining to the refusal to work that you made on August 24, 2008, at Air Canada, concerning Employees refusing to work due to a lack of confidence in the Captain.

This document confirms the determination that I verbally gave in the presence of the parties involved, following the inquiry. That is, the circumstances on which the refusal is based constitute a normal working condition of employment within the meaning of subsection 128(2) of the Canada Labour Code. For this reason, there will be no investigation under section 129 into whether or not a danger exists.

[12] On September 8, 2008, the HSO released a corrected decision along with the Preliminary Inquiry Report. The corrected version states:

You will find enclosed the document entitled “Preliminary Inquiry Report” pertaining to the refusal to work that you made on August 24, 2008, at AIR CANADA, concerning: “conflict between captain and chief steward”.

This document confirms the determination that I verbally gave in the presence of the parties involved, following my inquiry. That is, the circumstances on which the refusal is based constitute a normal working condition of employment within the meaning of subsection 128(2) of the Canada Labour Code. For this reason, there will be no investigation under section 129 into whether or not a danger exists.”

Issues

[13] In my view, the issues to be resolved are as follows:

1. What is the appropriate standard of review?
2. Can an HSO find that the circumstances of a work refusal constitute a “normal condition of employment”, without conducting an investigation under section 129 of the Code and without making a determination on the existence of danger?
3. Did the HSO commit a reviewable error in finding that the circumstances of this work refusal constituted a “normal condition of employment”?
4. Did the HSO breach any principles of procedural fairness in making her decision?

Applicant’s Written Submissions

[14] The applicant submits that except for Issue 3 which, to the extent it questions a finding of fact, is reviewable on a deferential standard, the appropriate standard of review is correctness. Questions of jurisdiction, such as Issue 2, continue to be subject to the standard of correctness. Upon assessing the standard of review, it should be noted that the Code contains no privative clause for decisions of an HSO and because validating refusals to work go to the heart of this legislation, less deference should be afforded. HSOs have no expertise in matters of jurisdiction or natural justice. No deference is to be afforded in reviewing questions of procedural fairness.

[15] Regarding the issue of jurisdiction, the applicant submits that because the HSO refused to investigate pursuant to section 129, she lacked the jurisdiction to make a finding with respect to a “normal condition of employment”. Section 129 requires an HSO to make an investigation “without delay” on being notified of a continued work refusal. The HSO can only find that something is a “normal condition of employment”, when performing a danger investigation. Further, the HSO’s finding in this case deprived the employees of the right to refuse work even if the circumstances were dangerous. This would be contrary to the remedial purposes of the Code.

[16] The applicant also submits that the HSO erred and based her decision on erroneous findings of fact made in a perverse or capricious manner when she found that the danger of a mentally unstable airplane pilot constituted a normal condition of employment, without making a proper investigation. The HSO improperly relied on the employer’s word. She allowed the employer to fill out the Preliminary Inquiry Report including the conclusions which should have been left for the HSO to make. She then changed her decision later to even more reflect the employer’s

characterization of the issue (a conflict between crew and pilot). The HSO should have made inquiries such as whether the pilot's alleged comments were normal, or whether it was normal for a crew to have a lack of confidence in a pilot. All she did was ask some people who knew the captain about his mental state and stability. She accepted their opinions without attempting to ask anyone else with direct evidence of the incident. Circumstances which create an increased level of risk, which are not essential to the job, are not normal conditions of employment.

Respondent's Written Submissions

[17] The respondent agrees that Issue 2 and Issue 4 should be reviewed on the standard of correctness. For Issue 3, the HSO's conclusion, the appropriate standard is reasonableness. This decision was an issue of law and fact and involved the HSO's particular area of expertise. The HSO was best poised to review all of the evidence. Her assessment goes to the very heart of the functions that HSOs are mandated to perform under Part II of the Code.

[18] Regarding jurisdiction, the respondent submits that subsection 128(2) of the Code allows an HSO to decide that the circumstances upon which a refusal is based constitute a normal condition of employment, without making a finding of danger. Subsection 128(1) states the conditions under which an employee has the right to refuse to do a job. Subsections 128(6), (9), (10) and (13) then set out the procedure the employer and employee must follow if there is a refusal. That is what occurred here. Since the employer did not feel the situation required correction, the employees continued to refuse to work. Therefore, an HSO was contacted.

[19] Subsection 128(2) enumerates two instances where employees do not have the right to refuse to work. The applicant maintains that a determination of danger must occur before the HSO can conclude upon a normal condition of employment. That is incorrect. Paragraph 128(2)(b) does not say: an employee “may refuse to work if the danger is a normal condition of employment”. Rather, paragraph 128(2)(b) says an employee may not refuse if “the danger referred to in subsection (1) is a normal condition of employment”. The danger referred to in subsection (1) is the situation or the circumstances upon which the employee has decided to stop working. Therefore, there is no requirement for an HSO to make a determination of danger under subsection 128(2).

[20] An investigation under section 129 is only warranted when all of the preconditions which grant the employee the right to refuse work have been satisfied. When an exception has been met under subsection 128(2), no work refusal exists under subsection 128(1). Employees cannot refuse to work and require an HSO to conduct an investigation, when the alleged situation of danger amounts to a normal condition of employment. The right to refuse to do one’s job is an extraordinary measure.

[21] Pursuant to section 141, an HSO can conduct a preliminary inquiry and conclude that a circumstance is a normal condition of employment. In the present case, the HSO correctly exercised her jurisdiction under section 141 by conducting a preliminary inquiry, determined that the preliminary criteria for a work refusal had not been met and on that basis, determined that an investigation under section 129 was not warranted.

[22] The respondent submits that the HSO did not omit any relevant facts in her assessment and did not fail to consider the circumstances of an increased level of risk. The evidence she reviewed gave her good and reasonable grounds to conclude that conflicts and mistrust between crew members do arise as a normal course of employment. The HSO did inquire about the captain's view of the incident when she spoke to the operations manager, who had just spoken to the captain. The evidence before the HSO on the whole supported her conclusion, despite the characterization of the events by the employees.

[23] The respondent submits that the HSO's inquiry was conducted in an open and transparent manner. She met with the complaining employees. Although there was no investigation under section 129, employee workplace committee members and employees were fully engaged in the inquiry and had a meaningful opportunity to present their case fully and fairly. The HSO was not required to speak with the captain, as she was provided with all the details of the evening in question.

Analysis and Decision

[24] **Issue 1**

What is the standard of review?

Different issues in this case require different standards of review.

[25] Issue 2 is a question of pure jurisdiction because it requires the Court to determine whether the HSO has the statutory authority to make the decision she did. No deference is to be afforded and the standard of correctness applies (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraph 59).

[26] Issue 3 reviews the HSO's conclusion that the circumstances of the work refusal constituted a normal condition of employment. "Normal condition of employment" is not a legal term, nor is it defined in the Code. Thus, on its face, this appears to be primarily a determination of fact falling within the HSO's realm of expertise.

[27] The applicant contends that the lack of a privative clause implies a high standard of scrutiny. However, in my view, the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 (QL) at paragraphs 23 to 38, diminished the importance of the presence or absence of a privative clause, and clarified that it was only one of four factors to consider in the then termed 'pragmatic and functional' analysis. The four factors are: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of the enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal.

[28] Later, *Dunsmuir* above, taught that even where a review of prior jurisprudence has not determined the appropriate standard, a full standard of review analysis is not always necessary

(paragraph 62). At paragraph 51, the Court described how looking at the ‘nature of the question’ can often be determinative:

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[29] Taking a preliminary look at the ‘nature of the question’ also allows courts to determine without a full analysis that certain types of questions will attract the correctness standard (see *Dunsmuir* above):

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces...

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*....

[30] Along this same line of reasoning, the *Dunsmuir* Court took the view that:

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard

must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[31] Here, I think it is enough to say that the standard of review is reasonableness because the question is purely one of fact and falls within the HSO's expertise. The absence of a privative clause matters little.

[32] Issue 4 involves a review of procedural fairness. In accordance with *Dunsmuir* above, questions of procedural fairness must be decided on a standard of correctness.

[33] **Issue 2**

Can an HSO find that the circumstances of a work refusal constitute a "normal condition of employment", without conducting an investigation under section 129 of the Code and without making a determination on the existence of danger?

Part II of the Code is titled "Occupational Health and Safety". The relevant provisions of Part II can be found in the annex in their entirety. The provisions at the core of this analysis are subsections 128(1), (2), (13) and 129(1) which read as follows:

128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

128.(1) Sous réserve des autres dispositions du présent article, l'employé au travail 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

a) l'utilisation ou le

machine or thing constitutes a danger to the employee or to another employee;

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.

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :

(a) the refusal puts the life, health or safety of another person directly in danger; or

a) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;

(b) the danger referred to in subsection (1) is a normal condition of employment.

b) le danger visé au paragraphe (1) constitue une condition normale de son emploi.

...

...

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the

(13) L'employé peut maintenir son refus s'il a des motifs raisonnables de croire que le danger continue d'exister malgré les mesures prises par l'employeur pour protéger les employés ou si ce dernier conteste son rapport. Dès qu'il est informé du maintien du refus, l'employeur en avise l'agent de santé et de sécurité.

continued refusal, the employer shall notify a health and safety officer.

...
129.(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

...
129.(1) Une fois informé, conformément au paragraphe 128(13), du maintien du refus, l'agent de santé et de sécurité effectue sans délai une enquête sur la question en présence de l'employeur, de l'employé et d'un membre du comité local ayant été choisi par les employés ou du représentant, selon le cas, ou, à défaut, de tout employé du même lieu de travail que désigne l'employé intéressé, ou fait effectuer cette enquête par un autre agent de santé et de sécurité.

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

[34] The parties agree that if a danger referred to in subsection 128(1) is a normal condition of employment under paragraph 128(2)(b), employees do not have the right to refuse to work.

[35] The question is whether an HSO can make a determination on whether a situation is a normal condition of employment through a preliminary inquiry or whether he or she is compelled to launch an investigation under section 129 “without delay” before making such a determination.

[36] Section 141 of the Code empowers the HSO to conduct preliminary inquiries. Subsection 141(1) can be found in the annex.

[37] The legislation works as follows. Subsection 128(1) states the conditions under which an employee has the right to refuse to do a job. The rest of section 128 sets out the procedure the employer and employee must follow, up to and including the contacting of an HSO under subsection 128(13). Subsection 128(2) enumerates two instances where employees do not have the right to refuse to work, but neither the employer nor the employee has the jurisdiction to make such a determination. Both sides are entitled to maintain their positions until the arrival of an HSO.

[38] Upon being contacted under subsection 128(13), the applicant urges that an HSO must, “without delay” launch into an investigation under section 129 upon being notified of an employee’s continued refusal to work. The legislation does not make reference to a preliminary inquiry by the HSO to first ascertain whether the work refusal is not barred by subsection 128(2).

[39] It is submitted that a problem with the applicant’s interpretation is that an HSO may at times be required to launch into a futile investigation even when the work refusal was not permitted by subsection 128(2), and when the HSO’s better judgment advises against the need for such an investigation.

[40] Despite this problem, I agree that section 129 simply does not permit an HSO to engage in a preliminary inquiry upon being called to the workplace of an employee who continues to refuse to work and allege a danger under subsection 128(13).

[41] Although Parliament accorded HSOs broad powers under section 141, including the power to conduct an inquiry at any reasonable time, this cannot override the clear language of section 129.

[42] The respondent submits that an investigation under section 129 is only warranted when the preliminary criteria for a work refusal have been satisfied. When an exception under subsection 128(2) applies, no work refusal exists under subsection 128(1). Thus, an HSO should be able, under the auspices of sections 128 and 141, to determine if an investigation under section 129 is warranted before launching into the investigation.

[43] While this interpretation deserves consideration, it cannot override the clear language of section 129. In the end, I find that the Code does not give an HSO the jurisdiction to conduct a preliminary inquiry, or to make any determination under subsection 128(2), upon being called to a workplace under subsection 128(13).

[44] On one final note, I realize that this interpretation leaves the exceptions under subsection 128(2) in a precarious position because although either exception clearly invalidates a refusal to

work, the Code is silent as to how and when a subsection 128(2) determination can first be made.

This however, is a deficiency that can only be resolved by Parliament.

[45] Because of my finding on Issue 2, I need not deal with the remaining issues.

[46] The application for judicial review is therefore allowed and the decision of the HSO is quashed and set aside.

[47] The applicant shall have its costs of the application.

JUDGMENT

[48] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the decision of the Health and Safety Officer is quashed and set aside.
2. The applicant shall have its costs of the application.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Canada Labour Code*, R.S., 1985, c. L-2

122.(1) In this Part,	122.(1) Les définitions qui suivent s'appliquent à la présente partie.
...	...
"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;	« danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.
...	...
128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	128.(1) Sous réserve des autres dispositions du présent article, l'employé au travail 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. |
| (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if | (2) L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas : |
| (a) the refusal puts the life, health or safety of another person directly in danger; or | a) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne; |
| (b) the danger referred to in subsection (1) is a normal condition of employment. | b) le danger visé au paragraphe (1) constitue une condition normale de son emploi. |
| (3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that | (3) L'employé se trouvant à bord d'un navire ou d'un aéronef en service avise sans délai le responsable du moyen de transport du danger en cause s'il a des motifs raisonnables de croire : |
| (a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee, | a) soit que l'utilisation ou le fonctionnement d'une machine ou d'une chose à bord constitue un danger pour lui-même ou un autre employé; |

(b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or

b) soit qu'il est dangereux pour lui de travailler à bord;

(c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee, the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.

c) soit que l'accomplissement d'une tâche à bord constitue un danger pour lui-même ou un autre employé. Le responsable doit aussitôt que possible, sans toutefois compromettre le fonctionnement du navire ou de l'aéronef, décider si l'employé peut cesser d'utiliser ou de faire fonctionner la machine ou la chose en question, de travailler dans ce lieu ou d'accomplir la tâche, et informer l'employé de sa décision.

(4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.

(4) L'employé qui, en application du paragraphe (3), est informé qu'il ne peut cesser d'utiliser ou de faire fonctionner la machine ou la chose, de travailler dans le lieu ou d'accomplir la tâche, ne peut, pendant que le navire ou l'aéronef où il travaille est en service, se prévaloir du droit de refus prévu au présent article.

(5) For the purposes of subsections (3) and (4),

(5) Pour l'application des paragraphes (3) et (4), un navire ou un aéronef sont en service,

respectivement :

(a) a ship is in operation from the time it casts off from a wharf in a Canadian or foreign port until it is next secured alongside a wharf in Canada; and

a) entre le démarrage du quai d'un port canadien ou étranger et l'amarrage subséquent à un quai canadien;

(b) an aircraft is in operation from the time it first moves under its own power for the purpose of taking off from a Canadian or foreign place of departure until it comes to rest at the end of its flight to its first destination in Canada.

b) entre le moment où il se déplace par ses propres moyens en vue de décoller d'un point donné, au Canada ou à l'étranger, et celui où il s'immobilise une fois arrivé à sa première destination canadienne.

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

(6) L'employé qui se prévaut des dispositions du paragraphe (1) ou qui en est empêché en vertu du paragraphe (4) fait sans délai rapport sur la question à son employeur.

(7) Where an employee makes a report under subsection (6), the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in this section, shall inform the employer, in the prescribed manner and time if any is prescribed, whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee

(7) L'employé informe alors l'employeur, selon les modalités — de temps et autres — éventuellement prévues par règlement, de son intention de se prévaloir du présent article ou des dispositions d'une convention collective traitant du refus de travailler en cas de danger. Le choix de l'employé est, sauf accord à l'effet contraire avec l'employeur, irrévocable.

agree otherwise.

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(a) at least one member of the work place committee who does not exercise managerial functions;

(b) the health and safety representative; or

(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the

(8) S'il reconnaît l'existence du danger, l'employeur prend sans délai les mesures qui s'imposent pour protéger les employés; il informe le comité local ou le représentant de la situation et des mesures prises.

(9) En l'absence de règlement de la situation au titre du paragraphe (8), l'employé, s'il y est fondé aux termes du présent article, peut maintenir son refus; il présente sans délai à l'employeur et au comité local ou au représentant un rapport circonstancié à cet effet.

(10) Saisi du rapport, l'employeur fait enquête sans délai à ce sujet en présence de l'employé et, selon le cas :

a) d'au moins un membre du comité local, ce membre ne devant pas faire partie de la direction;

b) du représentant;

c) lorsque ni l'une ni l'autre des personnes visées aux alinéas a) et b) n'est disponible, d'au moins une personne choisie,

employee.	dans le même lieu de travail, par l'employé.
(11) If more than one employee has made a report of a similar nature under subsection (9), those employees may designate one employee from among themselves to be present at the investigation.	(11) Lorsque plusieurs employés ont présenté à leur employeur des rapports au même effet, ils peuvent désigner l'un d'entre eux pour agir en leur nom dans le cadre de l'enquête.
(12) An employer may proceed with an investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.	(12) L'employeur peut poursuivre son enquête en l'absence de l'employé lorsque ce dernier ou celui qui a été désigné au titre du paragraphe (11) décide de ne pas y assister.
(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.	(13) L'employé peut maintenir son refus s'il a des motifs raisonnables de croire que le danger continue d'exister malgré les mesures prises par l'employeur pour protéger les employés ou si ce dernier conteste son rapport. Dès qu'il est informé du maintien du refus, l'employeur en avise l'agent de santé et de sécurité.
(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).	(14) L'employeur informe le comité local ou le représentant des mesures qu'il a prises dans le cadre du paragraphe (13).
129.(1) On being notified that an employee continues to refuse	129.(1) Une fois informé, conformément au paragraphe

to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written

128(13), du maintien du refus, l'agent de santé et de sécurité effectue sans délai une enquête sur la question en présence de l'employeur, de l'employé et d'un membre du comité local ayant été choisi par les employés ou du représentant, selon le cas, ou, à défaut, de tout employé du même lieu de travail que désigne l'employé intéressé, ou fait effectuer cette enquête par un autre agent de santé et de sécurité.

(2) Lorsque plusieurs employés maintiennent leur refus, ils peuvent désigner l'un d'entre eux pour agir en leur nom dans le cadre de l'enquête.

(3) L'agent peut procéder à l'enquête en l'absence de toute personne mentionnée aux paragraphes (1) ou (2) qui décide de ne pas y assister.

(4) Au terme de l'enquête, l'agent décide de l'existence du danger et informe aussitôt par écrit l'employeur et l'employé de sa décision.

notification of the decision to the employer and the employee.

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless

(a) the other employee is qualified for the work;

(b) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and

(c) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under

(5) Avant la tenue de l'enquête et tant que l'agent n'a pas rendu sa décision, l'employeur peut exiger la présence de l'employé en un lieu sûr proche du lieu en cause ou affecter celui-ci à d'autres tâches convenables. Il ne peut toutefois affecter un autre employé au poste du premier que si les conditions suivantes sont réunies :

a) cet employé a les compétences voulues;

b) il a fait part à cet employé du refus de son prédécesseur et des motifs du refus;

c) il croit, pour des motifs raisonnables, que le remplacement ne constitue pas un danger pour cet employé.

(6) S'il conclut à l'existence du danger, l'agent donne, en vertu du paragraphe 145(2), les instructions qu'il juge indiquées. L'employé peut maintenir son refus jusqu'à l'exécution des instructions ou leur modification ou annulation dans le cadre de la présente partie.

this Part.

(7) If a health and safety officer decides that the danger does not exist, 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 ten days after receiving notice of the decision.

...

140.(1) The Minister may designate as a regional health and safety officer or as a health and safety officer for the purposes of this Part any person who is qualified to perform the duties of such an officer.

(2) The Minister may, with the approval of the Governor in Council, enter into an agreement with any province or any provincial body specifying the terms and conditions under which a person employed by that province or provincial body may act as a health and safety officer for the purposes of this Part and, if such an agreement has been entered into, a person so employed and referred to in the agreement is deemed to be designated as a health and safety officer under subsection

(7) Si l'agent conclut à l'absence de danger, 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.

...

140.(1) Le ministre peut désigner toute personne compétente comme agent de santé et de sécurité ou agent régional de santé et de sécurité pour l'application de la présente partie.

(2) Avec l'approbation du gouverneur en conseil, le ministre peut conclure avec une province ou un organisme provincial un accord aux termes duquel telle personne employée par cette province ou cet organisme peut, aux conditions qui y sont prévues, agir à titre d'agent de santé et de sécurité pour l'application de la présente partie; cette personne est assimilée à un agent de santé et de sécurité nommé en vertu du paragraphe (1).

(1).

141.(1) Subject to section 143.2, a health and safety officer may, in carrying out the officer's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may

141.(1) Dans l'exercice de ses fonctions et sous réserve de l'article 143.2, l'agent de santé et de sécurité peut, à toute heure convenable, entrer dans tout lieu de travail placé sous l'entière autorité d'un employeur. En ce qui concerne tout lieu de travail en général, il peut :

(a) conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;

a) effectuer des examens, essais, enquêtes et inspections ou ordonner à l'employeur de les effectuer;

(b) take or remove for analysis, samples of any material or substance or any biological, chemical or physical agent;

b) procéder, aux fins d'analyse, à des prélèvements de matériaux ou substances ou de tout agent biologique, chimique ou physique;

(c) be accompanied or assisted by any person and bring any equipment that the officer deems necessary to carry out the officer's duties;

c) apporter le matériel et se faire accompagner ou assister par les personnes qu'il estime nécessaires;

(d) take or remove, for testing, material or equipment if there is no reasonable alternative to doing so;

d) emporter, aux fins d'essais ou d'analyses, toute pièce de matériel ou d'équipement lorsque les essais ou analyses ne peuvent raisonnablement être réalisés sur place;

(e) take photographs and make sketches;

e) prendre des photographies et faire des croquis;

(f) direct the employer to ensure that any place or thing specified by the officer not be disturbed for a reasonable period pending

f) ordonner à l'employeur de faire en sorte que tel endroit ou tel objet ne soit pas dérangé pendant un délai raisonnable en

an examination, test, inquiry, investigation or inspection in relation to the place or thing;

attendant l'examen, l'essai, l'enquête ou l'inspection qui s'y rapporte;

(g) direct any person not to disturb any place or thing specified by the officer for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;

g) ordonner à toute personne de ne pas déranger tel endroit ou tel objet pendant un délai raisonnable en attendant l'examen, l'essai, l'enquête ou l'inspection qui s'y rapporte;

(h) direct the employer to produce documents and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information;

h) ordonner à l'employeur de produire des documents et des renseignements afférents à la santé et à la sécurité de ses employés ou à la sûreté du lieu lui-même et de lui permettre de les examiner et de les reproduire totalement ou partiellement;

(i) direct the employer or an employee to make or provide statements, in the form and manner that the officer may specify, respecting working conditions and material and equipment that affect the health or safety of employees;

i) ordonner à l'employeur ou à un employé de faire ou de fournir des déclarations — en la forme et selon les modalités qu'il peut préciser — à propos des conditions de travail, du matériel et de l'équipement influant sur la santé ou la sécurité des employés;

(j) direct the employer or an employee or a person designated by either of them to accompany the officer while the officer is in the work place; and

j) ordonner à l'employeur ou à un employé, ou à la personne que désigne l'un ou l'autre, selon le cas, de l'accompagner lorsqu'il se trouve dans le lieu de travail;

(k) meet with any person in private or, at the request of the person, in the presence of the person's legal counsel or union

k) avoir des entretiens privés avec toute personne, celle-ci pouvant, à son choix, être accompagnée d'un représentant

representative.

syndical ou d'un conseiller juridique.

(2) A health and safety officer may issue a direction under subsection (1) whether or not the officer is in the work place at the time the direction is issued.

(2) L'agent peut donner à l'employeur ou à l'employé les ordres prévus au paragraphe (1) même s'il ne se trouve pas physiquement dans le lieu de travail.

(3) A health and safety officer who has, under paragraph (1)(d), taken or removed material or equipment for testing shall, if requested by the person from whom it was taken or removed, return the material or equipment to the person after testing is completed unless the material or equipment is required for the purposes of a prosecution under this Part.

(3) Le matériel ou l'équipement emporté en vertu de l'alinéa (1)d) est remis sur demande à l'intéressé dès que les essais ou analyses sont terminés, à moins qu'il ne soit requis dans le cadre de poursuites engagées sous le régime de la présente partie.

(4) A health and safety officer shall investigate every death of an employee that occurred in the work place or while the employee was working, or that was the result of an injury that occurred in the work place or while the employee was working.

(4) L'agent fait enquête sur tout décès d'employé qui survient dans le lieu de travail ou pendant que l'employé était au travail ou qui résulte de blessures subies dans les mêmes circonstances.

(5) If the death results from a motor vehicle accident on a public road, as part of the investigation the health and safety officer shall obtain a copy of any police report as soon as possible after the accident.

(5) Lorsque le décès résulte d'un accident survenu sur la voie publique et impliquant un véhicule automobile, l'agent chargé de l'enquête doit notamment obtenir dans les meilleurs délais des autorités policières compétentes tout rapport de police s'y rapportant.

(6) Within ten days after completing a written report on the findings of an inquiry or investigation, the health and safety officer shall provide the employer and the work place committee or the health and safety representative with a copy of the report.

(7) The Minister shall provide every health and safety officer with a certificate of authority and, when carrying out duties under this Part, the officer shall show the certificate to any person who asks to see it.

(8) A health and safety officer is not personally liable for anything done or omitted to be done by the officer in good faith under the authority or purported authority of this Part.

(9) Notwithstanding subsection (8), and for greater certainty, Her Majesty in right of Canada is not relieved of any civil liability to which Her Majesty in right of Canada may otherwise be subject.

(6) Dans les dix jours qui suivent l'achèvement du rapport écrit faisant suite à toute enquête qu'il effectue, l'agent en transmet copie à l'employeur et au comité local ou au représentant.

(7) Le ministre remet à l'agent un certificat attestant sa qualité, que celui-ci présente, lorsqu'il exerce les fonctions qui lui sont conférées sous le régime de la présente partie, à toute personne qui lui en fait la demande.

(8) L'agent est dégagé de toute responsabilité personnelle en ce qui concerne les actes ou omissions faits de bonne foi dans l'exercice effectif ou censé tel des pouvoirs que lui confère la présente partie.

(9) Il est toutefois entendu que le paragraphe (8) n'a pas pour effet de dégager Sa Majesté du chef du Canada de la responsabilité civile qu'elle pourrait par ailleurs encourir.

FEDERAL COURT
SOLICITORS OF RECORD

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