Federal Court Cour fédérale

Date: 20130718
Docket: T-887-12

Citation: 2013 FC 797

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 18, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DAVID LAROCHE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the decision of an appeals officer of the occupational Health and Safety Tribunal Canada (the Tribunal), dated April 4, 2012, regarding a refusal to work if danger filed by the applicant under section 128 of the *Canada Labour Code*, RSC 1985, c L-2 (the Code). This is the second application for judicial review resulting from this refusal to work.

Background

[2] A brief history of the legal proceedings to date is necessary.

[3] On March 13, 2009, when asked to participate in a search to be conducted by the Service de Police de la Ville de Montréal, the applicant, who is an employee of the Canada Border Services Agency (the CBSA), refused, after being informed that he could not carry his [TRANSLATION] “defensive tools” (a truncheon, handcuffs, pepper spray and a fire arm). On the same day, the applicant filed a refusal to work, relying on section 128 of the Code. The relevant provision of this section reads 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 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.

[4] Section 124 of the Code imposes a general obligation on the CBSA as an employer to

ensure that the health and safety at work of every person employed by it is protected. An employee may refuse to work when he or she is dissatisfied with the measures taken to ensure his or her protection. If there is a danger, within the meaning of the Code, the refusal is justified.

[5] The investigation into the refusal was conducted by a health and safety officer. On May 1, 2009, she concluded that there had been no danger within the meaning of the Code.

[6] This decision was appealed, and the appeal decision was made by an appeals officer on September 29, 2010. The initial decision was confirmed.

[7] The applicant applied for a first judicial review of this decision. That application for judicial review was allowed (*Laroche v Canada (Attorney General)*, 2011 FC 1454, 401 FTR 287). The Court ordered that the entire matter be "referred back to the appeals officer so that she [could] complete her analysis in accordance with the reasons of this judgment".

[8] Pursuant to the judgement of this Court, the same appeals officer resumed her analysis where she had left off, without convening a hearing or receiving additional submissions. The appeals officer essentially improved her analysis as required by the Court, without, however, changing the initial conclusion she had reached: there had been no danger within the meaning of the Code. This decision was made on April 4, 2012.

[9] IT is of this later decision that the applicant is seeking judicial review.

Reasons

[10] To understand the situation before the Court, one must return to the reasons for the appeals officer's first decision, dated September 29, 2010.

[11] To begin with, the officer recognizes that the definition of "danger" is at the heart of the problem. She refers to section 128 and quotes the definition of danger given by the Code at subsection 122(1):

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.

[12] Not all possible hazards represent a danger under the Code. Rather there must be a reasonable possibility of danger (*Verville v. Canada (Correctional Services)*, 2004 FC 767, 253 FTR 294, particularly paragraph 36). This understanding of the test is not disputed by the parties

in this matter.

[13] Relying on the evidence, the appeals officer identified two types of hazard. I will reproduce part of paragraph 110 of her decision, where the two types of hazard are identified:

> i. if the location had not been properly secured beforehand and an armed individual was at the location;
> ii. if the police officers did not properly guard the location and an armed individual was within the outside perimeter of the location or managed to enter the location.

[14] Consequently, a public servant participating in a search is immediately exposed to a hazard if the location has not been secured beforehand. The public servant is also exposed to a hazard if, even when the location has been secured beforehand, a security perimeter is not maintained. If there is a reasonable possibility of a hazard, there is danger within the meaning of section 122, and the public servant would be justified in refusing to work, as permitted under section 128 of the Code. Conversely, if no danger within the meaning of the Code exists, the refusal to work is not warranted.

[15] The Tribunal appeals officer concluded that there was no danger in regard to the two types of hazard identified. As to the first type of hazard, the police forces always communicate with the customs officers and notify them to report to the location after it has been secured. This conclusion was not challenged on review.

[16] Regarding the second type of hazard, specifically the security perimeter, the appeals officer found that the possibility of hazard did not reach the level of reasonable possibility. She arrived at this conclusion because CBSA officers are free to decide not to enter an allegedly

secure perimeter if they are not satisfied or have the slightest doubt that the perimeter is not properly guarded. As a result, neither type of hazard posed a danger.

[17] It was on the second type of hazard that the application for judicial review was successful in this Court, the Court being satisfied with the decision on the first type.

[18] Relying on the Federal Court of Appeal's decision in *Martin v Canada (Attorney General)*, 2005 FCA 156, the Court was not satisfied with the analysis because the appeals officer had not had regard to relevant evidence.

[19] As the Court noted, CBSA officers may well find perimeter surveillance measures to be sufficient and agree to enter a search location, but what would happen if these measures were relaxed or disappeared in the course of the search? With regard to the second type of hazard, two quite distinct situations must be considered: first, the existence of a perimeter when the customs officer embarks on the search and, second, the existence and maintenance of this perimeter during the search.

[20] The appeals officer's failure to consider this second situation (maintenance of the perimeter during the search) made her decision unreasonable and was therefore fatal. In other words, if a CBSA officer's option to refuse to enter the search location because it does not seem safe ensures that officer's safety, the perimeter must also remain secure during the search. This situation was not even examined by the appeals officer, who was satisfied that the location had been secured and that an adequate perimeter had been established such that there was no

reasonable possibility of danger. The dynamic nature of a search was not sufficiently considered.

[21] However, the remedy chosen by this Court was of limited scope, as I noted previously. Noting that there was ample evidence relevant to examining the dynamics of a search, rather than just the static conditions present at the beginning of a search, the Court decided to refer the matter back to the appeals officer for an examination of these dynamics.

[22] Paragraph 39 of this Court's decision reads as follows:

> [39] . . . This component, which had been raised by the applicant, was just as relevant and it was overlooked by the appeals officer. Yet, several pieces of evidence were relevant to assessing and measuring the risk of injury associated with the possibility that one or more persons could enter the premises during the operation, in particular:
> 1. The nature of the sites where the searches were carried out.
> 2. The testimony of the applicant and his colleague L. Moreau who stated that during their searches of private homes they were alone in most of the rooms in which they worked.
> 3. The testimony of the applicant that he had been working alone in a basement with a single point of access and that when he found the object of the search and called the police officers working upstairs, several minutes went by before they came down to find him.
> 4. The testimony of the applicant that for a search conducted on an exterior site, the police officers stayed in their car and that he had been offered no close cover.
> 5. The testimony of L. Moreau that he had never felt or been given the impression that the police officers present at the location were there to protect him during his searches.
> 6. The testimony of the applicant and L. Moreau that no police officer escorted them from or to their vehicle as they approached and left the search location, and more specifically, the testimony of the applicant that he had once been obliged to return to his vehicle to collect some detection tools during one of the searches.
> 7. The testimony of R. Groulx, a member of the RCMP, regarding the dynamic nature of the operations and the possibility that the circumstances could change during an operation.
> 8. The testimony of the applicant and L. Moreau on the training

> they received to defend against attacks with their defensive equipment and their vulnerability if they were to be attacked when they did not have their defensive equipment.
> 9. The testimony of Y. Patenaude of the SPVM who stated that if the outside perimeter of a search location is not well guarded, anyone can enter the location.

[23] As a result, the decision to be made by the appeals officer was limited to this second situation, that is, the maintenance of a secure perimeter, which she had failed to examine in her first decision. This examination was based on the evidence that had been submitted; the analysis was to be completed. This is what the appeals officer was to focus on, and it is this otherwise narrow decision of which the applicant is seeking judicial review.

[24] In her second decision, the appeals officer completed the analysis. She chose to reproduce many paragraphs from her first decision, which explains why the second decision contains almost 150 paragraphs. The actual analysis requested by this Court covers only a few paragraphs, at the end of which the appeals officer concludes:

> [TRANSLATION]
> [125] In light of the above, it is my opinion that, on March 17, 2009, the possibility that the location D. Laroche was to enter to carry out his search was not properly guarded by the police force in order to ensure that no armed individuals were found in the outside perimeter or could enter the location while D. Laroche was carrying out his task was a mere possibility, but not a reasonable one.

<u>Analysis</u>

[25] Two issues are before this Court. First, did the appeals officer breach procedural fairness by declining the request to hold a hearing following the judgment of this Court? Second, is the appeals officer's second decision reasonable? I will examine these issues in the order in which

they were presented.

Procedural fairness

[26] The applicant complained about a breach of procedural fairness when the appeals officer declined the request to hold a hearing following the first judgment of this Court and before making her second decision. It is understood that this issue is reviewable on a correctness standard (*Sketchley v Canada (Attorney General)*, [2006] 3 FCR 392).

[27] In my opinion, the procedural fairness argument has no merit. There are several reasons for this conclusion.

[28] The scope of the previous decisions and judgments is important. The matter before this Court only concerns cases where police forces seek assistance from the Canada Border Services Agency (the Agency) in carrying out searches, presumably because the Agency has resources these police forces do not have. We are speaking of assistance here, as the search to be carried out does not fall under the mandate conferred by the *Customs Act*, the *Excise Act* or the *Excise Act, 2001*. Public servants with the powers of officers under these statutes are peace officers within the meaning of the definition of "peace officer" provided in section 2 of the *Criminal Code*. When public servants have the characteristics of a peace officer, they have the statutory powers and protections conferred on peace officers.

[29] In situations where they are only providing assistance, public servants are not peace officers. The Agency therefore required that public servants who agree to provide police forces

with assistance not carry their defensive tools in such situations since, in the Agency's opinion, unlike peace officers in carrying out their duties, they are not protected against civil or criminal liability. Moreover, participation in a support operation is voluntary when a police force is in charge of it. I acknowledge that this particular view of the status of peace officers is not universally accepted, since the union representing the applicant seems to have a different interpretation. Ultimately, what matters here is that the CBSA decided that, during searches conducted for purposes other than the statutes it is tasked to enforce, its officers may not carry certain equipment that they would be able to carry if the operation was the Agency's responsibility.

[30] The review of this issue was not made any easier by the fact that the details of the search in which the applicant was asked to participate are unknown, since the Agency declined to participate. The matter is therefore quite theoretical. The scope of this affair, based on the facts in evidence, is therefore restricted to support situations. This observation is important as it provides a better understanding of the very narrow context of the appeals officer's decision, and also of this Court's judgment giving instructions to the appeals officer.

[31] Indeed, it is somewhat surprising that a situation where it would have been possible to simply refuse to participate, this being an option that was available to the applicant, resulted in a formal refusal to work under section 128 of the Code (which, in turn, was investigated), two decisions from an appeals officer, and now a second application for judicial review, all of this since March 13, 2009. Again, the only issue here is the voluntary participation of public servants of the Agency in assisting police forces in situations that are not covered by the Agency's

mandate. Nothing more. The issue would disappear if the Agency stopped offering such support or if its public servants no longer participated voluntarily.

[32] The judgment of this Court that led to the decision under review was rendered on December 12, 2011. Almost three months later, on March 5, 2012, the applicant enquired about the holding of [TRANSLATION] "a hearing in the April to June 2012 period". He received a reply the following day. The written reply was clear, informing him that [TRANSLATION] "no new hearing would be held in this matter". The Tribunal Registrar's letter then referred to the judgment of this Court to point out that the appeals officer had to complete [TRANSLATION] "her analysis in light of the comments of the Court and not re-hear the matter". The letter concluded that the appeals officer [TRANSLATION] "[would] not hold a new hearing in this case". The applicant was thus warned more than once.

[33] There is no doubt that holding a hearing is the most sophisticated form of participation in an administrative proceeding. The rules of procedural fairness can be observed without holding a hearing. Yet that is what the applicant requested, and his request was clearly refused. So, for almost three months, he did not make any procedural fairness-related requests, and, when he did make one, he required the highest degree of procedural fairness; his request was decisively denied, and no more was heard of the matter. The applicant did not make any new requests to participate in any other manner in the exercise the Court had asked the appeals officer to perform. Is it surprising that a decision was rendered one month later, on April 4? Had there been a waiver, thus precluding the applicant from arguing a breach of procedural fairness?

[34] In fact, the obstacle to the applicant's argument that he should have been heard in some way is fundamental. It lies in the judgment of this Court.

[35] As I attempted to explain, the judgement of this Court refers the matter back to the decision maker because the analysis of one element of the file seems incomplete. The record did not change, the parties made submissions on the dynamic nature of operations such as searches, and the matter was heard. But even though it had been heard, the matter was not decided because the response to one of the questions was not complete.

[36] The applicant then wanted to be given an opportunity to make additional submissions. By definition, there was nothing new: the analysis of one question was incomplete.

[37] This is not unlike the decisions of the Supreme Court of Canada in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, and *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 [*Knight*]. The obligations of procedural fairness do not extend to requiring hearings when full exchanges have already taken place.

[38] *Canada Lands Company CLC Ltd v Alberta (Municipal Government Board)*, 2008 ABQB 51, has certain similarities with the present matter. The applicant challenged the municipal tax assessment of certain properties by the Municipal Government Board (MGB). An initial judicial review (2006 ABQB 293) had the following result:

> [136] The decision of the MGB as to the amount of the assessment is set aside and I direct the MGB to reconsider the assessment in light of these Reasons.

[39] The directed reconsideration was also judicially reviewed:

> [2] The MGB's reconsideration of the appeal of the 2003 assessment did not involve a new hearing, new evidence or further submissions. The panel wrote a new decision based solely on the record generated at the original hearing. After reconsidering its decision, the MGB issued MGB 009/07 on January 30, 2007, arriving at exactly the same assessment as in MGB 101/05; namely, $52,489,000.
>
> . . .
>
> [9] In fact, I directed in para. 3 of my formal order that the MGB "reconsider the assessment in light of the Reasons for Judgment." However, in para. 5 of that order, I left the MGB some discretion as to the manner in which it conducted its reconsideration of the assessment appeal. This allowed the MGB the option of conducting a full-rehearing, rendering its decision solely on the previous record or carrying out some form of partial re-hearing. The decision of the panel to not hear further evidence or further submissions and to render a new decision based solely on the record was within its discretion.

[40] In my opinion, the same conclusion is required in the present matter. This Court ordered that one aspect of the question be fully analyzed. In no way did it suggest that a new hearing or new submissions were required.

[41] I agree that if new evidence had been considered by the appeals officer, a new hearing, whatever its appropriate form, would have been necessary. But if the appeals officer had considered other evidence, she would have gone beyond the scope of the matter and would have exceeded what was required of her by the judgment of this Court, that is, to complete her analysis. With respect, this was all that she was entitled to do. The matter had been heard; now was the time to complete her analysis and not to re-open the case.

[42] The applicant names only one authority in support of his argument, a short excerpt from Brown and Evans, *Judicial Review of Administrative Action in Canada*, at paragraph 12:6320, entitled "Scope and Procedure of a Redetermination":

> When a tribunal reconsiders a matter either on its own motion or following judicial review it must, of course, comply with the duty of fairness.

[43] The problem is that what is at issue in the case at bar is not a redetermination. In the previous paragraphs, the authors establish what a redetermination is:

> Generally, a decision-maker may redetermine a matter after its original decision has been set aside or declared invalid on an application for judicial review. Thus, a tribunal may <u>decide a dispute for a second time</u> where its first decision was <u>quashed for breach of either the duty of fairness or a statutory procedural requirement</u>. And despite some earlier decisions to the opposite effect, it now seems clear that a tribunal may make a redetermination even though, when quashing the original decision, the reviewing court did not order that the matter be remitted. This is so because technically the effect of quashing a decision on a declaration of invalidity is to leave the parties, and the tribunal, <u>in the position that they were in prior to the making of the invalid decision</u>.
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> (Reference omitted. Emphasis added.)

[44] Rather than ordering a redetermination, this Court ordered that part of the analysis be completed. It did not question the previous analysis; in fact, it was satisfied with it. What remained to be considered was the dynamic nature of searches in order to determine whether there is danger within the meaning of the Code and how this danger can be minimized so that there is no reasonable possibility that it would occur.

[45] A panoply of remedies may be ordered following a judicial review, in particular, undoubtedly exceptional, cases even going as far as ordering specific performance (see *Canada*

(Public Safety and Emergency Preparedness) v LeBon, 2013 FCA 55). The only directive given was to complete the analysis: there was no mention of reconsidering the matter or making a redetermination because of an error. It was a question of the appeals officer finishing what she had started—on the basis of the existing file (*Francella v Canada (Attorney General)* (2003), 234 DLR (4th) 572, 313 NR 354 (FCA)).

[46] If I misunderstood and a redetermination was to be made, I would have concluded that the procedural fairness argument was raised too late, much later than at the earliest opportunity, as required by the case law.

[47] As I indicated previously, almost three months after this Court's decision to refer the matter back to the appeals officer so that she could complete her analysis, the applicant expressed his desire for a hearing, the most stringent rule of procedural fairness. He did not have to wait long for a reply. It arrived the next day and was firm.

[48] Nonetheless, the applicant did nothing for a few weeks, and the new decision was rendered a month later. In the words of Madam Justice L'Heureux-Dubé in *Knight*, above, at page 686:

> . . . Since I accept the trial judge's finding of facts that "everything that had to be said had been said" (at p. 283), the requirement of the formal giving of reasons and the holding of a hearing would achieve no more, in my respectful view, than to impose upon the appellant Board a purely procedural requirement, against the above-stated principles of flexibility of administrative procedure.

[49] In my opinion, the appeals officer was entitled to believe that the applicant was satisfied

that she simply had to complete her analysis. The reply letter was clear (*Regina v Campbell et al*, [1969] 2 OR 126). This is not to suggest that the applicant should have hurried to this Court the day after to seek a remedy for the refusal to hold a hearing: he might have been told that such a step was premature. Rather, the applicant's complete silence after the definitive refusal suggests a form of acquiescence, or at least gives the reasonable impression that he accepted the reply.

[50] As everyone knows, judicial review is a discretionary remedy that can be denied (*MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6).

[51] In the case at bar, the following factors all support a rejection of this remedy:

1. the Court only ordered the appeals officer to complete the analysis of one aspect of the affair;
2. all the evidence had been heard;
3. the parties had made their submissions;
4. the applicant, after almost three months, asked for a hearing to be held, a request that was immediately and unambiguously denied;
5. despite this definitive refusal, he took no further measures to seek other arrangements, which certainly suggests a form of acquiescence; at the very least, it is difficult at this stage to severely criticize the administrative tribunal (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2001] 4 FC 85 (FCA); *F. Zonman E Co Real Estate Ltd v Toronto Real Estate Board* (1982), 36 OR 724 (Ontario Divisional Court)).

[52] In a case with narrow parameters, including an order of this Court that simply requires a completed analysis, in which all has been said, thus eliminating the possibility of actual prejudice, and where the applicant did not argue his case on time, even though he was notified by the administrative tribunal that there would be no hearing, the balance of convenience tips in

favour of an assessment of the merit of this dispute, which dates back to March 13, 2009.

Was the decision reasonable?

[53] The second issue to be disposed of concerns the quality of the decision made by the appeals officer. The issue is whether the decision was reasonable.

[54] In fact, the standard of review was already determined in the first judgment of this Court, and there is no reason to depart from this decision (*Canada Post Corp v Pollard*, 2008 FCA 305). The parties agree.

[55] The standard of reasonableness means deference towards the administrative tribunal. Paragraph 49 of *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*]:

> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[56] Occupational health and safety is of course the expertise that has been developed by the Tribunal and its appeals officer in the case at bar. The concept of "danger" under the Code is a concept that she deals with on a daily basis. She is thus owed considerable deference. The very

nature of the concept of deference implies that there are several acceptable outcomes, and the review court cannot substitute its opinions for those of the administrative tribunal if the tribunal's opinions fall within a range of "acceptable and rational solutions".

[57] Paragraph 47 of *Dunsmuir*, above, provides the first indications of what to consider to be satisfied that a decision is reasonable. Does the decision have the qualities of reasonableness?

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[58] The applicant therefore had to persuade the Court that the decision was unreasonable because it did not fall within the range of acceptable and rational solutions. This is the burden the applicant has to discharge.

[59] In the matter at bar, the reasonableness of the decision must be assessed on the basis of the second decision, rendered in response to the order to complete the analysis. As pointed out by the applicant, and as noted previously, this new analysis is only a few paragraphs long.

[60] The appeals officer was asked to consider all of the relevant evidence to determine

whether there was danger within the meaning of the Code. If there was no danger, the refusal to work would not have been valid under section 128 of the Code. The concept of danger is dependent on the possibility that a hazard arises. For a danger to be the subject of a refusal to work, there must be a reasonable possibility, which implies a measure of objectivity. Subjective fear alone cannot satisfy this test. Consequently, the analysis that had to be completed was to focus on the reasonable possibility that a hazard arise not only before the search started (armed individual at the location before the search) or once a secure perimeter has been established around the search location, but also during the search.

[61] On judicial review, the quality of the decision issued as a result of this Court's judgment must be assessed in light of the Supreme Court of Canada's unanimous decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*], where Madam Justice Abella wrote at paragraph 14:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result . . . .

[62] We do not live in a perfect world, and cannot expect the reasons of a decision to be perfect either. Here is the test a review court should impose according to the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union*, above:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent

> element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
>
> (Emphasis added.)

[63] The appeals officer clearly understood the task imposed on her by this Court. She weighed the submitted evidence. The various assertions identified by this Court, and which I reproduced at paragraph 19 of my reasons, are outweighed by other evidence that tends to establish and support the conclusion reached by the appeals officer that we are not dealing with a reasonable possibility but a mere possibility.

[64] For example, while it is undoubtedly true that the circumstances surrounding an operation can change very quickly (testimony of a member of the RCMP) and that anyone can enter a search location if the perimeter is not being guarded (police officer of the Service de police de la Ville de Montréal), the evidence also revealed that not only no such incident had ever occurred during searches performed by Agency officers, but also the applicant himself conceded that the possibility of them occurring was low. The fact that no such incident has ever occurred does not show that the possibility is not a reasonable one, but the applicant's own concession tends to

confirm that a secure perimeter will continue to be secure given the police presence at the search location. Moreover, officers may refuse to enter a search location if no inspection has been carried out or if the perimeter is not secure at the start of the search, as this Court accepted.

[65] The same logic applies at this stage of the analysis. The appeals officer pointed out that CBSA officers always have the option of ceasing their duties if they are no longer satisfied with the safety of a location even when, as acknowledged by the applicant and a colleague of his, [TRANSLATION] “armed police officers always remained at the location where they were working to guard the location” (paragraph 123) with the support of a detailed plan prepared in advanced.

[66] Searches are undoubtedly variable operations. The flexibility conferred on officers who assist police forces is intended to minimize the hazards presented by the large variety of circumstances that can occur. The possibility that a danger materializes is a very real one. But what counts here is reasonable possibility. The possibility is minimized by an intervention plan, the police officer’s duty to guard the location and CBSA officers’ option to decide on site to state their dissatisfaction with the measures taken in light of the circumstances.

[67] In my opinion, the appeals officer, based on her analysis of the evidence provided, could reasonably conclude that, in the circumstances, there was only a mere possibility that an individual, armed or not, might manage to enter the search location, after the location had been secured and a perimeter had been established, despite the location being guarded during the search according to the operational plan. Having paid respectful attention to the decision maker’s reasons, I understand the basis of her decision. The conclusions of this decision fall within the

range of acceptable and rational solutions. They have the qualities of reasonableness, in that the decision-making process was justifiable, transparent and intelligible.

[68] Ultimately, the applicant wishes to be able to carry his [TRANSLATION] "defensive tools" during any search, because of his subjective fear of a potential danger. He appears to claim that anyone at a search location should be armed. If this were necessary, many other individuals, certainly not all of them peace officers, who assist police forces in searches because of their particular area of expertise, should also carry [TRANSLATION] "defensive tools". But being at a search location to provide technical support is quite different from the role played by peace officers who conduct the search. When security measures are taken, and particularly when the person providing support may withdraw if these measures seem inadequate before or during the search, I fail to see how the conclusion of the occupational health and safety expert, the appeals officer, could be characterized as being unreasonable. Yet that was the burden on the applicant. He did not discharge it.

[69] Consequently, the application for judicial review must be dismissed.

JUDGMENT

The application for judicial review of the decision by Katia Néron, appeals officer of the Occupational Health and Safety Tribunal Canada, dated April 4, 2012, is dismissed. With costs.

"Yvan Roy"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-887-12
STYLE OF CAUSE:	DAVID LAROCHE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 15, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	Roy J.
DATED:	July 18, 2013

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