Federal Court Cour fédérale

Date: 20221223

Docket: T-1365-21

Citation: 2022 FC 1785

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 23, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BENOIT LACHAPELLE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Attorney General of Canada [AGC] seeks judicial review of the decision of the Occupational Health and Safety Tribunal of Canada [Tribunal] dated August 5, 2021, allowing the appeal filed by Benoit Lachapelle and amending the decision previously rendered by the official delegate of the Minister of Labour [ministerial delegate].

[2] In general terms, in the context of its decision, the Tribunal interpreted the concept of danger as defined in subsection 122(1) of the *Canada Labor Code*, RSC 1985, c L-2 [*Code*]. Since 2014, danger has been defined as follows:

> ***danger*** means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered. *(danger)*
>
> ***danger*** Situation, tâche ou risque qui pourrait vraisemblablement présenter une menace imminente ou sérieuse pour la vie ou pour la santé de la personne qui y est exposée avant que, selon le cas, la situation soit corrigée, la tâche modifiée ou le risque écarté (*danger*).

[3] More specifically, and at the heart of this dispute, the Tribunal examined the meaning to be given to the word "vraisemblablement" in that definition in relation to a serious threat. In summary, the Tribunal (1) examined the meaning that the ministerial delegate gave to the term; (2) pointed to the terminological difficulty caused by the use of the word "vraisemblablement"; (3) pointed to the fact that the words used to make distinctions are in fact synonyms; (4) cited the Tribunal's jurisprudence interpreting the concept of danger; (5) cited with approval the case law characterizing "vraisemblance" (in the English version, "could reasonably be expected") as a question of "reasonable probability", "reasonable possibility", "beyond a hypothetical threat", more than "simply hypothetical" and a "probability"; and (6) rejected the notion of " raisonnablement vraisemblable" (reasonably likely).

[4] Ultimately, on the basis of its assessment of the evidence, the Tribunal found that Mr. Lachapelle, in the circumstances of his refusal, was likely to face a serious threat within the meaning of the Tribunal's jurisprudence. The Tribunal therefore concluded that when Mr.

Lachapelle refused to work in 2018, there was a danger that did not constitute a normal condition of employment.

[5] The AGC is essentially arguing before the Court that the Tribunal's finding that there was a danger is unreasonable because (1) it is important to assess the likelihood and probability of the hazard occurring, and not its possibility, and the Tribunal erroneously applied jurisprudential principles in relation to the word "likely"; (2) the evidence before the ministerial delegate showed that the hazards were only possible, but not likely; and (3) the Tribunal considered irrelevant factors, including the "low frequency, high risk" principle.

[6] The AGC also submits that the Tribunal breached the principles of natural justice and procedural fairness by relying on dictionary definitions without first giving the parties an opportunity to provide submissions.

[7] Mr. Lachapelle replies that the Tribunal's decision was not unreasonable given that (1) the term "vraisemblablement" in the French version of the definition of danger actually corresponds to the words "could reasonably be expected" in the English version and that neither of these versions takes precedence over the other; (2) the terms "vraisemblable", "possible", "plausible" and "probable" can effectively be used as synonyms; (3) it is correct to say that the jurisprudence uses terms such as "probability" or "mere possibility" to try to circumscribe certain aspects of the notion of likelihood, so the Tribunal did not ignore its jurisprudence; (4) the Court must show deference to the decision maker's factual assessment, and in this case the Tribunal considered all the important elements; and (5) the Tribunal addressed the "serious"

threat test and then applied the “low frequency, high risk” principle in the appropriate section of its analysis.

[8] Mr. Lachapelle adds that the Tribunal did not breach the principles of natural justice and procedural fairness because it used the two dictionaries not to define terms, but to illustrate that the distinctiveness of the vocabulary used is in fact not distinctive.

[9] For the reasons below, the application for judicial review will be dismissed. In short, I find that the AGC has not demonstrated that the Tribunal’s decision is unreasonable or that the Tribunal violated the rules of natural justice and procedural fairness.

II. Background

[10] In 2018, Mr. Lachapelle was a Level I correctional officer with the Correctional Service of Canada. He worked at the Special Handling Unit [SHU], also known as “super max”, a facility where male inmates who pose an ongoing danger to the public, staff and/or other inmates and who cannot be safely managed at any other maximum security institution are incarcerated.

[11] As described in the Tribunal’s decision, which is uncontested, the SHU consists of five wings around a central control station. Each wing consists of rows of inmate cells on the ground floor (floor), a frisk-search area (vestibule), a dayroom with glazed partitions, and an outdoor courtyard (yard). The areas are overhung by a gallery network with gunports. Since May 2015, one SHU officer has been armed with a Colt 556 rifle, commonly known as a C-8, replacing the less powerful 9-mm rifle.

[12] On July 16, 2018, having reasonable cause to believe that a condition existed in the workplace that constituted a danger to him, Mr. Lachapelle relied on paragraph 128(1)(b) of the Code to invoke a refusal to work in his workplace.

[13] In his refusal to work letter, Mr. Lachapelle alleged that: (1) on the SHU gallery, the 9-mm rifle was replaced by the Colt 556 rifle; (2) the Colt 556 rifle was introduced without any additional security measures, despite the fact that it is more powerful; (3) another colleague filed a complaint under section 127 of the Code in 2016 for the same reasons; (4) the windows in the SHU dayrooms are not strong enough to stop a bullet fired from the gallery, and this is a life-threatening danger for officers stationed on the main floor; (5) there is a request to replace the dayroom windows; and (6) the heatwave in recent weeks affects the behaviour of SHU inmates and increases the potential for armed intervention.

[14] Following Mr. Lachapelle's refusal to work, the procedure provided for in section 128 of the Code was followed. Mr. Lachapelle continued his refusal to work, and in July 2018, the ministerial delegate conducted the investigation provided for in subsection 129(1) of the Code to determine whether there was a danger to Mr. Lachapelle at the time he exercised his right to refuse work under section 128 of the Code on July 16, 2018.

[15] On July 27, 2018, the ministerial delegate rendered her decision. In section III of her decision, the ministerial delegate reviewed the definition of *danger* set out in subsection 122(1) of the Code, which definition I cited above.

[16] The ministerial delegate noted that this definition of danger was first interpreted by an appeals officer in *Correctional Service of Canada v Ketcheson*, 2016 OHSTC 19 at paragraph 199 [*Ketcheson*] in which the appeals officer suggests using the following three-part test to determine whether a danger exists:

> To simplify matters, the questions to be asked whether there is a "danger" are as follows:
>
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> (b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[17] With regard to the first point of the three-part test, the ministerial delegate noted that Mr. Lachapelle alleged that a life-threatening danger could be created for an officer who might be stationed on the ground floor and deployed to handle an incident in a dayroom if a shot was fired by another correctional officer from the surveillance gallery. The ministerial delegate noted that Mr. Lachapelle also alleged that should such a situation occur, the windows of the dayrooms are not strong enough to stop a bullet fired from the gallery and there is a hazard that an officer standing outside the dayroom could be shot directly or by ricochet.

[18] With respect to the second point of the three-part test, the ministerial delegate first found that the situation did not present an *imminent* threat to the life and health of the employee given that, essentially, the situation was not about to materialize.

[19] The ministerial delegate then considered whether the situation is likely to present a *serious* threat. She reviewed the concept of "serious threat" as set out in *Ketcheson* at paragraph 210:

> A serious threat is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future … A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[20] The ministerial delegate did not specifically state her conclusion that the threat was serious, and she abandoned that concept to then list the factors to be taken into consideration in determining the "reasonable likelihood" of the serious threat. We understand further on that she assumed, without confirming it, that the threat was a serious one and that this aspect had therefore been satisfied.

[21] In connection with the "reasonable expectation" of the serious threat, the ministerial delegate referred to *Keith Hall & Sons Transport Limited v Robin Wilkins*, 2017 OHSTC 1 [*Keith Hall*] and *Nolan et al. v Western Stevedoring*, 2017 OHSTC 11 [*Nolan et al.*]. She concluded that reasonable expectation requires circumstances beyond a "hypothetical threat" or a "mere probability", based on concrete facts, that would allow a reasonable person to conclude that there is a "reasonable possibility" that employees would be exposed to the alleged serious

threat. The ministerial delegate noted that the definition of danger was based on a "reasonable expectation" that the alleged situation might occur, and cited a passage from *Brink's Canada Limited v Dendura*, 2017 OHSTC 9. She then pointed out that it is "plausible" that a bullet could be fired from the surveillance gallery and that an officer stationed in proximity could be shot, and concluded that the situation is more a "possibility" than a "reasonable probability."

[22] Ultimately, the ministerial delegate was of the opinion that from an objective point of view, a reasonable person who is duly informed and aware of the circumstances of the SHU would conclude that the evidence presented did not establish that there was a reasonable probability that all the conditions would arise concurrently in order for the alleged danger to arise and that therefore, the reasonable expectation of the serious threat did not exist. On July 27, 2018, as a result of her investigation, the ministerial delegate determined that "a danger does not exist", which is one of the decisions open to her under the combined effect of subsection 129(4) and paragraph 128(13)(c) of the Code.

[23] On August 2, 2018, Mr. Lachapelle appealed the decision to the Tribunal, alleging that a danger existed.

III. The Tribunal's decision

[24] On August 5, 2021, after a *de novo* review, the Tribunal concluded that at the time of the refusal to work, there was a danger that did not represent a normal condition of employment for Mr. Lachapelle. The Tribunal therefore allowed Mr. Lachapelle's appeal and amended the ministerial delegate's no-danger decision.

[25] The Tribunal noted certain aspects of the ministerial delegate's decision and pointed out at the outset the terminological difficulty caused by the use of the word "vraisemblablement" in the definition of "danger" in the [French version] of the Code to correspond to the expression "reasonably be expected" in the English version, which has been rendered in numerous decisions by the expression "reasonable expectation" ["attente raisonnable"] The Tribunal also noted that the French translation of *Ketcheson*, originally written in English, uses the words "vraisemblablement" (vraisemblable), "probablement" (probable), and "possibilité" (possible) for the purposes of drawing distinctions, whereas according to the dictionaries Le Petit Robert and the Multi Dictionnaire de la Langue Française, the words "vraisemblable", "possible", "plausible" and "probable" are synonyms. The Tribunal added that the ministerial delegate's decision illustrated a certain confusion of terms that led the Tribunal to question the validity of her conclusions. Finally, it noted that the words used in the Code in the definition of "danger" are "reasonably expected" in the English version, which is rendered in French as "vraisemblable" and not "probabilité raisonnable".

[26] The Tribunal stated that it had to determine whether the decision of the ministerial delegate was well founded, or in other words, whether Mr. Lachapelle was exposed to a danger, as defined by the Code, at the time of exercising his right to refuse work. The Tribunal then set out the party's arguments in detail.

[27] The Tribunal first described Mr. Lachapelle's arguments. He argued that (1) the analysis must be based on the grid established by the Tribunal in *Ketcheson*; (2) the facts do not constitute an imminent threat, but rather a serious threat; and (3) particular weight must be given

to the concept of reasonable expectation in the analysis. In the Tribunal's view, Mr. Lachapelle relied on the Tribunal's decision in *Correctional Service of Canada v Sandrina Courtepatte*, 2018 OHSTC 9 at paragraph 41, according to which "… making it clear that for a danger to exist, a threat, as per any of its sources, need only have a reasonable potential of existence as opposed to existing positively. … somewhere between certainty and hypothetical".

[28] The Tribunal then reviewed the evidence presented by Mr. Lachapelle. On this point, it observed that the statistical evidence presented by Mr. Lachapelle demonstrated the occurrence of several events where the C-8 rifle was deployed in dayrooms. Thus, according to the Tribunal, the evidence showed that incidents (fights, assaults with handmade weapons) occur between inmates in these rooms, although there have never been any direct shots fired at an inmate at SHU. Mr. Lachapelle also submitted to the Tribunal evidence from a ballistics expert confirming that the shot is lethal.

[29] As for the position of the AGC, the Tribunal pointed out that the AGC, like Mr. Lachapelle, referred to the analytical framework set out in *Ketcheson* to determine whether the decision of the ministerial delegate was well founded. Before the Tribunal, the AGC maintained that the real issue is not whether a shot at an inmate is likely ("vraisemblable"), but rather whether it is reasonably likely ("raisonnablement vraisemblable") that a correctional officer behind the glazing of the dayrooms would be hit by a bullet fired from the gallery. The AGC argued that Mr. Lachapelle must demonstrate that the hazard represents more than a hypothetical situation, i.e., that there is a reasonable probability that it will occur, citing *Zimmerman v. Correctional Service of Canada*, 2018 OHSTC 14, and that it is more likely than not that the

hazard evoked would materialize. The AGC submitted to the Tribunal that each of the circumstances that must occur for the hazard to materialize was unlikely, and the hazard of them all occurring concurrently was entirely hypothetical. The AGC was therefore of the opinion that there was no danger and the hazard was neither an imminent nor a serious threat. The AGC highlighted statistical evidence with respect to firearms at the SHU illustrating that no shots at inmates occurred at the SHU between April 1, 2015, and November 20, 2019.

[30] In its analysis, the Tribunal first reviewed the salient parts of Mr. Lachapelle's statement of work refusal. The Tribunal indicated that there was an admission that the glazed partitions in the dayrooms facing the corridors were not bullet proof and that there was no claim to the effect that a shot per se through a glazing in a dayroom that struck a correctional officer on the other side of said partition, in the absence of all the mitigation, training, protective, operative or other factors that the parties dealt with extensively in their evidence and argument, might not injure or even kill the said officer.

[31] The Tribunal commented that "[e]verything hinges on the notion of the likelihood or reasonable expectation of the occurrence of the shooting situation resulting in an imminent or serious threat, i.e., harm, in light of the presence of these elements, in whole, in part or not at all". The Tribunal added that "[t]he ministerial delegate concluded that while it was **plausible** that such a shooting situation could occur, the real issue was the **likelihood** of such an occurrence, which she associated more with a **possibility** than with a reasonable **probability**, thereby appearing, as noted above, to give different meanings to terms that are essentially synonymous".

[32] The Tribunal observed that in *Ketcheson*, the decision maker had developed an analytical grid and examined the concepts of imminent threat and serious threat separately. The Tribunal also cited *Keith Hall,* in which reasonable expectation is likened to "reasonably expected", "more than a hypothetical threat" and more than "a reasonable possibility". Finally, the Tribunal referred to *Nolan et al.,* in which reasonable expectation is more than a "mere possibility" and is not "remote or hypothetical".

[33] With regard to the interpretation of the term "reasonable expectation", the Tribunal was of the view that the exercise becomes somewhat futile when it consists of attempting to make distinctions by giving different meanings to terms that have essentially the same meaning (e.g., "plausible," "possible" and "probable.") The Tribunal added that in reality, the only question to be asked is "is it likely or not?" without imposing a criterion of assurance or certainty of its occurrence. On this front, the Tribunal rejected the expression "raisonnablement vraisemblable" used by the AGC, finding that it represented a reductive approach that did not meet the criterion set by the Code, namely that of "vraisemblable" ["reasonably expected" in the English version of the Code].

[34] The Tribunal reiterated the evidence it had considered, confirmed that the opinion of the ballistics expert was helpful, and repeated certain evidence. At paragraph 91 of its decision, the Tribunal expressed its view that the hazard that an officer in the corridor adjacent to the dayrooms could be seriously or even fatally injured in the event of a shot from the gallery striking a dayroom glazed partition had been established. The Tribunal acknowledged that the use of firearms is a rare occurrence both in the SHU and in other maximum-security

penitentiaries. It commented that this same evidence, however, while serving to establish that the C-8 had not been used at the SHU, showed that this was not the case at other maximum-security penitentiaries. The Tribunal relied on the data specific to the SHU (“super max”, the most dangerous inmates and fewer of them and the short statistical reference period for the data) to conclude that the past cannot be any guarantee of the future, I am paraphrasing, and accorded little weight to these statistical data.

[35] The Tribunal then pointed out that the ministerial delegate had considered a long list of pre-conditions or measures to mitigate the hazard of the various risks to evaluate the probability of a threat and the Tribunal found that these measures were not specifically directed at situations involving the use of firearms and therefore could not be decisive factors in assessing the existence of the danger in this case and the likelihood of the threat (i.e., the issue before us in paragraph 93).

[36] Finally, the Tribunal did not accept the argument of assured success of an emergency shooting noted by the ministerial delegate, given the circumstances under which it is likely to occur.

[37] Having weighed and in fact discarded past statistical evidence, the evidence of mitigating measures in place and that related to the presumption of a successful shot, i.e., the evidence used by the ministerial delegate and justifying her finding of no danger, the Tribunal concluded that the ministerial delegate erred in her conclusion. It concluded, on the contrary, that Mr. Lachapelle, in the circumstances of the refusal, “was likely to face a serious threat within the

meaning of the *Ketcheson* and *Keith Hall & Sons Transport Limited* decisions referred to above" repeating the evidence supporting its finding in particular and referring to whether the threat could be "reasonably expected" to result in serious injury.

[38] The Tribunal cited the concept of reasonable expectation it agreed with, which it quoted from *Ketcheson* at paragraph 210: "the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person".

[39] With regard to determining whether the danger constitutes a normal condition of employment, the Tribunal reiterated that the evidence was clear as to the infrequency of the use of firearms and pointed out that the case law recognizes that "… infrequency, whatever its degree, cannot serve as a reason for not taking all the measures within the hierarchy of control set out in section 122.2 to try to eliminate it, since the potential seriousness of the hazard legitimizes the importance of mitigating measures, according to the Court in *Martin-Ivie v. Canada (Attorney General)*, 2013 FC 772, thus legitimizing the principle of 'high risk, low frequency.'" The Tribunal noted that the evidence showed that the employer did not take any mitigating or preventive measures that would have made the risk or danger residual and a normal condition of employment.

[40] The Tribunal concluded that "… at the time of the refusal to work, there was a danger that did not represent a normal condition of employment for the appellant Lachapelle" and consequently amended the no-danger decision issued by the ministerial delegate. However, with

regard to the possibility of issuing directions, the Tribunal added that it chose "… not to issue a direction at this time, but remain seized of the matter and have jurisdiction to issue any direction deemed appropriate if the parties fail to resolve the matter within 90 days of the date hereof and such request is made to me."

IV. Standard of review

[41] In view of the arguments raised by the AGC, the Court agrees with the parties that the Tribunal's decision should be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 73 [*Vavilov*]).

[42] When the standard of reasonableness applies, the role of the reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on "an inherently coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (Vavilov at para 85). The reviewing court must consider " … the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must therefore ask " … whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99 citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74 and *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 13).

[43] On reading the record and during the hearing, I had difficulty assessing whether two of the elements in the definition of danger at issue in this case—reasonably be expected and serious threat—should be interpreted in isolation or as a unit. I asked for additional representations from the parties on this issue, and they were kind enough to send them to me. However, I realize that this issue cannot be examined by the Court in the context of a judicial review because neither the parties nor the Tribunal dealt with it prior to this application for judicial review. Given that the role of the Court when considering an application for judicial review does not involve providing decision makers with the interpretation that should be given to a provision, but rather verifying that the decision maker's interpretation was reasonable or correct, depending on the case, I realize that it would be a mistake on my part to examine that issue. Furthermore, determining where this concept of reasonable expectation lies has no consequences for the record in this case given that the issue is rather to determine whether the Tribunal's interpretation of this term was reasonable.

[44] I will therefore examine the concept of reasonable expectation as it was dealt with by the Tribunal and leave aside the determination of whether reasonable expectation is an element of serious threat or a separate element.

[45] As for the allegation of a breach of natural justice and procedural fairness, the AGC quotes *Vavilov* at paragraph 127. As noted by my colleague Justice Gascon at paragraphs 13 and 14 of *Ilaka v Canada (Citizenship and Immigration)*, 2022 FC 1622:

> … the approach has not changed since *Vavilov* (*Vavilov* at para 23). The Federal Court of Appeal has repeatedly found that procedural fairness does not really require the application of the usual standards of judicial review (*Canadian Association of*

> *Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 54). …
>
> Thus, when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review, the reviewing court must, taking into account the particular context and circumstances at issue, determine whether the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair chance to know and respond to the case against them. The reviewing court owes no deference to the decision maker when considering issues of procedural fairness.

V. Positions of the parties and analysis

A. *The decision is reasonable*

(1) The interpretation of the term "reasonably expected"

a) *Arguments of the parties*

[46] The AGC argues that at the beginning of the decision when the Tribunal looked at the definition of "vraisemblance" in different dictionaries, the Tribunal was acting in such a way as to [TRANSLATION] "unreasonably influence the Tribunal's entire analysis of the concept of 'reasonable expectation' and 'serious threat' in the decision under review". The AGC argues that the Tribunal had already intimately linked the concept of "reasonable expectation" to "probability" in *Ketcheson* at paragraph 210 and that " … the mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat" and quotes *Air Canada v Canadian Union of Public Employees (Air Canada*

Component), 2020 FC 420 at paragraph 40, where the Court, addressing the concept of danger, explained that "[t]he task of the decision-maker is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future". The AGC argues that in this case, the Tribunal chose the concept of possibility rather than probability, which is a lower threshold.

[47] The AGC argues that [TRANSLATION] "on the one hand, the Tribunal recognized that the ministerial delegate distinguished between the 'possibility' and the 'probability' of the threat occurring, but on the other hand, criticized her for giving 'different meanings to terms that are essentially synonymous'". The AGC is of the opinion that the legal concepts of "possibility", "probability", "plausibility" and "reasonable expectation" are not synonyms as they are highly distinguishable in the case law.

[48] Mr. Lachapelle responds that the Tribunal's decision is reasonable. He also cites *Ketcheson* as the first decision to deal with the new definition of "danger" and notes that at paragraph 199 of *Ketcheson*, the Tribunal sets out the three-pronged test for assessing the presence of danger within the meaning of subsection 122(1) of the Code.

[49] Mr. Lachapelle notes that the Tribunal accurately indicates that the correct French translation of "reasonably expected" is "vraisemblablement" and not "probabilité raisonnable". Mr. Lachapelle is also of the opinion that it is correct to suggest that the terms "vraisemblable", "possible", "plausible" and "probable" may be used as synonyms, as described in two dictionaries, the Petit Robert and the Multi Dictionnaire de la Langue Française. Mr. Lachapelle

submits that it is untrue to claim that the Tribunal ignored the case law when it in fact discussed it in paragraphs 70 to 80 of its decision.

[50] Mr. Lachapelle adds that it is also accurate to state that the case law uses terms such as "probability" or "mere possibility" to define certain aspects of the concept of reasonable expectation, but that it is false to claim that the Tribunal completely ignored this. Mr. Lachapelle stresses that on the contrary, the Tribunal reviewed the case law related to the issue of reasonable expectation at paragraphs 70 to 80 of the decision.

[51] Mr. Lachapelle argues that the Tribunal's comment regarding the difficulty associated with the concept of reasonable expectation is reasonable and that in any event, this interpretation did not influence the outcome of the decision.

b) *Analysis*

[52] In 2014, the definition of "danger" in the Code was amended, and the parties point out that the Tribunal interpreted this new definition for the first time in *Ketcheson*.

[53] I reproduce here the three-pronged test set out by the Tribunal at paragraph 199 of *Ketcheson*, as cited by the parties:

> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or

> (b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered? [Emphasis added]

[54] The concept of reasonable expectation is undoubtedly at the heart of the analysis of the broader concept of danger, as defined in the Code, regardless of whether this reasonable expectation is interpreted separately from or together with the concept of serious or imminent threat.

[55] That said, the AGC's arguments do not persuade me that the Tribunal interpreted the concept of reasonable expectation as a possibility rather than a probability, even assuming that there is a significant difference in the meaning of the two words.

[56] As pointed out by Mr. Lachapelle, the Tribunal noted the ordinary sense of the words and the similarity in their meanings, which is not unreasonable. Furthermore, the Tribunal reviewed the case law and consistently applied the principles that emerge from it, as required by the AGC. See, for example:

> • At paragraph 78, citing *Nolan et al.*, in which mere possibility is not sufficient;
>
> • At paragraph 79, again citing *Nolan et al.,* in which the appeals officer indicated that the determination involves an appreciation of facts and passing judgment on the likelihood of occurrence;
>
> • At paragraph 79, where the Tribunal indicated that, in its etymological sense, "reasonable expectation" is associated with "probable";

> • At paragraph 96, agreeing with the concept of reasonable expectation explained in *Ketcheson* and *Keith Hall*, a concept replete with "probabilities".

[57] The AGC has not demonstrated that, in interpreting the term "reasonably expected", the Tribunal used a lower threshold than that suggested by its own case law, or that the Tribunal's decision in this regard is unreasonable.

(2) The evidence before the Tribunal

a) *Arguments of the parties*

[58] The AGC reiterates the uncontested evidence [TRANSLATION] " … [a]ccording to which recent statistics from the last three years demonstrate that there were 74 interventions requiring the use of force to control a situation at the SHU, including 19 interventions in a dayroom, without the need to use the C-8 rifle on inmates". The AGC also highlights the evidence demonstrating that the use of firearms at the SHU is relatively rare.

[59] The AGC alleges that [TRANSLATION] "[i]n assessing whether it is reasonably expected that a correctional officer behind the glazing of the SHU dayrooms would be hit by a bullet fired by a correctional officer on the gallery over the dayrooms, the onus is on the appellant to demonstrate that the alleged hazard is more than a hypothetical situation". According to the AGC, the evidence indicates instead that the hazards were only possible, and not reasonably expected.

[60] Mr. Lachapelle notes that the AGC is challenging [TRANSLATION] " … the Tribunal's analysis of the evidence, particularly in relation to its assessment of the statistics". Mr. Lachapelle reminds the Court that it [TRANSLATION] "… must show deference to the factual assessment conducted by the decision maker…" found at paragraphs 81 to 95 of the decision under review. Mr. Lachapelle maintains that this analysis of the evidence by the Tribunal is supported.

[61] Mr. Lachapelle cites the decision in *Canada (Attorney General) v Laycock*, 2018 FC 750 at paragraph 15 [*Laycock*], which stipulates *inter alia* that the reviewing court owes great deference where highly specialized expertise is applied.

b) *Analysis*

[62] As the AGC pointed out, the Tribunal was unambiguous with regard to the infrequency of the use of firearms at the SHU. The AGC stresses the statistical evidence showing that it has never been necessary to use the C-8 rifle. However, the Tribunal notes at paragraph 91 of its decision that the data regarding the infrequent use of firearms must be considered in light of various factors, including the short statistical reference period for the said data. The Tribunal therefore weighed the evidence, but accorded little weight to the statistics.

[63] It is not the role of the Court to reweigh the evidence to reach a different conclusion (*Singh v Canada (Citizenship and Immigration)*, 2019 FC 727 at para 10 citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Bhatti v Canada (Citizenship and Immigration)*, 2021 FC 1386 at para 36; *Catalyst Pharmaceuticals, Inc v Canada (Attorney*

General), 2022 FC 292 at para 186; *Haji v Canada (Citizenship and Immigration)*, 2022 FC 291 at para 35; *Ramirez Arroyave v Canada (Citizenship and Immigration)*, 2022 FC 426 at para 19). This principle is all the more true given that "[g] reat deference is owed by a reviewing Court where highly specialized expertise is applied in the employment context. This is particularly true in a prison environment where multifactorial considerations abound" (*Laycock* at para 15).

[64] The AGC's argument to the effect that another decision maker already characterized the situation as a possibility, suggesting that it was not reasonably expected, is not persuasive.

[65] The AGC's argument that the Tribunal issued a completely speculative finding in stating that the past cannot by any guarantee of the future is hardly persuasive either. In the context of paragraph 91 of the decision under review and the elements that the Tribunal considered in its decision, this comment is not unreasonable. I would point out that in a judicial review, the burden is on the applicant, who must establish that the decision is unreasonable. Paragraph 31 of the AGC's memorandum stating that the conclusion does not in any way meet the test established by the case law is simply insufficient to persuade me of the unreasonableness of said conclusion.

(3) Consideration of irrelevant factors

a) *Arguments of the parties*

[66] The AGC argues that the Tribunal was wrong to apply the principle of "low frequency, high risk" at paragraphs 96 and 102 of its decision, in the context of determining the very

existence of a danger and not simply when analyzing the normal condition of employment, which is a fatal error.

[67] The AGC cites *Martin-Ivie v Canada (Attorney General)*, 2013 FC 772 at paragraph 41 [*Martin-Ivie*] in stating the following principle: "where the consequences of a particular event are dire or critical for an individual, prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of that event occurring". In that decision, the Court commented that (*Martin-Ivie* at para 44):

> … the Code does not require or indeed even permit the application of the "low frequency, high risk principle" to the application of the definition of "danger" in the legislation. There is nothing in the definition of "danger" set out in section 122 of the Code which would allow for the application of the "low frequency, high risk" principle as the wording of the definition contemplates that all dangers are to be assessed in a similar way.

[68] I note that section 122 was worded differently in 2013, as follows:

> "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.

[69] Mr. Lachapelle responds that this claim by the AGC is incorrect because the Tribunal was in fact addressing the criterion of the "seriousness" of the threat. Mr. Lachapelle maintains that the principle of "low frequency, high risk" was in fact applied at the appropriate stage of the

analysis, i.e., under the analysis related to paragraph 128(2)(b) of the Code [TRANSLATION] "Is the danger raised a normal condition of employment?"

b) *Analysis*

[70] I agree with Mr. Lachapelle's arguments. The *Ketcheson* decision equates serious threat with severity of harm and important consequences (*Ketcheson* at para 130). As indicated by Mr. Lachapelle at paragraph 54 of his memorandum, the seriousness of the consequences of being struck by a bullet identifies the "serious" nature of the threat.

[71] The principle of "low frequency, high risk" was only raised by the Tribunal at the appropriate stage of the analysis, i.e., when dealing with the issue under paragraph 128(2)(b) of the Code.

B. *The Tribunal respected the principles of natural justice or procedural fairness*

(1) Arguments of the parties

[72] The AGC reiterates that the Tribunal wrongly concluded that certain terms related to the concept of danger are synonyms (paragraphs 5 and 70 of the decision) and argues that [TRANSLATION] " … it is not open to the Tribunal to use ordinary dictionaries for legal concepts that have a well-defined meaning in the case law and to draw a conclusion on a determinative issue, all without giving the parties an opportunity to present arguments". On this point, the AGC

cites *Pfizer v Deputy Minister of National Revenue*, [1977] 1 SCR 456 at page 463. The AGC is of the opinion that [TRANSLATION] "[t]he Tribunal did not give the parties any notice that the meaning of terms central to its analysis would be based on dictionary searches".

[73] Mr. Lachapelle responds by explaining that [TRANSLATION] "the Tribunal did not use the two dictionaries to 'define' terms, but rather to illustrate the difficulty associated with the concept of 'reasonable expectation' and its vocabulary used, which is sometimes distinctive, when in its etymological sense, 'reasonably expected' is associated with 'plausible', 'possible' and 'probable.'

[74] Mr. Lachapelle alleges that it would be pointless to provide the parties with an opportunity to present arguments given that the [TRANSLATION] "… Tribunal was only voicing a criticism and/or an observation on the difficulty presented by the concept of reasonable expectation, and the parties could not add anything material to that debate".

(2) Analysis

[75] The Federal Court of Appeal recently reiterated the principle of procedural fairness in *CSX Transportation Inc v ABB Inc*, 2022 FCA 96 [*CSX Transportation*]. In that case, the Court had not given the parties an opportunity to make submissions on the applicability of the *Civil Code of Québec*. The Federal Court of Appeal stated that "[t]he Federal Court need not have fleshed out the issues for the parties in much detail at all. Rather, it only had to flag the issues with enough particularity to facilitate the making of submissions" (*CSX Transportation* at para 9).

[76] The AGC's argument that there was a breach of the principles of procedural fairness is closely tied to the first issue examined in the context of this decision, on the reasonableness of the interpretation of the criterion of reasonable expectation. In fact, the AGC argues that it is not [TRANSLATION] "open to the Tribunal to use ordinary dictionaries for legal concepts … , all without giving the parties an opportunity to present arguments".

[77] I do not agree with this argument, having found in the first part of this decision that the Tribunal did not rely on dictionary definitions to define legal concepts that have a defined meaning in the case law. On the contrary, as noted above, the Tribunal in fact relied on said relevant case law. For that reason alone, the AGC's argument fails.

[78] Furthermore, while it is not determinative in this case given my aforementioned conclusion, I note that the parties' submissions to the Tribunal are not in the applicant's record, and are therefore not before this Court. It is difficult, if not impossible, to determine what the parties did or did not argue before the Tribunal without access to the arguments.

[79] In short, I am not persuaded that the process followed by the Tribunal was not fair.

VI. Conclusion

[80] For the foregoing reasons, the AGC's application for judicial review is dismissed. I find nothing irrational in the decision-making process followed by the Tribunal or in its findings. The Tribunal's decision reflects the required transparency, justification and intelligibility and is not tainted by any reviewable error. According to the reasonableness standard, it is sufficient for the

decision to be based on an inherently coherent and rational chain of analysis and to be justified in relation to the facts and law that constrain the decision maker. The AGC did not demonstrate that such was not the case her, particularly in view of the Tribunal case law interpreting the issue of reasonable expectation in the definition of danger.

JUDGMENT in T-1365-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondent in accordance with rule 407.

3. The parties must indicate to the Court what information they consider confidential no later than January 16, 2023.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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