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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE  June 13, 2023 13 juin 2023  Lindsay Krieger	D É P O S É
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File No.

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**Matthew Duiker, Tim Cotton and Tristin Kerekes**

Appellants

-and-

**Attorney General of Canada**

Respondent

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Edmonton, Alberta.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 13, 2023

Issued by: \_\_\_\_\_  
(Registry Officer)

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AND TO: Mimi Sukhdeo, Regional Director  
Labour Program – Employment and Social Development Canada  
1100-300 West Georgia Street  
Vancouver, BC V6B 6B4

## APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Federal Court's order of the Honourable Justice Paul Favel dated May 19, 2023 in Court File T-685-22 by which he dismissed the Appellants' application for judicial review of a decision of the Regional Director of the Labour Program of Employment and Social Development Canada ("ESDC").

THE APPELLANTS ASK that the Federal Court of Appeal:

- set aside the Federal Court's Decision;
- grant the Appellants' application for judicial review;
- remit the matter back to the ESDC for reconsideration in accordance with the reasons of this Honourable Court;
- grant the Appellants their costs in this Court and the Court below; and
- grant such further relief as counsel may advise and this Honourable Court will permit.

THE GROUNDS OF APPEAL are as follows:

### **Background**

This appeal concerns a decision by the Regional Director of the Labour Program of the ESDC, dated March 3, 2022 (the "ESDC Decision"), which concluded that a work refusal at the Edmonton Institution was made in bad faith, and which the ESDC accordingly refused to investigate. The ESDC Decision was subsequently upheld on judicial review by Justice Paul Favel, in a decision dated May 19, 2023 (the "FC Decision").

At the time of the events leading to the work refusal described below, the Appellants worked as correctional officers at the Edmonton Institution ("EI"), a maximum security prison.

On January 8, 2022, an altercation between inmates occurred on one of EI's cell blocks. In an attempt to stop the fight, a correctional officer fired five warning shots from a Colt C8 rifle. After the warning shots did not stop the fight, a shot was fired at one of the individuals. The shot missed, however, and the round penetrated a fire door that separated two cell blocks, subsequently striking part of a riot barrier pillar behind the door.

Following this incident, a work refusal pursuant to s 128 of the Canada Labour Code, RSC 1985, c L-2 (the "Code") was made. As a consequence of the work refusal, affected correctional officers began to work a "modified routine." Under the modified routine, inmate activity and access was reduced, non-managerial correctional officers oversaw only limited movement of inmates, while management handled other inmate movements, for example, the movement of inmates in and out of yards and the mixing

of inmates behind barriers. Under a “normal routine,” such duties would have been performed by non-managerial correctional officers.

The work refusal was eventually referred to ESDC, which made a finding of danger. The ESDC directed the employer to take measures to correct the hazard.

On February 8, 2022, the employer removed the C8 rifles from the internal sub-control posts within EI.

On February 10, 2022, Matthew Duiker was informed by management that correctional officers would be returning to the normal movement routine, effective immediately. Following this announcement, Mr. Duiker and certain other employees informed management that they were refusing under s 128 of the Code to perform their duties as correctional officers on the internal sub-control posts while inmates were outside of their cells. The basis for the refusal was that the lack of an immediate firearm response from the sub-control constituted a danger to employees working on the floor among inmates.

Following certain steps taken pursuant to the Code, the work refusal was eventually referred to the ESDC.

### **The initial decision**

By her decision, dated March 3, 2022 (and communicated to the Appellants on the same day), Ms. Sukhdeo (a Regional Director of ESDC) concluded that the work refusal was in bad faith and refused to investigate the matter pursuant to s 129(1)(c) of the Code. Among other things, the Regional Director found that at the time of the refusal the refusing employees were not conducting their normally scheduled work routine, so there was no imminent threat of serious harm. Furthermore, the Regional Director found that the work refusal “demonstrated bad faith in bypassing the Internal Complaint Resolution Process to work in a collabrative [sic] manner with the established health and safety committee, and attempt to resolve this matter within the institution.”

The Regional Director accordingly ruled that, pursuant to s 129(1.2) of the Code, the refusing employees were no longer entitled under s 128(15) of the Code to continue to refuse to work and were to return to conducting their normally scheduled work routine within the institution as directed by the employer.

### **The decision below**

The Appellants sought judicial review of the ESDC Decision on the basis that it was unreasonable and made in a procedurally unfair manner. On May 19, 2023, the Court below issued its decision in the matter (the “FC Decision”). The FC Decision upheld the ESDC Decision, with the reviewing Justice finding the ESDC Decision was both reasonable and procedurally fair.

The Justice gave two bases on which the ESDC Decision’s finding of bad faith was

reasonable. First, the Justice cited that the work refusal option under the Code was only to be used in emergency situations and that “the inherently dangerous work environment of an institution such as the EI makes it difficult to envisage a situation where a refusal to work due to violence or danger could be justified.” Second, the Justice referred to what he viewed to be contradictory positions taken by certain employees between the January and February work refusals. The Justice found that either of these points would have permitted the ESDC to make a finding of bad faith.

However, neither of these points formed the basis for the ESDC’s finding of bad faith. The Justice accordingly upheld the ESDC Decision for reasons not actually given, something that is not appropriate on a reasonableness review.

Furthermore, the Justice acknowledged that there was evidence that the parties attempted to work collaboratively to solve the correctional officers’ concerns prior to the February 10, 2022 work refusal. This finding is directly contrary to the ESDC Decision’s finding that the work refusal was done in bad faith precisely because there was no attempt to work collaboratively within the institution to resolve the issue.

The Justice also concluded that the ESDC Decision had been made in a procedurally fair manner. He made this finding despite recognizing that it appeared that the ESDC Investigator charged with reviewing the work refusal did “not appear to have contacted any of the Applicants” or union representatives to discuss the work refusal or the various allegations Employer representatives made about the work refusal and the union’s alleged involvement in it. The Justice also acknowledged that the Appellants learned that the ESDC considered them to be acting in bad faith only after the Appellants received the ESDC Decision. The Appellants were thus never provided an opportunity to respond to the ESDC’s bad faith finding, which is a breach of procedural fairness.

### **Basis for the appeal to this Court**

The Appellants submit that the Justice below erred by:

- Failing to properly apply the reasonableness standard of review;
- Unreasonably upholding the Decision based on reasons not actually given by the decision-maker;
- Unreasonably making findings of fact and/or law based on matters not found in evidence, contrary to the evidence, or contrary to the weight of the evidence;
- Unreasonably taking into account irrelevant considerations and/or failing to take relevant consideration into account;
- Unreasonably interpreting and/or applying legislation and/or case law;
- Failing to find a breach of procedural fairness; and

- Such other grounds as Counsel may advise and this Honourable Court may permit.

June 13, 2023



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*(Signature of solicitor or appellant)*

Adam Cembrowski

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SOR/2004-283, ss. 35 and 38