Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada (Correctional Service) v. Glenn Brown and Kevin Kunkel, 2013 OHSTC 20

Date: 2013-07-24
Case Nos.: 2011-02
Rendered at: Ottawa

Between:

Correctional Service of Canada, Appellant

and

Glenn Brown and Kevin Kunkel, Respondents

and

UCCO-SACC-CSN, Intervenor

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by a health and safety officer.
Decision:	The direction is confirmed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Martin Desmeules, Counsel, Treasury Board, Legal Services, Department of Justice
For the respondents:	Mr. Jordan Schmahl, Workplace Health and Safety Committee Co-Chair
For the intervenor:	Mr. Giovanni Mancini, Counsel, Laplante et associés

REASONS

[1] This appeal has been brought by Correctional Service of Canada (CSC) against a direction issued by Health and Safety Officer (HSO) Robert Tomlin at the conclusion of the latter's investigation into the work refusals registered on December 14, 2010, by respondents Glenn Brown and Kevin Kunkel. The respondents were at the time and still are employed by the appellant in the capacity of correctional managers (CM) at the federal penitentiary known as Warkworth Institution.

[2] This direction, which was issued pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code* (the Code) and thus can be referred to as a "danger" direction, followed the actions taken by the two respondents who were claiming by their refusals that there existed a "clear danger" for the CMs when in areas of inmate activity due to not having been issued individually fitted anti-stabbing protective vests and having been instructed by Warkworth Institution management not to wear protective vests in the normal course of their duties.

[3] At the time of those refusals, actually on the date preceding said refusals, the wearing at all times of individually fitted stab resistant vests had become mandatory for correctional officers (CO) effectively being supervised by CMs such as the two refusing employees. HSO Tomlin arrived at the conclusion that the performance of an activity constituted a danger to the said employees while at work in that "correctional managers (were) regularly exposed to the hazard of unpredictable behaviour of inmates without having appropriate protection." More specifically in the text of the direction, HSO Tomlin referred to the employer obligation at paragraph 125(1)(*l*) of the Code to provide "prescribed safety materials, equipment, devices and clothing" to its employees, and the required regulatory adjunct at subsection 12.9(c) of the *Canada Occupational Health and Safety Regulations* that requires the employer, in this case the appellant, to provide "an appropriate body covering where there is a hazard of injury to or through the skin in a work place."

HSO Tomlin's direction, issued on December 20, 2010, reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*)
>
> On 12 December 2010, the undersigned health and safety officer conducted an investigation following a refusal to work made by Mr. Glenn Brown and Mr. Kevin Kunkel and employees they represent in the work place operated by Correctional Service of Canada, being an employer subject to the Canada Labour Code, Part II, at WARKWORTH INSTITUTION, 15847 COUNTY RD. 29, Campbellford, Ontario, K0K 3K0, the said work place being sometimes known as CORRECTIONAL SERVICE OF CANADA.
>
> The health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

> Correctional Managers are regularly exposed to the hazard of unpredictable behaviour of inmates, without having appropriate protection.
>
> Subsection 125.(1)(l) of the Canada Labour Code Part II, Occupational Health and Safety
>
> Paragraph: 12.9(c) of the Canada Occupational Health and Safety Regulations
>
> > Where there is a hazard of injury to or through the skin in a work place, the employer shall provide to every person granted access to the workplace
> >
> > (c) an appropriate body covering.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the Canada Labour Code, Part II, to protect any person from the danger no later than 20 December 2010.
>
> Issued at Warkworth, this 20th day of December, 2010.
>
> BOB TOMLIN
> Health and Safety Officer
> […]

[4] Based on the wording used in the direction by HSO Tomlin, and the item of personal protective equipment central to the employee refusals and the HSO's consideration, it would thus appear that the latter's issuance of such "danger" direction was based on his identifying the hazard as being that of injury to or through the skin in a work environment marked by the element of unpredictable human behaviour. The words used by the HSO in the conclusion of his investigation report, which resulted in the direction, clarify the officer's thinking. He stated:

> Correctional Managers spend 4-6 hours per day in close proximity to and/or in direct contact of inmates. The Correctional Manager job hazard analysis indicates they are at significant risk of exposure to the known hazard of unpredictable inmate human behaviour that can result in assault and/or hostage taking.

[5] While the employees directly concerned by the present appeal are CMs, the bargaining agent representing COs across Canada, and thus those COs working at Warkworth Institution alongside the respondent CMs in this case, sought and was granted by the undersigned authorization to intervene in the proceeding, with the appellant not objecting. Counsel for said bargaining agent submitted that UCCO-SACC-CSN has had extensive dealings with CSC on the issue of protective vests central to the present case which are seen as fundamental to the safety and security of COs across Canada, and that any ruling concerning such piece of personal protective equipment in this case is likely to affect COs to one extent or another. The authorization to intervene that was granted was however restricted to cross-examination of the witnesses called by the appellant and the

respondents and the presentation of closing arguments. The intervenor was not authorized to lead evidence in the case.

[6] It needs to be pointed out at this time, in light of the authorized intervention by UCCO-SACC-CSN and even though counsel for the appellant may have expressly made such comment solely in his final submissions, that the present appeal is not about the issuance of fitted stab resistant vests to COs, but the fact that CMs may not wear such protective equipment and the danger that this may create for them. As such, whether the fact that CMs do not wear such vests may create a danger for COs who may, for example, be required to step between a menacing inmate and an unprotected CM, is not the issue with which I am seized and is not relevant to the determination of this appeal.

Background

[7] Warkworth Institution is situated in Ontario and, within the established federal penitentiary security classification order of minimum, medium and maximum, is classified as a medium security institution. At the time of the hearing, it held a population of 602 inmates, making it the largest such institution in the country. Approximately 15 CMs such as the two respondents are employed at Warkworth Institution.

[8] Evidence was received from multiple witnesses to the effect that in addition to the official institution classification previously mentioned, penitentiaries are also unofficially designated, from a practical standpoint, as high or low medium security, depending, among other elements, on the general characteristics of their individual inmate population. While the appellant did present evidence and argue that such designation held no official sanction, it did not go as far as claiming that factually such designation did not exist or was not used.

[9] Considerable testimony was received to the effect that Warkworth Institution is considered a “high medium” facility, meaning that the inmate population is more violent, that there are more incidents and consequently that the danger to staff is greater. In fact, for the 2009/2010 period, Warkworth Institution had the highest number of reportable incidents of all medium security institutions in Ontario (837), a number that is effectively higher than any Ontario institution, regardless of classification, as well as the highest number of violent incidents (93) for its group of institutions, one that exceeds even the combined total of such incidents for all maximum security establishments in the province.

[10] The investigation report by HSO Tomlin provides a concise outlook as to the origin of the present case and the main background elements that were considered by the HSO and will effectively need to be considered by the undersigned.

[11] The respondents Brown and Kunkel’s refusals concerning the present matter were preceded by the following situations. Mr. Brown had made a complaint under the *Internal Complaint Resolution Process* (subsection 127.1(1)) established by the Code and which requires that it be investigated by an employee and an employer member of the work place health and safety committee. Although the complaint was upheld, the

Institution warden disagreed with the outcome and ordered the CM not to wear a protective vest and obviously did not agree that Mr. Brown be provided with a fitted vest.

[12] In the case of Mr. Kunkel, at the time of his refusal, he was an acting CM who had previously been fitted with such a vest as a CO. In his acting capacity, he was also instructed not to wear his own vest. Both opted to refuse to work because of the potential danger they faced in the execution of their regular duties in areas of inmate activity.

[13] The appellant does not disagree with what has led to the refusals. It argued to the HSO and essentially has argued before the undersigned that CMs are not "first responders" to incidents involving inmates and therefore should not be in the vicinity of an inmate in such circumstances without having a CO nearby.

[14] The facts established by the HSO do not differ from what has been presented to the undersigned and thus the latter's report does offer a complete background to the determination that will follow. CMs receive the CSC core training and are virtually always promoted to CM from the CO position.

[15] CMs directly supervise COs. They wear virtually the same uniform as the COs, save for the colour of their shirt and the number of gold stripes on their epaulets. They are issued handcuffs, search gloves and CPR masks and are expected to have those on their person, the same as COs. The CM(s) office(s) is situated in the inmate living units, off the hallway leading from the entry door to the ranges. Inmates go regularly by the said office throughout the day and evening and there is often direct contact between the latter and the CM. The door to the said office is not a CSC standard secure door.

[16] In cases of response to emergencies, CMs are not considered first responders. On every shift, a team of four COs make up the Institution emergency response team. The primary function of the CM is to coordinate the response and supervise CO activity during the response to said emergency. However, as required by CSC Commissioner's Directive 567-2, CMs have to attend the scene during the emergency response and as a result are put in the vicinity of inmates who may be engaged in undesirable or criminal behaviour. It was noted by the HSO and agreed by all parties before the undersigned that where dictated by circumstances, CMs may themselves engage inmate(s) if necessary. On the subject of response to certain situations, CMs may be called upon to respond to situations where an inmate may be irate towards or have some grievance against a particular CO and be demanding to see the CMs. While management maintains that CMs should not always respond to these types of situations, it nonetheless recognizes that this constitutes a common practice.

[17] In the course of their duties, CMs are regularly deployed to the hospital, canteen, kitchen and methadone program, primarily to observe and ensure that the various activities associated with these areas proceed without disruption. These are all areas where large numbers of inmates are present and consequently the potential for violence is increased. In some instances, CMs conduct some of those activities with no CO present. Should certain situations arise in those areas where a response is needed, CMs may be required to act as first responders due to their proximity to the occurrence.

[18] While management has expressed the view that the risk of CMs becoming the target of an inmate assault is no greater than the risk to other non-CX staff such as parole officer, nurse, doctor or policeman, there was and still is between all parties agreement that CMs spend daily four to six hours in close proximity to or in direct contact with inmates. Throughout the day, there exists the potential for CMs to be deployed throughout the institution to backfill a CO position for a period of time and a variety of reasons. In such circumstances, they have access to a pool of protective vests that they can wear, as confirmed before the undersigned by Janice Sandeson, Assistant Warden, Operations. Those however are not fitted to individual CMs and as a result may not provide the appropriate protection. This was at the crux of the issue before the HSO and remains such before the undersigned.

[19] The investigation report by HSO Tomlin notes that in 2009, the co-ordinator of correctional operations completed a CSC-Job Hazard Analysis worksheet at Warkworth Institution which showed a weighted score of 100 out of a possible 125 for both the risk of inmate assault on CMs and the risk of a CM being taken hostage, which the HSO described as a significant risk of exposure to such hazard.

[20] In his description of the CMs circumstances, HSO Tomlin also made mention of two specific types of situations where CMs may be at risk. First, he noted that many inmates are not comfortable living in the general population at the institution for a variety of reasons, debts being one reason that was mentioned at the hearing, and thus prefer to be in segregation or in a maximum security unit where they are isolated from other inmates. It would appear that it is common knowledge that if an inmate assaults a CM, this will result in isolation or segregation of the inmate. According to the HSO, this makes the CM a potential target of inmate aggression. Along the same line, double bunking has been a developing situation in penitentiaries, brought about by an increasing inmate population and dwindling space. Inmates do not like double bunking. CMs are the ones who do the double bunking assessment and decide which inmates will be affected. In the HSOs opinion, this could also increase the risk of assault from a dissatisfied, aggressive inmate.

Issue(s)

[21] HSO Tomlin justified the issuance of his direction on a danger being constituted by the performance of an activity by the respondent CMs at Warkworth Institution, and then added some specificity by stating that said CMs in the exercise of their duties had to contend with the hazard of unpredictable inmate behaviour while not having or being provided with appropriate protection, that protection being an appropriate body covering to protect against the hazard of injury to or through the skin in that work place. This conclusion by HSO Tomlin thus entails what I would describe as four elements.

[22] First there are the duties of a CM. Second there is the environment where said duties are executed to which one can add a third element, which is that of unpredictable inmate behaviour. Finally, the fourth element has to do with the risk or hazard of injury to or through the skin which would call for the use of an appropriate body covering. The appellant is claiming that no danger existed for the two respondents on the day of their refusal, firstly because nothing had changed in the conditions at the institution from

preceding days and as such nothing could be construed as having developed into a "danger" and secondly, because their duties do not require that they act as first responders in situations involving inmates actions, which in essence would mean that if they execute their duties as their employer intends, they would not be put at risk and thus would not need the body protection central to this matter, which is a fitted stab protective vest.

[23] HSO Tomlin concluded that there existed a danger for the respondents on December 14, 2010.That is the issue I have to determine, taking into account the elements mentioned above.

Submissions of the parties

[24] The parties called a total of nine witnesses, four for the appellant and five for the respondents. All those witnesses averaged more than 20 years of experience in correctional work. There is agreement between all parties that although those witnesses are not or have not been assessed as experts, the undersigned can defer to their opinions, as experienced ordinary witnesses. The parties offered as support for this the words of the Federal Court in *Verville* v. *Canada (Correctional Services)*, [2004] F.C.J. No. 940 (F.C.) (QL), at par. 51:

> Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.

A) Appellant's Submissions

[25] Relative to the joint position of the parties expressed above, the appellant submitted however that finding support for one's opinion or conclusion on that of experienced ordinary witnesses does not mean that an appeals officer can forfeit his jurisdiction on the issues before him. As such, the appellant is of the view that the undersigned owes no deference to any witnesses' opinion that a danger exists or that a hazard "rises up to the level of constituting a danger". While there may be many witnesses brought by each side, counsel made it a point of stating that the determination to be reached on the evidence presented has nothing in common with a poll. As such, as an appeal before an appeals officer is construed as a *de novo* hearing, only the facts in evidence before the appeals officer can guide the latter's decision and consequently, no deference is owed to the findings of fact or the conclusion arrived at by the HSO.

[26] The appellant's basic position is that case law has determined that the right to refuse to work must be seen as an emergency measure, thus not meant to address long standing problems such as that concerning the wearing of fitted vests by CMs, and thus will be justified only in specific and exceptional circumstances. As such, on December

14, 2010, the date of the actual refusal by the respondents, it was business as usual at Warkworth Institution, nothing out of the ordinary was occurring and there was no heightened level of risk or particular situation. As a result, the appellant has argued that on that day, the respondents had no reasonable cause to believe that there was a danger, as supported by the Threat Risk Assessment conducted by Assistant Warden, Operations Sandeson, which had shown nothing out of the ordinary. Furthermore, there was no factual indication on that specific day that the situation would change that day or the next.

[27] The appellant argues further that there can be no doubt that the timing of the refusal to work by the respondents is linked with the issuance of fitted stab resistant vests to COs who started to wear them on the day prior to the refusal, said refusal therefore not capable of being linked to a particular hazard, let alone a danger. CMs thus cannot refuse to work because they have direct contact with inmates and the unpredictability of human behaviour, since this had not changed. This should be viewed as a normal condition of their employment and as such, in itself would be sufficient to dispose of this appeal.

[28] While disputing the interpretation put by HSO Tomlin on the information obtained through his investigation, the appellant does not dispute the accuracy of the factual information collected by the HSO in the course of said investigation. In point of fact, the testimony given by all the witnesses called by the appellant would tend, in the undersigned's opinion, to reinforce those findings of fact by the HSO. That evidence has thus established or reaffirmed the following.

[29] The stated duties of CMs do not call for them to act as first responders relative to emergency situations or incidents that may occur while they are on duty. That role is reserved for COs (CX 1 and 2) generally and particularly to four COs that make up the first responders team on every shift. The stated role of CMs calls for them to be present in all such instances, observe COs dealing with such situations and be available and prepared to advise, react, order certain actions that would in all likelihood concern and/or impact on an inmate or inmates involved. That being said, it has been established that quite often, CMs will be required by the circumstances or the nature of the incidents or emergencies, or because they happen to be alone or first on site, to act without delay and thus become *de facto* or situational first responders and intervene even physically to deal with the situations at hand. While in their stated duties by the employer, they are not supposed to act in this manner, the fact that they do is known and accepted as fact by the appellant.

[30] Just like COs, CMs interact constantly with inmates, are present in their vicinity, even proximate vicinity and are often required to make decisions or endorse decisions by COs or order measures that will impact on inmates and actually affect their life in detention. Such would be, for example, decisions relative to segregation or double bunking, charges relative to disciplinary faults and decisions affecting certain inmate privileges.

[31] Apart from being required to take part or be present in certain segments of the daily routine of inmates, such as canteen, methadone, meals and others, CMs are easily accessible to inmates who can go by, be active in proximity of and even access and enter

the CM's office, often with no CO in close proximity or even actually present, thus having the CM alone with an inmate who may not even have been searched.

[32] It is established fact that within the walls of the Institution, inmates have access to many diverse items that can be turned into some form of weapon, as has been clearly demonstrated through exhibits A-3 and A-4 relative to a single institution-wide search that resulted in the finding of 33 such knives, shivs and shanks that can only have one purpose, that of injuring someone or worse through stabbing. What's more, the appellant, through its own witnesses, has recognized that the presence of such items or weapons is a constant situation that cannot be completely or permanently eradicated. However successful searches and seizures may be, the appellant has recognized that new weapons will rapidly surface again, sometimes the following day.

[33] The issue central to the present case necessarily calls into consideration the fear or risk of assault, in the present case assault on CMs. The evidence has shown that the concept of assault is diverse in that an assault can be verbal threats, gestures, various physical contacts that can reach various degrees of violence, and others. All appellant witnesses testified to at least having had knowledge of assaults on inmates and on COs or having witnessed such assaults and, for some, of having themselves been assaulted in one way or another. I can add here that the witnesses that were called by the respondents have also testified along the same line.

[34] A report filed as Exhibit A-5 (tab 8) by the appellant shows that between March 5, 2010, and November 1, 2011, there were three such assaults on CMs at Warkworth Institution. At the same time, the same report shows that between financial year 2007/2008 and 2011/2012, no less than 55 such assaults, this time on other staff, which I take to mean COs for the most part, occurred at Warkworth Institution. It needs to be pointed out here that the evidence by the appellant is the same as that obtained by HSO Tomlin to the effect that while there may be a complement of 15 CMs for the Institution, said managers are often called to backfill, in other words to replace, COs during posts where there may be a shortage of such officers for whatever reasons. In those circumstances, the evidence is that subbing CMs are required to wear protective vests, those being taken from a pool of such vests which, however, would not be fitted to their personal measurements, unless in some cases, prior to becoming a manager, one would have been provided with a personal fitted vest as a CO and would use it, which was actually the case for respondent Mr. Kunkel. Finally, CMs carry on their person search gloves, mask and handcuffs.

[35] As stated above, it is the position of the appellant that at the time of the refusal, there existed no circumstance that would have differed from the previous day or days and that as such, there was no foundation for the refusal by the respondents. According to counsel, HSO Tomlin put weight on the fact that CMs spend a significant amount of time daily in proximity of and/or in direct contact with inmates, something that is amply established through the evidence and not contested by the appellant. Furthermore, counsel for the appellant also pointed out that the HSO relied on the Job Hazard Analysis for CMs to conclude that they are exposed to the hazard of unpredictable human behaviour that can translate into assault and/or hostage taking, that on the basis of a weighted score of 100/125, a formula actually provided by the appellant employer with a

score that would be the same for many other identified hazards such as slipping/falling/tripping or even falling down stairs. Stated differently, counsel argued that said score shows that the risk of being assaulted by an inmate may be no more likely than the risk one faces while walking or climbing stairs. Based on this, the appellant submitted that the Job Hazard Analysis carries no weight in the determination of whether a danger existed. Therefore, as the HSO, according to the appellant, failed to identify any particular circumstances that could have led to the latter's finding that a danger existed as per the proper legal definition of "danger" in the Code, HSO Tomlin thus erred in finding that there was a danger.

[36] It is the appellant's position that the respondents did not face a danger, as defined in the Code and case law, on December 14, 2010, nor did they at any other time. Noting that in *Martin* v. *Canada (Attorney General),* 2005 FCA 156, the Federal Court of Appeal had stated that a finding of "danger" cannot be grounded in speculation or hypothesis, but through an appeals officer weighing the evidence and determining whether it is more likely than not that the circumstances expected to give rise to the injury would take place in the future, counsel referred to the words of the Federal Court in *Canada Post Corporation* v. *Pollard*, 2007 FC 1362, to underline the four elements that need to be satisfied to find that an existing or potential hazard constitutes a danger. The facts of the case must thus establish the following:

> [66] […]
>
> (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;
>
> (2) an employee will be exposed to the hazard, condition or activity when it presents itself;
>
> (3) exposure to the hazard, condition or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
>
> (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered,

with there needing to be a reasonable possibility that the circumstances under which the illness or injury could be expected to be caused will occur in the future.

[37] In light of the above, the appellant puts the legal test for determining whether a "danger" exists as a matter of probability. In short, for such a finding, the determination to be made is whether it is more likely than not that what the respondents are asserting will take place in the future as a reasonable possibility as opposed to a mere possibility. The appellant recognizes that at any given time, various stabbing weapons are present in the Institution, and it does not contest that if a person is stabbed, such will likely result in an injury to one or many parts of the body. However, the appellant is of the view that the scenario in which a CM is stabbed does not meet the test in that it is not a reasonable possibility, but only a mere possibility. While the appellant does not deny that inmates have access to a multitude of items that could be used as weapons and that it is

impossible to completely eliminate inmates' access to such items, the appellant points out there is no evidence that a stabbing weapon has been used on staff or that a stabbing is likely to happen in the future.

[38] On the availability and use of stab resistant vests for CMs at Warkworth Institution, counsel for the appellant notes that opinions vary between CMs as to the usefulness or the desirability of such. Furthermore, except for COs, no one else at Warkworth Institution wears a vest, with the exception of CMs who do so in compliance with the direction issued by HSO Tomlin. Furthermore, the appellant points out that there is a pool of such vests, should the need for such occur, and those vests will offer the same protection, if of appropriate size. All witnesses have however indicated that they would prefer a personal fitted vest if given the choice. It is the appellant's view that a stab resistant vest offers only limited protection. It provides protection against a stabbing in an area covered by the vest, but only that area. It offers no protection to the head, neck, face, arms, wrists, hands, groin, legs or feet, nor does it offer protection against the likelihood of an assault, with or without weapon. Along this line of thinking, the witnesses called by the respondents have all worked over 20 years in corrections and they have had daily direct contact with inmates without wearing a stab resistant vest. However, as put by the appellant, they now testify that they need such a vest and that, just one day after COs have been issued such vests, claiming that doing their job as CMs has become dangerous.

[39] In the opinion of the appellant, it was not dangerous and it remains so. In point of fact, CMs are managers. They manage human, material and financial resources. They supervise and coordinate activities and yet they have frequent interactions with inmates where there is a risk of verbal and physical assault, and for this they have access to a personal portable alarm, a radio and OC spray. They are not first responders. Should they be present when an incident of any kind occurs, it is not their role to intervene. Theirs is to assess the information and or situation. If they deem a situation to be safe, they may intervene but they are not required to do so. In point of fact, the appellant offers the opinion that CMs may choose to intervene in certain cases because, with good intentions, they carry with them their reflexes as COs, forgetting that they have become CMs and thus no longer are COs.

[40] The appellant also argues that a protective vest is not the only nor the ultimate means of protection. Dynamic security constitutes the backbone of how CSC does its business. It means by this that COs are properly trained in various techniques and their core training teaches them to work in the safest conditions. Counsel sees this as important because CMs are for the most part former and experienced COs. In addition to cells being searched every 30 days, the inmates' individual histories are available to COs and CMs through various tools and the information about inmates is available through a number of sources such as parole officers, security intelligence officers and other CSC staff. Also, through their interaction with inmates, CMs and COs observe inmates moods and are trained to defuse situations, to use their presence as deterrent and to be aware of their surroundings. In short, it is the opinion of the appellant that CMs do not need a protective vest as they have all the tools to do their work safely. The hazard or risk identified by the HSO and the respondents is "the unpredictability of human behaviour". Because of this unpredictability, the respondents have put forth the opinion that inmates can assault at any time and without warning, with the stab resistant vest meant to protect against a

specific type of assault, stabbing with a weapon. The appellant does not deny that it will never be possible to completely eliminate the risk of assault by an inmate. However, the hazard is clearly mitigated by the work of all CSC specialists who observe and assess the inmates and by dynamic security.

[41] Finally, the appellant concedes that assaults do occur and that assaults can be in many forms. In fact, it was the appellant who voluntarily entered into evidence the list of assaults on staff at Warkworth Institution dating back to 2007, said list noting three assaults on CMs over a shorter period. Life inside a correctional institution is also governed by a number of rules and therefore, bad behaviour carries consequences, even in jail. That is something that inmates are aware of and contributes to their maintaining acceptable conduct. Yet, according to the appellant, anything is possible. However, fear of being hurt in altercation with staff, fear of segregation, fear of going to a less pleasant environment like a maximum security institution, fear of losing privileges, of being fined or of having to serve more time are all factors that arguably come through a person's mind before stabbing someone.

[42] Referring to *Stone* and *Canada (Correctional Service),* [2002] C.L.C.A.O.D. No. 27, the appellant notes that inmates are human beings who have free will and as such can decide at any point in time and without warning to carry out an assault against a member of the staff. While anything is possible, the concept of "danger" as defined in the Code is not in harmony with unpredictability of human behaviour, an inherent characteristic of law enforcement. That being the case, it is the position of the appellant that despite the unpredictability of human behaviour, the possibility of an inmate at Warkworth Institution deciding one day, either upon reflection or spontaneously, to stab a CM is a mere possibility, not a reasonable possibility. There was therefore no danger on December 14, 2010, that could serve as foundation for the issuance by HSO Tomlin of the direction under appeal.

B) Respondents' Submissions

[43] The respondents called five witnesses to testify in this case and, generally speaking, those witnesses gave testimony that one could say mirrored in many respects that which those witnesses for the appellant offered, with an understandable degree of emphasis towards the position advocated by the respondents. Given this, I do not intend to repeat, even if in abbreviated form, all that was attested to by the respondents' witnesses for the reason just mentioned and also because, as stated initially regarding the testimony of the appellant's witnesses, it also quite closely mirrors the findings of fact arrived at by HSO Tomlin which have been recounted in the initial paragraphs of this determination. That being said, there are nonetheless a few elements that warrant being repeated.

[44] First however, it is useful to note here that the respondents' position is that a finding of danger is not precluded by the concept of unpredictable inmate behaviour found to be normal in a correctional environment. In point of fact, the respondents suggest that the fact that the risk of assault on CMs is based on the recognized or accepted unpredictability or spontaneity of inmate behaviour does not preclude a finding of danger, because a distinction needs to be drawn between this and the "normal

condition of employment" limit to the right to refuse dangerous work. They base this approach on the words of Madam Justice Gauthier in *Verville*, to the effect that this is very different [from] saying that unpredictability of inmates' behaviour is alien to the concept of danger in the Code. It would be wrong to conclude that if a risk of a certain type of harm is inherent in an environment, an employee could never refuse work for a reason related to it.

[45] All witnesses produced by the respondents have either been assaulted or have witnessed assaults by inmates on other inmates or on a CO or CM or, to be complete, have knowledge of such. There is no necessity to go into the details of such, save to say that based on testimony from all witnesses and ample documentation originating from the appellant, the risk of assault on inmates and correctional personnel as well as the occurrence of such, is an established fact.

[46] As for the respondents' witnesses, testimony was given to the effect that CMs may, by force of circumstances, become what has been described as "situational first responders" due to a variety of reasons, such as their obligation to respond to the activation of all alarms or due to the fact that they are not confined or obliged to remain in their office and are required by their duties to "roam" the building and thus come across and be in contact with inmates who can be in large groups, or again by their role in attending certain particular activities such as methadone, canteen or kitchen, and thus be faced with responding to situations or incidents while official "first responders" are designated to respond relative to specific locations.

[47] On the midnight shift, which is a time of lowest staff complement on site, testimony by respondent Mr. Kunkel was to the effect that should there occur some incident, CMs would respond as first responders. The gist of all testimony from either side was that while not designated as first responders, CMs who may be in constant contact with inmates, such as unit CMs, may be required by the situation to respond directly, and that this is known by the appellant.

[48] In terms of protective equipment, it would appear that at the time of the work refusals, CMs only carried search gloves, first aid masks and handcuffs and had not been issued radios, OC spray or portable personal alarms (of limited use where a CM would be roaming the premises because of their programmed situational capacity) which is standard CO equipment. From the standpoint of risks to which they may be exposed, respondents' witnesses have explained that CMs working conditions are essentially the same as that of COs and yet, in addition to the appellant's decision to prohibit the wearing of protective vests, they are not equipped in the same manner, and while they could need a protective vest, baton, OC spray and even possibly firearm, those are not readily available as they may be under lock and key in the CM's office (with the exception of firearm) or part of the vest pool located somewhere in the institution. As such, should an incident occur where said protective equipment was needed, a CM faced with needing to respond immediately would not have the time to obtain said equipment and may be in danger. The Situation Management Model (SMM) needs to be followed by CMs in responding as stated to an incident as listed. Thus, where a CM might be faced with inmate behaviour evidencing "potential to cause grievous bodily harm or death" and not have or wear a protective vest, all other response tools listed in the SMM, such as

baton, firearm, chemical agent or inflammatory spray, and other intermediary weapons such as pressure water hoses and canines, are either under lock and key in the CM's office or elsewhere in the institution or otherwise not readily accessible, therefore leaving a CM with no vest faced with potential grievous bodily arm with the only other response option under the SMM consisting in physical handling of the inmate and the hope that COs in the vicinity or designated as first responders come to help.

[49] The respondents submit that the expectation by the appellant that a danger such as an assault or an assault with a weapon is possible or expected to occur is implicit in CSC reports, the SMM, the CM's work description and the JHA for the position of CM. The mere fact of the presence of stab resistant vests should serve as indication of their necessity in situations that could cause injury, the potential of which, according to the respondents, has been demonstrated. Furthermore, this is reinforced by the fact that in trying to procure stab resistant vests for COs prior to the December 13, 2010, date of mandatory wearing of such, CSC sought vests with "protective inserts to withstand stabbing actions with spikes and sharp objects", this because inmates have access to and have used weapons with spikes and sharp objects to injure staff in the past.

[50] As to the position adopted by the appellant that everything was normal on December 14, 2010, the date of the refusals to work, based on a Threat Risk Assessment that Assistant Warden, Operations Sandeson testified she conducted, the respondents note that no such document was entered into evidence nor were the respondents capable of locating such assessment. The collective testimony obtained in this case stands for the conclusion that fitted vests stand to provide a better and more comfortable protection than non fitted vests, unless said non fitted vests obtained from the available pool of such, a pool that witnesses have indicated has never been properly renewed, approximate closely the measurements of the individual in need of one at any given time.

[51] CMs take part, in specific programs and inmate activities, and there has been considerable testimony regarding those. However, regarding the canteen routine, testimony by CM Curt Schmid shed a different light on the information already received. There was testimony that the canteen routine is run essentially by one CM who must accompany by himself his unit inmates, numbering over a hundred. However, Mr. Schmid testified that while it is true that a single CM is charged with managing the behaviour of such a large number of inmates by himself, inmates who have not been searched or "metal detected", in the situation where a CM is not available, the task will be taken over by COs and the canteen routine will be run by a minimum of two COs wearing fitted stab resistant vests.

[52] Much was said by witnesses about the situation concerning the unit CM office that has no standard security door or lock and is usually left open. Witnesses for both sides testified that inmates can enter this office freely with the closest CO being up a set of stairs and in the security control room, possibly some 30-40 feet away. Those inmates, as already recounted, are not searched prior to accessing said office. Those same witnesses stated that at the time of the refusals, CMs, while in their office, did not have a radio, personal portable alarm or OC spray and did not wear fitted stab resistant vests. The added evidence however is that if CMs required emergency assistance while in their office, they would have to try and activate a fixed point alarm located on the far wall of

their office and if they succeeded, it could take on average 1 to 3 minutes to get assistance, a long time when faced with an aggressor.

[53] The appellant underlined the fact that dynamic security constitutes the central block for correctional staff to respond to various situations involving inmates. In that respect, evidence was adduced that COs are trained in arrest and control as well as self defence techniques. They receive core training that teaches them about the laws that govern their working conditions and how to manage inmates. Furthermore, COs are re-certified annually in self defence, personal safety refresher training, weapons management and use of force applications. Actually, upon hiring, COs are warned by the appellant employer that when dealing with inmates, they can be assaulted, maimed or even killed. They are also warned that the weapon of choice for inmates is a handmade knife referred to as a “shank” or “shiv” that can be made out of anything. The added element brought forth, again by witnesses for both parties, is that once a CO becomes a CM, they no longer receive this annual training.

[54] In consideration of all that precedes, the respondents have formulated the following conclusions that support, in their opinion, a finding by the undersigned of confirmation of HSO Tomlin’s direction and dismissal of the appeal. Those conclusions are:

- the inference arising logically from the presented evidence is that sharpened weapons are common at Warkworth Institution. They cannot ever be fully removed and are always going to be manufactured and carried by inmates;

- inmates have used these weapons in the past to stab, maim and attempt to kill other inmates at Warkworth Institution and they have used these weapons to threaten COs and CMs;

- inmate behaviour is unpredictable and an inmate can go from cooperative to behaviour causing grievous bodily harm or death at any time;

- inmates do not always exhibit a progressive escalation of aggressiveness and it is impossible to always tell when an inmate will become violent;

- all witnesses have agreed that a CM can be stabbed at any time, on any day, while working at Warkworth Institution;

- CSC is aware of this risk and informs all potential employees of the risk of inmates, that an employee could be injured or killed while working with inmates. CSC further informs all potential employees that the weapon of choice for an inmate is a handmade knife referred to as a “shank” or “shiv”;

- CSC has mitigated this danger by providing COs with fitted stab resistant vests, but has not issued the same piece of equipment to CMs;

- the respondents submit that based on the evidence before the appeals officer, that the only reasonable conclusion is that the hazard of unpredictable inmate behaviour is a reasonable possibility and therefore a danger, as defined by the Code, exists that justifies the direction.

C) Intervenor's Submissions

[55] The intervenor correctly identifies the central issue in this case as being the danger to CMs in carrying out their duties without the protective fitted stab proof vest, and does indicate support for the position taken by the respondent and endorses its submissions. At the same time however, in its capacity as bargaining agent for COs, including those at Warkworth Institution, the intervenor is of the view that this issue directly affects the health and safety of its CO members, in that they may be put at risk by the need to intervene to protect CMs not wearing the said protective vests. This is what has motivated the intervention by UCCO-SACC CSN. The appellant has objected to this position. I have already briefly addressed this question at the beginning of this decision, indicating that I shared the opinion expressed by the appellant that the sole issue before me is the danger to CMs. I will address this question further in my later analysis. As for the intervenor's submissions, what follows bears solely on what has been identified as the central issue.

[56] The fact that COs at Warkworth Institution are now obliged to wear a fitted stab resistant vest raises, according to the intervenor, the fundamental question of why this is so. The intervenor finds the answer in the evidence that has been adduced by both parties. In its opinion, the inescapable answer is that vests are required to protect COs against stabs in the area of the body protected by the vests, and one thus cannot avoid the inescapable inference from this that to arrive at such a decision, CSC believed that there was a reasonable possibility that a CO could get stabbed. Consequently, for its appeal to succeed, the appellant had to demonstrate to the undersigned that the work of CMs does not expose them to the same reasonable possibility.

[57] It is the opinion of the intervenor that the whole of the evidence shows the exact opposite, and that there is a reasonable possibility that CMs could be stabbed. All the witnesses at the hearing recognized that possibility, as well as the fact that knives, shanks, shivs and other homemade weapons are constantly present at Warkworth Institution, cannot be eliminated and always resurface or reappear, even after successful searches and seizures. This is uncontradicted evidence. Additional uncontested evidence is the fact that Warkworth Institution is considered a "high medium" institution with the highest level of violent incidents in Ontario, and where CMs have direct contact on a daily basis with inmates who have not been searched prior to the contact and, in the case of unit CMs, their offices being situated at the entry points of ranges that see high numbers of inmates daily which would cause a certain delay in intervention by COs

should an assault on a unit CM occur.

[58] The intervenor notes that the employer CSC has warned all CMs and COs, through their job description and other communications, that working in the Institution could put them in situations leading to death or serious bodily harm. Yet, by the position it has taken in this case, the same appellant employer would have the appeals officer accept that this is not really true in the case of CMs, with the evidence having established that inmate violence is unpredictable, can occur at any time and inmate behaviour can escalate from cooperative to extremely violent in a matter of seconds.

[59] While the appellant may have argued that on December 14, 2010, the day of the refusal and more importantly the day following the general obligation on COs to wear fitted vests, everything was normal and there were no specific exceptional circumstances and no heightened level of risk compared to the previous day, thus negating the presence of danger to the respondents, the intervenor notes that the definition of "danger" in the Code was amended in 2000 to include future activities and that Federal Court case law (*Martin* v *Canada (Attorney General)*, 2003 FC 1158); *Verville* (cited previously)) and Tribunal decisions (Vandal et al. and Correctional Service of Canada, Decision No. OHSTC-09-009; *Armstrong* v. *Canada (Correctional Service)*, 2010 OHSTC 6) have consistently done away with this immediacy approach.

[60] In addition, where the appellant submits that CMs having direct contact with inmates constitutes a normal condition of employment that would disallow resorting to a refusal to work, the intervenor submits that this would be contrary to the notion of normal condition of employment where the employer must first take all necessary steps to eliminate, reduce or control the hazard, condition or activities for which no direction can reasonably be issued before the conclusion of normal condition of employment can be arrived at. In intervenor's opinion, it is difficult to reconcile the views expressed by the appellant that the risk of CMs being assaulted is negligible and the fact that the possibility of a CM being stabbed is not a reasonable one with the fact that the appellant has warned them of the risk of death or serious bodily harm and the fact that it has COs who work alongside CMs who may be often alone with inmates wear protective vests that it does not want CMs to wear.

[61] The affirmation by the appellant that CMs are not first responders, should not intervene when an incident occurs and therefore do not need those vests is contrary to the evidence and contradicted by several managers who testified they would intervene. In the intervenor's view, the obvious implication of that appellant position is that if a CM were to witness a CO being assaulted by an inmate, he or she could not help the CO, which in turn would mean that if the CO is being beaten, the CM would simply observe the beating while waiting, perhaps several minutes, for other COs to respond.

[62] As a whole, the intervenor argues that the position of the appellant is based on an interpretation of the concept of "danger" that is not current, and in conclusion, refers to the statement made by the appellant in its submissions to the effect that "employees, including correctional managers, more likely than not, are not at risk of being stabbed by inmates" to infer a contradictory approach, stating: "an employer cannot warn its employees that they may be killed or suffer grievous bodily harm in the course of duty,

then provide them with fitted stab resistant vests, and then state, publicly no less, that they are not at risk of being stabbed by inmates". For the intervenor, the appeal should be dismissed and the direction confirmed.

D) Rebuttal by Appellant

[63] In its rebuttal, the appellant addresses generally the same elements it raised in its main submissions in order to emphasize a number of points as follows:

- Warkworth is a medium security environment and inmates have a medium security classification. Maximum security inmates are housed at maximum security institutions.

- CMs are members of the institution's management team. CMs are not first responders. Like all CSC staff, they do have contact with inmates on a regular basis, however, with COs being present in the units as well. Even when conducting interviews or court in their respective offices, there should be a CO present, unless the CM determines that the risk is minimal.

- There is no denying that objects that could be used to stab a person are present. If anything, the fact that there is no evidence of a stabbing incident on staff at Warkworth demonstrates the effectiveness of CSC actions in eliminating or controlling the potential hazard. Mitigation including adherence to existing procedures, inmates' assessments and dynamic security clearly minimizes this potential hazard. It never happened.

- There is nothing into evidence to suggest that such an incident was more likely to happen on the day the respondents refused to work or at a later time. The respondents' and the intervenor's positions are based in speculation and on hypothetical scenarios.

- The appellant reiterates that the legal test for determining whether a "danger" exists is a matter of probability. For a finding of danger, the determination to be made is whether it is more likely than not that what the respondents are asserting will take place in the future. For a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility.

For the appellant, the evidence does not support a finding that a CM will be stabbed as a reasonable possibility as opposed to a mere possibility.

Analysis

1) Preliminary issues

[64] In its search for authorization to intervene, the intervenor indicated that in hearing this appeal, consideration should be given by the undersigned to the issue of whether the refusal by the employer to provide CMs with fitted stab resistant vests could result in danger to its member COs because of the possibility that the COs could need or be required to intervene to protect unprotected CMs. In the initial part of this decision, I found that this particular issue was not before me and that it need not be addressed in order to determine the issue raised by the respondents' appeal. I also indicated that I would comment further on this at this stage of my determination.

[65] Leaving aside the fact, established by the evidence, that COs are designated and/or *de facto* first responders whose function it is to assist, come to the aid of personnel, including CMs, who may be in harm's way through inmate actions, I will comment first that I have neither received nor seen any indication in dealing with this matter that the respondents, when they exercised their refusal to work and subsequently brought it to appeal, were doing so for reasons of danger to more than themselves. That being said however, when looking at the wording of subsection 128(1) of the Code, it becomes obvious that the factual situation at the root of the refusal more directly relates to paragraph (*c*) of the provision which speaks of the performance of an activity constituting a danger to the refusing employee or to another employee, and thus would, were I to follow that logic, cause the undersigned to possibly extend the coverage of the present appeal.

[66] There is however a difficulty with this, in that the intervenor would have the undersigned extend the issue to its constituents, COs, although no evidence has been adduced with respect to a danger to COs, all the evidence and submissions presented in this case, while in many respects extending beyond the specific situation of the two respondents for purposes of shoring up their case, only concerning the situation of CMs. This being said, the specific matter at hand, the one that has essentially been raised and addressed is that of danger to the respondent CMs, and addressing such should serve to resolve the matter where other CMs may be concerned.

[67] As to dealing with the secondary issue of danger to third party COs, I find that doing so is not necessary for me to fully address that which is before me, and I thus agree with the introductory comments by counsel for the appellant that the issue of collateral danger to COs created by CMs not wearing fitted stab resistant vests is not before me.

2) Merits - Did HSO Tomlin err in issuing a direction of danger on December 20, 2010?

[68] All through the presentation of their case, the parties have raised numerous questions that all turn around the central issue of whether the respondents had a valid claim to being faced with a danger that would justify their refusing to work on December 14, 2010. Given the specificity of their claim, that is seeking to be provided with and allowed to wear stab resistant fitted vests in the execution of their duties, and also the

specificity of HSO Tomlin's direction based on the obligation put on the employer under the Code to provide its employees with the proper personal protective equipment, in this case an appropriate body covering that would offer protection against the hazard of injury to or through the skin, I feel confident in reducing my examination of this case and its evidence to the question of whether the evidence is sufficient to warrant a conclusion of reasonable possibility of the respondents, CMs at Warkworth Institution, to be stabbed in the execution of their duties and thus a finding of danger that would validate the issuance of the direction by HSO Tomlin.

[69] In considering this, I must examine whether the factual circumstances brought forth in evidence by all parties satisfy the definition of "danger" as it presently appears in the Code, and also whether in considering the duties of the respondent CMs and the circumstances under which they are executed, I am brought or not to a finding of normal condition of employment.

[70] The appellant has presented a very thorough case covering all elements of the function of CM, and in doing so, drawing attention to the differences with the function of CO. In short, if I follow the rationale put forth by the appellant, the first are managers, members of the appellant's management team, while the COs are the line workers constantly facing the inmates and thus in need of more complete protection.

[71] In pointing out that on the day of the refusals, nothing in the institution was different from the previous day, in terms of conditions that might have led to the belief or perception of danger, counsel also reinforced the appellant's position by stating in rebuttal that while there may be objects in the penitentiary that could be used to stab someone, here making no distinction between COs and CMs, stabbing of a staff member at Warkworth Institution had never occurred and that there was nothing to suggest that this was more likely to happen on the day of the refusal or after. The appellant recognizes that unpredictability of inmate behaviour is a factor to be acknowledged, but sees this as normal condition of employment that would restrict the right to refuse to work.

[72] At the risk of repetition, what needs to be determined in this case is whether a "danger" existed for the respondents when they exercised their right to refuse to work. Case law from the Federal Court (*Verville, Martin* (cited previously)), the Federal Court of Appeal (*Canada Post Corporation* v. *Pollard*, 2008 FCA 305) and from this Tribunal (D. Morrison et al., C. McDonnell et al. and Canada Post Corporation, Decision no. OHSTC-09-032) for example, have long established that "danger" cannot be assessed in a vacuum or on the basis of hypothetical or speculative situations, nor, would I add, restricted to a specific or specified time frame. The determination has to be based on verifiable elements, elements that do not have to exist at a specific time but however do present the reasonable capacity to come to reality at some time.

[73] The addition of the word "potential" ("éventuel" in the French text) to the definition of "danger" in the amended Code had a profound effect on the right of refusal, because actual danger no longer needed to exist when refusal action was taken, as long as conditions or circumstances reasonably could in the future. That being said, the test for determining the existence of "danger" has been fashioned through many court decisions and entails the following:

- the existing or potential hazard or condition, or the current or future activity in question will likely present itself;

- an employee will be exposed to the hazard, condition or activity when it presents itself;

- exposure to the hazard, condition or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time;

- the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.

[74] The concept of "unpredictable inmate (human) behaviour" has been at the center of the arguments originating from both sides. No one has suggested that this concept is not a reality in a correctional environment. However, there have been differing views as to the place this concept should receive in evaluating the existence of danger. This unpredictability, which could translate into an assault on personnel, in the present case CMs, with a knife or similar weapon, has been presented by the appellant as essentially part and parcel of the correctional environment and work, one that cannot be avoided, and thus a normal condition of employment preventing refusal to work. It bears noting that this position by the appellant employer is relative to CMs whose tasks, according to the employer, are not those of COs whose tasks require constant and continuous interaction with and exposure to inmates.

[75] The respondents and intervenor, on the other hand, abundantly noting that in reality CMs are practically as much in contact and interaction with inmates as are COs, present this concept as an element in evaluating the potentiality of hazard in the determination of "danger" and of adequate protective measures.

[76] There have been many court pronouncements on this concept and the words of Madam Justice Gauthier in *Verville* (cited previously), commenting on the definition of "danger", relative to a correctional environment, are enlightening:

> The customary meaning of "potential" hazard or condition does not exclude a hazard or condition, which may or may not happen based on unpredictable human behaviour. If a hazard or condition is capable of coming into being or action, it should be covered by the definition. As I said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear that in this case, spontaneous assaults are indeed capable of coming into being or action.
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> [Underlining added]

[77] It is important to note that the factual circumstances in the *Verville* case (cited previously) were in many respects akin to that which is found in the present case. In that case, COs, who could need to respond to unpredictable actions by inmates such as assaults, had not been allowed to carry on their person what was seen as essential equipment (handcuffs) to allow them to control such inmate action while avoiding, to the

extent possible, injury. The Federal Court of Appeal also dealt, albeit less directly, with the concept of unpredictable human behaviour in overturning a pronouncement by an appeals officer who, having excluded evidence relative to the unpredictability of human behaviour relative to potential assaults on park wardens performing law enforcement duties, had concluded to lack of evidence to support a finding of danger. In overturning the finding, Mr. Justice Rothstein of the Federal Court of Appeal stated in *Martin* (cited previously):

> [35] Because law enforcement activity inherently involves the unpredictability of human behaviour, Mr. Cadieux finds that it cannot constitute a "danger" within the meaning of the definition. This would exclude a finding of "danger" in respect of any law enforcement activity generally. There is no explanation as to why, categorically, this would be the case.
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> [Underlining added]

[78] It is thus clear from the above, that a finding of "danger" that would warrant or justify a refusal to work, can be arrived at even where the elements or circumstances that constitute the danger are characterized by unpredictable human behaviour, a factor that I would consider unquestionable in work around inmates in a correctional institution.

[79] The appellant's position and the conclusion that it is seeking from the undersigned is not that the work of CMs, as the work of COs, is not dangerous. That is not contested and actually would be very difficult to question given the very clear warnings to individuals seeking those positions and clearly spelled out in the job descriptions of both groups and many other documents from the employer. Rather, the appellant is pinpointing, as in some ways did the HSO, a certain type of occurrence in a correctional environment to wit, the use of the ever present stabbing or piercing weapons in a correctional institution, in this case Warkworth Institution, to inflict to one or more CMs an injury to or through the skin.

[80] Furthermore, the appellant is not claiming that such an incident could not happen, even with all it describes as the various means of dealing with a difficult population at the disposal of CMs and the protective availability of COs working alongside the former. What the appellant is claiming is that there is solely a mere possibility of such an occurrence, and thus not sufficient to satisfy the threshold of reasonable possibility that the courts have fashioned to conclude to the existence of "danger" validating a refusal to work.

[81] Determination of whether the possibility is "mere" rather than "reasonable" has been described by Mr. Justice Rothstein in *Martin* (cited previously) as determining the likeliness of occurrence, as may be inferred from past and present circumstances, with, in the present case "unpredictability of inmate behaviour" being a constant circumstance:

> [37] I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases 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.

[82] The appellant argued many points to support its contention that there is no reasonable possibility that CMs be injured, assaulted, with a piercing weapon so that they would need to be protected in the manner advocated by HSO Tomlin and the respondents. Those have been enunciated in my summary of the parties' submissions and I do not propose to recount all of those here. Central however to those appellant submissions was that CMs do not have the same functions as COs; that while they may be proximate to inmates from four to six hours per shift, it is mostly if not always with COs present or in close proximity; that there never has been a CM stabbed at Warkworth Institution; that they are not first responders and therefore run less of a chance to be exposed to violent action from inmates; that their use of dynamic security means and methods is in itself or has proven sufficient to protect them and that, if required by circumstances, certain defensive and protective tools are at their disposal; including protective vests from a pool of such, specially when called upon to sub for COs, all this in an environment that is agreed by all parties to be violent with the added uncontested element of unpredictable inmate behaviour and where it is also uncontested that whatever actions may be undertaken by correctional authorities at Warkworth Institution, the presence of knife, shivs and shanks in the possession of inmates will not be capable of eradication.

[83] The question therefore is whether the conclusion sought by the appellant is supported by the facts in evidence. I cited above the words of Mr. Justice Rothstein as giving an indication of what can be considered in arriving at a determination of whether a reasonable possibility exists of the danger that the respondents claim they need to be protected from. Madam Justice Gauthier also gave some such indications in *Verville* (cited previously) that should be repeated here:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. […]

[84] This sentence should serve to put to rest the argument made by the appellant to the effect that there has never been a staff stabbing at Warkworth Institution because of the controlling measures being applied by CSC at Warkworth Institution, and thus no reasonable possibility of this occurring. Were I to consider only that single specific type of incident, my determination of the issue here would be much simpler in that if there had been such stabbing occurrence on staff, given all other particulars of the case, the reasonable potential of it occurring again in the future would be quite obvious. On the other hand, the decision could be quite different on the evidence that this type of occurrence had never happened. My determination however must not be restricted to the occurrence or not, but rather contemplate the potential for it to happen given all the peculiarities of the situation. In other words, it is not because it has not happened that it could not happen, all circumstances considered.

[85] The Court went on to state:

> [51] […] A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.
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> [Underlining added]

[86] The evidence, factual and documentary, adduced at the hearing, although tendered by opposing parties and thus intended to support opposing positions, is far from being contradictory and in fact is often complementary if not seemingly common to both parties. I do not propose here to go over every item that makes up the body of evidence that I have to consider. There are however a number of points that stand out:

[87] Warkworth Institution is a correctional environment that, although classified as medium security, is nonetheless a violent environment as verified by the evidence. This is reinforced by the caution given at hiring to COs as well as CMs that they may be at risk of grievous bodily arm and/or death in those duties. That element may not be restricted to Warkworth Institution, but has to be recognized for what it is, and that is a permanent factor in the work of the COs and CMs.

[88] On paper, the tasks of CMs clearly differ from those of COs. I have thus noted the various testimony about the procedures, protocols and methods to be used by CMs and the general proviso, which is central to the appellant's position, that in contacts and/or attendance at routine, unforeseen or even emergency actions or incidents, the CM is supposed to, instructed even, to observe and not get directly involved, contrary to COs who can be described as front or main line actors vis-à-vis inmates.

[89] That same distinction is also made relative to the first responder aspect of those tasks. Based on the evidence, the reality appears to be somewhat different in that CMs are shown to be involved, intervene and interact constantly with inmates and actually also take on the role of first responders in many instances, albeit maybe forced by circumstances, and that is with the knowledge and assent, at least tacit and even express, of the employer, again as can be derived from the evidence. While I agree that from the standpoint of tasks and functions, one cannot conclude to assimilation of the two groups, from the standpoint of objective factual practicalities or reality, a considerable cross-over exists with the inescapable conclusion that with respect to contact and interaction with inmates, there is a great deal of similarity between the work of COs and that of CMs, particularly in addressing threatening or emergency situations involving inmate vs. inmate or inmate vs. staff situations.

[90] The appellant has put forth as a mitigating factor to the risk incurred by CMs being in the presence of inmates that in practice, they are not alone and that there is always a CO present or nearby that could intervene where dictated by the situation or at the behest of a CM in fear for his or her safety. According to the appellant, this validates in part the first responder status of COs and serves to demonstrate the need the latter have for a protective fitted vest and the absence of such permanent need where CMs are concerned. Once again however, the evidence demonstrates a differing reality. While it is

true that CMs generally are not supposed to work in isolation or by themselves when proximate to inmates, it has been abundantly demonstrated that this is not the case and that CMs, by chance or even as part of their regular duties, find themselves alone with a proximate inmate or inmates, often inmates that may not have been searched. A CM's task relative to the canteen routine or to receiving an inmate in his manager's office for either court or dealing with individual inmate grievances are examples that come readily to mind and have been attested to at the hearing.

[91] According to the appellant, the application or use of dynamic security, what I would describe as the soft touch, as opposed to more violent or physical means of attending a situation, constitutes the central block or backbone strategy in dealing with inmates. The appellant has thus argued that it is the proper and productive use of dynamic security by CMs that renders the permanent wearing of a fitted protective vest unnecessary. This however does conveniently leave aside the fact that dynamic security is equally a preferred approach of COs in their dealings with inmates, an approach that is favoured by the appellant. Yet, COs do so while wearing a protective vest and having on their person a number of protective or defensive items of equipment that CMs do not have, although some are kept under lock and key in their office.

[92] The presence of homemade puncturing weapons within the institution has been demonstrated and readily admitted by the appellant. There is also evidence to those types of weapons being regularly found, through searches, in varying numbers. It has also been shown that those can be manufactured from just about anything, ranging from pieces of glass to sharpened utensils and even sharpened tooth brushes. There is a need for routine as well as unscheduled specific or general searches by COs supervised by CMs and yet, the appellant has readily admitted that regardless of the number of searches and seizures, new such weapons constantly reappear, often within a day or hours and, a fact I consider somewhat worrisome, regardless of the means employed, that those cannot be eradicated.

[93] Apart from their presence in support of COs at various stages of the daily routine within the Institution where they are proximate to inmates, CMs are also called upon to take decisions that may affect and displease inmates and cause them to become angry and even aggressive. Such are decisions on double bunking, segregation, charges and holding inmate court.

[94] There have been assaults on staff at Warkworth Institution, and some have been on CMs, albeit in lower numbers that on other staff. At the same time, the appellant has argued that there has never been a staff stabbing at Warkworth Institution.

[95] The appellant quite rightly has argued that the determination of the existence of danger is a matter of probability, and in that light has taken the position that in the present case, while it is not impossible that a CM be assaulted and stabbed, there is only a mere possibility that this could happen, a possibility that is not high enough for the undersigned to conclude, on his own, as HSO Tomlin did and as such conclude to the existence of a danger.

[96] I have considered and weighed all the evidence and taken into account that such an incident has never occurred at Warkworth Institution. In considering all the elements

brought to my attention, one needs to point out that the threshold to be met is certainly lower than certainty that such an aggression will happen. All I have to do is determine, on all the facts and circumstances, whether the possibility that this could happen is a reasonable one and that if it happens, injury or even worse can happen before it can be prevented. One has to remember here that what is being looked at in this case is the possibility of an assault with a puncturing weapon on a CM not wearing a stab resistant vest. In my opinion, all the evidentiary elements brought forth satisfy the test I mentioned above and in my opinion, the possibility that such an assault could happen and that injury or worse could result is a reasonable one.

[97] This being said, there remains the question of whether this danger constitutes a normal condition of employment. The Code has as its purpose the prevention of accidents and injury to health arising out, linked with or occurring in the course of employment to which it applies. The concept of normal condition of employment finds its foundation at section 122.2 of the said legislation that states that preventive measures that would lead to meeting the prevention purpose of the Code "should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal preventive equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees". This is commonly referred to as the hierarchy of controls.

[98] A normal condition of employment has been described as the residual hazard that remains after the employer has followed all the required steps and put in place all the safety measures required under the Code. In the case at hand, in describing the danger he viewed as validating the refusal to work of the two respondents, HSO Tomlin pointed to the employer obligation, in the hierarchy of controls, to provide protective personal equipment against injury to or through the skin in the nature of an appropriate body covering of the kind worn by COs.

[99] My colleague appeals officers have all dealt at times with this concept of normal condition of employment. In *Armstrong* (cited previously), the appeals officer stated:

> Consequently, in order to determine that a danger constitutes a normal condition of employment, that danger must be one that cannot be controlled through the protective measures set out under the Code. Such a danger would not justify invoking the right of refusal or continuing to refuse to work once it had been determined to be a normal condition of employment.

[100] In another appeal decision, this one in P&O Ports Inc. &Western Stevedoring Co. Ltd. and International Longshoremen's and Warehousemen's Union, Local 500, CAO-07-030, the appeals officer expressed the notion in terms closely associated with the hierarchy of controls mentioned above:

> [152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and finally, if the existing or potential hazard still remains, he must make sure that employees are

> provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. […]
>
> [153] Once all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. […]

[101] In the instant case, it has been recognized and established that the presence of stabbing weapons within the Institution is a factor that cannot be eradicated. The evidence, in fact, is that although the appellant routinely or unexpectedly searches the premises, such weapons always resurface. The appellant, through making it mandatory for COs to wear fitted stab resistant vests at all times and supplying such to all COs, and in making available to CMs similar vests from a pool to be used when CMs sub for COs and to be collected and worn on an *ad hoc* basis where CMs find themselves in situations that they feel may require it, has practically demonstrated its incapacity to effectively gain complete control over such hazard, even with planned and impromptu searches.

[102] In my opinion, having some of its employees exposed to a hazard it has recognized exists while insisting that another group of its employees working alongside be protected, does not constitute a normal condition of employment for the former.

[103] I have concluded previously that for all intents and purposes, CMs are exposed to the same risk or hazard of injury to or through the skin by a puncturing weapon. This being the case, they should be entitled to the same level of protection. In my opinion, prohibiting the wearing of such equipment at all times and essentially not satisfying the purpose of the legislation by suggesting that said equipment, be it appropriate or not, can be individually accessed by a CM or CMs faced with a situation or incident does not translate into meeting one's obligations under the Code.

[104] In this respect, the words of Madam Justice Gauthier in *Verville* (cited previously) take on a convincing meaning:

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, <u>would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car ?</u>
>
> [Underlining added]

[105] In my opinion, the same rationale finds application in the present case. In my opinion, the two first stages of the hierarchy of controls referred to above are not being satisfied, which leaves the remaining stage, that of providing the adequate personal protective equipment, clothing, devices or materials dictated by the established circumstances.

[106] This being said, the two respondents in this case refused to work as a result of having been prohibited from wearing protective stab resistant vests while working as CMs at Warkworth Institution. In one case, the CM was wearing a vest that had been obtained from a pool of such vests, albeit not fitted to the individual, and thus not wearing his own fitted vest and the other, an acting manager, was wearing his own fitted vest that he had been previously provided with as a CO. The HSO determined that the two employees were at risk and justified in refusing to work and consequently concluded to the existence of a danger while pointing to the employer obligation to provide employees with proper protective equipment inspired by the hierarchy of controls established under the legislation.

[107] I have reviewed and considered all the evidence that has been submitted and all the submissions that the parties have provided to the undersigned. In my opinion, at the time of their refusal, given all the circumstances, there was a reasonable possibility that the respondents could be assaulted and injured prior to being properly protected. In my opinion, there was thus a danger that validated their refusal to work and this and the circumstances surrounding this were not normal conditions of employment.

Decision

[108] For these reasons, the appeal is dismissed and the direction issued by HSO Tomlin on December 20, 2010, is confirmed.

Jean-Pierre Aubre
Appeals Officer