

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Brian Zimmerman v. Canada (Correctional Service), 2013 OHSTC 34

Date: 2013-11-26
Case No.: 2009-32
Rendered at: Ottawa

Between:

Brian Zimmerman, Appellant

and

Correctional Service of Canada, Respondent

Matter: Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer

Decision: The decision that a danger did not exist is rescinded and a direction is issued

Decision rendered by: Mr. Douglas Malanka, Appeals Officer

Language of decision: English

For the Appellant: Ms. Corinne Blanchette, Union Advisor, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – Confédération des syndicats nationaux

For the Respondent: Mr. Michel Girard, Counsel, Department of Justice Canada, Labour and Employment Law Group

REASONS

[1] This is an appeal brought by Brian Zimmerman, a Correctional Officer employed at Kent Institution (Kent), Agassiz, British Columbia, pursuant to subsection 129(7) of the *Canada Labour Code* (the Code).

[2] On November 12, 2009, Correctional Officer (CO) Zimmerman refused to work pursuant to section 128 of the Code. Health and Safety Officer (HSO) Michael O'Byrne investigated CO Zimmerman's continued refusal in accordance with subsection 129(1) of the Code and decided that a danger did not exist for CO Zimmerman. HSO O'Byrne informed CO Zimmerman of his decision in writing on November 16, 2009 and CO Zimmerman appealed the decision pursuant to subsection 129(7) on the same date. A hearing was held pursuant to subsection 146.1(1) of the Code at Abbotsford, British Columbia, on October 16, 2012.

Background

[3] Kent is located in Agassiz, British Columbia, and is the only maximum security institution for men in Correctional Service of Canada's (CSC) Pacific Region. Kent has an overall maximum of 336 beds with approximately 400 staff, 270 of whom are uniformed officers. A few months prior to CO Zimmerman's refusal to work, a new 96 bed unit referred to as Unit 4 or Pod 1¹ was opened. Pod 1 is unique at Kent in that it is a self contained unit which houses its own living units, yards, program corridors and common rooms, laundry room, and gymnasium. Pod 1 is also equipped with an upper level gallery or balcony that overlooks the ranges and other common areas in Pod 1 and permits a CO posted there to observe inmates below. The gallery or balcony is often referred to at Kent as the gun walk, gallery gun walk or the pod living unit gun walk. Pod 1 is also unique from the other living units at Kent in that the feed from the Closed Circuit Television (CCTV) cameras located in Pod 1 are not fed to the Main Communications Control Post (MCCP). The MCCP is responsible for receiving and conveying communications pertaining to alarms and other emergency situations at Kent. Instead, the CCTV feeds from Pod 1 go to the Pod 1 Control Post, the Security Intelligence Office, the Emergency Command Post (ECP) and the Correctional Manager's (CM) office. A map of Kent was provided at the hearing that confirms that Pod 1 is a satellite to the other part of Kent joined by a corridor with barriers.

[4] According to HSO O'Byrne's Investigation Report and Decision, CO Zimmerman initially refused to work on November 3, 2009, citing the following eight issues of concern to his employer:

1. Unit lighting - Intermittent loss of control;
2. Intercom system - Intermittent loss of control;
3. Tier and common area cameral system - Intermittent loss of control;
4. Door camera coverage - loss of camera during range walks;

¹ The terms Unit 4 and Pod 1 were used at the hearing interchangeably by witnesses and in documents to describe the housing unit in question. For consistency, I refer to the Unit in my decision only as Pod 1 as it better communicates the unique design of the Unit.

5. CCTV monitoring in the MCCP - no feed;
6. Cell doors - opening outside of operator control;
7. Weapons retention in the gun - single point harness; and
8. Cell night lights - turning on at the same time.

[5] CSC conducted an investigation into CO Zimmerman's refusal and Mr. Whitney Mullin, A/Warden at Kent, agreed with CO Zimmerman that a danger existed. A/Warden Mullin removed staff from the danger until the danger could be resolved.

[6] Warden Harold Massey subsequently wrote to CO Zimmerman on November 10, 2009, and stated that the danger related to items 1, 2, 3, 4 and 6 in his complaint had been resolved and only items 5, 7 and 8 remained.

[7] With regard to item 5, Warden Massey acknowledged that there is no CCTV feed from Pod 1 to the MCCP, but stated that the CCTV system is fed to the Pod 1 Control Post, the CM office and the Security Intelligence Officer office for investigative/evidentiary purposes. Warden Massey further stated that, while management does not acknowledge that this item represents a danger, more research could be conducted to determine if running a feed from Pod 1 to the MCCP is possible.

[8] With regard to item 7, Warden Massey agreed that the space between the security bars on the gun walk viewing windows is large enough for a weapon to fall through into an inmate occupied area. Warden Massey wrote that management at Kent supported the purchase of the single point harness to prevent rifles from falling through the grates but this could not be implemented without approval of Regional Headquarters (RHQ). He stated that RHQ had been advised of the issue and that he expected a response by the following week.

[9] With regard to item 8, Warden Massey stated a request to alter the cell night lights was sent to RHQ and he is awaiting approval.

[10] Warden Harold Massey further confirmed in his letter of November 10, 2009, that a "full return to normal routine" was expected on November 13, 2009, at 16:00 hours.

[11] On November 12, 2009, CO Zimmerman continued to refuse to work pursuant to subsection 128(13) of the Code and cited the same eight health and safety issues to HSO O'Byrne that he had previously cited to his employer on November 3, 2009. CO Zimmerman reiterated to HSO O'Byrne that a danger exists for COs in Pod 1 because feed from the CCTV cameras in Pod 1 are not fed to the MCCP as with all of the other living units at Kent.

[12] CO Zimmerman also reiterated to HSO O'Byrne that the design of the shooting portals on the gun walk makes it possible for rifles to either fall from or be pulled by inmates down into the inmate population such that inmates would then have possession of a high calibre weapon.

[13] Following his investigation, HSO O'Byrne confirmed in his investigation report and decision that the items in CO Zimmerman's refusal are the result of the newly constructed Pod 1 and are not representative of a normal condition of employment.

[14] HSO O'Byrne further confirmed in his report that not having the feed from CCTV cameras in Pod 1 integrated into the MCCP removes a layer of protection for COs but he held that this decreased level of protection does not constitute a danger for CO Zimmerman. With regard to the safety issue of powerful rifles falling into the hands of inmates, HSO O'Byrne decided that this did not constitute a danger because he had an assurance of voluntary compliance from the employer to address and resolve the matter.

[15] HSO O'Byrne concluded overall that the employer had done significant remedial work following CO Zimmerman's initial refusal to work and had reduced or eliminated the danger. HSO O'Byrne stated that the continued safety concerns are more speculative in nature and unlikely to create a future danger.

Issues

[16] This appeal raises the following issues for determination:

- whether a danger existed for CO Zimmerman on November 12, 2009, and continues to exist; and
- if I find that a danger existed or exists for CO Zimmerman, whether the danger constitutes a normal condition of employment.

A) Appellant's Submissions

[17] Ms. Corinne Blanchette, Union Advisor for the appellant, called the following seven witnesses:

- CO Zimmerman;
- CM Verville;
- CO Sterkenburg;
- CO Fernett;
- CO Aulakh;
- CO Wallin; and
- CO Conteh.

[18] Ms. Blanchette referred me to the definition of danger in section 122 of the Code and stated that the definition includes any current or future activity that could reasonably be expected to cause injury to a person exposed thereto before the hazard can be corrected.

[19] Ms. Blanchette noted that COs can be posted to three positions in Pod 1: the Control Post which is situated in front of bi-level ranges or tiers housing inmates; the console from which COs normally conduct range walks and interact directly with inmates; and the gun

walk/gallery or balcony-like level that overlooks the ranges and other common areas in Pod 1.

[20] Ms. Blanchette argued that even though CO Zimmerman was not assigned to work in Pod 1 on the day of his refusal to work, he was posted to Unit B outside of Pod 1 and could have been required to respond to any alarm or emergency in Pod 1 as COs from outside of Pod 1 are designated as first responders. Ms. Blanchette also stated that CO Zimmerman could be assigned to Pod 1 in the future as his work schedule comprised of a spare week where he could be posted anywhere at Kent.

[21] Ms. Blanchette held that the unpredictable behaviour of inmates is covered by the definition of danger in the Code and this was recognized by the Honourable Justice Gauthier in the case of *Verville v. Canada (Correctional Services)*, 2004 FC 767. Justice Gauthier wrote the following at paragraph 41 of her decision:

[41] With respect to i) in paragraph 40 above, the customary meaning of "potential"^[4] or "éventuel"^[5] 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.

[22] Ms. Blanchette cited paragraph 36 in *Verville* and stated that this confirms that the definition of danger only requires one to ascertain the circumstances in which an existing or potential hazard or condition or future activity could be expected to cause injury and to establish that such circumstances will occur as a reasonable possibility.

[23] Ms. Blanchette cited paragraph 51 of the *Verville* decision and held that Justice Gauthier confirmed that a trier of fact can rely on expert opinion or experienced-based expert opinion of ordinary witnesses and on inference arising logically or reasonably from known facts. Ms. Blanchette submitted that the COs who testified have the necessary experience to establish what situation could cause injury.

[24] Ms. Blanchette stated that the employer had taken corrective action on many of the safety issues raised by CO Zimmerman at his refusal to work and so only three matters remain to be adjudicated in this appeal. Those issues include:

- the absence of camera feeds from Pod 1 being fed to the MCCP;
- deficiencies related to the Intercom system in Pod 1; and
- deficiencies related to training and work on the Pod 1 Gun Walk post.

[25] Ms. Blanchette made submissions on the above noted remaining matters and I have summarized her submissions under the following headings.

MCCP Feed

[26] Ms. Blanchette held that the absence of feed from the CCTV cameras in Pod 1 to the MCCP post for monitoring by the MCCP officer was contrary to CSC policy and practice in other parts of Kent and in other prisons. Ms. Blanchette held that this removed a level of protection for COs which was not mitigated by CSC.

[27] In this regard, Ms. Blanchette held that the testimony of COs and the evidence submitted in the case establishes that the absence of CCTV camera feeds to the MCCP negatively impacts on the ability of COs in Pod 1 to be advised in advance of any developing activities of inmates in the Pod that are suspicious or threatening to COs and to respond with minimal delay to cell alarms, personal portable alarms (PPAs), fire alarms, electrical alarms and perimeter alarms.

[28] Ms. Blanchette stated that the evidence in the case also establishes that the absence of live feed from Pod 1 cameras to the MCCP diminishes the ability of CO first responders to receive timely and comprehensive intelligence information on the situation referred to in the SMM, to reorganize their response to emergencies and/or incidents; and to call for or receive timely police, medical or other emergency assistance. Ms. Blanchette held that this information is also essential for the occupational health and safety of COs.

[29] Ms. Blanchette added that having intelligence information regarding an alarm or other emergency is critical to CO's health and safety. She referred me to the testimonies of COs Zimmerman and Aulakh that the response time to Pod 1 varies between 15 to 30 seconds. CM Verville testified that the response time to Pod 1 is longer due to the number of barriers in Pod 1 that must be opened and closed.

[30] Ms. Blanchette argued that providing the feed from CCTV cameras in Pod 1 to Control Post in Pod 1 does not mitigate not providing the feed to the MCCP because COs in the Pod 1 Control Post are not monitoring the cameras during an alarm or other emergency. Ms. Blanchette held that evidence of CO Conteh was that the two COs in the Control Post are busy opening doors to let responders into Pod 1 during an alarm or incident and getting COs in Pod 1 back from the living units.

[31] Ms. Blanchette noted that Personal Portable Alarms (PPAs) issued to COs are assigned to units and cannot be used to pinpoint the location of the CO on a unit who has sounded the alarm. Ms. Blanchette argued that this can further delay first responders and such a delay increases the risk that the CO will be injured or that the injury will be more serious. COs Aulakh and Strekenburg testified that mock exercises conducted as part of ERT training confirmed that 33 stab wounds or 50 head blows could be delivered by someone in seven seconds. Ms. Blanchette held that the MCCP officer would be able to advise first responders of the precise location of the CO requiring assistance.

[32] Ms. Blanchette held that the employer had not provided any documentation or evidence regarding CSC's decision for not feeding the feed from cameras in Pod 1 to the MCCP. Ms. Blanchette further reiterated that the respondent had not submitted evidence of any measures put in place to mitigate the removal of this level of protection.

[33] Ms. Blanchette referred to the testimony of COs who testified that having information about the nature of the emergency and the number of inmates involved from the MCCP officer enables them to respond with appropriate precautions especially when they arrive on the scene fatigued.

[34] Ms. Blanchette argued that the danger of not having live CCTV feed from Pod 1 to the MCCP is not mitigated by the portable radio issued to COs. She held that the evidence is that the radios are not effective for communicating risk because inmates can hear CO plans and can use the information to their advantage.

[35] Ms. Blanchette held that it is not helpful that the CCTV feed from the living unit camera in Pod 1 are provided in the CM's office because CMs are not trained on how to verify equipment and to monitor the feeds. Ms. Blanchette further referred to CM Verville's evidence that a CM in charge does not have time to monitor the CCTV screens when they are busy dealing with any emergency.

Intercom System on Ranges in Pod 1

[36] Ms. Blanchette submitted that the testimony of COs and evidence submitted at the hearing demonstrate that the intercom located at the front of a range cannot be used by COs working at the end of a range to communicate with the COs in the Control Post if they need help.

[37] Ms. Blanchette further held that the portable radios issued to COs do not mitigate against this deficiency because the use and effectiveness of radios for communicating emergencies is limited during an emergency by policy and may also be hazardous if inmates overhear the COs. Also, Ms. Blanchette pointed to the testimony of CO Strekenburg that, once he is involved in an altercation or incident with an inmate, it is impossible for a CO to access one's radio as the CO's hands are busy defending from blows.

[38] Finally, Ms. Blanchette noted that telephones are not located beside all gun portals on the gun walk gallery and in those cases the CO on the post may be required to leave the gun port through which he is observing inmates and run to the nearest telephone or down to the Control Post in order to communicate his observations to the Control Post. Ms. Blanchette argued this causes the gun walk officer to leave the post and negates the ability of the officer to monitor the situation and possibly save the life of a CO.

Pod 1 Gallery Gun Walk Post

[39] Ms. Blanchette added that COs Zimmerman and Conteh complained that the horizontal bars that CSC added to the gun walk portals can delay the ability of the gun walk officer to rapidly and accurately deliver a necessary shot when they have to withdraw and reinsert their firearm because an inmate being targeted moves.

[40] Ms. Blanchette added that COs Conteh and Strekenburg also complained that three stacked gun walks do not permit COs to shoot in their preferred position due to lack of space

and that the employer has not trained COs to shoot in the prone position. The COs also complained that it is impossible for COs in the Control Post in Pod 1 to deliver a shot to the end of the lower range and that it is risky to shoot at a target on the upper range due to the chance of ricochet off the barrier doors.

[41] Ms. Blanchette held that all of this constitutes a hazard and referred to the CSC “*Contingency Plan Manual*” for Kent that reads, “During the first ten minutes of any potential serious uprising, it is important to show an immediate, well organized response.” and stated that is not always possible on Pod 1.

[42] Ms. Blanchette asked that I rescind the decision of HSO O’Byrne and find that a danger existed for CO Zimmerman.

Danger a Normal Condition of Employment

[43] Ms. Blanchette cited the decision of the Federal Court in *Canada v. Vandal*, 2010 FC 87, which confirmed that a normal condition of employment is the residual danger that remains after the employer has taken all necessary steps to eliminate, reduce or control the hazard, condition or activity. Ms. Blanchette held that the danger in this case can be controlled or reduced and, therefore, the danger does not constitute a normal condition of employment.

B) Respondent’s Submissions

Dismissal of Appeal

[44] Mr. Girard, counsel for the respondent, argued that CO Zimmerman’s appeal should be dismissed because the appellant did not face a danger on November 12, 2009, as defined in the Code and the jurisprudence. Mr. Girard referred to subsection 128(1) of the Code and held that the right to refuse work is an individual right and applies only to the employee invoking it. Mr. Girard held that Appeals Officer Wiwchar stated in *Maureen Harper v. Canadian Food Inspection Agency*, 2011 OHSTC 19 that a work refusal can only be invoked if the impugned condition in the workplace constitutes a danger to the refusing employee and cannot be invoked if the alleged dangerous conditions instead concern other employees.

[45] Mr. Girard noted that CO Zimmerman was not working on Pod 1 on the day of his work refusal and maintained that this establishes that CO Zimmerman would not be personally exposed to a danger in Pod 1 at the time of his work refusal. Mr. Girard held that the appeal should be dismissed based on this alone. Mr. Girard submitted that the appellant’s argument that CO Zimmerman could be assigned to work in Pod 1 one day in the future is not sufficient for refusing to work.

Scope of the Appeal

[46] Mr. Girard submitted that subsection 129(7) of the Code does not permit an appellant to raise new concerns at the appeal hearing. Mr. Girard referred to the Federal Court of Appeal in *Canada (Treasury Board) v. Fletcher* 2002 FCA 424, which states that the right to

refuse work is a continuous one and, if an employee has a concern that was not presented to the HSO and decided upon, the employee can exercise the right to refuse on the different issue(s).

[47] Mr. Girard further argued that, while the Federal Court of Appeal ruled in the *Martin v. Canada (Attorney General)*, 2005 FCA 156 decision that an appeal before an appeals officer is *de novo*, this does not mean that an appeals officer can adjudicate issues not presented to the health and safety officer during the employee's continued refusal to work.

[48] Mr. Girard added that the Federal Court of Appeal in the cases of *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.) and *Shneidman v. Canada (C.R.A.)* 2007 FCA 192, also confirmed that a *de novo* review does not permit the Appeals officer to adjudicate issues that were not already part of the record.

[49] Mr. Girard held that the following issues were raised at the appeal hearing and were not mentioned to the HSO at the time of his investigation and therefore, cannot be adjudicated in this appeal:

- a. Dead zones for radios in Pod 1;
- b. No intercom at the end of the range;
- c. Difficulty for the gun walk officer to communicate with the control post;
- d. Bars on the gun ports in Pod 1;
- e. The shooting position for certain gun ports in Pod 1 and the lack of training in the prone position;
- f. Difficulty in shooting from the control post in Pod 1;
- g. Live feeds from living units removed from MCCP.

[50] Mr. Girard maintained that the sole outstanding issue in this appeal is the absence of CCTV live feed to the MCCP from cameras in Pod 1. Mr. Girard stated that on November 10, 2009, Warden Harold Massey wrote to CO Zimmerman saying that immediate action was taken to resolve the issues he had raised and a danger no longer existed.

On the Merits

[51] Mr. Girard then held that there was no danger to the appellant on the date of his refusal to work. Mr. Girard referred to subsection 128(1) of the Code and cited paragraph 51 of the *Stone and Canada (Correctional Service)*, [2002] C.L.C.A.O.D. No. 27 decision. In that case, Appeals Officer Cadieux wrote that the right to refuse work remains an emergency measure and not meant to address long standing problems.

[52] Mr. Girard further held that the test for danger has been articulated by the Federal Court in *Canada Post Corporation v. Pollard* 2007 FC 1362 (affirmed by the Federal Court of Appeal in 2008 FCA 305) and argued that, there must be a reasonable possibility and not a mere possibility that the circumstances related to a hazard will occur for a finding of danger. Mr. Girard held that the finding of danger cannot be grounded in speculation or hypothesis.

[53] Mr. Girard referred to the decision in *Verville* in which Justice Gauthier of the Federal Court set out the situations where a reasonable expectation of injury could be established:

- a. Evidence of a prior injury in the same circumstances;
- b. Expert opinion;
- c. Opinion evidence from an ordinary witness who, by virtue of their experience, is better positioned than the trier of fact to form the opinion; or
- d. It could be established through an inference arising logically or reasonably from known facts.

[54] Mr. Girard held that this establishes that the appellant must establish that there is a reasonable expectation of injury on the basis of its evidence or on the basis of inferences arising from known facts. He maintained that the appellant submitted no evidence of prior injuries at the hearing and called no expert witness.

MCCP Feed

[55] Mr. Girard submitted that the testimony of his witnesses and evidence given at the hearing established that the absence of live feed from CCTV cameras in Pod 1 to the MCCP post does not constitute a danger for CO Zimmerman. Mr. Girard held that the evidence of Deputy Warden Mattson was that CSC's policies, procedures, training and protective equipment in place and in use at Kent mitigates any risk that might arise.

[56] Mr. Girard referred to the testimony of Deputy Warden Mattson that the design of Pod 1, with a secure armed Control Post and a Console from which inmates access COs, mitigates risk because it limits inmate movement and facilitates dynamic security. Mr. Girard further submitted that Deputy Warden Mattson testified that dynamic security keeps COs and other officials at Kent apprised of the mood and behaviour of inmates and enables them to anticipate problems.

[57] Mr. Girard stated that the testimony of Deputy Warden Mattson was that dynamic security is a fundamental tool and operating strategy for CSC. According to Deputy Warden Mattson, dynamic security encompasses full interaction between COs and inmates and makes Kent more secure because staff know more about individual inmates and that information can be assessed and responded to by staff and management.

[58] Mr. Girard referred to the testimony of Deputy Warden Mattson and submitted that inmate behaviour is recorded and communicated via officer statements, observation reports and case management reports to security intelligence officers. Mr. Girard added that this information is shared with staff even if they cannot attend morning debriefing meetings.

[59] Mr. Girard added that the testimony of Deputy Warden Mattson was that the live feed from CCTV cameras in Pod 1 is fed to the Pod 1 Control Post, the Security Intelligence Office, the ECP and the CM's office.

[60] Mr. Girard submitted that the evidence of Deputy Warden Mattson showed that there are numerous sets of eyes always monitoring COs on the range. According to Deputy Warden Mattson, the two COs from the Control Post, the two COs at the Console and the single gun gallery officer remains in constant visual contact of staff and inmate movement within the Pod 1 during the day and evening shift. During the night shift, there is only one CO in the Control post but inmates are locked in their cells.

[61] Mr. Girard maintained that COs are provided with personal protective equipment, including radios and are equipped and trained to deal with incidents.

[62] Mr. Girard held that the gallery gun walk officer can communicate with COs in the Control Post using personal radios or the telephone and intercom on the gallery.

[63] Mr. Girard submitted that there was no evidence in the case that MCCP monitoring of the live feed from Pod 1 allows for faster deployment of COs to respond to an alarm in the Pod. Mr. Girard held that live feed from Pod 1 was not lost; rather Deputy Warden Mattson confirmed its function and accountability had been moved up to management level.

[64] Mr. Girard submitted that the CM is in charge in the event of an incident and not the MCCP officer. Mr. Girard held that the evidence of Deputy Warden Mattson was that a second CM on a shift is designated as the On-Scene-Controller who arrives on the scene, assesses and manages the situation. Mr. Girard held that Deputy Warden Mattson's testimony was that the On-Scene-Controller is better placed to make decisions than someone in the MCCP. Mr. Girard referred to the testimony of Deputy Warden Mattson and Mr. Hunken that electronic equipment is tested and repaired daily by three technicians.

[65] Mr. Girard held that the evidence did not establish that the absence of CCTV live feed from Pod 1 to the MCCP would reasonably cause injury. Mr. Girard maintained to the contrary that the evidence of Deputy Warden Mattson and documents entered into evidence was that COs in Pod 1 are constantly under surveillance by COs in the control post, console and gallery and held that dynamic security is more effective than MCCP involvement.

[66] Mr. Girard pointed to evidence and testimony of CO Zimmerman, who agreed that COs must protect their own health and safety when responding to a situation.

[67] Mr. Girard submitted that Mr. Hunken testified that he had observed CMs receiving this training on the cameras despite CM Verville's testimony that he had not been trained to use CCTV monitors in his office. Mr. Girard noted Mr. Hunken's testimony that there would be more training once the project was completed.

[68] Mr. Girard held that the appellant had not submitted evidence at the hearing to demonstrate that there was anything unusual taking place in Pod 1 on November 12, 2009, to put CO Zimmerman in danger. Mr. Girard concluded that the appellant relies heavily on opinion, perception and hypothesis including the testimony of COs that they felt safer knowing that the MCCP may be watching.

[69] Mr. Girard submitted that there must be a reasonable possibility that an injury would occur due to the absence of alleged communication problems in Pod 1 and this was not established by the appellant.

Pod 1 Gallery Gun Walk Post

[70] Mr. Girard submitted that there must be a reasonable possibility that an injury would occur due to the alleged problems connected with the shooting position or obstructed shooting in Pod 1. Mr. Girard held that, while Deputy Warden Mattson testified that there could be blind spots, he also stated that the gun coverage in Pod 1 was well thought out and broad. Mr. Girard held that the appellant did not submit evidence of anyone taking a shot and experiencing difficulty.

Any Danger Found Is a Normal Condition of Employment

[71] Mr. Girard argued in the alternative that any danger found for not having live feed from the CCTV cameras in Pod 1 fed to the MCCP is a normal condition of work. Mr. Girard confirmed that the correctional setting is, by its very nature, dangerous as COs deal with unpredictable human behaviour and their jobs are inherently dangerous.

C) Reply Submissions of the Appellant

[72] Ms. Blanchette held that Mr. Girard was applying the definition of danger that existed in the Code prior to year 2000 if he was suggesting that CO Zimmerman was not permitted under the Code to refuse to work because he was not assigned to work in Pod 1 on the day of his refusal to work. Ms. Blanchette submitted that this interpretation is inconsistent with *Verville* and *Martin*.

[73] Ms. Blanchette agreed that CO Zimmerman was not posted in Pod 1 on the day of his refusal to work but noted that he could have been required to respond to an emergency in Pod 1 and that he could have been posted to Pod 1 during his spare board.

[74] Ms. Blanchette held that the appellant has not brought new issues to the appeal as the absence of CCTV live feed from Pod 1 to the MCCP and the issue of the intercom on the ranges in Pod 1 was always part of the refusal to work complaint of CO Zimmerman. Ms. Blanchette said that CO Zimmerman agreed to drop his complaint that rifles issued to COs on the gun walk could fall or be pulled through the metal grate on shooting portals on the gun gallery if a single point rifle harness was issued. Ms. Blanchette stated that CSC's addition of bars on the gun portals in response to CO Zimmerman's complaint created a new hazard.

[75] Ms. Blanchette responded that the *Fletcher* and *Stone* cases cited by the respondent are not helpful in this appeal because they predate the seminal decisions in the cases of *Verville* and *Martin*. Ms. Blanchette added that the respondent's citation of *Burchill* and *Shneidman* decisions are of little value as the question before the Courts was in a different legal framework.

[76] Ms. Blanchette reiterated that witnesses testified that the risk of injury increases for COs where there is a delay in response to an alarm and an altercation lasts longer as a result. Ms. Blanchette held that concluding that such risk is reasonably capable of causing injury to COs is something that can easily be inferred arising logically and reasonably from the facts. Ms. Blanchette maintained that CO witnesses agreed that a forceful response has a positive effect on efforts to deter and quell an altercation. This, Ms. Blanchette maintained, is the kind of logical inference that Justice Gauthier stated in her decision in *Verville* that should be considered in deciding if a danger exists.

[77] Ms. Blanchette also stated that one can infer from logic that the risk of injury to COs decreases where the CO responders have information regarding the nature of the altercations towards which they are running.

[78] Ms. Blanchette cited paragraph 34 of the Federal Court decision in the case of *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN)* and *Attorney General of Canada*, 2008 FC 542, where it is stated that :

[...] It is not sufficient for the appeals officer in assessing whether or not the first part of his “danger” test is met, to simply look at the measures taken by the CSC to reduce the danger. The test requires that the appeals officer not only look at the actions of CSC, but also the success of those actions in eliminating, or controlling the hazard, condition, or activity. In my opinion, the appeals officer failed to consider evidence as to the effectiveness of the measures taken by the CSC [...]

[79] Ms. Blanchette held that the respondent did not provide evidence on how the CSC policies, procedures, standing orders training and protective equipment mitigate the absence of CCTV feed from the Pod 1 living units to the MCCP. Ms. Blanchette held that all of these apply to other units at Kent to other institutions who have live CCTV feed from living units going to the MCCP. Ms. Blanchette added that the technical manual on the procurement of cameras stated that the cameras add value to the safety and security of staff.

[80] Ms. Blanchette submitted that the respondent led no evidence to support its claim that: the self contained design of Pod 1 contributes to safety for staff and inmates; COs on the floor in Pod 1 are under constant surveillance by four or five other COs; COs could stand close to the intercom while doing their range walk; COs can use their radios to remain in constant communication with the COs in the Control Post; other posts could monitor the CCTV live feed from Pod 1 cameras; or that COs would not intervene if there was a danger. Appellant witnesses testified to the contrary.

[81] Ms. Blanchette held that there was no evidence that dynamic security mitigates the danger of absence of live feed from Pod 1 to the MCCP.

Analysis

Preliminary Issues

1. Motion to Dismiss Appeal

[82] Mr. Girard argued that the appellant's case should be dismissed because subsection 128(1) of the Code only permits an employee to refuse to work in a place where a condition exists that constitutes a danger to the refusing employee. Mr. Girard held that CO Zimmerman was neither assigned to work on Pod 1 on the day of his refusal to work nor scheduled to work in Pod 1 and so a danger could not have existed for him. Mr. Girard held that CO Zimmerman refused to work having concern for the health and safety of other COs.

[83] However, the evidence in the case established that CO Zimmerman was scheduled to work and could have been assigned to Pod 1 at any time or could have been required to go to Pod 1 during an emergency as a first responder.

[84] Section 128(1) of the Code provides the circumstances in which an employee may exercise his right to refuse to work as follows :

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

- (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
- (b) a condition exists in the place that constitutes a danger to the employee; or
- (c) the performance of the activity constitutes a danger to the employee or to another employee.

[Underlining added]

[85] In this appeal, there was no evidence that CO Zimmerman refused to operate a machine or thing or to work in a place because a condition existed that constituted danger uniquely to him. Rather, I take from the evidence that CO Zimmerman refused to perform his CO activities as he believed that doing so constituted a danger to him or another employee in the circumstances he enumerated in his refusal to work registration to HSO O'Byrne. Pursuant to section 128(1) of the Code CO Zimmerman is permitted to refuse to perform an activity if he has reasonable cause to believe that the performance of the activity constitutes a danger to himself or to another employee.

[86] With regard to Mr. Girard's argument that a danger did not exist for CO Zimmerman because there was no imminent danger at the time of his refusal to work, the concept of imminent danger was abandoned in 2000 when the definition of danger was amended in the Code. The current term "danger" is defined by subsection 122(1) of the Code:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury of illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness

occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[87] For all the above reasons, the respondent's request to dismiss the appeal is dismissed.

2) Scope of the Appeal

[88] Mr. Girard argued that Warden Massey's letter to CO Zimmerman on November 10, 2009 confirmed that immediate action had been taken to resolve the issues that he cited in his refusal to work and that a danger no longer existed. Mr. Girard held that the sole issue that is properly before me deals with the CCTV live feed of Pod 1 not being monitored in the MCCP.

[89] Subsection 128(13) of the Code addresses the situation where an employer takes steps to protect employees from a danger. This provision specifies that the employee has the right to continue to refuse to work if the employee has reasonable cause to believe that the danger continues to exist. Subsection 128(13) of the Code reads:

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

[90] In the case before me, it is significant that CO Zimmerman included all of his complaints in the right to refuse registration document that he gave to HSO O'Byrne at the time of HSO O'Byrne's investigation. Thus a reasonable conclusion is that all complaints raised by CO Zimmerman to HSO O'Byrne are reviewable by me.

[91] That stated, Ms. Blanchette conceded that the employer had taken corrective action on many of the safety issues raised by CO Zimmerman at this refusal to work and confirmed in her submission that only three complaints of CO Zimmerman remain to be adjudicated in this appeal. Ms. Blanchette confirmed that these three complaints include: the absence of camera feeds from Pod 1 being feed to the MCCP; deficiencies related to the Intercom system in Pod 1; and deficiencies related to work on the Pod 1 Gun Walk post.

[92] Ms. Blanchette submitted that the absence of CCTV live feed from Pod 1 to the MCCP and the issue of the intercom was always part of the refusal to work complaint of CO Zimmerman. Ms. Blanchette further stated that CO Zimmerman's refusal to work complaint that rifles issued to COs on the gun walk may fall through or be pulled through the metal grate on shooting portals on the gun gallery remains because CSC's action that added horizontal bars on the gun portals to address CO Zimmerman's complaint and created a new hazard.

[93] Based on all of the above, I find that the following issues are within the scope of the appeal before me:

1. The absence of camera feeds from Pod 1 being feed to the M CCP;
2. The alleged deficiencies related to the Intercom system in Pod 1; and
3. The alleged deficiencies related to work on the Pod 1 Gun Walk post.

On the Merits

[94] To decide if a danger existed for CO Zimmerman, I have to ask myself whether there is a reasonable possibility of injury to the CO's due to the: the absence of camera feeds from Pod 1 being feed to the M CCP; the deficiencies related to the Intercom system in Pod 1 and the deficiencies related to work on the Pod 1 Gun Walk post.

[95] In this regard, Madame Justice Gauthier wrote in paragraph 36 of the *Verville* decision that it is necessary to determine the circumstances in which a potential or existing hazard, condition or activity could be expected to cause injury or illness and that such circumstances will occur in the future as a reasonable possibility for a finding of danger. Madame Justice Gauthier wrote:

[...] I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in which circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

M CCP Feed

[96] As previously noted, on November 10, 2009, Warden Massey agreed in his letter that more research could be conducted to determine if running a feed from Pod 1 to the M CCP is possible. To this end, Warden Massey stated that the Company responsible for managing cameras at Kent would assess the potential of bringing CCTV feed from Pod 1 to the M CCP and that union and management would discuss/develop an action plan once the assessment had been completed.

[97] I take from this that management at Kent agreed at some level that CCTV feed from Pod 1 to the M CCP may indeed offer some health and safety protection to COs employed there and to COs who must respond to alarms and other emergencies in Pod 1. While Warden Massey disagreed that this constituted a danger, he agreed that the matter should be reviewed and assessed.

[98] HSO O'Byrne appears to have similarly agreed with this as he wrote in his investigation report that the absence of CCTV feed from Pod 1 to the M CCP creates a lesser level of protection for CO who must work in Pod 1 but this does not constitute a danger.

[99] Notwithstanding the above, the respondent position at the hearing was that the absence of live CCTV feed from Pod 1 to the M CCP does not constitute a danger to COs working in Pod 1 or responding to an emergency for several reasons. The respondent

held that any danger that might exist is mitigated by: the unique self contained design of Pod 1 which reduces inmate movement and enhances dynamic security; CSC's policies and in the form of Commissioner Directives, Standing Order, Post Orders, Job Descriptions; the training provided to COs; and the protective equipment issued to COs.

[100] In this regard, I find the respondent did not demonstrate how the numerous policies, procedures, standing orders addressing dynamic security, control of inmate movement, CO training and CO personal protection equipment mitigate the absence of live feed from CCTV cameras in Pod 1 to the MCCP especially after an assault or incident has occurred despite all of the security measures in place. Moreover, CM Verville testified that information provided by the MCCP assists dynamic security and emergency response in the living units.

[101] Post Order B-1 entitled, "Main Communication Control Post (MCCP) Post CO – 11 Sector Coordinator, B-1", dated 2009-05-22 confirms under *Responsibilities* that the post is an essential element of security operations and that the MCCP Officer is responsible for investigating any occurrence, dispatching staff and notifying the CM - OIC in the event of an alarm. The Post Order further states under "Response to Alarms" that the MCCP operator is to monitor all system enunciator panels and CCTV monitors at all times to detect internal or external attempted breach of security barriers, fences, etc, and to supply the ECP with audio and/or visual updates in the event of an emergency situation.

[102] The unchallenged testimony of COs Zimmerman, Aulakh, Conteh and Sterkenburg and CM Verville was that CCTV feed from Pod 1 cameras to the MCCP provides a level of protection to CO that may reduce the risk of injury and severity in an emergency. According to the COs, the MCCP can provide immediate and essential information to COs responding to an alarm or other emergency situation regarding the location of incident, the number of inmates potentially involved, the nature of the emergency, whether ancillary fire safety equipment is required, the presence of weapons and whether anyone is injured and needing medical assistance. Additionally, the MCCP officer can enhance the ability of COs to reorganize their response to emergencies and/or incidents and to call for or receive timely police, medical or other emergency assistance. An example of an early call for medical assistance by the MCCP officer was put into evidence.

[103] Furthermore, Deputy Warden Mattson agreed that the PPA does not indicate the precise location of the officer, that the officer in the Control Post is not permitted to use his radio to relay the specific location of an alarm and that any delay in response to an alarm could result in injury or death to COs in the unit. Deputy Warden Mattson also agreed that live feed to the MCCP would enable the MCCP officer to advise the response team to an emergency in Pod 1 if weapons were present, whether the emergency involved a fire requiring COs responding to bring self contained breathing equipment and to call for assistance if the MCCP officer could see that an injury or injuries were present and summon help.

[104] Regarding the respondent's argument that the absence of live feed from cameras in Pod 1 to the MCCP does not constitute a danger because CCTV cameras are for investigative/evidentiary purposes, the evidence of CM Verville was that the MCCP has provided COs and emergency response team members with valuable information regarding

inmate activities going on during a riot at Kent. In this regard, Deputy Warden Mattson agreed that in June of 2012 the MCCP officer at Kent summoned medical assistance before anyone else. In addition, the email that CO Conteh submitted into evidence from Julie Karavel, CSC National Headquarters, and John Wiseman on the subject of the use of additional cameras in medium security women's institution to eliminate drugs and ensure the safety and security of staff and inmates confirms that CSC well understands that the MCCP can reduce risk to the health and safety of COs by monitoring and reporting on inmate activity and authorized such usage.

[105] The respondent also took the position that COs are not required to respond to alarms if doing so could endanger their health and safety. The evidence from CO Zimmerman was that COs are obliged by their job descriptions and CSC documents to protect inmates. COs Zimmerman and Aulakh and CM Verville, seasoned officers, held that the line is not always clear. In my opinion, it is not a stretch of logic to conclude that an instantaneous decision to fight or take flight during an emotionally charged situation is subject to error even for the most seasoned and trained persons. This is especially so because COs rely on each other to their assistance when their health and safety is at risk. Frankly, the respondent's position that CO may simply decide to withdraw during any event is overly simplistic and not reliable.

[106] The respondent additionally argued that the absence of live feed from cameras in Pod 1 to the MCCP does not constitute a danger because the CM who is in charge of the Institution can monitor CCTV cameras from Pod 1 in his office and/or the On-Scene-Controller can provide information to the CM - OIC. CM Verville's contrary evidence was that a CM acting as Officer-in-Charge does not have time to be monitoring the CCTV feed from Pod 1 during an incident and that the On-the-Scene officer is not always the first on the scene. CM Verville also testified that he was not trained on operating the cameras for that purpose. Mr. Hunken's testimony that he observed CMs being tested did not confirm which CMs had been trained or the full nature of the training. On that basis, I am persuaded that the risk is not mitigated by the fact that the camera feed from Pod 1 goes to the CM or the argument that the On-the-Scene can provide the information in the same timely manner.

[107] Mr. Girard stated in his submissions that a danger did not exist because nothing was happening or about to happen on Pod 1. This, however, is not determinative because, as I have already noted, Madame Justice Gauthier wrote in paragraph 36 of the *Verville* decision that it is unnecessary to establish precisely the time when the potential condition or hazard or the future activity will occur. Rather, the definition of danger only requires that one ascertains in which circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[108] With regard to Mr. Girard's position that the appeal should be dismissed because the appellant had not established a reasonable expectation of injury because the appellant had not submitted evidence of prior injuries and called no expert witnesses, I refer to paragraph stated at 51 of the Federal Court decision in *Verville* wherein Justice Gauthier stated:

[...] 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.

[109] In this case, I have given considerable weight to the testimonies of the COs as ordinary witnesses based on their extensive knowledge, experience and training regarding the issues.

[110] In this regard, it must be noted that Kent is a maximum security institution and all parties agreed that the unpredictability of inmates to spontaneously assault a CO or other inmate without warning is an ever present hazard and that such assault does not follow any predictable progression. Parties also agreed that dynamic security and negotiations cannot assure that COs will not be attacked.

[111] The unchallenged evidence of CO Strekenburg was that the use of weapons has increased at Kent and he has personally observed stabbings and the unchallenged evidence of COs Aulakh and Strekenburg was that it takes longer to respond to an incident in Pod 1 and that 33 stab wounds or 50 head blows could be delivered by someone in as little as seven seconds.

[112] COs Conteh and Strekenburg testified that a firearm has been deployed twice in Pod 1 since its opening. I take that these were serious incidents because *Post Order F-11, Gallery Post: Pod Living Unit Gun Walk* states that a firearm can only be deployed to prevent death, grievous bodily harm to a correctional officer or inmate or escape when all lesser means are unavailable or have proven unsuccessful. Paragraph (kk) of *Post Order F-11, Gallery Post: Pod Living Unit Gun Walk* states:

A warning shot may be used to prevent death, grievous bodily harm or escapes when all lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situational factors.

A deliberately aimed shot at an individual to prevent death, grievous bodily harm or escapes shall only be used when all lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situational factors.

A deliberately aimed shot at an individual to prevent destruction of property if there is a reasonable possibility that a life-threatening incident will develop and if lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situational factors.

[113] In my opinion, all of this establishes that the absence of live feed from the CCTV cameras in Pod 1 to the MCCP constitutes a hazard for COs employed on Pod 1 or for COs required to respond to an assault or other emergency that is not mitigated by CSC and could reasonably be expected in the circumstances to cause injury to a CO exposed thereto not as a mere possibility but as a reasonable one.

[114] For all the above reasons, I conclude that a danger existed for CO Zimmerman on the day he exercised his right to refuse dangerous work.

Is the Danger a Normal Condition of Employment?

[115] I must now decide whether the danger constitutes a normal condition of employment and therefore precluded CO Zimmerman from exercising his work refusal.

[116] The Federal Court in *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846 upheld the Appeals Officer's interpretation in that case with regard to a danger that constituted a normal condition of employment at paragraph 46 as follows:

[46] The Appeals Officer held as follows at paragraph 152:

[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. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.

[153] Once all of 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. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.

[154] For the purposes of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[117] In *Canada v. E. Vandal* (2010 FC 87), the Federal Court affirmed the reasoning of this Tribunal found in paragraph 302 of *Eric Vandal et al. and Correctional Service Canada* decision (OHSTC-07-009) relative to what constitutes a normal condition of employment in the context of correctional officers having to escort inmates. Paragraph 302 of that decision reads as follows:

[302] There is also an important distinction to be made between such a danger and a danger that constitutes a normal condition of employment that would preclude a refusal to work. The latter presupposes that the employer has first determined that a danger exists during escorts and has

then taken all of the measures necessary to protect its employees, i.e. it has identified and controlled all of the factors that could have a major negative impact on the duty of conducting escorts. At that point there is nothing more the employer can do to protect its employees any further.

[118] In the case at hand, the evidence was that the absence of CCTV feed from Pod 1 to the MCCP increases risk to COs who are deployed to work or who must respond to an alarm of incident in Pod 1. Taking into account the evidence of COs that the MCCP officer can assist COs in assessing, responding, containing and isolating an incident and the evidence that the risk of not having the live camera feed is not mitigated by CSC, I find that the danger does not constitute a normal condition of employment for CO Zimmerman.

Intercom System on Ranges in Pod 1

[119] The appellant's position is that the intercom on each range in Pod 1 is not helpful for COs to communicate with Control Post officers in Pod 1 because the intercom is located near the sliding doors and may not be heard. In this regard, CO Zimmerman testified that COs cannot use their radio as an alternate because the channel is used throughout Kent and inmates can overhear what is being communicated. Additionally, the testimony of COs Zimmerman and Conteh and CM Verville was that portable radios issued to COs do not mitigate the intercom problem because their use is limited during an alarm by policy.

[120] In this regard, CO Zimmerman referred me to *Standing Order 567-2* dated 2009-12-21 entitled *Protocol For Staff Responding to Emergencies* which states in section 18 that, "Once a PPS is announced by the MCCP all telephone conversations and radio traffic shall cease immediately and no other calls shall be initiated until the alarm is cleared." CO Strekenburg held that it was impossible for a CO to access the radio during an altercation or incident with an inmate, as the officer's hands are busy defending from blows.

[121] HSO O'Byrne wrote in his investigation report that the employer stated that the intercom in Pod 1 is primarily for the use of Control Post officers communicating with inmates and should not be relied upon as an emergency device. Ms. Blanchette did not dispute this statement directly in her submissions.

[122] The employer's position was that there are no communication problems for COs on the range communicating with colleagues in Pod 1 as one officer will stand close to the intercom near the entrance of the range and can be in contact with the console via the intercom. I note that *Post Order F-11, Pod Living Unit Gun Walk* for the Gallery Post states that the Officer is responsible for maintaining constant observation of staff and inmate movement within the Pod including inmate ranges, common areas, program corridors, class rooms and the interior/exterior exercise areas. Mr. Girard held that this post represents an essential element security operations designed to support the handling of secure inmate movement and supervision.

[123] Taking all of this into account, I was not convinced by the evidence that the location of the intercom system on the ranges or challenges connected with that location could be reasonably expected in the circumstance to cause injury to a CO and I confirm the finding of HSO O'Byrne that this did not constitute a danger for COs in Pod 1.

Pod 1 Gallery Gun Walk Post

[124] To appreciate this issue it is necessary to refer to Kent's *Contingency Plan Manual* and to *Post Order F-11, Pod Living Unit Gun Walk* for the Gallery Post. In the case of Kent's *Contingency Plan Manual*, the Manual reads, "During the first ten minutes of any potential serious uprising, it is important to show an immediate, well organized response." *Post Order F-11* states that the gallery officer needs to be assessing whether a warning shot or a deliberate aimed shot is necessary in the event of an emergency situation to prevent death or grievous bodily injury. In my opinion, these documents confirm that the gun gallery officer has an important safety role for deterring and/or curtailing emergency situations in order to save someone's life.

[125] CO Zimmerman's refusal to work complaint included his concern that space between the security bars was sufficiently large to permit a rifle to fall through the bars when the officer was using the gun gallery viewing window. If this were to occur, a powerful rifle would get into the hands of inmates.

[126] Warden Massey agreed in his letter to CO Zimmerman dated November 10, 2009 that the space between the security bars was sufficiently large to permit a rifle to fall through the bars when the officer was using the gun gallery viewing window despite the current shoulder belt. He stated that Kent supports a single point harness but noted that such a harness is not listed in the security manual and so management at Kent was prevented from purchasing it. Warden Massey advised in his letter that a request had been forward to CSC RHQ for permission to purchase and use the single point harness.

[127] In the interim, CSC had horizontal bars installed in viewing windows on the gun gallery to prevent rifles from falling or being pulled by inmates through the grates. According to CO Zimmerman, this had the unintended consequence of creating a new hazard as the bars can delay a CO on the gun gallery from delivering a timely shot. With the bars, the CO must now withdraw and reinsert the firearm through the bars each time the inmate in question moves. Ms. Blanchette held that the time to do this diminishes the likelihood of the potentially lifesaving shot being timely and successful.

[128] In my view, the evidence confirms that this gallery gun walk post officer provides a necessary layer of protection for COs working in Pod 1 and for COs responding from other parts of Kent to an emergency. As a result of the horizontal bars affixed to the gun portals, the gallery gun walk officer is not always capable of delivering a timely and accurate warning or deliberate shot to quell an incident or to save the life of a CO.

[129] CO Conteh testified that a firearm has been deployed twice on Pod 1 with multiple shots since the Pod 1 opened. In my opinion, this demonstrates that this risk of an emergency situation occurring in Pod 1 is not hypothetical.

[130] Based on the evidence, it is my opinion that the extra horizontal bars installed on gun gallery viewing windows in Pod 1 could in the circumstances be reasonably expected to

cause injury to CO Zimmerman in the event of an incident in Pod 1 as a reasonable possibility as opposed to a mere possibility. With the addition of the bars, the CO is required to withdraw and reinsert the firearm through the bars each time the inmate in question moves. As a result of the horizontal bars affixed to the gun portals, the gallery gun walk officer is not always capable of delivering a necessary warning or deliberate shot during an incident to quell or arrest an incident or to save the life of a CO.

[131] Consequently, I find that addition of horizontal bars installed on gun gallery viewing windows on pod 1 to prevent rifles from falling or being pulled by inmates through the grates constitute a danger for COs working in Pod 1 and for COs responding from other parts of Kent to an emergency.

Is the Danger a Normal Condition of Employment?

[132] To decide if this danger constitutes a normal condition of employment and therefore precluded CO Zimmerman from exercising his work refusal, I refer again to the *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500* and Vandal decisions.

[133] In this regard, the respondent was made aware of problems raised by CO Zimmerman and did not act because the Deputy Warden Mattson was waiting for CSC Headquarters to decide how to resolve the matter. In the meantime, the employer had bars installed to prevent a rifle from getting into the hands of inmates. Despite the employer's efforts, the evidence before me demonstrates that CSC has not addressed the danger raised by CO Zimmerman and cannot be said to have taken all reasonable measure to address the hazard. On that basis, I find that the danger does not constitute a normal condition of employment.

Decision

[134] For all the reasons specified, I hereby rescind the decision that a danger did not exist rendered by HSO O'Byrne on November 16, 2009.

[135] I direct the employer to take measures to correct the hazards that constitute the danger as per the direction appended to this decision.

Douglas Malanka
Appeals Officer



APPENDIX

Citation: Brian Zimmerman v. Canada (Correctional Service), 2013 OHSTC 34

Case no.: 2009-32

IN THE MATTER OF THE *CANADA LABOUR CODE*

PART II - OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER PURSUANT TO PARAGRAPH 145(2)(a)

Following an appeal brought under subsection 129(7) of the *Canada Labour Code*, Part II, I conducted an inquiry, pursuant to subsection 146.1(1), with respect to a decision that the danger did not exist rendered by a health and safety officer Michael O'Byrne on November 16, 2009. That decision was rendered following an investigation into a refusal to work made by Brian Zimmerman, a Correctional Officer (CO) employed at Kent Institution, Agassiz, British Columbia. The work place is operated by Correctional Service of Canada, an employer subject to the *Canada Labour Code*, Part II.

I conclude from the evidence that the absence of CCTV feed from Pod 1 to the MCCP increases risk of injury for COs working in Pod 1 or responding to an emergency there as it removes a layer of protection available to COs in other parts of Kent Institution which is not otherwise mitigated. Such CCTV feed enables the MCCP officer to provide and/or confirm necessary and timely intelligence for COs and responding to an assault or other emergency such as the exact location of the alarm or emergency, the number of inmates potentially involved, the nature of the emergency, whether ancillary fire safety equipment is required, the presence of weapons and whether anyone is injured and needing medical, enhance the ability of COs to reorganize their response to emergencies and/or incidents and to call for or receive timely police, medical or other emergency assistance and other information that was identified by COs.

I further conclude that the addition of horizontal bars installed in viewing windows on the gun gallery to prevent rifles from falling or being pulled by inmates through the grates constitutes a danger for COs working in Pod 1 and for COs responding from other parts of Kent Institution to an emergency. The evidence confirms that the gun gallery officer has an important safety role for deterring and/or curtailing an emergency situation before it escalates in magnitude or risk and for directing a deliberate shot to save someone's life. With the addition of the bars, the CO is required to withdraw and reinsert the firearm through the bars each time the inmate in question moves. As a result of the horizontal bars affixed to the

gun portals, the gallery gun walk office is not capable in every circumstance of delivering a necessary warning or deliberate shot during an incident to quell or arrest an incident or to save the life of a CO.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures within 90 days to correct the hazards that constitute the danger and to report those measures to a Health and Safety Officer of the Vancouver District Office by February 24, 2014.

Issued at Ottawa this 26th day of November, 2013.

Douglas Malanka
Appeals Officer

To: Correctional Service of Canada
Kent Institution
Agassiz, British Columbia