CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Mr. Juan Verville & fifteen other correctional officers

applicants

and

Correctional Service Canada
Kent Institution

employer

and

Todd Campbell

health & safety officer

Decision No.: 02-013
June 28, 2002

[1] This case concerns an appeal made by Mr. Juan Verville and fifteen other correctional officers (COs) under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision of absence of danger as defined in the *Code* (hereafter referred to as "danger") given by health and safety officer Todd Campbell, Human Resources Development Canada on September 27, 2001. The employer, Correctional Service Canada, also appealed, under subsection 146(1) of the *Code*, a direction (see Appendix) issued by the health and safety officer under subsection 145(1) for a contravention of section 124 of the *Code*.

[2] The facts of this case are not in dispute. As a result of being ordered not to carry handcuffs on his person, Juan Verville and 15 other correctional officers refused to carry out their duties at the Kent Institution in Agassiz,

British Columbia. This refusal to work occurred on the evening of September 24, 2001. The health and safety officer arrived to investigate the refusals to work on September 25, 2001. Mr. Verville had, for the previous eighteen months, routinely carried handcuffs in the Living Units, with the acquiescence of management. However, on September 22, 2001, Mr. Verville was advised by his supervisor that he was not to carry handcuffs in the Living Units. On September 24, Mr. Verville was ordered not to wear handcuffs while working in the Units. As a result of management's decision, Mr. Verville and the fifteen other correctional officers refused to work in Living Units A to H of the Institution. The reason for the refusals to work was that the correctional officers believed that they would be exposed to "danger" as defined in the *Code* if they were required to work in the Units without being allowed to carry handcuffs.

[3] The health and safety officer carried out an investigation into the refusals to work and concluded that there was, in fact, no danger under the *Code* as "the lack of handcuffs on their person could not reasonably be expected to cause injury to the CO's". However, due to the employer's imposed handcuff policy, the health and safety officer found that the health and safety of the correctional officers was not adequately protected by the employer, Correctional Service Canada. As a result, the health and safety officer asserted that there had been a contravention of section 124 of the *Code*. He issued a direction to Correctional Service Canada, the relevant part reading,

> The health and safety of Correctional Officers working in Living Units A thru H, is not protected as these employees are not permitted to carry on their person, at their discretion, a pair of Correctional Services Canada approved handcuffs while working in these Units. Having the closest such handcuffs normally available in the Living Unit Control Posts (Bubbles), prevents the Correctional Officers from being able to expediently access this equipment to restrain and secure inmates displaying violent behaviour towards the Correctional Officers or other inmates. The delay in accessing this equipment when needed, prolongs the physical altercation between the Correctional Officers and inmates, requires greater amounts of physical force by the Correctional Officers to subdue and restrain the inmates, and thereby increases the likelihood and severity of injuries received by the Correctional Officers, (and inmates).

[4] The employees appealed the finding of no danger, and the employer appealed the direction for contravention issued.

Appeal of the Decision

[5] Concerning the finding of no danger, I find myself in agreement with the health and safety officer. Under section 128 (1) of the *Code*, an employee may refuse to work if he/she has reasonable cause to believe that working in his/her workplace constitutes a danger to himself/herself or to other employees.

> **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
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> *(a)* the use or operation of the machine or thing constitutes a danger to the employee or to another employee, or
>
> *(b)* a condition exists in the place that constitutes a danger to the employee, or
>
> *(c)* the performance of the activity by the employee constitutes a danger to the employee or to another employee.
>
> **(2)** An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> *(d)* the refusal puts the life, health or safety of another person directly in danger; or
>
> *(e)* the danger referred to in subsection (1) is a normal condition of employment.

[6] Danger is defined at section 122(1) of the *Code* as follows:

> any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system

[7] The health and safety officer had to determine whether such a danger existed for the employees. Thus, the real issue in dispute is whether, when the health and safety officer investigated the refusals to work, there existed such a danger that the employees were justified in refusing to work in Living Units A to H without handcuffs.

[8] The correct standard as to whether a danger exists was clarified by myself in the decision of Parks Canada v. Martin[1] where I stated that,

> In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of the facts gathered during his investigation, that:
>
> - the future activity in question will take place[2] ;
> - an employee will be exposed to the activity when it occurs; and
> - there is a reasonable expectation that:
>   - the activity will cause injury or illness to the employee exposed thereto; and,
>   - the injury or illness will occur immediately upon exposure to the activity.

[1] Parks Canada Agency v. Doug Martin and the Public Service Alliance of Canada (Canada Appeals Office, Decision No. 02-009, May 23, 2002)

[2] This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.

[9] There is no indication in the instant case that the employees would be exposed to an activity that would cause injury to them. It is true that they were required to work amongst prisoners incarcerated in a maximum security facility, but there was no specific threat or occurrence that night that might reasonably be thought to cause injury. There was also no information that anything out of the ordinary was going to occur in the foreseeable future. The concern of the refusing correctional officers was that an assault can happen at any time without warning. That concern is based primarily on the unpredictability of the inmates' behaviour. The testimonies of correctional officers were eloquent on this point.

[10] In a maximum security environment, such as the Kent Institution, the risk of being assaulted is always present, and is inherent to a correctional officer's job (see the Federal Court decision of Canada v. Lavoie[3]). Thus, there is an inherent risk of being assaulted without warning in such an environment. In order to find that a danger existed, it would have to be demonstrated, based on the facts gathered during the health and safety officer's investigation, that there was a reasonable expectation that an injury was likely to occur to those correctional officers' carrying out their current or future duties. This reasonable expectation should not be based on hypothesis or conjecture. Furthermore, the employees argue that the injury would occur because the correctional officers are not permitted to carry handcuffs at their discretion. This has not been demonstrated.

[11] The employees alleged that by not being permitted to carry handcuffs, the length of a potential struggle with an inmate would be lengthened, thus increasing the possibility of injury. This argument is based on a future possibility of a struggle, as well as the unproven hypothesis that a longer struggle carries an increased risk of injury. As I have expressed previously in Parks Canada and wish to stress, the concept of "danger" as defined in the *Code* is unique in that it only applies in exceptional circumstances and is a concept that is strictly based on facts. Like the Parks Canada case, this case is based on the unpredictability of human behaviour, a concept that I have said is not in harmony with the concept of danger as defined in the *Code*. I find that the risk that the correctional officers faced on September 24, 2001 was nothing other than the risk inherent to their work.

[12] For all the above reasons, I confirm the decision of no danger rendered by the health and safety officer.

[3] Canada (Attorney General) v. Lavoie, [1998] F.C.J. No. 1285, FC T-2420-97

Appeal of the Direction

[13] Concerning the appeal of the direction issued by the health and safety officer, the employer is asking me to set it aside. This direction requires the employer to permit correctional officers to carry handcuffs, at their discretion, while working in the Living Units.

[14] This direction is based on a contravention of section 124 of the *Code*, which reads,

> Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[15] The *Code* permits anyone who is "aggrieved" by a direction to appeal this direction to an appeals officer (s. 146(1)). The appeals officer then shall, "in a summary way", inquire into the circumstances of the direction, and may vary, rescind, or confirm the direction (s. 146.1(1)). The job of the appeals officer is to place himself or herself in the shoes of the health and safety officer and make the determination that he or she ought to have made. An appeal under s. 146(1) is not an "appeal" in the technical sense, and thus there is no onus on anyone (see H.D. Snook[4]). Guided by s.122.1, which states that the purpose of Part II of the *Code* is to "prevent accidents and injury to health arising out of, linked with or occurring in the course of employment", an appeals officer is simply concerned with coming up with the correct decision from a health and safety perspective.

[16] There is no inherent contradiction between finding that although "danger" as defined in the *Code* may be found not to exist, a contravention may still exist. For this reason, a safety officer may find that even though there was no "danger", an employer nevertheless may not have ensured the protection of the health and safety of his employees.

[17] A direction is issued by a health and safety officer in order to remedy a contravention. In the case at hand, the health and safety officer was of the opinion that in order to remedy the failure of the employer to ensure the protection of the health and safety of the employees, those employees should be permitted to carry handcuffs on the job, at their discretion. I am not persuaded that the employer has not taken the necessary measures to protect the health and safety of its employees. Furthermore, I am not persuaded that providing the employees with the discretion to use handcuffs would be a proper remedy to the alleged problem.

[4] H.D. Snook (1991), 86 di 74, C.L.R.B. (Canada Labour Relations Board).

[18] I do not think that it has been established that the employer did not ensure the protection of the health and safety of its employees. In order for a contravention to exist, the employer must not have taken all reasonable steps to ensure employee health and safety. Employers may be guided, in part, by s.122.2, which states,

> Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[19] In the instant case, the employer has, in my opinion, taken all reasonable steps to ensure the employees' health and safety. They have attempted (as much as possible in a penitentiary setting) to eliminate and reduce hazards by training the correctional officers, and conducting risk assessments, and by instituting a Dynamic Security Model for interacting with prisoners. In addition, the correctional officers are issued with a Personal Protection Alarm (PPA) that acts like a "panic button" to summon assistance and they have access to protective equipment such as handcuffs and OC spray from the Living Unit Control Post ("bubble"), where an armed correctional officer is standing by.

[20] It can be said that the employer could always do more and provide more to protect its employees. However, in Westcoast Energy v. Cadieux[5], the Federal Court made it clear that s.125 (and by extension, s.124) of the *Code* did not impose legal obligations on the employer beyond a certain minimum standard. This reasoning has been followed by decisions such as Canadian National Railway v. Scully[6], where regional safety officer (now appeals officer) D. Malanka concluded that in order for a contravention of s.124 to exist, the evidence must be "compelling to show that an extra level of protection is needed to protect the health and safety of employees". Mr. Malanka, in another, more recent, decision[7], stated that in order to require the installation of safety equipment (in this case, a fire prevention system), he must be convinced that that equipment is necessary to protect the health and safety of the employees, and that, on a balance of probabilities, the current safety measures were inadequate to protect employees.

[21] It has also been established in the instant case that:

- there is no evidence that the unavailability of handcuffs, due to correctional officers not carrying them on their person, has ever led to injury,

[5] Westcoast Energy v. Cadieux, [1995] F.C.J. No. 1584, FC T-1607-93
[6] Canadian National Railway v. Scully, [2001] C.L.C.R.S.O.D No. 3 (QL), para 35
[7] Buckham Transport Ltd. (Re), [2001] C.L.C.R.S.O.D No. 5 (QL), para. 41 and 42

- that the correctional officers are required not to carry handcuffs on their person due to the Dynamic Security Model, which mandates that correctional officers decrease their "displays of force" (such as the wearing of handcuffs) in order to increase their safety, and
- the PPAs have a very short response time (no more than two minutes, and usually much less).

[22] Thus, I am not convinced that there has been a contravention of s.124, and it follows then, that there is no need to issue a direction.

[23] Also, even if there had been a contravention of s.124, the direction issued would not provide a proper remedy. The employees argued that by not having ready access to handcuffs, i.e. on their person, they were placed in danger (or more accurately, at risk) as any possible physical struggle would be lengthened by the time it took for someone to bring them handcuffs. Assuming this to be the case, it would seem that the proper action would be to require the mandatory wearing of handcuffs. As the argument is based on the unpredictability of getting into a struggle with a prisoner, as well as the varying length of a struggle, any correctional officer who chose not to wear handcuffs that day would be at the same disadvantage as someone who was prevented by management from wearing them. Just as the wearing of other safety equipment, such as hard hats, is not discretionary in certain situations, neither should the wearing of handcuffs, if they were truly necessary. The use of safety equipment should not be a discretionary decision made by employees.

[24] I accept the employer's assertion that an important part of Dynamic Security is the "removal of traditional symbols of authority" in interactions between prisoners and staff. In addition, if a correctional officer feels at increased risk on a particular shift, he or she may request permission to carry handcuffs on that shift. The employer prefers that option because it is consistent with Dynamic Security. It allows the employer to be aware of any increased risks to its employees or inmates, which would not be the case if the correctional officers wore handcuffs at their discretion, with no reporting requirements. This is because the current situation, where the CO's must request permission to carry handcuffs on any particular shift, encourages the CO's to share information about risks. Withholding this information would impede Correctional Service Canada's ability to manage the penitentiaries in a diligent and responsible manner. Despite the fact that there are inherent risks to the job, the employer is responsible for taking measures to ensure that any job or duty is free from unnecessary risks. I believe that the employer has taken the necessary steps to mitigate the risks in this case.

[25] However, I would like to point out that I am not unsympathetic to the concerns shown by the correctional officers. Theirs is not an easy job, and interpreters of the *Code* since at least 1991[8] have expressed frustration that the *Code* is not necessarily the appropriate vehicle for resolving problems such as this one.

[26] Because of this, problems that are apparent, such as some employees not feeling confident in their employer's commitment to their health and safety, as well as some confusion over policy and employer requirements, indicate that the concerns of the correctional officers could perhaps be better served by the Internal Complaint Resolution Process found at s.127.1 of the *Code*.

[27] For all of the above reasons, I rescind the direction issued by safety officer Todd Campbell, on September 27, 2001.

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Serge Cadieux
Appeals Officer

[8] Stephenson and Treasury Board (Solicitor General), [1991] P.S.S.R.B. No. 70 (Public Service Staff Relations Board) (QL)

APPENDIX

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGAPH 145(1)

On 25 September 2001, the undersigned Health and Safety Officer conducted an investigation following a refusal to work made by employees named on the attached page, in the work place operated by CORRECTIONAL SERVICE CANADA, being an employer subject to the *Canada Labour Code*, Part II, at P.O. Box 1500, 4732 Cemetary Road, Agassiz, British Columbia, V0M 1A0, the said work place being sometimes known as Kent Institution.

The said Health and Safety Officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, is being contravened:

> *124. Every employee shall ensure that the health and safety at work of every person employed by the employer is protected.*

The health and safety of Correctional Officers working in Living Unites A thru H, is not protected as these employees are not permitted to carry on their person, at their discretion, a pair of Correctional Service Canada approved handcuffs while working in these Units. Having the closest such handcuffs normally available in the Living Unit Control Posts (Bubbles), prevents the Correctional Officers from being able to expediently access this equipment to restrain and secure inmates displaying violent behaviour towards the Correctional Officers or other inmates. The delay in accessing this equipment when needed, prolongs the physical altercation between the Correctional Officers and inmates, requires greater amounts of physical force by the Correctional Officers to subdue and restrain the inmates, and thereby increases the likelihood and severity of injuries received by the Correctional Officers, (and inmates).

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than 11 October 2001.

Issued at Surrey, this 27th day of September 2001.

TODD CAMPBELL
Health and Safety Officer

To: CORRECTIONAL SERVICE CANADA
Kent Institution
P.O. Box 1500
4732 Cemetary Road
Agassiz, B.C. V0M 1A0

SUMMARY OF APPEALS OFFICER'S DECISION

Decision No.: **02-013**

Appellant: Mr. Juan Verville & fifteen other correctional officers

Respondent: Correctional Service Canada, Kent Institution

Provisions:

***Canada Labour Code*:** 122(1), 124, 128(1), 129(7), 145(1), 146(1)

Keywords: Danger, correctional officers, Living Units, handcuffs, discretion to wear handcuffs, maximum security facility, assault, unpredictability of human behaviour, risk and assault, necessary measures to protect employees, Dynamic Security, risk assessment, Personal Protection Alarm, Living Unit Control Post, display of force, PPA response time, length of a struggle, inherent risk.

Summary:

A health and safety officer was called to investigate a refusal to work at the Kent Institution. Mr. Juan Verville and fifteen other correctional officers (COs) refused to work in Living Units A to H of the Institution because they were ordered by management not to wear handcuffs in those Units. The health and safety officer ruled that COs were not in danger as defined in the *Canada Labour Code*, Part II (the Code). He however ruled that Correctional Service Canada (CSC) was in contravention of section 124 of the Code by not allowing COs to carry on their persons and at their discretion, a set of handcuffs. The health and safety officer issued a direction under subsection 145(1) of the Code to CSC. The employees appealed the decision of no danger whereas CSC appealed the direction.

On appeal, the appeals officer confirmed the decision of absence of danger and rescinded the direction for contravention.

The appeals officer agreed with the health and safety officer that no danger as defined in the Code existed at the time of his investigation to COs. He acknowledged that in a penitentiary environment there exists an inherent risk of assault but that no information was made available to him that an incident was taking place or would take place. The appeals officer ruled that the COs concern was related to the unpredictability of the behaviour of inmates, a concept that is not in harmony with danger as defined in the Code.

As for the direction, the appeals officer believed that the measures taken by CSC did protect the health and safety of employees. Based on a decision of the

Federal Court in Westcoast v. Cadieux, the appeals officer found that section 124 of the Code did not impose legal obligations on the employer beyond a certain minimum standard. The employer's measures to protect COs included training, conducting risk assessments, instituting a Dynamic Security Model for interacting with inmates. COs are also issued a Personal Protection Alarm which results in assistance being provided at the very most within 2 minutes. COs also have access to handcuffs and OC spray from the Living Unit Control Post where an armed CO is standing by. For all those reasons the appeals officer was satisfied that the measures taken by CSC were sufficient to protect the COs and rescinded the direction.