

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Mr. Jack Stone

Applicant

and

Correctional Service of Canada

Employer

Decision No. 02-019

December 6 , 2002

This case was heard by appeals officer Serge Cadieux on September 18 and 19, 2002 in Moncton, N.B. A view of specific areas of concern at the Springhill Institution took place on the morning of September 18, 2002.

Appearances

Mr. Jack Stone, for himself and Mr. George Manthorne for the Union of Canadian Correctional Officers (UCCO).

Mr. Richard E. Fader, counsel, for Correctional Service of Canada.

Glen Grandy, health and safety officer, Human Resources Development Canada, Labour Program.

- [1] Mr. Stone is a correctional officer (CX) at the Springhill Institution. On February 12, 2002, he exercised his right to refuse to work. Mr. Stone's statement of refusal to work is reported in the health and safety officer's Investigation Report and Decision. It reads:

I am revoking (sic) my right to refuse dangerous work under the *Canada Labour Code*, section 128.1. I am doing this on behalf of myself and my fellow employees.

My concern is the ability of inmates to bring contraband back from the maintenance and industrial shops. Staffing #26 (read #20) Building properly will allow staff to control this traffic to a large degree and very much reduce this risk...

- [2] Mr. Stone clarified his concern at the hearing during his opening statement. He stated that inmates that work in any of the shops e.g. the number 18 building: the vocational industrial shop, or the number 19 building: the maintenance shop, have the ability to steal or manufacture contraband items that can endanger the health and safety of staff at the Springhill Institution. Furthermore, they have the ability to transport this contraband unimpeded back to their cells, the inside yard, the outside yard, the gym, or any place in the Institution where inmates have access, which puts any staff that works in this area in danger. Mr. Stone is of the view that:

"By not staffing the service entrance properly, we feel CSC are not practicing the due diligence that the Labour Code say they must in controlling this identified risk."

- [3] Although Mr. Stone's refusal to work was not treated as a group refusal, it was clear that he was refusing for all correctional officers. However, the health and safety officer, Mr. Glenn Grandy, acknowledged that no other correctional officer had similarly refused to work. According to the health and safety officer, the reason for his involvement in this refusal to work was that the concern of Mr. Stone had not been addressed to his satisfaction by the Internal Complaint Resolution Process found at section 127.1 of the *Canada Labour Code*, Part II (the Code).
- [4] Under that process, health and safety committee members, of whom Mr. Stone was a member, investigated a complaint lodged on August 11, 2001, by Mr. Sean McLeod, another correctional officer of the Springhill Institution. Mr. McLeod had asked his immediate supervisor to initiate the Internal Complaint Resolution Process to address the staffing of the Service Entrance, a post which had been eliminated following a post analysis in the mid 1990's. Mr. McLeod was of the view that

This post if staffed properly could very possibly stop a great deal of contraband in the institution that is fabricated in the maintenance shops. There have been several home made knives that clearly come from the maintenance shop that have been found in the living units by staff doing routine searching. These weapons create a threat to both staff and inmates once they have been made.

Along with the shop instructors doing their routine searching and having the Service Entrance properly staffed by CX we can greatly reduce the risk of staff and inmates being injured or killed in our institution.

- [5] The health and safety committee members concluded that

There would be a reduced risk if the Inmate Movement Control Post, Building #20, was manned with a minimum of two CX Officers, one to control the gates, and one to search all inmates and vehicles passing the post, as requested by the complainant...

However, the committee noted in its conclusion that

Further to the above, the Investigators recognize that reinstatement of, or expansion to, a Post, is (sic) beyond their authority, and will require, as a minimum, a detailed post analysis.

- [6] The health and safety officer investigated Mr. Stone's refusal to work, on site, on February 18, 2002, six days after the initial refusal to work. According to the health and safety officer, the delay in carrying out the investigation is due to management not being ready to receive the officer.
- [7] The health and safety officer carried out his investigation and concluded that Mr. Stone was not in a situation of danger as defined in the Code. His decision was based on the following facts, which have been reported in the health and safety officer's Investigation Report and Decision:
- Service gate adjacent to # 20 post has not been staffed full time since 1992/1993 and at that time was used mainly for vehicle control and very limited staff searching.
 - Service gate used for special movements, construction and for emergencies.
 - Springhill Institution Searching plan in place and is reviewed on a regular basis and as specific threats arises.
 - Inmates issued fork, knife and spoon for hygienic purposes. Contraband may be obtained and is accessible anywhere the inmate is permitted to be.
 - Training records for both uniformed and non uniformed staff were reviewed. Staff that control inmates must be trained in searching and frisking procedures in accordance with internal protocol. Records of those trained were made available.
 - Staff in # 18 and # 19 buildings were observed or questioned on frisking procedures and appeared to be competent.
- [8] Mr. Grandy explained that it is the policy of the Institution to have instructors search inmates every time they leave the shop. The only time they are not searched is when they go outside of the shop for a smoke break. The health and safety officer agreed with Mr. Stone that, notwithstanding that the inmates are thoroughly searched by the shop instructors, "...the door is open and they are able to put stuff out unobserved at any time". He further acknowledged that inmates could pick up later the contraband in question and

proceed to another destination with it. In fact, the health and safety officer ascertained through a walk-around that there were nails, pieces of strap and rocks that could be used by inmates to fabricate weapons at any time.

- [9] When asked by Mr. Fader whether he was aware of anything specific that had occurred to justify the concern of Mr. Stone, the health and safety officer answered that there was one incident. He referred to the planer¹ blade incident which had occurred two to three weeks prior to his investigation. In that incident, a planer blade from a shop was reported missing by the shop instructor. The blade was later found outside an inmate's cell. Mr. Stone emphasized that it is only after the planer blade incident that the practice of searching inmates leaving the shop took place. The health and safety officer stated that this incident had no role to play in his decision. He also added that there was nothing out of the ordinary going on at the Institution at the time of his investigation.
- [10] Mr. Ralph James Henwood works for Correctional Service Canada at Springhill Institution as a shop instructor. In his shop, nine (9) inmates work at manufacturing furniture. It should be noted that the testimony of Mr. Henwood was corroborated by the testimony of Mr. Morley Wood, another shop instructor at Springhill Institution.
- [11] Mr. Henwood stated that the inmates in his shop move around freely and have access to the outside of the building. He acknowledged that the inmates could manufacture a weapon or some other form of contraband in his shop without his knowledge. They could also put the contraband outside to be picked up later in the day after they have been searched and sent back to the units. Mr. Henwood testified that it is also not unusual, especially in the summer time, to look outside of the shop and to find inmates there that do not belong to any of the shops. In fact some inmates have walked in his shop without business and he had to ask them to leave. There are a variety of reasons why these people are walking, or floating, around and shop instructors, like correctional officers, have serious concerns with this. The point being made is that it may not necessarily be the inmates working in the shop who would pick up the contraband placed outside. He related to the tribunal incidents that support this proposition.
- [12] Mr. Henwood confirmed to Mr. Fader that he considers himself part of the security team of the Institution and that he is continuously on guard, a subsequent reference made by Mr. Wood to dynamic² security at Springhill. For example, Mr. Henwood pats down the inmates leaving his shop every day after having verified that all the tools are accounted for in the shop. He will also inspect the outside of his shop. If he sees or finds anything illegal or suspicious, such as someone walking in an area where that person should not be, he is required to and will take appropriate action such as questioning and searching the

¹ A tool for planing wood

² Mr. Wood explained that, in his personal view, dynamic security is ongoing day to day security procedures such as searching and observing anything out of the ordinary.

individual in question. He will also write up an observation report. Inmates that are caught with contraband or a weapon will be charged. They could end up in segregation where they are locked up twenty three hours a day and could see their security classification brought up to maximum. It is Mr. Henderson's view that he and the other shop supervisors feel that security in the areas of buildings #18 and #19 would be improved if the service entrance was staffed properly.

- [13] Mr. Carlyle Brown, Acting Security Officer, and Mr. Chris Howard, Acting Coordinator Corrections Operations (CCO), testified on behalf of the employer. The witnesses described in their own words what constitutes dynamic security at Springhill Institution. Basically, it is the intelligence gathering through staff (corrections officers, instructors, personal development officers, recreation staff, etc.) interaction with and observation of inmates. Dynamic security is one of the tools used along with preventive security, which is intended to prevent a security incident from happening. The involvement of the staff with the inmates is very important because it allows the staff to identify potentially dangerous situations.
- [14] The basic difference between a medium security institution such as Springhill and a maximum security institution such as Dorchester is the emphasis on dynamic security in a medium security institution rather than on static security, meaning a greater interaction of the staff with the inmates. An inmate is classified as medium security after having conducted an assessment of the individual by considering various factors such as his crime, the involvement of violence in the commission of the crime, his behaviour, the police reports, the judge's report etc. The classification is reviewed on a yearly basis or on a need basis. Mr. Howard has also explained that the difference between minimum, medium and maximum security relates to the degree of freedom within the institution.
- [15] Mr. Howard testified that Springhill is a medium security institution housing approximately four hundred inmates. Within the institution there is a maximum security section of fifteen bed units for federally sentenced women (FSW). Springhill Institution is also the regional reception centre for the Atlantic region where all federally sentenced inmates, currently approximately sixty, are sent to for their intake assessment. The remaining three hundred and thirty inmates constitute the general population, fifteen of which are kept in segregation. None of these inmates, other than the general population, have access to buildings numbers 18 and 19 or the service entrance. At no time is there contact between the male and female population although, as noted by Mr. Stone, contact may be accomplished through a third party.
- [16] Mr. Brown explained that locking up inmates in order to allow the Institution to conduct a search will only result in increased tension in the Institution. Dynamic security would suffer because the increase in static security (lock down) would impede the ability of staff to gather information. On the day of Mr. Stone's refusal to work, both Mr. Brown and Mr. Howard agreed that the mood of the Institution, which is assessed on a daily basis, was at level green, meaning that nothing out of the ordinary was going on.

- [17] Mr. Howard agreed with Mr. Fader that there likely is a weapon present in the Institution at any given moment. However, they manage that risk by engaging the Springhill Institution Searching Plan which is updated on a regular basis and as the need arises. They also inform the staff of any new development. The plan is made available to all staff and its application is mandatory. For example, the plan specifies, with respect to “Frisk Search”, that in “Locations where inmates use tools: *All shops where inmates have access to tools or materials that can be fashioned into a weapon shall be searched routinely, each time they leave the shop.*”
- [18] The post at building #20 used to be staffed. Mr. Brown testified that when it was staffed, inmates would walk through a metal detector and would not necessarily be searched unless there was information given to the person manning the post that something was coming out. Unless the inmate would set off the metal detector, he would only be asked where he was going and allowed to proceed. Vehicles were not searched. Mr. Brown and Mr. Howard expressed the view that they would prefer to have inmates searched at the shop rather than at a distance from the shop such as at the service entrance. Having shop instructors doing the search does not present a problem since they are part of the team and are very competent since they have all been trained in the search protocol.
- [19] Mr. Alfred Legere is the Deputy Warden at Springhill Institution. Mr. Legere explained that a medium security institution is an environment to house offenders and provide them with opportunities for improving their situation so that they have better integration potential. He added that in order to understand the philosophy behind medium security one must understand how that classification is reached. Medium security classification is affected by three factors i.e. escape risk, institutional adjustment concerns and public safety risk. An offender cannot be classified as medium security if that offender has high institutional adjustment concerns such as behaviour management problems i.e. assaults on other inmates, threatening behaviour, etc.
- [20] Mr. Legere agreed with Mr. Stone that there are situations where the security classification of an inmate can be and has been overridden by the Deputy Warden. However, an inmate who has seen his classification reduced from maximum to medium is no longer a maximum security inmate but a medium security one because the *Correction and Conditional Release Act* authorizes this. In addition to this, some inmates may be classified at maximum and be housed temporarily in the reception centre until they are transferred. Some maximum security inmates would consequently share some facilities used by medium security inmates.
- [21] Mr. Legere confirmed the earlier testimonies that dynamic security is the dynamic intervention between staff and offenders. He added that it is their most crucial tool in managing offender populations. There are other crucial tools, static security being one of them. The rapport with the offenders leads to a high level of security information that is passed on to staff. The better the rapport, the better the intelligence received.

- [22] Mr. Legere described preventive security as being a funnel for information that is gathered. It is a function where the results of dynamic security are managed via a network of information sharing.
- [23] Mr. Legere explained that there exists a balance, at a medium security institution, between dynamic security (approximately 70%) and static security (approximately 30%). Static security is necessary in a medium security, for example the perimeter fence is necessary to prevent escapes. There is a time when more static security would be needed, such as when a high security concern is made known. However, operating under those conditions all the time would mean that a maximum security environment has been created, a situation that is not necessarily better or desirable.
- [24] Mr. Legere shared the views of Mr. Brown and Mr. Howard regarding the staffing of building #20. He stated that he has greater confidence in source searching than at a distance such as at the post at building #20. Even if that control post was at a certain area, inmates would find a way to breach that barrier either by throwing the contraband over the fence where the post is located or some other way. There is a need however to recognize that Springhill Institution is a medium security environment. Offenders are there based on a risk assessment. Every situation is managed with a risk assessment or analysis.

- [25] Mr. Stone provided the tribunal with his final oral arguments in this case. The tribunal finds it useful to repeat those arguments in their entirety. They are:
- “We believe that the testimony today has shown conclusively that weapons and contraband dangerous to the safety of staff can be produced in areas 18 and 19 buildings and is easily made available to any and all inmates of the institution. We feel that references made to the inmate profile is irrelevant since Springhill is in fact a medium institution with both medium and maximum inmates housed there with some of the history of assaulting staff and taking hostages. When Springhill opened in 1967, the service entrance was an intricate part of the security system of this Institution. Two staff members, days and afternoons and the control of contraband from these areas was very effective. Springhill Institution at that time was a medium and that designation has never changed in over 35 years. We have, however, added two maximum security units. I believe, based on my own experience as a correctional officer for over 35 years at Springhill Institution that our inmate population profile has changed considerably for the worst. Testimony heard here today certainly show inmates have the ability to take contraband and weapons from the areas of 18 and 19 buildings despite the search plan presently in place. By not staffing the service entrance properly, we feel CSC is not practicing the due diligence that the Labour Code says they must in controlling this identified risk.”
- [26] When asked whether he wished to refer the tribunal to provisions of the Code in support of his arguments, Mr. Stone replied in the following manner:
- “I chose this method to rectify what I see as a problem I felt I had no other choice. We were in a situation where we had just been through a lock down and had the institution completely searched and this had been an ongoing problem for a long while and had been talked about by myself and a number of other people that it had somehow needed to be addressed and at this point in time we basically had

the institution cleaned up by searching, like Mr. Legere alluded to earlier and I felt that it was an appropriate time to do this so that we could keep it that way and at that time I felt that there was a danger to me and the rest of the people that I work with because of the situation noted.”

[27] Mr. Fader submitted that on the day of the refusal to work, there was nothing out of the ordinary happening in the Institution. In referring to section 128 of the Code, Mr. Fader opined that “What we are dealing here is an alleged condition in the work place.” The risks feared by Mr. Stone and other officers i.e. that weapons be fabricated in the shops and go undetected and be used against them, are “...risks that are inherent to the position of the correctional officer and have been mitigated by the employer through its training, policies and procedures.”

[28] The job description of the correctional officer makes reference to this type of risk. It states at page 13, under the heading Work Environment, that:

There is frequent exposure to inmates who may be agitated, unpredictable, attempt to intimidate or resort to violence.

[29] Mr. Fader submitted that it is a normal condition of employment for a correctional officer to be in a work place where in all likelihood there are inmates who have access to weapons. On this point, Mr. Fader referred the tribunal to Appeals Officer Decision No. 02-013, *Juan Verville & al and Correctional Service, Kent Institution*, which dealt with the possibility of being attacked at any moment in a correctional environment. He submitted that

“...that it is exactly and precisely what we are dealing with here today. Being exposed to inmates that may be in the possession of weapons is a normal condition of employment.”

[30] The risks identified by Mr. Stone were of a general nature and are a normal condition of employment of a correctional officer. Mr. Fader acknowledged that these risks cannot be reduced to zero. However, said Mr. Fader, the employer has in place extremely sophisticated security policies, both dynamic and preventive, which mitigate the risk effectively.

[31] Although the definition of “danger” was modified through amendments to the Code, which became effective on October 1, 2000, the concept of “danger” has not changed drastically. In support of this position, Mr. Fader referred the tribunal to the *Welbourne and Canadian Pacific Railway Co.* Decision No. 01-008. This decision confirms that although the new definition of danger is an improvement over the prior definition, it is not a radical departure from the original meaning. This is due primarily to the existence of the same concepts of a reasonable expectation that injury would occur upon exposure to the hazard, condition or activity. Hypothetical or speculative situations continue to be excluded from the definition of danger.

[32] The concepts of the new definition of danger were later reinforced in the Parks Canada case, Appeals Officer Decision No. 02-009, *Parks Canada Agency and Doug Martin and Public Service Alliance of Canada*. That case discussed the scope of the new definition of danger and how it applies to this case. Under that definition, a future activity would have to be about to occur and cause injury to the employee upon exposure. Mr. Fader submitted that:

“Now the future activity in this case would have to be the fashioning of a weapon, the taking of the weapon and using them (sic) to assault an officer. There is no evidence that that future activity will take place or was going to take place based on the facts.”

[33] Mr. Fader submitted that the concern of Mr. Stone was a general concern. He stated that in order for danger to exist, there has to be a reasonable degree of certainty that injury will occur on exposure to the hazard, condition or activity. In light of this, the right to refuse remains an exceptional measure.

[34] The issue to be decided in this case, as it is in every case resulting from an appeal under subsection 129(7) of the *Canada Labour Code*, Part II (the Code), is whether danger as defined in the Code, existed to Mr. Stone when the health and safety officer investigated this employee’s refusal to work.

[35] The decision of the health and safety officer in this case is based strictly on facts related to the complaint of Mr. Stone although not necessarily specific to Mr. Stone. The health and safety officer considered the definition of danger within the meaning of subsection 122(1) of the Code and, with regards to the facts obtained from his investigation, ruled that Mr. Stone was not in danger as defined in the Code. While the facts considered by the health and safety officer should have been somewhat more specific with regards to Mr. Stone’s refusal to work, in my opinion, his decision of absence of danger should stand for the following reasons.

[36] “Danger” is defined at subsection 122(1) of the Code as follows:

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

“danger” Situation, tâche ou risque – existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade – même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d’avoir des effets à long terme sur la santé ou le système reproducteur.

[37] I have analysed extensively the definition of danger in the Parks Canada case, *supra*, as it applied to the activity of law enforcement. A similar analysis was performed in *Correctional Service of Canada - Drumheller Institution v. Larry DeWolfe*, (hereafter the Drumheller Decision) Appeals Officer Decision No. 02-005, as it applied to an existing or potential hazard or condition referred to in the definition of danger.

[38] Following the two analyses referred to above, a three point test was developed in each case to identify the steps that the health and safety officer must go through in order to establish the existence of danger as defined in the Code. These tests do not consider the latency aspect of an injury which, in passing, is not relevant in the instant case. In order to reflect the complete definition of danger within the meaning of subsection 122(1) of the *Canada Labour Code*, Part II (the Code) i.e. an existing or potential hazard or condition or a current or future activity, the test will read as follows:

“ For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of an existing or potential hazard or condition or a current or future activity, he/she must be persuaded, on the basis of the facts gathered during his/her investigation, that:

- a hazard or condition will come into being or the future activity in question will take place³;
- an employee will be exposed to the hazard or condition or activity when it occurs; and
- there is a reasonable expectation that:
 - the hazard or condition or the activity will cause injury or illness to the employee exposed thereto; and,
 - the injury or illness will occur immediately upon exposure to the hazard or condition or the activity.”

[39] It is Mr. Fader’s submission that Mr. Stone’s concern was “...the fashioning of a weapon, the taking of the weapon and using them (sic) to assault an officer.” The stated concern of Mr. Stone on the other hand at the time of his refusal to work was:

“My concern is the ability of inmates to bring contraband back from the maintenance and industrial shops. Staffing #26 (read #20) Building properly will allow staff to control this traffic to a large degree and very much reduce this risk...”

Therefore, Mr. Stone’s concern is both prospective and non specific.

[40] Applying the facts of this case to the definition of danger, it is clear that Mr. Stone was not faced with any immediate or future situation i.e. a hazard, condition or activity, involving the fashioning of a weapon from undetected contraband that would jeopardize his health and safety and result in injury to him in any foreseeable future. Also, the fact that inmates could fabricate a weapon in one of the shops that would be undetected because of the

³ This first condition is redundant in cases where the health and safety officer has established that the hazard or condition exists or the activity is taking place at the time of his/her investigation.

absence of a control post at a specific location in the Institution is not helpful in this case to establish objectively that this will result in an assault on Mr. Stone or on any other officer. Working in a medium security penitentiary is by the very nature of that environment a higher risk environment than most work places. Mr. Stone's job description emphasizes that exposure to violence is a normal condition of his employment. Specifically, Mr. Stone's job description states, under the section of Working Conditions, Part 15 Work Environment, that:

There is frequent exposure to inmates who may be agitated, unpredictable, attempt to intimidate or resort to violence. The incumbent may be required to intervene in various threatening or violent situations involving inmates, staff or visitors, including emergencies (ie: riots), instances where other resources are not available for immediate aid and those where lethal force may be necessary. There is potential for inmates to verbally or physically assault the incumbent, to which all attempts at self-defense, including lethal force are authorized for use (inmate assaults may have deadly intent)...

- [41] On the basis of the evidence submitted in this case, it is clear that Mr. Stone did not refuse to work because he had specific knowledge of something happening or about to happen in the Institution that would jeopardize his health and safety at some specific time. There existed no actual hazard or condition at the time of Mr. Stone's refusal to work that would support a finding that danger existed. The mood of the Institution at the time of Mr. Stone's refusal to work was indicative that nothing out of the ordinary was happening or about to happen. Mr. Stone had no information, and manifestly no evidence, that an inmate working in one of the shops had in fact fabricated a weapon and intended to use it against him, or any other officer for that matter.
- [42] The only incident that raised a heightened concern about a possible threat to the health and safety of the correctional officers, including Mr. Stone, was the planer blade incident. That incident was dealt with prior to the refusal to work of Mr. Stone. The planer blade was found and returned to the authorities of the Institution. An incident that occurred in the past cannot be used to establish objectively the existence of danger. In the Parks Canada decision, *supra*, I dealt with this issue, at paragraph # 162, by stating
162. The tribunal cannot rule positively on the existence of "danger" as defined in the Code solely on the basis of past occurrences. The notion of "danger" as defined in the Code, which includes the concept of "future activity", does not authorize a health and safety officer to look into the past to declare that a "danger" as defined in the Code exists. "Danger" as defined in the Code is either immediate or prospective, as explained above. A "danger" as defined in the Code cannot exist retrospectively.
- [43] In my opinion, Mr. Stone refused to work in order to bring the issue of the staffing of post #20 to a head. In the end, Mr. Stone was challenging the policy of the Institution to compensate the absence of staff at post #20 with dynamic and preventive security. The type of concern expressed by Mr. Stone is of a general nature. It is an ongoing concern that has been at the forefront of discussions since the staffing of post #20 was terminated in

1992/1993. It concerns the remote, although in that type of environment a very real, possibility that one of the wandering inmates will pick up contraband that could be used as or to fabricate a weapon. According to Mr. Stone, the contraband or weapon in question could also escape detection in the shops and eventually be used against the staff. The argument of Mr. Stone is that staffing post #20 could reduce significantly the risk of the contraband or weapon being undetected.

- [44] This type of possibility is however without factual basis in the instant case. From the perspective of the right to refuse provisions under the Code which require the health and safety officer to determine the existence of danger on the basis of objective⁴ criteria, Mr. Stone's proposition amounts to the speculative possibility that injury to himself or to another officer will occur at some point in time as a result of not staffing the post in question. However, this possibility cannot be substantiated by the facts of this case and thus, is hypothetical. As I have said in the Parks Canada decision, *supra*,

"145. Given that the health and safety officer must investigate a situation in a factual manner and having regard to the four objective criteria listed above, hypothetical and speculative situations will continue to be excluded from the definition of danger. After all, both hypothetical and speculative situations have no firm factual basis, a direct contradiction with the concept of "danger" as defined in the Code."

- [45] Also, Mr. Stone has no evidence that any weapon that might have been fabricated in any of the shops, or elsewhere in the Institution, would be used against him. It was acknowledged that a weapon is probably present in the Institution at any given moment. This is a reasonable assumption to make given the nature of the population incarcerated at Springhill. This is not to relieve the concern of Mr. Stone or any other member of the staff, and rightly so. However, that is the nature of a medium security penitentiary.

- [46] The risk of being assaulted with a weapon, any type of weapon, whether or not it has been fabricated from material obtained from one of the shops, is part and parcel of the job of a correctional officer. That risk is however mitigated by the numerous controls, security policies and procedures put in place by Correctional Service Canada. The Springhill Institution Searching Plan is an example of such a procedure, an effective one which, in passing, had been activated and resulted in the lock down of the Institution prior to Mr. Stone's refusal to work. The ongoing interaction with the offenders, i.e. dynamic security, is another example of the type of security measure used by the staff to identify potential threatening situations. Preventive security is another aspect of the overall security system in place in a medium security institution. The overall security system in such penitentiaries necessarily includes a certain amount of static security. Much of the debate in this case centers on whether the absence of staff at post #20 increases, in the end, the risk of assault on correctional officers to the point where the staff is in danger as defined in the Code.

⁴ *Coulombe v. Empire Stevedoring Co.* (1989), 78 di 52 (Can. L.R.B.)

[47] However, a medium security institution is not a maximum security institution and thus, the security measures must be reflecting this difference. As an employer subject to the application of the Code, it is the responsibility of Correctional Service Canada, as the employer of its staff, to develop and implement a security system that will control and mitigate the risk of assault that is ever present in a medium security institution recognizing that it is, for all practical reasons, impossible to totally eliminate that risk. That is the general duty of the employer under section 124 of the Code which provides:

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

[48] In order to comply with its general duty under section 124 above, the employer must take all measures reasonable in the circumstances to protect the health and safety at work of its employees. There is no evidence in the instant case that management did not take appropriate steps to protect the health and safety of correctional officers.

[49] In a medium security institution, ensuring the protection of all the staff all the time may be unrealistic. Locking up inmates twenty four hours a day is manifestly not an option. Assessing the risk that individual inmates represent is one measure adopted by Correctional Service Canada to comply with its general duty under the Code and its mandate under the *Correction and Conditional Release Act*. There are many elements to be considered when assessing the risks that offenders represent and the best measures to adopt to deal with these risks. There exist however no single measure that would guarantee the health and safety of staff.

[50] Inmates are human beings who have free will⁵ and as such can decide at any point in time and without warning to carry out an assault against a member of the staff. This has to do with the unpredictability of human behaviour that I have addressed at paragraph 155 of the Parks Canada Decision, *supra*, in which I wrote:

“155. It is clear from the above that one cannot ascertain with any degree of reliability whether a law enforcement situation resulting in injury will occur. In cases of this nature, the “who”, the “what”, the “where”, the “when” and the “under what circumstances” are important criteria necessary to establish objectively the likelihood of injury and therefore of danger. Evidently, the concept of “danger” as defined in the Code is not in harmony with unpredictability of human behaviour, an inherent characteristic of law enforcement. In professions where “intentionality” is a dominant element of the job, establishing factually that “danger” as defined in the Code exists may prove to be a challenge on its own. In the absence of specific facts that will eliminate the unpredictability aspect of human behaviour, the health and safety officer will likely have to conclude on the absence of “danger” as defined in the Code since he will be faced strictly with a hypothetical or speculative situation.”

[51] As it stands today, the right to refuse provisions in the Code are not meant to address long standing problems such as the problem identified by Mr. Stone in the instant case. The right to refuse in the Code remains an emergency measure to deal with situations where one can

⁵ *Stephenson et al. v. Solicitor General*, P.S.S.R.B. File 165-2-83, 1991.

reasonable expect the employee to be injured when exposed to the hazard, condition or activity. However, it cannot be a danger that is inherent to the employee's work or is a normal condition⁶ of employment. This statement alone is fraught with consequences for correctional officers. Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers, who are specifically trained to deal with these situations, it is very difficult to envisage a situation, in that environment, where a refusal to work for violence could be justified other than in a specific and exceptional circumstance.

[52] This does not mean that I believe that the complaint of Mr. Stone was unfounded or frivolous. On the contrary, correctional officers and other staff such as shop instructors have serious concerns with the issue of not staffing post #20. They also have a serious concern with the hazards associated with allowing inmates to wander on the grounds of the Institution without anybody's apparent knowledge of their whereabouts or suddenly appearing at the maintenance and industrial shops. This, in my respectful opinion, is a valid concern, one that should be addressed by the Institution normally through its health and safety committee.

[53] For all the above reasons, I confirm the decision of absence of danger, as defined in the Code, rendered by the health and safety officer in the instant case.

Serge Cadieux
Appeals Officer

⁶ *Montani v. Canadian National Railway (1994), 95 di 157 (C.I.R.B.)*

SUMMARY OF APPEALS OFFICER DECISION

Decision No.: 02-019

Applicant: Jack Stone

Respondent: Correctional Service Canada, Springhill Institution

KEY WORDS: Refusal to work, contraband, weapon, internal complaint resolution process, frisk, search procedure, shop instructors, dynamic security, preventive security, medium security, lock down, offenders, inmates, static security, policy, hypothetical possibility, detection of contraband, search plan.

PROVISIONS: C.L.C.: 127.1, 129(7)

SUMMARY:

A health and safety officer investigated a refusal to work exercised by a correctional officer. The basis for the refusal to work was “the ability of inmates to bring contraband back from the maintenance and industrial shops. The correctional officer believed that staffing #20 building (the service entrance) properly would allow staff to control this traffic to a large degree and very much reduce this risk. The employer had carried out an analysis of this post and had concluded there was no need to staff that post since it required the shop supervisors to frisk inmates whenever they left the shops. The health and safety officer agreed with Correctional Service Canada and ruled that danger as defined in the Code did not exist to the refusing employee.

On appeal, the appeals officer agreed with the health and safety officer. The appeals officer concluded that there was no evidence that the correctional officer would be injured as a result of the remote possibility that an inmate would have taken contraband from the shop to carry out an assault against the officer or any other correctional officer. The appeals officer felt that the refusing employee was using the right to refuse to challenge the policy of the employer to replace the staff at the post in question by an increase in dynamic security. The type of concern expressed by the refusing employee was of a general nature. Any risk of violence in a medium security penitentiary was deemed to be a normal condition of employment for correctional officers. The appeals officer confirmed the decision of absence of danger.