Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

165 Hôtel de Ville, Hull, Quebec, K1A 0J2 – Fax : (819) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Correctional Service Canada
applicant

and

John Carpenter
UCCO/SAAC/CSN

Decision No. 05-012
March 30, 2005

This case was heard by appeals officer Michèle Beauchamp, in Drumheller, Alberta, on April 20 and 21, 2004.

Appearances

For the employer
Richard Fader, counsel
Ron Goriuk, Deputy Warden (retired), Correctional Service Canada (CSC), Drumheller Institution, Drumheller, Alberta
Terry Yemen, Coordinator, CSC, Drumheller Institution
Jeff Guntrip, local health and safety committee member, CSC, Drumheller Institution, Drumheller, Alberta

For the employees
John Carpenter, counsel, UCCO/SAAC/CSN
James Schellenberg, Correctional Officer (CO), CSC, Drumheller Institution
Daniel Wood, CO, CSC, Drumheller Institution, Drumheller, Alberta

Health and safety officer
Neil Campbell, Human Resources and Skills Development Canada, Calgary, Alberta

[1] This case concerns an appeal made pursuant to section 146 of the *Canada Labour Code* (the *Code*), Part II, by Correctional Service Canada, Drumheller Institution, against a direction (Appendix A) issued to CSC under paragraph 145(2)(*a*) of the *Code* by health and safety officer (HSO) Neil Campbell on May 14, 2001.

[2] The facts of the case are well known to both parties. I have therefore chosen to summarize very briefly the statements that I received from the health and safety officer and the parties during the hearing and from the documents that were sent to me and exchanged between the parties before, during and after the hearing.

[3] On May 10, 2001, HSO Campbell was advised by the Drumheller Institution warden, Tim Fullerton, of the refusals to work made by Daniel Wood and James Schellenberg, two correctional officers working on the evening shifts. Mr. Fullerton also informed him that he had not been able to resolve the matter through the internal complaint resolution process[1].

[4] HSO Campbell went to Drumheller Institution with another HSO and started his investigation. He concluded it around midnight and told the parties that he would make his decision known the next day. At that time, the evening shift was over and the prison was under lock down, as it had been since the two employees had refused to work.

[5] HSO Campbell noted in his investigation report that correctional officers Daniel Wood and James Schellenberg both refused to work for the following reason:

> By not posting the required number of correctional officers in the living units, an unsafe working condition is created.

[6] HSO Campbell first met with the warden, Tim Fullerton. The warden told him that the prison was under lock down following the refusals to work and would remain so throughout his investigation. He also informed him that everything was quiet on the units, that the level of tension at Drumheller Institution was assessed daily and that tensions were not abnormally high on that day.

[7] HSO Campbell went out to units 8 and 11. He did not go into the cell block but stayed in the security control room, known as the bubble. He noticed that from the bubble, there was only a partial view from the range. He was advised that, even when four correctional officers are posted to a living unit, two are responsible for other posts, which means that sometimes, there are only two officers left in the living units.

[8] HSO Campbell did not notice anything out of the ordinary at the time of his investigation, because of the lock down, *i.e.* no inmates were yelling, banging on bars or trying to escape, and he did not personally observe anything that was cause for concern.

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[1] The internal complaint resolution process is a process established by section 127.1 of the *Canada Labour Code*, Part II, to resolve occupational health and safety complaints made by employees. Take note that subsection 127.1(1) clearly states that this process is **not to be used in lieu of** an employee's right to refuse to work under s. 128, of an employee's right to continue to refuse to work under s. 129 or of a pregnant and nursing employee's right to refuse to work under s. 132.

[9] His primary concern at the time of his investigation was that the Post Order established by CSC required that there be four officers in the living units during evening shifts. That procedure allowed one officer to patrol the yard and two officers to respond to an inmate incident while the fourth officer would remain on guard in the bubble.

[10] However, that Post Order was not being followed on the day of the refusal and the reduction of staff to three officers meant that if an incident happened, only two officers would be in the bubble and only one of them would be available to react.

[11] HSO Campbell knew that warden Fullerton was aware that the two employees were refusing not only because of staffing but also because of threats made by inmates. Furthermore, the warden did not deny that threats had been made and told him that they had been assessed.

[12] HSO Campbell was also concerned by the fact that, although he had not observed anything in particular during his investigation, there was a general strong feeling and worry among the guards that something was definitely going to happen. He remarked in his report and at the hearing that the inmates did have a riot on May 12.

[13] HSO Campbell recorded the following facts in his report:

> The Post Order for Cell Block Supervision Posts (amended 01-04-09) requires four (4) C.O.II's to be assigned to the evening shift in the living units. Providing less than four (4) officers during a shift will create a situation where there will only be two (2) officers present in the living unit if one (1) officer is sent for outside patrol. Since one (1) officer must remain in the control room or bubble for security reasons, only one (1) officer is available to respond to an incident and two (2) should normally attend.
>
> A Public Service Staff Relations Board (PSSRB) decision made last year (before the changes to Part II of the *Canada Labour Code*) concerning refusals to work due to minimal staffing at Dorchester Maximum Security Penitentiary found the matter of minimal staffing units in a penitentiary with only two (2) correctional officers at a time cannot be considered a condition inherent to their work given that such a condition presents a possibility that danger and thus injury could occur, since one officer had to remain in the control room, only one officer could attend to the unit if required, and two should normally attend.

[14] HSO Campbell also noted the following sequence of events in his assignment narrative report:

- May 11, 2001
- Made decision to uphold refusals due to danger based on Staff Post Order which identifies minimum staffing levels for each shift. Everything below minimum has the potential for injury when only one guard is available to respond to any incidents that may arise. Also based on [Public Service Staff

Relations Board] decision at Dorchester which identified minimum staffing below 3 in a living unit constituted a situation of danger.

- - 2:00 PM – phoned Tim Fullerton, Warden, and verbally gave him my decision. Told him I would hand deliver it Monday, May 14, 2001
- May 12, 2001
- - 11:45 PM – received call from Larry de Wolfe at Drumheller Pen Advising me of a riot going on inside the prison
- May 14, 2001
- - Finished writing direction and cover letters and drove to Drumheller and delivered direction
- May 24, 2001
- - received written response from Tim Fullerton, Warden, that four officers are posted for evening shift

[15] HSO Campbell's investigation into the refusals to work led him to conclude that

> a condition exists in the place that constitutes a danger to the employees while at work:
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> > minimum staffing levels established by post order for cell block supervision post (amended 01-04-09) for all shifts are not being maintained and this condition poses a danger to the health and safety of correctional officers working in the living units.

[16] Consequently, HSO Campbell directed Correctional Service, under paragraph 145(2)(*a*) of the *Code*, to

> take measures immediately to correct the condition that constitutes the danger.

Position of the Employer

[17] The employer's counsel declared that the appeal was based on the three main following arguments:

- first, there was no danger for the employees at the time of the health and safety officer's investigation, since the inmates were under lock down and there was nothing out of the ordinary going on;
- second, there was no evidence to support the concept of a "reasonable" likelihood of danger;
- third, any risk that was identified constituted a normal condition of employment.

[18] To determine his first argument that there was no danger at the time of the HSO's investigation, the employer argued that the purpose of the *Canada Labour Code* is not achieved through the refusal to work provisions, but through the ones regarding the internal resolution process. Even if the refusals to work provisions are important, he said, they are in fact limited to the "continued right to refuse".

[19] The employer affirmed that the *Code* requires that the first investigation be made by the employer, after which the employee can still continue to refuse if he disagrees with the employer. It is only if the employee continues to refuse that the HSO is called to investigate. Furthermore, subsection 129(6) stipulates that the danger must "exist" at the time of the HSO's investigation, since the employee can refuse until the corrections required by the HSO are made. This is, he said, the steps and process expressed in the decision made by the Federal Court in *Fletcher*[2].

[20] Moreover, the employer argued that the health and safety officer had to determine if danger existed at the time of his investigation, not at the time of the employees' refusal to work. This principle, he said, was further confirmed by Appeals Officer Malanka in *Doell*[3].

[21] Consequently, the employer stated that the scope of the investigation made by the HSO is simply to determine if it is safe for the employee to return to work. In the present case, he argued, it was safe because HSO Campbell affirmed that there was no danger at the time of his investigation and Daniel Wood, one of the refusing employee, declared that he was mainly preoccupied by what could happen the following day.

[22] The second argument made by the employer's counsel concerned the reasonable likelihood of danger. Even if we consider the situation prospectively, he said, there was still no danger, because there was no reasonable expectation that the employees would be injured.

[23] To support this affirmation, the employer made reference to the *Byfield*[4] and the *Chapman*[5] cases, where Appeals Officer Douglas Malanka established in his decisions a four-prong test to be used to determine the existence of danger. The employer also quoted the Federal Court Trial Division decision in *Martin*[6], in which Honourable Justice Tremblay-Lamer affirmed the test applied by Appeals Officer Serge Cadieux that the presence of a danger can be decided only if there is a reasonable expectation of injury.

[24] In the case at bar, said the employer, there was no danger for the refusing employees. In fact, the Post Order contemplated having two COs in the range and one in the courtyard, and if there were four COs, the fourth one was considered an extra. The employer was of the opinion that the purpose of my inquiry was not to analyse Correctional Service' policy, but only to determine if danger was present. And, he affirmed, there was no danger for the employees because nothing unusual was going on at the time and the operational adjustments never resulted in injury.

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[2] *Canada (Attorney General) v. Fletcher (C.A)*, 2002 FCA 424, November 5, 2002.
[3] *Doell and Canada (Correctional Service)*, Appeals Officer Douglas Malanka, Decision 04-014, March 19, 2004.
[4] *Byfield and Canada (Correctional Service)*, Appeals Officer Douglas Malanka, Decision 03-007, March 10, 2003.
[5] *Chapman and Canada (Customs and Revenue Agency)*, Appeals Officer Douglas Malanka, Decision 03-019, October 31, 2003.
[6] *Martin v. Canada (Attorney General)*, 2003 FC 1158, October 6, 2003.

[25] The employer asserted that minor scuffles and illegal card games did take place on the day of the refusal and insults were indeed thrown at guards. However, he believed that the cause of the riot that took place two days after the refusals to work was not linked to those incidents. Furthermore, the riot was not relevant to the finding of danger made by HSO Campbell because, he said, riots are spontaneous events in any penitentiary institution.

[26] The employer argued that if we apply to the present case the criteria established in *Chapman* [7], we find that there was:

- a quick response time;
- well established procedures;
- excellent employee training;
- professional officers;
- available equipment; and
- outstanding communication between management and officers.

[27] The employer believed that HSO Campbell's finding of danger was purely speculative. He affirmed that, on the contrary, the evidence was overwhelmingly pointing to the absence of danger. In his opinion, the fact was that the refusing employees did not like their employer's staffing policy and wanted to be rid of it. The employer concluded his second argument by saying that it would simply be ludicrous to allow the health and safety officer to make a decision about staffing when he does not know anything about it.

[28] Finally, to present his third argument, the employer stated that if a risk was indeed established, that risk would constitute a normal condition of employment. Moreover, as such, that risk would be subject to paragraph 128(2)(*b*) of the *Code* and the employees would not be allowed to refuse work. He argued that a large number of cases exist on that subject and referred to paragraph 51 of the *Stone*[8] decision rendered by Appeals Officer Serge Cadieux, who declared:

> The right to refuse in the *Code* remains an emergency measure to deal with situations where one can reasonably 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 condition … 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.

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[7] *Chapman*, *supra.*
[8] *Stone and Canada (Correctional Service)*, Appeals Officer Serge Cadieux, Decision 02-019, December 6, 2002.

[29] The employer argued that in the case at bar, there were no specific and exceptional circumstances that would justify a finding of danger, even given that inmates had been playing cards, yelling or insulting officers. He believed that the risks found in the institution were mitigated by the fact that the employer established the proper work procedures, trained the employees and provided the necessary equipment to them. Correctional Service, not the health and safety officer, were the experts when it came to identifying risks and determining the necessary staffing levels.

Position of the Union

[30] The union's counsel argued that the evidence provided at the hearing pointed to very different findings than the ones referred to by the employer's counsel. Fundamentally, he said, Correctional Service had the right to manage the work place. However, in the present case, the issue was related to the occupational health and safety of the employees. In that respect, the *Canada Labour Code* provided very clearly that an employee had a right to refuse work if he believed that there was an unsafe condition that did not represent a normal condition of his employment.

[31] Contrary to what the employer's counsel affirmed, some courts' decisions also confirmed the fact that in order to decide on a danger, the HSO had to examine the situation prevailing at the time of the refusal as well as the one existing at the time of the investigation.

[32] To illustrate that fact, the union gave the example of a defective machine that an employee would be told to use. If the employee refused to work because he considered that machine to be dangerous, would the investigating HSO have to declare that the machine did not constitute a danger if that machine was turned off at the time of his investigation? Would he not have to also take into account the situation prevailing at the time of the employee's refusal?

[33] The union argued that the same analogy could be made with the present case. The refusal took place because Correctional Service' policy on staffing was not being followed. CSC had adopted a posting order specifying that there had to be not three but four COs on the shift. The employer's counsel referred to that staffing reduction as operational adjustments, but that was not the point. The COs knew the importance of their job requirements and they were well aware of and had seen the impact of any safety deficiencies on their health and safety. They were relying on what CSC had established, not on what HSO Campbell decided following their refusal.

[34] Furthermore, as demonstrated by the warden’s statement regarding scheduling and the communications policy, the union argued that there was evidence of a breakdown in communications on May 10 because the log book contained no report that officer Wood had been assaulted the day before his refusal.

[35] The union argued that the correctional officers were not making a complaint against their employer's policy. Mostly, they were concerned by the fact that given the previous incidents and the general feeling that tension was getting high and something was bound to happen, it was dangerous to have only three officers on duty.

[36] The union further argued that there was no evidence that the employer made the necessary changes to adapt to the heightened level of tension on May 10th or that he reacted as soon as he was informed that a refusal was to take place. The fact that there was a lock down when HSO Campbell investigated the employees' refusal did not in itself make the danger disappear. This was further evidenced by the fact that a riot did happen less than 24 hours after the lock down and 48 hours after the refusal.

[37] The union's counsel affirmed that in *Fletcher*[9], Justice Desjardins did say that a refusal was "not a forum to discuss an employer's policy". However, he argued that the present case was about changes made by the employer to the post order without evaluating the risks and requiring employees to adapt to unsafe conditions.

Impact of the *Verville*[10] Decision

[38] After the hearing had been held, Honourable Justice Gauthier of the Federal Court issued, on May 26, 2004, a judgment on *Verville*[11]. This came as a result of her judicial review of a decision made by Appeals Officer Serge Cadieux in another case regarding Correctional Service Canada, Kent Institution[12].

[39] Counsel for the union requested that both parties send submissions to my attention as to the impact of Justice Gauthier's ruling on the present case. I agreed.

Position of the Employer on *Verville*[13]

[40] The employer's counsel wrote from the outset that the employer relied on the arguments that he had made at the original hearing and believed that the *Verville*[14] decision did neither alter nor purport to alter the law in this area.

[41] Basically, the employer argued that contrary to the respondents' assumption, Justice Gauthier did not "conclude that this test ["danger"] had been met." She quashed the decision and returned the matter to another Appeals Officer because Appeals Officer Cadieux might not have considered all of the evidence before him.

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[9] *Fletcher, supra*.
[10] V*erville v. Canada (Correctional Service)*, [2004] F.C.J. No. 940, per. Gauthier J.
[11] V*erville, supra.*
[12] *Juan Verville & Fifteen Other Correctional Officers v. Correctional Service Canada, Kent Institution*, Appeals Officer Serge Cadieux, Decision 02-013, June 28, 2001.
[13] *Verville, supra.*
[14] *Verville, supra.*

[42] The employer's counsel believed that

> the *Verville* decision confirms the prior jurisprudence from the Federal Court in the *Parks Canada* decision[15] and in large part the seminal decision from this tribunal in *Welbourne*[16]. It is noted that while the new definition of danger sets out to improve the prior definition by including the term "potential," the definition retains two elements from the prior definition: (a) "reasonably be expected" and (b) "before the hazard or condition can be corrected." The decision of Justice Gauthier confirms the prior line of jurisprudence holding that the definition of danger excludes hypothetical or speculative situations.

[43] The employer's counsel submitted an exhaustive review of the evolution and judicial treatment of the definition of "danger", going as far as 1978, when the first provision on the right to refuse was enacted for employees under federal jurisdiction.

[44] Although extremely interesting from an historical point of view, I have chosen to reproduce only those excerpts that I consider to be more closely relevant to the present case, that is the ones that are directly related to Justice Gauthier's decision on *Verville*[17].

> *(c) The new definition of "danger"*
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> On June 29, 2000, Bill C-12, an Act to amend Part II of the *Code,* received Royal Assent. The amended *Code* came into force on September 30, 2000. The new definition of "danger" is as follows:
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> "[D]anger" 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 [emphasis added].
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> …
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> *(d) Recent jurisprudence: a more detailed test*
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> Subsequently Appeals Officer Serge Cadieux released the *Parks Canada Agency* decision.[18]
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> …

[15] *Martin v. Canada (Attorney General),* [2004] 1 F.C.R. 625, per. Tremblay-Lamer J.
[16] *Welbourne v. Canadian Pacific Railway Co.,* [2001] C.L.C.A.O.D. No.9, per. S. Cadieux.
[17] *Verville, supra.*
[18] *Parks Canada Agency v. Martin*, [2002] C.L.C.A.O.D. No. 8.

The Appeals Officer characterized the concept of danger as follows:

> In the instant case, the health and safety officer opted to address the park warden safety issue under subsection 145(2) of the *Code*, a provision that is highly specific in that it deals with a restrictive concept that has been set as a very high standard, and in my opinion, rightly so. The concept of "danger" as defined in the *Code* is unique in that it only applies in **exceptional circumstances**. It is a concept that is strictly based on facts [emphasis added).[19]

…

The Appeals Officer created the following test:

> **The *Code* allows for a future activity to be taken into consideration in order to declare that "danger" as defined in the *Code* exists. However, this is not an open-ended expression**. 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; 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.
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> Note: The latency aspect of the injury or illness will not be addressed in this decision since this was not raised as an issue in the instant case. However, I would refer the reader to paragraph #21 of the *Welbourne* decision for clarification [emphasis added].[20]

The Appeals Officer ruled that without evidence that someone will act out in a certain manner, the unpredictability of human behaviour is incongruent with the concept of danger and a safety officer will be left with a hypothetical or speculative situation not meeting the high standard of danger. In rescinding the directions issued by the safety officer, Serge Cadieux noted: "To put it in general terms, he [the safety officer] confused what might happen with what will happen."[21]

The decision of Appeals Officer Cadieux was confirmed on judicial review.[22] In analysing the definition of danger Justice Tremblay-Lamer quoted the *Welbourne* decision: "In order to constitute danger as defined in the *Code,* it must be reasonable to expect that the prospective hazard, condition or activity **will cause** injury or illness to a person exposed to it before the hazard or condition can be

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[19] *Supra*, at page 34 (QL).
[20] *Supra*, at page 32 (QL).
[21] *Supra*, at page 44 (QL).
[22] *Martin v. Canada (Attorney General)*, [2004] 1 F.C.R. 625, per. Tremblay-Lamer.

corrected or the activity modified [emphasis added]."[23] Justice Tremblay-Lamer noted that: "I agree with the above analysis made by Cadieux in *Welbourne*." While identifying the concept of potential hazard or future activity she specifically noted:

> Furthermore, it is evident to me that the amended definition still encompasses the concept of reasonable expectation which excludes speculative situations: the provision specifically provides that the "future activity that **could reasonably** be **expected** to cause injury or illness to [the] person exposed". This requires evidence and obliges the safety officer to perform an objective analysis of a particular situation.[24]

The Court went on to note that the absence of "specific evidence indicating when grievous bodily harm or death could reasonably occur" requires a safety officer to conclude no danger as s/he "would be faced strictly with a hypothetical or speculative situation."[25]

The Court did note one wrinkle in the Appeals Officer's decision. Focusing on the second part of the definition of danger dealing with exposure to hazardous substances. The Court noted that: "...it is not necessary that there be a reasonable expectation that the injury or illness will occur **immediately** on exposure to the activity in order to constitute a danger…[26] Tremblay-Lamer did go on to note that: "Nevertheless, in my opinion, the new definition still requires an **impending element** because the injury or illness has to occur "before the hazard or condition can be corrected, or the activity altered." Consistent with the *Welbourne* decision, the Court emphasised the fact that "…an injury or illness can occur upon exposure even if the effects on the physical integrity or the health of the exposed person are not immediate."[27]

By emphasising the requirement for reasonable expectation, the Court noted: "... the new definition of "danger" has to be read in context, taking into account the major repercussions that can be caused by a finding of danger."[28] The Court noted that the risks identified by the safety officer were not based on any specific set of facts. The application for judicial review of the Appeals Officer's decision was dismissed.

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[23] *Supra*, at paragraph 53 (QL).
[24] *Supra*, at paragraph 56.
[25] *Supra*, at paragraph 57.
[26] *Supra*, at paragraph 58.
[27] *Welbourne, supra*, at paragraph 21.
[28] *Martin, supra*, at paragraph 61.

Finally we have the decision of Justice Gauthier in *Verville*.[29] This case involved 15 correctional officers [who] refused to work … no danger ...[he] found, however, that the employer violated section 124 of the *Code* and issued a direction pursuant to section 145(1). The employer appealed the direction and the employees appealed the finding of no danger.

The Appeals Officer hearing the case found that the safety officer was correct in not finding there to be a danger. The Appeals Officer also rescinded the section 145(1) direction on the basis that the employer did not violate section 124 of the *Code*. The matter was referred to the Federal Court on judicial review, and heard by Justice Gauthier who rendered her decision on May 26, 2004.

At paragraph 34 of her decision Justice Gauthier confirms the legal test established in the *Parks Canada* decision. It is clear that the *Verville* decision is an application of the *Parks Canada* decision and not a departure from it. At paragraph 36 the Court noted: "...the definition only requires that one ascertains in what 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 [emphasis added)". Picking up on the concept of reasonable expectation the Court goes on to note at paragraph 43: "Thus, if those assaults could **reasonably be expected** to cause injury, they will come within the definition of danger [emphasis added]."

It is respectfully submitted that the decision of the Court in *Verville* follows the decision of Justice Tremblay-Lamer in the *Parks Canada* case. As a result, it is respectfully submitted that the legal test is, as it was presented at the original hearing of this matter, as follows:

> Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that:
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> - the potential hazard or condition or future activity in question will likely present itself;
> - an employee will likely be exposed to the hazard, condition or activity when it presents itself;
> - the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and
> - the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.[30]

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[29] *Verville v. Canada (Correctional Service)*, [2004] F.C.J. No. 940 (T.D.).
[30] *Supra*, paragraph 80.

Normal Condition of Employment

> With respect to the issue of section 128(2)(b) and the concept of a "normal condition of employment", it is important to note that the Court in *Verville* made no finding with respect to whether the facts supported such a conclusion. The Court criticized the Appeals Officer for failing to consider evidence and noted: "Obviously, these reasons should not be construed as giving any indication or opinion as to whether or not in this particular case, the circumstances fall within paragraph 128(2)(b)."[31]

[45] In conclusion, the employer's counsel believed that the Court had not altered the interpretation of the definition of danger. Therefore, he continued to rely on the submissions he had made at the original hearing of this matter.

Position of the Union on *Verville*[32]

[46] The union's counsel wrote the following submissions concerning the ruling of Justice Gauthier in *Verville*[33] and its impact on the present appeal. Again, I am reproducing here only those excerpts that I consider to be more closely related to the present case.

> The *Verville* decision concerns correctional officers working in the living units at the Kent maximum security penitentiary in British Columbia. Certain officers invoked their right to refuse to work under s. 128(1) of the *Canada Labour Code* ("the *Code*") following a directive from the employer, the Correctional Service of Canada ("CSC"), that they could no longer carry handcuffs or any other form of restraining equipment as a matter of routine. CSC's directive was designed to implement a "Dynamic Security Model" that called for the removal of all traditional symbols of authority as a means of increasing the safety of correctional officers. The officers in question, all of whom had chosen to carry handcuffs as a result of past incidents, refused to work on the basis that they had "reasonable cause to believe" that a condition existed that constituted a danger.
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> A Health and Safety Officer investigated the work refusals and determined that there was no "danger" under the *Code.* The matter was appealed to Appeals Officer Cadieux ("Cadieux") who held that the officers had failed to prove that there was a potential "danger" within the meaning of the *Code* since they failed to establish that an altercation causing injury would of necessity take place every time an officer lacked handcuffs or that if an altercation did occur, an officer would suffer injury immediately as a result. Cadieux concluded that the concern

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[31] *Verville, supra,* at paragraph 56.
[32] *Verville, supra.*
[33] *Verville, supra.*

over a potential hazard was merely speculative because the correctional officers were unable to identify a specific threat, and their concern was based primarily on the unpredictability of inmates' behaviour. Cadieux also dismissed the risk of injury from assaults by inmates as "nothing other than the risk inherent to their work," as set out in s. 128(2)(b) of the *Code.* The officers judicially reviewed Cadieux's decision.

Madam Justice Gauthier of the Federal Court of Canada allowed the officers' application and held that the test applied by Appeals Officer Cadieux, requiring that risks be specific and immediate, failed to give effect to the broader amended definition of "danger" in the *Code.* Rather, Gauthier J. held that a reasonable possibility of "danger" is sufficient and that certainty is not required. Referring to the addition of the words "potential hazard or condition" in s. 128 of the *Code*, she stated that "the *Code* is no longer limited to specific factual situations existing at the time the employee refuses to work". As a result, she held that it is no longer necessary to establish that injury will immediately result every time a condition occurs, nor is it necessary to identify the precise time when a potential injury will occur. At paras. 34-36 of *Verville,* Gauthier J. stated:

> ...the injury or illness may not happen *immediately* upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.
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> Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury.
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> ... 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. (Emphasis in original]

Instead, Gauthier J. ruled at para. 36 of *Verville* that employees only need to establish broadly "in what circumstances [the condition, hazard or activity] could be expected to cause injury and that... such circumstances will occur in the future, not as a mere possibility but as a reasonable one."

At paras. 37 and 41-43 of *Verville,* Gauthier J. found that the correctional officers had defined with sufficient precision the set of facts which could be expected to cause injury, namely, "a spontaneous assault on a correctional officer who does not carry handcuffs." Moreover, hazards "which may or may not happen based on unpredictable human behaviour" are not excluded from the definition of danger, if they are "capable of coming into being." Under the amended definition of "danger" in the *Code,* Gauthier J. ruled that if spontaneous assaults "could

reasonably be expected to cause injury they will come within the definition of danger." Based on evidence that the risk of physical confrontation with inmates was "high" and that the risk of assault, while of "low frequency" was of "high severity", she concluded that this test had been met.

Gauthier J. specifically held that the fact that the risk of assault is based on spontaneous or unpredictable human behaviour does not preclude a finding of "danger" under the *Code.* While s. 128(2)(b) of the *Code* limits an employee's right to refuse work where the hazard constitutes a "normal" condition of his or her employment, and while the risk of spontaneous assaults could be said to be inherent in a prison environment, Gauthier J. held at para. 43 of *Verville* that "this is very different [from] saying that unpredictability of inmates' behaviour is alien to the concept of danger in the *Code.*" She also stated that it would be wrong to conclude that if a risk of a certain type of harm is inherent in an environment, an employee could never refuse work for a reason related to it.

Rather, at paras. 52 and 55 of *Verville,* Gauthier J. stated that the issue is whether there has been an increase in the risk over and above the normal conditions, since "'normal' refers to something regular, to a typical state or level of affairs. something that is not out of the ordinary." To illustrate this point, Gauthier J. asked: "[(W]ould one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?"

Appeals Officer Cadieux had based his decision on the fact that "a risk of assault is always present" in a penitentiary, and on the proposition that reduction of risk through carrying handcuffs was an "unproven hypothesis". In this regard, Gauthier J. held that the Appeals Officer had erred in failing to consider evidence indicating that carrying handcuffs did in fact reduce the risk to officers, and in ignoring the argument that the employer's policy prohibiting the carrying of handcuffs increased the *degree of risk* of injury from a spontaneous assault beyond what was "normal" for the environment in question. In the result, the Federal Court found the Cadieux's decision to be unreasonable, directed that it be set aside, and the matter remitted to a different Appeals Officer for re-determination.

The Interpretation of "Danger" in Verville Applies to the Instant Case and Such "Danger" Has Been Established in Evidence

It is submitted that the Federal Court's decision in *Verville* supports the conclusions of Health and Safety Officer Neil Campbell ("Safety Officer Campbell") in the instant case.

Safety Officer Campbell conducted a thorough investigation into the refusals to work, interviewing representatives of both CSC and the officers. Based on the evidence gathered during this investigation, the Safety Officer concluded that there was a "danger" to the officers. In his Investigation Report and Decision, he stated:

> The Post Order for Cell Block Supervision Posts (amended 01-04-09*)* requires four (4) C .O. II's to be assigned to the evening shift in the living units. Providing less than four (4) officers during a shift will create a situation where there will only be two (2) officers present in the living unit if one (1) officer is sent outside for patrol. Since one (1) officer must remain in the control room or bubble for security reasons, *only one (1) officer is available to respond to an incident and two (2) should normally attend.* [Emphasis added.]

In other words, Safety Officer Campbell found that the CSC's decision to provide less than four officers in Units 8 and 11 on May 10, 2001 gave rise to a "danger" because of the reasonable probability of an incident occurring and there being only one officer to respond to such an incident. As stated in para. 41 of *Verville,* spontaneous assaults on officers and other incidents involving inmates are capable of coming into being or action and may therefore constitute a "danger" under the *Code,* even though they are based on unpredictable human behaviour. One does not need to be able to ascertain exactly when such an incident will occur.

In the instant case, both Officers Schellenberg and Wood testified that there existed a state of heightened tension at the Institution on the day of the work refusals. For example, an inmate had assaulted Officer Wood during a drug bust in Unit 11 the day prior to the work refusals. Until concern was expressed by Officer Schellenberg, the inmate who assaulted Officer Wood remained in the general inmate population. Later that day. other inmates in Unit 11 made threatening gestures towards Officer Wood during his regular inspection rounds on the Unit. A number of inmates also made threatening gestures towards Officer Wood on the day of the work refusals. There is also evidence that officers have been unable to respond adequately or appropriately to incidents in the past as a result of there being less than four officers on a shift. In addition, a riot took place at the Institution on May 12, 2001--two days after the work refusals. This is relevant in that it demonstrates that the officers' concerns were not hypothetical or speculative. Rather, this was the very type of incident the officers foresaw when they invoked their right to refuse to work.

As Gauthier J. stated at para. 51 of *Verville*:

> ... 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 opinion 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.*. [Emphasis added.]

[47] Counsel for the union stated in conclusion:

> The set of facts which could be expected to cause injury in the instant case and therefore constituted a "danger" to Officers Schellenberg and Wood is a spontaneous assault on a correctional officer in a unit staffed with less than four officers, *in the context of heightened tensions at the institution.* Since one officer must remain in the control room or bubble for security reasons, this meant that only one officer was available to respond to an incident and two should normally attend. These facts gave rise to an *abnormal degree of risk* of injury to the officers, posing a "danger". In *Verville,* the Federal Court of Canada clearly stated that an analogous set of facts is capable of constituting a "danger" within the meaning of s. 128(1) of the *Code.*
>
> Therefore, it is submitted that the law and the evidence support Safety Officer Campbell's conclusion that such a "danger" did exist and that Officers Wood and Schellenberg had a reasonable basis for invoking their right to refuse to work.

[48] In a further letter in reply to the applicant's submissions, counsel for the union argued that

> Justice Gauthier found that the circumstances as defined by the correctional officers in *Verville* were capable of constituting a danger under the *Canada Labour Code* ("*Code*") *as a matter of law* and were not excluded *a priori*, and that the evidence had to be reconsidered in that context by a different appeals officer.

[49] Counsel Carpenter particularly emphasized the following conclusions made by Justice Gauthier in *Verville*[34] .

- With the addition of words such as "potential" or "éventuel" and future activity in s. 128 of the *Code,* that section is no longer limited to specific factual situations existing at the time the employee refuses to work. (para. 32)
- The injury or illness may not happen *immediately* upon exposure, rather it needs to happen before the condition or activity is altered. (para. 34; emphasis in original)
- The definition of "danger" in the *Code* does not require that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. Rather, the condition or activity must be capable of causing injury at any time, but not necessarily every time. (para. 35)

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[34] *Verville, supra.*

- It is not necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. The definition of "danger" only requires that one ascertain in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future as a reasonable possibility. (para. 36)
- The decision of Tremblay-Lamer J. in *Martin v. Canada (Attorney General),* [2004] 1 F.C.R. 625 is distinguishable because no specific facts had been presented and the refusal to work in that case rested essentially on the general job description. In that sense, it was purely hypothetical. (para. 37)
- The definition used by the Appeals Officer in *Verville* was flawed. (para. 38)
- The customary meaning of "potential" or "éventuel" 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 of "danger" in the *Code.* (para. 41)
- If spontaneous assaults on correctional officers by inmates could reasonably be expected to cause injury, they will come within the definition of "danger". However, if that danger constitutes a normal condition of his employment, the employee will not have the right to rely on it to refuse to work. (para. 43)
- The Appeals Officer in *Verville* failed to consider the argument that even though risk of injury or death may be a normal condition of employment for correctional officers and security guards, an *increased danger or risk* of *injury* resulting for example from a change in the employer's policy may not automatically be excluded under paragraph 128(2)(b). (paras. 52 and 53)
- "Normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential part but which depends on the method used to perform a job or an activity. (para. 55)
- The Appeals Officer's decision under review in *Verville* is unreasonable. (para. 57)

[50] Counsel for the union believed that CSC

> overstated the test of "danger" by stating that the potential hazard or condition or future activity in question will "likely" present itself; an employee will "likely" be exposed to the condition when it presents itself; the exposure to the condition will "likely" cause injury or illness to the employee exposed thereto; and the injury or illness will "likely" occur before the condition can be corrected.

[51] Counsel for the union added that

> "[l]ikelihood" is synonymous with probability, whereas Justice Gauthier in *Verville* states that there need only be a *reasonable possibility* that the condition, hazard or activity will occur. Moreover, Justice Gauthier stated that the definition does not require that every time the condition or activity occurs, it will cause injury – it must be capable of causing injury at any time, but not necessarily every time.

[52] As to the impact of the *Verville* decision on the present case, counsel for the union submitted the following:

> The set of facts which could be expected to cause injury in the instant case and therefore constituted a "danger" to Officers Schellenberg and Wood is a spontaneous assault(s) on a correctional officer(s) in a unit staffed with less than four officers, that is below the mandated minimum manning levels, in the context of heightened tensions at the Institution. The investigating Safety Officer and the Tribunal in this case have before it evidence of the manning policy, of the heightened tensions and the opinion of experienced Officers as to the danger. Since one officer must remain in the control room or bubble for security reasons, this meant that only one officer was available to respond to an incident and two should normally attend. These facts gave rise to an *abnormal degree* of *risk of* injury to the officers, posing a "danger".
>
> In *Verville,* the Federal Court of Canada clearly stated that an analogous set of facts is capable, as a matter of law, of coming within the definition of "danger", depending on the evidence adduced. Therefore, it is submitted that the law and the evidence support Safety Officer Campbell's conclusion that such a "danger" did exist and that Officers Wood and Schellenberg had a reasonable basis for invoking their right to refuse to work.

Analysis and Decision

[53] Health and safety officer Campbell issued a direction to the employer under subsection 145(2) to correct a situation of danger following his decision that correctional officers Wood and Schellenberg were in a situation of danger when he investigated their refusals to work.

[54] Therefore, I have to determine if the two employees were in a situation of danger in order to decide if I will confirm, rescind or vary the direction issued to CSC.

[55] If I find that the employees were in danger, I will also have to decide if that danger represented a normal condition of employment. The relevant provisions of the *Code* are the following.

[56] Subsection 122(1) defines danger 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.

[57] Subsection 128(1) authorizes employees to refuse to work in the following situations :

> 128.(1)(b) 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
> …
> (*b*)...a condition exists in the place that constitutes a danger to the employee …

[58] Subsection 128(2) does not permit employees to refuse to work in the following situations:

> 128(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
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> (*a*) the refusal puts the life, health or safety of another person in danger; or
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.

[59] Subsections 129(1), (4) and (6) and subsection 145(2) dictate what the health and safety officer must do when advised of a refusal to work, on completion of his investigation and if deciding that a danger exists:

> 129(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter in the presence of the employer, the employee and one other person who is
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> (*a*) an employee member of the work place committee;
> (*b*) the health and safety representative; or
> (*c*) if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee.
>
> 129(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.
>
> 129(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.
>
> 145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place, or the performance of an activity constitutes a danger to an employee while at work,

> (*a*) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
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> (i) correct the hazard or condition or alter the activity that constitutes the danger, or
> (ii) protect any person from the danger; and
>
> (*b*) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine or thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

[60] To analyse the issues before me, I will consider the facts that were presented to me, what the provisions of the *Code* tell me, my understanding of Honourable Justice Gauthier's ruling in *Verville*[35] and the parties' arguments on that ruling.

[61] In her Verville[36] decision, Justice Gauthier ruled on three issues in particular, *i.e.* the standard of review of Appeals Officers' decisions, the definition of danger as it applies to the right to refuse work under subsection 128(1) and the restriction applicable to that right under subsection 128(2) when the danger represents a normal condition of employment.

[62] First, it is important to note Justice Gauthier's observations on the standard of review applicable to Appeals Officers' decisions. They clearly demonstrate that, because it is very much fact-intensive, the question of the existence of danger or not as defined in the *Code* is a mixed question of law and facts normally subject to the highest standard determined by the pragmatic and functional approach adopted by the Supreme Court, *i.e.* the patent unreasonableness standard. This is what Justice Gauthier wrote:

> [24] In her recent decision in *Martin v. Canada (Attorney General)*, 2003 FC 1158, [2003] F.C.J. No. 1463 (T.D.) (QL), Tremblay-Lamer J., using the pragmatic and functional approach recommended by the Supreme Court of Canada, determined that the question of whether or not there was danger as defined in the *Code* in a particular situation was a mixed question of fact and law, which would normally be subject to the patent unreasonableness standard because it is very much fact-intensive.

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[35] *Verville, supra.*
[36] *Verville, supra.*

> [25] However, because the definition of danger has recently been amended and had never been judicially considered, she held that, exceptionally, the mixed question of fact and law before her was more law-intensive and should be reviewed on the reasonableness simpliciter standard.
>
> [26] I agree with this analysis of my learned colleague. I also believe that, in the present case, the mixed question of fact and law under review involves a critical legal component. The appeal officer in this case was the same as in *Martin*, *supra*. He based the decision before me on the legal interpretation he developed in his decision in *Parks Canada Agency v. Doug Martin and the Public Service Alliance of Canada* (Canada Appeals Office, Decision No. 02-009, May 23, 2002), which was before Tremblay-Lamer J. in *Martin, supra* and which he had issued just one month before. I will thus review his determination of whether or not there was a danger in this particular case on the standard of reasonableness simpliciter.

[63] Justice Gauthier declared that no special deference is to be given to Appeals Officers regarding questions of law because they have no special expertise on those questions. She stated:

> [27] As to the alleged error with respect to the standard of proof applied by the appeal officer, this is a question of law for which appeal officers do not have any special expertise and which does not call for any special deference. But I do not have to determine whether I should apply the standard of reasonableness or correctness because I conclude that the decision is correct in that respect. With respect to pure findings of facts, the standard of review will be patent unreasonableness.

[64] Justice Gauthier's decision clearly explained some issues that are particularly relevant and important to the present case and that regularly represent central points of Appeals Officers' decisions.

[65] Justice Gauthier stated that one does not have to determine exactly when the potential condition or hazard will occur, it is sufficient to establish when it is reasonable to expect them to occur:

> [36] In that respect, 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 what 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.

[66] Justice Gauthier affirmed that the customary meaning of “potential” does not exclude a hazard or condition based on unpredictable human behaviour. If a hazard or condition is capable of coming into being, even if we do not know exactly when, it should be covered by the definition. She stated:

> [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.

[67] Justice Gauthier added on the issue of assaults:

> [43] Thus, if those assaults could reasonably be expected to cause injury, they will come within the definition of danger. However, if that danger constitutes a normal condition of his employment, the employee will not have the right to rely on it to refuse to work (s. 128(2)(*b*)). But, that is very different than saying that unpredictability of inmates' behaviour is alien to the concept of danger in the *Code*.

[68] Justice Gauthier also confirmed that there is little case law on the restriction established by subsection 128(2) to the right to refuse. She said:

> [54] There appears to be little jurisprudence from this Court on this issue. In *Canada (Attorney General) v. Lavoie*, [1998] F.C.J. No. 1285 (T.D.) (QL), cited by the appeal officer, the argument with respect to an increased risk over and above the normal conditions of employment was not raised, nor did the Court consider the decisions of the Board referred to by the applicant, two of which were issued after the decision in *Lavoie, supra* (see paragraph 52 above).

[69] However, Justice Gauthier did ask if it would be logical to exclude a level of risk that would depend on the method used to perform the activity, by saying:

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

[70] Given Justice Gauthier's ruling and considering the facts submitted by the parties and their positions on the direction issued by HSO Campbell following his decision of danger, I believe that the two correctional officers were in a situation of danger when he investigated their refusal to work, for the following reasons.

[71] The employer's counsel held that when an employee refuses to work, the first investigation is made by the employer. The HSO is called to investigate only when the employee continues to refuse. He then held that subsection 129(6) stipulates that the danger must only "exist" at the time of the HSO investigation, since the employee can refuse until the corrections required by the HSO are made. This is, he said, the principle expressed in the decision made by the Federal Court in *Fletcher*[37].

[72] I do not disagree that the HSO is called in to investigate only when the employee continues to refuse. However, I firmly believe that, when investigating a refusal, the health and safety officer has no choice but to consider both the circumstances prevailing at the time of his investigation and the ones that were prevailing when the employee refused.

[73] I believe that in subsection 129(6), the choice of the present tense to say that the HSO has to decide if "a danger exists", is the equivalent, in reality, of a "continuous or time-independent present", or what we would call, in French, "un présent intemporel". Therefore, I believe that it has to be interpreted in light of the true intent and spirit of the *Code*, that is "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment…"

[74] This means that, first, the HSO needs to gather all the facts, in order to obtain a complete overview if the circumstances surrounding the refusals. So he also needs to ask himself why when they refused to work, the employees were considering that the condition of their work had changed to the point that it became a danger for them.

[75] Second, the HSO is called in to investigate when either no satisfying measures, from the employee's perspective, or no measures at all, are put in place by the employer to eliminate the danger and the employees continue to refuse. Consequently, the HSO has to examine what measures, if any, the employer implemented regarding the reasons invoked for the refusals until he arrived to investigate.

[76] Third, we have to keep in mind section 122.2 of the *Code*, which states:

> Preventive measures should consist first in 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.

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[37] *Fletcher, supra.*

[77] Therefore, I believe that the HSO cannot evaluate if a potential hazard can reasonably be expected to become a danger, *i.e.* to cause injury before it is eliminated, if he does not consider how, in the past, that hazard was controlled in such a way that it was kept from becoming a danger for the employees while at work and it was considered to have remained under control until the refusals to work.

[78] In other words, the HSO has to examine if what the employees invoked as a danger when they refused to work still exists at the time that he is investigating and/or has the potential to become a danger in the future.

[79] In the present case, HSO Campbell based his decision on:

- the fact that the employer had not followed its Post Order requiring the presence of four COs in the unit and
- the fact that the employer had not considered or taken into account the generalized feeling among guards that something was definitely bound to happen.

[80] There is ample evidence that the employer modified his staffing policy. However, I was not given by the employer sufficient evidence that he mitigated this policy change by conducting a new evaluation of the level of risk that this staffing policy modification would bring about for the guards.

[81] The employer did not demonstrate to my satisfaction that he measured the impact of this policy change on the normal working conditions of the guards. He did not express either that he had consulted its local health and safety committee to obtain its input on the implementation of this policy change, as required by paragraph 125(1)(*z.05*) of the *Code*. On the contrary, the employer declared that the staffing policy change was strictly management's prerogative and constituted only a matter of operational policy.

[82] In my opinion, CSC's operational policies have a definite impact on the health and safety of its employees, especially in an environment like a correctional institution, where everything is set in rules destined, among other things, to protect the public and the employees and to dynamically encourage the inmate population to re-integrate into society.

[83] I believe that, in the present case, the refusing employees were not questioning management's prerogative to modify the Post Order. Rather, they realized, and demonstrated at the hearing, that the staffing change had caused unrest to a point of heightened tensions within the inmate population and the guards.

[84] Justice Gauthier stated that a reasonable expectation of injury can be established through opinions of ordinary experienced persons. She said:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of

> ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.

[85] In the present case, I believe that the correctional officers were "in a better position to form the opinion" that there was a danger because they were directly involved with the inmates and they could directly feel the heightened tensions within the units.

[86] In addition, I believe that HSO Campbell's decision of danger was further confirmed by the fact that a riot took place 48 hours after the refusals to work and less than 24 hours after HSO Campbell's investigation, giving credit to that feeling of heightened tensions.

[87] Moreover, the *Code* assigns to the employer the responsibility to ensure the health and safety of its employees. Consequently, CSC should evaluate any changes that it brings into a procedure to determine if it creates a new level of risk, that, in turn, it must also measure and control.

[88] Finally, with respect to the restriction created by subsection 128(2) of the *Code*, Justice Gauthier declared:

> [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.
>
> …
>
> [43] Thus, if those assaults could reasonably be expected to cause injury, they will come within the definition of danger. However, if that danger constitutes a normal condition of his employment, the employee will not have the right to rely on it to refuse to work (s. 128(2)(*b*)). But, that is very different than saying that unpredictability of inmates' behaviour is alien to the concept of danger in the *Code*.

[89] In the present case, I did not receive sufficient evidence that the danger invoked by the refusing employees and observed by HSO Campbell was a normal condition of employment. On the contrary. And aside from locking down the inmates when the employees refused to work, which is the usual procedure in those cases, the employer did not evaluate the situation or the risks and he did not take into account the opinions and feelings expressed by the correctional officers.

[90] Therefore, I believe that given the heightened tensions and the risks of assaults, the reduction in staffing as a result of the Post Order constituted a danger to the employees.

[91] For these reasons, I confirm the direction that health and safety officer Campbell gave to the employer under subsection 145(2) of the *Code* following his decision that a condition existed in the work place that constituted a danger for correctional officers Schellenberg and Wood.

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Michèle Beauchamp
Appeals Officer

Summary of Appeals Officer Decision

Decision No.: 05-012

Applicants: James Schellenberg and Daniel Wood

Respondent: Correctional Service Canada

Key Words: Refusal to work, danger, staffing

Provisions: *Canada Labour Code* 122(1); 128; 129; 145(2)
Canada Occupational Health and Safety Regulations: N/A.

Summary :

Two correctional officers refused to work because they considered that by not posting the required number of correctional officers in the living units, the employer had created an unsafe working condition.

A health and safety officer investigated their refusals to work and decided that minimum staffing levels established by the employer were not being maintained, thus constituting a danger for the employees. He issued to the employer a direction under subsection 145(2)(*a*) to immediately correct the condition.

The Appeals Officer confirmed the direction that the health and safety officer gave to the employer under paragraph 145(2)(*a*) of the *Code* following his decision that a condition existed in the work place that constituted a danger for the correctional officers.