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

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Canada Labour Code
Part II
Occupational Health and Safety

Correctional Service Canada
Edmonton Institution
applicant

and

Confédération des syndicats nationaux – UCCO
respondent

Decision No. 05-037
Date: September 7, 2005

This case was heard by Appeals Officer Pierre Guénette, in Edmonton, Alberta, on June 22-23, 2005.

Appearances

For the applicant
Trent E. Kane, Unit Manager and co-chair of the joint occupational health and safety (OHS) committee, Correctional Service Canada (CSC), Edmonton Institution, Edmonton, Alberta

Stéphane Hould, Counsel, Justice Canada, Treasury Board of Canada Secretariat, Legal Services

For the respondent
Barry Holigroski, Correctional Officer (CO) II, Search Coordinator, CSC, Edmonton Institution

Sandrina Courtepatte, CO I, CSC, Edmonton Institution
Brenda Kincade, CO I, CSC, Edmonton Institution
Allan Johnston, CO I, CSC, Edmonton Institution

Céline Lalande, Union Advisor, Confédération des syndicats nationaux (CSN)

Health and safety officer
Jack Almond, Human Resources and Skills Development Canada (HRSDC), Labour Program, Edmonton, Alberta

[1] This case concerns an appeal made pursuant to subsection 146(1) of the C*anada Labour Code* (the *Code*), Part II, by legal counsel Kerry Scullion, on behalf of Correctional Service Canada, Edmonton Institution, relative to a direction issued by health and safety officer (HSO) Jack Almond.

[2] On May 28, 2002, Human Resources and Skills Development Canada was advised by the Edmonton Institution of the refusal to work of Sandrina Courtepatte, a correctional officer working at the Edmonton Institution.

[3] On the day of her refusal to work, Ms. Courtepatte had submitted the following memorandum advising her employer that she was exercising her right to refuse to work:

> I am writing to inform you that the informal resolution process between the Management at Edmonton Institution, Al Johnston and myself S. Courtepatte on the Section 128 of the *Canada Labour Code*. That I called at approximately 1816 hrs on May 28, 2002 was not resolved to my satisfaction, I would like to inform you that with seven feet of aluminium still unaccounted for and managements refusal to lock down the entire Institution for a proper search with no inmate access to the areas where this metal could be. I also asked for a proper grid search of the recreation areas with metal detectors, as well as a complete visual search of these areas to be conducted. I perceive that my life and safety as well as other staff employed at Edmonton Institution are in danger or I could suffer serious injury if you continue with the movement of the inmates out of their cells. I would like you to know that I would like to have HRDC called in to investigate my concerns for my risk for serious bodily injury or death in the workplace.

[4] HSO Almond conducted an investigation the next morning. The employer sent me a copy of a document entitled *Investigation Report and Decision* that HSO Almond had written and sent to him as a result of his investigation. However, for some reason, HSO Almond was unable to submit his investigation file as such for the appeal. Nevertheless, I retain the following from that document and from his testimony at the hearing.

[5] HSO Almond testified that at the time of the work refusal, groups of inmates had been moved from their cell units into the gymnasium where they were to work out.

[6] During his investigation into S. Courtepatte's refusal to work, HSO Almond established that there was only one person doing the pat-down[1] and there was a strong possibility that weapons were concealed somewhere inside the institution.

[7] HSO Almond's investigation led him to conclude that a danger existed for S. Courtepatte when she performed a search inside the institution to find the missing piece of aluminium. The search required frisking or coming into close contact with inmates during a period of tension. Furthermore, it was carried out while it was known that threats had been made against correctional officers.

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[1] A pat-down is a non-intrusive search of inmates. It is mostly done each time an inmate moves from point A to point B inside the institution.

[8] As a result of his investigation, HSO Almond wrote the following decision in the *Investigation Report and Decision* that he sent to the employer:

> I uphold the right of Sandrina Courtepatte the Corrections Officer Invoking her right to Refuse Dangerous Work. I consider the work to be dangerous within the scope of the *Canada Labour Code* Part II Section 128.(1)(*b*).

[9] Furthermore, in the letter accompanying his *Investigation Report and Decision*, HSO Almond also specified to the employer:

> PLEASE BE ADVISED THAT PURSUANT TO SUBSECTION 129.(1) OF THE *CANADA LABOUR CODE* PART II. I INVESTIGATED THE COMPLAINT AND HAVE COME TO THE CONCLUSION THAT A DANGER EXISTS.
>
> This shall apply to all body frisk procedures and close personal contact with Edmonton Institution Inmates until the subject missing metal material has been found or deemed not to be on the property. The Co-chairs of the Health and Safety Committee, Mssrs. Kane and Johnston shall be in agreement that the subject metal is found or deemed to be not on the property.
>
> Therefore please be advised that the Edmonton Institution shall remain in a "Lockdown Condition" until the above paragraph has been satisfied.

[10] Consequently, HSO Almond issued to the Edmonton Institution the following direction under section 145(2) of the *Code*:

> The said health and safety officer considers that the performance of an activity, by an employee constitutes a danger to the employee while at work: To Wit;
>
> The activity of Sandrina Courtepatte frisking or coming into close contact with inmates during this period of tension at the prison. That is the search for metallic material that has been made or, may be made into weapons commonly known as shivs (form of knife). This activity is being carried out when it is known that threats to maim or kill have been made against correctional officers.
>
> Therefore pursuant to the *Canada Labour Code* Part II Section 124. *Every employer shall ensure that the health and safety of every person employed by the employer is protected.* This practise shall be discontinued until the said metallic material is found or is deemed not to be on the premises as agreed to by the C/O Chairs of the Institute Occupational Health and Safety Committee, Mssrs. Kane and Johnston.
>
> …
>
> This direction shall take effect immediately upon receipt of the direction.

[11] In the last paragraph of that same direction, HSO Almond added:

> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) of the *Canada Labour Code*, Part II, to discontinue the use, operation or activity until you the employer has complied with the direction issued under paragraph 145(2)(*a*)(i) of the *Canada Labour Code*, Part II.

[12] HSO Almond declared that he received written confirmation from CSC that the Edmonton Institution had complied with his direction.

[13] Trent E. Kane testified for the Edmonton Institution. I retain the following from his testimony.

[14] T. Kane described how the Edmonton Institution was run on a day to day operation. He also depicted the physical premises of the institution with a sketch and photographs. T. Kane explained the following facts:

- Two pieces of aluminium were found in C block;
- A correctional officer found that there was a piece of aluminium missing from a kitchen cart; that piece was about 7 to 10 feet long;
- The employer decided to search for the missing piece of aluminium in cell blocks B, C and E, including all cells and all common dormitories;
- The search focused only on blocks where inmates had access to the kitchen;
- At the time of S. Courtepatte's refusal to work, C and E blocks had already been searched. The employer had closed the exercise yard and had released small groups of inmates from the cell blocks;
- The decision to do a pat-down was a team decision. Inmates were leaving the cell blocks to go to the interior courtyard;
- S. Courtepatte's refusal to work occurred when inmates where in the courtyard;
- Following the refusal to work, management ordered that all movements of inmates be stopped;
- As a result, the inmates became angry and started threatening correctional officers;
- The employee co-chair of the OHS committee and T. Kane met S. Courtepatte;
- S. Courtepatte described how she felt about the situation;
- Both co-chairs disagreed on the conclusion of their joint investigation;
- More specifically, the employer believed that there was no danger for the employee because he had no information about any increased risk;
- The employer called the Labour Program on the same night and was told that a HSO would be there the next morning to investigate;
- The next morning, HSO Almond began his investigation by meeting only with union members;

- Following that meeting, HSO Almond met with management representatives, who expressed their concerns about the fact that the HSO had met with union members without them being present. HSO Almond did not offer any explanation on this issue;
- HSO Almond questioned management about operational matters;
- Two days later, HSO Almond decided that a danger existed for the employee. He confirmed his decision in writing and issued a direction to the employer;
- Management complied with the direction by ordering a full search of the institution;
- Once the search was completed in one area, that area was open to inmates, upon agreement by both co-chairs;
- Even with a full search, the piece of aluminium missing from the kitchen cart was never found.

[15] Under cross-examination, T. Kane stated that there had been incidents from time to time in the kitchen area and that a couple of days before the refusal to work, a piece of metal had been found during an attack.

[16] T. Kane declared that at the time of the refusal to work, the metal detector used in the wing barrier could not detect soft aluminium. Metal detectors were changed after the refusal to work, but that change was related to the use of a new technology, not as a result of the refusal to work.

[17] Finally, T. Kane stated that at the time of the refusal to work, the interior yard had not been searched.

[18] Barry Holigroski was the first witness for the respondent. I retain the following from his testimony.

[19] B. Holigroski explained that he found a piece of aluminium in the board game room on May 24, 2002 and informed his supervisor of his finding. Later, a CO discovered that a piece of aluminium of about 7 to 10 feet long was missing from a kitchen cart.

[20] B. Holigroski stated that he put a piece of aluminium through a metal detector but the alarm did not go off. He added that he was involved in the cell block area search during the day shift, but the missing piece of aluminium was not found.

[21] Sandrina Courtepatte was the second witness for the respondent. I retain the following from her testimony.

[22] S. Courtepatte participated in the search for the missing piece of aluminium. The search started in the gymnasium. It was not completed when it was stopped and the inmates were authorized to go in. S. Courtepatte requested that the recreation yard be searched, but management disagreed.

[23] S. Courtepatte said that she was afraid of being stabbed by inmates. So following management's negative reply, she exercised her right to refuse to work.

[24] S. Courtepatte added that it was sometime difficult to identify which inmate made the detector beep when too many of them went through the pat-down control metal scanner at the same time. When that happened, the CO would inform the supervisor of the incident, but there was no follow-up if the inmate was already in the gym.

[25] S. Courtepatte informed the supervisor and a union representative of her refusal to work. She complained that she was concerned that correctional officers could be in danger during a range walk because inmates were locked in the cell block. She also believed that inmates had weapons in their possession.

[26] On cross-examination, S. Courtepatte said that correctional officers cannot do, in one night, a full search of the gym and the recreation yard.

[27] Brenda Kincade was the third respondent's witness. I retain the following from her testimony.

[28] B. Kincade stated that she was assigned in the pat-down area. She explained that inmates normally have to go through the pat-down barrier but they often pass through without being controlled.

[29] B. Kincade said that there were some discussions during a MCC meeting on May 24, 2002 about gang activities within the institution and the high number of threats against correctional officers. Mr. Holigroski provided some information about the missing piece of aluminium. Management agreed to search B and C Units. The union recommended a full search of the institution but management decided to go with a selective search in cell blocks.

[30] B. Kincade stated that correctional officers were terrified to be alone with inmates during the search. The union was not satisfied about having only a pat-down search and the fact that the metal detector could not detect aluminium.

[31] B. Kincade testified that S. Courtepatte told her that she felt her life was in danger because the whole institution was not being searched and inmates were allowed to move at the same time.

[32] Allan Johnston also testified for the respondent. I retain the following from his testimony.

[33] A. Johnston recalled incidents involving inmates using weapons against a correctional officer that took place before May 2002. More specifically, a correctional officer was taken hostage and three other correctional officers were assaulted in different incidents.

[34] A. Johnston said that there were a lot of gang members in May 2002 and that management started to segregate inmates to avoid gang confrontation.

[35] A. Johnston confirmed that he participated in the investigation of S. Courtepatte's refusal to work on May 28, 2002. At that meeting, management told the union that the Edmonton Institution was safe. However, the union argued that some areas of the institution had not been searched and that only a superficial search of the gym had been made.

[36] A. Johnston stated that he was in the meeting room with HSO Almond and other union members on the morning of May 29, 2002 but that the HSO did not ensure that management representatives attended the meeting. However, HSO Almond did a tour of the institution.

[37] According to A. Johnston, HSO Almond informed management and union the next day of his decision of danger and he issued a verbal direction to the Edmonton Institution.

[38] A. Johnston stated that, as a result of the direction, a ‘‘game plan’’ was established with T. Kane and the search of the whole institution was completed on June 12, 2002.

[39] In his submissions, counsel Stéphane Hould declared that I should examine two issues in my decision.

[40] First, I have to determine, based on the evidence, if HSO Almond erred when he decided that there was a danger. If I find that he did, I should rescind the direction that he issued to CSC, Edmonton Institution. If I decide that his decision was relevant, I should ask myself if his direction was appropriate in the circumstances.

[41] Counsel Hould believed that HSO Almond erred in his decision given the definition of danger under Part II of the *Code*. Therefore, HSO Almond’s decision and direction should be rescinded.

[42] Counsel Hould argued that I have to take into consideration the inherent danger associated with the work performed in a penitentiary. His position was that all measures had been put in place to ensure the safety of the employees and that the employer cannot control everything that happens inside a maximum institution.

[43] Counsel Hould referred to paragraph 36 of Justice Gauthier’s decision in *Juan Verville*[2], where she wrote:

> [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.

[2] *Juan Verville and Correctional Service Canada*, Kent Institution, 2004 FC 767, May 26, 2004.

[44] Counsel Hould held that the definition of danger implies that I have to take into consideration in what circumstances the danger could be expected to cause injury and if there is not a mere possibility but a reasonable possibility that the circumstances will happen. He argued that S. Courtepatte felt that an assault could happen, but that there was no evidence that the assault would occur.

[45] To support his position, counsel Hould made reference to the *Stone*[3] decision, where Appeals Officer Serge Cadieux declared in paragraphs 46 and 47:

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

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

[46] Counsel Hould added that T. Kane had described in his testimony that the following security measures were in place in the institution:

- The coordination of inmates' movement was tight;
- The pat-down procedure was a routine procedure;
- Correctional officers were trained on that procedure;
- Two correctional officers were standing guard in the courtyard during the movement of inmates;
- There was a correctional officer in the control guard post to control the door as well as two control officers who are always armed.

[47] Counsel Hould argued that there was no doubt that the employer took all necessary measures to protect correctional officers in May 2002:

- Management assessed the situation by conducting a search in specific cell blocks;
- Management deployed the correctional officer supervisor during the pat-down;
- The number of inmate movements was reduced;
- There was no history of assault in the pat-down area.

[48] Counsel Hould explained how the notion of inherent risk applies in the context of correctional officers being in contact with inmates. He made reference to the *Bouchard*[4] decision, where Appeals Officer Michèle Beauchamp wrote, in paragraph 22:

> [22] Were Correctional Officers Bouchard and Guillemette facing a danger within the meaning of the *Code* (when they refused to work)? I do not believe that in this case, the risk they were facing fell outside the normal conditions of their employment to the extent that it represented a danger within the meaning of the *Code*. Correctional officers work in an environment that involves an inherent possibility of violence. I consider that, as the officers' employer, the CSC did its best to reduce the risks associated with this ETA by taking various steps including risk assessment by a team of professionals who were very familiar with the circumstances involved.

[49] The second issue that the employer's counsel asked me to consider is that if I agree with HSO Almond that S. Courtepatte was in danger, I must examine the wording of the direction that the HSO issued to CSC, Edmonton Institution.

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[4] *Bouchard and Canada (Correctional Service)*, Appeals Officer Michèle Beauchamp, Decision 01-027, December 12, 2001.

[50] Counsel Hould was of the opinion that the direction was putting the security of the institution in the hands of employees. HSO Almond directed the Edmonton institution that if the missing piece of aluminium was not found, the OHS committee had to come to the agreement that it would be deemed not to be inside the institution. He argued that such a direction was not allowed under the *Code* and that the *Code* did not give that kind of authority to the HSO.

[51] Counsel Hould also maintained that the direction created another problem, in that it ordered correctional officers to avoid contact with inmates, which was in direct contradiction with the duties of a correctional officer.

[52] Counsel Hould raised another issue during his final submissions, concerning the lock down order included in the direction. He argued that it was incompatible with the safety of inmates and correctional officers and that T. Kane had explained that the lock down created more danger and raised the level of tension within the institution.

[53] Counsel Hould believed that the direction was not essential and should be rescinded. Moreover, there was no use to vary the direction given that the situation had happened more than three years before.

[54] Counsel Hould also held that HSO Almond did not investigate S. Courtepatte's refusal to work in accordance with subsection 129(1) of the *Code*, because he started his investigation only with union representatives and made no effort to request management's presence even though T. Kane was in the institution at that time.

[55] Finally, counsel Hould argued that HSO Almond had already made his decision when he met with the employer's representatives.

[56] For her part, union advisor Céline Lalande requested in her submissions that I confirm the decision of danger and the direction issued by HSO Almond.

[57] Union advisor Lalande believed that there was a danger for S. Courtepatte, as defined in the *Code*, given the following elements:

- The category of inmates inside that maximum institution;
- The reduced risk of injury if there were no prohibited weapons inside the institution;
- The procedure in place served to control a limited risk;
- The employer did not take all possible measures to eliminate or minimize the danger; and
- The employer proceeded with a partial search of the institution instead of a full one.

[58] Union advisor Lalande referred to HSO Almond's testimony to examine the following facts:

- The tension caused by the presence of gangs;
- The kitchen Incident that occurred about twenty days before S. Courtepatte's refusal to work, where a correctional officer was unable to intervene;
- The missing piece of aluminium could have been anywhere in the institution;
- Aluminium could not be detected by the metal detector;
- The search did not stop the movement of inmates and weapons could have been passed between cell blocks;
- The increased tension from inmates because weapons were in circulation, not because of the refusal to work.

[59] Union advisor Lalande held that the new *Code* gave a broader definition of danger. She referred to paragraph 32 of the *Juan Verville*[5] decision, where Justice Gauthier wrote:

> [32] With the addition of words such as ''potential'' or ''éventuel'' and future activity, the *Code* is no longer limited to specific factual situations existing at the time the employee refuses to work.

[60] Union advisor Lalande affirmed that, in the present case, the activity was the movement of inmates and it was reasonable to expect inmates to be in possession of metal weapons. She referred to paragraph 34 of the *Juan Verville*[6] decision, where Justice Gauthier wrote:

> [34] The above statement is not entirely accurate. As mentioned in *Martin, supra*, 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.

[61] Union advisor Lalande also referred me to paragraph 35 of that decision[7], more specifically regarding the occurrence of the injury. She believed that the presence of metal weapons inside an institution could reasonably be expected to cause injury to S. Courtepatte and other correctional officers at any time, even if it was not necessarily every time. Justice Gauthier said:

> [35] 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. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.

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[5] *Juan Verville, supra.*
[6] *Juan Verville, supra.*
[7] *Juan Verville, supra.*

[62] Union advisor Lalande maintained that HSO Almond made the right decision given the size of the missing piece of metal and that there was reasonable ground to believe that inmates were in possession of metal weapons. Therefore, the employer should have taken the necessary measures to find it.

[63] Union advisor Lalande also made reference to paragraph 41 of the *Juan Verville*[8] decision to argue that there was not a mere possibility but a reasonable one that S. Courtepatte or another correctional officer could have been injured by an inmate. Justice Gauthier wrote:

> [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.
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> [4] "potential": capable of coming into being or action. *The Canadian Oxford Dictionary* (Don Mills, Ontario: Oxford University Press, 2001) at 1134.
>
> [5] "éventuel": Qui peut se produire si certaines conditions se trouvent réalisées. Qui peut ou non se produire. *Le Nouveau Petit Robert* (Dictionnaires le Robert – Paris, 1993) at 947.

[64] Union advisor Lalande believed that the level of risk was higher than normal and was therefore not a normal condition of work. Thus, the definition of danger was met and HSO Almond was correct in his interpretation of the *Code*.

[65] Union advisor Lalande argued that the direction issued to the Edmonton Institution did not imply that the institution would be put in the hands of the health and safety committee. It was addressed to the employer, represented by Joanna Pauline, Acting Warden, and the role of the health and safety committee was only to say if the situation was correct.

[66] For those reasons, union advisor Lalande was of the opinion that the decision of danger and the direction issued by HSO Almond to CSC, Edmonton Institution, should be confirmed.

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[67] The issue to be decided in the present case is whether HSO Almond erred when he decided that a danger existed for S. Courtepatte at the time of his investigation. Following that determination, I must decide whether to confirm, rescind or vary the decision and direction that he issued to the CSC, Edmonton Institution.

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[8] *Juan Verville, supra.*

[68] To do so, I will consider the facts and arguments submitted by both parties, as well as the definition of danger found in the *Code*.

[69] Danger is defined in section 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.

[70] To decide that a danger existed in the present case, the definition requires me to ascertain the circumstances when the potential hazard could have been expected to cause injury and to determine that there was a reasonable possibility that such circumstances would have taken place in the future.

[71] In this case, the potential hazard was the possibility of an inmate attacking CO Courtepatte with a weapon formed from the piece of aluminium that was missing in the institution.

[72] In accordance with the uncontested evidence heard in this case, the following circumstances existed at the time of HSO Almond's investigation where the aforementioned potential hazard could reasonably be expected to cause injury before the hazard could be corrected. These included:

- a correctional officer found two pieces of aluminium approximately 7 to 8 inches by one inch. One was shaped as a knife or a "shiv";
- a search in the institution revealed that a 7 to 10 foot piece of aluminium was missing from a kitchen cart;
- during the initial search organized by the Institution to find the missing aluminium, the institution did not secure the areas being searched. This was significant because the evidence was that inmates were able to pass pat-down positions and move from one area to another without being patted down;
- during their investigation, the institution found that the metal detector used at the time in the institution was unable to detect aluminium;
- tension existed between gangs for a certain period of time as evidence by an incident where an inmate was sprayed with boiling water while working in the kitchen.
- inmates voiced threats that they would maim or kill correctional officers. CO Courtepatte stated that she feared being assaulted during a pat-down when she refused to work.

[73] In my opinion, the above noted evidence establishes that circumstances existed at the time of HSO Almond's investigation that the potential hazard feared by CO Courtepatte could reasonably have been expected to cause injury to her in the future. I further that there was a reasonable possibility, as opposed to a mere possibility, that the circumstances would persist or occur in the future. The evidence in this regard was that:

- the missing aluminium was not found at the time of HSO Almond's investigation;
- to avoid a confrontation with inmates, management at the institute preferred to overlook the fact that some inmates had evaded the pat-down station rather than make them redo the pat-down;
- tension was unabated at the time of HSO Almond's investigation; and
- Edmonton Institution is a maximum security penitentiary and in the circumstances, inmate threats had to be regarded as serious.

[74] Counsel Hould argued that there was no basis for S. Courtepatte fear that she could be assaulted by inmates as the Institution had no information that an assault on a correctional officer was expected.

[75] However, in paragraph 51 of *Juan Verville*[9], Justice Gauthier affirmed that a realistic probability of getting injured can be determined from opinions of ordinary experienced persons. She wrote:

> [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.

[76] In this particular case, I believe that S. Courtepatte's concern was based on her experience and her direct contact with inmates which enabled her, in the circumstances, to reasonably assess inmate threats.

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[9] *Juan Verville, supra.*

[77] Counsel Hould argued that the employer cannot control everything that happens inside. He referred to paragraph 46 of the *Stone*[10] decision, where Appeals Officer Serge Cadieux wrote:

> [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(…)

[78] However, in the present case, it is my opinion that the situation demanded a wide and controlled search. Instead, management chose to limit its search to avoid inmate confrontation. In my opinion, this response was inadequate in the circumstances for ensuring that the health and safety of CO Courtepatte and other correctional officers was protected.

[79] Counsel Hould held that any danger that existed at the Institution was a normal condition of work. To support his position, he referred to Michèle Beauchamps' decision in *Bouchard*[11].

[80] However, contrary to the situation described in the *Bouchard* [12] decision, the unique circumstances in this case which included the fact that a correctional officer had already found a weapon made of aluminium, the missing piece of aluminium was not found and that inmate tension was high following an inmate attack, suggests that the danger could hardly be considered to be a normal condition of work.

[81] While it may not be completely probative, a letter sent by T. Kane the following June, confirmed that the search directed by HSO Almond had turned up:

- 122 pounds of metal, including 50 pounds of nails, 31 of which had been turned into weapons;
- 32 club-like weapons;
- 4 pieces of PVC pipe found in the yard ground;
- 46 large spikes, approximately six to eight inches long.

[82] Based on the evidence, I concur for the above mentioned reasons with HSO Almond's decision that a danger existed for S. Courtepatte.

[83] That stated, I must consider the direction issued by HSO Almond and deal with two matters raised by Counsel Hould regarding the letter dated May 30, 2002, in which HSO Almond confirmed to parties his decision that a danger existed for S. Courtepatte.

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[10] *Stone and Canada (Correctional Service), supra.*
[11] *Bouchard and Canada (Correctional Service), supra.*
[12] *Bouchard and Canada (Correctional Service), supra.*

[84] Dealing first with HSO Almond's letter of May 30, 2002, in which he confirmed his decision to parties, Counsel Hould complained that the last two paragraphs each constituted a direction and that the directions should be rescinded. The two paragraphs read

> This shall apply to all body frisk procedures and close personal contact with Edmonton Institution Inmates until the subject missing metal material has been found or deemed not to be on the property. The Co-chairs of the Health and Safety Committee, Mssrs. Kane and Johnston shall be in agreement that the subject metal is found or deemed to be not on the property.
>
> Therefore please be advised that the Edmonton Institution shall remain in a "Lockdown Condition" until the above paragraph has been satisfied.

[85] Counsel Hould held that the requirement that the two co-chairs agree with the result of the search was inappropriate because it went against management' rights and responsibilities.

[86] With regard to the second paragraph, he held that this was inappropriate because locking down the institution as instructed created a serious hazard in the institution.

[87] In my opinion, I have no reason to disagree with Counsel Hould that the two paragraphs constituted a direction despite the fact that they were included in the notice of decision and were separate from the actual direction that HSO Almond subsequently issued the same day.

[88] In the case of the direction directing co-chair to be in agreement, section 124 of the *Code* requires every employer to ensure that the health and safety at work of every person employed by the employer is protected. In my view, the direction is inconsistent with section 124 of the *Code* and must be rescinded.

[89] With regard to HSO Almond's direction in the decision letter that the institution be locked down, correctional officers at the hearing did not disagree with Counsel Hould's view that this requirement, itself, created a serious hazard. As I see no rationale for doing otherwise, I would agree that this direction must be rescinded.

[90] Paragraph 146.1(1)(*a*) of the *Code* authorizes me to confirm, vary or rescind a decision or direction. It reads:

> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> (*a*) vary, rescind or confirm the decision or direction[.]

[91] Based on that authority I hereby rescind these two directions which were included in HSO Almond's letter dated on May 30th, 2002 confirming that a danger existed for S. Courtepatte.

[92] In the direction that HSO Almond issued to Edmonton Institution on May 30, 2002, he ordered the institution, pursuant to paragraph 145(2) of the *Code*, to find the missing piece of metal or to determine that it was not on the premises of the institution and to have both co-chairs of the health and safety committee agree on the issue of the search.

[93] While I am convinced that to order the employer to find the missing piece of metal was acceptable, given the circumstances inside the institution at the time of HSO Almond's investigation, I have already confirmed that requiring the employer that have both co-chairs of the OHS committee agree about the result of the search was inappropriate.

[94] Therefore, under the authority granted to me by paragraph 146.1(1)(*a*) of the *Code*, I am varying, for the above mentioned reasons, the direction that HSO Almond issued to CSC, Edmonton Institution, under paragraph 145(2), on May 30, 2002, by replacing it as follows:

In the Mater of the *Canada Labour Code*

Part II – Ocupational Health and Safety

Direction to an Employer Under Subsection 145(2)(*a*) and (*b*)

On May 29, 2002, the undersigned health and safety officer conducted an investigation following a refusal to work made by Sandrina Courtepatte in the work place operated by CORRECTIONAL SERVICE CANADA, being an employer subject to the *Canada Labour Code,* Part II, at EDMONTON INSTITUTION, 21611 MERIDIAN ST, BOX 2290, EDMONTON, ALBERTA, T5J 3H7, the said work place being sometime known as CORRECTIONAL SERVICE CANADA.

The said health and safety officer considers that the performance of an activity, by an employee constitutes a danger to the employee while at work: to wit;

The activity of Sandrina Courtepatte frisking or coming into close contact with inmates during this period of tension at the prison. That is the search for metallic material that has been made or, may be made into weapons commonly known as shivs (form of knife). This activity is being carried out when it is known that threats to maim or kill have been made against correctional officers.

Pursuant to section 124 of the *Canada Labour Code*, Part II, "[e]very employer shall ensure that the health and safety at work of every person employed by the employer is protected." Therefore, the employer shall proceed with a full search of the Edmonton Institution and ensure the control of inmates' movements during the search.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately protect any person from the danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to conduct this activity until this direction has been complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

Issued at Edmonton, this 30th day of May, 2002.

_____

(**signature**)
Jack Almond
Health and Safety Officer
AB3533
Canada Place, Room 260
9700 Jasper Avenue
Edmonton, AB T5J 4C1
Phone number (780) 495-2086
Fax Number (780) 495-2998

To: Correctional Service Canada
Edmonton Maximum Institution 21611 Meridian St.,
Box 2290
Edmonton, Alberta, T5J 3H7

[95] I understand that the employer complied with the direction that was issued on May 30, 2002. Therefore, no further action is required by the employer with respect to the varied direction.

[96] Finally, I feel compelled to make the following comment in orbiter. Counsel Hould complained during the hearing that HSO Almond had commenced his investigation of the refusal to work by meeting with the union separately without including management representatives in the meeting. He held that this meeting was contrary to subsection 129(1) of the *Code* and alleged that it had biased HSO Almond's decision and direction.

[97] Subsection 129(1) of the *Code* reads:

> 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
>
> (*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.

[My underline.]

[98] In my opinion, there was no evidence to justify HSO Almond's departure from the requirements in subsection 129(1) of the *Code* and I cannot disagree that this departure created, at the minimum, an untenable perception of bias regarding both his decision and direction.

_____

Pierre Guénette
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-037

Applicant: Correctional Service Canada, Edmonton Institution

Respondent: Confédération des syndicats nationaux – UCCO

Key words: Danger, pat-down, search, tension, lock down, refusal to work,

Provisions: CLC 122, 124, 128, 129(7), 145, 146
COSHR N/A

Summary:

A correctional officer refused to work because the employer would not lock down the entire institution to do a proper search for a missing piece of aluminium. She felt that her health and safety, as well as that of other correctional officers at the institution, were in danger if the employer maintained the movement of inmates during the search.

The health and safety officer decided that there was a danger and issued a direction to the employer.

The Appeals Officer confirmed the decision of danger but varied the direction.