Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Gaelen Joe et. al. v. Correctional Service of Canada, 2012 OHSTC 25

Date: 2012-07-20
Case No.: 2008-15
Rendered at: Ottawa

Between:

Gaelen Joe et. al., Appellants

and

Correctional Service of Canada, Respondent

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer
Decision:	The decision that a danger does not exist is confirmed.
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the appellant(s):	Ms Marie-Pier Dupuis-Langis, Union Advisor – CSN-Pacific
For the respondent:	Mr John G. Jaworski, Counsel – Legal Services, Treasury Board

REASONS

[1] This case concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision of no danger rendered by Ms Marlene Yemchuk, Health and Safety Officer (HSO) on June 12, 2008.

Background

[2] Messrs Gaelen Joe, Elie Gareb, Jacques Castex, Joe Macaulay, Peter Lee and Chris Tinnion were employed as Correctional Officers II (CO-IIs) at the Matsqui Institution (Matsqui). Matsqui is a Correctional Service Canada (CSC) medium security penitentiary located in Abbotsford, British Colombia.

[3] On May 10, 2008, the employees invoked their right to refuse dangerous work due to the circumstances in the Living Unit (LU) at Matsqui.

[4] Their refusal to work was premised on the fact that the employees could not exit to the safety of the exterior of the building from the CO-II offices without passing through the LU and, in the case of a major disturbance, this exit route would pose a danger to their health and safety. The employees felt that an upcoming implementation of a total smoking ban would create a major disturbance at the institution.

[5] On January 31, 2006, a partial smoking ban was instituted at every CSC Institution. At Matsqui, May 10, 2008, was the date of the final day of tobacco sales with May 20, 2008, indicated as the date of implementation for the total smoking ban.

[6] The employees reported their work refusal to the employer on May 10, 2008, the final day of tobacco sales. The matter was investigated by employee and employer representatives. Human Resources and Skills Development Canada, Labour Program, was subsequently notified of the refusal to work and attended to the matter.

[7] The Matsqui inmates were locked in their cells on May 10, 2008, due to the refusal to work. No disturbances were reported.

[8] In her preliminary inquiry report, dated June 12, 2008, HSO Yemchuk concluded that she did not believe that the risk presented would fall outside the normal range of the employees' duties. Consequently, HSO Yemchuk did not investigate further.

[9] On May 20, 2008, the employees filed an appeal with the Occupational Health and Safety Tribunal.

[10] On April 26, 2011, I toured Matsqui with the parties. The visit focused on the LU CO-II offices and the egress route that passed through the Control Post (bubble) to the exit on the roof. On April 27 and 29, 2011, and on June 20 and 22, 2011, the appeal hearing took place in Abbotsford, British Columbia.

Issues

[11] I must make a decision with respect to the following issues:

(i) Whether the appellants were exposed to a danger as defined under the Code when they exercised their right to refuse to work?

(ii) If the appellants were exposed to a danger as define under the Code when they exercised their right to refuse work, is this danger a normal condition of employment?

Submissions of the parties

[12] The parties' final submissions were received on September 6, 2011.

Appellants' submissions

[13] The appellants' case consisted of evidence from the following witnesses: Mr G. Gillette, CO-II - Union Regional Health and Safety Representative, Mr Joe, CO-II/Union Local President and Mr Castex, CO-II.

[14] Mr Gillette has been employed with CSC for 14 years and he worked 9 years at Matsqui. Mr Gillette's testimony related to his understanding and experience about applicable institutional directives. He described the operations, practices and specific particularities involving the inmate population at the LU around the time of the work refusals as well as testimony about the circumstances that could occur in the event a major disturbance happened. Mr Gillette gave evidence about being personally approached by inmates that told him they would do something with regard to the ban. In addition, he testified about the circumstances around a riot at Matsqui in 1981 and its ramifications.

[15] Mr Gillette provided an explanation about exiting from the CO II offices the case of a major disturbance, from the LU would be through its main door; however, if it was not possible, it would be through the Control Post and up the roof. He explained the many challenges a CO-II would encounter during a major disturbance and in particular while egressing through the Control Post. The construction and protective equipment in the CO-II offices was also explained by him.

[16] Mr Joe was scheduled to work at the LU at the time of the work refusal however his primary shift was at the Segregation Unit. Mr Joe provided evidence regarding his understanding and experience about applicable institutional directives. He testified about the inmate smoking population and their practices within Mastqui, the manner CO-IIs were affected and how they could possibly be affected during the impending total smoking ban. He provided evidence about members submitting Officer's Statement / Observation Reports (OSORs) that were not reflected in the minutes of morning briefing and that the employer was minimizing or disregarding the information that was provided

by staff. Information about the construction and protective equipment in the CO-II offices was also provided by him.

[17] Mr Castex was working on the LU third floor on the day of the work refusal. The evidence of Mr Castex consisted of his understanding and experience about applicable institutional directives. He described the inmate population and how the total smoking ban represented a significant change for them and he spoke of the risk that something could happen. He testified that inmates were transmitting kytes[1] to staff that mentioned the place would burn down and that staff would be killed if a total tobacco ban was to occur. Mr Castex stated that he observed changes in inmate behaviour that he found unusual and suspicious.

[18] The appellants contend that HSO Yemchuk erred in deciding that they were not exposed to a danger.

[19] The appellants argued that the single egress route out of the LU CO-II offices constituted a danger in the event of a major disturbance incident, and this danger fell outside of the range of the employees' normal condition of employment.

The HSO's decision

[20] The appellants began their submissions by pointing to the HSO's use of a questionnaire to determine that the employees' refusal was not based on a divergence from normal working conditions. It is argued that the HSO did not commence a formal investigation into the refusal to work, thereby implicitly determining that a danger did not exist.

[21] The appellants referenced the decision in *Canada v. Vandal, St-Pierre, Turbis, Gosselin*[2], and argued that a HSO must investigate and make a determination if a danger exists. They maintained that the HSO's decision was therefore unfounded in fact and in law and should be rescinded.

Reasonable expectation

[22] The appellants pointed to the definition of danger in *Verville v. Canada (Correctional Service)*[3] in order to demonstrate reasonable expectations based on job-based opinions.

[23] In *Verville*, Justice Gauthier of the Federal Court determined that the definition of danger only requires that one ascertain in which circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not

[1] A kyte is an unsigned note from an inmate to anyone at Matsqui.
[2] 2010 FC 87.
[3] 2004 FC 767.

as a mere possibility but as a reasonable one.[4] The Court also held that 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."[5]

[24] Using the definition of reasonable expectation from *Verville*, the appellants argued that they had a reasonable expectation based on their experience as correctional officers and/or ERT members that having a single egress route out the LU CO-II offices could reasonably be expected to cause injury in the event of a major disturbance.

[25] The appellants argued that this expectation was established through an inference arising out of several factors known at the time of refusal. The factors, are briefly summarized as follows:

(a) The likelihood of inmates being able to breach certain barriers in the LU area in the event of a disturbance;
(b) the potential inability for officers to reach LU exits in the event of a disturbance;
(c) the lack of an exit to the exterior of the building from CO-II offices;
(d) the potential ability of inmates to breach the CO-II offices through a film/glass window in the door; and
(e) the lack of protective equipment in the CO-II offices.

[26] In combination with these factors, the appellants argued that the pending total smoke ban created a strong likelihood of an inmate disturbance. In their submissions, the appellants pointed to evidence presented by officers Joe, Gillette and Castex that a total smoke ban represented a significant change to inmate life and therefore presented a risk that something could happen.

[27] The appellants also pointed to evidence from Mr Joe that certain factors relating to inmates' mood and conditions were not reflected in the minutes or morning briefings and were not shared with other staff members and/or the union. The appellants provided further testimony from Mr. Castex that inmates were providing kytes to officers outlining threats. Furthermore, the officers had noticed changes in inmates' behaviour, such as the refusal to communicate with officers.

[28] Finally, the appellants also argued that the reasonable expectation of danger was reached due to knowledge that front-line staff was typically responsible for responding to emergencies before the ERT would arrive.

[29] The appellants submitted that these factors, when taken together, led to a reasonable inference of danger to the employees in the case of a disturbance.

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[4] *Verville* at paragraph 36.
[5] *Verville* at paragraph 51.

Employer's assessment of danger

[30] The appellants submitted that the employer did not assess the danger and therefore contravened the general duty of an employer, outlined by section 124 of the Code and, that the Threat Risk Assessment (TRA) template could not assess all situations, nor could it take into consideration the unpredictability of human nature.

The normal condition of employment

[31] The appellants argued that the employer failed to demonstrate that the danger faced by the employees was a normal condition of employment as stipulated in subsection 128(2) of the Code.

[32] The appellants pointed to the interpretation of subsection 128(2) of the Code in *Verville*, where the Court held that the customary meaning of the words in the subsection supported a view that "normal" refers to something regular, to a typical state of affairs, and to something that is not out of the ordinary.[6]

[33] Citing this definition of "normal", the appellants argued that major disturbances are not something that happens on a regular basis; therefore, they cannot be seen as a normal condition of employment. Furthermore, the appellants submitted that the employer's definition of the officers' job description was so broad that it would never allow employees to exercise their right to refuse work.

[34] To support this assertion, the appellants referenced the decision in *Johnstone, Allain and Martin v. Correctional Service Canada*[7] which stated at paragraph 131, "the Code does not require anyone to go as far as to put their health, safety or life on the line even if their job entails working with dangerous offenders."

[35] Citing evidence presented by the employees relating to the situation in the facility, the appellants therefore submitted that the danger did not constitute a normal condition of employment.

[36] The appellants concluded by submitting that the HSO's decision should be rescinded and that the employer contravened the Code as employees were not able to safely access the emergency exit.

Respondent's submissions

[37] The respondent's case consisted of evidence from the following witnesses: Mr G. Brown, Warden, Matsqui (at the time of the refusals), Mr G. Dosanjh, Correctional Manager (CM), Matsqui, Mr M. Grant, Security Intelligence Officer (SIO), Matsqui, (Acting SIO at the time of the refusals), and Mr S. Verwold, Acting Assistant Warden

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[6] *Verville* at para. 55.
[7] CAO 2005-020.

Management Services (A/AWMS), Matsqui, (employed in the maintenance department at Matsqui at the time of the refusals).

[38] Mr Brown testified about his duties and responsibilities as the Warden at Matsqui. He explained CSC directives and policies that were in effect at the time and he gave a description of the inmate population at Matsqui. He testified about the measures that were put into place at the institution regarding the pending total smoking ban. He provided evidence about security intelligence that was gathered during that period.

[39] Mr Dosanjh testified about his duties and responsibilities as Correctional Manager and the various procedures in place at the LU at issue in this case. He described how information relevant to the total smoking ban issue was obtained, recorded and transferred between management and correctional officers. He also explained the various pieces of security equipment at the LU.

[40] Mr Grant testified about his correctional experience, his duties and responsibilities as Security Intelligence Officer, he was acting in the position at the time of the work refusals. He explained how security intelligence is obtained, evaluated and disseminated to staff; he explained the term kyte and how this method of information transfer between inmates and staff is assessed; he explained the manner he interacts with the inmate committee and tier representatives. He entered his notes relating to the circumstances regarding the total smoking ban and he provided an explanation regarding the difference between information and intelligence that he received and assessed on a daily basis.

[41] Mr Verwold testified about his experience at the institution and his responsibities and duties. He provided evidence concerning physical aspects of the LU e.g. construction details of the office at issue, the barriers and their mechanisms.

[42] According to the respondent, HSO Yemchuk did not err in her finding of no danger.

[43] The respondent began by arguing that testimony about a riot in 1981 should not impact this case, as the incident occurred 30 years ago, it did not involve an attack against staff, and did not take place in the LU. Furthermore, the respondent also argued that testimony about a protest in the prison yard in 2008 had nothing to do with the current case, as the event did not occur in the LU.

The normal condition of employment

[44] Citing *Fletcher v. Canada (Attorney General)*[8] at paragraph 18, the respondent argued that the right to refuse work is an emergency measure to be used in situations only where employees perceive that they are faced with immediate danger and where injury is likely to occur right then and there.

[8] 2003 FC 275.

[45] The respondent argued that case law has determined the correctional setting to be very dangerous by its inherent nature. It argued that staff must deal with unpredictable human behaviour and that correctional officer jobs are inherently dangerous.

[46] In addition, the respondent argued that the dangerous nature of the job is clearly set out in the work description and that this has been recognized by the Tribunal, the PSSRB and the Federal Court. The respondent submitted that correctional officers, specifically CO-IIs assigned to the LU, are expected to work among inmates. This includes carrying out rounds and counts as a normal condition of employment.

[47] As examples, the respondent argued that CO-IIs are expected to do rounds; work meal lines, and they supervise movement and hobbies as a normal condition of employment. Inmates could attack CO-IIs during any of these instances, making their job inherently dangerous.

Reasonable expectation

[48] Citing *Welbourne v. CPR*[9], the respondent submitted that the concept of reasonable expectation excludes hypothetical or speculative situations; however, it argued that there must be a reasonable degree of certainty that the illness or injury is likely to occur upon the exposure to the hazard.

[49] The respondent cited the decision in *Unger v. CSC*[10] for the proposition that there must be some evidence upon which to base the statements of reasonable expectation. The respondent argued that there was no evidence to indicate that there would be an assault on staff, let alone CO-IIs in the LU or in the vicinity of the LU.

[50] The respondent also cited *CSC v. DeWolfe and Campbell*[11] and argued that the facts must establish that:

(a) a hazard or condition will come into being;
(b) an employee will be exposed to the hazard or condition when it comes into being;
(c) there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
(d) the injury or illness will occur immediately upon exposure to the hazard or condition.

[51] The respondent argued that persuasive evidence is needed to establish that a disruption would occur. Without such evidence, the threat simply remains speculative. The respondent therefore argued that the hazard could not be the general condition of being exposed to inmates without a barrier, as it is both a normal condition of employment and an inherent risk associated with the job.

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[9] CAO 2001-008.
[10] 2011 OHSTC 8.
[11] CAO 2002-005.

[52] The respondent argued that a threat of "risk" is not enough to find that there is a danger. The respondent submitted that there was no evidence that CO-IIs or the LU was going to be attacked as supported by the following evidence:

- Logbooks for the LU for the week prior to the refusal, the daily Management Briefing Minutes, and the Correctional Managers Logbook all indicated that the institution was running normally;
- only one of the employees who refused to work had worked during the five days prior to the work refusal, this officer did not attend the hearing and did not give evidence;
- Warden Brown and SIO Grant demonstrated that security evidence showed that nothing was going to happen;
- none of the appellants' witnesses provided any first hand knowledge of any sort of threat; their assessments were based on rumour.

[53] The respondent argued that additional weight should not be given to the evidence of the COs because of the fact that they work directly with inmates. Furthermore, there was additional information available (e.g. in the logbooks, management briefing minutes, and manager's logbook) that the COs did not examine. The respondent also pointed to the fact that Officers, Castex or Gillette were not in the institution during the week before the work refusal.

Appellants' reply

[54] The appellants began their reply by highlighting several inconsistencies in the employer's submissions. They noted that:

- Despite the fact that Officers Lee, Macauley, Gareb and Tinnion did not give evidence at the hearing, the appellants point to the fact that these employees worked on the 1st and 2nd floors of the LU. As the LU floors are similar, the appellants argued that any danger on one floor would have constituted a danger on another floor.
- The appellants pointed to Mr Grant's resume and argued that he did not become a substantive SIO before June 1, 2009, (after the refusal to work). He was Acting SIO at the time of the refusals.
- The appellants disagreed with the respondent's assertion that there were 245 inmates housed in LU in May 2008. The appellants pointed to the testimony of Officers Joe, Gillette and Castex who all indicated that the LU housed close to 300 inmates at the time of the refusal to work.
- The appellants argued that OSORs were left to management's discretion, if they deemed it to be appropriate.
- The appellants submitted that significant changes in behaviour and mood, unusual activity and changes in routine were not recorded in logbooks. Furthermore, the appellant argued that CO-IIs did not have access to the CM's logbook.

- The appellants submitted that the minutes dated May 3, 2008, and May 4, 2008, were missing from the Management Meeting Briefings.
- The appellants asked that Exhibits 13, 14, 59, and 64 not be considered in the appeal as these documents were not in effect at the time of the work refusal.
- The appellants pointed to the fact that the employer indicated that incidents usually arose in situations where inmates had a perception of injustice. The appellants therefore submitted that a total smoking ban could be perceived as unfair (as 80% of the institution population was smoking).
- The appellants disagreed with the respondent's characterization of the January 25, 2008, event as not being relevant to the case. They argued that the employer did not provide any formal documentation showing that no staff was injured.
- The appellants argued that the information regarding a possible disturbance would not have been included in the logbook as these entries are brief and do not give detailed synopsis of what has been going on in the institution. Therefore, the appellants argued that it was not reasonable to argue that Officers Joe and Castex should have reviewed the logbook.

[55] In their legal submissions, the appellants pointed to the fact that the *Verville* decision was more recent than *Welbourne* and that the definition of danger in *Verville* is broader than *Welbourne*.

[56] The appellants also pointed to *Verville* to counter the respondent's assertion that danger must be perceived to be immediate and real. They cited Justice Gauthier in *Verville*: "I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard of the future activity will occur...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."[12]

[57] The appellants pointed to *Verville* again for the proposition that "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 better position that the trier of fact to form the opinion. It could even be established through an inference logically or reasonably known from the facts."[13]

[58] The appellants argued that the CO-IIs satisfy this test. It argued that the employees had a reasonable expectation based on their experience as correctional officers and/or ERT members that the single egress route could reasonably be expected to cause injury in the event of a major disturbance. Furthermore, the appellants argued that the employees had reasonable expectation to believe that a major disturbance was going to happen.

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[12] *Verville* at para. 36.
[13] *Verville* at para. 51.

[59] Finally, the appellants argued that the respondent's definition of "normal condition of employment" was set quite high, making it difficult to argue that any conditions were abnormal.

Analysis

[60] At issue in the present case is, at the onset, whether a danger as defined by subsection 122(1) of the Code was present at the Matsqui Institution at the time of the appellants work refusal on May 10, 2008, and in the affirmative, whether the said danger is a normal condition of employment in the circumstances.

[61] The term "danger" is defined by subsection 122(1) of the Code:

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

[62] In respect to the applicable test for determining the presence of an existing or potential hazard within the meaning of section 122(1) of the Code, Madame Justice Gauthier, in the Federal Court *Verville* decision, at paragraph 36, stated the following:

> 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 which circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. [my underlining]

[63] In the case at hand, the refusals exercised by the employees were premised on the fact that on May 10, 2008, they believed that the first stage of the total ban on smoking would result in an "impending riot" or "possible major disturbance", the actual terms used by some employees in their refusal statements, and that the single egress route out of the LU CO-II offices constituted a danger to them.

[64] In order to reach a conclusion of danger within the meaning of the Code by applying the test stated in *Verville*, I must:

(i) identify the hazard associated with carrying out the work activity;
(ii) identify the circumstances in which it is reasonably possible that this hazard could cause injury; and

(iii) determine whether these circumstances could have occurred on May 10, 2008, not as a mere possibility, but as a reasonable one.

What is the hazard associated with carrying out the work activity?

[65] The appellants submitted that the hazard that was considered a danger to them at the time of their work refusals in May 2008 related to the fact that there was only one egress route out of the LU CO-II offices in the event of a major disturbance incident. I agree with the first part of the description that the LU CX-II office configuration is a key component of the perceived hazardous situation. What I disagree with is that it is coupled with what the appellants described as "a major disturbance incident" which can be construed as meaning a major disturbance that could occur at any time in the future under circumstances other than those in the present case. I interpret *Verville* as requiring one to ascertain that the circumstances that could be expected to cause injury to refusing employees as referring to the circumstances at the time of their work refusals.

[66] In light of the above, my analysis will focus on the set of circumstances which involved a potential major disturbance relating to the implementation of the upcoming total smoking ban and that specific period.

[67] In conclusion, the hazard associated with carrying out the work activity that I must determine to be dangerous or not will relate to the circumstances involving the configuration of the LU CO-II offices and surrounding area coupled with a potential major disturbance that was expected to occur in the period around May 10, 2008, the implementation date of the first stage of the total smoking ban.

In which circumstances would it be reasonably possible that this hazard could cause injury to the employees?

[68] I will now address the circumstances on or about May 10, 2008, that could create the hazard described above and thus make it reasonably possible to cause an injury to the employees. All the following elements would be required to create the circumstances that are hazardous to the employees:

(i) a major disturbance located at or near the LU;
(ii) inmates breaching the range barriers or inmates that are already within the confines outside of the LU CO-II offices when barriers are closed; and
(iii) employees that are trapped in the LU CO-II offices and unable to reach the bubble or escape door.

Could the circumstances, that created the hazard described above on May 10, 2008, have occurred not as a mere possibility but as a reasonable one?

[69] I will begin my analysis of this question by focusing on element (i) of the hazardous circumstances that I described concerning the potential major disturbance in May 2008. Should I find that there was a reasonable possibility, and not a mere possibility, that a major disturbance could have occurred, the next step will be to turn my attention to elements (ii) and (iii) pertaining to the issues concerning the LU range barriers, LU CO-II offices' general layout, construction, protection equipment and methods of egress.

[70] The appellants submitted that there was a reasonable likelihood of a major disturbance occurring in May 2008. This contention was based primarily on the evidence from Messrs Joe and Castex who testified that the total smoking ban represented a significant change within the inmate population at Matsqui with respect to the mood and because inmates were not as communicative with COs at that time. Mr Joe testified that there was fear among all staff members as the total smoking ban came closer. It is argued that these behavioral changes were factors that were not reflected in reports and as such COs believed the employer was minimizing and/or disregarding those factors.

[71] The appellants argued further that Mr Castex's testimony that inmates were putting in kytes stating that the place would burn down and that staff would be killed if a total tobacco ban was to become effective was important evidence that substantiates the reasonable possibility that a major disturbance would occur.

[72] The appellants also put to me that the CO-IIs had a reasonable expectation based on their experience as correctional officers and/or ERT members and through inference arising reasonably from known facts at the time, that a major disturbance could have occurred and could cause injury to them. This argument was supported by a citation in *Verville* at paragraph 51 that reiterated its position. It argued that together all factors stated by the witnesses would lead one to reasonably infer that a danger existed.

[73] At this point, the question is whether or not there is evidence to support a finding that a major disturbance could have occurred on or about May 10, 2008, as a result of the implementation of the total smoking ban.

[74] I acknowledge that the witnesses that provided evidence for the appellants on that issue were very experienced and qualified to make assessments regarding the hazardous circumstances that could arise in the course of their duties as COs. Nonetheless, my decision must be based on factual information that is relevant to the circumstances at the time of the refusals which would in turn convince me of the likelihood of a major disturbance occurring on or about May 10, 2008, that in conjunction with the COs perceptions based on their knowledge and experience.

[75] In that respect, I find that the appellants' evidence fell short in convincing with me that there was a reasonable possibility that a major disturbance could have occurred on or about May 10, 2008.

[76] For example, Mr Castex testified on cross examination that he heard comments from one inmate to another like "...when this place goes..." however he did not approach the inmates who had the conversation nor could he recollect relevant details when and where the comments were made nor did he report the incident to the employer or the SIO. He could only recall that he may have reported this to a co-worker.

[77] As well, Mr Castex testified that prior to the implementation of the total smoking ban two inmates on his case work load stopped coming to see him which supports the appellants' contention that inmates were not talking to staff. However, on cross examination he confirmed that one inmate was never in the habit to see him and this circumstance was not reported to the employer.

[78] Furthermore, on the issue of kytes prior to the implementation of the total smoking ban, Mr Castex testified that although he heard of inmates putting kytes he did not receive any. He also testified on cross examination that no one threatened him prior to the implementation of the total smoking ban nor did he file any OSORs with respect to the tensions and disturbance that he suggested were coming.

[79] By Mr Castex not making any kind of a report to the employer about any of the above concerns, whether it be by OSOR or not, does not assist me to understand, in a factual manner, the extent or degree of his fears, concerns or the extent of the hazard as it related to a major disturbance during that time.

[80] In addition, Mr Joe and Mr Castex testified that all six appellants attended the morning shift briefing given by the CM at the commencement of the day shift the morning of May 10, 2008. It is at that briefing that all six appellants decided that they would refuse to work. On that day, four of the six appellants (Messrs Gareb, Macaulay, Castex and Tinnon) were scheduled to work as CO-IIs in the LU. The two other appellants (Messrs Joe and Lee) were not scheduled to work, however agreed to work the shift because two other CO-IIs were supposed to work were on leave. Mr Joe's regular post from September 2007 to April 2009 was in the segregation unit and he was called in for overtime on May 10th.

[81] Mr Castex testified that apart from Mr Joe, the other four appellants usually worked the LU with him and that he and the other four appellants were coming to work on May 10, 2008, following days off. The LU logbooks indicated that the last shift prior to May 10, 2008 by appellants (Messrs Castex, Macaulay, Gareb and Tinnon) occurred on May 5, 2008. The only appellant who worked after May 5, 2008, was Mr Lee. Mr Lee did not attend the hearing.

[82] In the days leading up to May 10, 2008, the appellants, excluding Mr Lee, were not physically present in the days leading up to their collective work refusal. Much of the

appellants' evidence that a danger existed, due to a potential disturbance, was based on perceived changes to inmate behaviour and the sending of kytes.

[83] Given that all the appellants were not present at the LU in the days leading to May 10, 2008, apart from appellant Mr Lee, who did not testify, I am left to conclude that they did not have a complete picture of the situation at Matsqui at the time of their refusals. As such, I find that their assumptions that a major disturbance could occur was based on speculation rather than fact. Because factual information was available that Matsqui was operating normally, I am not convinced by the appellants' evidence that a major disturbance could have occurred.

[84] On the other hand, I did receive convincing evidence stemming from the Management Briefing Minutes that indicated to me for the 9 days prior to the work refusals, from May 1 to May 9, 2008, Matsqui was running normally and that there was nothing abnormal or untoward occurring to suggest that there would be any form of major protest, major disturbance, riot or any other actions of that magnitude. This evidence was confirmed during the cross-examinations of Messrs Joe and Castex. Furthermore, the CO-II and CO-I Living Unit Post logbooks for each level from April 28 to May 10, 2008, and Correctional Managers logbooks from April 28 to May 11, 2008, indicated the same.

[85] In cross examination, Messrs Joe and Castex testified that they make it a habit to review the logbook of whatever post they work at the beginning of the shift, and that they would even go back over previous days if they had been off, to know what occurred.

[86] When probed further during cross examination, Mr Joe testified that he did not go and look at logbooks for the LU on May 10, 2008, or for at least a week prior nor did he go to the SIO's office and review any OSORs. He did not file any OSORs with respect to tensions or a potential disturbance due to the implementation of the total smoking ban at Matsqui. This aspect lends weight to the fact his concerns were not elevated to a degree which would warrant reactionary or preventative measures by the employer.

[87] When probed further during cross examination Mr Castex testified that he did not look at the logbooks for the LU or review the Management Briefing Minutes on the morning of May 10, 2008. Mr Castex testified that he did not attend his assigned post at the LU at any time on the day of the work refusal which indicates to me that he was not completely apprised of the most current conditions at his work place.

[88] Mr Grant was in the position of Acting SIO at time of the work refusals. He is the person responsible to gather information through a variety of means which included the interception of communication, human sources and the review of OSORs. His assessment, which is based on established security standards and criteria, concluded that although there was some talk and conjecture within Matsqui, there was no inmate plans based on the security intelligence that a major disturbance or revolt would occur. Nevertheless, the possibility of a protest by individual inmates was not ruled out.

[89] Both the SIO and the Warden testified that from a security intelligence perspective leading up to the total smoking ban on May 8, 2008, there may have been a concern that some inmates may react individually, however institutional measures were in place to address that risk. The SIO constantly reviewed information provided to him including the OSORs as well as information provided by confidential inmate sources and an ongoing Threat Risk Assessment (TRA) was performed and implemented based on the security intelligence.

[90] Moreover, I received convincing evidence that the total smoking ban at Matsqui was introduced and implemented in a methodical and transparent manner which I believe significantly mitigated the potential of this issue resulting in a major disturbance. I will elaborate further on those measures taken by the employer by referring to the evidence of the Warden and other relevant exhibits.

[91] The total smoking ban within Matsqui and throughout all CSC institutions began as a partial ban in January 2006. In early 2007, the employer announced it was contemplating a total smoking ban and that consultations would take place with employees, unions, inmates and other stakeholders. Those consultations were concluded in the summer of 2007 and at that time it was announced that the total ban on smoking would come into effect as of April 30, 2008.

[92] On January 3, 2008, the Warden sent an email to all Matsqui managers as well as the local union executive that included Mr Joe, which provided the employer's policy concerning the total smoking ban named the "Total Smoking Ban Implementation Roadmap". Another reminder was communicated nationally on January 21, 2008.

[93] On February 21, 2008, the Warden sent an email to all Matsqui users advising them that the original date for the total smoking ban was pushed back to May 5, 2008. The email also advised that the last day of tobacco sales for inmates would be April 21, 2008, and that there would be replacement items for inmates to purchase at their canteen. This email informed staff that smoking cessation programs and aids were available and it reminded staff of the importance of staff communication with the inmate population. This subject was also discussed further with the Matsqui local union during consultation meetings held on March 27, 2008. Additional communication on the matter between management and staff occurred in March and April 2008.

[94] On April 22, 2008, the Commissioner of CSC sent a departmental communiqué to all CSC personnel updating them on the implementation of the total smoking ban. It advised that the ban would not start at all institutions on the same day but would be staggered. The implementation date for Matsqui was moved to May 20, 2008. As a result, the final date for tobacco sales was changed from April 21, 2008 to May 10, 2008. The cut-off date for the sale of tobacco was around ten days prior to the implementation of the total smoking ban, the reasoning being that this would allow for natural attrition of tobacco within Matsqui. It was thought that once sales ceased, most if not all the tobacco would be gone by the implementation date which would preclude staff from trying to catch inmates trying to sneak around smoking.

[95] The Warden testified that one of the reasons that the implementation of the total smoking ban was pushed back at Matsqui was to avoid it coinciding with the ban implementation at other maximum security institutions like the one at Kent Institution which would occur on May 5, 2008. The Warden stated that inmates at Matsqui were attuned to that fact. He testified that there was information sharing between the regional and national levels and any hint of a disturbance at these locations would be communicated and assessed. In effect, nothing happened at Kent Institution with the implementation of the total smoking ban.

[96] On May 2, 2008, the appellants' union issued an information update to their members about the implementation of the total smoking and tobacco ban and the implications. It reminded its members to notify management of any information they have that might indicate inmates are planning a disruption. This was to be transmitted by writing OSORs, informing management and notifying the union. It also instructed members to ensure they write the charges for the inmates who try to resist the ban.

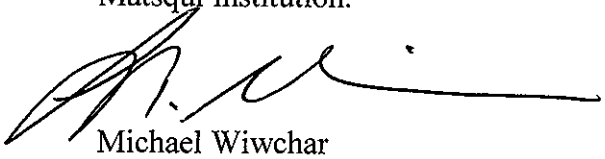
[97] After having considered the above evidence, I conclude that it was merely possible that a major disturbance could have occurred as a result of the implementation of the smoking ban at or around the LU at Matsqui on May 10, 2008. Moreover, because this integral element was merely possible for there to be hazardous circumstances as described in paragraph 68, an analysis of the other two elements is not required and as such I also find that there was no reasonable possibility that the circumstances could have caused injury to the appellants.

[98] In any event, the cessation of the sale of tobacco as well as the implementation of the total smoke ban did take place without any incident or disturbance. The total smoking ban was carried out as a two-step process so that inmates had knowledge far in advance on May 10, 2008, and the result appears to be indicative that it was done in a fair manner which avoided a major disruption.

[99] On the basis of the evidence, I find that the appellants were not exposed to a danger as defined in subsection 122(1) of the Code. Therefore, the issue regarding normal condition of employment need not be addressed.

Decision

[100] For all the reasons above, I find that a danger did not exist on May 10, 2008 at the Matsqui Institution.



Michael Wiwchar
Appeals Officer