Occupational Health and Safety Tribunal Canada

Date: 2015-06-18
Case No.: 2013-33

Between:

Joel Gartner, Appellant

and

Canada Border Services Agency, Respondent

Indexed as: *Gartner* v. *Canada Border Services Agency*

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. Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Himself
For the respondent:	Ms. Allison Sephton, Counsel, Department of Justice Canada, Treasury Board Secretariat Legal Services
Citation:	2015 OHSTC 10

REASONS

[1] This decision concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision rendered on June 20, 2013, by Health and Safety Officer (HSO) Gord Logan following a work refusal made by the appellant and other employees of the Canada Border Services Agency (CBSA or "employer"). HSO Logan conducted an investigation on June 6, 2013, and, on the basis of the information and documents obtained in the course of his investigation, found that a danger did not exist for Mr. Gartner and his colleagues to carry out their work-related activities in the circumstances that gave rise to the refusal. Mr. Gartner appealed this decision on July 12, 2013, after informing the Occupational Health and Safety Tribunal Canada ("Tribunal") of his intention to do so on June 27, 2013.

[2] The hearing in this matter took place in Winnipeg, Manitoba, on February 17 and 18, 2015. The appellant represented himself and testified on his own behalf. The respondent called four witnesses: Mr. Mathew Chammartin, A/Operational Superintendent with CBSA, Ms. Dawn Lambert, Senior OSH Advisor with CBSA, Mr. Nigel Suarez, Senior Program Advisor with CBSA's Arming Division at Headquarters, and Mr. Lincoln Poulin, President of the Winnipeg Rifle and Pistol Association (WRPA).

Background

[3] The circumstances of the refusal can be briefly described as follows. Mr. Gartner is employed with the CBSA as a Border Services Officer (BSO). On June 5, 2013, he was scheduled to attend a mandatory CBSA firearms training session at the WRPA gun range. The session was scheduled from 13:00 to 16:00. There were eight BSOs and three instructors in attendance for this particular session. At the start of the session, Mr. Gartner advised his supervisor Mr. Chammartin that they were refusing to work as they felt that the conditions in which they were to carry out their activities were unsafe. As set out in the Refusal to Work Registration Form, signed by Mr. Gartner and other refusing employees, the grounds invoked for the refusal are as follows:

> Contrary to current federal legislation, the recent CBSA operational bulletin (May 2013) states the limitations on BSO powers and authorities when working away from the point-of-entry. The bulletin attempts to remove the BSOs peace officer status when away from the point-of-entry. This operational bulletin furthers the dangerous situation for the following reasons:
>
> > Unhindered public access to the public range.
> >
> > CBSA has stated they will not be indemnified should they attempt to defend themselves, other officers or the public from any threat.
> >
> > BSOs may not use CBSA assets to protect themselves, other officers or the public in a dangerous or use of force situation (goes against training).
> >
> > Other law enforcement agencies are provided with law enforcement-only, private ranges with no public access: Local

> examples including Winnipeg Police service, RCMP, and Department of National Defence. There are other law enforcement ranges that could be used by the CBSA. These other law enforcement officers have peace officer status when using public ranges.
>
> An example of dangerous situation today was a black SUV approaching the range at 1235 hrs while the range was active and officers were taking part in the CBSA assigned practice session. This member of the public did not identify themselves as a member of the range and did not have any reason to be there.

[4] The employer's representatives on site determined that there was no danger for Mr. Gartner to proceed with the training session as scheduled. The refusing employees disagreed and continued to refuse, at which point the Labour Program of Human Resources and Skills Development Canada (HRSDC), as it was named then, was contacted in order to have a health and safety officer investigate the matter.

[5] HSO Logan began his investigation into the circumstances of the refusal on the following day, June 6, 2013. The focus of HSO Logan's analysis and decision relates primarily to the physical conditions prevailing at the WRPA premises and the alleged unsafe conditions that those premises presented to the appellant. This is understandable as it appears to have been the main focus of the grounds invoked in support of the refusal. However, most of the appellant's evidence and argument at the hearing of the appeal focussed on the legal implications of the policy set out in Operational Bulletin PRG-2013-30 titled "*Clarification of Criminal Code s. 495 Arrest Authorities for Enforcement and Intelligence Officers*" ("the Bulletin"). More precisely, the appellant's submissions and testimony related principally on the implications of not having peace officer status, while at the same time being required to carry with him, for the purpose of the training session, his usual defensive and protective equipment (duty firearm and rounds of ammunitions, OC spray, retractable baton, handcuffs, etc., hereafter referred to as "defensive equipment"), which are categorized as prohibited weapons under the *Criminal Code* of Canada ("*Cr. C.*").

[6] The Bulletin, which is central to the issues examined in the present appeal, purports to clarify that Enforcement and Intelligence Officers have the arrest authorities conferred by section 495 of the *Cr. C.* to peace officers, only in situations where a person is committing an offence under the *Immigration and Refugee Protection Act (IRPA)* or the *Customs Act* (hereafter referred to as "program legislation"). Paragraph 7 of the Bulletin captures the essence of the policy:

> 7. As a result, E & I officers are only peace officers for the purpose of administering and enforcing the CA and the IRPA and do not have the authority under s. 495 of the CC to arrest for any of CC offences.

[7] Paragraph 12 of the Bulletin is also of relevance to the parties' arguments in the present appeal:

> 12. The exercise by E&I officers of powers in the CC which apply to all members of the public (for example those set out in s. 494 of the CC)

> cannot be endorsed by the CBSA. The use of CBSA assets in such circumstances is not authorized by the CBSA. The Treasury Board's Policy on Legal Assistance and Indemnification limits the legal assistance and indemnification available to any Crown servant, including an E&I officer, who chooses to act outside the scope of their duties or course of employment.

The Facts

[8] Considering first the physical conditions under which the training session was being held, the facts established by HSO Logan and stated at pages 9 and 10 of his report dated June 27, 2013, and filed with the Tribunal, are not contested and are consistent with the evidence presented at the hearing, namely with the testimony of Messrs. Chammartin and Poulin. The WPRA is a shooting facility located approximately five kilometres north of Winnipeg at 1201 Miller Road. This facility includes an indoor handgun range and four outdoor ranges. Three of the ranges are for handguns and one is for rifles. The west outdoor range is the only range rented and used by the CBSA for their practice sessions. The west range is accessed by a gravel road which runs off 10 metres inside the property line. There is a thick stand of trees all along the road and the road is approximately 135 metres in length. The west range itself is 100 metres in length. There is an approximately 5 metre high earthen berm surrounding the range on three sides. The fourth side of the range is a wooden building structure which consists of a solid wood wall with wooden lattice on top, which provides the entry point to the range from the parking area. Access to the range is through a single doorway located in the middle of the wooden wall. This area has a roof structure which covers the shooting stations.

[9] Activities on the range are not visible to someone outside the property. There is a row of thick vegetation all along the south and west ends of the WRPA property. The WRPA facility is a private members only club, with over 200 members. All members of the club have been subject to an RCMP background check and must have a current Possession and Acquisition Licence ("Licence") for their firearms. All membership applications to the club are reviewed by the membership chairman and must be approved by the board, after references are conducted.

[10] The WRPA provides a current membership list to the RCMP. Should any member lose or have their Licence privileges temporarily suspended, the RCMP immediately notifies the WRPA, which then suspends the member's privileges at the club pending the return of their Licence. No guests are allowed to visit the club unless the visits are pre-approved and pre-arranged. Guests' access is strictly limited to the indoor range and no guests are allowed to use the outdoor ranges unless it is during a sanctioned competitive event.

[11] The site has a number of warning signs all around the perimeter of the property that states there is no trespassing allowed and that the facility is a gun range. The sign at the main entrance states that the site is a private members only facility. When CBSA rents and occupies the west range of the WRPA facility, that area is then completely off-limits to all regular club members. Members are alerted to this fact via a posting in the main building, in the club's newsletter and via e-mail.

[12] No one involved with the operation of the site is aware of any physical confrontations or situations of individuals being belligerent at the site ever occurring. There have been no occurrences of unauthorized persons trespassing or trying to gain unauthorized access to the west range while it was being occupied and used by CBSA personnel. Other than an SUV with one occupant and a dog briefly in the parking lot on the day of the scheduled training exercise, there were no other persons on the west range.

[13] Based on the above considerations, HSO Logan concluded that a danger did not exist and informed the parties of his decision on June 20, 2013.

[14] Mr. Gartner reiterated at the hearing and in his submissions, that the main reason for refusing to work was that not having his peace officer status while being identifiable as a BSO, gave rise to the unsafe work situation. In addition, he was concerned that the training was taking place at an outdoor range that was not “law enforcement-only” and was also concerned with the presence of wildlife, domestic animals living on the property, low-flying airplanes from the nearby airfield, and the ease with which the public could access the range and view the officers dressed in uniform, with possible ill-intent towards them.

[15] Turning to what appears to be the primary source of the concern that led to the refusal, Mr. Gartner explained that he took cognizance of the Bulletin shortly before the training session. He explained that he was concerned with the implications of the Bulletin, as firearms training sessions were not part of the enforcement of program legislation, and the fact that he was not “protected” by the peace officer status that he normally enjoys when carrying out his regular duties as BSO when enforcing program legislation. Yet, he was required to be in full uniform for the session and carry with him all of his usual protective and defensive equipment. Consequently, he expressed the view that not only this situation made him highly visible as a BSO, it also caused him to be in violation of sections 91 to 95 of the *Cr. C.* (unlawful possession of prohibited weapons). In the explanations he provided at the hearing, he indicated that it was the unknown repercussions of not having peace officer status in relation to his safety that was the concern and that in his opinion, constituted a danger to him.

Issue

[16] The issue is whether the appellant was exposed to a danger as defined under the Code in the circumstances that led him to exercise his right to refuse to work on June 5, 2013.

Submissions of the parties

A) Appellant’s submissions

[17] At the hearing of the appeal, the appellant, who was representing himself, presented a combination of facts and argument explaining the reasons why he (and others) refused to carry out their assigned work activities on June 5, 2013. It is clear that the Bulletin issued by his employer shortly before that day caused Mr. Gartner to be

concerned with the implications of not having peace officer status while attending a mandatory firearm training session at the WRPA outdoor firing range.

[18] In his written submissions, which I hereby summarize but which I have reviewed and considered in their totality, the appellant submits that as the firearms training session did not fall under the scope of the *IRPA* or the *Customs Act*, he believed that he did not have peace officer status at that time, which gave rise to the unsafe work refusal. In addition to the lack of peace officer status, the fact that the training was taking place at an outdoor range that was not law enforcement-only, presented additional hazards. Mr. Gartner and his colleagues were concerned with the presence of wildlife, domestic animals that lived on the property, low-flying planes from the nearby airfield, the ease with which the public could access the range and view the officers, as well as the requirement for the employees to be identifiable as BSOs without having peace officer status.

[19] The appellant then submits that ultimately, the main concerns of the ten individuals who took part in the unsafe work refusal were the possible ramifications of the issuance of the CBSA's Bulletin, the consequences of not having peace officer status and the CBSA's position that they would not be indemnified should any type of incident take place during the training at the firing range. The removal of their peace officer status was the number one concern listed in the HSO's report. The appellant further explained that the reason for his appeal is that he does not believe that the consequences of the removal of his peace officer status were explored to the extent that they were required to be in order for HSO Logan to make a conclusive decision of 'danger' or 'no danger' in his case.

[20] From that point on, most of the appellant's written submissions relate to the legality of having in his possession in such circumstances his duty firearm, weapons and devices categorized under the *Cr. C*. as prohibited weapons or devices. Mr. Gartner points out that "in searching through the *Criminal Code of Canada*, case law, the *Public Agents Firearms Regulations*, the *Canada Border Services Agency Act*, the *Customs Act*, various CBSA policies, *IRPA* and the *Regulations Prescribing Public Officers*, it is clear that the only person who can legally possess a prohibited firearm, weapon or device is a peace officer. As the CBSA's policy restricts the peace officer status of its BSOs to its mandate and program legislation, and firearms training sessions are neither of these, every BSO being sent for their mandatory annual firearms training session is, in the appellant's view, "being forced to violate sections 91, 92, 93, 94 and 95 of the *Criminal Code of Canada*".

[21] The appellant also makes reference to the form titled "*Authorization to Transport and Store Firearms at a Place Other Than a Canada Border Services Agency Office*" (ATT) introduced by Mr. Suarez during his testimony. Mr. Suarez stated that this is an internal CBSA form. In Mr. Gartner's view, the form contains several statements that are contradictory to the CBSA's policy that restricts peace officer status to the CBSA's mandate and program legislation. The form states three times, while citing legislation each time, that the holder of the ATT form is in fact a peace officer. However, the appellant points out that the only time he has ever had to complete and carry this form is

when attending a firearms training session. He adds that he was in possession of this form, authorized by his Superintendent, when he refused to work on June 5, 2013. He submits further that Mr. Suarez did admit that the form was being revised, and in the appellant's view, this is a clear example of "how there are serious flaws in the CBSA's policies, as their policy on the restriction of a BSO's peace officer status to program legislation and the statements made in the ATT are demonstrably contradictory".

[22] The appellant submits that the authorities relied upon by the employer to state that he was, in the employer's view, lawfully in possession of prohibited weapons, namely that he was a "public officer" within the meaning of section 117.07 of the *Cr. C.,* did not withstand legal analysis. He referred to Mr. Suarez's testimony, who expressed the view that Mr. Gartner's possession of prohibited weapons for the purpose of the firearm training session met the requirements of the *Regulations Prescribing Public Officers (RPPO)*. That regulation is made pursuant to one of the heads of the definition of "public officer" enunciated in subsection 117.07(2) of the *Cr. C.*, more specifically its paragraph (g). The appellant disagrees with that proposition, and submits that his situation does not fall under either paragraphs (b) or (f) of the *RPPO,* which read as follows:

> (b) employees of police forces or other public service agencies who are responsible for the acquisition, examination, inventory, storage, maintenance, issuance or transportation of firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition or explosive substances;
>
> (f) immigration officers;

[23] The appellant cites the Federal Court decision in *Laroche* v. *Canada (Attorney General)*, 2011 FC 1454, which in his view lends itself best to his unsafe work refusal. In Mr. Gartner's view, that decision highlights the contradictions in CBSA's policies regarding BSO's peace officer status. In that case, CBSA successfully argued that BSOs do not have peace officer status while they are assisting the local police in searching a location, outside the scope of administering program legislation, and as a result were not authorized to have with them their defensive equipment. The fact that BSO Laroche was told he could not carry his defensive equipment was what led to his unsafe work refusal. For the appellant, it is clear that the CBSA's policy on restricting peace officer status to its mandate and program legislation is at odds with its policy that all BSOs must annually attend a firearms training session and bring with them all their defensive equipment at the session. BSOs do not have peace officer status during a firearms training session, therefore, in Mr. Gartner's view, it is against the law, based on the CBSA's own legal opinion, for them to carry their defensive equipment. In Mr. Gartner's view, the CBSA was either correct in the case of *Laroche* or in the present case. It cannot be correct in both, as the CBSA's legal positions in these two cases are at odds with one another.

[24] Finally, the appellant sums up his argument as follows:

> On June 5, 2013, my employer sent my colleagues and I into a situation where had I not refused to work, we would have all been breaking the law. The only way that I could prevent that from happening was to submit an unsafe work refusal, as the other options available to me at that time

> would have led to me being disciplined by my employer. The training session was mandatory, as was the requirement for me to carry my prohibited defensive equipment. Although the definition of “danger” in the *Canada Labour Code* does not make specific reference to an employer requesting an employee to break the law, I would argue that such a request is beyond danger. By “beyond” I do not mean “outside of the definition of”, but rather that such a request is worse than putting an employee in danger. In the case of my colleagues and myself, it put us in a situation that could have led to arrest, charges, incarceration, and loss of employment, family and friends.

[25] The appellant concludes by requesting that HSO Logan’s decision of “no danger” be rescinded and that a “danger” direction be issued to the CBSA.

B) Respondent’s submissions

[26] Counsel for the respondent first points out that the main reason invoked by Mr. Gartner for his work refusal on June 5, 2013, was in fact that he had just learned that he did not have peace officer status while participating in a firearms training session at a public access firing range. According to him, this activity posed a risk or threat to him because he believes that since he did not have peace officer status during this activity, he could have been arrested or imprisoned for possessing prohibited weapons. The respondent submits that the threat or risk identified by Mr. Gartner does not constitute a danger within the definition of the Code, and that the risk for the appellant of being arrested and incarcerated for the possession of prohibited weapons does not withstand legal scrutiny.

[27] The respondent referred to the definition of danger set out in section 122 of the Code, and to the jurisprudence which has interpreted that concept, in particular regarding the notion that there must be a “reasonable possibility”, based on the facts presented in evidence, that the hazard or condition will present itself and is capable of causing injury or illness, and is not mere conjecture: *Canada Post Corporation* v. *Pollard,* 2007 FC 1362 (affirmed by 2008 FCA 305); *David Laroche* v. *Canada Border Services Agency,* 2010 OHSTC 12; *Verville* v. *Canada (Service correctionnel)*, 2004 FC 767; *Welbourne* v. *Canadian Pacific Railway Co.,* 2001 CLCAOD No. 9.

[28] The respondent further submits that the threat to the appellant’s safety allegedly caused by the presence of wildlife, dogs and low-flying aircrafts, and the fact that the appellant was identifiable as a law enforcement officer by his uniform, were merely hypothetical or speculative threats which could not reasonably be expected to cause injury or illness, and as such could not constitute a danger within the meaning of the Code.

[29] Regarding the appellant’s main argument in this appeal to the effect that being required to carry with him his defensive equipment for the purpose of a firearm training session without having peace officer status, renders him in violation of sections 91 to 95 of the *Cr. C.*, counsel for the respondent argues that paragraphs 117.07(2)(a) (*peace officer*) and (g) (*prescribed by regulation*) exempt Mr. Gartner from the application of those provisions in the circumstances. The respondent submits that firstly, although

Mr. Gartner may not have peace officer status because he is not enforcing program legislation, he is a public officer and a peace officer for the purpose of paragraphs 117.07(1)(a) and (2)(a). The exemption applies if the public officer simply possesses them for the purpose of their employment - it is not limited to possession during or "in the course of" the officer's duties. The addition of the words "for the purpose of" broadens the scope of the exemption to other forms of possession which are strongly linked to the actual performance of duties or employment without that possession occurring in the very "course of the duties or employment". As BSOs must possess the firearm and defensive equipment for the purpose of their employment as peace officers, they fall within the exemption under paragraph 117.07 (2)(a). The maintenance of his firearm skills is a condition of his employment, that the firearms training session at the time was mandatory, and that it was mandatory for him to carry all of this defensive equipment while on duty.

[30] Counsel also refers to *The Policy on Use of Force and Defensive Equipment*, which specifies that employees are accountable for the proper use of defensive equipment "in the course of or for the purpose of their duties or employment" and for "maintaining their skills and certifications with respect to defensive equipment" (paragraphs 6.9(a) and (c)). Section 2.0 of the *Standard Operating Procedures on Agency Firearms and Defensive Equipment* also lists the requirements for firearms training and certification, and supports the connection between firearms training, practice, and re-certification, and employment as a BSO.

[31] Counsel for the respondent also submits that BSOs fall under the "immigration officer" exception in the *RPPO*, at paragraph 1(1)(f). They may not be called "immigration officers" in practice or in program legislation (as Mr. Gartner points out, the term "immigration officer" is not currently found in the *IRPA*), BSOs are considered immigration officers for the purposes of these Regulations because of the duties they perform. BSOs are administering and enforcing the *IRPA*. Controlling the access of foreign travellers to Canada is inherently an immigration function.

[32] The respondent further submits that in any event, these "risks" do not constitute danger within the definition of the Code. The Code speaks of existing or potential hazards or conditions or any current or future activity that could reasonably be expected to cause injury or illness. The threat of arrest and imprisonment do not fall within this definition. They cannot reasonably be expected to cause injury or illness. They are nowhere near related to the health and safety of Mr. Gartner, the protection of which are the aim of a work refusal and the entire Occupational Health and Safety regime. As a result, the respondent submits that a hypothetical fear of being arrested or of not being indemnified is not an objectively reasonable cause to believe that a danger exists, as arrest and imprisonment cannot be considered hazards or conditions which could reasonably be expected to cause illness or injury (*Canada Post* v. *Jolly*, 16 CLRBR 300; *Boivin* v. *Canada Customs and Revenue Agency*, 2003 PSSRB 94; *Ferraro* (January 24, 2000), Decision No. 50 (CIRB) at para 16*; Brulé* v. *Canadian National Railway Company* (February 18,1999), Decision No. 2 (CIRB).

[33] The respondent submits that Mr. Gartner's claim is in essence a policy grievance purporting to challenge the perceived gap in the legislation and CBSA policy. There were no different conditions on the range that day than from previous firearms practice sessions held at the same range. All that was different was the issuance of the Bulletin which clarified that CBSA Intelligence and Enforcement officers do not have peace officer status on a firing range if they are not administering either the *IRPA* or the *Customs Act*, and as such cannot use civilian arrest authorities in that situation. In her view, the right to refuse is not meant to address issues of that nature (*Stone* v. *Correctional Service of Canada*, Appeals Officer Decision No. 02-019 (December 6, 2002).

[34] In response to Mr. Gartner's assertion that the perceived danger also related to his inability to arrest persons who may get into a fight, counsel submits that is far too much of a leap in logic to reasonably expect that Mr. Gartner's inability to arrest someone posed a risk or threat of physical injury to him - especially since Mr. Gartner agrees that there was no physical threat posed to him that day by another individual. But even if Mr. Gartner had felt physically threatened, he would have been entitled to defend himself, regardless of whether or not he had peace officer status. This defence under section 34 of the *Cr. C.* is available to anyone and the appellant's training on the *Incident Management Intervention Model* (de-escalation and the use of appropriate force) would have helped him to deal with such a situation if it had occurred. The respondent's witnesses explained how Mr. Gartner could still have acted in self-defence if he felt the need to do so if a dangerous situation presented itself at the range.

[35] In addition, the respondent submits that there was no reasonable expectation that a situation would have presented itself to Mr. Gartner at the range that day that would have required him to either arrest someone or defend himself from a physical threat posed by another individual. The evidence establishes clearly that there has never been a threat or assault to a CBSA officer by a member of the public while using the outdoor range at the WRPA and that the range has been used since 2007 at a rate of approximately 40 CBSA firearms sessions, or elsewhere in Canada in other public or private ranges.

[36] The respondent argues that the fear of the appellant that he may not be indemnified if an incident occurred during the training does not amount to a danger. Furthermore, given the wording of the *Treasury Board's Policy on Legal Assistance and Indemnification*, Mr. Gartner could still be eligible for indemnification if he had to act in self-defence, as long as he met the three criteria listed in that policy. Nigel Suarez pointed out in his testimony that this policy applies to all public servants, and there is no linkage with peace officer status. The Bulletin was clarifying that a CBSA Enforcement and Intelligence Officer may not be indemnified if he or she tried to arrest someone using civilian arrest authorities while participating in a firearms training session.

[37] The respondent further submits that there is simply no evidence that Mr. Gartner was targeted on the day in question because he was wearing his CBSA uniform and that claim is purely speculative, in light of the evidence presented regarding the particular features of the range, its limited access to WRPA members and the conditions under which the session was held on June 5, 2013. There could have been no reasonable

expectation that Mr. Gartner would have been targeted by someone with ill-intent that day because he was wearing his uniform. The odds are extremely slim that someone with ill-intent would have known that the CBSA officers were on the range that day and sought them out, or accidentally stumbled upon them and then decided to target them. As such, the risk identified by Mr. Gartner here is purely hypothetical, and therefore cannot be the basis for a finding of danger. Such a fear based on the unpredictability of human behaviour is inconsistent with the concept of danger as defined in the Code (*Verville* v. *Correctional Service of Canada, Kent Institution*, Appeals Officer Decision No. 02-013 (June 28, 2002); *Unger* v. *Canada (Correctional Service),* 2011 OHSTC 8; *Correctional Service of Canada, Drumheller Institution* v. *De Wolfe*, Appeals Officer Decision No. 02-005. Even if there was a risk of being identified and targeted, this is not unique to the fact of being present on a public-access firearm range - the risk presents itself anytime a BSO is in uniform. The ability to arrest someone would not reduce the risk of being targeted by someone with ill-intent. As officers must wear their uniforms at all times while on duty, this represents a normal condition of employment, which cannot be considered a danger *Canada* (*Attorney General)* v. *Fletcher* [2003] 2 FCR 475 (FCA).

[38] The respondent further argues that the potential threats relating to the presence of wildlife, dogs or low-flying aircrafts are not properly part of the scope of the appeal, as they were not raised before HSO Logan. Subsection 129(7) of the Code provides for an appeal procedure and the appellant is not permitted to raise new concerns that were not raised before the health and safety officer. The mechanism provided by the Code calls for a specific fact-finding investigation to deal with a specific situation (*Fletcher* v. *Canada (Treasury Board)* 2002 FCA 424). In counsel’s submissions, it is well established before other administrative tribunals that a *de novo* hearing doesn't allow the Tribunal to adjudicate issues that were not already part of the record (*James Francis Burchill* v. *A.G. Canada,* [1981] 1 F.C. 109 (C.A.); *Shneidman* v. *Canada* (C.R.A.) 2007 FCA 192.

[39] In the alternative, the respondent submits that there is no evidence that Mr. Gartner even saw wildlife on the day of the refusal, or the hypothetical presence of wildlife would have posed a danger to Mr. Gartner. Likewise, risks posed by the presence of dogs are not supported by the evidence, are hypothetical in nature and could not be reasonably expected to cause illness or injury. As to the presence of low-flying aircraft, there was no evidence that there were low-flying aircraft present on the day of the work refusal and Mr. Gartner did not identify how the presence of low-flying aircraft posed a risk or threat to him.

[40] In conclusion, the respondent submits that the circumstances of this case clearly indicate that no danger existed within the meaning of the Code on the day of the work refusal. The alleged “dangers” referenced by Mr. Gartner are either purely speculative or hypothetical, or simply do not fall within the definition of danger at all. Accordingly, the appeal should be dismissed.

Analysis

[41] My duty as an appeals officer is to determine whether the decision by HSO Logan, further to his investigation of Mr. Gartner’s work refusal, that the appellant

was not exposed to a danger on June 5, 2013, is well-founded. As directed by subsection 146.1(1) of the Code, I must look into the circumstances of the decision and the reasons for it and I am authorized to vary, rescind or confirm the decision.

[42] The present appeal arises out of a work refusal made pursuant to subsection 128(1) of the Code, which reads as follows:

> **128.** (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.

[43] The word "danger" is defined in subsection 122(1) of the Code, as follows:

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

[44] In the present case, the danger that is alleged to exist by the appellant relates, among other reasons, to the risks of certain events occurring or potential threats to his safety as a result of possible human behaviour. In *Canada Post Corporation* v. *Pollard*, 2007 FC 1362, 321 FTR 284, the Federal Court summarized the state of the law concerning the criteria for assessing the concept of danger under the Code in such a context:

> **[66]** As a matter of law, in order to find that an existing or potential hazard constitutes a "danger" within the meaning of Part II of the Code, the facts must establish the following:
>
> (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;
> (2) an employee will be exposed to the hazard, condition, or activity when it presents itself;
> (3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
> (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.
>
> **[67]** The final element requires consideration of the circumstances under which the hazard, condition, or activity could be expected to cause injury or illness. There must be a reasonable possibility that such circumstances will occur in the future. See: *Verville v. Canada (Correctional Services)* (2004), 253 F.T.R. 294 at paragraphs 33-36.

> **[68]** In *Martin* C.A., cited above, the Federal Court of Appeal provided additional guidance on the proper approach to determine whether a potential hazard or future activity could be expected to cause injury or illness. At paragraph 37 of its reasons, the Court observed that a finding of "danger" cannot be grounded in speculation or hypothesis. The task of an appeals officer, in the Court's view, was to weigh the evidence and determine whether it was more likely than not that the circumstances expected to give rise to the injury would take place in the future.

[45] In *Laroche,* the Federal Court reiterates the analysis that must be conducted in applying the definition of "danger", at paragraph 32 of the judgment:

> [32] The Federal Court of Appeal, which upheld this decision in *Pollard*, cited above, reiterated the criteria for applying the definition of "danger" as follows:
>
> > **[16]** The Appeals Officer**,** at paragraphs 71 to 78, reviewed the case law on the concept of "danger". Relying more particularly on the decision of this Court in *Martin v. Canada (Attorney General)*, 2005 FCA 156 (CanLII), 2005 FCA 156 and that of Madam Justice Gauthier in *Verville v. Canada (Correctional Service)*, 2004 FC 767, he stated that the hazard or condition can be existing or potential and the activity, current or future; that in this case the hazards were potential in nature; that for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.
> >
> > **[17]** This statement of the law is beyond reproach or is, at the least, reasonable in the *Dunsmuir* sense.

[46] In determining whether a danger was present in the circumstances placed in evidence before me, I must carry out the review in a *de novo* manner, meaning that I am not bound by the findings of fact or conclusions of the HSO and I may consider all relevant evidence relating to the circumstances that prevailed at the time of the decision, including evidence which may or may not have been considered by the HSO (*DP World (Canada) Inc.* v. *International Longshore and Warehouse Union, Local 500,* 2013 OHSTC 3). I will elaborate on that point later in these reasons.

[47] I also point out that my task is not to make a determination as to whether the appellant had reasonable cause to believe that a condition or activity presented a danger. The inquiry mandated under section 146.1 of the Code is for the purpose of making a determination, on an objective standard, as to whether there was in fact a danger at the time of the refusal or the investigation.

[48] Having stated the legal parameters that apply to the issues raised in the present appeal, I will deal with each of the grounds raised by the appellant in support of his contention that he was exposed to a danger on June 5, 2013. I will first address the appellant's submission regarding the legal implications of the Bulletin. The rationale behind the "legal policy" statement in the Bulletin appears fairly simple. When BSOs are not enforcing program legislation, they do not have the peace officer status that such legislation confers upon them in order to support their enforcement responsibilities. Consequently, when they are not enforcing program legislation, such as during a firearms practice session, they have *a priori* no reason to arrest, search or detain anyone and their peace officer status has lost its original purpose and foundation.

[49] A significant portion of the appellant's submissions at the hearing and as set out in his written argument, turned on his belief that he was facing a danger as a result of being in contravention of sections 91 to 95 of the *Cr. C.* (unlawful possession of prohibited weapons) because he was required by the employer to be in possession of his defensive equipment for the training session, while not having peace officer status, as stated in the Bulletin. The employer's representatives explained in their testimony that the reason for such a requirement is that the practice should mirror the conditions as when the officer is on duty, i.e. with the same clothing and garments.

[50] I am somewhat intrigued by the fact that this point, which now appears so central to the appellant's case, does not seem to have been raised at the time of the refusal, as no reference is made to it in HSO Logan's report. In any event, having considered the parties' submissions, I am of the view that this argument must fail, for the following reasons. Firstly, I am persuaded by the respondent's argument that Mr. Gartner was an "exempted person" within the meaning of section 117.07 of the *Cr. C.*, by reason of being a "public officer" as defined in that section, with the result that sections 91 to 95 (unlawful possession of prohibited weapons) did not apply to him in the circumstances of the refusal. This result is achieved in my opinion by the operation of paragraphs 117.07(1)(a), 117.07(2)(a) and (g) and paragraph 1(1)(f) of the *RPPO*. Those provisions read as follows:

> **117.07** (1) Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the *Firearms Act* by reason only that the public officer
>
> (*a*) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment;
>
> […]
>
> (2) In this section, "public officer" means
>
> (*a*) a peace officer;
>
> […]
>
> (*g*) a person, or member of a class of persons, employed in the federal public administration or by the government of a province or municipality who is prescribed to be a public officer;

> […]
>
> **1.**(1) A member of any of the following class of persons, if employed in the public service of Canada or by the government of a province or municipality, is a public officer for the purposes of paragraph 117.07 (2)(g) of the *Criminal Code*:
>
> […]
>
> (f) immigration officers

[51] I agree with the appellant that the application of paragraph 117.07(2)(a), which refers to a peace officer, raises a question of interpretation. As the appellant did not have, in CBSA's opinion as set out in the Bulletin, peace officer status for the purpose of section 495 of the *Cr. C.*, how can he be considered a peace officer for the purpose of the definition of "public officer" in paragraph 117.07(2)(a)? However, I accept the argument that the wording and purpose of subsection 117.07(1), and the closing words of its paragraph (a) in particular, suggest a broader interpretation of the words "peace officer" in the definition of "public officer", to include activities carried out "in the course or <u>for the purpose of</u> the public officer's <u>duties or</u> employment" [Underlining added]. This interpretation is not inconsistent with the more narrow approach taken by CBSA in limiting "peace officer" status for the purpose of exercising the intrusive and significant powers of arrest, search, seizure and detention set out in section 495 of the *Cr. C.*, to activities linked directly to the enforcement of program legislation. The object of the exemption provisions relating the possession of prohibited weapons is materially different in my view. Consequently, firearms practice and training sessions, which are mandated by CBSA, may not be directly related to the enforcement of program legislation (peace officer referred to in section 495 *Cr. C.*), but they are activities carried out for the purpose of the BSO's duties or employment, and as a result are captured by paragraph 117.07(1)(a). Mr. Gartner was in possession of his defensive equipment for a purpose directly related to his employment as BSO, which is the maintenance of his firearm skills, described in the evidence as a condition of his employment.

[52] I am also of the opinion that Mr. Gartner was an exempted person in light of his responsibilities as "immigration officer", which is listed at paragraph (f) of the *RPPO* prescribing public officers pursuant to paragraph 117.07(2)(g). The testimony of Mr. Suarez is persuasive in that respect: BSO are called upon to enforce the *IRPA* as part of their duties. It may be that the nomenclature "immigration officer" has been repealed from that *Act* without the *RPPO* having been revised accordingly. I accept that those words are intended to refer generically to persons who administer and enforce the *IRPA*, which BSOs are. Hence, the reasoning applied in respect of paragraphs 117.07(1)(a) and (2)(a) also applies to (f), such that the possession of the defensive equipment for a mandatory firearms training session, is "for the purpose of the public officer's duties or employment" as an immigration officer.

[53] I have also considered the fact that Mr. Gartner was in possession of an "*Authorization to Transport and Store Firearms at a Place Other Than a Canada Border Services Agency Office*", which makes it clear that Mr. Gartner is duly authorized by his superiors to have in his possession prohibited weapons and devices used in relation to his

employment as a BSO. I would think that such authorization by his superiors, which is consistent with the requirement that Mr. Gartner be in possession of his defensive equipment for the firearms training session, would constitute a complete defence in the unlikely event that he be charged with an offence under sections 91 to 95 of the *Cr. C.*.

[54] My reading of section 117.07 also addresses Mr. Gartner's reliance on the *Laroche* decision of the Federal Court in his submissions, which he presented as follows:

> "Based on the legislation and case law provided, it is clear that the CBSA's policy on restricting peace officer status to its mandate and program legislation is at odds with its policy that all BSOs must annually attend a firearms training session. BSOs do not have peace officer status during a firearms training session, therefore it is against the law, based on the CBSA's own legal opinion, for them to carry their defensive equipment. In *Laroche v. Canada*, the CBSA successfully argued this. The CBSA was either correct in the case of Laroche or in my case. It cannot be correct in both, as the CBSA's two positions in these two cases are at odds with one another."

[55] Mr. Gartner argues that the CBSA's position in the present appeal is inconsistent with the position it took before the Court in *Laroche*. In that case, the BSO was called upon to assist local police authorities with a search operation conducted outside of CBSA's mandate. Applying the same rationale as in the present case, the employer concluded that as Mr. Laroche was not enforcing program legislation, he did not have peace officer status and thus could not use the powers of section 495 of the *Cr. C.*. As a result, he was forbidden to wear his defensive equipment during the operations, a situation which Mr. Laroche considered to present a danger to him. The claim of danger was eventually dismissed in *David Laroche* v. *Canada Border Services Agency*, 2012 OHSTC 11 (confirmed by *Laroche* v. *Canada (Attorney General)* 2013 FC 797).

[56] I fail to see how the *Laroche* judgement (Bédard, J.) assists the appellant with his argument. There is no indication in that decision that the BSO involved was not allowed to wear his defensive equipment to avoid a prosecution under section 91 to 95 of the *Cr. C.*. On the contrary, the Court states as follows at paragraph 4 of its decision:

> [4] Until March 2009, search experts wore their protective equipment and defensive equipment during all search operations, whether they occurred during operations under the CBSA mandate or those under the jurisdiction of police forces where the officers were assisting police officers. In March 2009, the CBSA amended the Policy to forbid their officers from wearing their defence equipment during searches under the jurisdiction of police forces. This change was introduced after the CBSA received a legal opinion stating that when officers participate in operations falling outside of the CBSA's mandate and the legislation it enforces, they are not acting in their capacity as peace officers and thus are not protected under section 25 of the *Criminal Code* if an incident were to occur.

[57] In the second Federal Court decision rendered in the matter, the Court (Roy, J.) also made reference to this policy, at paragraph 29 of the judgment:

> [29] In situations where they are only providing assistance, public servants are not peace officers. The Agency therefore required that public servants who agree to provide police forces with assistance not carry their defensive tools in such situations since, in the Agency's opinion, unlike peace officers in carrying out their duties, they are not protected against civil or criminal liability. Moreover, participation in a support operation is voluntary when a police force is in charge of it. I acknowledge that this particular view of the status of peace officers is not universally accepted, since the union representing the applicant seems to have a different interpretation. Ultimately, what matters here is that the CBSA decided that, during searches conducted for purposes other than the statutes it is tasked to enforce, its officers may not carry certain equipment that they would be able to carry if the operation was the Agency's responsibility.

[Underlining added]

[58] It seems therefore that CBSA's decision to prohibit BSOs from wearing their defensive equipment in those situations is an operational policy decision in relation to its civil or criminal liability and is unrelated to the issue of unlawful possession of prohibited weapons or devices. I point out that BSOs in the *Laroche* situation were prevented from wearing their defensive equipment while they were taking part in a police operation, which led them to argue that this placed them in a dangerous situation, an argument that takes us somewhat closer to the kinds of situations that the protections set out in the Code are designed to address. Ironically, the basis of the appellant's submissions in the present proceedings is that he is required to wear his defensive equipment during a firearms training session, which he considers to be the source of the alleged danger when combined with the loss of his peace officer status.

[59] This takes me to the fundamental question that I must answer in this case. The real issue is not whether Mr. Gartner might be in violation of the *Cr. C*. when in possession of his defensive equipment at a training session; or whether being "deprived" of his peace officer status in those circumstances may, if an incident occurs, incur his civil or criminal liability, without indemnification; or whether CBSA's legal or policy positions outlined above regarding peace officer status are correct or appropriate. Although I have offered my views on these questions, they are only peripheral to the central issue in the present proceedings, which is whether the combination of these factors and considerations, regardless of who is right or wrong, amount to a danger under the Code.

[60] In my view, there is simply no relationship between Mr. Gartner's submissions stated above and the presence, on June 5, 2013, of an existing or potential hazard or condition that can reasonably be expected to have caused him injury or illness, as "danger" is defined in the Code. The fear of being prosecuted for unlawful possession of prohibited weapons in a situation where he is required, therefore clearly authorized, by the employer to wear his defensive equipment, is not in my view a danger under the Code. Likewise, I see no link between not having a "peace officer" status during the firearm exercise and a danger under the Code. Peace officer status is not a protection against danger; it is a legal status which attributes certain exceptional and coercive

powers to certain individuals in light of their law enforcement responsibilities, and which enables them to lawfully take certain actions that ordinary citizens cannot take.

[61] Having considered all of the appellant's submissions, I conclude that the essence of his argument rests on a disagreement with CBSA's policy regarding the loss by BSOs of their peace officer status in certain circumstances. Mr. Gartner went so far as agreeing with counsel for the respondent that he was not actually faced with a danger *per se* on the day of the refusal. There were no different conditions on the range that day from previous firearms practice sessions held at that location. All that was different was the issuance of the Bulletin, of which Mr. Gartner did not completely measure the implications, and with which he obviously disagrees. The appeal process under the Code is not the appropriate forum to debate matters of that nature (*Stone*).

[62] Turning back to the original grounds for the refusal, Mr. Gartner explained how the fact that he did not have his peace officer status placed him in an unsafe situation. At the hearing, Mr. Gartner spoke of how if he saw two people getting into a fight on the street, he would not be able to arrest them, and this was a danger to him. Also, he indicated that as the WRPA is a publicly accessible firing range, he was vulnerable to threats or aggressions by individuals who would have noticed his uniform and could have access to the premises. Being deprived of his peace officer status caused him to be unsure of his rights and obligations and legal protection if such a situation had arisen.

[63] However, Mr. Gartner agreed that there was no physical threat posed to him on that day. These are all hypothetical scenarios. I agree with the respondent that nothing would have prevented Mr. Gartner from acting in self-defence if he felt the need to do so if a dangerous situation had presented itself at the range. The right to self-defence under section 34 of the *Cr. C.* is available to anyone, regardless of whether one enjoys peace officer status or not. Mr. Suarez made it clear in his testimony that the Bulletin was simply clarifying that the CBSA would not endorse one of its officers using a civilian arrest authority under the *Criminal Code* while at firearms practice on a public access range, and would not endorse the use of CBSA assets to further that purpose. He testified that the Bulletin does not address the right to self-defence at all, a statement with which I agree. He testified that if necessary, a CBSA officer would be able to defend himself or herself by virtue of section 34 of the *Cr. C.*, assuming that the use of force was reasonable and justifiable in the circumstances. He also testified that there would be no issue with a CBSA officer using his or her CBSA issued firearm and/or defensive equipment in self-defence if such use was reasonable and justified in the circumstances. I am in agreement that this is an accurate statement of the law. The evidence presented by Mr. Chammartin also established that Mr. Gartner has been trained in incident management response through the "Incident Management Intervention Model", in how to de-escalate situations and how to respond with appropriate force if necessary. This knowledge acquired through training as to how to best react in these types of situations assists Mr. Gartner regardless of whether he has peace officer status or not.

[64] In addition, considering all the circumstances that prevailed on that day at the WRPA, the likelihood of such an event occurring is minimal and at best highly speculative. Safety precautions are in place during a training session, which includes the

presence of a range officer to ensure that no one else enters the range area while officers are shooting. There was no evidence presented that CBSA officers have been targeted because of their uniform in similar situations. There has never been a threat or assault to a CBSA officer by a member of the public while using the outdoor range at the WRPA, and there have been hundreds of those sessions since 2007. The president of the WRPA, Mr. Poulin, testified that there have been no incidents of trespassing or violence between individuals at the WRPA. When the CBSA rents the outdoor range for firearms sessions, it has exclusive use of the range, and members of the WRPA are notified by email of the date and times when the range is being rented out and therefore off limits for them to use. Ms. Dawn Lambert, a CBSA Senior OSH Advisor, testified that there have been no threats or assaults to CBSA officers by members of the public at any firing range anywhere in Canada. She testified that the CBSA has conducted 3,916 firearms training exercises on firing ranges and that in 2013, the CBSA was using 78 ranges in total across Canada, of which 66 were either public or private ranges (as opposed to law enforcement-only ranges).

[65] Other factors presented in evidence also support a finding that any risk of harm to the BSOs present on the range that day is at best remote. The location of the range itself is remote. The visibility of the particular range being used by the BSOs that day is very low as visibility of the range from the road is minimal during the months when there is foliage on the trees such as in early June, and it is not visible from the other ranges or buildings at the WRPA. Visibility of people using this particular range is further limited by the wooden canopy structure covering the shooting area. The only way that someone would know that CBSA officers were using that particular range that day would be to drive down the road to that particular range and look directly inside the shooting area.

[66] Furthermore, access to the range is also limited to members of the range, who must hold valid Licences and as such have had background checks conducted by the RCMP. The WRPA also conducts reference checks of potential members. Membership at the WRPA is limited to 225 members and there is a strict guest policy. There are numerous signs indicating “no trespassing” and “members only” at both the entrance of the range and around the perimeter of the property.

[67] I note that the Work Refusal Registration Form illustrates the hazard by mentioning that a black SUV driven by an unidentified person who had apparently no reason to be there, was seen approaching the range at the start of the session. Mr. Gartner did not elaborate on this fact at the hearing and to find that the mere presence of that unidentified person placed the employees in a situation of danger would be entirely speculative and not founded on any material facts.

[68] All of these facts relating to the situation that prevailed on the day of the refusal lead me to conclude that the risk of BSOs being physically threatened or assaulted is remote, unlikely to materialize and purely speculative. Indeed, I wonder why someone with the intention of assaulting or otherwise threatening a BSO would choose to do so at a firing range where there are eight armed law enforcement officers and three instructors, who are in the process of shooting their firearms. The following excerpt from the *Unger* decision, at paragraphs 50 and 52, aptly captures the situation at hand:

> [50] Whether there is a reasonable possibility that the above circumstances will occur, and thus a reasonable expectation of injury, cannot be based on hypothesis or conjecture. The appellant has provided many scenarios that, if they were to occur in a particular order or in a chain of unfortunate events, could potentially result in injury. Without a doubt, the circumstances in which the situation could cause injury are highly speculative and are based on the piling of hypothetical situations upon one another.
>
> […]
>
> [52] Certainly there is some possibility that the unarmed escort of Inmate A could cause injury. The situation in which Mr. Unger works involves human behaviour, a degree of which will always be unpredictable. However, this unpredictability may amount to a mere possibility that the circumstances that could be expected to cause injury may arise, but it certainly does not amount to a reasonable possibility. There is simply no reasonable possibility that the above circumstances will occur, thus no reasonable expectation that the potential hazard in this case will cause injury and as a consequence, no danger.

[Underlining added]

[69] Admittedly, the concerns expressed by Mr. Gartner would be addressed if the employer was using a law enforcement-only shooting range. The choice of a publicly accessible private range was explained in evidence by the small number of law enforcement-only ranges available, the possible scheduling conflicts and the risks of being bumped when they are used. It was not disputed that the WRPA complied with the health and safety standards set out in the *CBSA Standards on Firing Ranges*, introduced in evidence. Applying the proper legal reasoning to the facts submitted in evidence, I am not persuaded by the argument that the use of a private firing range such as the WRPA, as opposed to a law enforcement-only range such as the RCMP's or the Winnipeg City Police, presented a danger to the appellant. I am of the view that the precautionary measures in place at the range described at length in these reasons, adequately address any potential risk of injury to BSOs as a result of unpredictable and unlawful conduct of other persons while the shooting practice is taking place. To the extent that preference should be given to law enforcement-only ranges is an issue between the parties, that debate falls outside of the occupational health and safety framework set out in the Code.

[70] Turning to the question of indemnification, I am also of the view that the appellant's argument must fail. Mr. Gartner contends that the possibility that he may not be indemnified should he attempt to defend himself without having peace officer status (Refusal to Work Registration Form) while at the firearms practice. I simply cannot see how this situation may constitute a risk, let alone a danger within the meaning of the Code. Firstly, the Bulletin states that the exercise by Enforcement and Intelligence officer of powers in the *Cr. C.* which apply to all members of the public (for example those set out in s. 494 (arrest without a warrant for a *Cr. C.* offence)" will not be endorsed by the CBSA. I find it clear that, given the context of the Bulletin, this statement would not apply to situations where Mr. Gartner would have to exercise self-defence against someone about to assault him. I agree with the respondent that if such a situation was to occur, Mr. Gartner could still be eligible for indemnification under the *Treasury Board's*

Policy on Legal Assistance and Indemnification, so long as he met the three criteria listed in that Policy. Whether Mr. Gartner has peace officer status or not at the time such a situation was to occur, is immaterial.

[71] In the final analysis, whether Mr. Gartner would be covered by that Policy or not has no bearing on whether this constitutes a hazard that could reasonably be expected to cause injury or illness, as danger is defined in the Code. While Mr. Gartner may be concerned with the implications of not having peace officer status on his entitlement to receive legal assistance from his employer, this debate properly falls in my view within the realm of labour relations, and not that of occupational health and safety under the Code.

[72] At the hearing, Mr. Gartner also identified three additional threats that, in his view, put his personal safety in jeopardy on the day of the refusal: the presence of wildlife, of dogs on the range and of low-flying aircraft while the shooting was going on. The respondent objected to these threats being considered in appeal, as they were not raised before HSO Logan at the time of the refusal. In counsel for the respondent's view, those alleged threats constitute new grounds and should not be allowed to fall in the scope of the present appeal.

[73] As the respondent acknowledges, the appeals officer conducting an inquiry under section 146.1 hears the matter *de novo* (*Fletcher; DP World (Canada) Inc.)*. I also agree with the respondent that the proceeding under section 146.1 is in the nature of an appeal of a decision or direction already issued by a health and safety officer, and in light of the wording of that section, its scope ought to be confined to the circumstances that led to the impugned decision or direction. This is a proper characteristic of an appeal process.

[74] However, hearing a matter *de novo* has been said to include the consideration of <u>new facts</u> or argument which may not have been considered by the HSO or presented to him or her, for whatever reason, to the extent that the fundamental nature of the issue is not altered. In the present case, the issue is whether a condition existed in a place (the WRPA firing range) on June 5, 2013, that constitutes a danger to the employee.

[75] I am of the view that the additional threats raised by Mr. Gartner at the hearing are directly connected to the central issue of the appeal, which is to determine whether a dangerous condition existed at the time of the refusal. As a result, I am prepared to consider these factors in my analysis of that question, although the fact that they were only raised at the appeal stage will no doubt influence the weight and credibility that those grounds ought to be given.

[76] I have considered the appellant's explanations provided at the hearing on those grounds, and the respondent's submissions and I find the alleged hazards to be without foundation and not to constitute a danger, for the reasons that follow.

[77] Firstly, Mr. Gartner stated that the presence of wildlife (deer or a flock of birds) at the WRPA posed a risk. However, he did not explain how this caused a risk to him or what kind of risk this presented. He could not recall if he actually saw wildlife on the day

of his refusal. Even if wildlife had been present, there is no evidence that they would have posed a danger to Mr. Gartner or his colleagues, armed as he was during a firearm shooting session. As Mr. Poulin testified, there have never been any recorded incidents involving wildlife at the WRPA. Ms. Lambert testified that in the research she conducted into injuries which occurred to CBSA officers while using public-access ranges, none were related to wildlife. Consequently, the alleged threat caused by the presence of wildlife is purely speculative and hypothetical, and in my opinion cannot be the basis for a finding of danger.

[78] Secondly, Mr. Gartner testified that the BSOs frequently saw dogs at the WRPA, and that one time, he could not get out of his car because there were two dogs present. He said the dogs could be running up behind the BSOs or jumping on them. However, Mr. Gartner was not sure that he saw dogs on that day, let alone that any dog present may have displayed a hostile conduct. Mr. Poulin testified that to his knowledge, there have never been any incidents between the dogs on the property and patrons of the range. Mr. Chammartin, who testified having attended countless firearms training sessions at the WRPA, testified that to his knowledge, the dogs have never interfered with any training activities and he has never had a course candidate complain about them. He testified that in his experience, they have always been friendly. I am unable to conclude, on the basis of such evidence, that the possible presence of dogs on the property could, in the circumstances, be the source of a danger within the meaning of the Code. The fear expressed by Mr. Gartner is purely hypothetical and is not supported by the evidence.

[79] Finally, Mr. Gartner did not identify how the presence of low-flying aircraft posed a risk or threat to him. There was also no evidence that there were low-flying aircraft present on the day of the work. Without more evidence or explanation, I am left to wonder how the possible presence of low-flying aircrafts may constitute a hazard that could reasonably be expected to cause injury or illness to Mr. Gartner.

[80] In conclusion, I find that the circumstances prevailing on June 5, 2013, and the conditions under which the appellant was required to attend a firearms training session did not present a danger within the meaning of the Code. As a result, HSO Logan’s decision that a danger does not exist is well-founded and the appeal must be dismissed.

Decision

[81] For all the reasons above, the decision that a danger does not exist rendered by HSO Logan on June 20, 2013, is confirmed.

Pierre Hamel
Appeals Officer