Occupational Health and Safety Tribunal Canada

Date: 2015-10-22
Case No.: 2012-39

Between:

Correctional Service of Canada, Appellant

and

Natalie Leeman, Respondent

Indexed as: *Correctional Service of Canada* v. *Leeman*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.
Decision:	The appeal is dismissed on the grounds of mootness.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Talitha A. Nabbali, Counsel, Department of Justice Canada, Legal Services Treasury Board Secretariat
For the respondent:	Ms. Peggy E. Smith, Barrister and Solicitor, Peggy E. Smith Law Office
Citation:	2015 OHSTC 19

REASONS

[1] This is an appeal brought pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) by the Correctional Service of Canada (CSC), as employer, against a direction issued pursuant to paragraph 145(2)(*a*) of the Code by Health and Safety Officer (HSO) Lewis A. Jenkins on June 6, 2012, relative to a work refusal by Ms. Natalie Leeman. The HSO completed his investigation into the work refusal registered by the respondent by concluding that the CSC had failed to take sufficient steps to protect employees working alone when providing telephone privileges to inmates in the segregation unit of Collins Bay Institution (CBI), and thus directed the said CSC, as employer, to alter immediately the activity found to constitute the danger.

Background

[2] For the sake of clarity at the outset, one needs to have a clear understanding of the nature of the penal institution at the center of this case. At the time of the work refusal by the respondent on May 31, 2012, CBI was classified as a medium security institution which, on April 1, 2013, initially in the course of a one year pilot project, became what is referred to as a "clustered" institution, meaning that under a single management team, a minimum security institution formerly known as Frontenac Institution was united with the medium security unit known as Collins Bay Institution.

[3] On May 7, 2014, which was the first day of the hearing into the present case, it was anticipated that a maximum security unit, then under final stages of construction, would be added to the clustered CBI and it was expected to become operational in July 2014, thus prior to the present decision being rendered. The clustering of institutions does not affect front-line staff resourcing. Furthermore, within such institutions, differing populations do not mix and inmates interact in a manner that respects their security classification. CBI, like all other CSC institutions, operates on a shift work basis and thus there are three types of shifts in the segregation unit: day shift (7am to 3 pm); evening shift (3pm to 11pm); and midnight/morning shift (11pm to 7am). Activities, visits and programming occur during the day and evening shifts, whereas during the midnight/morning shift, all inmates are locked down at cell level with no movement occurring except in case of emergency. The shift staffing of the CBI segregation unit is generally based on national and local deployment standards, the capacity of the unit, the number of occupied cells as well as the profile of the inmates present in the unit at any given time.

[4] While the CBI unit at all times had held inmates classified as maximum security, due mostly to the unit's transition section allowing for the transfer of inmates from other institutions, it was established that at the time of the Leeman work refusal as well as at the time of the appeal hearing, the segregation unit at CBI had been and remained classified as medium security, although it was

anticipated that with the addition of the new maximum security unit to the CBI clustered institution, its segregation unit would undergo a classification change to maximum security.

[5] From the standpoint of housing capacity, at the time of the respondent's work refusal on May 31, 2012, CBI's segregation unit held 33 cells over two ranges and included a transition unit with 10 cells. When this matter was heard at appeal, the said unit had undergone a number of changes, the most significant being the disbandment of the transition unit and the transformation of those 10 cells into additional segregation cells, thus making it a segregation unit totalling 43 cells and impacting on its staffing requirements from the previous 33 cells unit, albeit in both cases keeping the medium security level since at the time of the hearing, as previously stated, the security level had not been altered by the yet to become operational new maximum security unit.

[6] The investigation conducted by HSO Jenkins on June 1, 2012, was brought about by the work refusal registered by the respondent on May 31, 2012, whereby she indicated her belief of there being a danger to her as a result of possibly being in direct contact with inmates when providing telephone privileges in the institution's segregation unit while the unit is operationally adjusted to a single correctional officer (CO) during the evening shift. The contact with inmates that the refusing employee was referring to was through the opened food slot in the door to each segregation cell, said slot, as is apparent from its designation as well as photos adduced as evidence at the hearing, being used to pass food trays as well as telephone receivers part of a moveable telephone cart to be brought to the door of the cell whose occupant is being provided with said telephone privileges.

[7] The actual hazard invoked by the refusing employee was risk of exposure to body fluids and/or biohazards through the open food slot that a CO working alone could not anticipate or prevent as the latter's attention to the actual unlocking of the food slot door would prevent continuous observation of the inmate within that cell, more precisely observation of the inmate remaining at the back of the cell as ordered, something that can seemingly be achieved better when the COs are working in pairs.

[8] The actual investigation by HSO Jenkins established the following facts. On May 30, 2012, a new protocol designed to reduce the risk of assault to a CO, such as what is mentioned above, was implemented regarding the provision of food trays and telephone privileges through the cell door food slot. According to said new procedures, the CO was to order the inmate to the back of the latter's cell and observe him doing so, then insert the key into the key slot, turn the key to open the latch and use his or her other hand to open the food slot door, step back and place the phone cart in front of the now open slot and then have the inmate come forward to make his call. It was stipulated that at no time should a CO put his or her hand(s) through the food slot.

[9] Prior to May 30, 2012, the procedure for providing telephone privileges to segregated inmates called for the participation of two officers and thus, the CO in segregation, when working alone at certain times as a result of operational adjustment of the multi-function officer, would obtain assistance from either a correctional manager, sector coordinator, multi-function officer or visitor security officer every 30 minutes, which is the duration of the privilege, this requiring their participation for approximately three minutes.

[10] One must note that the Collins Bay Institution Operational Adjustment Plan for 2011/2012, thus applicable at the time of the work refusal, stated that when operationally adjusted during the evening shift, and thus the multi-function officer redeployed, the unit would operate according to the midnight routine, meaning with a single officer. With the implementation of the new protocol/procedure on May 30, 2012, the CO in segregation could thereafter not be provided with said assistance at times of operational adjustment of the multi-function officer and thus would be required to perform said task alone. CD-004 or Commissioner's Directive 004, which establishes National Standards for the Deployment of Correctional Officers, provides that a segregation unit made up of 41-60 beds or cells that is classified as medium security, as the institution of which it is part, can be staffed on the evening shift by two officers, one being multi-function, with the latter being operationally adjustable once the evening meal has been provided, the cleaners have completed their tasks and all inmates are secured in their cells.

[11] HSO Jenkins' investigation showed that the task of opening the food slots performed by COs is the same, whether done for the purpose of providing feeding through the said food slots or for the provision of telephone privileges, yet, for the purpose of feeding inmates, two COs and one food services officer are required, as opposed to the provision of telephone privileges which involves two COs, one of whom possibly being operationally adjusted (assigned to other tasks and thus not present in segregation) at certain times, which is the situation challenged by the respondent. It was also determined by the HSO that during inmate movements to V&C or Health Care, the CO(s) in the segregation unit has to ensure that the corridor barrier in the passageway to segregation remains closed and thus, should an incident occur in that unit with a single CO present and prevented from opening the said barrier, intervention by the COs outside the barrier would be delayed since they would have to draw the key and crank handle from the institution's main gate to open the said barrier and respond.

[12] HSO Jenkins' review of CBI's Job Hazard Analysis Worksheets for the "issue of phone calls" and that of "feeding inmates" demonstrated that for essentially the same task of opening the food slot, the probability weighted score for exposure to body fluids and/or biohazards is 4/5 ("may occur in this job") where the feeding task is concerned and 2/5 ("has happened before") in the case of the provision of telephone privileges, with staffing levels for each of these

functions being different in that where feeding of inmates is concerned, two COs and one food services officer are required and in the case of providing phone calls, two COs are assigned with one potentially operationally adjusted at certain times of the day.

[13] The decision by HSO Jenkins was essentially based on this distinction. He pointed to the difference in the probability weighted score for exposure to body fluids and /or biohazards between the two tasks being performed, which he described as "very similar in nature" and the fact that feeding requires two COs who cannot be operationally adjusted while the provision of phone call privileges allows for the operational adjustment of one of the two COs, with the remaining segregation unit CO being nonetheless expected to perform the tasks involved in the provision of telephone privileges. This led to the finding of "danger" by HSO Jenkins where a segregation unit CO is alone through operational adjustment to provide the telephone privileges. It needs to be pointed out that HSO Jenkins neither visited or viewed the CBI segregation unit nor did the latter witness the actual processes involved in the feeding and the provision of telephone privileges.

[14] As previously stated, the hearing into this matter by the undersigned began on May 7, 2014. However, it is important to note here that prior to that date, the undersigned attended at CBI and while present in the institution's segregation unit, took a view of the complete unit, inclusive of what used to be described as the transition unit, and was given an actual complete demonstration by Ms. Leeman, in the presence of representatives from both sides, of the actual complete process of providing telephone privileges to segregation inmates through a cell door food slot. The undersigned also witnessed the actual use of a telephone by a segregation inmate and also did approach and stand proximate to a number of cells and had a view to the interior of those as would a CO providing access to telephones in that unit.

[15] This matter has originated with the respondent exercising her right of refusing dangerous work provided by the Code relative not only to a task that she was expected to execute, to wit the provision of telephone privileges to inmates of CBI's segregation unit, but also, and I must note more specifically, relative to the manner in which she was to do so, to wit through the food slot of cell doors while being alone in the said segregation unit.

[16] HSO Jenkins, who conducted the investigation into the refusal action, concluded that at the time of the refusal and of the latter's investigation, the said task of providing to segregation inmates the said telephone privileges while alone in the segregation unit constituted a danger due to the employer having failed to take sufficient protective steps. The actual wording of HSO Jenkins in finding that the performance of an activity constituted a danger to the employee while at work was that "the employer has failed to take sufficient steps to protect

employees working alone when providing telephone privileges to inmates in the segregation unit".

[17] It is important to note that even though this is not mentioned in the HSO's direction, the latter's investigation report as well as the factual circumstances discussed at length in that report concern the provision of said privileges during the so-called evening shift as well as the manner in which this task is executed to wit, through the opening of the food slot part of the locked cell door, and the potential for exposure to body fluids and/or biohazards.

Issues

[18] The issue to be determined by the latter is thus clearly identifiable as being whether, for the respondent, there was a danger within the meaning of the Code in providing telephone privileges to segregation unit inmates while working alone in said unit.

[19] That being said however, an additional issue has become evident and been raised by the respondent. That issue has to do with the fact that with the passage of time, conditions affecting CBI generally, and the segregation unit of said institution in particular, have greatly changed between the time of the refusal by Ms. Leeman and the time that the matter has come to be heard and decided by the undersigned. As such it is claimed that because of those changes, the conditions that led to the work refusal (working alone) and the conclusion of the HSO no longer exist, nor could they exist anew because of the reclassification of the institution as "clustered", the change in security classification of the segregation unit and the ensuing staffing requirements, as per Deployment Orders and Standards and local operational adjustment plan, and that consequently there is no longer a live issue between the parties nor a possibility or need for the undersigned to bring about a meaningful corrective conclusion.

[20] The respondent is thus claiming that this matter is now "moot" and thus should not proceed on the merits. As regards the merits of the present case, I am of the view that consideration of the evidence on the factual circumstances is necessary in this instance to address the matter of "mootness", and that the merits may nonetheless need to be addressed in my conclusion.

Submissions of the parties

A) Appellant's submissions

[21] Counsel for the appellant referred first to Commissioner's Directive 004 (CD-004) as the basis for the development of National Standards of Deployment for Correctional Officers at each level of security and type of facility to achieve consistent levels of safety and security. CD-004 has a number of annexes with

annexes B and D being most relevant to the issue at hand. As such, Annex B sets out nationally the deployment and resource standards by institution type and security activity, including for segregation units, while Annex D, which sets out specific or "local" deployment levels, applies the substance of Annex B to each institution's local environment, considering the necessary variants specific to a given institution.

[22] Based on this, given that at the time of the work refusal, CBI's segregation unit, classified as medium security, had a maximum of 33 cells, it was considered a Level B medium security unit according to Annex B for the purpose of staffing. However, due to the 10 cells transition unit proximity at the time, this affected the staffing of both units, bringing this to a Level C joint staffing. With the subsequent changes to the segregation unit which increased the number of cells to 43, with the security level remaining unchanged at medium at the time of the hearing into this matter, the staffing level remained at Level C. What this translates into in actual staffing is as follows.

[23] While Level B (26-40 beds) of Annex B calls for one officer (CO-1) for the evening shift, Level C provides for two officers (one CO-II Sector Coordinator and one CO-I Multi-Function Officer) for the same evening shift in a medium security segregation unit. The same Annex B expressly sets out that such Multi-Function Officer can be reassigned, operationally adjusted, to other security activities once the evening meal has been provided. Counsel submitted that in practice, the Multi-Function Officer is only reassigned to other security activities once the meal service has been provided, the cleaner(s) has cleaned and put all equipment away and the inmates are all secured in their cells. Counsel also submitted that according to Annex B of CD-004, the provision of telephone privileges during the evening shift in all segregation units can be done, depending on circumstances, by one CO working alone.

[24] By way of explanation, counsel noted that in a medium security segregation unit housing less than 41 inmates at a time, therefore staffed at Level B of Annex B, only one CO is posted during the evening shift, the same being the case for a maximum security segregation unit housing less than 20 inmates where the Multi-Function Officer may be operationally adjusted during the evening shift once the meal service has been completed and all inmates are secured in their cells.

[25] Counsel also referred to the fact that local deployment standards adapted to the necessary variants of each institution's local environment have been adopted and are part of CD-004 at Annex D. In the case of CBI, those were adopted, had not changed since April 1, 2011, at the time of the hearing, and thus were applicable at the time of the respondent's refusal to work. It was submitted by counsel for the appellant that those local standards provide that CBI's segregation unit is to be staffed by two officers during the evening shift, a unit coordinator CO-II and a multi-function officer CO-I.

[26] Counsel also referred to the fact that this case occurred at a time generally coinciding with the closure of maximum security Kingston Penitentiary, the soon to become operational new maximum security unit that would be part of the CBI clustered institution, and therefore the necessity of absorbing a number of the officers that were previously assigned to that penitentiary. In this respect, it was submitted that while new "anticipatory" local deployment standards for CBI had been approved in the fall of 2013, therefore after the refusal action by Ms. Leeman, those providing for additional staffing for CBI's segregation unit on the evening shift (3 COs including a multi-function CO-I) once the maximum security segment of the clustered institution became operational, it is the CBI local standards which form part of Annex D of CD-004 that remained in force, therefore providing for a Unit Coordinator CO-II and a Multi-Function Officer CO-I for the segregation unit on the evening shift.

[27] Counsel also pointed out that the necessity to absorb a number of Kingston Penitentiary officers who would eventually be assigned to the new maximum security unit of the clustered CBI had resulted in those surplus officers having been assigned temporarily to various posts at CBI, including within the segregation unit, with the consequence being that CBI's segregation unit, at the time of the hearing, was being staffed at the level of a maximum security segregation unit while nonetheless remaining classified as a medium security unit.

[28] The crux of the issue in the present case obviously relates to the notion of operational adjustment and whether on the evening shift of a medium security segregation unit, one of the two COs assigned to the unit, i.e. the multi-function officer CO-I, can be operationally adjusted, leaving the single remaining unit coordinator CO-II (Ms. Leeman), alone to provide telephone privileges. All CSC institutions, including CBI, have an operational adjustment plan and decisions under the plan are always made by local (institutional) management (duty correctional manager) at the beginning of a shift and can be altered according to prevailing circumstances in the institution (risk assessment).

[29] The application of such a plan allows for the increase or decrease of officers assigned to a post, in the present case the segregation unit evening shift, based on the operational and security requirements at a specific time and date. At the time of HSO Jenkins' investigation and the hearing into this matter, CBI's operational adjustment plan in force was that which had been approved by then warden Julie Blasko on November 4, 2011, although a new plan was being developed at the time of this hearing to take into account the upcoming changes to CBI. As part of a number of posts within CBI that were and are operationally adjustable, two such posts concern the segregation unit, although for the purposes of the present case, only the operational adjustment of the multi-function officer in the segregation unit during the evening shift is at issue.

[30] As previously noted and as submitted by the appellant, HSO Jenkins' decision is essentially based on the fact that the latter took issue with the different Job Hazard Analysis (JHA) ratings for the tasks of feeding inmates and that of providing phone privileges, both in segregation, as both tasks call for the opening of the food slots part of the cell doors. Counsel submitted that a JHA isolates, analyses and rates the tasks performed in the work place, with the rating based on the following factors: frequency of task, severity of hazard and probability of hazard. As such, the higher the critical rating score for a task, obtained by multiplying together the individual score for each individual factor, the more hazardous it is considered.

[31] In this regard, counsel noted that the actual JHA for all duties and security activities performed by COs within the institution is made by the local health and safety committee, reviewed, approved by local management and continuously reviewed. At the time of the refusal by Ms. Leeman and the hearing at appeal, the applicable CBI JHA for the segregation unit was dated January 2012. Counsel submitted that the evidence provided by three of her witnesses (Stacey, Velichka and Buller) demonstrated that the higher rating attributed to the feeding task could be explained by the "probability factor" which could be explained through the following:

- all food slots are opened at the same time when inmates are being fed, and food is delivered quickly (as inmates become upset if their food arrives late, cold, etc.) whereas phone access can be spread over long periods of time, food slots opened individually, allowing officers to better control and plan phone delivery;

- food delivery occurs at a given time, unlike telephone access which is controlled by officers and can occur as appropriate;

- phone calls are desired by inmates, which may not necessarily be the case for food for a variety of reasons, ranging from taste to strike to warmth of food;

- an uncooperative inmate may be deprived of phone privileges but not food;

- there are no records of security incidents relating to telephone access in any CSC segregation unit whereas numerous security incidents have been recorded regarding the delivery of food in segregation units, including spitting, throwing liquids, throwing food trays, etc.

[32] On the specific subject of providing access to telephones in the segregation unit, counsel noted that this is done during the day and the evening shifts according to a schedule that may have been established by a CO having consulted the inmates seeking such access. On a practical basis, and the

undersigned was able to verify this during his taking a view of both the CBI segregation unit itself and the telephone privileges provision procedure prior to the commencement of the hearing, telephones in segregation are mobile and resemble pay-phones on carts. They are to be placed by the attending CO directly in front of a segregation cell's food slot. Meant to be pushed frontward by the CO, these units can pivot 360 degrees and thus are easily manipulated and manoeuvred.

[33] It is the appellant's submission that once the mobile phone unit has been placed in front of a given food slot, the CO no longer has a role to play until the unit needs to be moved to another inmate's cell or put away. The actual operation of the telephone is the sole responsibility of the inmate who must do so from the latter's cell by reaching out of the food slot, picking up the receiver and inserting the telephone access card into the unit and then dialing the desired number. The appellant submitted that each institution is responsible for developing its own procedure to open food slots and that this was the case at CBI, with the said protocol being communicated to officers working in segregation. The CBI protocol in place listed the following steps to be followed:

i. unlock the outside padlock or bolt on the food slot, if one is present, and secure on the door of the cell for safe keeping;

ii. look through window of cell and direct inmate to move to and remain at back of cell;

iii. should the inmate fail to abide by the direction, withhold phone privilege and notify the correctional manager;

iv. where the inmate abides by the direction, the Folger-Adam key is inserted into the food slot lock, and using one hand, the CO is to turn said key while maintaining visual contact with the inmate;

v. where the inmate continues to cooperate and remains at back of cell, using the other hand the CO is to pull down on the food slot door so as to open it;

vi. move the mobile telephone unit in front of the open food slot.

vii. follow same steps in reverse to remove the telephone unit upon completion of call.

[34] It was submitted by the appellant that the respondent had testified always attempting to adhere to the said protocol when providing telephone privileges to inmates in segregation.

[35] Counsel for the appellant also argued that testimonial evidence had also established that a number of additional security measures were to be adhered to in order to ensure a safe provision of telephone privileges:

- segregation officers are to ensure that all cleaning supplies and equipment has been properly put away and stored prior to commencing telephone delivery;

- telephone privileges should never be provided where an officer has no visual of an inmate or of the latter's cell;

- with the food slot open, officers have no reason to remain near the food slot so as to be within grabbing distance;

- at no time should officers put their hands in the food slot, or turn their back on an inmate while providing said privileges;

- when providing telephone privileges, officers are to ensure that they wear their PPAs, carry their radios and Mark 4 OC spray.

[36] On the actual work refusal by respondent N. Leeman on May 31, 2012, it is the appellant's submission that such work refusal was the first time that any issues had been raised with either the provision of telephone privileges in segregation or the opening of food slots and that the required investigation by the employer was conducted by Assistant-Warden (management services) Wayne Buller.

[37] In the course of the said investigation, the latter met with the respondent and assessed her concerns, discussed with Ms. Leeman the procedure to open food slots for the purpose of providing telephone privileges and reviewed with the latter the CBI's segregation unit and went through a demonstration of the proper procedures for providing telephone privileges, including the opening and closing of food slots. At the conclusion of his investigation, Mr. Buller was satisfied that the respondent as well as the other COs could follow good security practices when opening food slots and consequently that an officer working alone in segregation could safely open food slots to provide telephone privileges to inmates.

[38] The respondent disagreed with Mr. Buller's conclusion and her continued work refusal caused HSO Jenkins to initiate his own investigation. In the course of said investigation, HSO Jenkins met with two employee representatives of the local health and safety Committee, Mr. Buller, CBI Deputy Warden Germain as well as the institution's Coordinator of Correctional Operations (S. Doering). As regards the said investigation, counsel for the appellant notes that in his testimony at the hearing, HSO Jenkins admitted to not

having visited CBI's segregation unit and not having asked to see a demonstration as to how telephone privileges were provided in said unit.

[39] Furthermore, counsel submits that HSO Jenkins' conclusion of "danger" was based solely on the latter's concern that the JHA ratings for the segregation unit were different for the tasks of delivering food and that of providing telephone access, the first being higher (more dangerous) than the second, and that he did not understand how there could be such differences as both tasks required officers to open and close food slots, a situation he felt was contradictory. Counsel further noted that HSO Jenkins recognized never having sought an explanation as to why the JHA ratings differed for those two tasks, and thus concluded that because more than one staff member was required to deliver food in the segregation unit, having an officer working alone in the segregation unit providing telephone access to inmates constituted a danger.

[40] In addition to contesting the claim by the respondent that this appeal is moot, the appellant submits that HSO Jenkins erred in his finding of danger. Pointing out that the central purpose of the Code is one of prevention of accidents and injury to health in the work place, counsel notes that while the legislation allows employees to refuse to work, in itself an extraordinary measure (*Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424), where they have "reasonable cause to believe" that doing so would constitute a danger to themselves or another employee, the reasonableness of such belief cannot be solely subjective, as stated by the Federal Court in *Laroche* v. *Canada (Attorney General)*, 2013 FC 797 as follows:

> [60] […] The concept of danger is dependent on the possibility that a hazard arises. For a danger to be the subject of a refusal to work, there must be a reasonable possibility, which implies a measure of objectivity. Subjective fear alone cannot satisfy this test. […]

[41] Such test, actually a four part test, was spelled out by the Federal Court in *Canada Post Corporation* v. *Pollard*, 2007 FC 1362, and thus requires that the following four elements be established to arrive at a finding of "danger" as defined in the Code:

> [66] […]
>
> (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.

[42] As a whole, the position of the appellant is that the situation raised by the respondent as justifying her refusal to work does not satisfy any of the elements of that test. As to the first element of the test, counsel submits that the respondent presented no evidence in support of her allegation that she may face a potential hazard of direct contact with inmates when providing telephone privileges alone in CBI's segregation unit. Referring to Commissioner's Directive 004 (Annex B, pages 36 and 68), counsel for the appellant contends that the evidence is that there is no direct contact between officers and inmates when the latter are secured in their cells, as stated as follows in CD004: "when inmates are secured in their cells […] there is no direct contact between the inmates and the officer overseeing the segregation unit", and that consequently said alleged potential hazard or direct contact with inmates being speculative, there cannot be a conclusion of "danger" on that basis. This being so, and there being no evidence of the alleged hazard, it follows, according to counsel, that exposure to such hazard can only be speculative, meaning that the second part of the *Pollard* test cannot be met.

[43] Regarding the third part of the test, i.e. the possibility of injury, the appellant also submits that this can only be speculative or, to adopt the criteria stated in the *Verville* v. *Canada (Service correctionnel)*, 2004 FC 767, Federal Court decision, a "mere" possibility of injury is insufficient to support a finding of danger. The appellant notes that the respondent has offered a number of allegations regarding the type of injury that could be sustained if required to act alone in providing telephone access to segregation inmates.

[44] As to the first such allegation, that of being grabbed by an inmate through the food slot, counsel submitted that no evidence has been adduced in this regard, the evidence being instead that no officer at CBI has ever been grabbed by an inmate in this manner. Second, the respondent has suggested that she could suffer the same incident as had occurred in 2002 to another officer in what is known as 3-Block, that is being struck in the head through the eye level sliding metal opening on the cell door used to check on inmates. Counsel noted in this regard that those openings are vastly dissimilar from and were not used as food slots and had been covered with heavy metal grill after the assault and thus, as a result, that such an assault could not occur in CBI's segregation unit.

[45] A third possibility raised by the respondent had to do with food slot snares that work like a noose by trapping a member if it is entered into a food slot. The appellant's submission on this is first that the protocol in place for providing telephone privileges is that officers should never and do not need to put their hand in a food slot and second that the evidence is that there has never been a food slot snare at CBI. According to counsel, even if one were to

recognize the possibility of such snares being present at CBI, by following the established protocol, there is no reasonable possibility of an officer being injured in this manner when providing telephone privileges.

[46] Finally, the respondent has raised the possibility of assault with a modified broom or other object. In this regard, noting that no assaults have ever occurred during the provision of telephone privileges to segregation inmates, counsel for the appellant maintained that such allegation is unfounded as inmates in segregation are locked in their cells and officers in segregation are responsible for and have full control over the cleaner and thus can ensure that brooms and other cleaning supplies are not utilized to fashion weapons and are returned to their appropriate storage area prior to providing telephone privileges, this meaning that there is no reasonable possibility that an officer would be injured by a broom or other object. Counsel for the appellant thus submits that the evidence clearly establishes the absence of a reasonable possibility of injury to officers providing telephone privileges to inmates while working alone in segregation and that as a consequence, the third criteria required to establish "danger" under the Code is not met.

[47] Finally, as regards the fourth part of the test, the appellant takes the position that if the alleged hazard does actually exist, it is a normal condition of employment and thus cannot be further mitigated. According to counsel, determining whether a hazard is a normal condition of employment and thus an exception to the right of work refusal, or whether such hazard represents a danger under the Code, requires that a distinction be drawn between the essential characteristics of the job or activity and the methodology that could be altered to eliminate or avoid the danger in question. In this respect, where it is the hazard of direct contact with inmates that is alleged by the respondent, the opinion of the appellant is that if such a hazard does exist, something that is denied, further mitigation cannot be achieved and thus said hazard is a normal condition of employment.

[48] It is the appellant's position that the actual procedure for providing telephone privileges does not vary, whether undertaken by one or more officers. In this respect, counsel notes that the additional officers do not participate in the actual procedure and merely observe the officer delivering the telephone from either the top of the range or the control post, and thus the effect of their presence is solely shortening the response time in the event that an incident occurs, not actually mitigating any hazard that may be associated with such activity. Counsel for the appellant thus argues that as additional officers have no impact on the process for providing telephone privileges to segregation inmates, any direct contact with inmates while providing such privileges cannot be due to the fact that an officer is working alone.

[49] Such hazard exists at all times regardless of the number of officers present when telephone privileges are being provided and must be attributed to

the unpredictability of human behaviour in an environment such as a penitentiary. From a general standpoint, the position put forth by counsel is that exposure to inmates who are unpredictable, uncooperative or volatile is an inherent characteristic of the position of CO and that furthermore, direct contact with inmates in segregation or elsewhere in a CSC institution is a normal condition of employment for COs, something clearly set out in their relevant job descriptions and post orders, and thus a hazard that cannot be addressed or remedied by application of the Code.

[50] Counsel however argues that engineering and administrative control mechanisms have been put in place by the appellant to ensure the safety of COs when providing telephone privileges to segregation inmates. Those control mechanisms are the same, regardless of whether one or more officers take part in the operation, and all officers working in segregation are provided with the identical necessary personal protective equipment, again regardless of whether working alone or not.

[51] Additionally, the appellant does provide all COs with the necessary training to ensure their safety, whether working alone or not, and this entails awareness of their surroundings, maintaining a visual of inmates and keeping a safe distance from the latter. In summation, it is counsel's conclusion that the evidence shows that the employer has implemented all measures that serve to mitigate the hazards associated with providing telephone privileges to segregation inmates and that as regards the hazard of direct contact with inmates, if such in fact exists, it represents a normal condition of employment and is not dependent on whether an officer is working alone or with other officers in the segregation unit.

[52] While counsel argues that what precedes is sufficient for the undersigned to grant the appeal, Ms. Nabbali also points to the emergency nature of the work refusal process under the Code to contend that given that these work refusal provisions exist in the Code to ensure that at a specific time and place, an employee's work will not expose one to a dangerous situation, the refusal process is not meant to be used to attack an employer's policies, such as those relating to staffing. In the present case, counsel for the appellant opines that the respondent is attempting through its refusal action to challenge Annex B and Annex D of CD-004, something not supported at case law.

[53] According to counsel, there is in place a process to allow the bargaining agent to consult with CSC management relative to the deployment standards set out in CD-004, such process needing to be utilized by the bargaining agent instead of attempting to paint their disagreement with CSC's staffing policy as a work refusal. The uncontested evidence, according to counsel, is that the bargaining agent has never raised any issues regarding deployment standards as they relate to operational adjustments in segregation, nor have any issues ever been raised with CBI management relating to the provision of telephone

privileges in the segregation unit or the operation of the food slots. Pointing to what she describes as a failure to act by the bargaining agent, it is counsel's view that such cannot now be remedied through the respondent's work refusal. Since the evidence presented at the hearing does not support a finding of danger, the appellant is of the view that its appeal should be granted.

B) Respondent's submissions

[54] The respondent's submissions are built around two main points. Firstly, the respondent argues that the dispute relative to the provision of telephone privileges in CBI's segregation unit is moot, as intervening events between the work refusal by Ms. Leeman and the hearing and decision into this appeal have rendered the dispute academic and, additionally, should I come to the conclusion that the matter has become moot, that I should not exercise my discretion to issue a decision on the merits. Alternatively, the respondent is of the opinion that the finding of danger arrived at by HSO Jenkins should be upheld by the undersigned.

[55] In addition to invoking the leading case law on the matter of mootness, namely *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342, the respondent's argument that this matter is moot is based on three CSC internal documents that the respondent claims establish that the situation at CBI, as it existed at the time of the work refusal by the respondent, is no longer the same and thus, with the structural changes to CBI now in place, the circumstances that are now present signify that there is no longer anything to be corrected in this regard by a decision by the undersigned on the merits of the appeal.

[56] Those documents are Policy Bulletin 394 that took effect on May 8, 2013, Policy Bulletin 445 which was effective on April 1, 2014 and Commissioner Directive 706 (amended) which took effect on April 2, 2014. The combined effect, over time, of these three documents, as regards CBI, is the creation of a new governance structure consisting of the merger of Collins Bay (medium security) and Frontenac (minimum security) Institutions and the addition of a new 96 bed maximum security unit expected to be operational in July 2014, and thus had not yet come into operation at the time of the hearing into the present matter. This new institutional structure, which designated CBI as a "clustered" institution as of April 2, 2014, thus shortly prior to the hearing into the present appeal, designated CBI as a clustered site formed of maximum, medium and minimum units, defined as "a group of separate units of different security levels administered by one Institutional Head. The difference between a clustered institution and a multi-level institution is related to maintaining the distinction and separation of the various security levels, normally in relation to accommodation, structured activities and inmate movement".

[57] Counsel for the respondent has submitted that at the time of the hearing, there existed no national deployment standards in place for clustered institutions

and that new local deployment standards and operational routines announced in Bulletin 394 had not yet been put in place. Nonetheless, counsel submitted that it was unchallenged testimony by respondent Leeman that as of October 2013 (staff meeting), changes had been announced and made to the staffing levels in segregation on the evening shift, meaning that there would thereafter be three officers working that shift in segregation, a situation which counsel for the respondent described as being identified in testimony for the appellant as being the framework for the "future" staffing level at CBI.

[58] Furthermore, counsel submitted that evidence by the respondent is to the effect that there have since consistently been three officers on staff in segregation during the evening shift, thus reflecting the current as well as the projected staffing level for the evening shift in segregation. Additionally, the position put forth by the respondent is that Ms. Leeman was informed at that October 2013 meeting of the putting in place of a new operational adjustment plan for segregation on the evening shift whereby the multi-function officer part of the three member segregation staff could be redeployed, leaving two officers in segregation to provide phone service, although such service would be suspended were the staffing level drop to one officer who then would be left to work alone in segregation.

[59] It is submitted by the respondent that those have been the working conditions in segregation on the evening shift since October 2013 that Ms. Leeman has consistently worked under, and that future national deployment standards and local operational adjustment plans for a segregation unit in a clustered institution remained speculative at the time of the hearing. In the case at hand, the respondent submits that the particular facts and circumstances under which Ms. Leeman exercised her refusal right were unique to the day of her refusal and cannot be duplicated, in that it concerns a local past practice in place that was changed without notice, and a new protocol put in place without training or modification to the respondent's current manner of using the telephone cart.

[60] The respondent puts forth the argument that upon applying the two-part test established by the Supreme Court of Canada in its *Borowski* decision, the undersigned should find this appeal to be moot and opt not to proceed on the merits. On the first part of the test, which calls for a live controversy affecting the rights of parties to still be present at the time of the appeal hearing, the respondent notes that at the time of the work refusal, CBI had been classified as a medium security institution and that the appellant/employer is relying upon the published National Deployment Standards for such an institution, the associated local deployment standards as well as CBI's 2011-2012 operational adjustment plan to argue that the segregation unit could be operationally adjusted to one officer during the evening shift, with that officer being responsible for providing telephone privileges to inmates. The respondent argues in this regard that such a position by the appellant ignores the evidence adduced at the hearing, in that it is

based on the National Deployment Standards and Local Operational Adjustment Plan that were in place prior to CBI being reclassified and prior to the commencement of this appeal hearing.

[61] In short, the respondent claims that the local staffing and operational adjustment plans in place at the time of the hearing differ from those that had been in place at the time of the refusal, and that the future operation and use of the segregation unit is evolving as would the content of the national deployment standards and local operational adjustment plans being drafted to take into account the new classification of the institution (clustered).

[62] It is thus the position advanced by the respondent that on the facts in evidence, there is no live controversy for the undersigned to decide. Taking into account the change in CBI's classification, counsel for the respondent has argued that national deployment standards represent only the context in which the other factual elements must be assessed. As such, the specific facts of any future incident are purely hypothetical, and those underlying facts and particular circumstances of a future work refusal would have to be assessed within the context of those national deployment standards in place at that time, and would form the essential elements of any future claim of danger.

[63] Consequently, any future controversy is completely hypothetical. Referring to the deployment standards to be altered in light of the change in institution classification, counsel further argued that the right to refuse work and the associated appeal rights cannot be used to obtain a ruling with respect to a policy that has not yet been formulated, a further reason to find the issue in the present case moot.

[64] As to proceeding to hear this matter on the merits, notwithstanding the respondent's opinion that the issue in the present case is moot, counsel has argued that no purpose can be served by hearing this appeal, as a work refusal is not a policy grievance, and the national deployment standards and the associated local policies, while representing the context against which this dispute is taking place, are not the issue in dispute. As previously stated, the respondent is of the opinion that the appellant is improperly seeking to use the appeal mechanism as a means of obtaining a policy ruling that would uphold the right of CSC to enforce the national deployment standards for staffing purposes. Invoking the Federal Court of Appeal's decision in *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424, to argue that a work refusal and its associated appeal mechanisms are not the proper forum to raise or debate policy issues, counsel for the respondent maintains that the jurisdiction of an appeals officer is not to establish or apply policies, but rather to establish whether, in the context of the facts before him, a danger existed for the worker who has exercised the right to refuse to work.

[65] At the time the work refusal took place, counsel argues that there was a generic deployment standard for a medium security institution in place as well as a local site adjustment plan. The evidence is that there was also a long standing local practice in place for the provision of phone privileges to inmates on the evening shift. The respondent's conditions of work were altered by correctional manager Stacey's decision to revert to strict adherence to the staffing levels of the national deployment standards of the time. It is the respondent's view that as her work refusal was based on situational facts that were in place at the time that are no longer in place, there is no labour relations purpose served in revisiting a historical event, the factual and contextual particulars of which cannot be duplicated, and furthermore, there is no meaningful remedy available to the parties. The undersigned should thus opt not to exercise his jurisdiction to hear this matter and the appeal should be dismissed.

[66] As an alternative to the argument that the issue under appeal is moot, the respondent's position is that on the merits, the undersigned should uphold the finding of danger arrived at by HSO Jenkins in issuing the latter's direction. In essence, the respondent is arguing that when Ms. Leeman was asked to provide telephone privileges to segregation unit inmates on the evening shift while working alone, this represented a departure from an established local practice of having telephone privileges provided by one CO being observed by a second CO.

[67] According to counsel for the respondent, national deployment standards, referred to as generic standards, are national in scope and are generally applied for the purposes of consistency between similarly classified institutions. There is however a capacity to vary those standards on an individual site to take account of local peculiarities. It is submitted by the respondent that on May 30, 2012, the day preceding Ms. Leeman's refusal, the appellant employer decided to ignore the local practice and order the respondent to perform her job as required under the generic standards for a medium security institution, whilst she had only provided phone service to inmates in segregation on the evening shift under the observation of a second officer and, where the position was operationally adjusted, she would wait for a second staff member to arrive for the purpose of observing prior to performing that task. This was the first time that the respondent had been asked to provide phone service by herself during a period of operational adjustment.

[68] Testimony was offered in support of the respondent's position that the local practice was effectively to operate segregation as a midnight/morning shift in the event the staffing levels were operationally adjusted to one officer. As such, officers on the midnight shift work alone and are not permitted to open the food slot or cell door during that time. Witnesses for the appellant (Buller and Stacey) testified having no knowledge or memory of such local or past practice, although Mr. Buller and HSO Jenkins did accept that an extra officer could serve as deterrent for good behaviour and, having full visual, provide immediate

assistance to the officer providing phone service if needed.

[69] It is the respondent's position that although, on May 4, 2012, the employer had advised employees of the coming into effect on May 12, 2012, of a change to the segregation routine of providing phone privileges/opening and closing food slots, whereby, in operational adjustment situations, there was to be contact with the desk correctional manager in order to have a second officer assigned to observe and assist, she was informed on May 30th that such process would not be followed and that she would have to proceed alone where the unit was operationally adjusted on the evening shift and follow a four step protocol of best practices.

[70] According to the respondent, that protocol of "best practices" was neither in place nor commonly understood or followed by officers working in segregation prior to
May 30, 2012, and was incorporated into the amended local post order for segregation on the evening shift only between June 12 and June 17, 2012, thus after Ms. Leeman's work refusal of May 31. In essence, the respondent's evidence is that inmates can use an open food slot as an opportunity to initiate direct contact such as reaching through an open slot, using a broken broom handle as a weapon, throwing hot liquids, feces or urine or using snares, such possibility being reduced where the inmate is required to remain at the back of his cell while the slot is being opened and continuously observed as remaining there by an assisting officer. This constant observation is necessary since inmates can move 20 feet in one second and the cells are only eight feet from back to front.

[71] In the case of respondent Leeman, she claims that she cannot maintain a continuous visual on an inmate after directing that the latter remain at the back of the cell because of her stature, whether when opening or trying to close the open food slot, and thus at those times, her arm is or was exposed and could be grabbed. As to the possibility of the phone cart being used as a protective shield, it is the respondent's position that phone carts are not always easy to move, contrary to the appellant's claim through its witness Stacey's demonstration with a swivel chair, and that there never has been any discussion of using the cart in this manner, the proper manner being to keep the cart to one's side while opening and closing the food slot.

[72] Central to HSO Jenkins' conclusion that led to the issuance of the direction under appeal was the latter's perception that for essentially the same basic task of the opening of food slots, the Job Hazard Analysis conducted regarding the feeding of inmates and that of providing telephone privileges resulted in differing probability weighted scores for exposure to body fluids and/or biohazards with resulting differing staffing levels for each of these functions. As noted by the respondent, the appellant's explanation of this is that inmates are prone to better behaviour when being provided phone service, which

they desire, rather than food which they may choose to forego, and thus are more motivated to obey a CO's directive to move and remain at the back of the cell while the latter is proceeding to open the food slot.

[73] Furthermore, the appellant has put forth that there have been no recorded incidents of assault during phone privileges provision. It is the respondent's position that this is an hypothesis that is not supported by the evidence that has been adduced, primarily because this has never been tested since the segregation unit has never been operationally adjusted to one officer, be it prior to the Leeman work refusal, after the direction under appeal or since the changes in staff and procedure that occurred in October 2013. Additionally, the respondent contends that inmates are often placed in segregation for bad behaviour reasons, poor social skills or an assaultive nature, and that the appellant's hypothesis ignores the fact that inmate misbehaviour during food service may cause the loss of phone privileges.

[74] The respondent questions the premise upon which it claims the appellant has built its case to wit, that there is no possibility of direct contact between an officer and the inmates when locked in their cells in segregation. The respondent argues that the evidence shows that while there is no direct contact between inmates and officers when inmates are secured in their cells in segregation, this is not the case when the food slot is opened. At that time, there exists the risk that direct contact can occur and this is the hazard that must be addressed.

[75] It is the respondent's opinion that the appellant's position fails to place the hazard of the open food slot in the context of the work refusal, including: (1) the past practice of providing phone service under the observation of a second pair of eyes, (2) specific incidents of the food slot being used to initiate direct contact during food delivery, (3) the delay in the ability of the lone officer providing phone service to obtain assistance in the event of a security issue, (4) the failure of the appellant to implement, train and ensure compliance with the protocol designed to ensure the health and safety of the officer prior to the response to the work refusal. It is the respondent's opinion that this is against such background that a finding of danger must be made.

[76] Based on the line of court cases (*Fletcher*, *Verville*, *Martin*[1], *Pollard*, *Vandal*) that have extensively considered the definition of "danger" and have confirmed and settled the principles through which the question of danger must be answered, counsel for the respondent submits that the following has been established by the respondent:

- it is the opening of the food slot rather than the use of the food slot that creates the hazard of direct contact;

[1] *Martin* v. *Canada (Attorney General)*, 2005 FCA 156

- the health and safety committee did not agree with the decision to revert to a strict application of the National Deployment Standards as per Ms. Stacey's directive (protocol) of May 30th, 2012;

- there is no history of prior complaints because the local practice had always been to provide a second set of eyes, and cancel the issue and collection of phones until assistance was provided;

- prior to the issuance of the Stacey directive on May 30th, 2012, there had been no training with respect to the use of the phone cart as a shield, or any consideration given to the needed response time for someone outside the segregation unit to provide assistance;

- inmates have used the food slot opening as an opportunity to assault officers in the past by reaching out and grabbing officers, by throwing fluids, including urine and feces, through the food slot and the use of snares. It is not unreasonable to expect that an inmate on segregation will find other methods of using the respondent's food slot opening for their own purposes;

- the officers who work with the inmates and provide the service are in the best position to assess the hazard. The evidence that they provided was that the "second pair of eyes" has served as a deterrent to bad behaviour, and that the presence of a second officer is necessary both as a deterrent and a witness to any security incident, as well as to provide immediate assistance in the event that something goes wrong.

[77] As regards the above, it is the respondent's submission that an appeals officer must consider those in the context of the National Deployment Standards although the sole application and reliance on the said standards does not suffice to defeat an employee's work refusal.

[78] Finally, as regards the weight the undersigned should afford the evidence offered by both parties, counsel for the respondent submits that where there is a possible conflict or gap in the evidence adduced by the witnesses from both sides, such conflict or gap should be resolved in the respondent's (employee) favour. It is the respondent's submission that while its witnesses are all experienced officers with years of experience in segregation at CBI and thus have first-hand knowledge of the staffing and practices in place during the times relevant to the refusal, the appellant's witnesses were not forthcoming with respect to the production of documents and evidence regarding the local past practice of staffing during operational adjustment in segregation or the current and future practices.

[79] It is thus the opinion of the respondent that this appeal should be dismissed, first because the issue it raises is moot and consequently that no

labour relations purpose could be served by a decision at this time, and second, in the alternative, that the direction by HSO Jenkins on danger should be upheld.

C) Reply

[80] The appellant's reply deals first with the issue of mootness raised by the respondent, and in this regard claims that there remains a live issue or controversy between the parties and in front of the undersigned at the time of the hearing into this appeal and of my formulating a final decision, and second, failing a finding of mootness, that the evidence does not support a conclusion of danger in the circumstances existing at the time of the work refusal and the investigation by HSO Jenkins.

[81] On the mootness issue, the appellant challenges the respondent's assertion that phone services have continued to be provided in segregation with two officers present, and that CBI's segregation unit can no longer be operationally adjusted to one officer during the evening shift, thus rendering the issue moot. While not claiming that this is not factually the case, the appellant explains that this is only due to the direction issued by HSO Jenkins following Ms. Leeman's work refusal, a direction which is being challenged through the present appeal, and not to any change in policy or standards that the appellant employer would have made or accepted. Had the appellant acted otherwise, it would be in violation of the direction, and thus the Code. The appellant stresses that the evidence demonstrates that "but for" the direction of HSO Jenkins, CBI's segregation unit could be operationally adjusted to one officer.

[82] That evidence is to the following:

- At the time of the work refusal and of the hearing into this matter, CBI's segregation unit remained a medium security segregation unit as the maximum security unit at the newly clustered CBI had yet to open. Consequently, the local deployment standards for CBI had not yet changed. They called for the deployment of one CO-2 and one Multi-Function Officer in the segregation unit during the evening shift. As per Annex B of Commissioner's Directive 004, in medium security segregation units such as the one at CBI, "after the meal has been provided and the inmate cleaners have completed their tasks, all inmates are secured in their cells. The Multi-Function Officer would be assigned to other security activities. The Officer who remains in the segregation unit will be responsible for conducting duties such as patrols to ensure the well-being of inmates and provide access to the mobile phone station if inmate phone calls have not been completed." The CBI Operational Adjustment plan in force at the time of the work refusal and this hearing allowed the operational adjustment of the Multi-Function Officer during the evening shift.

- With the opening of the new maximum security unit part of the newly clustered CBI, even with the segregation unit being consequently considered to be maximum security, officers working alone could still be required to provide telephone privileges to inmates where the population of CBI's segregation unit would fall below twenty inmates. Even with the new or anticipated local deployment standards being implemented as a result of such clustering, CD-004 would still allow management to operationally adjust officers assigned to the segregation unit, depending on the number of occupied cells. As set out in Annex B of CD-004, segregation units can be staffed with one officer during the evening shift regardless of their security classification. Maximum security segregation units with less than twenty occupied cells can be operationally adjusted to one officer, whereas medium security units with less than sixty such cells can also be operationally adjusted to one officer. In short, depending on certain circumstances, Multi-Function Officers assigned to both maximum and medium security segregation units can be redeployed after the meal during the evening shift, with the officer remaining in the segregation unit expected to "ensure the well-being of inmates and provide access to the mobile phone station".

[83] Given what precedes, the appellant submits that the evidence is clear, in that were it not for HSO Jenkins direction of June 6, 2012, CBI's segregation unit could be operationally adjusted to one officer during the evening shift, with the said lone officer being responsible for providing telephone privileges to inmates. There thus remains a live controversy between the parties which means that the first parameter of the test established by the Supreme Court of Canada in *Borowski*, the leading case on the question of mootness, cannot be met and the matter needs to be determined on the merits.

[84] As for consideration of the merits of the matter at hand, the appellant generally agrees with the respondent's contention that the presence of two officers would allow for a quicker response time on a post or range. However, the appellant's position is that "response time" does not represent a factor in assessing whether a "danger" exists as defined by the Code. For the appellant, what needs to be applied for this purpose is the four-part test enunciated by the Federal Court in *Pollard*.

[85] On the hazard analysis made by the respondent to demonstrate that a hazard exists when telephone privileges are provided to segregation inmates by an officer working alone, the appellant replies that such analysis is replete with errors and, on the central suggestion by the respondent regarding the capacity of an inmate to move, at the drop of an eye, from the back of the cell where ordered to stay in order to allow for the opening of the food slot by that lone officer, and thus essentially assault the officer, the appellant notes first that in a correctional environment that needs to be considered volatile and unpredictable, an inmate

can choose at any time to disobey an order to remain at the back of the cell, with such action carrying consequences such as the loss of phone privileges.

[86] On the actual sequence of movements, as described by the respondent, required to complete the provision of telephone privileges, the appellant is of the view that no hazard is created and explains as follows:

- "when you drop your eyes to insert and apply the key", "moving the padlock": the food slot remains closed and locked until an officer inserts and turns the key and pulls open the food slot. Consequently, even where an inmate would move from the back to the front of the cell when the officer drops momentarily his/her eyes for the purpose of inserting and applying the key to the lock, or moving the padlock where there is one, there would be no risk of contact with the officer as the food slot remains closed. Should this occur, the food slot would simply not be pulled open, would be relocked, the phone privileges withheld and the correctional manager informed.

- "moving the phone cart into position": when the phone cart is being moved into position, the food slot has already been opened. When moving the phone cart, an officer is not near enough to the food slot to allow direct contact between the latter and the inmate. Furthermore, the phone cart is always to be pushed into position in a manner that keeps the officer behind the cart and thus preventing the officer from being grabbed by an inmate reaching out. Should this occur, meaning that the inmate would not have abided by the instruction to remain at the back of the cell, this would cause telephone privileges to be withheld and the correctional manager notified.

- "pulling open the food slot": this is to be done with the officer maintaining a visual of the inmate, and the windows of the segregation cells are long and start at a height that makes it possible for all officers to look through them, regardless of stature, and thus in contradiction with the contention by Ms. Leeman that it is not possible for her because of her stature. Maintaining such visual of the inmate allows for immediate action on the part of the officer who then would push said slot closed and prevent any contact with the inmate.

[87] It is the appellant's submission that the respondent improperly formulates the hazard at issue in the present case when it claims that it is whether there is a risk of contact when the food slot is opened. It is the appellant's contention that what is really at issue is whether a danger exists when an officer working alone provides telephone privileges to inmates in segregation, and in this essentially quotes the wording used by HSO Jenkins in the latter's direction where he states that "the employer has failed to take sufficient steps to protect employees working alone when providing telephone privileges to inmates in the segregation

unit", thus instead circumventing the notion of direct contact between an officer and an inmate to the provision of telephone privileges while working alone. In this respect, the appellant is of the view that the evidence shows that where an officer working alone in CBI's segregation unit follows the proper procedure in providing telephone privileges, including as regards the actual opening of the food slot, no hazard exists.

[88] Finally, the appellant refutes that Ms. Leeman established a number of elements in her testimony. In this respect, it is the position of the appellant that the respondent has presented no evidence of hazard, since where proper procedures are followed, there is no hazard of direct contact with inmates. Furthermore, contrary to what is claimed by the respondent, the evidence is that the Health and Safety Committee never raised issues as regards operational adjustment in segregation and furthermore, the evidence presented by the appellant clearly establishes that there has been operational adjustment in segregation during the evening shift on numerous occasions, and that when this occurred, assistance to provide telephone privileges could be obtained from the correctional manager or another officer, if available failing which, the officers were effectively expected to act alone in the provision of said telephone privileges.

[89] The appellant holds the opinion that the training provided to all officers includes that they are to ensure their safety at all times, utilizing every means at their disposal, as per their Arrest and Control and Personal Safety refresher training. The appellant recognizes that officers in segregation have been assaulted by inmates but points out that, as per the evidence, this has only occurred in the course of feeding service, not when telephone privileges were being provided, with the explanation for this distinction having been one of the elements covered in the appellant's principal submissions. As a whole, the appellant offers the view that where an officer claims "danger" in refusing to work, it is not for that officer to analyze whether a hazard is present, such analysis needing to be left to the HSO and eventually to the appeals officer.

[90] Lastly, the appellant objects to the allegation by the respondent that the appellant was not forthcoming with document production or the evidence of local past practices, noting instead that its witness (Stacey) had described in detail that she had advised officers that assistance could be sought to provide said telephone privileges when working alone in segregation, and that officers and/or correctional managers, where available, would provide such assistance. The appellant also challenges the relevance of the document entered into evidence as A-6, said document showing that the segregation unit evening shift at CBI was to be manned by three officers, pointing out that testimony regarding said exhibit (Velichka) clearly explained that this was not yet in force since, as a "document for the future", it concerned what CBI's staffing was likely to be at an unknown future date, when the maximum security unit at CBI would finally open. It is the appellant's submission in this regard that the undersigned needs to

be concerned with the operations at the time of the work refusal, and those operations at CBI that were current at the time of the hearing, not what those would likely be at a future and unknown date.

Analysis

[91] As stated at the outset, at issue in the present appeal is a direction issued by HSO Jenkins pursuant to 145(2)(*a*) of the Code based on the latter's conclusion that a danger existed for a refusing employee relative to a work activity that the said employee was required to conduct in her work place. Subsection 146(1) of the Code provides that an employer, employee or trade union, in the case at hand the employer, that feels aggrieved by said direction may bring an appeal against such to an appeals officer, and as stated previously, this has been properly done in this case according to the requirements of the legislation.

[92] What takes on particular importance, particularly in the present case because of the issues raised herein by both parties, is subsection 146(2) of the same legislation which clearly spells out that the mere fact of bringing an appeal "does not operate as a stay of the direction", meaning that in the absence of such staying order, an appealed direction is required, under the legislation, to be complied with up to and until such appeal has been finally determined by an appeals officer.

[93] In the present case, the party subjected to the direction, which is the appellant employer, did not see fit to seek a stay of said direction and thus one must assume, and the contrary has not been claimed by any party, that the direction by HSO Jenkins that the employer, for all intents and purposes, cease to require that telephone privileges in the segregation unit at CBI be provided by an officer working alone, particularly during the evening shift where the refusing employee is concerned, has been complied and has continued to be complied with until this decision, all other circumstances and conditions as may have existed at the time of the refusal and hearing remaining equal.

[94] Stated differently, where, in the interim between the issuance of HSO Jenkins' direction and the actual hearing and decision by the undersigned, the appellant has ceased to require that telephone privileges be provided by a lone working officer during the evening shift, it is as a consequence of an order to do so by a health and safety officer and not through the voluntary exercise of its managerial authority, with compliance with such order being mandatory under the statute where its application is not stayed. Thus, *de facto*, telephone privileges have not been and continue to not be provided in the segregation unit of CBI on the evening shift by an officer working alone without the benefit of another officer acting in the capacity of observer.

[95] Before going further, there needs to be clarified a question relative to the definition of the issue at hand as there appears to not be a full meeting of minds by the parties on this. The direction, as formulated by HSO Jenkins, speaks of "an activity (that) constitutes a danger" and, more specifically, of needed "sufficient steps to protect employees working alone when providing telephone privileges to inmates in the segregation unit". All through the HSO's investigation report as well as the actual hearing by the undersigned and the submissions by the parties, the general description of what constitutes "danger" relative to working alone in the segregation unit when providing telephone privileges has been reduced to the hazard of direct contact with an inmate while executing such activity, said contact being in part associated with exposure to body fluids and/or biohazards, as appears evident when one reads the investigation report of HSO Jenkins giving great importance to the Job Hazard Analysis and the difference in probability weighted scores for such exposure between feeding of inmates and providing telephone privileges.

[96] The appellant has argued that what must be considered by the undersigned in determining whether there exists a danger is the entirety of the situation of an officer working alone in the segregation unit who is tasked with providing telephone privileges to inmates, thus whether there is a hazard of direct contact between a lone working officer and an inmate when providing such telephone privileges, therefore rendering the actual fact of the food slot being "opened" as only one part or element of the situation being considered, as opposed to the more specific definition of the hazard by the respondent of there being such hazard, this being a risk of direct contact with an inmate, solely "once the food slot is opened" for the purpose of telephone privileges.

[97] In this regard, one must note that there is clearly agreement between the parties, supported by the evidence, and certainly ascertained by the undersigned when taking a view of the segregation unit at CBI and witnessing a demonstration of the actual process of providing telephone privileges by the refusing employee herself in the presence of a number of witnesses representing both sides, that there is no direct contact between inmates and officers, even an officer working alone in the segregation unit on the evening shift, when the inmates are secured in their cell.

[98] In this regard, I take "secured" to mean, as the undersigned has witnessed, that the cell door is closed and locked, the food slot is closed and secured, and the opening (window) in each cell door that allows the duty officer(s) to look or observe inside the cell is protected by glass such that no contact of any kind is possible. At the same time, one cannot ignore the fact that the sole task that has been raised by refusing employee Leeman, considered by HSO Jenkins in the latter's investigation and also in the course of this appeal, has been the actual provision of telephone privileges to segregation unit inmates, and this begs the question of how is that task achieved, with the single and inescapable answer being, as established by HSO Jenkins, submitted and argued by the parties and ascertained by the undersigned when viewing the segregation

unit at CBI and the procedure followed by COs in executing that task, through the cell door food slot and consequently the opening of such.

[99] While I find this difference of expressing the potential hazard by the parties to be somewhat akin to a question of semantics, the fact remains that the evidence has shown and it has been argued and recognized by both sides that apart from the actual "opened" food slot, there is in place a process or procedure to be followed by an officer in opening said food slot for the purpose of providing telephone privileges, and in my opinion, one cannot separate the steps to be followed to manage to open the food slot from the state of "openness" of such.

[100] With what precedes in mind, it is important to note however that it is not solely the actual process of providing telephone privileges to segregation inmates at CBI, inclusive of the time within that process when the food slot in a cell door is actually opened or open, and thus in those circumstances the potential of being exposed to biohazards may be present, that has been claimed or found to constitute a danger, but rather the combination that this is done and occurs when there is only one officer at work in the segregation unit and this, during the evening shift. One only has to read the statement of refusal by Ms. Leeman ("I feel that my safety could be compromised by opening food slots in segregation when only one officer is present (operational adjustment)"), or the description by HSO Jenkins, in his direction, of the activity that constitutes a danger to conclude, in considering the issue at appeal, that one cannot dissociate the process of providing telephone privileges, the open status at some time during the process of the food slot being opened, from the fact that this occurs when an officer is working alone in the unit.

[101] That is the entirety of the issue to be considered and in this regard, one must also recognize that neither the refusing employee nor the HSO or even the parties in their submissions, have put forth that the same process could present a danger when an officer is not working alone, although the parties do offer differing perspectives as to the actual role to be played by the second officer, the appellant essentially describing this role as simply observer from somewhat afar whereas the respondent appears to view this observer role as one to be played in close proximity to the officer actually proceeding with providing access to the telephone.

[102] However, testimony at the hearing, photographic evidence of the segregation unit, of the cell doors and of the telephone carts, as well as the undersigned's own perception derived from his viewing the actual operation of providing said telephone privileges, would show that where a second officer would be present for or take part in said operation, in order to maintain a visual this would be solely in the capacity of observer standing proximate to the first officer and somewhat away from the cell door and window due to the placement of the food slot and the window and the presence of the primary officer involved

in the opening of such as well as the size, configuration and needed placement of the telephone cart, resulting, in my opinion, in a less than complete visual of the interior of the segregation cell. Any other role for this assisting or second officer would solely amount to one of "after the fact" intervention as opposed to one of taking part in prevention of incidents.

[103] Having said this, the respondent has first argued that this matter or, to be more specific, the issue of telephone privileges in segregation being provided by a lone working officer on the evening shift constituting a danger has become moot because of intervening events between the refusal and the appeal hearing, and that consequently, upon such finding on my part, the matter should be concluded without consideration of the merits and thus evidently with such conclusion, the finding of danger and the direction by HSO Jenkins should be allowed to stand. The arguments formulated by both sides have been reported in the summary of their submissions above and thus, in my opinion, it is not necessary to restate at length the various points the parties have made on this.

[104] Suffice it to say that the respondent's position on this issue can be summarized as being situational. By this I mean that it invokes the consequences of the direction by HSO Jenkins on the evening shift segregation staffing and phone provision privileges, the existence of what the respondent claims is an existing local staffing practice, local staffing and operational adjustment plans at time of refusal differing from those that had been put in effect as a result of Kinston Penitentiary closure and the CBI warden's decision that the segregation unit would work as a maximum security unit (5 day officers and 3 evening officers), the effect of changes to staffing levels in segregation evening shift announced in October 2013 that would mirror "future" or projected staffing levels in segregation when CBI would be fully operational as a clustered institution (min-med-max security levels) and the ensuing consistent necessary three officer staffing of segregation during the evening shift (allowing for the operational adjustment of the multi-function officer).

[105] As a whole, in addition to what may have been the staffing situation prior to Ms. Stacey's decision to adhere to the National Deployment Standards under CD-004, it is the position of the respondent that at least factually, *de facto,* between the time of the work refusal and the time of the appeal hearing and by extension the present decision, intervening events such as the reclassification of CBI, the October 2013 announcement of staffing changes in segregation that were also to constitute the framework for the "future" staffing levels of clustered CBI and the consistent three officer segregation staffing for the evening shift, the situation of a lone officer in segregation providing telephone privileges has not reoccurred nor, by implication, would it re-occur once all three units of clustered CBI would become operational impacting by necessity on the classification and the staffing of the segregation unit.

[106] As such, for the respondent there is no longer a concrete and tangible dispute nor the need for corrective action and the dispute has become academic since any future situation raising the same issue would have to be determined according to deployment standards that would be in place at that time, deployment standards that would need to reflect the new, local, personality of the institution.

[107] On the other hand, as regards the continued presence of a live controversy, the appellant has chosen to base its arguments on generic or formal unchanged national deployment standards as well as generic local deployment standards and local adjustment plan for CBI both at the time of the work refusal and direction as well as at the time of the appeal hearing. This results in giving little weight to the decision made by CBI warden in October 2013 to treat or work the segregation unit at CBI as a maximum security unit and thus, staffing wise, making use of the additional COs available as a result of Kingston Penitentiary closure pending the opening of the new maximum security unit of the newly designated clustered CBI which, given testimony received at the hearing, can be assumed to be operational when the present decision is being rendered.

[108] In short, the appellant maintains that notwithstanding the direction by HSO Jenkins, the actual "on the books" so to say legal framework that was in place at the time of the refusal to work had not changed at the time of the appeal hearing, this referring to both the National Deployment Standards as well as the local deployment standards for CBI, allowing for the provision of telephone privileges in segregation by an officer working alone in the case of the operational adjustment of the assigned multi-function officer, this in the case of a medium security classified segregation unit, which was the case for CBI's unit both at the time of the refusal and still at the time of the appeal hearing.

[109] Furthermore, giving credence to the evidence adduced at the hearing that where CBI had been newly designated as a clustered institution and that as a result of the opening and becoming operational of the new maximum security unit part of that clustered institution that, according to the testimonial evidence was to occur just a few weeks past the date of the hearing into the present matter and thus, one would expect and as implied, prior to the present decision being rendered, the segregation unit at CBI would become designated as maximum security, the appellant argued that regardless of the "new" local deployment standards for CBI that one could expect to be put in place (yet not formally adopted at time of hearing) as a result of these changes in designation and classification, Commissioner's Directive 004, as the generic framework generally applicable to all institutions and forming the base from which local deployment standards can be developed, would still allow management to decide to operationally adjust officers assigned to the segregation unit during the evening shift.

[110] This however would be dependent on the number of cells occupied at any given time, the number being less than 20 for maximum security segregation units (leaving two officers on post) and less than 60 for medium security units (leaving one officer on post). The evidence has established that with the adjunction of the cells that were part of the unit formerly known as the transition unit, CBI's segregation unit now comprises 43 cells. While no evidence was provided as to the average rate of occupancy of CBI's or any other segregation unit in any penal institution of any classification, given the generally publicized overpopulation of such institutions of which I can take notice, I am comfortable in formulating the opinion that the occurrence of such rate of occupancy as is mentioned above is likely remote, even if possible.

[111] The appellant's position on mootness is thus that the authority to operationally adjust the segregation unit to one officer has always been and remains present as per National Deployment Standards and that, were it not for the direction by HSO Jenkins, CBI's segregation unit could be operationally adjusted to one officer during the evening shift, that direction having been issued where the segregation unit and the institution were designated as medium security. The appellant thus opines that a live controversy remains between the parties and that as such, the matter is not moot and the undersigned must decide the matter on the merits.

[112] In *Borowski*, which remains the leading authority on the doctrine of mootness, the Supreme Court of Canada determined:

> […] The general principle applies when the decision of the court (or an appeals officer in the present case) will not have the effect of resolving some controversy **which affects or may affect** the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time **when the court is called upon to reach a decision**. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. […]
>
> [Emphasis added]

[113] Applying the words of the Court to the facts and circumstances of this case and to the central issue it raises which is whether, for refusing employee Leeman, there is (was) danger in having an officer working alone providing telephone privileges to inmates in CBI's segregation unit, I cannot avoid taking into consideration a number of facts. First, that prior to the events that caused the refusal, there appears to have existed a local practice of having a second officer present for the provision of telephone privileges during the evening shift.

[114] Second, since October 2013, CBI's segregation unit has functioned as a maximum security unit, at least factually if not formally, even though the actual change in classification may not have been formalized at the time. Third, that around the time of the hearing, changes had occurred or were about to occur relative to the status, classification and structure of CBI (and consequently its segregation unit), now a clustered institution that would see the unit classified as maximum security. Fourth, that in the case of Ms. Leeman, the consequence of HSO Jenkins' direction would have ensured that the provision of telephone privileges during the evening shift would not be conducted by a lone working officer, with compliance with such direction being mandatory under the Code until at least the time of the present decision and thus serving as bridge into the new CBI circumstances and expected local deployment standards that were, according to evidence from the appellant's own witnesses, to reflect what the warden had already directed in October 2013 to accommodate the "surplus" of officers available as a result of Kingston Penitentiary closure but who would be assigned to the new maximum security unit of the clustered institution and the Institution's single, maximum security segregation unit.

[115] This being said, one is led to conclude that since the direction that followed her work refusal until the time of this decision and, if one is to accept what was described at the hearing as the staffing levels that were projected, although not formalized at the time, for the evening shift of the maximum security classified segregation unit at the clustered CBI Institution, Ms. Leeman has not been, and may not be put in the situation of having to provide telephone privileges on the evening shift while working alone. And fifth, the apparent possibility to derogate from generic national deployment standards through the creation of local deployment standards and practices designed to satisfy local particular circumstances, as evidenced by the warden's October 2013 decision.

[116] This being said, what the appellant has opposed to the respondent's position does not take into account, in my opinion, the actual functioning and staffing, albeit not entirely in accordance with CD-004, of the segregation unit and simply offers potential situations regarding occupancy of the unit, situations that, in the absence of any supporting factual evidence, I find to be somewhat remote. It is therefore my conclusion that there really remains no live controversy or current tangible dispute between the parties regarding the circumstances of the present case and consequently, considering that this matter originated with the exercise of a right that is a personal employee right under the Code, I find that this appeal is moot.

[117] Having found the appeal to be moot, I must now determine, in applying the second stage of analysis spelled out by the Supreme Court in *Borowski*, whether I should exercise my discretion to decide the merits of the case despite the absence of a live controversy. In doing this, one must note that the Court indicated that one may be guided in the exercise of such discretion by considering the underlying rationale of the mootness doctrine, thus the existence

of an adversarial context, the concern for judicial economy and the need to be sensitive to the effectiveness or efficacy of "judicial" intervention, and consequently as a whole, I must decide whether there remains an issue that warrants consideration. In doing so, I must take into account the fact that where mootness is considered, it is the situation as it exists up to the point of decision and even beyond under certain circumstances, that must be considered while the determination of the merits, that is whether, as in this case, there was a "danger", as defined by the Code, such needs to be determined on the basis of the facts and circumstances as they were at the time of the work refusal and the conclusions arrived at by the health and safety officer.

[118] Furthermore, one must also not lose track of the fact that the right to refuse dangerous work is an individual right prescribed under subsection 128(1) of the Code, and thus is required to be determined on the basis of the facts, circumstances and consequently evidence that apply and concern specifically a refusing employee, with the eventual appeal decision on the merits needing to be rendered on the same basis.

[119] In this regard, the present case concerns a refusal to work by Ms. Leeman that occurred on May 31, 2012, with a subsequent direction issued by HSO Jenkins on June 6, 2012, upon conclusion of the latter's investigation, thus more than three years prior to the present decision. In the interim, the evidence adduced at the appeal hearing has shown that the circumstances relevant to the issue that existed at the time of the refusal no longer exist or have evolved sufficiently to warrant drawing the conclusion that the situation that existed at the time of the refusal is no longer the same. Deciding the merits would thus concern a situation that no longer exists or that is sufficiently different as to be not the same as the present days. That being the case, such decision on the merits would be of little consequence to the refusing employee as the evidence has shown that employee's present day work situation to be different from that which existed at the time of refusal.

[120] In addition, while a decision on the merits in this case might be of some interest relative to other similar cases, if any, because such decision would need to adhere to the specificity of the case circumstances, its impact on other potential cases would, in my opinion, be negligible as those other potential cases would need to be decided on their own specific circumstances and facts. In short then, it is my opinion that proceeding to determine the merits of the present case would serve little purpose, and whether it be the above determination that the appeal is moot or this present conclusion, this would not have the effect of preventing the issues that this case may raise from being considered in other matters where circumstances would so warrant. Consequently, I choose not to exercise my discretion to determine this appeal on the merits.

Decision

[121] For these reasons, the appeal is dismissed on the grounds of mootness.

Jean-Pierre Aubre
Appeals Officer