Occupational Health and Safety Tribunal Canada

Date: 2016-03-15
Case No.: 2013-40

Between:

City of Ottawa (OC Transpo), Appellant

and

Norman MacDuff, Respondent

and

Amalgamated Transit Union (ATU), Local 279, Intervenor

Indexed as: *City of Ottawa (OC Transpo)* v. *MacDuff*

Matter:	Appeal under subsection 146(1) of the C*anada Labour Code* of directions issued by a health and safety officer
Decision:	The directions are rescinded
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the appellant:	Ms. C. Katie Black & Ms. Stephanie V. Lewis, Caza Saikaley LLP
For the respondent:	Mr. Jon Funston
For the Intervenor:	Mr. John McLuckie, Jewitt McLuckie & Associates
Citation:	2016 OHSTC 2

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by the City of Ottawa ("OC Transpo" or "the employer") against three (3) directions issued on July 4, 2013 by Health and Safety Officer (HSO) Marc Béland following his investigation of a refusal to work made by the respondent. The appeal was filed with the Occupational Health and Safety Tribunal Canada (Tribunal) on July 26, 2013.

[2] One of HSO Béland's directions was issued under subsection 145(1) of the Code and relates to a contravention of paragraph 125(1)(*z.16*) of the Code and section 20.3 of the *Canada Occupational Health and Safety Regulations* (the Regulations), hereafter referred to as "the contravention direction". The other two directions were issued under paragraph 145(2)(*a*) of the Code (hereafter referred to as "the danger directions").

[3] The respondent, Mr. Norman MacDuff, is employed as a bus operator with the employer. He was assaulted by a customer passenger while at work on March 26, 2013 and sustained injuries as a result of the assault. He was off work until his return to partial duties, which was scheduled for June 4, 2013. At the commencement of his work shift on that date, he invoked his right to refuse to work on the basis that he considered his work place to be unsafe because the employer had not taken appropriate measures to prevent the recurrence of assaults similar to the one he suffered on March 26, 2013.

[4] The directions under appeal read as follows:

1. <u>The "contravention direction" under subsection 145(1)</u>

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER
> SUBSECTION 145(1)
>
> On June 4, 2013, the undersigned health and safety officer conducted an investigation in the work place operated by City of Ottawa, being an employer subject to the *Canada Labour Code*, Part II, at 1500 St-Laurent, Ottawa, Ontario, K1G 0Z8, the said work place being sometimes known as OC Transpo - St-Laurent Garage.
>
> The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> **No. / No: 1**
>
> Paragraph 125.(1) (z.16) - *Canada Labour Code* Part II,

Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

take the prescribed steps to prevent and protect against violence in the work place;

Section 20.3 - Canada Occupational Health & Safety Regulations

The employer shall develop and post at a place accessible to all employees a work place violence prevention policy setting out, among other things, the following obligations of the employer:

(a) to provide a safe, healthy and violence-free work place;

(b) to dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it;

(c) to communicate to its employees information in its possession about factors contributing to work place violence; and

(d) to assist employees who have been exposed to work place violence.

The employer has failed to implement a work place violence prevention program, as prescribed.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than August 1st, 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, within the time frame specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Ottawa On, this 4th day of July, 2013.

[signed]
Marc Béland
Health and Safety Officer
[…]

2. The "danger directions":

(i) To the employer under paragraph 145(2)(*a*):

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER
PARAGRAPH 145(2)(*a*)

On June 5, 2013, the undersigned health and safety officer conducted an investigation following a refusal to work made by Mr. N. Mac Duff in the work place operated by City of Ottawa, being an employer subject to the *Canada Labour Code*, Part II, at 1500 St-Laurent, Ottawa, Ontario, K1G 0Z8, the said work place being sometimes known as OC Transpo -
St-Laurent garage.

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

It is dangerous for Mr. Mac Duff, the employee who made the refusal to work, to perform his bus operator duties where he is exposed to members of the public, as a lack of systematic controls exist to prevent a work place violence-related injury to him similar to the one he suffered on March 26, 2013.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger no later than August 1st, 2013.

Issued at Ottawa On, this 4th day of July, 2103.

[signed]
Marc Béland
Health and Safety Officer
[…]

(ii) To the respondent under subsection 145(2.1):

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO AN EMPLOYEE UNDER
SUBSECTION 145(2.1)

On June 4, 2013, the undersigned health and safety officer conducted an investigation following a refusal to work made by Norman Mac Duff in the work place operated by City of Ottawa, being an employer subject to the *Canada Labour Code*, Part II, at 1500 St. Laurent Blvd., Ottawa,

> Ontario, K1G 0Z8, the said work place being sometimes known as OC Transpo - St-Laurent garage.
>
> The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:
>
> **It is dangerous for Mr. Mac Duff, the employee who made the refusal to work, to perform his bus operator duties where he is exposed to members of the public, as a lack of systematic controls exist to prevent a work place violence-related injury to him similar to the one he suffered on March 26, 2013.**
>
> Therefore, you are HEREBY DIRECTED, pursuant to subsection145(2.1) of the *Canada Labour Code*, Part II, to discontinue the use , operation or activity until your employer has complied with the directions issued under paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II to alter the activity that constitutes the danger.
>
> Issued at Ottawa On, this 4th day of July, 2013.
>
> [signed]
> Marc Béland
> Health and Safety Officer
> […]

[5] Since the two "danger directions" essentially mirror each other and have the same foundation, I will treat them as one for the purpose of the present decision.

Events leading up to the hearing of the appeal

[6] The appellant sought and obtained a stay of one of the two "danger directions", which enjoined the appellant to take appropriate measures to address the activity constituting a danger to Mr. MacDuff, namely to correct the "lack of systematic controls to prevent a work place violence-related injury to him similar to the one he suffered on March 26, 2013". The appeals officer's decision granting the stay is cited as C*ity of Ottawa (OC Transpo)* v. *Norman MacDuff*, 2013 OHSTC 27. The stay was ordered to be effective until the final disposition of the appeal on its merits.

[7] On October 31, 2013, Appeals Officer McDermott granted the Amalgamated Transit Union (ATU), Local 279's application for intervenor status. The decision to grant intervenor status to the ATU, Local 279 specified its participatory rights as follows: it may cross-examine witnesses called by the parties and it may make final submissions.

[8] The appeal was heard in Ottawa on the following dates in 2015: April 7 to 10, May 12 and 20, June 8 to 10. The scheduling of the hearing presented some difficulties as a result of a change of counsel for the appellant, whose counsel

originally assigned to this appeal experienced health issues, and of the conflicting availability of the three parties' representatives.

[9] The scope of the appeal, the extent of my jurisdiction and the appropriate framing of the issues raised by the present appeal arose a number of times in the course of the pre-hearing disclosure procedures and during the hearing. Those questions arose in relation to the introduction of evidence pertaining to facts that were subsequent to the circumstances of the refusal, or seemingly unrelated to those circumstances. I felt compelled at the parties' insistence to issue a ruling on this matter. My ruling and the reasons for it are set out further in the present decision.

[10] Shortly before the hearing, the appellant informed the Tribunal and the parties that it would be seeking a confidentiality order regarding certain aspects of the evidence, namely facts related to special constables employed by OC Transpo. The appellant followed up with the presentation of a motion to have certain portions of the evidence held *in camera*, because of their possible implications on the security of the transit system and the safety of employees and passengers. After hearing the parties on the matter, I granted the motion and the confidentiality order and rendered a written interlocutory decision to that effect. My decision is attached to the present reasons as an Appendix.

[11] I was apprised on the third day of the hearing that Mr. MacDuff had apparently recorded the early portion of the hearing. Mr. MacDuff's acknowledged that he had recorded the hearing and that he had stopped recording after the first day, on the advice of his representative. I expressed concern for this conduct as I had not authorized the recording of the proceedings. I issued a verbal order to Mr. MacDuff to delete any such recording, which he committed to do. This confirms my order.

Background

[12] The appeal arises out of the respondent's refusal to perform his duties as a bus operator for OC Transpo on June 4, 2013, pursuant to section 128 of the Code. As explained by Mr. Troy Charter, the Assistant General Manager, Transit Operations for OC Transpo, OC Transpo is a large and complex transit agency that provides municipal transit service to the residents of Ottawa and visiting public. It is part of the structure of the City of Ottawa, who is the employer under the applicable collective agreement.

[13] HSO Béland refers to the reasons for such refusal as being set out in a document which Mr. MacDuff attached to an email he sent to his supervisor, Ms. Meagan Kaye, Section Head, Employee Management, on June 3, 2013, the day before his scheduled return to his bus operator duties. The email reads as follows:

> Good afternoon Mrs Kaye:

> As you are aware, I was assaulted by a customer of your company on 26/03/2013.
> I would like to make you aware that I hold my employer at fault for this incident/assault. The reason I do so, is that neither a Job Hazard Analysis (JHA) or a Hazard Prevention Programme (HPP) are in place to manage work place injuries. All federally regulated companies had been manadated (*sic*), in 2005, by the Federal Government to put these in place. Had one been in place at OC Transpo, the process would have indicated that the steps the company had taken, (or not taken), over the last 7 years were inadequate in keeping myself and other employees safe from assaults and any other injuries. The company was mandated to have a JHA & HPP to be completed by 30/01/2013. To date only a portion has been completed (2 job classifications). How many more employees will have to be hurt in the same way before the company takes action to protect us?
>
> Norman MacDuff

[14] I note that the email's subject description is: JHA (Job Hazard Assessment) and HPP (Hazard Prevention Program). On the morning of June 4, 2013, Mr. MacDuff invoked his right to refuse to work. As related in the evidence adduced at the hearing, he advised his employer that he had unsafe working conditions because the employer's customers were assaulting people and himself. He indicated that the protective measures the employer was referring to as having been taken (such as the Red Line button, Security Codes, the assistance of special constables and Transit Supervisors, all of which will be further explained later in these reasons), were reactive and did not prevent assaults from happening.

[15] With a view to addressing the respondent's concerns, the employer apparently offered Mr. MacDuff a number of options in the hope of convincing him to carry out his duties that day. These included a change of route from the one he was assigned to, a different bus model, and having a special constable ride on his bus for the duration of his shift.

[16] As the parties were unable to resolve the dispute as to whether Mr. MacDuff was exposed to a danger by taking on his duties as bus operator that morning, Ms. Marilyn St-Pierre, Superintendent Transit Operations, contacted Human Resources and Skills Development Canada (as it was named then) to have a health and safety officer investigate the refusal and make a determination on whether a danger existed for Mr. MacDuff.

[17] As a result, HSO Béland was assigned to conduct an investigation into the circumstances of the refusal, as prescribed by section 129 of the Code. As he sets out in his report dated February 6, 2014, HSO Béland conducted his investigation on June 5, 2013. He visited the respondent's work place located at 1500 St-Laurent Blvd. in Ottawa and met with Mr. MacDuff, Mr. Tony Viola, employee member of the Health and Safety Committee, Ms. Kaye,

Ms. St-Pierre and Ms. Donna-Lynn Ahee, Safety Coordinator for OC Transpo, in order to gather the facts that led to the refusal.

[18] Subsequent to that meeting, he also took cognizance of a number of documents provided by the employer at his request. HSO Béland summarizes his investigation in his report by simply referring to those documents and expressing a view on whether the documents satisfy the requirements of the Code and the Regulations insofar as the employer's obligations relating to hazard prevention, violence prevention, training of employees, and whether they constitute appropriate preventative measures to guard against the risk of bus operators being assaulted by customer passengers.

[19] After setting out those considerations, HSO Béland concluded that Mr. MacDuff was exposed to a danger and issued the two "danger directions" referenced above. He also issued the "contravention direction", enjoining the employer to cease being in contravention of paragraph 125(1)(*z.16*) of the Code and section 20.3 of the Regulations.

Part I - Preliminary Issue: Scope of the Appeal

[20] Before identifying the issues raised by the present appeal, I will deal with a question that had been discussed at various points of the hearing and during the pre-hearing stage of the process, of the scope of the appeal and what should properly be the purpose and focus of my inquiry.

[21] More specifically, on May 12, 2015, the day before the resumption of the hearing which had been adjourned on April 10, 2015, the appellant's counsel filed unsolicited written submissions with the Tribunal relating to the scope of the hearing, the extent of my jurisdiction and the definition of danger that ought to apply to this appeal, in light of amendments recently brought to the Code and proclaimed in force on October 31, 2014.

[22] As previously noted, although my inclination was to take this question under reserve and dispose of it in my final reasons, I felt compelled to make a formal ruling on this matter in order to ensure that the parties were properly apprised of my understanding of the scope of the appeal. The nature of the evidence to be adduced by the appellant and the respondent, and the extent of the intervenor's cross-examination, were obviously dependant on the scope I was prepared to give to my inquiry under section 146.1 of the Code, and on which version of the definition of "danger" was to apply. Resolving those questions was indeed critical for the parties to know where they stood regarding the presentation of their case and their evidence.

[23] The respondent and intervenor were given an opportunity to respond in writing to the appellant's submissions and I endeavoured to issue an interlocutory ruling quickly, with reasons to follow, so as to allow the hearing to continue

without further delays. I informed the parties of my ruling on May 29, 2015, in the following terms:

> This is further to the Appellant's submissions presented to the Tribunal on May 12, 2015 with respect to the "jurisdiction" of the appeal's officer in the present proceedings.
>
> At the hearing held on May 13, 2015, all parties stressed the need for clarity in relation to the questions raised by the Appellant in its submissions in order to ensure a fair hearing and allow the parties the opportunity to fully state their case and present their evidence in relation to the actual issues that I will be considering on the merits of the appeal. More particularly, the parties stressed the importance of clarifying the scope of the appeal and which statutory definition of "danger" was applicable to the appeal, and the need for a formal determination on these matters at this stage of the proceedings.
>
> Accordingly, after considering the parties' submissions and authorities, my decision on the questions raised by the Appellant is as follows:
>
> The definition of "danger" that is applicable to the present proceedings is the definition as it read in section 122 of the *Code* at the time of the refusal, i.e. June 4, 2013.
>
> The questions of whether the "alleged danger has been remedied" since the refusal as a result of measures subsequently taken by the Appellant, or "no longer exists" as a result, or whether the Appellant has "complied with the direction", do not fall within the scope of the appeal. This does not mean that facts that are subsequent to June 4, 2013 are *ipso facto* inadmissible. Such facts could be admitted, and properly weighed, if they are presented for the purpose of making determinations on the issues that are central to the appeal, namely:
>
> - regarding the direction issued under subsection 145(1) of the *Code*, whether the Appellant was in contravention of the *Code* by allegedly not having in place a Violence Prevention Policy at the time of the direction, and whether the direction issued for that reason is well-founded in the circumstances that led to its issuance;
>
> - regarding the two "danger" directions issued under paragraph 145(2) of the *Code*, whether on June 4, 2013 there was a hazard, condition or activity that presented a "danger" to the respondent within the meaning of the *Code* as interpreted by the jurisprudence, including whether the control measures allegedly in place at the time were adequate in light of the *Code*, and whether the directions issued in those

> circumstances ought to be rescinded, varied or confirmed.
>
> The issues raised by the appeal are not moot, as there is still a live controversy on these issues.
>
> As I informed the parties, reasons in support of the present interlocutory ruling will be provided in the decision to be rendered on the merits of the appeal.

[24] I will now set out the parties' submissions and the reasons for my ruling.

(a) Appellant's submissions

[25] The appellant's submissions may be summarized as follows. The appellant submits that the appeals officer has the jurisdiction to evaluate whether a danger existed on June 4, 2013, and, if so, whether the alleged danger has since been rectified by the employer. Consequently, evidence of facts and employer initiatives that occurred since the day of the refusal are entirely relevant to the appeal.

[26] The appellant refers to subsection 145.1(2) of the Code which gives the appeals officer all the powers of investigation of the HSO. As such, the appeals officer may investigate the work refusal "afresh" in the same way as the HSO.

[27] The appellant submits that the appeal process is a *de novo* proceeding, which authorizes the appeals officer to "review" the matter anew and to receive any evidence, irrespective of whether such would have been available to the HSO (*Douglas Martin et al.* v. *Attorney General of Canada,* 2005 FCA 156 (*Martin*); *Brink's Canada Limited* v. *La Croix, Stewart and Faulds,* 2015 OHSTC 2 (*Brink's*); *Vancouver Wharves Ltd* v. *Attorney General of Canada,* 1998 CarswellNat 4366; *Bell Canada* v. *Labour Canada,* 1984 CarswellNat 758 (*Bell Canada*)). The appellant reiterates that Federal Court jurisprudence establishes that new developments can be relied upon in a *de novo* hearing before an appeals officer, provided that they are related to the circumstances that gave rise to the refusal to work or the issuance of the direction under appeal.

[28] Regarding the definition of danger, the appellant submits that the current and arguably more restrictive definition of danger, as amended on October 31, 2014, should apply in this case, citing section 10, paragraphs 44(*c*) and (*h*) of the *Interpretation Act,* R.S.C. 1985, c.I-21.

[29] The appellant further argues that the work refusal has now become moot as the employer, "in good faith and out of an abundance of caution", has taken steps to make OC Transpo an even safer work environment than it was previously. The appellant stresses that appeals officers have regularly made findings with regard to new evidence in the context of determining whether an issue was moot (*PSAC* v. *Canada (Treasury Board – Canada Border Services Agency),* 2011 PSLRB 130; *Babb* v. *Canada Revenue Agency,* 2010 OHSTC 4 (*Babb*); *Lelonde and*

Correctional Service of Canada, Appeals Officer Decision No. 07-026; *Ouellette* v. *SaskTel,* 2010 OHSTC 13.)

[30] The appellant submits that the appeals officer can determine whether a danger exists and that such language is not referential to a past event: it speaks to the present situation that the employee must face upon his or her return to work. Should the appeals officer find that there was, in fact, a danger and confirm the finding of the HSO, then the employer would have to take steps to remedy that danger. In such a case, the requisite steps will already have been taken by the employer, says the appellant. Therefore, the employer could be left with a finding of danger when the danger no longer exists and no individual is seized with determining whether the danger has been rectified.

[31] In the appellant's view, pursuant to subsection 146.1(4) it is the appeals officer and not the HSO that would need to determine whether the employer has complied with a direction, once issued. Regardless of which definition "danger" is found to be applicable, the appellant submits that the inquiry under section 146.1 of the Code is a "forward-looking" process and as such, the appeals officer must take into consideration the situation as it exists at the time of his inquiry (*Correctional Service Canada (CSC) Millhaven Institution* and *Union of Canadian Correctional Officers,* Appeals Officer Decision No.: 06-026 (2006), overturned by *Union of Canadian Correctional Officers* v. *Canada (Attorney General*), 2008 FC 542) *(UCCO-SACC-CSN).*

(b) Respondent's submissions

[32] The respondent submits that the purpose of the hearing, as stated in section 146 of the Code, is to inquire into the particular circumstances leading to the safety officer's decision to issue the Direction, and to confirm, vary or rescind the said direction.

[33] In response to the employer's assertions that any issue relating to assaults has been corrected by measures taken by the employer, the respondent submits since the occurrence of assaults remains constant and there is nothing that the employer has presented thus far that has been approved or even reviewed by Employment and Social Development Canada (ESDC), the conditions and the situation at OC Transpo has not significantly changed with regards to the supposed new Violence Prevention Policy (VPP) preventing assaults. None of the alleged program or policy changes presumably taken have been reviewed or approved by ESDC.

[34] The respondent refers to statements I made in the course of pre-hearing case management teleconferences, pointing to the scope of the appeal as being related to the circumstances that prevailed during the period of the refusal and directions. He also points out the appellant's objections to the disclosure of documentation related to the development of a new VPP as being irrelevant to the case as being outside

the scope of the appeal. He argues that the appellant cannot have it both ways by now relying on that information in support of its argument.

[35] Regarding the definition of danger, the respondent submits that the previous version of the definition applies, given the transitional provisions set out in Bill C-4, subsection 199(1).

(c) Intervenor's submissions

[36] The Intervenor sees three distinct issues raised by the appellant's argument: (i) Is the scope of my jurisdiction limited to a determination of strictly whether or not a danger for the purposes of the Code existed with respect to Mr. MacDuff on June 4, 2013 or can he consider whether any danger that may have existed has since been remedied by the City of Ottawa; (ii) Is the definition of danger applicable to this appeal proceeding the one in force at the time of the work refusal or should the definition of danger instead be the more restrictive definition brought about by the *Economic Action Plan 2013 Act, No.2,* which came into force on October 31, 2014; and (iii) has this appeal in some way been rendered moot.

[37] The intervenor takes no position on the first issue.

[38] The intervenor submits that the definition of danger that applies to the present proceedings must be that in place at the time of the work refusal. This is consistent with
the transitional provisions set out at subsection 199(1) of the *Economic Action Plan 2013 Act, No.2.* Even were these transitional provisions not present, it is the intervenor's view that the former definition of danger would still apply. What the employer is arguing is not simply that the definition of danger has changed but rather that a work refusal made under the former definition and an appeal perfected under that former definition must now be determined on the basis of a new and significantly modified definition. In other words, the employer seeks to apply the October 2014 changes to the Code retroactively to June of 2013. A clear statement of legislative intent to have the language apply retroactively is needed for this to occur.

[39] With respect to the third issue, namely whether or not the appeal proceedings are moot, the intervenor states that no finding of mootness can be made at this stage of the proceedings. The City of Ottawa's assertion that the appeal has become moot as it has, "in good faith and out of an abundance of caution, taken steps to make OC Transpo an even safer work environment than it was previously", bases itself on a series of factual assertions that have not yet been found to be valid by the Tribunal, nor have they been conceded in any way by either the respondent or the intervenor.

(d) Appellant's reply

[40] In summary, the appellant reiterates that a hearing *de novo* requires the Tribunal to make a "fresh determination" of the issues before it, and in doing so, it has all the powers of an HSO and may hear fresh evidence irrespective of whether that evidence was or could have been available to the HSO conducting the investigation. The appeals officer cannot send the matter back to the Labour Program of ESDC for further examination (*UCCO-SACC-CSN*; *Maritime Employers Assn. v. Murray*, 1991 CarswellNat 847*)*. The legal obligation on the employer to rectify a danger necessarily requires that the Tribunal evaluate the impacts of the steps taken by the City of Ottawa should a finding of danger be made.

[41] The appellant concedes that the transitional provision of the *Economic Action Plan 2013 Act, No.2,* applies to this appeal proceeding.

Reasons

The applicable definition of "danger"

[42] The first issue I dealt with in my interlocutory ruling related to the applicable definition of "danger". I ruled that the definition of danger that applies to the present proceedings is the definition as it read in section 122 of the Code at the time of the refusal, i.e. June 4, 2013.

[43] Subsection 199(1) of the *Economic Action Plan 2013 Act, No.2* reads as follows:

> **199. (1)** The *Canada Labour Code*, as it read immediately before the coming into force of this section, applies to
>
> > (*a*) any proceedings—commenced before that coming into force—with respect to which a health and safety officer or a regional health and safety officer may exercise powers or perform duties or functions under Part II of that Act, as it read immediately before that coming into force; and
> >
> > (*b)* any procedure—commenced before that coming into force—relating to a refusal to work commenced under sections 128 to 129 of that Act, as it read immediately before that coming into force.

[44] This transitional provision makes it obvious that Parliament intended the former definition of danger to continue to apply to existing procedures and proceedings such as the present appeal, in spite of the amendments coming into force on October 31, 2014. The appellant conceded that point in its reply

submissions. Accordingly, there is no need for further justification of my conclusion.

The purpose of the inquiry under section 146.1 of the Code

[45] Secondly, I have dismissed the employer's argument regarding the purpose and scope of the inquiry conducted under section 146.1 of the Code. That section reads as follows:

> 146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing**.**
>
> […]
>
> 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> (a) vary, rescind or confirm the decision or direction; and
>
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
>
> […]
>
> [Underlining added]

[46] Section 146.1 mandates the appeals officer to inquire, without delay and in a summary way, into the circumstances of the decision or direction, and the reasons for it. The foundation of the appellant's contention is based on the notion that appeals officer conduct a *de novo* process under 146.1. The appellant has cited caselaw that recognize the authority, if not the duty, of the appeals officer to hear and consider evidence that the HSO did not have before him at the time of the investigation and when the direction was issued. I do not disagree with that contention. I agree that the inquiry under 146.1 is a *de novo* process, and there is a considerable volume of authorities supporting this point. However, with respect, I am of the view that the appellant misconstrues the meaning of a *de novo* inquiry in the context of 146.1 of the Code.

[47] First, the plain language of 146.1 sets out an appeal procedure into the circumstances that led an HSO to form certain conclusions and issue a direction. The inquiry conducted under that section must necessarily relate to those circumstances, not to circumstances as they exist at the time of the inquiry - in our case, more than two years later. It would no longer be an appeal, but an independent inquiry into entirely new circumstances. This is not what the Code envisages in my view.

[48] The principle emerging from the caselaw, as I understand it, is that the appeals officer is not bound by the evidence gathered by the HSO, or by his conclusions on the facts. Fresh evidence may be contemporaneous to the refusal or direction, or it may be subsequent to the direction. However, the purpose for which the fresh evidence may be admitted is not for making determinations on the circumstances as they exist at the time of the appeals officer's inquiry. The purpose of the "fresh" evidence must relate to the circumstances that were investigated by the HSO. Its purpose must be to shed light on the circumstances and factual context leading to the issuance of the direction.

[49] An example of this can be found in *UCCO-SACC-CSN*, cited by the appellant. The Court found that the appeals officer had erred by not considering evidence brought by correctional officers of facts subsequent to the issuance of the direction, namely evidence of continued exposure to second hand smoke in correctional institutions. Such evidence did not purport to re-examine afresh the situation as it existed at the time of the inquiry. It was rather accepted for the purpose of assessing the efficiency of the measures the employer had put in place at the time of the HSO's direction, to address the danger - a smoking ban policy - and which the employer considered adequate to remedy the alleged danger and minimize the risk to employees' health. Clearly in this case, the purpose for the introduction of the subsequent evidence was, as the Court puts it, for assessing the efficiency of the measure that the employer claimed to have had in place at the time of the investigation. I do not read that judgement as providing authority for the appeals officer to determine the state of the matter at the time of the inquiry, or make a determination as to whether the employer is in compliance with the directions at the time of his inquiry, as sought by the appellant. This in my view is clearly outside the scope of the inquiry under 146.1 of the Code.

[50] The Court's findings in fact provide support to the observations that I made as part of my May 29, 2015 ruling.

[51] The perspective advanced by the appellant changes an appeal inquiry into a completely new investigation to be conducted at the time of the hearing. In my view such an approach would lose the fundament feature of the appellate jurisdiction that is contemplated by the Code and would render the circumstances leading to the original direction virtually irrelevant. Also, in practical terms, as it is common for an appeal to be heard quite some time after the original decision or direction, and recognizing that safety and health issues are not static, there would hardly be finality in the process, as the appellant's approach would be an incentive for the parties to bring up new facts, new developments, new policies occurring up to - or even during - the hearing. The appeal process would risk becoming interminable, and this is not in my view how Parliament intended the Code to operate.

Whether the employer is in compliance

[52] Regarding the appellant's submission that my inquiry should look into the extent to which the employer has complied with the directions, I say again that it is an incorrect understanding of the appeal process. A direction, once issued, is legally binding and must be complied with in spite of an appeal being filed, unless a stay is obtained pursuant to subsection 146(2) of the Code. Stays are only granted exceptionally, in cases where the appellant satisfies a number of fairly stringent criteria. In the vast majority of cases, the employer will have complied with the direction when the appeal is heard. The argument that the appeals officer's task is to look into and assess whether the employer has complied with the direction completely changes the nature of the appeal process, which is to determine whether the direction was correctly issued in the first place.

[53] The Code deals with compliance issues through its penal provisions. In other words, it does not belong to the appeals officer to determine whether the employer has complied with a direction or to assess whether the corrective measures are adequate or whether the workplace is safe at the time of the inquiry. That responsibility is vested with health and safety officers of the Labour Program - now with the Minister under the amended Code - as part of their enforcement continuum. Failure to comply with a direction constitutes an offence under the Code. The extent to which an employer has met its obligation to satisfy a direction will be assessed by Labour Program officials in the context of determining whether a prosecution is warranted. The only role of the appeal's officer in this scheme is to determine whether the direction is well-founded, and in doing so may vary, rescind or confirm it, no more no less.

[54] The above description of the scheme as I understand it does not offend the judgment of the Federal Court of Appeal in *Maritime Employers' Assn.,* cited by the appellant. In that case, the Court quashed an order of a then "regional safety officer" purporting to "refer the matter back to the HSO for him to verify whether the fork-lift trucks in question were still too noisy", and to take the necessary action to ensure that the employer was in compliance with the direction. The Court found no authority in section 146 to support that order.

[55] My reference to the interplay between the inspectorate/enforcement function and the appeals officer process does not imply a suggestion that the matter be referred back to the HSO, as the regional safety officer erroneously did in *Maritime Employers' Assn*. If anything, that judgement supports the view that the question of whether the employer is in compliance or has removed the danger after the direction is issued simply does not fall within the province of the appeals officer.

[56] The appellant also invokes the powers set out in subsection 145.1(2) in support of its position. Subsection 145.1(2), as it read at the time of the direction, is as follows:

> **145.1** (2) For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.
>
> [Underlining added]

[57] The appellant cites the *Martin* judgement in support of its thesis. In that decision the Federal Court of Appeal ruled that the appeals officer had erred when declaring himself without jurisdiction to substitute a "danger direction" (subsection 145(2)) by a "contravention direction" (subsection 145(1)). The Court held that subsection 145.1(2) empowered the appeals officer to do so, should the evidence placed before him justify it. I do not read that judgement to mean that subsection 145.1(2) empowers the appeals officer to examine the situation as it exists at the time of his inquiry or whether the appellant has complied with the direction, as the appellant submits. The discussion in *Martin* is premised, in my view, on the examination of the circumstances leading to the issuance of the direction and Rothstein, J.'s comments should be understood in that spirit:

> [27] Under section 146.1 [as enacted *idem*], an appeals officer may "vary, rescind or confirm" [as enacted *idem*] a direction of a health and safety officer. If a health and safety officer has made a direction under subsection 145(2) that the appeals officer considers inappropriate, he may rescind that direction. However, because he now has all the powers of a health and safety officer, he may also vary it to provide for what he considers the health and safety officer should have directed.
>
> [28] An appeal before an appeals officer is *de novo*. Under section 146.2 [as enacted *idem*], the appeals officer may summon and enforce the attendance of witnesses, receive and accept any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).
>
> [Underlining added]

[58] Therefore, I do not share the appellant's view that subsection 145.1(2) supports its position. Those powers are an accessory to the primary jurisdiction of the appeals officer. The opening words of that section, "for the purposes of sections 146 to 146.5", support this view. The primary purpose and scope of the appeals officer's inquiry is framed in section 146.1. Exercising this primary jurisdiction in a *de novo* manner means that the appeals officer must look at the case afresh from the same perspective of the health and safety officer, and in doing so, may issue any ruling that the HSO could have issued including rulings of contravention of the Code (subsection 145(1)) when the original direction is based on subsection 145(2).

[59] I share the view of the appeals officer in *Canadian Union of Postal Workers* v. *Canada Post Corporation*, 2013 OHSTC 23, as to the proper meaning of the Court's words in paragraphs 27 and 28 of *Martin*:

> [41] Having thoroughly considered the parties' submissions, I am of the opinion that if an appeals officer finds that the employer is or was in contravention of the Code at the time of the HSO's investigation, the appeals officer may vary the direction issued by the HSO to provide for what, in the appeals officer's opinion, the HSO should have directed. This, in my view, means that an appeals officer may vary a direction to include other contraventions that the appeals officer determines should have been identified in the context of the investigation for correction in the original direction issued by the HSO.
>
> [Underlining added]

[60] There is arguably an exception to this principle in situations where the appeal is lodged under subsection 129(7) of the Code, against a decision that a danger does not exist. In those cases, the appeals officer's task in the inquiry under section 146.1 is to determine whether the HSO was correct in finding that a danger did not exist in the circumstances of the refusal. In the event that the appeals officer finds that the HSO was incorrect and that a danger existed, then the Code empowers the appeals officer to exercise his/her remedial powers and issue "any direction that the appeals officer considers appropriate" (paragraph 146.1(1)(*b*) of the Code). The appeals officer exercises such a power, by necessary implication, after his inquiry is finished. A direction issued in that context can only be prospective. In order to exercise such remedial power in a pragmatic and purposeful manner, it makes sense to question whether a direction is still warranted at the time of its issuance by the appeals officer. That direction is in fact an original direction. It only makes sense then for an appeals officer, in considering whether it is appropriate that a direction be issued in that situation, to take into account whether the dangerous situation has been corrected or has disappeared.

Caselaw distinguished

[61] The appellant has cited a number of decisions purporting to support its legal position. In my view, they can be distinguished on a number of grounds. I do not find it necessary to review each decision cited, but will simply highlight some of the distinctions that should be made. For example in *Brink's*, the appeals officer was asked to rule on a preliminary motion whereby the respondent union was seeking a dismissal of the appeals on the sole ground that the employer had not complied with various provisions of the Code before making the changes to its operations that had led an HSO to issue a danger direction to the employer. In my view, the motion raised the same question as in *Martin*, whether an appeals officer seized with reviewing a danger direction could also issue a "contravention direction". Interestingly though, the appeals officer states as follows at paragraph 20:

> [20] Proper comprehension of the jurisdiction of an appeals officer is essential to arriving at a conclusion in this instance. As appeals officer, I sit in review of a decision or direction by a health and safety officer, as the case may be, and depending on whether the conclusion arrived at by said officer is characterized as a "decision" pursuant to subsection 129(7) of the Code or a "direction" made pursuant to subsection 145(1) of the Code in the case of a finding of "contravention" or pursuant to subsection 145(2) of the Code in the case of a finding of "danger" as is the case here. Subsection 146.1(1) uses specific terminology to indicate the limits of what is submitted to an appeals officer. It states in mandatory form ("shall") that the appeals officer is to "inquire into the circumstances of the decision or direction […] and the reasons for it." (Underlining added) On this alone, I find that it is not within the jurisdiction of an appeals officer to seize oneself or be seized for determination of a matter or issue that has not initially been the object of a determination by a health and safety officer. In my opinion, the wording of the Code alone is sufficient to validate the proposition that an appeals officer is seized with inquiring into the specific directions issued in the specific appeals of which he is seized.
>
> [Underlining added]

[62] Those statements suggest that the scope of the appeal is defined by the direction under appeal and must relate to the circumstances of the direction as they existed then, and not on peripheral facts or circumstances prevailing at the time of the hearing of the appeal.

[63] The appellant also draws my attention to paragraphs 27 and 28 of the *Bell Canada* case before the Canada Labour Relations Board (CLRB) in 1984, which was then exercising similar functions as those of the appeals officer under the current Code:

> [27] Bell Canada argued that the Board, in examining the "need" for the direction, should not look at any evidence that might have come Labour Canada's attention to justify it after it was actually issued. Counsel took the position that the Board's review under section 95 could not go beyond that which was actually in the safety officer's mind at the point where he considered the situation to be a source of imminent danger and issued the direction.
>
> [28] The board's view is that it is quite impracticable, not to say unfair to all concerned, to contemplate such an approach. If no new material that favours the need for the direction could be considered in review, it would be equally difficult to accept new material which supported the claim that the direction should be altered or rescinded. It is, after all, the Board's duty to get at the truth of a situation and to do so in the interests of employee safety. The direction is an on-going thing. It operates with as

> much force today as it did on the day it was issued. If there is new information, not available to Labour Canada on the day it was issued, that either justifies it or does the opposite, the Board must be able to have it and consider it in reaching a conclusion about the continuing need for the direction.
>
> [Underlining added]

[64] It should be pointed out that section 95 of the Code reads differently than the current section 146.1. Subsection 95(1), which is current subsection 146(1)'s precursor, authorized the employer to refer a direction issued by a HSO, to the CLRB for review. Subsection 95(2), which is subsection 146.1(1)'s precursor, reads as follows:

> 95(2) The Canada Labour Relations Board shall, where a direction of a safety officer is referred to it pursuant to subsection (1), without delay and in a summary way inquire into the circumstances of the direction and the need therefor, and may vary, rescind or confirm the direction.
>
> [Underlining added]

[65] The CLRB's jurisdiction thus included a determination as to the arguably broader notion of the need for the direction, as opposed to the "reasons" for it as subsection 146.1(1) sets it out currently. I consider this to be a material distinction and this case is of little assistance to the appellant.

[66] Looking at other cases referred to by the appellant discussing the appeals officer's power to vary a direction, I also see a substantive difference between modifying a compliance date, or modifying the designation of the employer, and the proposition advanced by the appellant. The former properly apply the corrective powers of the appeal's officer within the scope of his inquiry, while the latter fundamentally and inappropriately in my view, alters the focus of the inquiry.

[67] This discussion leads me to the conclusion, with respect, that the appellant's proposition is founded on an incorrect extrapolation of the jurisprudence. Conversely, I find the comments of the appeals officer in *Babb*, also cited by the appellant, to be precisely on point, at paragraphs 37 to 42:

> [37] Pursuant to ss. 146.1(1) of the Code, when an appeal is brought under ss. 129.(7) as in this case, the appeals officer must inquire into the circumstances that existed at the time of the work refusal to determine whether the HSO arrived at the correct decision. The inquiry consists of a factual review of all the circumstances that existed at the time of the HSO's investigation. Therefore, I must put myself in the HSO's position at the time of his investigation to determine whether or not there was a danger as defined by the Code. This determination must

> take into account the power outage and the specific set of conditions that it created on the day of the refusal.
>
> [38] Ms. Mackinnon submitted that because a hearing before an appeals officer is *de novo* new evidence that was not considered by the HSO can be introduced. I agree. However, the case law states that this new evidence must pertain to the circumstances that existed on the day of the refusal. As stated in a decision of the Canada Appeals Office in *Duplessis* and *Forest Products Terminal Corporation. Ltd.* Hence, the AO hearing a matter *de novo* has sufficient powers to receive any new evidence, including evidence that a HSO could or should have received, as long as it relates to the circumstances that gave rise to the refusal to work or the issuance of the direction under appeal.
>
> [39] The circumstances that gave rise to Mr. Babb's refusal to work were the condition of the air and the odour present at the work place located at 875 Heron Road following the power failure.
>
> [40] I therefore disagree with Ms. Mackinnon's submission that because the hearing before me is *de novo* I have a "practical responsibility to look into whether events have occurred since the original work refusal that may affect the determination of danger".
>
> […]
>
> [42] I find it important to reiterate that, my jurisdiction, in this appeal, is to determine whether or not the HSO's conclusion that a danger did not exist for Mr. Babb, on June 19, 2006 was well founded. To do so, I will consider the situation that existed on that day, as a consequence of the power failure. My jurisdiction does not extend to look at the issue of air quality "in general" at 875 Heron Road, Ottawa. (…)
>
> [Underlining added]

The matter is not moot

[68] Finally, my May 29, 2015 ruling addressed the mootness argument raised by the appellant. I determined that the matter was not moot. The appellant's claim of mootness is of course premised on its assertion that measures brought subsequently have remedied the situation. In light of my determination of the proper scope of my inquiry under section 146.1, as I have set out to demonstrate in the preceding paragraphs, this argument is without merit. It is clear that the dispute as to whether the employer contravened the Code at the time of the direction or whether Mr. MacDuff was exposed to a danger on June 4, 2013, is vigorously debated between the parties.

[69] The jurisprudence recognizes that decision-makers, such as appeals officers, have the authority to apply the doctrine of mootness, i.e. decide not to hear a case if there remains no live issue between the parties, in the spirit of economy of judicial resources. The test to be satisfied in that regard is derived from the Supreme Court of Canada's decision in *Borowski* v. *Canada (Attorney General),* [1989] 1 S.C.R. 342 (*Borowski).* Such a request is generally presented to the decision-maker well before the beginning of the hearing and commonly rests on facts that are generally not contested by the parties, as reflected in the caselaw submitted by the appellant.

[70] In the present instance, the factual basis upon which the mootness argument is founded is unquestionably contested by the other parties. It would defy the very foundation of the mootness concept to have to first inquire into a dispute on whether the facts invoked to support the claim of mootness, which go to the heart of the substantive matters at issue in the appeal, are established. In my view, there is clearly a live issue between the parties and the appellant's mootness argument simply does not address, let alone satisfy the *Borowski* criteria.

[71] I add in passing that, in reviewing the caselaw cited by the appellant, a finding of mootness by an appeals officer usually results in the dismissal of the appeal. Such an outcome would hardly have served the appellant's case.

Part II - The Issues Raised by the Appeal

[72] The issues raised by the present appeal are as follows:

> (i) regarding the "contravention direction" issued under subsection 145(1) of the Code, whether the appellant was in contravention of the Code, more specifically paragraph 125(1)(*z.16)* of the Code and section 20.3 of the Regulations, by allegedly not having "implemented a Violence Prevention Program, as prescribed" at the time of the direction, and whether the direction issued for that reason is well-founded;
>
> (ii) regarding the two "danger directions" issued under subsection 145(2) of the Code, whether on June 4, 2013 there was a hazard, condition or activity that presented a "danger" to the respondent within the meaning of the Code and whether the directions issued as a result are well founded.

Part III - The "Contravention Direction"

Submissions of the parties

(a) Appellant's submissions

[73] In summary, the appellant submits that the employer had in place many policies, procedures and directives aimed at addressing violence-prevention in the workplace. The appellant stresses that the City of Ottawa is the employer, not OC Transpo, contrary to what HSO Béland repeatedly mentioned in his report. OC

Transpo is not a distinct legal entity and the City of Ottawa's overarching policies on the matter are relevant and should be taken into consideration, which HSO Béland failed to do.

[74] Such policies include the Violence in the Workplace Policy (2003) and Procedures (2011), Harassment in the workplace Policy (2003) and Procedures (2011), the City of Ottawa's Code of Conduct, By-Law 2007-268 which specifically prohibits violence against Transit employees. These policies are supplemented by OC Transpo-specific policies and procedures developed over time and addressing concerns specific to employees working in the Transit System. Those policies were developed through groups specifically tasked with investigating these matters, like the Violence Prevention Working Group (established between 2003 and 2006) and through information gleaned by the review of completed Violence against Transit Employees (VATE) forms.

[75] The appellant submits that these Policies and procedures provide a systematic response to workplace violence, as required by Part XX (*VIA Rail Canada Inc.* v. *Cecile Mulhern and Unifor*, 2014 OHSTC 3). They apply the risk factors revealed by the ongoing VATE analyses conducted by the Policy Health and Safety Committee (the policy committee) to ensure that identified risks are minimized. Fare dispute is identified as an important factor of risk and procedures have specifically addressed that factor by making it clear to operators that they should not put themselves at risk over fare collection. This is included in the training provided to bus operators.

[76] The appellant submits that the legislation does not require that a violence prevention policy or program be located in a single document (*Skyjack Inc.* v. *Hutchinson,* [2007] O.L.R.B. rep. 191; *Kerry Gresty et al.* v. *Correctional Service Canada,* 2012 OHSTC 29). The direction should be rescinded.

(b) Respondent's submissions

[77] The respondent's submissions mostly focus on the "danger directions" and the fact that Mr. MacDuff was exposed to a danger on June 4, 2013 as a result of the employer's inadequate measures to control the danger posed by the risk of being assaulted by members of the public. Regarding the "contravention direction", the respondent's representative argues that the appellant undermines the significance of the phrase "as prescribed" in reference to "not having a VPP - violence prevention program - as prescribed" as mentioned in HSO Béland's direction. Regardless of the overarching violence prevention policy used by the City of Ottawa and OC Transpo, Part XX of the Regulations states that a federal workplace shall have a federally prescribed VPP specific to its workplace. Since OC Transpo operates in two provinces (Ontario and Québec), it is officially a federal workplace and therefore can only be using a violence prevention policy if such policy fulfills the requirements of the federal legislation, which at the time of the direction, it did not. This was shown in much of the evidence presented, which included documents updated as recently as 2014.

(c) Intervenor's submissions

[78] The intervenor's submissions also focus mostly on the "danger directions". Regarding the "contravention direction", the intervenor submits that the documents placed in evidence by the appellant do not constitute a "completed" violence prevention policy. The Code contemplates such a policy as being a proactive document created with the support and involvement of the policy committee. There was no evidence as to how the various documents came to be created or of the committee's involvement. Further, there was no evidence that the various policies presented by the employer were the result of any type of study or review of the risk of violence towards bus operators.

[79] The documents are generic to the City of Ottawa and do not address the unique nature of the federally-regulated workplace that is OC Transpo. The intervenor points out that it was acknowledged in testimony that the OC Transpo specific violence prevention policy was only in draft form at the time of Mr. MacDuff's refusal, and submits that there is more than sufficient evidence to conclude that a proper violence prevention policy was not in existence at the time of Mr. MacDuff's refusal**.**

Analysis

[80] The first question is to identify what contravention of the Code (or Regulations) is specified in the direction. This is not all that clear. HSO Béland first quotes section 20.3 of the Regulations. That section provides as follows:

> **20.3** The employer shall develop and post at a place accessible to all employees a work place violence prevention policy setting out, among other things, the following obligations of the employer:
>
> > (a) to provide a safe, healthy and violence-free work place;
> >
> > (b) to dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it;
> >
> > (c) to communicate to its employees information in its possession about factors contributing to work place violence; and
> >
> > (d) to assist employees who have been exposed to work place violence.
> >
> > [Underlining added]

[81] HSO Béland then writes that the employer "has failed to implement a workplace violence prevention program, as prescribed". I note that section 20.3 refers to the obligation to develop and post a policy, not to "implement a program". These are two different notions. I must assume that the word "program" implies the series of obligations placed on the employer by section 20.4 to 20.10 of the Regulations. Indeed, HSO Béland's report provides some context to his direction, which hints at some of those obligations. In his report, HSO Béland reviews the documentation provided by the employer during the course of his investigation. In fact, his report offers a series of commentary on that documentation without much directing thread or rationale. On a number of occasions, HSO Béland comments that the Violence Prevention Policy submitted by the employer is deficient in that it applies to all employees of the City of Ottawa, whereas Mr. MacDuff "is employed by OC Transpo".

[82] Throughout his report, HSO Béland comments repeatedly that OC Transpo is the employer and does not consider City-wide policies as being relevant or sufficiently targeting OC Transpo employees. Furthermore, HSO Béland comments on a number of points such as the involvement of the health and safety committee in investigations, the training of employees, and training specific to Mr. MacDuff. It is not clear whether his comments relate to violations of the Code or Regulations, and which provisions we should be concerned with. The only contravention that he identifies is a violation of section 20.3, which requires that the employer develops a violence prevention policy. The problem I am facing is that the direction is ambiguous on its face and when read in conjunction with his report. What is at issue in this appeal is not HSO Béland's report, but the direction that he issued further to his investigation.

[83] Consequently, I must first determine whether, at the material time, the employer had failed to develop and post a violence prevention policy, contrary to section 20.3. The policy contemplated by that section is not meant to be an operational document. It must state the prescribed policy intent and high-level obligations of the employer regarding the prevention of workplace violence. As stated in the document titled *Guide to Violence Prevention in the Workplace* (published by the Labour Program of HRSDC) - filed as Exhibit 56), the purpose of the policy is for the employer to demonstrate to employees that the employer is committed to providing a violence-free workplace and that assistance will be made available in cases where an employee has been exposed to workplace violence. The policy will outline the responsibilities and accountabilities of workplace parties in achieving a violence-free workplace.

[84] While I am not bound by this interpretation, I am of the view that it provide an accurate description of the obligation set out in section 20.3. I find nothing in section 20.3 that requires the employer to "implement a violence prevention program", as HSO Béland appears to have found. More concretely, Appendix A of the *Guide* offers guidance to parties in the development of violence prevention policy under section 20.3. It states that the manner in which those high-level obligations are achieved is spelled out in some detail in

subsequent provisions of Part XX. This confirms my understanding that nothing in those subsequent sections requires that the manner in which it has complied with the detailed obligations of Part XX be included in the policy itself.

[85] Accordingly, if the direction is to be understood as pointing to a violation of section 20.3, I am of the view that the employer was in compliance with that section at the time of the direction and HSO Béland had no valid basis upon which to issue his direction.

[86] It is apparent from the numerous references in his report that the problem that HSO Béland had with the existing violence prevention policy and procedures is based on his belief that OC Transpo is the employer. As a result, he considered that policies developed by the City of Ottawa to apply generically to all its employees were irrelevant or inadequate. It is trite to state that he was incorrect. By all parties' admission, Mr. MacDuff's employer in this matter is the City of Ottawa.

[87] The violence prevention policy and procedures presented in evidence by the appellant were developed in 2003 and modified in 2011. It is my opinion that they substantially meet all of the requirements set out in section 20.3 of the Regulations. In other words, a reference to all four obligations required to be included in the policy by that section, can be found. It is worth noting that the policy, in its original version, predates the coming into force of section 20.3. The fact that it does not specifically make reference to the Code or Part XX of the Regulations is immaterial.

[88] Regarding the posting requirement, there has not been much debate in the parties submissions that such a policy has been brought to the attention of employees over time through various means. Mr. Troy Charter, OC Transpo's Assistant General Manager, Transit Operations, testified that policies and procedures are brought to the attention of bus operators in their initial training, through the Operators Binder that bus operators are required to consult daily prior to commencing their shift, in bulletins posted at various points along the transit system and via the online portal for bus operators. There was no suggestion that Mr. MacDuff was unaware of the City of Ottawa's violence prevention policy.

[89] I must now turn to the phrase "failed to implement a violence prevention program". It is not clear what HSO Béland meant by his phrase, other than perhaps being concerned that the employer had not satisfied all or some of the obligations set out in Part XX of the Regulations. However, there is no detail or explanation as to how, when, in what way and regarding which provision is the employer in default. Is the issue whether the employer has not involved the health and safety committee (20.1); or failed to identify factors that contribute to workplace violence (20.4), or failed to properly assess those factors (20.5), or to establish controls (20.6), or failed to conduct a review (20.7), or failed to develop emergency notification procedures (20.8) or to train employees (20.10) or all of the above? I ask those questions rhetorically because in my view, a direction

must be specific enough to clearly identify the provision of the Code or Regulations that are allegedly being breached. This is not the case with HSO Béland's direction.

[90] Consequently, if the direction is to be read more broadly as we may infer from HSO Béland's report, it is in my view deficient for being vague. The bold statement that the employer failed to "implement a violence prevention program", that concept not being defined in legislation, without further particulars than a reference to section 20.3, renders the direction unduly vague and imprecise.

[91] Be that as it may, the evidence adduced at the hearing support the employer's contention that, at the time of the events, it was in substantial compliance with the obligations set out in Part XX. The evidence established that the City of Ottawa's Violence Prevention Policy was in existence at the time of the refusal, and was supplemented by policies specific to the work performed at OC Transpo, and aimed at advising bus operators on appropriate practices and conduct in order to prevent assaults. To name but a few, the employer referred to the *Transit Operations Handbook* (2007 - Exhibit 6, Tab 5), the *Violence prevention and You* document (Exhibit 6, Tab 6), a brochure developed by the Violence Prevention Working Group in 2006 and which provides guidance to bus operators on preventing assaults; the policies enacted in 2012 dealing with expectation of a bus operator regarding fares (*Fare Management Role of a bus Operator*), which is to inform not enforce, with a view to minimizing situations of confrontation. (Exhibit 6, Tabs 7, 8 and 9); notification of bus operators not to confiscate fare media, so as to avoid conflict and confrontations.

[92] Furthermore, the evidence established that employees, including the respondent, are trained on violence prevention.

[93] Ms. Donna-Lynn Ahee, OC Transpo's Safety Coordinator, testified that incidents of workplace violence, and specifically assaults against bus operators, are discussed at the policy committee and the risk factors that may contribute to violence are systematically examined and reviewed. Accordingly, the employer has implemented a number of policies and communications to bus operators that deal with fare disputes and caution operators not to get involved in fare disputes. Over time, it has removed the responsibility from the operators to enforce the payment of fares and highlighted that their responsibility is to <u>inform, not enforce</u>, the fare. Operators have discretion to have a passenger removed from their bus, which lets them be the judge of the situation. The policies and communications to employees emphasize that bus operators are to govern themselves in a way which ensures their safety by treating passengers with respect, de-escalating situations which may arise, by responding in a pro-active way to hostile passengers and not putting themselves in danger over fares. It was also established that the employer ensures that its employees have received the training with respect to violence prevention and that it follows up with employees who appear to have difficulties in this regard, as was done with Mr. MacDuff in

2010. Finally, it was also shown that the employer publicly denounces violence against its bus operators, illustrated by its support for Bill C-402 amending the *Criminal Code* in a way to make it a specific offence to assault a transit employee.

[94] In light of this evidentiary basis, I find no support for the broad conclusion that the appellant had failed to "implement a violence prevention program", whatever meaning is given to that phrase, at the time of Mr. MacDuff's refusal. The employer had in place measures aimed at preventing violence in the workplace and informing employees of their rights under the Code in that regards. Factors that contribute to violence are discussed and assessed at the policy committee. As I have already stated earlier in these reasons, the purpose of the present inquiry is not to conduct a new and independent investigation into whether the employer complies with all provisions of Part XX of the Regulations. It is to look at the validity of the specific direction that is being appealed.

[95] To sum up, the direction identifies a contravention of section 20.3 of the Regulations. This is the subject of the appeal and the only issue before me. The HSO seemingly based his conclusion on the erroneous belief that OC Transpo, not the City of Ottawa, is the employer. The employer established that, at the time of the direction, it had in a place a Violence Prevention Policy that satisfies the requirements of 20.3, as I read that section and that such policy had been communicated to its employees through various means. I therefore find that the employer was, at all material times, in compliance with section 20.3 of the Regulations. On that ground, I find the direction to be unfounded.

[96] Alternatively, if the direction is to be given a broader scope and reference to the "program" is meant to include the various steps laid out in Part XX of the Regulations, I find the direction to be deficient because it is vague and imprecise. After considering the evidence overall, I am satisfied that it establishes that the employer was not in contravention of that Part. The employer established that it has policies and procedures dealing with violence in the workplace, offers training to employees regarding the factors that may contribute to workplace violence, has measures to assist employees who may have been victims of violence. Those measures, looked as a whole, are measures that constitute a systematic response to workplace violence. While a debate on the sufficiency of the measures adopted by the employer or on their specific application is always possible, such a debate is beyond the scope of the present appeal. There is simply no basis for HSO Béland's broad statement that the employer had failed to implement a violence prevention program, as prescribed by the Regulations.

[97] There is therefore no justification for the "contravention direction" and the direction is rescinded.

[98] I was apprised at the hearing that the employer had developed a more robust Violence Prevention Policy, in response to HSO Béland's direction. In

fact, it has developed what appears to be a more comprehensive and integrated violence prevention plan (Exhibit 6 – Tab 21) which purports to satisfy the obligations set out in Part XX of the Regulations. I make no judgment as to whether this document satisfies each specific requirements of Part XX. This document is subsequent to the events that gave rise to the work refusal and as such falls outside of the present inquiry. That question properly falls in the realm of the Minister of Labour or his delegated officials' compliance continuum, as I explained earlier.

Part IV - The Two "Danger Directions"

Submissions of the parties

(a) Appellant's submissions

[99] The appellant's submissions can be summarized as follows.

[100] The appellant first refers to the job description of a bus operator, and submits that dealing with unpredictable and potentially volatile individuals is inherent in the job. The respondent's claim of danger amounts to saying that the general public of Ottawa presents a danger to bus operators. Dealing with the public does present certain risks, and the employer has taken appropriate measures to manage that risk, first by ensuring that employees, including Mr. MacDuff, are properly trained on appropriate behaviour and effective communication approaches in order to prevent assaults.

[101] The appellant refers to the voluminous evidence adduced at the hearing on the various training sessions provided to employees touching on workplace violence prevention, and more specifically on assault prevention to bus operators - Transit Ambassador Program, de-escalation training and pro in-motion training. Bus operators are specifically trained on how to avoid and manage fare disputes with customers, which was identified over time as an important factor contributing to potentially violent situations. Mr. MacDuff took that training with success. The appellant adds that there is no question that Mr. MacDuff knew the fare-related policies and procedures of OC Transpo.

[102] The appellant then refers to the availability of radio communication at all times between the operator and the Transit Operations Control Centre and the red line system on board of each bus, which the operator is trained to use in case of emergency. Those systems ensure that the operator will be provided immediate assistance should he/she feel that a situation is potentially dangerous. The red line ensures that a OC Transpo special constable or police officer is dispatched within a matter of minutes.

[103] Furthermore, the appellant points out that assault incident rates are tracked by OC Transpo. The VATE forms are reviewed for accuracy and proper classification of incident. The employer then compiles the relevant information into

a spreadsheet setting out detailed information on route numbers, time of day, day of week, etc. in order to identify possible trends. A summary of this report is shared with the policy committee and with local health and safety committees.

[104] The appellant then refers to the statistical analysis performed by Mr. Ian Scott, Ph. D., and submits that the risk of Mr. MacDuff being assaulted on June 4, 2013, was minute. His analysis reveals the following:

- in 2012 there was a 0,0092% chance that Mr. MacDuff would have a Level II assault per month;
- in 2012, there was a 0,00011% chance that he would have a Level II assault per revenue hour;
- in 2012, there was a 0,000000008% chance that he would have a Level II assault per boarding; that percentage is 0,0000014%, or 1 in every 71 million boardings, when using the average incident rate for the 3 years under study.

[105] Furthermore, no significant trends were identified and the variation in number of assaults can be explained by higher usage of the transit system depending on the time of day.

[106] The appellant submits that Mr. MacDuff has demonstrated a history of engaging in dangerous fare-related conduct and was reprimanded for it. It is suggested that Mr. MacDuff caused his own misfortune the night of March 26, 2013 when he was assaulted, by not complying with the employer's policies and adopting an aggressive attitude towards the person who assaulted him. The appellant's counsel reviews at length Mr. MacDuff's version of the incident and points to a number of contradictions and incongruences that should discredit his testimony. The appellant submits that, in light of his past behaviour, it is more likely that he engaged in a physical struggle with the passenger who was not paying the fare, contrary to what he has been trained to do.

[107] Regarding the actual work refusal of June 4, 2013, the appellant argues that there was no heightened risk on Mr. MacDuff the morning he returned to work. There was nothing out of the ordinary that morning in Mr. MacDuff's working conditions. Since he raised the fear of being assaulted again as the justification for his refusal to perform his duties, the employer offered Mr. MacDuff accommodation measures (different bus, different route, presence of special constable on the bus), all of which Mr. MacDuff refused.

[108] Mr. MacDuff's credibility is further questionable in light of the exaggerations and contradictions, reflected in an email to HSO Béland in September 2013, setting out the list of measures that would be required to make him feel safe, including the presence of a special constable at all times, which he denied when it was offered to him on June 4. The appellant noted the respondent's assertion that the employer never followed up on his proposed measures, but that he had to admit in cross-examination that he had met with Mr. Manconi, OC

Transpo's General Manager, for 2 hours, had surreptitiously recorded the meeting and that some of his suggestions were indeed acted upon by the employer.

[109] The appellant further submits that the respondent's perception of danger is unreasonable, in light of his testimony that the mere fact of wearing a OC Transpo uniform or cap was putting him in danger. Mr. MacDuff has an unreasonable apprehension of risk which cannot be accommodated because it would result in him never coming into contact with the public. Interacting with the public is a necessary part of being a bus operator and, along with actually driving the bus, are the most important part of the job.

[110] Regarding the issue of protective shields, which Mr. MacDuff argues would make him safe and which the intervenor raised repeatedly in his cross-examination of the appellant's witnesses, the appellant submits that shields are not an industry standard, as established by the testimony of the Chief special constable Mr. Jim Babe and demonstrated by his review of the situation across the country. This is also reflected in the American Public Transportation Association (APTA) Safety Audit Peer Review document (Exhibit 7). Furthermore, the uncontradicted evidence of Mr. Babe is that shields may present safety issues for the operators.

[111] The appellant then referred to the applicable statutory framework and the legal test developed by the Courts in applying the concept of danger under the Code (such as in *Verville* v. *Canada (Service correctionnel)*, 2004 FC 767 (*Verville*); *Martin*; *Canada Post Corporation* v. *Pollard and Canada (Attorney General)*, 2007 FC 1362 (*Pollard*); *Laroche* v. Canada (Attorney General), 2011 FC 1454 (*Laroche*); *Stewart R. Doell and Lorne Knihniski* and *Treasury Board of Canada (Correctional Service Canada),* Appeals Officer decision no. 04-014 (2004); *Denis Leclair* and *Correctional Services Canada*, Appeals Officer decision no. 01-024 (2001)). The issue is whether there was an existing or potential hazard or condition or activity that could reasonably be expected to cause injury before the hazard, condition or activity could be altered. This analysis calls into question the specific evidence from the day of the refusal. The definition of danger is established around the probability of a hazard occurring. This analysis must exclude hypothetical or speculative situations.

[112] The appellant submits that the circumstances on the day of the refusal cannot support a conclusion of danger. Mr. MacDuff was properly trained and well-informed on how to avoid potentially dangerous situations. This is part of his regular duties. The red line system was operational and special constables were at full complement that day, ensuring a quick response time (less than 5 minutes, and within one minute on March 26, 2013). Mr. MacDuff is the only operator who made a refusal that day.

[113] The appellant argues that the risk posed by the public using OC Transpo system has been mitigated adequately by the employer, with the measures referred above. Counsel asks whether it is more likely than not that Mr. MacDuff's exposure to this risk will result in injury. The appeals officer must look at the circumstances

prevailing on the day of the refusal. It must also be presumed that the employee is acting in accordance with his training and complies with policies and procedures (section 126 of the Code). Mr. MacDuff knew of de-escalation techniques, knew what to do if he had concerns about a passenger. He was specifically prohibited from enforcing fares, his role being one of informer, and it was within his discretion to ask a passenger to leave the bus or not, even if that person does not pay the fare.

[114] In the alternative, the appellant submits that should I find that there is a residual danger after those measures have been in place, the hazard posed by the public is excluded from the application of section 128 because it constitutes a normal condition of employment for OC Transpo bus operators, as reflected in the applicable job description. The appellant disagrees with the respondent and intervenor that further equipment - namely protective shields installed in the operator's "cockpit" - is required to mitigate any residual risk and argues that there is no legal or factual basis for this assertion. Counsel for the appellant reiterates the fact that the use of shields is not an industry standard, it was not recommended by the APTA Peer Study Review of OC Transpo's operations and there are serious concerns that it could create further risks.

[115] Accordingly, the appellant submits that the "danger directions" should be rescinded.

(b) Respondent's submissions

[116] The respondent's submissions may be summarized as follows. The respondent first refers to the definition of danger in the Code and refers to the justification invoked by Mr. MacDuff to refuse to work the morning of June 4, 2013. During his absence resulting from his assault on March 26, 2013, OC Transpo had failed to implement additional protective measures or alter his workplace conditions in order to prevent the recurrence of workplace violence assaults. Training on de-escalation techniques were ineffective measures in face of unpredictable attacks. Mr. MacDuff also realized that there had been no alterations made to the cockpit area of the bus he was assigned to, that would prevent another workplace violence episode against him. Mr. MacDuff felt that his workplace was still a dangerous workplace in light of another assault he was made aware of while he was absent on sick leave and that had occurred on April 22, 2013 (Exhibit 27).

[117] OC Transpo's processes and measures failed to protect the worker because they can only be implemented after the assault activity has occurred. The presence of special constables may shorten the duration or reduce the severity of an assault if they arrive on the scene quickly enough, thereby possibly fulfilling the requirements of section 20.8 of the Regulations. However, the respondent argues that the red line button and radio communication can increase aggressive behaviour from passengers in some circumstances.

[118] The respondent submits that the employer failed to properly de-brief Mr. MacDuff following his return to work on June 4. The purpose of the de-brief is to

help the worker understand exactly what took place and help him reintegrate the workplace after a traumatic experience. The respondent argues that the employer failed to ensure a proper return to work process as no arrangements has been made prior to Mr. MacDuff's return to work. In addition, there was a lot of confusion that morning, as no one seemed clear on what needed to be done regarding the refusal to work.

[119] The respondent also submits that there was no investigation into Mr. MacDuff's assault by the workplace health and safety committee, contrary to subsection 135(7) of the Code. The respondent stresses that investigations are conducted by special constables of OC Transpo, whom are neither seen as impartial, nor are they members of the committee. The purpose of a police-type investigation is to gather evidence to determine if a crime was committed; the purpose of a health and safety investigation, as mandated by the Regulations, is to determine the root cause of an incident and make recommendations to prevent its future occurrence. In this case, while OC Transpo determined that the cause of the assault was related to the payment of the fare, one can argue that the direct cause of the assault and injuries was the operator's unprotected exposure to the public.

[120] The respondent further argues that Part XX of the Regulations makes it clear that the employer's procedures must protect against workplace violence injury, including biological and psychological injuries, at the hands of members of the public (*Public Service Alliance of Canada* v. *Canada (Attorney General)*, 2014 FC 1066). In that regards, Level I and II assaults are relevant for the purpose of applying the Regulations. The employer is required to continually adapt, verify and change its programs and procedures to protect against hazards.

[121] Turning to the circumstances of the March 26, 2013 assault, the respondent's representative referred to Mr. MacDuff's description of what had happened that evening. He testified that the assailant boarded the bus, flashed his transfer and told him that "it had been dead" for two hours. Mr. MacDuff told the passenger that he would have to pay his fare. Seconds later, he was assaulted by the individual who punched him on the side of the head. Mr. MacDuff testified that he went into a trance-like state, reeling from the impact of the punch which may have triggered a concussion from a trauma to his brain. He had no opportunity to de-escalate the situation. In other words, as shown by the employer's own statistics and the VATE forms filed in evidence, assaults continue to occur in spite of the employer's training.

[122] In conclusion, the respondent disagrees with the appellant's argument that the risk of being assaulted is a normal condition of employment for bus operators. Before such a claim may be made, the employer must establish that it has complied with section 122.1 of the Code and taken reasonable measures to control the risk and provide protective equipment or devices, which the employer has not done (*Brazeau et al. and CAW* and *Securicor Canada Limited,* Appeals Officer decision No. 04-049 (2004)).

[123] The respondent seeks:

- the return of Mr. MacDuff to his operator job with the safeguards in place to protect him from harm from workplace violence;
- full involvement of the Policy and workplace committees in their roles and duties as outlined in the Code;
- ESDC to oversee the restructuring of the Health & Safety Committee and participate in the meetings until they are satisfied that the committee is functioning adequately; and
- full compensation for monetary costs incurred by Mr. MacDuff for his participation in this appeal.

(c) Intervenor's submissions

[124] The intervenor's submissions may be summarized as follows. The intervenor first reiterated the purpose of its participation in the present proceeding, which is to ensure that the Tribunal heard the perspective of the bus operators as a whole on the issue of safety in their workplace. The union wanted to flag issues of possible systemic failings within the workplace that were undermining the safety and security of operators.

[125] The intervenor first submits that all the employer's witnesses agree with the proposition that every employee at OC Transpo deserves to be safe while at work and to come home safely from working each day. This is an obligation of the employer set out in sections 122.1 and 124 of the Code. This obligation is prescribed more specifically in Part XIX of the Regulations, which require employers to identify and address all work-related hazards, in consultation with its policy health and safety committee. This is an ongoing obligation. Violence in the workplace is a specifically identified hazard under paragraph 125(1)(*z.16*) of the Code and Part XX of the Regulations.

[126] As there is no question that Mr. MacDuff was assaulted on March 26, 2013, the intervenor submits that the issues in the present appeal are whether or not the City of Ottawa had properly created a Violence Prevention Policy that adequately addressed the potential for violence and whether on the day of the refusal, the employer had addressed the danger posed by workplace violence so that the danger did not exist, or had been reduced to the greatest extent practicable.

[127] The intervenor referred to Mr. MacDuff's narrative of the events of March 26, 2013. Counsel stresses that his description of the incident is credible and that he was the victim of an unprovoked assault that evening, after asking an individual to pay the required fare. The intervenor acknowledges the steps taken by the employer relating to fare management, such as eliminating the ability of an operator to ask a passenger to leave the bus, and supports the employer's efforts to make the operator's role one of informing the passenger to pay the fare, rather having them using coercive methods. However, the intervenor stresses that this does not eliminate the danger of violence.

[128] The intervenor refers to the statistical evidence presented by the employer and states that it shows that violence against bus operators is far from an unknown or fluke occurrence. It is instead something that happens with disturbing regularity and frequency, i.e. more than once a week. This violence occurs even when operators comply with their training and City policies.
[129] In terms of the probability of an assault occurring, the intervenor refers to Dr. Scott's answer in cross-examination that, based on the average number of assaults and the number of bus operators employed by OC Transpo, the odds of a bus operator experiencing an assault (at Levels I and II) over the course of a working year is 1 in 26. Those odds are not nearly as remote as the employer suggests. The intervenor submits that the assault statistics takes the issue outside the range of speculation and puts it firmly into the category of a reasonable possibility. A danger created by possible events, even unpredictable ones such as assaults and robberies, must be addressed by an employer when these events reach the level of being a "reasonable possibility and not simply a mere possibility".

[130] The intervenor referred to the definition of danger in the Code, which should be read in conjunction with the purpose of Part II of the Code. The Code is remedial legislation and should be given a broad and purposeful approach (*Canadian Freightways Limited* and *Teamsters Local 31,* Appeals Officer decision no. 01-025 (2001); *Parks Canada Agency* v. *Martin,* Appeals Officer decision no. 02-009 (2002)). The danger needs not be immediate, it also contemplates future events and potential hazards (*Verville*). Consequently, the intervenor states that it need not be shown that an assault would have happened had Mr. MacDuff returned to work in June. Instead, it simply needs to be shown that an assault could possibly have occurred on that day in June (or any subsequent day) were no changes made to the working conditions of bus operators.

[131] The intervenor disagrees with the statement that the risk of assault is a normal condition of employment for bus operators. This argument can only be advanced when the employer has taken steps to mitigate those dangers. It is only when everything practical has been done to remove or reduce the danger that what remains can be regarded as inherent dangers to the job (*Eric V. and al. and Correctional Service of Canada,* Appeals Officer Decision No.: 09-009 (2009).

[132] The intervenor then refers to the events of June 4, 2013. The intervenor agrees with the characterization that the measures invoked by the employer to allegedly minimize the risk (red line, radio, special constables) were reactive, not preventive. They are meant to be utilized after an assault has occurred and do not prevent a driver from being attacked or injured. No physical shields or similar barriers had been installed in buses since March 2013, despite the employer's acknowledgement that such shields may have been helpful in preventing attacks on operators. There were no increases in the number of special constables. The "Walk and Ride" program, which provides that special constables exit their cars, ride on buses and patrol transit stations, had not yet restarted in 2013. Consequently, the danger continued to exist on June 4, 2013.

[133] The intervenor argues further that the employer did not take all reasonable steps to prevent or reduce the danger posed by passenger assaults. It did not adequately control the hazard nor did it bring it within safe limits, thereby violating the requirements of the Code to minimize to the greatest extent possible the danger presented by passenger violence.

[134] The intervenor takes the view that three additional measures ought to have been taken by the employer. First the installation of protective shields on buses, that would create a form of barrier between passengers and the operator, could reduce the possibility of assaults. There was only a short discussion at the policy committee, whose decision was to defer the issue. The intervenor challenges the concerns expressed by the employer as to possible risks of such equipment and referred to the fact that other Transit systems - such as Toronto - use shields on their buses. Other major centres outside of Canada also use shields on their buses. The intervenor suggests that the real concern of the employer was one of public perception of having their operators behind a shield.

[135] Secondly, the intervenor contends that the employer ought to have considered an increase in its special constables complement, arguing that its current number is insufficient to meet the security needs of an enterprise the magnitude of OC Transpo. The higher level of visible security would increase the level of safety for bus operators.

[136] Thirdly, the employer should have considered the installation of on-board cameras on its buses, as they would have a deterrent effect against violence while aiding in the apprehension of those passengers who continue to engage in violence against operators. It acknowledged that the employer had indeed considered this option, but that the union had concerns with possible use of this device to detect and discipline improper bus operator misconduct.

[137] In conclusion, the intervenor is asking the appeals officer to confirm the decision that Mr. MacDuff was exposed to a danger on June 4, 2013, and to confirm the directions issued by HSO Béland accordingly. The risk of violence was never properly evaluated and the employer has not taken all reasonable steps to prevent violence from occurring. The employer should be ordered as follows:

- initiate a pilot project to evaluate the effectiveness of appropriately designed operator shields in reducing the danger posed by passenger violence against bus operators;
- initiate a program to equip all City buses within a reasonable period of time with on-board cameras, the use of which should be restricted to the issues of operator safety; and
- increase the number of special constables so as to provide a higher level of security for bus operators through faster response times and greater visual deterrent.

(d) Appellant's reply

[138] In reply, the appellant reiterates a number of points it had already made in its main submissions. I will limit myself to stating the points raised in response to the other parties' submissions. Those points may be briefly summarized as follows.

[139] The appellant argues that other parties' submissions unduly expand the definition of danger. And they fail to address Mr. MacDuff's failure to follow OC Transpo policies. First, Level I assaults should be excluded from the analysis of danger, because there has to be a reasonable expectation that the activity will cause injury or illness. Whether the assault caused an injury is what distinguishes a Level I from a Level II assault. HSO Béland was therefore correct in focussing exclusively on Level II assaults. This is supported by the discussion in *Martin* v. *Canada (Attorney General)*, 2003 FC 1158, which refers to "grievous bodily harm or where death could reasonably occur", a standard which the Court of Appeal did not overturn in *Martin*.

[140] The appellant underlines that this appeal is about the circumstances surrounding Mr. MacDuff's assault alone. The respondent and intervenor's reliance on incidents involving other bus operators, who were not called at the hearing, should be disregarded by the appeals officer. As such, the VATE forms should not be admitted in evidence for the purpose of establishing the truth of their contents due to its prejudicial nature. The particular facts surrounding each of those events are crucial, and have not been established by a witness' first-hand evidence.

[141] Regarding the installation of shields, the appellant argues that the other parties unduly dismiss the concerns that were expressed regarding their use. Mr. Babe's testimony in that respect is the only credible direct evidence relating to shields. He worked with a shield in policing for many years and identified glare as being a real concern with such equipment. Protective shields are not the industry standard in Canada and in the wake of the OC Transpo and VIA Rail disaster in 2013, the employer cannot make changes to the cockpit that would increase risks to bus operators.

[142] Regarding the installation of cameras, the appellant submits that now that the question of privacy rights of operators has been resolved, the employer has adopted it on a move-forward basis.

[143] In response to the proposed increase of special constables, the appellant stresses that Mr. MacDuff refused to have a special constable ride with him for the duration of his shift. The appellant asks how these two facts can be reconciled.

[144] The appellant contends that investigations conducted by special constables clearly meet the requirements of section 20.9 of the Regulations. They provide an objective and detailed investigation into the events leading up to the assaults and what happened afterwards. As per subsection 20.9(5), this evidence is then presented in the form of a written VATE form which the employer (Ms. Ahee)

further analyzes and provides conclusions and recommendations. While the VATE forms are not provided to the committees due to privacy considerations, summaries of reported occurrences are provided to workplace committees on a monthly basis.

Analysis

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

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

[146] "Danger" is defined in subsection 122(1) of the Code, as follows:

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

[147] The definition of danger is multifaceted and has received judicial interpretation on many occasions. In *Pollard*, (2007 FC 1362), the Federal Court summarized the state of the law concerning the criteria for assessing the concept of danger under the Code in such a context:

> **[66]** As a matter of law, in order to find that an existing or potential hazard constitutes a "danger" within the meaning of Part II of the Code, the facts must establish the following:
>
> (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;

> (2) an employee will be exposed to the hazard, condition, or activity when it presents itself;
>
> (3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
>
> (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.
>
> **[67]** The final element requires consideration of the circumstances under which the hazard, condition, or activity could be expected to cause injury or illness. There must be a reasonable possibility that such circumstances will occur in the future. See: *Verville v. Canada (Correctional Services)* (2004), 253 F.T.R. 294 at paragraphs 33-36.
>
> **[68]** In *Martin* C.A., cited above, the Federal Court of Appeal provided additional guidance on the proper approach to determine whether a potential hazard or future activity could be expected to cause injury or illness. At paragraph 37 of its reasons, the Court observed that a finding of "danger" cannot be grounded in speculation or hypothesis. The task of an appeals officer, in the Court's view, was to weigh the evidence and determine whether it was more likely than not that the circumstances expected to give rise to the injury would take place in the future.
>
> [Underlining added]

[148] In *Laroche*, the Federal Court also described the nature of the analysis that must be conducted in applying the definition of "danger". The first element to consider when facing an alleged potential hazard is the probability of the hazard occurring:

> [30] First, I believe that the appeals officer correctly identified the issues she had to decide to determine whether a danger existed. I do not share the applicant's opinion that the appeals officer should bypass or adjust the "reasonable possibility" criterion to take into account the seriousness of the consequences if the hazard were to occur. The definition of danger set out in subsection 122(1) of the Code does not permit a balancing in relation to the seriousness of injury or illness. Once a hazard can reasonably be expected to cause injury or illness, it is a danger, regardless of the seriousness of the injury or illness. The definition of danger is established around the probability of the hazard occurring and not the seriousness of the consequences if the hazard occurs.
>
> [Underlining added]

[149] Then, after setting out the test outlined in paragraph 66 of the *Pollard* case, the Court states as follows at paragraph 32 of the judgment:

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

[150] In light of the definition, in the present case I must consider the following: (i) was there an existing or potential hazard or condition in place on June 4, 2013? (ii) is there a reasonable expectation that exposure to the hazard or condition or activity would cause injury or illness to a person exposed to it? (iii) could the potential hazard reasonably be expected to cause injury or illness before the hazard or condition could be corrected or the activity altered?

[151] As I have stressed earlier in these reasons, I must carry out the review in a *de novo* manner, meaning that I am not bound by the findings of fact or conclusions of the HSO and I may consider all relevant evidence relating to the circumstances that prevailed at the time of the decision, including evidence which may or may not have been considered by the HSO (*DP World (Canada) Inc.* v. *International Longshore and Warehouse Union, Local 500 et al.,* 2013 OHSTC 3).

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

[153] The question is therefore whether HSO Béland properly applied this legal test in the circumstances of Mr. MacDuff's refusal. In his two "danger directions", HSO Béland mentions that it is dangerous for Mr. MacDuff to "perform his duties where he is exposed to members of the public". Yet, one of the fundamental characteristics of the duties of a bus operator is to be "exposed to" members of the public. HSO Béland states further that there is a lack of systematic controls to prevent workplace violence against bus operators.

[154] Again, we must turn to his report to find some context to those conclusions. After his rather point-form commentary on the documentation provided by the employer, HSO Béland notes that the employer had not taken any new preventative steps in order to prevent assaults on Mr. MacDuff such as the one that occurred on March 26, 2013. As a result, he concludes that a danger existed on June 4, 2013. His reasoning to reach such conclusion in relation to the legal definition of danger is at best cryptic.

[155] In my view, HSO Béland misconstrued his task when he investigated Mr. MacDuff's refusal on June 4, 2013. The fact that the employer had not finalized the Threat and Risk Analysis mandated by Part XIX of the Regulations, or that the health and safety committee did not participate in investigations of incidents of violence against bus operators, or that Mr. MacDuff's training was, in his opinion, inadequate, does not mean that Mr. MacDuff was facing a danger the morning of June 4, 2013. Whether he was facing a danger or not was the question HSO Béland had to determine.

[156] As I am to look *de novo* at the situation prevailing on June 4, 2013, I must conduct my own analysis of whether a danger existed, on the basis of the evidence presented at the hearing. The evidence established that the conditions in Mr. MacDuff's workplace were his usual working conditions and that the task/activity that he was scheduled to perform was nothing other than his normal duties as a bus operator. He had been performing those duties for 13 years.

[157] Mr. MacDuff was scheduled to work four (4) hours that morning, being on a gradual return to work schedule after his 3-month absence following the assault of March 26, 2013. In his email to his supervisor, Ms. Megan Kay, sent the day before his return to work, Mr. MacDuff reminds her that he was assaulted on that date and the employer had not yet completed the job hazard analysis for his position, with a view to properly analyzing the risks of assaults, and that he was holding the employer responsible for his misfortune. On the morning of June 4, he explained his refusal by the fact that he felt unsafe as nothing had changed since the day of the assault and that the employer had no acceptable solutions to prevent this situation from reoccurring.

[158] There is no dispute that it is not the particular route, or neighbourhood that was the alleged source of danger, nor the condition of the vehicle he was to drive that morning. There was no particular indication or information that the risk of

being assaulted was heightened on that particular day. There was no suggestion that Mr. MacDuff was medically unfit - for example due to post-traumatic stress which may have resulted from the March 26 assault - to perform his duties on that day.

[159] It was established that the communications systems in place were functional. Bus operators may contact the Integrated Control Centre in situations where he or she fears that a situation is escalating. Appropriate resources can then be dispatched, such as Transit supervisors, special constables, the Ottawa Police Service or other emergency services. Each bus is equipped with a silent alarm, referred to as a "red line button", for the use of operators where they feel that a situation is escalating to the point that requires immediate intervention.

[160] The employer established that the complement of special constables with the Transit Law department was at full staff on that day. Special constables are peace officers specialized to perform policing functions related to the Ottawa Transit System to supplement the regular police force. That service is designed to respond quickly to emergencies. For example, special constables arrived at the scene of the incident less than one minute after Mr. MacDuff had depressed the red line button following the assault on March 26, 2013.

[161] In short, there was nothing unusual about Mr. MacDuff's duties or working conditions on that day.

[162] It was established that the employer offered Mr. MacDuff the possibility of taking another route than the one he was assigned to, or a different kind of vehicle. The presence of a special constable for the duration of his shift was also offered to Mr. MacDuff, as a measure to reassure him. Mr. MacDuff did not accept those accommodations. It is clear that the basis of Mr. MacDuff's refusal that morning was the fear of being assaulted again by a member of the public, regardless of the particular conditions prevailing on that day.

[163] In an email to HSO Béland dated September 9, 2013, Mr. MacDuff lists a number of proactive measures that the employer ought to have taken to address his situation. Those measures include the installation of a protective shield on buses, to create a barrier between members of the public and the bus operator. In fact, as the hearing unfolded and as reflected in the cross-examination of the appellant's witnesses by the respondent and the intervenor, the issue of protective shields was the "elephant in the room" so to speak. I can only speculate that this is also what HSO Béland may have had in mind without being explicit about it, when he referred in his directions to bus operators being "exposed to" members of the public. The list also included the presence of cameras on each bus, providing a live feed in real time, of the situation of buses, and the presence of a special constable in full uniform on each bus during the entirety of the shift. There are approximately 800 routes operated every day in OC Transpo's transit system.

[164] It is trite that the work of a bus operator implies having to deal with the public throughout the shift. This is reflected in the job description of bus operators

and is highlighted repeatedly in the training offered to new employees as well as in periodical refresher training (such as pro-in-motion). The manner in which bus operators should interact with the public is also addressed, in the perspective of displaying professional behaviour as ambassadors of the organization, but also in the perspective of preventing situations which may threaten the safety and security of bus operators. Those measures include techniques for de-escalating situations, the availability of communications tools (radio connection with the Control Centre and the red line), the role of informer as opposed to enforcer of fares. The fare enforcers constitute a distinct professional group of employees at OC Transpo. The evidence is rather clear that many training modules touch on these points. The employer has put in place mechanisms which ensure that employees receive such training, such as cyclical training calendars and reminders. For example, Mr. MacDuff was formally reminded on February 9, 2012, to complete his mandatory Violence Awareness training, in addition to several bulletins previously issued by the Training Department. The employer identifies employees whose behaviour may be problematic and who require special attention. This was the case with Mr. MacDuff who, in the employer's view, had inappropriately engaged in a confrontation with a customer regarding a fare dispute, in October of 2010. In other words, Mr. MacDuff has been sensitized to the risk of confrontation inherent in dealing with members of the public and the need to take precautions and has followed relevant training successfully.

[165] The employer has placed significant emphasis in its submissions on Mr. MacDuff's failure to abide by the employer's policies and procedures with respect to fare collection on board a bus and inappropriate conduct towards a passenger. Indeed, the employer forcefully suggests that Mr. MacDuff was unduly aggressive in the manner in which he claimed payment from the passenger who assaulted him on March 26, 2013, and his behaviour is the cause of his own misfortune.

[166] Mr. MacDuff testified on the events as they unfolded the evening of March 26, 2013. As outlined in the supervisor's incident report, Mr. MacDuff was operating his bus (route 98) and providing service to the south end of the City. When Mr. MacDuff pulled his bus into the South Keys Transitway Station, several passengers boarded. The assailant boarded the bus, flashed his transfer and told Mr. MacDuff that it had been "dead" for two hours. Mr. MacDuff then told the passenger that he would have to pay his fare, without raising his voice. He pointed to the fare box with his finger. Seconds later, while he was still in his seat, Mr. MacDuff was assaulted by the passenger who punched him on the side of the head (sucker punch), from behind him. He testified that he went into a "trance-like" state, and his memory becomes blurred from that point on. The blow caused him to close his eyes and when he opened them, he was hanging on to the passenger's jacket, to prevent him from leaving. A struggle ensued and both persons ended up outside the bus. Mr. MacDuff was thrown on the ground and punched a few times. The assailant eventually ran off the scene when other passengers yelled out to stop.

[167] The employer challenges Mr. MacDuff's credibility based on his past aggressive behaviour towards passengers who did not pay the fare, and on his

tendency to exaggerate (for example the email listing corrective action required – Exhibit 73, his refusal to wear the OC Transpo uniform for fear of being assaulted). The employer suggests that Mr. MacDuff engaged in a confrontational approach with the individual who assaulted him, and is now on a personal crusade to have the employer install shields on board buses.

[168] I do not subscribe to the employer's argument. Mr. MacDuff is the only witness who testified as to what happened on the night of March 26, 2013. There is no other version of the incident against which the credibility of Mr. MacDuff's version can be compared, or discarded. His description of the events is not inconsistent with his statements immediately after the events and reports prepared that same day by other persons (see: Transit Supervisor's Incident Report - Exhibit 24, Tab 5). The mere fact that he was previously involved in altercations with passengers or that he was found to have breached policies (including those on fare collection) in the past does not convince me to prefer the employer's thesis that Mr. MacDuff provoked the assault, to Mr. MacDuff's first hand description of the events. On a balance of probabilities, I accept Mr. MacDuff's version as being truthful. I accept that the assault was likely caused by his request to the passenger to pay the fare because his transfer had expired. He did not raise his voice or otherwise behave aggressively. The blow to his head came abruptly (sucker punch) as he was still sitting in his seat and the struggle that ensued was defensive.

[169] Be that as it may, these considerations are not, in my view, determinative of the outcome of this appeal.

[170] It is clear that the situation that caused Mr. MacDuff to be concerned with his safety on June 4, is common to all bus operators of OC Transpo. In such a context, if a danger is found to have existed in the circumstances described in evidence, the inescapable conclusion is that every bus operator is, at all times, facing a danger upon taking on a shift. This means that the fact of operating a bus, in and of itself, would constitute a danger that would require immediate correction, as prescribed by subsections 129(6) and 145(2). This conclusion would logically apply to all bus operators and OC Transpo's operations would have to grind to a halt until appropriate corrective measures are taken. The implications of a decision of danger in the circumstances described in the evidence are, needless to say, significant.

[171] The validity of the two "danger directions" in my view, turns on the probability of an assault occurring to Mr. MacDuff on the morning of June 4, 2013. I must refer back to the first component of the legal test stated earlier, whether a "potential hazard or condition" (the risk of an assault) exists in the workplace (the bus) or as a result of performing an activity (driving a bus). The legal question thus becomes whether the risk for Mr. MacDuff on that day of being assaulted is a reasonable possibility as opposed to a mere possibility, in order to be characterized as a danger under the Code (*Verville*).

[172] It is worth repeating the words of the Court in the *Laroche* judgment:

> […] The definition of danger is established around the probability of the hazard occurring and not the seriousness of the consequences if the hazard occurs.

[173] The task of determining whether the probability of an assault occurring is a mere possibility as opposed to a reasonable one (constituting a danger under the Code) may appear to many as a matter of semantics. However, this is the legal test that has been determined by the Courts to apply in a danger analysis. That question cannot be resolved arbitrarily and the answer essentially rests on the facts of each case. In order to measure the extent of the risk and determine whether it constitutes a danger under the Code, one must attempt to quantify the likelihood of the risk materializing.

[174] In *Martin-Ivie* v. *Canada Border Services Agency,* 2013 FC 772 (*Martin-Ivie),* the Court made reference to the *Martin* judgement and had this to say on that point, at paragraph 49:

> […] In *Martin*, Justice Rothstein, writing for the Federal Court of Appeal, set aside the decision of Officer Cadieux because he refused to consider whether such a possibility existed even in face of evidence about past assaults on park wardens, the nature of their duties and the types of individuals and situations they might face, which were risky. However, in so doing, Justice Rothstein specifically contemplated that the essence of the required inquiry involves assessment of the likelihood of the alleged risk materializing.
>
> [Underlining added]

[175] In my view, the statistical evidence presented by the employer at the hearing relating to the probability of an assault that can reasonably be expected to cause injury, is compelling, as I will explain further.

[176] The evidence establishes that OC Transpo has been analyzing incidents that occur against its bus operators in order to look for trends and allocate resources accordingly. This is done by reviewing VATE forms completed by supervisors at the scene of an incident after seeking input from the bus operator involved. The forms include information on the type of assault and summary of the incident. The incidents are categorized according to their nature and severity, much along the lines of the criteria set out in the *Criminal Code.* OC Transpo has classified incidents into three levels:

> Level I: Criminal threatening, contact/no contact; application of intentional force – slap, push, shove, grab, spat on, object thrown (contact/no contact) – no or minor injury.
>
> Level II: Application of intentional force, contact – punch, kick – injuries sustained; and

> Level III: Aggravated in nature, weapon involved, intensive/repeated physical contact with intent to maim.

[177] The assault against Mr. MacDuff on March 26, 2013, was classified as a Level II assault.

[178] The evidence introduced by the employer touched on incidents reported for the time period of January 2012 to November 30, 2014. It establishes that there were a total of 173 incidents during that period. Of that total, 168 are classified as Level I and the remaining five are classified as Level II. There are no Level III incidents reported. Given the definition of danger in the Code, which incorporates the requirement of a reasonable expectation of injury or illness, I agree with the employer's submissions that Levels II and III only are of significance for the purpose of the present appeal.

[179] The Federal Court states as follows in *Martin-Ivie,* at paragraph 49:

> […] Rather, the probability of injury in these — as in all other cases — is the central focus of the inquiry, and the case law teaches that for a "danger" to exist, the circumstances must be shown to present a realistic possibility of injury actually occurring.
>
> [Underlining added]

[180] Thus, the accident rate during that 3-year period adds up to an average of 59 Levels I and II combined per year, and two (2) Level II incidents per year, for all of OC Transpo's bus operators workforce, comprising approximately 1600 employees.

[181] What do those figures tell us in relation to the quantification of the risk? The evidence presented by Mr. Ian Scott, Ph. D. Senior Manager, Financial Advisory with Deloitte LLP, provides what I consider to be a determinative basis to answer that question. Mr. Scott's credentials as an expert statistician were not questioned. He was retained by the appellant to perform the following analysis: (i) data exploration to identify data gaps and summarize the available data, (ii) probability analysis based on historical OC Transpo bus operator incident data and operational data (e.g. boardings, service hours, bus routes schedules, etc.), and (iii) trend analysis to investigate the effect of selected factors (e.g. bus routes, time of day, etc.) on incident rate.

[182] The analysis was conducted on the basis of the information gathered by OC Transpo, as Ms. Ahee stated in her testimony. The validity and reliability of that information was not seriously contested. The statistical probabilities are based on Level II assaults, which as described above, are the ones where an employee has suffered an injury. Dr. Scott's conclusions can be summarized as follows. He looked at the probabilities of Mr. MacDuff sustaining a Level II assault against a number of operational metrics and found that:

- in 2012 there was a 0,0092% chance that Mr. MacDuff would be involved in a Level II assault per month;
- in 2012, there was a 0,00011% chance that he would be involved in a Level II per revenue hour
- and, perhaps even more telling in my view, in 2012, there was a 0,000000008% chance that he would be involved in a Level II assault per boarding; that percentage is 0,0000014%, or 1 in every 71 million boardings, when using the incident rate for the 3 years under study.

[183] When asked in cross-examination by the intervenor about the odds of a bus operator suffering an assault at Levels I or II in a given year, Mr. Scott stated that bus operators have, overall a 1 in 26 chance of being assaulted. These odds would be 1 in 900 if Level II assaults only were considered. I understand those statements to refer generically to all bus operators, as opposed to the odds of Mr. MacDuff himself being assaulted.

[184] Mr. Scott also analyzed the possibility of trends suggesting that certain days, or time of days or routes might be more dangerous than others. He found no trends that would be statistically significant in that regards. The higher number of assaults at a particular time of day or on particular bus routes could be explained by a higher number of passengers (e.g. rush hour, transitway express buses).

[185] Mr. Scott also compared the probabilities of a Level II assault to other metrics. This provides useful information on the relativity of the potential hazard involved in the present case. He compared the collision rates for OC Transpo in 2012 and 2013 to the average Level II incidents for those years, i.e. two (2). The collision rate was 1565 in 2012 and 1445 in 2013, for an average of 1505 collisions per year. He explained that Mr. MacDuff is 752.5 times more likely to have a collision than be involved in a Level II assault. Yet, as the appellant points out, no claim of danger is being made regarding the significantly higher risk of being involved in a road accident.

[186] In another example, Mr. Scott testified that Mr. MacDuff is seven (7) times more likely to be killed in a plane crash or killed in an act of terrorism, than to be subject to a Level II assault.

[187] Those comparisons, for what they are worth, nevertheless illustrate the fact that the probability of Mr. MacDuff being assaulted on June 4, 2013, is infinitesimally small, especially considering the employer's offer to have a special constable in uniform ride on the bus with Mr. MacDuff that day. In such circumstances, the risk of Mr. MacDuff being assaulted is virtually inexistent. This case is different from other cases reported in the jurisprudence involving employees working in penitentiaries, or whose duties consist of law enforcement or transport of money in armoured cars, and for whom the risk of serious assault is, a priori, much more likely and significant, given the nature of their duties.

[188] The intervenor points out that it is not only the odds of being assaulted that should be the source of concern, but the frequency and regularity of assaults occurring. I do not share that view, for the purpose of making the analysis of danger. As stated by the Courts, the probability of a risk materializing at the time of the refusal or the health and safety officer's investigation is what the concept of danger in the Code is concerned with.

[189] In the face of that evidence, it is simply not open for me to conclude that Mr. MacDuff was likely to be assaulted on the morning of June 4, 2013, or in the future for that matter, as the Court in *Pollard* has put it. The possibility of such an event occurring is far too remote to be characterized as a danger as defined in the Code.

[190] Bus operators are called upon to be in contact with members of the general public when they perform their duties. It is in the very nature of their jobs. I simply cannot be convinced that working with the public under the conditions presented in evidence presents, in and of itself, a danger to bus operators within the meaning of the Code. I find it deplorable and most unfortunate that Mr. MacDuff was assaulted on March 26, 2013, through no apparent fault of his. It is a reprehensible act for which one would hope that the culprit will face criminal justice. But living in society implies the possible misfortune of being the victim of unpredictable unlawful actions by ill-intended individuals. Zero-risk in that respect is in my view, unattainable.

[191] The appellant's evidence and the parties' submissions spent considerable time on the adequacy of the measures in place to minimize the risk of assaults. The appellant argues that it has taken appropriate preventive measures to mitigate a hazard over which, in the final analysis, it has no control.

[192] The employer placed great emphasis on the measures that it considers appropriate to manage the risk and prevent assaults, to the extent possible. Starting with the job description of the bus operator, it is clear that the ability to deal with the public and manage challenging customers is an inherent feature of the job. Mr. Lindsay Toll, Section Manager, Performance Training with the employer, testified as to the nature of the training provided to newly hired bus operators. He introduced voluminous documentation setting out the subject matters being covered over the course of that training (Exhibit 18, Vol. I to V), which was in place even before Mr. MacDuff received his training. This 31 day initial training provided to bus operators touches on the importance of those skills. It was established that sensitivity and de-escalation techniques represented a significant portion of the curriculum. A one-day module trained new bus operators on effective communication techniques and the risks of a breakdown in communication on the operator and passengers' safety. They are reminded of the importance of de-escalating situations before they get out of hand. Bus operators are informed that fare disputes are a major cause of aggressive customer behaviour. They are taught to request the fare in an open manner ("are you aware that…"), with a view to inform and not enforce the payment of a fare. They should not confiscate a pass, or

detain or eject people from the bus. They learn that they are given discretion to issue a day-pass if they feel that gesture may de-escalate a volatile situation. It was established that Mr. MacDuff received that training and is aware of those expectations. He did not dispute that.

[193] These are all key messages that are communicated repeatedly to bus operators early on in their careers and periodically throughout their employment through means such as "Pro-in motion" cyclical training, on a 3-year calendar (Exhibit 33), and an Assault Prevention Training (Assault Prevention Lesson Plan, Exhibit 23). In reviewing Mr. MacDuff's training record, Mr. Toll testified that he would have received the "Pro-in-motion" training and the City of Ottawa's Transit Services Workplace Violence Awareness training in 2012. The employer also publishes memos to operators found in the binders that operators are required to review at the start of their shift, informing them of a change in policy or procedure, such as the ones regarding fare collection.

[194] The evidence also established that bus operators have radio communication with the Transit Control Centre and are trained on the proper use of radio codes, should they feel the need for assistance. Should they feel that the use of a radio might escalate a potentially aggressive behaviour, they are taught that they can depress the red line system, and a special constable would be called forthwith. The evidence established that a special constable arrived at the scene of the event on March 26, 2013, less than 1 minute after Mr. MacDuff had depressed the red line button. Those systems were both operational on June 4, 2013, the day of Mr. MacDuff's work refusal.

[195] Special constables are essentially OC Transpo's constabulary force. They have peace officer status and are entitled to carry defensive weapons and equipment. They are trained with respect to investigation and the use of force techniques. They operate from a Transit Law Communication Centre, which operates 24 hours and has over 400 Closed Circuit Television (CCTV) cameras with live feeds in various points of the Transit System. Mr. MacDuff's assailant was caught on CCTV camera and his picture was broadcasted via crime stoppers. OC Transpo has re-established its "Walk and Ride" program, whereby special constables ensure a visible presence in transitways and on-board buses.

[196] The appellant also established that it tracks incidents of violence against bus operators in order to look at trends, such as cause of incident, time of day, day of the week, bus routes, etc. This is done by reviewing completed VATE forms. These analyses are then summarized in a report which is reviewed and discussed at the policy committee and eventually passed on to each OC Transpo's garages' local committee.

[197] That evidence is not contested. I am satisfied that the employer has not ignored the risk of assaults on bus operators and contrary to HSO Béland's finding, has in place systematic measures purporting to manage and mitigate that risk. However, the respondent and intervenor take the position that in spite of all these

measures, bus operators continue to be subject to assaults, which is proof that the employer is not meeting its legal obligations under the Code to provide its bus operators with a safe workplace and prevent them from being injured while at work. The respondent and intervenor submit that the measures described by the employer do not adequately mitigate the risk of assault and, in the final analysis, are simply ineffective. The respondent and intervenor submit more specifically that the employer should have considered the installation of protective shields to isolate the bus operator from the public, and should put in place more visible deterrents by increasing its complement of special constables and installing close circuit cameras on board buses.

[198] The central theme of the respondent and the intervenor's submissions is thus the employer's failure to consider more robust protective measures to guard bus operators against assaults. In my view, that dispute is only peripherally relevant to the appeal, as it is not central to the determination that I have to make in relation to the "danger directions", as I have explained above. That dispute, in my view, goes beyond what I consider to be the proper scope of the present inquiry, which is to look into the validity of directions issued by HSO Béland further to his conclusion that Mr. MacDuff was exposed to a danger on June 4, 2013. I have determined that Mr. MacDuff was not exposed to a danger, and in my view, this should be the end of the matter.

[199] What the respondent and intervenor are in fact arguing is that the employer is in breach of sections 124, 122.1 and 122.2 of the Code and Parts XIX and XX of the Regulations for not having fully explored appropriate preventive measures and, to paraphrase HSO Béland, for not having "systematic controls" or taken "new preventative steps" to protect Mr. MacDuff – and in fact all of its bus operators – from violence by members of the public. That argument implies that the focus of my inquiry should shift from assessing whether Mr. MacDuff was exposed to a danger, to a more general assessment of whether the employer had, at all material times, exercised due diligence or properly applied the hierarchy of controls envisaged by the Code, and as a result whether it had contravened those sections of the Code.

[200] While I already determined that this should not be the purpose of the present inquiry, I am mindful that the combined effect of subsections 146.1(2) (the power to vary a direction) and 145.1(2) of the Code authorizes an appeals officer to substitute a "danger direction" by a "contravention direction", in appropriate circumstances. This was held by the Court in *Martin*, in the following terms:

> [23] According to Mr. Cadieux, by proceeding under subsection 145(2), Mr. Grundie invoked a "provision that is highly specific in that it deals with a restrictive concept that has been set at a very high standard .... The concept of 'danger' as defined in the Code is unique in that it only applies in exceptional circumstances" (paragraph 150). Mr. Cadieux was unprepared to find a "danger" in this case.

[24] However, Mr. Cadieux was of the opinion that section 124 "is sufficiently broad in scope to cover all professions where 'intentionality', or the unpredictability of human behaviour, is the predominant element of the work" (paragraph 198). He found that the law enforcement activities of park wardens involved intentionality and the unpredictability of human behaviour. With respect, if that was his view, he should have proceeded to determine the complaint under section 124 and, if necessary, issue a direction under subsection 145(1).

[25] Mr. Cadieux did not set forth the criteria he would have considered had he assessed the matter under section 124. It is not for this Court to prescribe those criteria. However, I would observe that section 122.1 provides that the purpose of Part II of the Code is to prevent injury occurring in the course of employment and that section 122.2 provides that in appropriate cases, protective measures including the provision of personal protective equipment, devices or materials are to be provided. […]

[…]

[26] At one time it was questionable whether an appeals officer could proceed under subsection 145(1) when a health and safety officer had made a previous determination under subsection 145(2). See *Syndicat des débardeurs SCFP, local 375 c. Terminus Maritimes Fédéraux* (2000), 192 F.T.R. 1 (Fed. T.D.); affirmed (2001), 213 F.T.R. 59 (note) (Fed. C.A.). However, subsequent to that decision, the Code was amended by the addition of subsection 145.1(2) which provides:

(2) For the purposes of sections 146 to 146.5, an appeals officer has all of the powers, duties and immunity of a health and safety officer.	(2) Pour l'application des articles 146 à 146.5, l'agent d'appel est investi des mêmes attributions – notamment en matière d'immunité - que l'agent de santé et de sécurité.

[27] Under section 146.1, an appeals officer may "vary, rescind or confirm" a direction of a health and safety officer. If a health and safety officer has made a direction under subsection 145(2) that the appeals officer considers inappropriate, he may rescind that direction. However, because he now has all the powers of a health and safety officer, he may also vary it to provide for what he considers the health and safety officer should have directed.

[28] An appeal before an appeals officer is *de novo*. Under section 146.2, the appeals officer may summon and enforce the attendance of witnesses, receive and accept

> any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).
>
> [29] In this case, it was patently unreasonable for Mr. Cadieux not to have assessed the facts before him pursuant to section 124 and if he considered it appropriate, to issue a direction under subsection 145(1).
>
> [Underlining added]

[201] In view of this precedent, I will, for the sake of completeness, address the arguments submitted by the respondent and the intervenor on whether the employer was in breach of the general obligations of the Code. As I mentioned earlier, it is argued that the additional three measures that the employer ought to have considered in order to satisfy its obligations of due diligence under the general obligations of the Code are the installation of protective shields to isolate the bus operator from the public, the increase of its complement of special constables and the installation of closed circuit cameras on board buses.

[202] After having assessed the facts in this regard, I am of the view that it would not be appropriate to make any determination on these issues in the context of the present appeal. For the following reasons, I find that there is insufficient basis to issue any contravention direction under subsection 145(1) of the Code in this inquiry.

[203] Firstly, the only evidence relating to the installation of shields arose out of the testimony and cross-examination of the employer's witnesses, mostly Mr. Jim Babe, OC Transpo's Chief special constable. Mr. Robert Manion, a retired mechanic with OC Transpo, was called to testify by the respondent, to report on his experience with installing a "plexiglas" shield on a bus, a number of years prior to the events leading up to the refusal. His endeavour caused him to be reprimanded, as this initiative had not been authorized by the employer. Mr. Manion presented his evidence as a layperson, with no claim to having special expertise in the field.

[204] The respondent led no expert evidence supporting the use of such equipment. Neither did the intervenor, because of the limitations placed on its participatory rights in the present appeal, which did not include the right to adduce evidence. Consequently, there was no first-hand scientific evidence relating to the fabrication, design, types, material composition, or safety implications of protective shields. The Code does not prescribe the use of a shield let alone refer to a particular standard. I am therefore ill-equipped to make any informed finding on

that question, without the benefit of a more complete and compelling evidentiary record.

[205] The evidence on the use of protective shields may be summarized as follows. First, the use of shields is not an industry standard. The report on OC Transpo's safety and security management programs prepared by the American Public Transportation Association (ATAP) at OC Transpo's request, did not recommend their use to increase the safety of bus operators. Mr. Babe testified about the use of shields across major Canadian Transit Agencies and reported that 9 out of 10 agencies do not use shields. Only the Toronto Transit Commission (TTC) currently has its buses equipped with such devices. BC Transit is currently piloting their use. Winnipeg and Edmonton apparently ran a pilot project testing three different styles of shields, but Mr. Babe was told that the program was cancelled after operators voiced opposition to the use of shields.

[206] Secondly, concerns were expressed about the presence of shields, as they may create a glare or distraction for the operator, or prevent the operator from seeing the right-hand side mirror. There is also the risk of the operator being boxed in the cockpit in the event of an accident - accidents are more frequent than assaults – or other circumstances requiring the operator to quickly step out of his cockpit area. In other words, safety of operators would not be improved if the installation of a shield could create another potentially more serious hazard. While I agree with the intervenor that these concerns are speculative because OC Transpo has never actually test piloted the shields, I have no valid reason to disregard the cautionary views expressed by Mr. Babe, Mr. Charter and Ms. Ahee in their testimony. There is simply no direct evidence to the contrary.

[207] In other words, it is possible that protective barriers could further reduce the risk of certain kinds of assaults against operators by preventing passengers to get at them. It is also possible that their presence could worsen the safety situation of operators. In short, I am satisfied by the evidence on record that the use of that equipment in the operator's driving area raises technical issues and has a number of safety implications. It is worth noting that the remedy sought by the intervenor is that the employer should "initiate a pilot project to evaluate the effectiveness of appropriately designed operator shields". I am not persuaded that a contravention of the Code has been established because the employer has not explored the installation of shields, let alone for not having installed shields on its buses before Mr. MacDuff's return to work on June 4, 2013. I agree with the appellant that there is no legal or factual basis that could support a finding of contravention of sections 124, 122.1 or 122.2 the Code on that ground. That option is fraught with difficulty and its implementation should be debated in other *fora*, such as the policy committee where, as I was informed, it had been discussed in the past and that option deferred by committee members.

[208] Another measure was also raised by the intervenor to further reduce the risk of assault: by increasing the number of special constables to keep bus operators safe. It is argued that this measure would provide a higher level of visible deterrent.

Without going into detail on the number of special constables on staff at OC Transpo and how that resource is allocated, their numbers represent only a small fraction compared to the bus operators' workforce of 1600 employees. The intervenor's proposition, unless it is suggesting that a special constable ride on every bus route (approximately 800), which it is not, would remain within the realm of what it has itself described as a "reactive" measure in my view. Furthermore, the intervenor does not specify the order of magnitude of the increase that it is calling for. No justification was put forward as to the threshold number that would satisfy the employer's due diligence obligation under the Code. What should be considered "sufficient" for the purpose of sections 124, 122.1 and 122.2 of the Code? There is simply no objective evidence on that point. It is not possible in my view to reach a finding of contravention of the Code solely on the basis of such a subjective proposition. Accordingly, there is no evidence or cogent rationale that would support a finding of contravention of the Code in that respect.

[209] Finally, the intervenor is seeking the installation of CCTV cameras on board all buses "within a reasonable period of time". The appellant agrees with this proposal and states in its submissions that it has implemented their use now that the technology has advanced so as to protect bus operators' privacy, which had been raised as an issue in the past. It is not clear to me how such a measure will necessarily prevent, as Mr. MacDuff is seeking, assaults from happening again in the future. It may serve as a visible deterrent, as the presence of cameras may dissuade members of the public from engaging in criminal acts and it is likely in that spirit that the employer has undertaken to go forward with the installation of such devices. In the final analysis, I am not persuaded by the argument that the failure of the employer to have implemented such a measure at the time of Mr. MacDuff's refusal constitutes a violation of the Code.

[210] In his submissions, the respondent highlighted the fact the employer breaches the Code by not allowing the Health and Safety Committee(s) to participate in investigations when an assault has occurred, contrary to section 135 of the Code. He also argues that the employer violates section 20.9 of the Regulations by not having a "competent person", as defined in that section, conduct the investigation into assaults against bus operators when these incidents occur.

[211] The appeals officer's inquiry under section 146.1 is not intended to open the door to a general review of the employer's compliance with the Code or Regulations. Its scope is determined by the issues that flow from the directions under appeal. In my opinion, the questions raised by the respondent are not before me. In my view, they do not form part of the scope of the appeal, framed as it is by the directions issued by HSO Béland. They are unrelated to the circumstances of the refusal on June 4, 2013, and were not raised by Mr. MacDuff as part of the grounds in support of his refusal.

[212] Regarding the claim for reimbursement of monetary costs incurred by Mr. MacDuff as a result of the employer's appeal, the respondent did not cite any authorities in support of his request. This remedy is akin to the payment of legal

costs and specific statutory power is required to authorize the exercise of that authority. I can find no such power in the Code. Furthermore, given my disposition of the appeal, an order of costs would simply not be justifiable.

[213] Finally, the appellant argued in the alternative that the hazard invoked by Mr. MacDuff to support his refusal is a normal condition of employment for him, and is therefore excluded from the operation of section 128. Paragraph 128(2)(*b*) of the Code reads as follows:

> **128.** (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> (*a*) the refusal puts the life, health or safety of another person directly in danger; or
>
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.
>
> [Underlining added]

[214] The exception to the right to refuse to work set out under paragraph 128 (2)(*b*) is premised on a finding of danger. Having found that there was no danger at the time of the refusal, that question does not arise (see: *Martin-Ivie* at paragraph 47).

Part V - Decision

For the reasons set out above, the appeal is upheld and I rescind the three directions issued on July 4, 2013, by HSO Béland.

Pierre Hamel
Appeals Officer

APPENDIX

OHSTC Case No.: 2013-40

Between:

City of Ottawa (OC Transpo), Appellant

and

Norman MacDuff, Respondent

and

Amalgamated Transit Union (Local 279), Intervenor

Matter: Interlocutory Decision on the Appellant's Motion for an *in camera* Order and for the Protection of the Confidentiality of certain information.

1) The appellant is seeking an order to have a portion of this hearing held *in camera*.

2) The basis of that motion is the confidential nature of certain aspects of the evidence related to special constables employed by the City of Ottawa at OC Transpo. More specifically, the appellant wishes to enter evidence related to:

    1. The number of special constables on duty at OC Transpo at any given point in time
    2. The minimum number of special constables on duty at any given point in time, as per internal OC Transpo policy; and
    3. Scheduling information associated with special constables at any given point in time at OC Transpo.

    (such information hereafter referred to as "Confidential Information")

3) The appellant submits that the "Confidential Information", because it is in the nature of the operations of a police force whose mandate is to ensure the safety of the transit system, is protected under the public interest privilege, as its disclosure could undermine the safety of persons employed by the appellant and passengers using the transit system.

4) The appellant is seeking an order from the appeals officer that would allow for the presentation of the "Confidential Information" *in camera*, and that would also ensure that the confidentiality of such information by the persons who would be authorized to remain present during the *in camera* portion of the hearing, be maintained.

5) Paragraph 146.2(*h*) of the *Canada Labour Code* (the Code) provides that the appeals officer may determine the procedure to be followed in the appeal proceeding. Appeal proceedings under the section 146 of the Code are quasi-judicial proceedings and are open to the public. The open court principle is a cornerstone of our legal system and seeks to ensure that such proceedings are conducted in a fair and transparent manner, and be seen to be so conducted. However, there are situations where the need to protect the confidentiality of certain information outweighs the importance of an open process. Those situations are exceptional and should minimally impair the intrusion on the open court principle.

6) The appellant's motion is akin to a request for a publication ban. In reaching my decision on the appellant's motion, I have applied what I consider to be the appropriate legal test governing such a matter. That test has been set out by the Supreme Court of Canada and is commonly referred to as the *Dagenais/Mentuck* test, adapted of course to administrative proceedings such as the present proceedings. The question is whether the salutary effect of protecting the information from being publicly disclosed outweighs the right for

the general public to have access to the appeal process. And perhaps as importantly, whether the order sought would compromise the ability of parties to present their case fully.

7) The respondent does not oppose the motion. The intervenor does not oppose the motion on its merits, however is seeking that members of the Executive Board of the Union (ATU, Local 279) who may choose to attend the hearing, not be affected by the *in camera* order.

8) Having considered all of the above, I am persuaded that the appellant's motion is motivated by a genuine concern for the safety of OC Transpo employees and members of the public. I also accept the fact that the "Confidential Information" is sensitive and by its very nature, kept in confidence by the appellant. I am also of the view that should the "Confidential Information" become part of the public domain, the risk that such safety could be undermined, as a result of persons with unlawful intentions becoming aware of such information, is real and substantial. I am also of the view that the limited disclosure of the "Confidential Information", as sought by the appellant, is supported by the application of the public interest protection exception, described as the "Wigmore test", and by paragraph 8(1)(*c*) of the *Municipal Freedom of Information and Protection of Privacy Act*. And finally, I am confident that an order aimed at protecting the "Confidential Information" as it is described earlier, and appropriately framed, would not impair the ability of the parties to present their case, would still ensure that the process is seen to be conducted in a fair and transparent manner, and would constitute a minimal and reasonable encroachment on the open court principle.

9) As to the question of who will be authorized to attend the *in camera* portion of the hearing, I am of the view that only a limited number of persons whom I consider have a "need to know" in relation to the present proceedings, will be authorized to attend. This decision is no judgment on my part on the trustworthiness or reliability of persons who will be excluded and is solely founded on my desire to protect the "Confidential Information" to the fullest extent possible and to ensure a seamless application and enforcement of my order.

10) For the above reasons, I grant the Order as sought. My Order will read as follows:

ORDER

1. All "Confidential Information" with respect to OC Transpo's special constables, as listed above, will be adduced *in camera;*

2. The persons authorized to be in attendance during the *in camera* hearing are:

- Counsel and co-counsel for the appellant Ms. Katie Black and Ms. Stephanie Lewis and one instructing officer;
- The respondent Mr. Norman MacDuff and his representative Mr. Jon Funston;
- Counsel for the Intervenor Mr. John McLuckie and the law student assisting him, and the President of the Amalgamated Transit Union (local 279) Mr. Craig Watson; and
- Ms. Natasha Hyppolite, hearing clerk for the Tribunal and myself.

3. It is recognized that the appellant will disclose the "Confidential Information" for the limited purpose of the present appeal under section 146 of the Code*;*

4. The authorized persons under paragraph 2. of my Order are hereby deemed, by their presence at the *in camera* hearing, to have undertaken to:

    - Maintain the "Confidential Information" in confidence at all times;

    - Not make copies of the "Confidential Information";

    - Not disclose the "Confidential Information", in whole or in part, in its original form or by way of summary or analysis, to anyone except as explicitly ordered by the appeals officer or otherwise authorized by the appellant;

    - Only file redacted copies of documents containing the "Confidential Information" as Exhibits that may be accessible to the public;

    - Redact any references to the "Confidential Information" in any documents, including the decision to be rendered on the present appeal and written submissions of the parties, that may be accessible to the public.

Dated this 8th day of April, 2015

[signed]
Pierre Hamel
Appeals Officer