Occupational Health and Safety Tribunal Canada

Date: 2016-04-19
Case No.: 2012-47

Between:

Jordan Schmahl, Appellant

and

Correctional Service of Canada, Respondent

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

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer
Decision:	The decision that a danger does not exist is confirmed
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Sheryl Ferguson, Union Advisor, Ontario, UCCO/SACC-CSN
For the respondent:	Ms. Karen L. Clifford, Counsel, Treasury Board Secretariat Legal Services
Citation:	2016 OHSTC 6

REASONS

[1] This appeal has been brought by appellant Jordan Schmahl pursuant to subsection 129(7) of the *Canada Labour Code* (Code) against a decision rendered by Health and Safety Officer (HSO) Lewis A. Jenkins, pursuant to subsection 129(4) of the Code, at the end of the latter's investigation into the appellant's continued refusal to work. The conclusion arrived at by the HSO was that no danger existed for the appellant in the circumstances the latter had invoked as the basis for his refusal to work.

[2] Initially, the present appeal had been consolidated for the purpose of hearing with another appeal (file 2012-33), this one brought by Mr. Scott Huizinga against a similar decision of no danger rendered by another health and safety officer (Robert Tomlin), and involving the same issue in the same institution as the one brought by appellant Schmahl which is dealt with below.

[3] At the start of the scheduled hearing into these two appeals, the undersigned was informed by counsel for the appellants that Mr. Huizinga was withdrawing his appeal against the said decision of no danger and, as a consequence, the hearing that followed and the ensuing present decision concern solely the appeal by Mr. Schmahl.

Background

[4] The appellant is a correctional officer level 1 (CX 1) who, at the time of his refusal to work on July 2, 2012, was employed at Warkworth Institution, a medium security establishment which is located in Campbellford, Ontario. On that day, the appellant had been assigned to work during the day shift (7:00 to 15:00 hrs) in the segregation unit of the institution. However, shortly after the beginning of his shift, he was offered and agreed to exchange posts with another correctional officer, Ms. Sheri Lemoire, who had been assigned to the feeding and recreation post.

[5] The exchange was authorized by then acting correctional manager Curt Schmid, who was in charge of the institution on that holiday day and, in that capacity, would eventually investigate and respond to any work refusal occurring while on duty. As appellant Schmahl was local union president at the time, his union functions would have facilitated such post exchanges since efforts would be made to facilitate his postings and union work. Prior to the date of the refusal, the appellant had last been posted to the kitchen (feeding and recreation post) on June 30, 2012.

[6] This being said, upon the post exchange being authorized, Mr. Schmahl first attended to methadone delivery in the visitor and correspondence section, such being the first duty of those assigned to the feeding and recreation post on that shift, and once this was completed, he attended at the kitchen/feeding area, more specifically the B section. Apart from the actual food preparation area, the

kitchen/feeding area is made up of two sections, A and B, with food being served only in A section or mess, although both have tables and chairs for those who choose to have their meals there.

[7] Evidence has put Mr. Schmahl's arrival in the mess at 8:00 am or thereabout. The appellant reported first to the B mess, or non-serving side, with another officer, the latter carrying one of the Mark IX OC spray canisters (one for each mess) needing to be available to officers present in the messes during feeding time in case of emergency, and being required to be placed under lock and key in a wall-attached locked metal box/safe when not needed. In both mess A and B, the said boxes are secured to a wall portion adjoining an open door (behind the serving line in the case of mess A) through which, in an emergency and when access to the Mark IX OC canisters cannot be safely had, officers can go and then lock as the first part of their egress route to safety.

[8] It would appear that upon his arrival in mess B and the placing of the Mark IX in the wall safe, the appellant noted that the wall box/safe that would hold the Mark IX OC spray canister was loose and "shaky". It is at that time, thus just a few minutes after arriving on post, that the appellant registered his work refusal by contacting duty correctional manager C. Schmid. At that time, there were no inmates present as inmates had not yet begun arriving for their breakfast meal, they being sent to the messes in groups and at a rate determined by the sector coordinator CX 2 in charge, although there may have been some inmate kitchen workers present. Testimony at the hearing indicated that the first inmates may have started arriving for breakfast at around 8:30 am.

[9] It needs to be noted for a better understanding of what follows that there are two types of OC spray canister or aerosol projector to which correctional officers have access. First is the Mark IV OC spray canister that officers carry on their person in a belt holster. It is a smaller container than a Mark IX canister, has a smaller capacity and reach and is primarily designed to be used at a closer range on a more direct and one-at-a-time target/individual. Its smaller size also means that a lesser number of sprays are available to the user. Mark IX OC aerosol projectors on the other hand are larger and thus contain a greater quantity of the spray product, have a greater capacity and reach, are designed to be used at a greater and wider range than a Mark IV spray and thus, while usable to control single individuals from further than the Mark IV, serve also to control more than one individual at-a-time.

[10] Evidence was received at the hearing that the greater capacity and reach of the Mark IX projector entails also a greater risk of contamination and cross-contamination than the Mark IV projector. Mark IX containers are not worn on one's person in a holster but are kept in locked boxes or safes in specifically designated places in the institution, such as in the kitchen at feeding times, or the recreational area, and can be accessed when needed by officers using a key.

[11] The appellant's refusal to work statement, as reported in HSO Jenkins' investigation report, was to the effect that:

> Warkworth Institution's policy of locking Mark IX canisters inside secured safes in the kitchen does not allow Correctional Officers to utilize this essential piece of equipment. In spontaneous emergency circumstances officers would not be able to deploy the Mark IX canister without
>
> extensive time lapse to acquire one and this creates a danger. Also, the physical act of turning my back to crowds of inmates in the kitchen in order to unlock and acquire the Mark IX canister places me in a compromising/unsafe position to be overtaken and/or assault (sic) by inmates.

[12] In the course of his investigation, HSO Jenkins established the following facts, as listed in the latter's report:

-"there are four officers located in the mess, one CX 2 and three CX 1s. Two (*are stationed*) in mess A and two in mess B;
-the CX 2 is responsible for calling for more inmates (*to attend at feeding*) as conditions dictate (*thus signifying that the flow can be accelerated or slowed down depending on circumstances at any given time*);
-if a Correctional Officer needs to acquire the Mark IX spray they(*sic*) have to turn their back to the inmates. The other officer present is able to watch the officer's back while acquiring the canister. If the situation is volatile, the officers can exit via the egress (*route*), lock the door behind them and call for assistance;
-in the mess where the CX 2 is assigned, if he leaves the area to call for additional inmates (*to be sent from living units for feeding*), the other Correctional Officer is left by himself with the exception of Food Service staff (*which may include previously screened inmates assigned to work in the kitchen*). Again, if the situation is such that acquiring the Mark IX is not safe for the remaining officer, he has the ability to exit through the egress (*route)* and call for assistance.
-the safe is a metal lock (*sic*) box with a padlock on the side. Hinges are on the outside and not pinned. These are not the same safes as in the living unit control posts which utilize a Folgers Adams locking mechanism."

(Italics text added by undersigned)

[13] In arriving at a finding of no danger, HSO Jenkins formulated the following conclusion:

> When a spontaneous emergency occurs in the kitchen during feeding the officer has several choices: use dynamic security; deploy their Mark IV OC Spray; open the safe and deploy the Mark IX OC Spray or egress from the area locking the door behind them. Management has indicated that if the situation is volatile enough and officers cannot acquire the Mark IX OC Spray safely, the officers can egress and then call for assistance. Therefore I have determined that a danger does not exist under the *Canada Labour Code*, Part II.

[14] In his testimony at the hearing, HSO Jenkins testified to his being an experienced and trained health and safety officer whose training included both the

RCMP courses on investigative techniques as well as a course on investigation of hazardous occurrences. In addition to confirming, at the hearing, the findings enunciated in his investigation report, the HSO stated that in the course of said investigation, he had also confirmed the presence or existence of an emergency egress possibility out the back door of each mess hall, should there not be possibility or sufficient time for the correctional officers assigned to these posts to deploy the Mark IX OC spray in an emergency situation. In this regard however, the HSO did not look beyond the area (kitchen) into which the said back doors open, but confirmed that in the kitchen area, there would be present inmate kitchen workers in addition to regular kitchen personnel.

[15] He also confirmed the presence of CCTV cameras in the kitchen/mess area and that at feeding time, four correctional officers (3 CX1 and 1 CX2) are assigned to said area, with a fifth officer being stationed nearby in the breeze way providing access to the kitchen area and thus capable of providing assistance in seconds, all being equipped with personal protective equipment, including stab resistant vests, handcuffs and Mark IV OC spray, radios linked to Main Communication Control Post (MCCP), as well as a Personal Protective Alarm (PPA). Furthermore, he confirmed that inmate movement to and from the kitchen feeding area is controlled by the CX2 on duty there, who ensures that the living unit inmate groups are called to the kitchen feeding area in a staggered manner so as to control and not overcrowd the area.

[16] Finally, HSO Jenkins indicated that at the time of his investigation, he had not been provided with any information that would have indicated unusual circumstances or a higher degree of risk within the institution on the day of the refusal by Mr. Schmahl. In addition, in reference to the statement of work refusal registered by the appellant, HSO Jenkins indicated that through his investigation, he had understood the situation (128(1)(b) of the Code) being claimed to present a danger to be the respondent's policy of locking Mark IX spray canisters in secured safes, and the physical activity (128(1)(c)) being also claimed to present a danger to be the consequent requirement to open such safes in a certain manner to wit, with one's back to the inmates.

[17] As already stated above, at all times relevant to the refusal to work action undertaken by the appellant, Mr. Schmahl was a correctional officer CX1 employed at Warkworth Institution. However, and the relevance of this will become obvious in the course of consideration of some issues raised by the respondent, on May 1, 2014, and thus while the physical hearing of this appeal, which started on April 28, 2014 and continued into June 2014, proceeded, with submissions presented until November 2014, appellant Schmahl commenced in a CX III trainer position in an acting capacity, the duration of such running until May 2, 2017, thus continuing as the present decision is being made, although the latter's substantive position remains correctional officer CX I at Warkworth. This fact, as will be seen below, has been used by the respondent as basis for a claim that the present appeal is moot.

Issues

[18] The central issue to be determined by this appeal is thus, in my opinion, whether the policy of locking away the Mark IX aerosol projector in a kitchen safe in place at Warkworth Institution, which could have the effect of requiring an officer to turn his back on inmates in seeking to acquire the said protective equipment in an emergency, created a danger within the meaning of the Code.

[19] While this represents the apparent main issue to be resolved by this *de novo* consideration of the facts and circumstances that existed at the time of the appellant's work refusal and the decision by HSO Jenkins, the respondent has also raised three
separate additional issues that could affect the undersigned's consideration of the merits of this case.

[20] First, the respondent claims that the appellant has sought to expand the scope of the work refusal and thus of this appeal, by bringing to the fore concerns about the actual construction and "loose" wall attachment of the safe, something that had not been raised in the work refusal and the investigation by the HSO.

[21] Second, the respondent also questions the standing of the appellant to actually have refused to work, arguing abuse of the intent of the Code, more specifically the purpose of the refusal to work process under the legislation. In brief, the respondent essentially claims that the appellant actually engineered a work refusal in order to bring to resolution what the appellant himself, who was union president at the time, described as a long standing safety issue.

[22] Third, the respondent has submitted that the appeal should be dismissed on the sole ground of mootness, given that at the time of the appeal hearing, which proceeded some two years after the work refusal by Mr. Schmahl, he had not worked the kitchen post since his refusal and that in view of his acting appointment as an instructor CX III, he would not be required to work such post for a further three years, such five-year hiatus meaning that there no longer exists a present live controversy needing to be resolved through this appeal hearing and decision, more so since following the Schmahl refusal, the location of the Mark IX safe in mess A has been modified and thus in both mess A and B, the safes can be opened without having the officers turn their backs on inmates.

[23] While the additional issues of mootness and standing/abuse raised by the respondent will be dealt with below, the claim that the appellant attempted to extend the scope of the appeal by making reference to the condition ("loose") of the safe in mess B can be addressed immediately. As stated above, the statement of refusal presented by Mr. Schmahl was very specific and made no mention of the condition of the safe or its securing.

[24] Furthermore, while HSO Jenkins may have made a passing comment under the heading "facts established by the health and safety officer" to the effect that hinges of the safe "are on the outside and not pinned", this was evidently in comparing other safes located elsewhere in the institution, as evidenced by his words that "these are not the same safes as in the living unit control posts(…)" , with no effect of such comment transpiring in the HSO's decision cited at length above, and no mention whatsoever of said safe condition being made by the HSO in his decision.

[25] This being said, there is no disagreement between the parties that an appeals officer acts in a *de novo* fashion and thus has great flexibility in receiving evidence and information that may not have been available to an HSO being reviewed at appeal. Such evidence however must concern the issue initially raised by the refusal, not an expanding or expanded descriptive of what may, logically, be linked but was never raised *ab initio*. In this respect, the "shakiness" or "looseness" of the safe may logically relate to the overall situation of a Mark IX being locked in a safe, but the condition of the safe was not raised at the time of the refusal (see statement of refusal above) where solely the policy or rather the consequences of said employer policy to lock such was challenged.

[26] In this respect, I find that it is not necessary for the undersigned to determine whether the mention of the condition of the safe by the appellant attested to an intention to expand the scope of the appeal because in my opinion, the sole matter before me is the actual policy of the employer that is claimed to present a danger as well as the situation of the appellant to potentially be required to turn his back on inmates when seeking to unlock the safe and access the Mark IX OC container.

Submissions of the parties

[27] Four witnesses were heard for the appellant. They were appellant Jordan Schmahl, CX II officer C. Schmid, who was duty correctional manager on the day of the appellant's refusal, Tracy Scott Ohl CX I and team leader of the institution's Emergency Response Team (ERT) and CX I officer Sean O'Sullivan, employed at Warkworth Institution since September 2012.

[28] Five witnesses were heard for the respondent. They were Robert Ross Cameron, Warkworth Institution's Chief Institutional Services, Robert William Ferguson, senior project officer, security operations, Correctional Service Canada (CSC) HQ, Timothy Warren Gunter, employed at CSC for twenty years as CX I, II and IV, Thomas Rittwage, correctional manager CX IV, and Pauline McGee, CX IV Warkworth's Coordinator of Correctional Operations.

[29] In addition, some twenty-nine pieces of documentary evidence were adduced by both parties. Those were considered by the undersigned in preparing this decision.

A) Appellant's Submissions

[30] Stated in a nutshell, the position advocated by the appellant is that the decision by HSO Jenkins was unfounded in fact and law, as the employer's policy of locking the Mark IX canisters in secured safes in the kitchen rather than to allow correctional officers to wear such on their duty belts created a danger, such danger not coming within the range of the appellant's normal conditions of employment. As to the actual factual circumstances around the refusal by the appellant, the descriptive testimony offered by the appellant's witnesses generally replicated the description in the HSO report.

[31] This being said, on the notion of "danger" itself as defined in the Code, reference was made to the Federal Court decision in *Verville* v. *Canada* (*Service correctionnel*), 2004 FC 767, which dealt with the risk of spontaneous assault as in the present case, and stands for the fact that circumstances or conditions that have the potential to cause injury do not have to result in injury every time but only bear a reasonable possibility to do so, and that such reasonable potential or expectation can be evaluated by ordinary witnesses having the necessary experience when in a better position than the trier of fact to form such opinion.

[32] In this regard, the submission on behalf of the appellant was that the latter's experience as a correctional officer legitimized his reasonable expectation that the policy of the employer regarding the locking of the Mark IXs could reasonably be expected to result in injury to him or other employees. The appellant pointed out in this regard that it was the employer and not the appellant or any other employee who had made the decision to make Mark IX OC spray canisters available to officers working in the kitchen, as opposed to most other areas of the institution, this being warranted by the fact that the kitchen is one of the most dangerous area of the institution for a number of reasons.

[33] Those reasons range from the physical make-up of the kitchen/feeding/serving area and the impossibility of isolating and confining inmates due to the lack of barriers, to the fact that there are only four officers assigned in total to mess A and mess B to do static and dynamic security, that inmates are called in unit(s) groups to attend feeding, thus signifying that there may be large groups present in the kitchen at any given time, that inmates are not searched before leaving their units or entering the kitchen located in a separate building, this last fact occasioning the wearing of outside clothes, and this all enhancing the possibility of dangerous items concealment, and finally, that even though officers may be equipped with PPAs and radios, the limited number (4) of designated PPA responders, posted away from the kitchen in the living units, cannot guarantee a timely response to a call for assistance, as testified to by witness O'Sullivan, the same being the case for those officers electing instead to use their radio to call for assistance.

[34] Furthermore, the appellant submitted that despite the fact that there are, in the kitchen, security cameras that are monitored at MCCP (central control), those cameras do not cover certain areas and as a consequence, where an incident would occur in an unmonitored area and thus be unseen, additional staff could not be dispatched nor could the officer in the breeze way leading to the kitchen be informed and dispatched since that post relies on MCCP.

[35] Finally, the appellant submitted that where officers assigned to the kitchen would need to extricate themselves from a situation jeopardizing their security, exiting the kitchen would prove complicated as it involves a two step egress which means that once they exit through and lock the door behind the service counter, they are not immediately in the designated egress route, but find themselves in the kitchen among inmate kitchen workers and non-inmate kitchen staff. Reaching the egress route requires officers to go through a second door in the back of that area, needing however to wait for the duty CX II who is the only one with a key to unlock said door.

[36] Counsel for the appellant pointed out in this regard that HSO Jenkins admitted in testimony that he had not looked beyond the first kitchen door and only been told about the egress route. Having regard to the dangerous nature of the kitchen area, the appellant cited two incidents involving officers T. Ohl and C. Schmid, whereby, in the first case

(T. Ohl), the officer was already wearing the Mark IX on her belt and only needed to pull it out and attempt to spray the inmate to gain immediate compliance and put an end to an assault on another inmate, and in the second case (C. Schmid), where the officer was struck in the jaw by an inmate refusing to comply with direct orders in the presence of 150/200 inmates who would not, in any event, intervene in favour of an officer, the limited capacity of the Mark IV spray canister to gain compliance in the circumstances could have been obviated, had the Mark IX canister been easily accessible.

[37] Appellant counsel sought to counter the argument put forth by the employer at the hearing that there is no danger for correctional officers and no need to carry a Mark IX spray canister on their person when working in the kitchen since there are other more dangerous areas of the institution where employees work with less protection, particularly in all the physical plant areas where instructors and CSC employed trade people are only provided with a PPA.

[38] Counsel pointed to the admitted different role of these employees and the different relationship they have with the inmates, to the fact that differently from correctional officers, they do not wear a uniform that can be viewed as creating a barrier with inmates who are in small groups in those areas, that those areas are regularly visited by officers and also that inmates entering and exiting said areas or shops have to go through a metal detector.

[39] Counsel also invited the undersigned to give little weight to the testimony of respondent witness T. Gunter to the effect that, regularly supervising 100 inmates at canteen with no more than an anti-stab vest and a radio, he has never been afraid, is of the view that dynamic security enables him to anticipate and prevent many incidents, and feels that officers should rely only on their verbal and interpersonal skills, dynamic security and physical handling and thus need no other safety equipment. Counsel pointed out that Mr. Gunter disagrees with this Tribunal's decision making the wearing of anti-stab vests mandatory, has stated that this is not necessary and that he never wears any other protective equipment even if, at least at certain times, he is required to. According to counsel, such attitude demonstrates a lack of ability to evaluate risks inherent to a prison environment, even where said witness recognized that it would be easier for him to deal with inmates as he works constantly with the same inmates, a situation that differs from the situation of a CX I working in the kitchen and encountering numerous inmates that the officer may not be familiar with.

[40] The appellant submitted that the purpose of the Mark IX OC spray differs from that of all the other tools carried by officers, such as PPA, radio, first aid CPR mask, handcuffs, gloves and even Mark IV. It is an inflammatory spray held in a canister that can be used when the target is between 6 and 16 feet from the user and is intended to target a group or a small area to create time and distance between the user and inmates as well as in the case of incidents involving weapons and where more distance is required between staff and inmates.

[41] As well as with the other tools available to correctional officers, the Mark IX must be used in accordance with CSC's Situation Management Model (SMM), which represents the use of force model in place at CSC, where inmates are physically uncooperative or assaultive. It is not intended to be used once the Mark IV has been used, but rather, as another category of inflammatory spray, in different situations. As such, while the Mark IV is intended to be deployed against a single target, the Mark IX is preferable where a group is targeted.

[42] As regards the use of such inflammatory spray, the appellant argued that where officers choose not to use such sprays, they tend instead to use physical handling, which the appellant opines is more dangerous because of the greater proximity required and consequently the greater risk of injury to both an officer and an inmate, and also contrary to the SMM which indicates that OC Spray should be resorted to before physical handling in the management of a situation. This takes on even more importance when considering that CSC does not hire staff based on physical stature and its recruitment process does not involve a physical fitness test. A visible Mark IX canister, be it removed from the safe or worn on an officer's person, also serves as deterrent and, according to the SMM, is intended as such, as is the case for all other weapons provided to officers. As it is more impressive than the Mark IV and is perceived as such by inmates, its being kept in a safe prevents its use as a deterrent.

[43] The appellant further argued that a variety of situations may occur spontaneously in the kitchen that could require the use of the Mark IX. Those spontaneous situations may happen at any moment and are impossible to anticipate despite all the measures taken to assess risk, and thus the fact that the Mark IX would be locked away hampers its use. This is aggravated, according to testimony from the appellant, by the fact that the kitchen safes differ from those others in the institution and require more steps to be opened, including the need for officers who may be elsewhere in the kitchen area doing dynamic security to return to unlock the safe. The various steps required to actually access the canister would necessitate a certain period of time, evaluated by witness for the appellant T. Ohl to range from 30 seconds to one minute, a sufficient length of time, according to witness for the respondent Pauline McGee, for an officer to be punched and kicked many times.

[44] Furthermore, it is submitted that the suggestion that one officer could use a Mark IV to try and gain control while the other would be going for the Mark IX is not viable since the evidence is that those two types of OC spray are intended to be used in different situations, as opposed to successively. It was also argued that having the Mark IX locked away is counter to the efficient use of force option, an option that requires the tool to be available at all times as opposed to sporadically, and thus when needed will tend not to be used. According to appellant Schmahl, the various steps just mentioned would cause the appellant to feel he has lost the option to use the Mark IX.

[45] Furthermore, the appellant challenges the position put forth by the respondent employer at the hearing to the effect that the regular steps taken by the employer to assess the risks result in reducing the level of danger in the institution, noting instead that despite all the measures that may be taken, there will always remain a high degree of residual risk due to the unpredictability of human behaviour. On this, the appellant refers to this Tribunal's decision in *Armstrong* v. *Canada (Correctional Service),* 2010 OHSTC 6 (*Armstrong*) , where the appeals officer stated that "inmate behaviour can go from cooperative behaviour to behaviour causing grievous bodily harm or death without a progressive escalation of aggressiveness", and notes that witnesses for both sides have acknowledged that assaults by inmates, including assaults on staff, have happened in the last years at the institution, thus proving that not all risks can be assessed and all incidents avoided.

[46] Additionally, the appellant submitted that having correctional officers wearing the Mark IX on their person would not result in over-reliance on or excessive use of the said tool, this being supported by the lack of such where all officers wear the Mark IV on their person with numerous witnesses indicating never having resorted to the said tool, even in the case of one witness (Ohl) who always wears the Mark IX on her belt with the Mark IV for deterrence purposes but has never had to make use of it. It is the appellant's position that the extensive training received by correctional officers ensures that excessive use is not likely to happen, said training requiring that their tools be used in accordance with the

SMM, with the many existing controls in place, including the Officer Statement and Observation Reports (OSOR) and Reportable Use of Force, Post-incident Checklist, as well as the potential for disciplinary or criminal sanctions, ensuring that there be only appropriate use of force.

[47] Central to the work refusal by the appellant was the necessity, due to the placement of the safe(s), to turn one's back to inmates in order to open the safe to access the Mark IX canister. This situation, created by the employer's policy of locking away the Mark IX OC spray in a safe(s) in the kitchen, results in a heightened threat as the officers are placed in the unsafe position of risking to be overtaken or assaulted by inmates, and is contrary to the officers training where they are taught never to have their back to inmates. The documentary evidence in the form of pictures adduced at the hearing contradicts the employer's witnesses who attested to the possibility of opening the safes without turning one's back on the inmates, more so when one takes into account the fact that in mess A (serving side), there can be inmates that are serving the meals behind the counter as well as inmates in the kitchen.

[48] Furthermore, the fact that the location of the safe in mess A was changed after the appellant's work refusal so that, according to respondent witness R. Cameron, officers no longer be required to have their backs to the inmates when opening the safe serves to at least implicitly establish that at the time of the refusal, it was necessary to have one's back to inmates when opening the safe in mess A. In mess B, the safe location has not been moved and thus officers still need to turn their back to open it.

[49] The Mark IX OC spray canister needing to be put in safes in the kitchen at meal times means that it needs to be brought into the kitchen by the officers assigned to said posts and, as they are not supposed to wear said canister on their person when on post, this signifies that they do not have a proper holster on their duty belts and thus must carry the canisters by hand to the kitchen while encountering inmates on the way. Furthermore, it is submitted that consequently, where it is required that the Mark IX be taken out, it would have to be held in an officer's hand, thereby rendering more difficult the physical handling or handcuffing of an inmate where needed.

[50] Counsel for the appellant also alluded to the employer's contention that the risk of cross-contamination justifies the latter's refusal to allow that correctional officers wear the Mark IX on their person. However, while agreeing that the use of such tool carries such a risk, the appellant notes that this is not a new tool made available to correctional officers but rather one that is available in other areas of the institution, that as cross-contamination risk is the same whenever and wherever the OC spray is used, irrelevant of where the canister is taken from, and consequently that cross-contamination is not an issue, whether the canister is worn or taken from a belt holster or locked in and taken from a wall safe.

[51] The appellant also contends that preservation of life in the form of the possibility to egress the kitchen area at any time where officers feel threatened, while apparently considered paramount by HSO Jenkins, and accepted as an important principle by the appellant, must be considered in light of what the duties of a correctional officer entail, which is ensuring the security of the public, staff and inmates, and the need to intervene in threatening or violent situations where use of force may be needed, specially since correctional officers are peace officers and thus may be duty bound to take action.

[52] In this respect, it is submitted that it is more likely that officers would attempt to control a situation rather than egress the premises, except in extreme circumstances. This is why the employer has seen fit to equip correctional officers with personal protection equipment. Not wearing the Mark IX on their person would signify that it would have to remain in the wall safes should there be a need to egress, and given their construction and location, the kitchen safes could be easily breached by determined inmates. In this regard, the appellant pointed out that employer witness R. Cameron had indicated not being aware of any safety test being conducted on the safes prior to their installation.

[53] Prior to HSO Jenkins' decision of no danger, the initial response to the appellant's work refusal on behalf of the employer was given by C. Schmid who was duty correctional manager on July 2, 2012. The latter testified having informed Deputy Warden Christine Cairns as well as Assistant Warden Management Services R. Cameron of Mr. Schmahl's refusal.

[54] Counsel for the appellant drew attention of the undersigned to the fact that C. Schmid testified to having been called numerous times by the Deputy Warden during his examination of the situation raised by the refusal and encouraged to make a finding of no danger, even though he had issues with this position, since it was his opinion that if Mark IX spray canisters were considered by CSC to be useful, it would be better if officers could have them on their person. He testified to being reinforced in this belief by his own involvement in the incident of December 2012 where he was assaulted and about which he testified.

[55] The latter also testified that while business continued as usual in the institution on the day of the refusal, and thus the movement of inmates to the kitchen not slowed down (nor was an additional officer from segregation assigned to the kitchen, which would have disrupted the routine of the segregation inmates), even though he and the CX II assigned to the kitchen on that day (Goodfellow) may have agreed to there being a danger in locking away the Mark IX, his decision was dictated by his belief that to have changed inmate routine would have constituted a greater danger.

[56] Finally, counsel has submitted that in the present case, the employer has not taken all the measures to eliminate, reduce or control the hazard to which the appellant employee may be exposed since it would be possible to allow correctional

officers to carry a Mark IX canister on their duty belt while working in the kitchen. It is thus argued that the case law principle that a danger that constitutes a normal condition of employment must be residual in nature is not satisfied in the present case. Furthermore, in determining whether the claimed danger constitutes a normal condition of employment, it is the appellant's position that the "low frequency, high risk" principle developed in the appeals officer decision in *Parks Canada Agency* v. *Mr. Doug Martin and Public Service Alliance of Canada*, Decision No. 07-015 (*Parks Canada*) , should be applied. Such would be to the effect that :

> "…where the consequences of a particular event are dire or critical for an individual, prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of the event occurring. It also holds that, where the potential outcome of exposure to risk is dire or critical for a person, mitigating measures to prevent that dire outcome must be taken, regardless of the likelihood of the exposure occurring. "

[57] The appellant thus argues that the evidence illustrates that despite all the measures taken to assess and prevent the risk of assault, correctional institutions by their nature remain a dangerous environment. In this respect, the consequences of a spontaneous "group attack" in the kitchen, a large area differing from other areas in the institution and where large groups of inmates may congregate at any given time with no possibility of isolating inmates, represents the type of risk noted in the *Parks Canada* decision and one that could be mitigated through the issuance of the Mark IX to correctional officers. The fact that the employer has seen fit to have two Mark IX spray canisters placed in the kitchen constitutes an implicit recognition that this can represent a valuable tool to control situations that can occur in that area.

[58] It is thus the conclusion of the appellant, on the substance issue of this appeal, that the employer's policy to lock up the Mark IX canister creates a danger and that said danger does not represent a normal condition of employment.

Respondent's submissions

[59] As stated previously, the respondent's position vis-à-vis the appeal by Mr. Schmahl raises not only the question of substance as to whether the circumstances at the time of the work refusal that concerned the refusing employee constituted a danger for him within the meaning of the Code, but also issues that one could qualify as ancillary, although their determination by the undersigned in the manner sought by the respondent could signify that the appeal would not need to be determined on the merits.

[60] At the initial stages of this decision, I determined that the matter of whether the appellant had sought to expand the scope of the work refusal and consequently of the appeal by making numerous references at the hearing and in submissions to the construction and the securing of the safe(s) in the kitchen need not be determined by the undersigned, as such a question is not before me due to the real specificity of the work refusal formulation as well as that of the decision of the

HSO, both being silent on this subject. The respondent however has argued that on the basis of mootness as well as that of an abuse of the intent of the Code and consequent lack of standing for the appellant to have proceeded to refuse to work, this appeal should not be determined on the merits.

[61] The submissions of the respondent on the issue of mootness turn essentially on a single set of elements that, in the respondent's opinion, amount to the absence of a "present live controversy" which, it argues, does not expand to include "potential" or "future" live controversy. The respondent has based its position on the leading precedent set by the Supreme Court of Canada in *Borowski* v. *Canada (Attorney General)*, [1989] 1 SCR 342 (*Borowski*) to the effect that "The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question".

[62] In this regard, the respondent fashioned its mootness argument on the words of Justice Sopinka explaining the principle of the doctrine as follows:

> "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice."

[63] Noting the use by the court of the word "present" to qualify the expression "live controversy", which the respondent submitted as meaning "contemporaneous/actual in time rather than in the past or future", the latter submitted in this regard that the examination of mootness ought to consider the timeframe at hand and not speculate as to whether something could be an issue or controversy years in the future. The respondent thus argued that the factual uncontradicted evidence supports a finding of mootness as the issue of the appellant being placed in danger as a result of working the kitchen post is no longer a "present live controversy" between the appellant and the respondent. That evidence is that appellant Schmahl has not been at the kitchen post since the date of his work refusal and that his new work arrangement (acting CX III trainer) will run for a further three years into 2017.

[64] The respondent concedes that the "acting" nature of said assignment means that appellant Schmahl could be back as a CX I at the expiry of that assignment, and thus could then be required to work the kitchen post. However, the position put forth by the respondent is that a gap of five years (2 years between the refusal and the hearing plus 3 years of acting assignment) between the event and the potential for appellant Schmahl to be back in the kitchen post is sufficient to render the

matter moot.

[65] According to counsel, in considering such issue of mootness, the Tribunal has consistently held the same opinion that the alleged "danger" raised at the time of the work refusal must still exist at the time of the hearing by the appeals officer. Finally, as to the second element of the work refusal by correctional officer Schmahl to wit, that the safe /lockbox in mess A, which is the one associated with the refusal, was positioned in such a way as to cause the correctional officer seeking to unlock it to gain access to the Mark IX aerosol projector to turn or have his back to inmates in the mess, the respondent noted that the evidence shows that after the refusal by Mr. Schmahl, that box had been moved to correct the situation. Given that there had been no such difficulty with the lockbox in mess B, it was submitted by the respondent that since then and thus at the time of the hearing by the undersigned, no matter where correctional officers would then stand in accessing the lockbox in either mess, their backs would never be to inmates. The respondent thus submitted that the appeal should be dismissed on this sole ground of mootness.

[66] The respondent has also argued that the appeal should be dismissed due to the purpose of the appellant in refusing to work on that specific day, which counsel put as using the right of refusal to work as a tool to bring a long standing occupational health and safety issue to resolution, action which the Federal Court of Appeal in *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424 (*Fletcher*) found to be improper. Arguing that such right of refusal constitutes a serious emergency measure that ought to be based on a genuine, reasonable belief of danger and thus not used as a means to challenge a party's policies and procedures, counsel submitted that the evidence presented at the hearing demonstrated just that purpose on the part of the appellant. As such, it was pointed out that appellant Schmahl had admitted to having exchanged posts even though he had been originally stationed at segregation, this in order to take up the kitchen post, and had further recognized that conditions at Warkworth had not been different on the date of the work refusal (July 2, 2012) compared to the last time he had been posted in the kitchen, two days prior on June 30, 2012, when he had not felt the need to refuse to work.

[67] Additionally, the respondent pointed out that within a few minutes of arriving at the kitchen post and prior to any inmate even arriving or being present for their breakfast meal, Mr. Schmahl had already invoked his work refusal. Counsel also noted the further admission by appellant Schmahl, describing a long standing health and safety issue, that approximately one month earlier, in May 2012, he had filed a complaint under section 127.1 of the Code. That complaint used essentially the same wording as the one used for his refusal to work regarding the employer's "policy" of locking the Mark IX OC canisters in locked boxes, this time in another area of the institution.

[68] According to the respondent, in considering this issue the undersigned should find assistance in a previous decision by an appeals officer in *Jack Stone* v.

Correctional Service of Canada, Decision No. 02-019, which also involved a work refusal situation where there had been no specific knowledge of something happening or about to happen in that medium security institution that could jeopardize the refusing employee's health and safety at a specific time. In that case, the appeals officer having determined that the actual purpose of the refusing employee had been to bring an issue of staffing to a head and that this constituted a concern of a general nature, the appeals officer had reiterated a principle that the undersigned should apply, stating at paragraph 51:

> [51]… [T]he right to refuse provisions in the Code are not meant to address long standing problems such as the problem identified by Mr. Stone in the instant case. The right to refuse in the Code remains an emergency measure to deal with situations where one can reasonabl[y] expect the employee to be injured when exposed to the hazard, condition or activity. However, it cannot be a danger that is inherent to the employee's work or is a normal condition of employment. This statement alone is fraught with consequences for correctional officers. Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers, who are specifically trained to deal with these situations, it is very difficult to envisage a situation, in that environment, where a refusal to work for violence could be justified other than in a specific and exceptional circumstance.

The appeals officer in that case added that where such a valid concern of a general nature was found to exist, the more appropriate forum to address such would be the institution's health and safety committee.

[69] Given all of the above, the respondent reiterated that it is apparent from the work refusal formulation that the appellant is essentially complaining about an existent respondent policy and furthermore, given the lack of any evidence that there existed a specific danger at the time of the work refusal, that a strong inference should be drawn that correctional officer Schmahl simply took steps to put himself in place so he could file a work refusal against essentially the same "policy" as in his prior complaint.

[70] It is the respondent's submission that when taken in context, these actions by the appellant would appear to be an improper use of the Code, actions that should be strongly discouraged and condemned by the appeals officer, and found to be sufficient basis onto themselves to dismiss the appeal. The respondent added further that evidence presented at the hearing supports that the placement of the lockboxes in the kitchen area had been the subject of labour-management discussions at the local health and safety committee, which remains the proper forum for such discussion as opposed to an improper use of the work refusal process under the Code.

[71] As regards the substance and merits of the work refusal, the respondent has submitted that the decision of absence of danger arrived at by HSO Jenkins is well-founded and should be upheld. The respondent has founded this conclusion essentially on its contention that in seeking a reversal of HSO Jenkins decision, the appellant has ignored the reality and what the respondent sees as the uncontradicted

evidence put before the undersigned. Specifically, the respondent formulates a number of conclusions from the evidence, those being enunciated below.

[72] According to the respondent, the potential situation described by Mr. Schmahl to validate his work refusal has never arisen in the 37 years of Warkworth Institution's existence leading up to the date of the refusal, nor has such situation occurred in the two years that separate the refusal from the hearing into this appeal by the undersigned, prompting the respondent to qualify such situation as being speculative "in the extreme".

[73] Furthermore, on the potential for injury to correctional officers, the respondent notes that the chart listing incidents in the kitchen feeding area made available to the HSO in the course of the latter's investigation showed that in the sixteen months preceding the work refusal, there was but a single incident, occurring on December 11, 2011, that involved food trays being thrown at an officer by two inmates, such incident or situation not requiring the use of any OC spray.

[74] Along the same line of use of OC sprays, there is, according to the respondent, uncontradicted evidence that the Mark IX aerosol projector is unsuitable for close proximity use as demonstrated by the single time that it was used in the kitchen area when such use had resulted in unwarranted contamination of other inmates, a situation that could have aggravated the hazard faced by staff. In point of fact, the respondent pointed to evidence received, that it characterized as uncontradicted, to the effect that the training and direction to correctional officers is that should a situation such as what is envisioned in the appellant's work refusal ever arise and seeking to access the Mark IX OC spray from the lock box would put them at risk, they are to remove themselves from the situation immediately rather than stop and attempt to open the said lockbox or boxes.

[75] Furthermore, as to the actual placing of the Mark IX in the safes in the kitchen, the respondent notes that this was done as a result of the respondent acceding to a request by the bargaining agent in place and that such practice pre-dates the provision of Mark IV OC spray canisters to every correctional officer to wear on their person. Finally, as to the use or threatened use (by unholstering) of the Mark IV at Warkworth, it would be the uncontradicted evidence that every time this occurred, inmate compliance was achieved. In support of its argument in this case, the respondent noted that the safety value of the Mark IV OC spray had been invoked before by the appellant.

[76] Referring to a previous decision of the Tribunal in *Armstrong*, the respondent submitted that the appellant had taken the position in that case that the carrying on one's person of the Mark IV canister would protect correctional officers in the event of spontaneous emergency situations. Counsel went on further by submitting that the appellant had previously taken the position that such carrying of the Mark IV canister as routine personal protective equipment would not provoke

or inflame situations because the smaller canister is discreet and can be contained in its zipped pouch on the belts of correctional officers.

[77] In submitting that no danger existed in the circumstances of this case, the respondent has argued that the determination of danger, as defined by the Code, must be based on the four-part test developed by the Federal Court and the Federal Court of Appeal in the *Canada Post Corporation* v. *Canad*a (*Attorney General),*2007 FC 1362, affirmed by *Canada Post Corporation* v. *Pollard*, 2008 FCA 305) (*Pollard*) according to which the following must be established:

> 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;
> 4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.

[78] The respondent thus submits on that basis that no evidence has been brought by the appellant, based on the normal test of the balance of probabilities, that there was an existing or potential hazard or condition likely to materialize that went beyond the standard condition of employment that correctional officers encounter by being in the presence of inmates at a medium security facility. In this regard, the position put forth by the respondent is that the appellant, like all correctional officers, is trained and equipped with the proper tools to handle violence, assaults and non-compliance by inmates, whether it be in the kitchen or anywhere else in Warkworth Institution, all this being spelled out in the job description of a correctional officer.

[79] Furthermore, on the basis of the circumstances outlined in the appellant's work refusal, the respondent submits that on the evidence presented, which was that of a quiet and uneventful morning at Warkworth Institution, those circumstances suggest or provide no indication whatsoever that the appellant was at risk when exercising his work refusal and even less at risk of assault. As to determination of the occurrence of circumstances reasonably liable to cause injury or illness at some time, but not necessarily every time, the respondent notes that such determination cannot be based on speculation and hypothesis and that the Tribunal has consistently adhered to this principle. When this is applied to the facts and circumstances of the present case, the respondent's view is that what the appellant alleged as being the danger to which he was exposed which would legitimize his refusal, was purely speculative and hypothetical.

[80] The appellant has sought, through his refusal to work, to have Mark IX OC spray canisters carried by correctional officers on their person, particularly in the kitchen, invoking the risk of spontaneous assault by inmates to which proper

response would or could be delayed by having to go through the process of accessing and opening the lock box containing said protective equipment. On this, the policy of correctional officers routinely carrying Mark IV OC containers had been implemented by the respondent following the appeals officer's decision in *Armstrong* determining that correctional officers on living units are "exposed to spontaneous assaults by inmates", the appellant COs having maintained that the absence of OC spray for officers placed them at risk.

[81] Having, in that case, maintained that the routine availability to all of the Mark IV OC spray would obviate the risk of injury to correctional officers resulting from spontaneous assault, the respondent has submitted in the present case that no evidence was presented as to why it would now be necessary to escalate the level of the tool provided to the correctional officers from a Mark IV OC spray to a Mark IX OC spray. According to the respondent, the evidence in the present case is actually to the contrary because of the strong risk of contamination and cross-contamination in the deployment of the Mark IX OC spray, as recounted by CO Schmid in his response to Mr. Schmahl's refusal, as well as the deleterious impact on dynamic security that would take place if correctional officers carried or wore Mark IX OC spray while on post.

Reply

[82] On the issue of whether the appellant had standing to make the work refusal central to the present case and the challenge by the respondent that such standing was inexistent due to the appellant not being originally assigned to work the "feeding and recreation" post on the day of the refusal and the fact that this became the case solely as the result of a voluntary post exchange with another employee, said exchange being presented by the respondent as being for the sole purpose of making the said work refusal, the appellant replies the following.

[83] First, being initially assigned or not to the post is irrelevant to the issue as the reality is that at the time of the refusal, he was effectively working said post. Second, while the appellant may have exchanged posts, this had occurred following approval by correctional manager C. Schmid, who at that time was in charge of the institution, and who did authorize the exchange in the course of a common practice that had been resorted to numerous times by the appellant in the past to facilitate, as testified to by the latter, the exercise of his union duties vis-à-vis as many members of the local union as possible.

[84] Third, while the appellant does not question the fact that the right to refuse dangerous work is an individual right that must be exercised by the employee who has reasonable cause to believe that a danger exists and that it is absolutely essential that the refusing employee be directly facing the alleged danger while at his post, it is claimed that the facts of the present case do not indicate otherwise and that Mr. Schmahl was indeed respecting the conditions of the work refusal process in the Code as the evidence clearly demonstrates that he was effectively working in the

kitchen when he refused to work, and that he had good reason to agree to the sought and duly authorized exchange. Fourth, it is submitted by appellant counsel that at no time was evidence presented that would have shown that Mr. Schmahl exchanged posts with correctional officer Lemoire for the purpose of making a work refusal or that the work refusal was premeditated.

[85] Responding to the statement by the respondent that the refusal to work by the appellant is essentially a complaint about an existing employer policy and that the right to refuse to work being a serious measure that cannot be used to challenge employer policies and procedures, the appellant indicates its agreement with this premise formulated by the respondent, but submits that when a danger exists, the presence of tensions or disagreements between employer and employees on the specific issue does not preclude an employee from invoking the right to refuse to work. The appellant finds support for this position in case law, particularly in a decision by the Canada Industrial Relations Board (known previously as the Canada Labour Relations Board or CLRB), in *Simon* v. *Canada Post Corp*. (1993) 91 di 1, CLRB Decision No. 988 :

> […] the existence of tensions or disagreements between employer and employees on specific issues does not preclude an employee's refusing to work and enjoying the protection of the Code if that employee personally and sincerely believes he/she has reasonable cause to believe that a danger exists. This is a question that must be examined case by case.

[86] Appeals Officer Lafrance reiterated the same opinion in *Marc Duguay* v. *Canadian Broadcasting Corporation*, Decision No. 08-22. It is thus the opinion of the appellant that there is no foundation for the claim by the respondent that Mr. Schmahl lacked standing to exercise a right of refusal in the circumstances of the present case and that thus the sole remaining issue is whether the location of the Mark IX aerosol projectors in locked boxes in the kitchen on July 2, 2012, rather than being borne on duty belts of correctional officers, constituted a danger.

[87] As regards the claim by the respondent that the matter has become moot due to the appellant not having worked the kitchen post since the date of the refusal and the fact that as a result of a three-year acting appointment, the soonest Mr. Schmahl could be assigned anew to the said kitchen post would be July 3, 2017, thus creating a 5-year hiatus that the respondent argues is long enough to base a finding of mootness, the appellant formulated the following reply, noting as a premise that contrarily to the allegation by the respondent employer, the documentary evidence accepted by the undersigned may show that the appellant has worked the kitchen post on a few occasions between the refusal date and the start of his acting CX 3 appointment.

[88] The appellant shares the view expressed by the respondent that the case law that finds application on this matter of mootness is the decision by the Supreme Court of Canada in *Borowski*, which stands for the principle that a matter will be considered moot when "the decision of the court will not have the effect of

resolving some controversy which affects or may affect the rights of the parties". The appellant submits that contrary to the position of the respondent, a controversy affecting or potentially affecting the rights of the appellant still exists, the central element of this position being the fact that the appellant, albeit absent at this time from his substantive position, is not and will not be severed from said substantive position and thus will return to said position at some point and thus may be faced with the same safety concern.

[89] According to counsel for the appellant, that position is supported in case law which establishes that when there is a possibility that the person will be back in their position, appeals are generally not moot. In this regard, the appellant refers to the decision of the appeals officer in *Nelson Hunter* v. *Canada (Correctional Service)*, 2013 TSSTC 12, where the employer had sought a declaration of mootness from the appeals officer because the employee had transferred to another institution. Counsel notes that in that case, the appeals officer found that its decision could still have a practical impact on the rights of the employee because he might want to return to the original institution should his safety concerns be resolved and thus did not find the matter moot.

[90] In the present case, the appellant argues that it is even more obvious that the matter is not moot since, apart from the acting and thus temporary nature of his present appointment, Mr. Schmahl has indicated his desire to return in the position where he initiated his refusal to work and further, and thus more convincing, it has been agreed and is clear from the acting appointment document that Mr. Schmahl will return to his substantive position at the end of his acting appointment, no contrary evidence having been presented. This necessarily differentiates the present case from the case law invoked by the respondent wherein mootness was found as a result of the employee having either retired or definitely resigned from his position. In the appellant's opinion thus, the circumstances of the present case presented a live controversy at the time of the refusal and still present a live controversy as this decision is being made by the undersigned, one that is liable to affect the rights of the appellant, and thus must be resolved.

[91] Additionally, still on the basis of *Borowski*, the appellant notes that should the appeals officer find a question moot, the second step, as stated by the Court, is to determine whether the appeals officer should still exercise its discretion to decide the matter, three factors needing then to be considered to wit, the presence of an adversarial context, the concern for judicial economy and the need for the Tribunal to be sensitive to its role as an adjudicative branch within our political framework.

[92] The appellant has submitted, should the appeals officer conclude to mootness, that it should nonetheless exercise its discretion to hear the case on the merits as the circumstances of this case satisfy all three factors enunciated by the Court. According to the appellant, there is no question that the adversarial context still is present between the parties, the concern for judicial economy strongly supports such a position as it is apparent from what has transpired at the hearing

that the appellant is apparently not the only employee concerned by the fact that the Mark IX is in a locked box rather than worn by officers and consequently, upon the Tribunal refusing to decide this matter on the merits, there is every likelihood that another employee may similarly refuse to work in the near future. Finally, as there still exists a dispute affecting the rights of the parties, the appeals officer would not find itself outside its adjudicative role in deciding the matter at hand.

[93] The appellant also submits that the relocation of the lockbox in mess A is of no consequence on the issue of mootness since the complaint by the refusing employee was not directed solely at the mess A box. Furthermore, although the respondent claims that with this repositioning, both mess A and B boxes now do not require correctional officers to have their backs to inmates, the appellant continues to disagree that this is the case.

[94] On the substantive issue of "danger", the appellant first notes in his reply to the respondent submissions what he considers to be a number of factual mistakes relative to the evidence presented at the hearing as well as what is described as failure by the latter to put witnesses' statements into perspective and thus misrepresenting the tenure of what was effectively said. As such, it is pointed out that HSO Jenkins did not look beyond the kitchen egress door and thus was not aware that officers needed to wait among inmate kitchen workers.

[95] Furthermore, it is claimed that contrary to what the respondent claims, the appellant did mention a specific number of inmate kitchen workers being present at the time of the refusal. The matter of the subject of the discussions at the Institutional Joint Occupational Safety and Health Committee (IJOSH committee) meeting of July 3, 2012, and the recollection by respondent witness R. Cameron is also challenged, the appellant claiming that the condition of the lockbox was discussed, the appellant alluding to the *de novo* jurisdiction of the appeals officer to suggest that the matter should be considered even if not mentioned since the evidence indicates the contrary.

[96] Additionally, as to the decision by CX 2 Schmid not to slow down inmate movements into the kitchen, or have them eat in their units in light of the condition of the lockbox, the appellant considers necessary to note the former's explanation that on balance, this would have caused an increased risk to institutional security in light of inmates known adversity to routine changes. As to the statement by C. Schmid that no other officer refused to work, again the appellant notes that the respondent should also have noted that the former had managed to convince another officer (Foster) to refrain from doing so in light of the effect this might have on inmate routine.

[97] As regards the incident of June 16, 2012, involving officers T. Ohl and Ostrom, the appellant points out that the respondent failed to note that officer Ostrom had worn the Mark IX on her belt for the full duration of feeding time, this being useful in managing to break up a fight between inmates. Furthermore as to

distances to be respected for using the Mark IX, the appellant notes that witness T. Ohl did state that those have to be respected when time and circumstances allow. By the same token, the appellant notes that relative to the use of radios and PPAs to obtain assistance, there have been instances when there has been no response. On the testimony by T. Gunter to the effect that there has never been a spontaneous emergency at Warkworth where the Mark IX could not be obtained, the appellant refers to the incident attested to by officer C. Schmid where the latter was punched in the face by an inmate and felt that he needed, but could not access, the Mark IX OC spray since it was locked away. This brings the appellant to submit that while Commissioner's directive 567-4 may indicate that officers have the discretion to choose the appropriate response to every situation, this clearly did not come to be in C. Schmid's case since the Mark IX aerosol projector was locked away.

[98] While no numerical or objective data supporting the unpredictability of human behaviour has been provided, as stated by the respondent, the appellant submits that this phenomena has been amply established at case law and not contradicted *per se* by respondent's witnesses. Such phenomena is also obvious from the SMM showing that inmate behaviour can go from cooperative to grievous bodily harm and death instantly with escalation not necessarily progressive.

[99] Furthermore, the appellant contends that the appropriateness of using the Mark IX spray in a use-of-force evaluation is better attained or determined from the actual and direct evidence from involved officers as opposed to the review of video footage and hearsay. The appellant disagrees with the statement that conditions in the institution, on the day of the refusal, had not varied from the conditions that prevailed two days before when the appellant also worked the kitchen post, as it is submitted that it is the disrepair or condition of the lockbox that caused the employee to become convinced of the existence of "danger". Finally, the appellant contradicts the claim that he has not worked the kitchen post since the day of the refusal. Documents in evidence do indicate that the latter was assigned the kitchen post several times after the day of the refusal.

[100] Apart from its arguments regarding "spontaneous assault" risks and the fact that the lack of immediate availability of the Mark IX may place officers at risk, the appellant submits that there are situations where the Mark IX could be necessary in the kitchen due to the presence of large numbers of inmates. As regards the availability of said aerosol projector, the appellant notes that even though the advent of CSC policy of having all correctional officers carry the Mark IV OC spray on their person while on duty caused Warkworth Institution to remove the Mark IX from various locations within the institution, it did not see fit to remove same from the kitchen.

[101] Consequently, where no evidence was presented as to why it would be necessary to escalate the level of tools provided to officers, the appellant makes the argument that the introduction of a new tool is not being sought as it is already in place, a fact that evidences that the employer felt the Mark IX could be necessary in

the kitchen to respond to situations where the Mark IV would not be effective. Considering that it is a valuable tool that can be useful where the Mark IV may not be, what the appellant is simply seeking is that it can be easily accessible in situations where it could be needed. Not giving easy access to a tool recognized as necessary in certain circumstances signifies that the employer is not sufficiently mitigating an existing danger. Consequently the appeal should be upheld.

Analysis

[102] The challenge by the appellant to the conclusion of absence of danger arrived at by HSO Jenkins is that on the facts and circumstances presented, the situation invoked by Mr. Schmahl as the basis for his refusal did indeed present a danger, said situation in its simplest description being the employer having a policy of locking away Mark IX aerosol projectors in a wall safe in the kitchen during meal times impeding access to such protective equipment in a spontaneous emergency and necessitating correctional officers to have their backs to inmates. While questioning such a conclusion by the appellant on the merits, the respondent has raised two issues that need to be addressed first given the potential, as stated previously, that finding in favour of the respondent in either case may make deciding on the merits unnecessary. I will deal first with the respondent's claim of mootness.

Mootness

[103] The respondent has essentially based such claim on two arguments. The first is based on the presence, one should rather say the absence, of the appellant from the position he held at the time of his refusal to work and the considerable passage of time between that departure and the latter's intended return into the said substantive position at the end of a lengthy acting appointment to other functions. The second invokes material corrective action since that same refusal to work and relative to the positioning of the wall safe involved in the refusal that would no longer cause correctional officers to have their backs to inmates when opening said safe to access the Mark IX aerosol projector therein.

[104] The appellant, on the other hand, has countered the respondent's position on these particular points by arguing that the appellant employee has not been separated from his substantive position and that the intention, be it the employee's himself or the employer's through the wording of the offer of acting appointment, has clearly been that the employee will eventually return to the substantive position and thus could be exposed to the same situation raised through the latter's work refusal.

[105] Furthermore, the appellant points out that Tribunal case law supports the conclusion that mootness is not an issue when there is no definitive separation from the substantive position, thus making the passage of time irrelevant. Additionally, as to the question of the repositioning of the mess A box, the countering argument

by the appellant is that the said box was not the sole box at issue when Mr. Schmahl took refusing action and that regardless of the repositioning of that particular box, the appellant still contends that the positioning or repositioning of those boxes by the employer has not resolved the issue of having one's back to inmates in seeking to access the Mark IX aerosol projector(s).

[106] In making their argument on mootness, both parties have used as legal foundation the Supreme Court of Canada decision in *Borowski* which essentially requires, in order for a case not to be moot, that there be present (in other words that there remain) a live controversy affecting or potentially affecting the rights of the parties both at the time of initiation and that of decision. The crux of the matter is thus to decide whether there was and still is a live controversy between the parties.

[107] While the words "live controversy" have been used repeatedly by both sides, neither one has sought to provide an interpretation as to the meaning that should be put on those words relative to the consideration of "mootness". The words used in the *Borowski* decision by Mr. Justice Sopinka however, provide a clear picture of the meaning those words should receive when, equating the expression "live controversy" and "concrete dispute", he speaks of the "substratum of (the) appeal" and the "raison d'être of the action", thus clearly indicating that in order to determine whether a "live controversy" remains, one has to look first to the "substratum" and "raison d'être", thus the substance of the action as opposed to the act of initiating action.

[108] In the case at hand, Mr. Schmahl initiated the action by registering a refusal to work pursuant to paragraphs 128(1) (b) and (c) of the Code, thereby claiming, in general terminology, both the existence of a condition in the work place that constituted a danger to him as well as the performance by him of an of an activity that constituted a danger to the latter as well as to another employee. In more specific terminology, said work place condition as well as said activity performance can be clearly grasped through the actual wording of Mr. Schmahl's statement of refusal as Warkworth Institution's policy of locking Mark IX OC canisters inside secured safes in the kitchen, thereby impeding the rapid deployment of such safety equipment in spontaneous emergency circumstances, as well as the needed physical act of turning one's back on inmates when unlocking said safes. Those elements constitute the actual "substratum" or "raison d'être" of the action initiated by the refusing employee in seeking to have a danger recognized when his posting requires that he be at the kitchen, which is not always the case and is dependent on shift and post assignment.

[109] On this issue, the parties have faced off on the question of the continued shift presence or prolonged absence of the refusing employee from the kitchen assignment. In this regard, one must note that in *Borowski*, the Supreme Court has clearly indicated that in order to arrive at a conclusion of mootness, there must be definitiveness to a situation change such that there remains nothing concrete or

tangible to decide. In this regard, where the appellant claims that his temporary, albeit somewhat lengthy absence from CX- I assignments that would include attending to the kitchen, does not impact on the continued life of the controversy his refusal has raised, the respondent's position is to the contrary, suggesting that there should be recognized some time limit after which the life of the controversy should be viewed as ended.

[110] I do not share this opinion and on this, I believe I am supported by the substance of the decision in *Borowski*. While I share the opinion expressed by the parties that the right of work refusal under the Code is personal and thus the claimed danger should relate primarily to the employee and, as stated in this case, another employee, words that given the lack of specific designation take on a general meaning, it is my opinion that in deciding "mootness", one must separate the carrier of the controversy from the actual factual circumstances or elements that make up the controversy which should not be affected by the temporary, and thus not definitive, absence of the carrier.

[111] In the case at hand, no evidence has been presented to the effect that the respondent's policy of having the Mark IX aerosol projectors locked away in kitchen safes, and thus not worn constantly on their person by the correctional officers assigned to the kitchen, has been changed or revoked. Furthermore, as per the submissions of the parties, it would also appear that notwithstanding some corrective placement of the safe in mess A, there still is disagreement as to whether this would have solved the issue of officers having their backs to inmates when seeking to access the Mark IX from that safe. Finally, it is clear from the evidence as well as from the submissions of both parties that the acting CX III appointment of Mr. Schmahl is, by definition, temporary and that the latter is thus intended to return to his substantive position, thereby meaning that he would be liable to be assigned to the kitchen supervision post and faced with the same situation that caused him to refuse to work.

[112] Having considered all that precedes, it is my opinion that there remains a live controversy between the parties. Consequently, this matter is not moot.

Standing /Abuse of intent of the Code

[113] The second issue raised by the respondent has to do with the standing of the appellant to exercise his right to refuse to work in these particular circumstances and what the respondent has characterized as the appellant's abuse of such right provided under the Code in engineering a refusal under pretences in order to address what the appellant himself has described as a long standing health and safety situation. While considering this issue would have the undersigned taking into account all the factual elements and circumstances that have been presented or have become evident through the course of the hearing and presentation of the evidence and submissions to make an assessment on balance of probabilities, all the while keeping in mind the words of the preamble to subsection 128(1) of the Code

that read as follows: " 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 […]", such consideration needs to occur within the parameters set by the right of appeal afforded an employee under subsection 129(7) of the Code and the authority, one should say the jurisdiction, afforded an appeals officer pursuant to section 146 of the same legislation.

[114] That provision of the legislation offers very explicit language regarding what an appeals officer is entitled to do relative to the conclusion arrived at by an HSO, such being described as either a "direction" or, as in the present case, a "decision", which stands for a decision of "no danger" formulated pursuant to the latter's authority under subsection 129(4) of the Code. As such, an appeals officer is required to inquire into the circumstances of and the reasons for the said decision of "no danger" and may "vary, rescind or confirm" it, depending on the appeal officer's degree of agreement or disagreement with the decision of the HSO, this extending ultimately to the authority to issue a "danger direction" where found necessary by a finding of "danger".

[115] Normal circumstances would thus see an appeals officer essentially having to determine first whether the HSO's decision of "no danger" was correct, failing which and thus a "danger" being present, whether a direction was warranted or whether said danger could be considered a "normal condition of employment', a situation where an employee would be prohibited from refusing to work.

[116] In the case at hand however, the additional issue of abuse of the Code by the appellant, an issue that brings into question the intent or motivation of the latter, has been raised by the respondent who alleges that the appellant is making use of the right to refuse to work process as a means to challenge what the appellant has himself described as the employer's "policy" of having the Mark IX OC canisters locked away in the kitchen instead of worn on their person by correctional officers attending meal serving, what the appellant again described as a "long standing" safety issue. Regarding this, one cannot avoid noting that in formulating its position on abuse, the respondent clearly alludes to the actual wording used by the appellant in formulating his refusal. It is the respondent's position that this appeal should fail strictly on the issue of abuse, thus rendering consideration of the merits unwarranted.

[117] I cannot do as the respondent is seeking as this would, in my opinion, amount to exceeding my jurisdiction, which is clearly restricted under the Code to reviewing a finding of "danger" or 'no danger" to ascertain on the merits whether or not "danger" was present at the time of refusal, such not being a normal condition of employment. This does exclude, in my opinion, consideration of the motivation behind the refusal as a determinative element of the presence or absence of danger and thus determination of the appeal.

[118] Notwithstanding any opinion I may hold as to the motivation of the appellant, I cannot dismiss the appeal at the outset on the basis of abuse of the Code. Two points need to be made however. First, as regards this question of abuse, it is important to point out that the Code expressly deals with the situation where an employer believes an employee has abused his or her rights, providing the employer with authority to discipline such demonstrated wilful action once all investigations and appeals have been exhausted and conferring on another entity authority to consider complaints that may result therefrom, thus effectively excluding the appeals officer from such process. Second, while determining the actual issue of abuse may be outside my jurisdiction, evidentiary elements brought forth to support the argument about abuse of the Code may be relevant to the basic question of whether "danger" existed when the appellant refused to work on July 2, 2012, and consequently be considered in determining such issue.

Danger

[119] Both parties have unreservedly recognized that the right to refuse work under the Code is an individual, thus personal right, often described as an emergency measure, that must be based on a real or genuine reasonable belief of danger by the person invoking said right. The respondent's position is that such right cannot be used as a means to challenge an employer's policies and procedures or as a tool to bring long-standing occupational health and safety matters to a resolution, while the appellant has maintained that the presence of tensions and disagreements between employer and employee on a specific issue does not preclude an employee from invoking the right to refuse to work, a position with which I am in agreement.

[120] On this particular issue, one cannot avoid taking note of the submission by the appellant, referring to an appeals officer decision in *Correctional Service of Canada* v. *Dwight Guthro*, Decision No. 04-016, that it is absolutely essential that the employee who is refusing to work must be directly facing the alleged danger while at his post, and that thus it would not be possible for a correctional officer posted in the "Unit 11" refusing to work on the basis of a concern of danger arising in "Unit 7" where he was not posted, a somewhat attention getting comment when one considers that much of this case revolves around the fact that the appellant had not initially been scheduled to work the kitchen post and through an exchange with another employee, had placed himself, purposely, according to the respondent, and certainly voluntarily in agreeing to exchange posts as put forth by the appellant, in a position rendering the appellant capable of addressing through refusal what he described as a long standing occupational health and safety issue.

[121] A number of factual elements and circumstances are of particular interest in assessing the presence of "danger". The first concerns the actual wording of the appellant's refusal formulation which identifies the danger as being "Warkworth Institution's **policy** of locking Mark IX canisters in secured safes", the effects of said policy's application resulting in danger. On this, the respondent has referred

the undersigned to the decision of the Federal Court of Appeal in *Fletcher* standing for the principle that a personal right is not to be used as an instrument to challenge employer policies. While the terminology employed by the appellant may offer some glimpse of the employee's purpose at the time of refusal, it is certainly not determinative in and of itself of the central issue.

[122] The actions of the employee however are of interest. In this respect, a second element that cannot be ignored and was briefly noted at the outset concerns an internal complaint brought under section 127.1 of the Code by the appellant on May 15, 2012, thus approximately 6 weeks prior to his refusal, concerning the same employer policy and using essentially identical language to the appellant's refusal formulation, although concerning a different area of the institution.

[123] Of interest to the resolution of this standing issue is the fact that at the time of the hearing into the present appeal, the said complaint had, since its initial presentation, been "transferred", although no explanation was provided as to how and on what basis this could be achieved, from Mr. Schmahl, who had been union president at the time of the complaint initiation, to Mr. S. Huizinga, who replaced the latter in said function upon his acting CX III appointment to a non UCCO-SACC-CSN position, with the appeal against the conclusion of no danger reached by HSO Tomlin in the case of the said complaint being withdrawn by Mr. Huizinga at the outset of the hearing into the present Schmahl appeal, thereby leaving standing a concurrent conclusion of no danger regarding the same issue as that which is considered in the present appeal.

[124] A third element concerns the manner in which the refusing employee found himself in a position where he elected to refuse to work. The latter had not been scheduled to work the morning feeding/kitchen post on July 2, 2012, but found himself on that post through a voluntary post exchange, presented as having been voluntarily initiated by CX Lemoire who was scheduled to work the said kitchen post. It needs to be noted that CX Lemoire was not called to testify as to the circumstances as well as her motivation to propose such post exchange.

[125] Furthermore, although testimony at the hearing from CX II acting correctional manager C. Schmid was to the effect that the latter had authorized the post exchange, no explanation was provided regarding the apparent lack of registration of said exchange. C. Schmid's own testimony at the hearing was that while he did reject Mr. Schmahl's refusal, as he had been encouraged ("told") to do by the deputy warden, he did not agree with such decision and upon informing the refusing employee of said decision, indicated to the latter that he could take the matter forward.

[126] The appellant's own testimony, which was not contested, was to the effect that such post exchanges as that which occurred with CX Lemoire on July 2, 2012, were facilitated by the fact that he held the union president position and that efforts were usually made to ease the execution of his union activities and contacts with

employees of the institution. While in and of itself, such sequence of elements would be of little significance to the determination of "danger", the sequence of elements and events within which this post exchange and refusal did occur, when taken as a whole, offers a perspective that is replete with interrogation.

[127] As such, on June 30, 2012, thus two days prior to the refusal by the appellant, the latter was normally scheduled to work the kitchen post under the same conditions and the evidence is to the effect that at that time, there were no indications of a change in conditions, circumstances and atmosphere in the institution that could have led one to conclude to an increased risk to correctional personnel in general or the appellant in particular. Under those conditions, the appellant did not register a work refusal.

[128] Two days later, on July 2, 2012, with the same institution conditions prevailing and the atmosphere being even more relaxed given that said day was a staff holiday (in lieu of July 1 Canada Day), something readily recognized by the appellant, with programs not conducted and the week end routine being followed, meaning that in usually lesser numbers, inmates would start attending breakfast as called at or around 8:00am, the appellant having previously exchanged his scheduled segregation post for that of the kitchen post arrived in the kitchen area at 8:00 am, according to his testimony, and by 8:05am, again according to his own testimony, had registered his refusal to work with the duty correctional manager.

[129] It needs to be pointed out here that while Mr. Schmahl indicated having exercised his right of refusal upon arriving on post and noticing the defective wall attachment or securing of the safe that was to receive the Mark IX canister, his refusal formulation is silent on this particular matter. At the outset of this decision, I did determine the matter of the condition of the safe to be outside the scope of the present appeal. An element that cannot be overlooked as regards the time of refusal is the fact, confirmed in testimony by the appellant and acting correctional manager C. Schmid, that at that time, inmate breakfast had not actually started, meaning that inmates had not begun arriving in the kitchen/serving/feeding area and thus there were no inmates present when the appellant decided that conditions warranted his refusal to work. One should point out however the possible presence of some inmate kitchen workers at that time.

[130] In this respect, while counsel for the appellant sought at submissions to suggest a number of such present workers, a review of the undersigned's notes taken through the hearing showed that the appellant testified that there "may" have been such inmate workers present without suggesting any number in this regard. Noting again that the uncontested evidence is that at the time of the appellant's refusal, there were no indications of a change in the conditions, circumstances and atmosphere of the work place that could have served to indicate an increased risk to the health and safety of the appellant, it is relevant to point out that Mr. Schmahl testified to never having had to make use of the Mark IV aerosol projector in mess A or B of the kitchen and to never having had to deploy a Mark IX aerosol

projector as a deterrent or made use of such as a compliance tool at Warkworth Institution.

[131] While having previously determined the issue of abuse of the Code and, by inference, that of the intent and motivation of the appellant, to be outside my jurisdiction, the greater part of the hearing into this case, due to the nature of the issues raised *ab initio*, has seen the undersigned receive considerable evidence in that respect, inclusive of the individual himself and his deportment through the process and particularly through the hearing by the undersigned. In this regard, Mr. Schmahl has shown himself to be a very intelligent, well trained, competent, determined and literate individual, capable of delivering testimony, description and argument in a completely structured manner.

[132] In delivering information through his testimony, he has also demonstrated a very strong dedication to the occupational health and safety of employees through what was, at the time, his mandate as union president and co-chair (employees) of the IJOSH committee. His whole attitude at the hearing as well as the precision and completeness of his information transmission attested to what one could describe as a certain degree of enthusiasm in the execution of his occupational health and safety related duties. This would attest, in my opinion, to his understanding that in exercising the right to refuse under the Code, one is required under section 128 of the Code to have "reasonable cause to believe" that a danger warranting refusal exists. This "belief" or absence of such, whichever may be the case, however has no impact on my *de novo* determination, on balance, of whether "danger" effectively existed in the circumstances described at the time and in the employee's refusal formulation.

[133] This being said, I have considered all of the elements mentioned previously as well as the entire evidence submitted in the course of the hearing relative to available assistance in case of spontaneous emergency, tools and systems at the disposal and support of correctional officers, action and response procedures such as the SMM, the effectiveness of the Mark IV and Mark IX aerosol projectors, both from a deterrence as well as a compliance tool perspective and also as a provocative agent, the presence of other correctional officers in the kitchen area and vicinity at the time of the refusal action.

[134] I have also taken into account historical data regarding the use of such aerosol projectors in various sections of Warkworth (accepting that the Mark IX spray could see more use in cell extraction instances), the absence of any such feared event as raised by the refusal in the 37 years of existence of the institution up to the date of the refusal and through the two years that separated the refusal action from the actual hearing by the undersigned into this matter, and the fact that the removal or locking away of Mark IX canisters followed upon all correctional officers getting to wear Mark IV aerosol projectors on their duty belt. At the same time, I have remained aware of the particular nature of the work environment that is a penitentiary and the unpredictability of human behaviour relative to the

occurrence of spontaneous events or emergencies.

[135] I would also comment that the work place that is a penitentiary offers characteristics that are unlike most if not all other work places and as such, the unpredictability of human behaviour must remain at the forefront of the security means at the disposal of the persons at work in such a place. As such, in formulating his "no danger" decision in the present matter, HSO Jenkins clearly recognized the principle that where the means at the disposal of correctional officers may not be sufficient or readily available for use to gain control of a particular situation, they are not to expose themselves unduly and should extract themselves from the situation and obtain assistance.

[136] Testimony was received at the hearing into the present matter that extracting oneself from a situation may not be readily achieved without ready access to certain safety or compliance tools and that in some instances, remaining in place and working at gaining or regaining control, with all available tools, may prove less detrimental than leaving, thus evidencing differences of opinion on the manner of reacting to certain situations. In this respect, the conclusion by HSO Jenkins reflects the proper approach to safety of employee under the Code:

> "When a spontaneous emergency occurs in the kitchen during feeding, the officer has several choices: use dynamic security; deploy their Mark IV OC Spray; open the safe and deploy the Mark IX OC Spray or egress from the area locking the door behind them. Management has indicated that if the situation is volatile enough and officers cannot acquire the Mark IX OC Spray safely, the officers can egress and then call for assistance."

[137] The applicable test for the determination of "danger" has been properly argued as being that which was established by the Federal Court and the Federal Court of Appeal in *Pollard*. While this is a four-part test, each of its elements are conjunctive so that should the first not be satisfied, a finding of "danger" cannot be arrived at. The first element of the test requires that "the existing or potential hazard or condition, or the current or future activity will <u>likely</u> present itself." The use of the word "likely" indicates that what needs to be looked at is an element of "probability" as opposed to one of mere "possibility", and thus is more exigent.

[138] In the present case, the evidence is uncontradicted. At the time of refusal, there was no significant change in the work place circumstances and there was no indication that things were about to change nor was there any intelligence to suggest any significant change in the near future. Actually, the morning of the appellant's refusal was described as even less apt at changing circumstances. In a penitentiary, taking into account the unpredictability of human behaviour, one could say that there always exists the possibility of violence and thus of harm. However, the test calls for probability through the use of the word "likely" and given the circumstances as they were at the moment of refusal and thus under which the right of refusal was exercised, it is my opinion on balance that it was not likely that the appellant would be faced with the situation raised in his refusal formulation or would be or could be harmed by inmate violence from any cause on

that day and more particularly from any cause deriving from the latter's presence in the kitchen at the time.

[139] Should one view the circumstances as validating the possibility that the appellant could face violence from inmates at the time of his refusal, considerable evidence was presented about numerous control measures to deal with such which included training, personal protective equipment, control of inmate movements to the kitchen and messes, the number of correctional officers on post or in the vicinity as well as response capabilities and surveillance systems, among others, and no convincing evidence was presented that these measures could not be effective.

[140] Having taken all of the evidence in consideration and given due weight to the arguments offered by both sides, I have come to the conclusion that the first part of the *Pollard* test has not been satisfied. This being the case, the test involving conjunctive parts, there is no need to consider the other parts of the said test. Consequently, I find myself in agreement with HSO Jenkins that no danger existed in the circumstances of the refusal by the appellant.

Decision

[141] For the reasons stated above, the appeal is dismissed and the decision of no danger rendered on July 11th 2012, by HSO Jenkins is confirmed.

Jean-Pierre Aubre
Appeals Officer