Occupational Health and Safety Tribunal Canada

Citation: Kerry Gresty et al. and Correctional Service Canada; Correctional Service Canada and UCCO-SACC-CSN; Correctional Service Canada and UCCO-SACC-CSN; Holly Sabo and Correctional Service Canada, referred to as: Kerry Gresty et al. v. Correctional Service Canada, 2012 OHSTC 29

Date: 2012-08-03

Cases No.: 2010-11 2010-15 2010-31 2010-42

Rendered at: Ottawa

Between:

Case No: 2010-11

Kerry Gresty et al., Appellant

and

Correctional Service Canada, Respondent

Case No: 2010-15

Correctional Service Canada, Appellant

and

UCCO-SACC-CSN, Respondent

Case No: 2010-31

Correctional Service Canada, Appellant

and

UCCO-SACC-CSN, Respondent

Case No: 2010-45

Holly Sabo, Appellant

and

Correctional Service Canada, Respondent

Matter: Two appeals under subsection 129(7) of the Canada Labour Code of a decision rendered by health and safety officers
Two appeals under subsection 146(1) of the Canada Labour Code of two directions issued by a health and safety officer

Decisions: Case No. 2010-11: The decision that a danger does not exist is rescinded
Case No. 2010-15: The direction is varied
Case No. 2010-31: The direction is varied
Case No. 2010-42: The decision that a danger does not exist is rescinded

Decisions rendered by: Mr. Douglas Malanka, Appeals Officer

Language of decision: English

For the appellants: Ms. Jessie Caron, Counsel, Union of Canadian Correctional Officers (files 2010-11 & 2010-42); Mr. Martin Desmeules, Counsel, Department of Justice, Treasury Board Portfolio, Legal Services Unit (files 2010-15 & 2010-31)

For the respondents: Mr. Martin Desmeules, Counsel, Department of Justice, Treasury Board Portfolio, Legal Services Unit (files 2010-11 & 2010-42); Ms. Jessie Caron, Counsel, Union of Canadian Correctional Officers (files 2010-15 & 2010-31)

REASONS

[1] By agreement of the parties, the following four appeals were joined and heard together as they relate to a single set of facts or circumstances occurring at a single workplace. The hearing took place during the week of June 6-10, 2011. Individually, the appeals can be described as follows:

- An appeal by Correctional Officer (CO) Kerry Gresty, and others, pursuant to subsection 129(7) of the *Canada Labour Code*, of the decision of HSO Brian Zachary on March 22, 2010, finding that a danger did not exist for CO Gresty and the other COs who had refused to work (File 2010-11);
- An appeal by the Correctional Service of Canada (CSC), pursuant to subsection 146.(1) of the *Canada Labour Code*, of the direction issued by HSO Zachary to the CSC on March 22, 2010 (File 2010-15);
- An appeal by the CSC, pursuant to subsection 146(1) of the *Canada Labour Code*, of the direction issued by HSO Zachary to the CSC on June 22, 2010 (File 2010-31); and,
- An appeal by CO Holly Sabo, pursuant to subsection 129(7) of the *Canada Labour Code*, of the decision of HSO John Hood on March 29, 2010, finding that a danger did not exist for CO Sabo (File 2010-42).

Background

Correctional Officer Kerry Gresty's refusal to work

[2] On March 15, 2010, Kerry Gresty, a CO employed on the Churchill Unit of the Regional Psychiatric Centre (RPC) by the CSC, invoked her right to refuse to work pursuant to section 128 of the *Canada Labour Code* (Code). Specifically, CO Gresty held that transferring inmate X to and from her bed equipped with a Pinel Restraint System (PRS) to a "Broda" chair, similarly equipped with restraints, constituted a danger for her because she was not provided with adequate personal protective equipment (PPE) such as shin and knee pads, groin protection, helmet and visor, hazmat suit, OC pepper spray, shield and baton and corresponding training. CO Gresty referred to such transfers as a "planned use of force".

[3] CO Gresty further believed that the transfer constituted a danger because inmate X had a past record of 30 assaults on COs since June 2009, with 9 of them during the past month and one the day before CO Gresty refused to work. CO Gresty also viewed as dangerous the failure by clinical staff to follow the directions of COs during such interactions.

[4] Two days later, March 17, 2010, seven other correctional officers refused to work for essentially the same reasons as those cited by CO Gresty. They included CO Laurie Brussiere, CO Bonnie Lundgren, CO Jill Stedsman, CO Courtney Blais, CO Rhonda Hendricks, CO Kristen Recknell, and CO Meghan Hryhor.

[5] On March 20 and 21, 2010, Health and Safety Officer (HSO) Brian Zachary investigated the refusals to work. Following his investigation, he decided that a danger did not exist for CO Gresty and the other seven correctional officers who had refused to work. He confirmed his decision in writing to the correctional officers and to the employer in a letter dated March 22, 2010. On March 29, 2010, the correctional officers appealed HSO Zachary's decision pursuant to subsection 129(7) of the Code. This appeal was assigned file number 2010-11 by the Occupational Health and Safety Tribunal Canada (OHSTC).

First direction issued to CSC by HSO Zachary

[6] Despite HSO Zachary's decision that a danger did not exist for the COs who had refused to work, HSO Zachary found that the employer had failed to take prescribed steps to prevent and protect employees against violence in the Churchill Unit. On March 22, 2010, HSO Zachary issued a direction to the CSC pursuant to subsection 145(1) of the Code. In it, he directed the CSC to take steps to ensure that the contravention did not continue or reoccur. HSO Zachary's direction reads:

> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> **No. / No : 1**
>
> 125(1)(z.16) - Canada Labour Code Part II, 20.1 – Canada Occupational Health and Safety Regulation.
>
> The employer has failed to take the prescribed steps to prevent and protect against violence in the workplace in the Churchill unit.
>
> The employer shall follow all of the provisions set out in section XX of the Canada Occupational Health and Safety Regulations regarding the prevention of violence in the workplace taking into account all and any hazards that relate to the activities conducted by employees in the course of their duties.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than April 12, 2010.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.
>
> Issue at Saskatoon this 22nd day of March, 2010.

[7] This direction was appealed by the CSC on April 20, 2010, pursuant to subsection 146(1) of the *Code*. This appeal has been assigned file number 2010-15 by the OHSTC.

Second direction issued to CSC by HSO Zachary

[8] On June 22, 2010, HSO Zachary subsequently found that the CSC was in contravention of the Code because it was not providing COs with the appropriate personal protective equipment to protect them from injury to or through the skin when responding to non-planned use of force incidents where there is a risk of injury. HSO Zachary issued a second direction to the CSC pursuant to subsection 145(1) of the Code, worded as follows:

> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> **No. / No : 1**
>
> 125(1)(l) - Canada Labour Code Part II, and 12.9(c) - Canada Occupational Health and Safety Regulation.
>
> Correctional Officers, when responding to non-planned use of force incidents where there is a risk of injury are not being provided with the appropriate personal protective equipment to protect from injury to or through the skin.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than July 6, 2010.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.
>
> Issued at Winnipeg this 22nd day of June, 2010.

[9] On July 8, 2010, the employer appealed this direction pursuant to subsection 146(1) of the Code. This appeal has been assigned file number 2010-31 by the OHSTC.

Correctional Officer Holly Sabo's refusal to work:

[10] Subsequently, on October 15, 2010, CO Holly Sabo invoked her right to refuse to work after her employer had asked her to move inmate X from her "Broda" chair to a designated exercise room on Churchill Unit. CO Sabo refused to work because of inmate X's demeanor that particular day and because she felt that she did not have the appropriate PPE and training on the equipment. She stated that inmate X has a proven history of spontaneous physical attack on correctional officers.

[11] On October 18, 2010, HSO John Hood investigated the refusal. On October 20, 2010, he decided that a danger did not exist for CO Sabo. He confirmed his decision in writing to CO Sabo and to the employer in a letter dated October 26, 2010.

[12] On October 29, 2010, CO Sabo appealed the decision of HSO Hood pursuant to subsection 129(7) of the Code. This appeal has been assigned file number 2010-42 by the OHSTC.

Issues

[13] I will first address the appeals by CO Gresty and others, and that of CO Sabo, made pursuant to subsection 129(7) of the Code. The issue that I must examine with regard to those appeals is whether or not the movement of inmate X to and from the PRS bed and Broda chair constituted a danger for the Cos, and if so, whether such a danger constitutes a normal condition of employment.

[14] I will then address the appeals by the CSC of the two directions issued by HSO Zachary pursuant to subsection 145(1) of the Code. The issue to be examined on each of those appeals is the extent to which the evidence does or does not establish a contravention of the Code and its regulations as set out by the HSO.

[15] For each of these issues, I will begin by summarizing the parties' submissions before proceeding with an analysis.

[16] I note as well, that the Appellants raise issues, in their submissions, concerning the procedures that were followed by the employer subsequent to the work refusals that are the subject of appeals in this matter. I will not address these issues as my mandate, ultimately, is to either vary, rescind or confirm the decisions and directions under appeal, and to issue any direction considered appropriate under subsection 145(2) or (2.1).

I - Appeals by CO Gresty et al. and CO Sabo of the decisions of no danger

Appellant's submissions

Overview of the appellant's position

[17] Ms. Caron cited the definition of danger in section 122 of the Code and held that a danger is a hazard that could reasonably be expected to cause injury before it can be corrected. Ms. Caron held that, on its face, the situation involving COs who transfer inmate X meets the criteria in the definition of danger, as there exists a hazard and a reasonable expectation of injury in the cases.

Submissions on the existence of a hazard

[18] Ms. Caron held that inmate X is a hazard to herself and to staff. She noted that Correctional Manager (CM) C. Sullivan, the employer representative who participated in the investigation of HSO Gresty's refusal to work, agreed with the investigative team that transferring inmate X to and from the Pinel Bed to the Broda Chair and back constituted a hazard. Ms. Caron submitted that counsel for the Respondent admitted this on several occasions during the hearing and opined that this admission should satisfy the first element of the definition of danger.

[19] Ms. Caron stated that the evidence is clear that inmate X is assaultive and unpredictable. She cited the oral evidence of CM Boucher that inmate X was potentially one of the most dangerous inmates that he had ever known. Ms. Caron further pointed out that CSC had posted a sign cautioning that inmate X is extremely assaultive. She added

that anyone would reasonably expect inmates to have a potential for violence, but such a notice denotes something extraordinary.

[20] Ms. Caron acknowledged that inmate X suffers multiple mental illnesses which may likely explain her behaviour, but this should not negate the hazard that she poses to staff. She submitted that, if anything, her mental illness only increases the hazard she poses.

[21] Ms. Caron pointed to the evidence that inmate X had committed thirty assaults on both clinical staff and COs. She pointed out the specific duties of COs which bring them into contact with inmate X. In addition to usual inmate duties, COs transfer inmate X to and from the Pinel Bed and Broda Chair to take her for showers, for exercise and to the bathroom. Additionally, COs must supervise inmate X's therapy and programming sessions and must intervene when she self-harms. Ms. Caron noted that in performing this work, COs work in close proximity to inmate X, at a distance that cannot be considered safe. This, Ms. Caron stated, is compounded by the fact that inmate X does not like to be touched.

[22] Ms. Caron added that there are times when inmate X clearly displays her intention to be assaultive. Ms. Caron noted that CO Gresty testified that, with all or her experience, she had never been able to "talk her down". Ms. Caron held that this risk is exacerbated by the additional risk that COs can be ordered by clinical staff to interact with inmate X despite her being in a "dark mood", rendering their behavioural training ineffective.

[23] Ms. Caron held that another risk factor is the lack of consultation and communication with COs relating to inmate X. Ms. Caron held that the evidence shows that no special roster arrangements are made that would enable COs to participate in the multidisciplinary consultations on the treatment plans and how they will be put into effect from an operational perspective.

[24] Ms. Caron argued that another risk factor connected with the risk posed by inmate X is the inconsistent use of the Emergency Response Team (ERT) when dealing with inmate X. She held that the uneven application of CD 567-1, Use of Force, makes it difficult for COs to get clear directions on how to deal with this unique inmate. Ms. Caron noted that ERT response to inmate X can take up to 2 hours, and that, in the interim, line staff COs have to respond to inmate X's self-harming incidents.

Submissions on the reasonable expectation of injury

[25] Ms. Caron referred to *Verville* v. *Canada (Correctional Services)* [1] regarding the "reasonable expectation of injury" and held that head butts, kicks, punches and body checks can reasonably be expected to cause injury. Ms. Caron cited, for instance, the evidence by COs Gresty, Slobodzian and Culbertson that they suffered disabling injuries within the meaning of section 15 of the *Canada Occupational Health and Safety Regulations* (Regulations).

[26] Ms. Caron referred to the *Parks Canada Agency and Douglas Martin*[2] decision which confirmed that the frequency of injury is not determinant to a finding of danger. Ms. Caron also acknowledged that inmate X does not assault COs every time they intervene with her. She stated, however, that this is not an obstacle to meeting the definition of danger under the Code, given that the *Verville* decision stated that it is not necessary to establish precisely the time when a potential condition or hazard or the future activity will occur.

[27] Ms. Caron held that inmate X has an ongoing history of unpredictable and extremely assaultive behaviour and, from the hazardous occurrence records found on file, it is reasonable to expect that COs will be injured by inmate X. Ms. Caron held that the probability of assault on staff and especially COs is significant given the evidence that, despite the training that COs receive to assess a person's demeanour and behaviour, she often surprises them with her unpredictability.

[28] Ms. Caron further observed that several witnesses testified during the hearing that dealing with inmate X exposes COs to psychological injuries which have the potential of being disabling. She held that Associate Clinical Director Angela Weber testified that dealing with inmate X is emotionally taxing and that it causes frustration and a feeling of helplessness in staff.

[29] Ms. Caron submitted that dealing with inmate X, especially in the context of transfers involving restraints, is a danger within the meaning of the Code. She added that neither the hazard nor its corresponding injuries are remote possibilities. To the contrary, the probability of assault is fairly high and assault is likely to result in disabling injuries for COs.

Submissions on the normal condition of employment

[30] Ms. Caron cited the case of *Vandal et al.* with respect to whether a danger constitutes a normal condition of employment as per paragraph 128(2)(b) of the Code, and therefore prevents an employee from refusing to work. As per the *Vandal* decision, an employer must prove that it has taken all necessary steps to reduce a risk to a point where the remaining hazard is "residual", in order for a danger to be considered a normal condition of employment.

[1] [2004] F.J.C. No. 940 (F.C.).
[2] [2002] C.L.C.A.O.D. No. 8.

[31] Ms. Caron held that irrespective of measures in place, cited by the employer, to ensure the health and safety of COs who must work with inmate X, the serious injuries sustained by COs in dealing with inmate X provide a factual presumption that the prevention measures established by the employer are ineffective for protecting COs from assault and injury. Thus additional measures in the form of supplementary PPE and training must be taken.

[32] Ms. Caron held that the RPC is the only federal correctional institution that operates in partnership with a University and that the evidence establishes that RPC is first and foremost a hospital despite the fact that its clientele is made up exclusively of inmates under the legislative authority of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[33] Ms. Caron submitted that RPC is not a conventional workplace for COs in that COs at standard institutions might have to perform PRS placements from time to time but COs on Churchill Unit at RPC are required to do it routinely. Moreover, COs must work alongside clinical staff who are not as security minded as COs and who do not construe the notion of risk in the same way. This, she held, is an element of risk for COs. In addition, decisions to take inmate X on and off restraints and the frequency of PRS placements in a day are based on clinical circumstances and not on security considerations.

[34] She held that, despite the uniqueness of work at RPC for COs, they receive no specialized training for working there beyond shield training which is ineffective. There are only two COs posted on Churchill Unit and each PRS placement requires 3 or 4 COs. As a result, multifunction officers have to be pulled from other posts or tasks at the institution to facilitate a standard Pinel placement and to attend to the other inmates. In addition, the use of the shield requires an additional officer. Moreover, there is not always enough space in the location for an additional officer with a shield. Finally, the shield training was a onetime event without refresher training and so COs have not developed the proper muscle memory to carry out the work safely.

[35] Ms. Caron stated that the PPE requested in this appeal would likely reduce the risk of injury based on the views of COs, and relied on the evidence of several COs in support of this position. According to Ms. Caron, COs are able to provide experience-based evidence both on the risks they run in their duties and the tools necessary to deal with these risks.

[36] With respect to the Situation Management Model (SMM), Ms. Caron argued that this tool is not intended to be an occupational health and safety prevention device for COs. It is not suited to the routine, preplanned act of PRS placement of inmate X, especially where inmate X is engaged in uncooperative and assaultive behaviour from the outset. The placement has to be done no matter what, forcing COs to carry out a task that they know will likely result in the use of force. Also, a CO is virtually unable to withdraw from the situation once inmate X becomes assaultive. In addition, COs are not always permitted to apply the SMM model as some tools referred to in the model are prohibited or discouraged from use.

[37] Ms. Caron argued that the employer has not demonstrated how any of the protective measures in place at RPC reduces the danger for COs to the point that what risk remains is residual. To the contrary, Ms. Caron argued that all the measures in place that were referred to by the employer are insufficient, sometimes ineffective in the circumstances and that additional measures must be taken in the form of supplementary PPE and training.

Disposition sought

[38] Ms. Caron concluded that the movement of a particularly assaultive inmate to and from the PRS constitutes a danger to the appellants within the meaning of the Code. That is, the situation meets the criteria in the definition of danger in terms of the hazard and the reasonable expectation of injury in the cases. Additional, Ms. Caron held that such a danger falls outside of the appellant's normal condition of employment. Ms. Caron asked that the Tribunal allow the appeal and declare that the circumstances justified the appellants' refusal to work.

[39] Ms. Caron further asked that the Tribunal direct the employer to provide COs with the appropriate personal protective equipment and the corresponding training and to provide non-security staff with security awareness training on a regular basis.

Respondent's submissions:

Overview of the relationship between COs and inmate X

[40] Mr. Desmeules held that RPC is a correctional institution that is first and foremost a hospital. He asserted that the clientele of RPC consists of inmates who are there to receive treatment for mental illness. Clinical/medical staff at RPC includes physicians, psychiatrists, psychologists, social workers and nurses who are responsible for the delivery of treatment.

[41] Mr. Desmeules noted that the hazard identified and the source of the alleged danger and contraventions of the Code is the inmate X who is diagnosed with mental illness and behavioural issues. Mr. Desmeules held that COs are responsible for providing a safe environment for the public, employees and inmates.

[42] Mr. Desmeules submitted that inmate X is restrained to prevent her from self-harming behaviour, but that restraining her at all times would be detrimental to her health. Staff's role is to take her out of the restraints and supervise her activities, including exercise. He added that COs must intervene if inmate X self-harms.

[43] Mr. Desmeules stated that staff is responsible for moving inmate X in and out of restraints. The ERT is no longer used for these tasks, except when COs have exercised the right to refuse work. Mr. Desmeules observed that clinical staff is of the view that the intervention of the ERT negatively affects inmate X. He referred to the testimony of Program Director Manager Hobman that inmate X is unsettled, frustrated and angry after the deployment of ERT. Mr. Desmeules referred to Dr. Mela Mansfield who told HSO

Hood that the intervention of the ERT has the potential to make the work place more unsafe.

[44] Mr. Desmeules disputed the appellants claim in their submission that the employer asked them to perform duties that were deemed too risky moments or a few hours earlier. He cited the testimony of CM Sullivan that COs are to reassess the situation after a while because inmate X usually calms with medication, communication and therapy.

[45] Although Mr. Desmeules acknowledged that inmate X is assaultive, he noted that potential violence and a degree of unpredictability of human behaviour is inherent to the work of a CO. The CSC provides training and equipment and makes every effort to keep employees safe.

[46] Mr. Desmeules stated that the job descriptions for CXO and CX02 state that it is necessary for the incumbent CO to identify risks and actively manage situations, and it is necessary for the incumbent CO to share operational information with other correctional staff between shifts to make them aware of any issues/problem/activity that may have developed and ensure preparedness and follow-up.

[47] Mr. Desmeules pointed out that the job description states:

> There is direct, daily exposure to inmates who may be agitated, unpredictable or uncooperative or who may attempt to intimidate or resort to violence. There is a potential for inmates to verbally abuse or physically assault the incumbent. Severe anxiety and potential injury may occur during and following violent incidents."

He added that it also states that:

> There is a requirement to intervene in threatening or violent situations involving inmates, staff or visitors, including crisis/emergencies (e.g. hostage taking, riots).

[48] Mr. Desmeules added that the job description also states that there is requirement to lift and move heavy objects (e.g. inmates on stretchers) and use security material/equipment that can lead to injury. This, Mr. Desmeules stated, isn't licence to ignore methodology for reducing risk to the residual level.

[49] Mr. Desmeules held that under the rubric of "Training", the job description states that COs receive 11 weeks of Core Training which includes two weeks of self-defence, arrest and control, pain compliance, training on the use of handcuffs and application of the PRS. COs are also trained in preventative precautions. Mr. Desmeules added that there is an annual or semi-annual recertification for, among other things, mental health training and the PRS.

[50] Mr. Desmeules submitted that the centre of CO training is the SMM. He pointed out that at the core of the SMM is the CAPRA which he pointed out establishes that the client being dealt with is an essential factor in determining how to approach a given situation.

[51] Mr. Desmeules held that Churchill Unit holds weekly Multidisciplinary Team meetings and there is almost always a CO present to offer the CO perspective. There is almost always a correctional manager present at the meetings who can relay the information to COs. Mr. Desmeules clarified that, ultimately Clinical staff make treatment decisions after discussions.

[52] Mr. Desmeules stated that inmate X's case was discussed at 6 retreats since she was admitted to RPC and 2 of the retreats were specific to her. He held that the daily interaction that COs have with inmate X is not formal training but gives COs an opportunity to learn and share information to discuss strategies and approaches. He held that this shared knowledge, experience, training and strategies contribute to mitigating risk.

[53] Mr. Desmeules stated that following CO Gresty's refusal to work the employer provided COs with a shield and training on its use.

[54] Mr. Desmeules argued that COs have access to numerous pieces of PPE at Churchill Unit and they are trained in their use.

Submissions with respect to non-existence of a danger within the meaning of the Code

[55] Mr. Desmeules refers to the case of *Canada Post Corporation v. Pollard*[3], and emphasizes that for a finding of danger, the reasonable expectation of injury must be ascertained. A reasonable possibility, as opposed to a mere possibility, is required. Mr. Desmeules also referred to the *Verville* decision, and underscored various passages in that case. They are as follows:

> 51 [...]A reasonable expectation could be based on expert opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the Trier of fact to form an opinion. […]
>
> 55 The customary meaning of words in paragraph 128(2)(b) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. […]
>
> 60 I agree with the respondent's initial position because as is clearly indicated by the appeal officer at paragraph 24, in order to determine if any employer has taken the necessary steps to mitigate the risk, one needs first to properly assess that risk. […]
>
> 68 As to the other statements made by the appeal officer at paragraphs 19, 20 and 24, I construe them to mean that an employer must take reasonable steps to identify the health and safety risks in the workplace and once a risk has been identified, either through a risk analysis, a complaint by an employee or otherwise, he must take reasonable steps to eliminate r minimize it as much as reasonable possible. [My underlining]

[3] [2008], F.J.C. No. 1477 (F.C.J.).

[56] Mr. Desmeules further cited paragraphs 50 and 55 in the decision of *Stone and Canada (Correctional Services)*, C.L.C.A.O.D. No. 27; paragraphs 18 to 22 in the decision of *Bouchard and Canada (Correctional Services)*, C.L.C.A.O.D. No. 28; and paragraphs 105 to 107 in the decision of *Glaister and Canada (Correctional Services)*, C.L.C.A.O.D. No. 11.

[57] The employer agrees that COs are able to provide experience based evidence but submits that, credibility aside, witnesses like the Deputy Warden or CMs with more experience are owed more deference.

[58] Mr. Desmeules stated that the employer does not dispute that interactions with inmate X pose a risk. However, the employer has identified, assessed and taken steps to eliminate or minimize the risk as much as possible.

[59] Mr. Desmeules argued that the issue in this case is the amount of PPE provided to COs for the performance of the task of removing and replacement of restraints on inmate X. He further held that the employer recognizes its responsibility for taking measures to ensure that any job or duty is free from unnecessary risks and takes this responsibility seriously.

[60] Mr. Desmeules held that the PC-39 position referenced in the Appellants submission was created wholly for inmate X to prevent her from self-injuring. He maintained that the creation of this post which is unique in Canada is an illustration of the level of thought and care the CSC has put into treating and interacting with inmate X.

[61] Mr. Desmeules maintained that Clinical Staff and senior COs agree that ERT is not the solution and neither is the use of more PPE. He urged that there is no struggle between clinical and correctional staff and any diverging views or opinions between the two groups did not result in greater risk to COs. Mr. Desmeules submitted that the evidence is clear that there is a weekly multidisciplinary team meeting and that a meeting without the presence of both a correctional manager and at least one CO would be the rarest exceptions and not a voluntary one. He stated that CO views are factored into decisions but it does not necessarily mean that their views will be retained.

[62] Mr. Desmeules denied the appellant's allegation in their submission that safety concerns are secondary and that the clinical side of the house is the driving force for deciding what will be done.

[63] He advanced that elbow, knee and groin pads do not protect against the types of injuries suffered by COs in connection with inmate X. He added that the pads hinder movement. A helmet and visor might prevent a broken nose but so does personal safety and self-defence training, and appropriate body positioning. Mr. Desmeules insisted that more PPE is not the answer. He held that the evidence demonstrates that when inmate X is in a "dark mood" the decision is to wait until inmate X is better as a result of interactions, therapy and/or medications and reassess later. Mr. Desmeules added that inmate X can be unpredictable even when she is in a good mood and so COs should always be careful to position themselves properly, apply their training and work together even when everything appears positive.

[64] Mr. Desmeules added that PPE such as that used by the ERT might lead to more agitation on the part of inmate X. In this regard, he cited the testimony of CM Sullivan that more PPE is not the solution. Mr. Desmeules agreed with the appellants' view that that ERT equipment is meant to be intimidating and having a deterring effect but held that ERT does not work for a mentally ill inmate. In fact, he held, it makes the situation worse.

[65] On the subject of danger, Mr. Desmeules stated that the risk to COs occurs when they take inmate X in and out of the PRS for shower and exercise. He held that the fact that COs know inmate X and that an assault is possible, mitigates the risk of injury.

[66] Mr. Desmeules suggested that the risk of injury in this case does not meet the threshold of reasonable possibility. He urged that the testimony of COs establishes that very few assaults resulted in injury. Mr. Desmeules stated that the actual evidence adduced in the hearing established only 4 injuries over a year and one half despite the multiple daily direct interventions of Cos with inmate X. Mr. Desmeules reiterated that every interaction with inmate X cannot reasonably be expected to cause injury. He added that, when inmate X is in a "dark mood", staff with experience recognize this and this knowledge helps to mitigate risk and COs can always wait and reassess the situation. He further maintained that this and the fact COs are trained and prepared for possible assault, renders injury to COs by inmate X a hypothetical or mere possibility, rather than a reasonable one.

[67] Mr. Desmeules further submitted that inmate X cannot be considered a constant danger based on the testimony of Manager Hobman, who stated inmate X is fine on many occasions. As well, it is to be noted, according to Mr. Desmeules, that all assaults are required to be recorded, and that they do not all result in injury.

[68] Mr. Desmeules granted that an employer must take steps to identify the health and safety risks in the work place and once the risk has been identified take reasonable steps to eliminate or minimize it to the extent reasonably possible. In his submission, when one considers the variables such as inmate X's behaviour and treatment, partner opinion, the formal and informal training of COs and the PPE already provided to COs, the employer feels that the risk is minimized as much as reasonably possible.

[69] Mr. Desmeules concluded that, given the knowledge, training and experience of COs, interactions with inmate X could not be reasonably expected to cause injury, and therefore the definition of danger as set out in the Code is not met. He further maintained that, given that the additional PPE requested by COs would not have prevented most injuries but rather could itself reduce the efficiency of treatment to inmate X which is the most effective way of mitigating risks to COs, the risk is minimized as much as reasonably possible.

[70] Mr. Desmeules submitted that COs are not confronted with danger on the Churchill Unit at RPC; every risk is known, reduced and controlled; and the employer takes the reasonable steps to minimize the risk as much as possible in the circumstances.

In the alternative, the employer submits that whatever risk or residual danger that remains is a normal condition of employment.

Submission regarding the normal condition of employment

[71] Mr. Desmeules held, in the alternative, that, the risk is a normal condition of employment, in light of the knowledge, experience and training of COs, as well as the protocols in place and the equipment available to them. He stated that normal refers to a regular, typical state or level of affairs, and is something not out of the ordinary. He stated that it is normal for COs to remove and replace restraints on inmate X.

[72] Mr. Desmeules submitted that a normal condition of employment is relative and a function of the context of the job. All COs are trained for PRS placement in the Pinel Restraint System and some COs do it more often than others.

[73] Mr. Desmeules argued that there is no factual presumption that the employer's measures are not effective despite the fact that COs have been injured while dealing with inmate X. Additionally, he argued that there is no presumption that more PPE would have prevented the injuries.

Disposition sought

[74] Mr. Desmeules argued that I should find that a danger did not exist for the COs who refused to work and confirm the decisions of the respective health and safety officers. Mr. Desmeules held that a danger did not exist for CO Gresty because her refusal to work resulted from an accumulation of events and not necessarily as a result of a specific danger that existed on that specific date.

[75] Mr. Desmeules held that a danger did not exist for CO Lawrence because her refusal to work did not lead to a decision by an HSO.

[76] Mr. Desmeules held that a danger did not exist for Co Holly Sabo because CO Sabo refused to reassess inmate X's behaviour after lunch and based her refusal to work on inmate X's behaviour the day before and on inmate X's threats to assault that morning.

Appellants' reply

[77] Ms. Caron argued that no expert evidence was adduced regarding certain assertions, which include: keeping inmate X in restraints 24 hours a day would be detrimental to her health; shower and exercise is a medical necessity; and the use of ERT equipment by COs would cause inmate X to be more agitated, reduce the effectiveness of inmate X's medical treatment and result in a higher risk of assault by inmate X.

[78] Ms. Caron stated that the assertions also held that it is inappropriate to call the ERT or to have an ERT-like squad conduct the transfers to and from the PRS system and Broda chair when inmate X is in a "dark mood as this decreases the efficiency of treatment.

[79] Ms. Caron held that the employer's argument that very few assaults resulted in an injury and that the evidence only confirmed 4 injuries over a period of 18 months is incorrect. Ms. Caron submitted that there were 18 hazardous occurrences investigation reports on file, 14 of which detail incidents of actual injuries caused by intentional assault. These 18 reports cover a period of eight months. Ms. Caron maintained that, while 4 injuries were adduced into evidence through testimony, they are but a sample of the broader picture.

[80] Ms. Caron held that the fact that attempted assaults must be reported, whether or not they cause injury, does not lessen the overall argument that assaults can reasonably be expected to cause injury.

[81] Ms. Caron argued that the employer's submission that CSC only resorts to ERT when COs refuse to work and that the PC-39 post was created exclusively for inmate X are grossly inaccurate and misleading.

[82] Ms. Caron held that the testimony of Deputy Warden Garwood-Filbert is not akin to expert evidence because Deputy Warden Garwood-Filbert only arrived at RPC in February 2010, never worked as a CO, and did not know that the town of Prince Albert was 150 kilometers away from the RPC which is where at least 2 of RPC's ERT team must be deployed from.

[83] Ms. Caron submitted that Deputy Warden Garwood-Filbert testified incorrectly that no inmates are permitted in the administration area of RPC and clinicians were acting as constants on Churchill Unit.

[84] Ms. Caron argued that the testimony of CM Sullivan is not akin to expert evidence given his overall lack of recall in cross-examination.

[85] Ms. Caron held that the evidence of CM Boucher challenges the employer's contention that the CAPRA principle contributes to CO safety in that they are better able to adapt to the situation because they know that inmate X is mentally ill. She further argued that, if mental health is to be taken into consideration as a CAPRA factor, it would be for determining what is "reasonable force" consistent with the SMM and inmate X's behaviour.

Analysis

[86] Section 122.1 of the Code states that the purpose of Part II is the prevention of accidents and injury to employees. It reads:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[87] In section 122.2, the Code instructs that the hierarchy of prevention measures should consist of first eliminating hazards, then reducing hazards that cannot be

eliminated and then providing personal protective equipment, clothing, devices or materials. Section 122.2 reads:

> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[88] Section 124 of the Code requires the employer to ensure that the health and safety of employees is protected. It reads:

> 124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

The term danger is defined in section 122 as follows:

> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.
>
> « danger » Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

[89] The Federal Court's decision in *Verville* interpreted the changes to the definition of danger that had occurred in 2000.

[90] Mr. Desmeules cited paragraphs 16 and 17 in the case of *Canada Post Corp. v. Pollard*:

> [16] The Appeals Officer, at paragraphs 71 to 78, reviewed the case law on the concept of "danger". Relying more particularly on the decision of this Court in *Martin v. Canada (Attorney General)*, [2005] F.C.J. No. 752, 2005 FCA 156, and that of Madam Justice Gauthier in *Verville v. Canada (Correctional Service)*, [2004] F.C.J. No. 940, 2004 FC 767, he stated that the hazard or condition can be existing or potential and the activity, current or future; that in this case the hazards were potential in nature; that for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.

> [17] This statement of the law is beyond reproach or is, at the least, reasonable in the Dunsmuir sense. [My underlining]

[91] In my opinion, paragraph 16 and 17 of the above noted case of *Canada Post Corp. v. Pollard* still applies and will be used in this decision.

[92] With regard to the other cases cited by Mr. Desmeules which included *Stone and Canada* and *Bouchard and Canada*, I agree with Ms. Caron's statement that little weight should be given to these decisions as they predate the Federal Court's decision in *Verville* and the Federal Court of Appeal's decision in the case of *Martin v. Canada*[4] had the effect of interpreting the new definition of danger in the amendments to the Code passed in year 2000.

[93] That being the case, my analysis will address:

i. the hazard; and,
ii. whether the hazard could reasonably be expected to cause injury.

[94] In connection with this analysis, CO witnesses offered opinion evidence based on their knowledge, training and experience. Ms. Caron submitted that COs are able to provide experience-based evidence akin to expert evidence both on the risks they run in their duties and the tools necessary to deal with these risks. She held that the training that COs receive, along with their knowledge of what is used by the ERT in circumstances similar to what they deal with in relation to inmate X make their opinion admissible and credible to the Tribunal.

[95] Mr. Desmeules agreed in his submission that COs are able to provide experience based evidence akin to expert evidence but submitted that, credibility aside, witnesses like the Deputy Warden or CMs with more experience are owed more deference.

[96] In my view COs are able to provide experience-based opinion evidence both on the risks they run in their duties and the tools necessary to deal with these risks. I will give weight to the evidence of the Deputy Warden and CMs, on these same points, where it is demonstrated by the evidence that they have experience in respect of same.

The hazard

[97] Mr. Desmeules confirmed in his submission that staff's role is to take inmate X out of the restraints and supervise her activities. He added that COs must intervene if the patient self-harms. Mr. Desmeules acknowledged in his submission that inmate X is assaultive and has assaulted other inmates, clinical staff and COs.

[98] The CO-II job description confirms in the section entitled "Work Environment - Psychological" that "[t]here is a requirement to intervene in threatening or violent situations to protect the safety of members of the public, staff, inmates and the institution (e.g. assaults, riots or hostage takings), when the use of force may be necessary."

[4] 2005 FCA 156.

[99] HSO Zachary noted in his Investigation Report and Decision regarding the refusals to work by CO Gresty et al. and dated, March 29, 2010, that:

> Patient inmate X has been violent in the past and has assaulted correctional officers as well as others. Lists of assaults were provided to this officer. Dr. Baziany confirmed that there is a high likelihood that inmate X would attempt to assault others.

[100] HSO Hood noted in his Investigation Report and Decision, dated October 26, 2010, connected with his investigation of CO Sabo's refusal to work that:

> Patient/inmate who is the subject in the refusal, has a history of mental problems leading to self-harming and assaultive behaviour.
>
> A sign posted outside of the patient/inmate cell door stating general restrictions as well as "Extremely Assaultive" as a visible reminder of a hazard to all staff.

[101] On June 25, 2010, Lisa Madraga, RPN, emailed various individuals, including Nurses, Correctional Managers, and COs. She advised them of her discussion with inmate X about assaulting staff and warned everyone to be careful with inmate X at all times and not to let their guard down. According to her email, inmate X told her that "it will have to happen again soon" and "the Officers deserve it (assault)" as "it's their job."

[102] CM Boucher testified that inmate X was potentially one of the most dangerous inmates that he had ever known.

[103] It is clear from the evidence that CSC recognizes that inmate X's tragic circumstances pose a unique challenge. For example, CM Boucher testified that every solution to reduce inmate X's head banging and assaultive behaviour is being considered, including a protective helmet for inmate X. Director Angela White testified regarding the extraordinary measures that have been taken. Those measures include:

- Administering ECT (shock treatment) to inmate X;
- Considering a padded room;
- Consulted with leading Psychologists and Psychiatrists regarding inmate X treatment;
- Considered fitting inmate X with a helmet to protect her from injury as a result of her head banging;
- Considering a Commissioners Directive on Pinel Restraints

[104] Given the evidence, I have concluded that there exists a hazard in the spontaneous and unpredictable assaultive behaviour of inmate X, that has caused physical injury to COs required to work in close proximity to her, while transferring her to and from the PRS bed to the Broda chair and escorting her to showers and exercise.

<u>Circumstances where hazard could reasonably be expected to cause injury:</u>

[105] At the hearing into this matter, there was specific testimony regarding injuries incurred by COs as a result of the hazard posed by inmate X. I note the following elements:

- CO Gresty testified that she was injured by inmate X on two assaults. The first time she was kicked by inmate X and the second time her wrist was hyper extended resulting in 3 days off work.
- CO Sabo testified that she was assaulted and injured by inmate X despite having a very good rapport with the inmate;
- CO Slobodzian testified that she was assaulted once by inmate X and suffered a whiplash injury while dealing with inmate X another time;
- CO Culbertson testified that she was injured when she intervened to control inmate X; and,
- CM Boucher testified that inmate X had kicked a pregnant nurse.

[106] CO Gresty specified in her statement to HSO Zachary when he was investigating her refusal to work that inmate X had assaulted 9 people in the last month and over 30 since her incarceration. CO Gresty testified during the hearing that not all assaults are reported.

[107] The evidence includes 18 hazardous occurrence investigation reports on file regarding inmate X, 14 of which detail incidents of actual injuries caused by intentional assault. These 18 reports cover a period of eight months.

[108] There is also evidence that COs are sometimes compelled to interact with inmate X notwithstanding concerns they have regarding her state, and their legitimate apprehension that inmate X is about to be assaultive.

[109] For instance, on the day that CO Sabo refused to work, she expressed her concerns to CM Sullivan and asked that the treatment team be reconvened to re-assess the decision to take inmate X off the Broda Chair for exercise in light of her assault on a nurse the previous night and the "dark mood" that she was currently displaying. She testified that CM Sullivan refused to agree with the option. Later, that morning the matter was discussed in the presence of another CM and CO Friesen. CO Sabo testified that she felt intimidated, and that she was told that she should be prepared to be assaulted.

[110] CO Sabo then testified that a nurse was sent to assess the inmate X's mood and allegedly reported back to the Correctional Managers that it was safe to perform the work with inmate X. CO Sabo stated that she could not rely on someone else's assessment of inmate X's**.**

[111] As well, CO Luna Lawrence testified that on June 29, 2010, CM Sullivan and Ouellet asked her to take the restraints off inmate X and she refused to do so. She stated that, when the correctional managers, the psychiatrist and Deputy Warden Garrison went with her to inmate X's cell, the Deputy Warden agreed that it was not safe to move her. After lunch, CO Lawrence stated that she was ordered to perform a PRS placement on inmate X with one other staff member. When CO Lawrence refused to do the work pursuant to section 128 of the Code, the ERT was deployed to perform the task.

CO Lawrence testified that since her refusal to work that day, she has met a lot of resistance to her opinions on how to perform duties on Churchill Unit in that every comment is questioned.

[112] In my opinion, this evidence clearly shows that inmate X has a history of spontaneous and unpredictable assault and injury to COs. The evidence establishes that COs have been assaulted and injured in the past when transferring inmate X to and from the Pinel Bed and Broda Chair and when taking her for showers, for exercise and to the bathroom. COs are also called upon to interact with inmate X despite their concerns that at a given point, she may be about to engage in physically hostile conduct.

[113] Given this evidence with respect to what amounts to a tendency to assault, and the nature of those assaults, I find that the risk of injury to COs is real, and that the hazard created by the Inmate X's situation can reasonably be expected to cause injury.

Finding regarding danger

[114] Based on the evidence in these appeals, I am satisfied that it is reasonable to expect that COs will be assaulted and injured by inmate X before the hazard of assault by inmate X can be corrected. On that basis, I find that a danger exists for the COs who refused to work and who must continue to transfer inmate X to and from Pinel restraints to the Broda chair and to escort her.

Did the danger constitute a normal condition of employment?

[115] Having found that a danger exists, I must determine whether at the time of the refusals, the danger that the COs were exposed to was a normal condition of employment pursuant to subsection 128(2)(b) of the Code, and accordingly, if the COs were thus precluded from exercising the right to refuse dangerous work.

[116] The Federal Court in *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500*[5], upheld the Appeals Officer's interpretation in that case with regard to a danger that constituted a normal condition of employment, and which read as follows:

> [152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.
>
> [153] Once all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred

[5] [2008] FC 846.

> to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions. [My underlining]

[117] In the more recent case of *Canada v. Vandal*[6], the Federal Court affirmed the reasoning of this Tribunal on what constitutes a normal condition of employment in the context of correctional officers having to escort inmates, in *Eric Vandal et. al.* v *Correctional Service of Canada*[7] which is as follows:

> [302] […] There is also an important distinction to be made between such a danger and a danger that constitutes a normal condition of employment that would preclude a refusal to work. The latter presupposes that the employer has first determined that a danger exists during escorts and has then taken all of the measures necessary to protect its employees, i.e. it has identified and controlled all of the factors that could have a major negative impact on the duty of conducting escorts. At that point there is nothing more the employer can do to protect its employees any further.

[118] Thus, in order to determine whether the danger COs face when transferring inmate X is a normal condition of employment, I need to take into consideration the steps taken by the CSC to mitigate this danger.

[119] Executive Director McMurty wrote to HSO Zachary on July 16, 2010 to report on CSC's compliance with his June 22, 2012 direction. She stated that the following outlines the action taken by CSC and RPC to mitigate the risk of injury to COs who manage inmates who are self-harming:

- Post standards
- Standard Security Equipment
- Deployment Standards and Rosters
- Training Standards
- The Situation Management Model and the Use of Force Continuum.

I will address these, as well as other factors which, in my view, are relevant to an assessment of the mitigation measures taken by the CSC, next.

Post standards

[120] On the subject of Post Standards relative to tools provided on Churchill in conjunction with inmate X, the testimony of CO Gresty was that she is provided with OC spray but must leave it in the control room until needed. She held that this also applies to the hazmat suit and the shield. CO Gresty testified, essentially, that when a CO requires the equipment in the control room for dealing with an assault by inmate X, they are unable to abandon their partner to do so. I must therefore conclude that there is some ineffectiveness to this measure.

[6] 2010 FC 87.
[7] OHSTC-07-009.

Standard security equipment

[121] According to Commissioner Directives, the normal response to an assaultive inmate who is refusing to cooperate is for the ERT to respond in a planned intervention. ERT members are equipped with what can be described as body armour and a helmet and face shield. However, because inmate X is mentally ill and her inclination is to assault COs without warning, management decided that line COs have to deal with inmate X's assaults without the personal protecting equipment (body armour and a helmet and face shield) provided to ERT members.

[122] Management justifies this by rationalizing that it would be inhuman to continually have inmate X confronted by COs in full body armour and that it might exacerbate her mental illness and increase her tendency to want to assault COs. COs, on the other hand, do not accept a situation that, in their view, leaves them under the constant threat of assault and the risk of injury.

[123] On the subject of Standard Security Equipment, Executive Director Lynn McMurty acknowledged and responded on March 16, 2010 to recommendations of the joint health and safety committee regarding their investigation of the refusal to work by CO Gresty. The recommendation of employee members of the joint health and safety committee was that the RPC should consult with Regional Headquarters and National Headquarters to obtain additional PPE for COs. According to the recommendation PPE should include but not be limited to, elbow pads, shin pads, knee pads, groin protection and a helmet with a visor. Ms. McMurty rejected the recommendation citing her view that the risks did not warrant the requirement for additional PPE.

[124] On October 15, CO Friesen wrote to Executive Director McMurty regarding CO Sabo's refusal to work on October 15, 2010. He wrote that, despite the measures put in place since CO Gresty's refusal to work, the risk of being assaulted by inmate X remains very high without appropriate PPE and training to mitigate the risk and COs do not feel that every available option to mitigate the risk of being assaulted by inmate X is being offered. He held that additional PPE is required to mitigate the risk and it should include: helmet with face shield; neck protection; knee, elbow, shin pads; and groin protection. He added that additional PPE and training was consistent with the direction that HSO Zachary issued to CSC. He conceded COs would not need all ERT-like equipment and that whatever additional PPE might be provided by CSC would not necessarily be used every time. However, he said that equipment must be readily available to COs and training on the equipment must be provided.

[125] I don't think that there is any question that PPE and training on the equipment is provided to ERT members because CSC is satisfied that the PPE will eliminate or reduce the risk of injury in situations where the ERT must deal with an assaultive inmate. The issue for employees is whether the PPE and training provided to ERT members would eliminate or reduce the risk of injury to them when dealing with inmate X's assaultive behaviours. The issue for CSC is whether not providing COs who have to deal with inmate X on a regular basis with ERT-type PPE and training will have a direct deleterious effect on the health and well-being of inmate X and an indirect negative impact on COs as inmate X may become more assaultive as a result of being handled regularly by an

ERT. In addition, CSC is concerned with the scheduling and cost of deploying an ERT every time.

[126] All COs who testified were in agreement that ERT-like PPE and training on the equipment would be useful for eliminating or reducing injury in connection with the assaults by inmate X. CO Sabo held that the additional PPE should include leg and arm pads and helmet and training on their use is necessary. She added that the equipment must be readily available to COs. Also, CO Friesen testified that additional ERT-like PPE would mitigate risk of injury to COs relative to inmate X.

[127] However, Manager Hobman testified that inmate X is unsettled, frustrated and angry after the deployment of ERT; D. Mela Mansfield told HSO Hood that the intervention of the ERT has the potential to make the work place more unsafe; and CM Sullivan testified that the PPE is unnecessary. CM Boucher testified that helmets, face shield and body armour protects the health and safety of members of the ERT and is, of itself, intimidating. He said that deployment of the ERT sends the message to a non-compliant inmate that is at the end of the line and further non-compliance is no longer being tolerated.

[128] Ms. Caron argued that no expert evidence was adduced at the hearing in support of the employer assertion that the use of ERT equipment by COs would cause inmate X to be more agitated, reduce the effectiveness of inmate X's medical treatment and result in a higher risk of assault by inmate X. Having considered the evidence on both sides of the issue, I acknowledge the concern that the use of the full regalia of PPE used by ERTs for transferring inmate X to and from Pinal restraints to the Broda chair and escorting her to exercise and shower when there is no indication that she will be assaultive, may cause inmate X to be more agitated, reduce the effectiveness of inmate X's medical treatment and result in a higher risk of assault by inmate X. I further feel that the intimidation factor related to ERT deployment mentioned by CM Boucher might well be lost on a mentally ill person.

[129] However, I understood the position of COs Sabo and Friesen to be that it may not be necessary for COs to have all of the PPE that is used by ERT members; and, further, that it may not be necessary for COs to use the ERT-like equipment in every occurrence involving inmate X. I also note the testimony of Deputy Warden Linda Garwood-Filbert that the RPC has considered establishing a two person ERT Team. These appear to me to be options that must be assessed for determining what amount of PPE is appropriate for purpose of eliminating or reducing the risk of injury of COs who are involved with inmate X.

Training standards and Situation Management Model

[130] On the subject of training standards, CM Boucher testified that COs are trained that distance from an inmate is dictated by the inmates' behaviour. He stated that, when you are close to the inmate, such as when a CO is performing a PRS placement, there is no time or space to react. COs are, by necessity of the placement, in the "red zone" which reduces the effectiveness of the body positioning techniques taught to COs.

[131] The evidence of COs Sabo and Culbertson confirm that COs can be ordered by clinical staff to interact with inmate X despite her being in a "dark mood" or unsettled disposition rendering their training on how to respond to demeanour and behaviour irrelevant.

[132] CO Sabo testified that she had attended some conferences and retreats regarding particularly difficult inmates. She stated that none of the events enlightened her in how this actually translated into operational skills for everyday use with inmate X.

[133] On the subject of the Situation Management Model and the Use of Force Continuum, Ms. Caron held that the Situation Management Model (SMM) specified in CD 567 is not suited to the routine, preplanned act of PRS placement on inmate X who has shown in the past to be uncooperative and assaultive from the outset. The placement has to be done regardless of the fact that COs assigned to carry out a task know they will likely be assaulted.

[134] The testimony of COs and Manager Hobman was that COs must respond when inmate X is self-harming. CO Friesen testified that most COs would respond to an inmate self-harming regardless. In addition, CO Gresty testified that it is virtually impossible to withdraw from the situation once inmate X becomes assaultive because they must remain and help their partner(s). The CSC reply, that COs may withdraw at any time to reconsider the situation if their health and safety is at risk, seems problematic given that the evidence shows that inmate X's situation requires continued involvement.

[135] I also note that some tools that are recognized by the SMM appear to have been designated as non-permissible in the case of inmate X. CM Boucher testified that a psychiatrist had formally prohibited the use of OC spray on an inmate X. He stated that such a prohibition order is incompatible with the CSC SMM. Moreover, CO Gresty testified that although the SMM authorizes COs to use their baton in the absence of being authorized to carry and use OC sprays, the option of using a baton on a mentally ill inmate X was problematic.

[136] CD 567, Management of Security Incidents states in section 20 of the Directive that the acronym CAPRA refers to: Client; Acquiring and Analysing; Partnership; Response; and Assessment. Section 19 of the Directive states that each situation must be assessed in terms of the CAPRA problem solving model.

[137] Mr. Desmeules submitted that CAPRA reduces risk to COs who must carry out Pinel placement because the CO know the client, inmate X, and their partners, who include other COs and clinical staff. Thus, Mr. Desmeules concludes that COs know when it is safe to involve themselves in an incident and know how to formulate their approach. Ms. Caron countered that the evidence of CM Boucher challenges this because they know that inmate X is mentally ill and has a history of unpredictable assaultive behaviour.

[138] The testimony of COs in this case established that: clinical staff dictate the treatment plan for inmate X regardless of what consultation is held and COs must comply; clinical staff can alter the treatment plan at will and without consultation and

COs must comply; COs are required by their job description to intervene immediately whenever inmate X self-harms. As per the testimony of CM Boucher, the placement of a CO in the "red zone", as would be required with physical handling, reduces the effectiveness of the body positioning techniques taught to COs and in my view this increases the risk of injury to COs.

[139] Taking all the evidence into account, I find that the Situation Management Model (SMM) specified in CD 567 is not well suited to the routine, preplanned act of PRS placement of inmate X. The evidence establishes that the inmate is unpredictably uncooperative and assaultive in situations where COs cannot withdraw. Further, given her mental illness, CSC has placed limitations on COs relative to how the SMM can be applied to inmate X.

Confusion regarding application of use of force directives

[140] An email from CM Sullivan to COs on the subject of Placement of inmate X on Pinel restraint system and COs confirms that there was confusion on the part of COs who are required to perform the PRS. CM Sullivan wrote in the email dated February 9, 2010, that there has been confusion on whether or not placement of inmate X in PRS is a use of force. He clarified to COs that every time inmate X is placed on PRS it is a *non-routine* placement and that all documentation listed in paragraph 44 of CD 844 must be filled out.

[141] On March 3, 2010, CM Sullivan responded in email to CO Gresty as follows:

> As I indicated in our conversations, not all of inmate X's Pinel Placements are "pre-planned." If inmate X becomes assaultive or demonstrates Self Harming Behaviour, the Pinal Placements becomes "Spontaneous."
>
> As well, you indicated that "using line staff through an intervention plan, as stated above, must be completed in conjunction with an SMEAC or just the SMEAC itself." You miss the other OR statement which would be with just line staff – the deployment of line staff authorized by the Institutional Head, Crisis Manager or Correctional Manager through an Intervention Plan. As the Correctional Manager, we have met this requirement by having an intervention plan in place. An AND/OR statement use in general writing is to mean "one or the other or both" is acceptable.
>
> Operational attempts will be make to have **women-only team** on a compliant inmate X returning her to the Pinel restraint system […].

[142] Having received copies of Commissioner's Directive (CD) 567, Management of Security Incidents, CD 567-1, Use of Force, CD 567-2, Use of Responding to Alarms and CD 567-3, Use of Restraint Equipment for Security Purposes and CD 844, Use of Restraint Equipment for Health Purposes, I reviewed them to assess their clarity relative to COs and Pinel restraint placements on inmate X.

[143] CD 567, entitled "Management of Security Incidents", states in section 8 that:

> The management and control of situations must be accomplished through a framework which includes, but is not limited, to (a) the use of force, ensuring that the response and manner in which force is used are appropriate and in accordance with CSC policy and applicable legislation (CD 567-1).

[144] CD 567-1, entitled "Use of Force", defines the term, "use of force" in section 5 of the Directive as being action by staff that is intended to obtain the cooperation and gain control of an inmate, by using one or more of the measures cited. Among those measures cited that qualify as a use of force include: "(a) the non-routine of restraint equipment", and "(f) the deployment of the Emergency Response Team (ERT) in conjunction with at least one of the use of force measures identified above" [my underline].

[145] However, the Operational Summary of the Clinical Management Plan, dated August 24, 2010, states in the section entitled "Interventions" that "the decrease of self-harm behaviour (done [by the] use of continued placement on PRS to help with compulsive head banging)." CO Gresty's evidence was that inmate X is restrained approximately 23 hours a day and is only removed from the PRS for brief opportunities for her to shower, bathroom and exercise. The reference to the deployment of the ERT, as noted in the paragraph above, states that such deployment must be in conjunction with the non-routine use of restraint equipment, use of physical control, use of inflammatory and/or chemical agents, the use of batons or other intermediary weapons or the use of firearms. Given this, I cannot see how CD 567-1, "Use of Force", applies in respect of the routine use of restraints to control inmate X.

[146] CD 567-3, entitled "Use of Restraint Equipment for Security Purposes", states in section 3 (Definitions) that restraint equipment includes hard restraints and soft restraints used for physical and mental health purposes and referred to in CD 844, entitled "Use of Restraint Equipment for Health Purposes". Section 13 states that the use of restraint equipment in non-routine circumstances may be authorized by the Institutional Head or his/her delegate upon completion of an individual Threat Risk Assessment to protect staff, etc., when all other reasonable methods have been considered.

[147] The problem I have with this is that inmate X's PRS placements are consistent per her Clinical Treatment Plan and are routine such that they do not appear to be covered by this CD provision which contemplates non-routine circumstances.

[148] Section 3 of CD 844, "Use of Restraint Equipment for Health Purposes", covers several definitions that are of interest to this case. For example, section 3 states that restraints for physical and mental health purposes are (a) necessary in any situation where there is a risk of serious bodily injury to the inmate, and (b) prior to the application of restraints, all less restrictive measures must have been tried and proven ineffective for resolving the situation. Restraint is defined as the temporary restriction or limitation of a person's free movement. Section 19 of the Directive states categorically: "Restraint equipment shall only be used as a temporary limitation or restriction of the inmate's free movement."

[149] My review of the above indicates that CSC is applying Directives that are not meant to apply to the unique situation faced by management at RPC relative to protecting

inmate X from her destructive behaviour. As a result, it is not surprising that the evidence reveals confusion in the interpretation and application of these Directives in the case of inmate X.

Issues with CO input into treatment plans regarding inmate X

[150] The evidence adduced at the hearing indicates that there is insufficient CO involvement in the development and implementation of treatment plans regarding inmate X. I base that finding on the following elements.

[151] Mr. Peter Guenther, Executive Director of the RPC - Prairies, sent a memorandum to the Management Committee at RPC - Prairies on April 7, 2008 regarding treatment agreements and management plans. Mr. Guenther stated in his memo that the inherent risk associated with the work at RPC can be managed in a variety of ways. To this end, he asked that the management committee ensure that affected stakeholders staff groups including COs be involved in the development and implementation of treatment plans and management plans. He stated that the consultation must be meaningful and structured in a way as to ensure maximum participation from a broad base of staff involved in the case. As well, Mr. Guenther stated that the treatment agreement needs to include, where practical, a structure period of predictable reviews to allow for continuous meaningful input.

[152] On October 15, 2010, CM Jean-Guy Ouellett and CO Mark Friesen wrote to Executive Director Lynn McMurty, RPC regarding management's investigation of the refusal to work by CO Sabo. CO Friesen recommended that all COs be consulted before any treatment plan is put in place and that the consultation should be meaningful and with their full participation.

[153] The evidence suggests that CO participation falls short of meaningful with respect to inmate X. For instance, CM Clay Shaw testified that COs do not always get relieved to attend treatment team meetings and COs are only consulted later on after decisions have been made. He stated that in Bow Unit, where he is working, he personally sits on treatments plans almost daily. According to CO Gresty, COs are not always freed up to attend the treatment team meetings. As well, they are sometimes only informed of treatment plans. CO Gresty opined that tensions between clinical and operational concerns persisted at Churchill despite management's commitment to ensure meaningful consultation with all stakeholders to mitigate risk.

[154] Further, despite not being present at a meeting, COs have had their names included as though they had attended the treatment meeting. CO Ashley Tokarchuk described such a circumstance in an email copied broadly and dated June 17, 2010. She complained that her name was inscribed on a treatment plan even though she did not attend the meeting. She stated that she would have disagreed with the treatment plan and felt that inmate X should be restrained when being escorted for her shower and exercise.

[155] Management similarly failed to consider and give appropriate weight to the views of COs who asked that the treatment plan be modified in response to significant negative changes to inmate X's behaviour during a shift or shifts. CO Culbertson testified that on the day she was injured in February of 2011, inmate X had learned the father of her children had died two days prior. CO Culbertson refused to take inmate X to her shower and exercise because she felt that this would likely result in an assault. When CO Culbertson spoke to the psychiatrist, the psychiatrist ignored her reservations and accused

CO Culbertson of not wanting to do her job. Later, when inmate X was coming off the treadmill, she became assaultive and this resulted in CO Culbertson being injured. At the same time, another CO was punched.

[156] The evidence also suggests that CO input, where it is provided, may not always have a meaningful impact. CO Gresty testified that the psychiatrist is the one who decides how inmate X is to be treated. The treatment team, which is a multidisciplinary team generally to include the CO on the shift at the time, reviews the treatment plans and progress on a weekly basis. She stated that the role of the CO is to provide operational input. However, when they are present at meetings, their concerns are not fully considered. CO Gresty testified regarding occurrences were she was rebuked by physicians who stated that the role of COs is to comply with the treatment plan. She indicated that when COs suggested security measures necessary for complying with the treatment plan, they were similar rebuked because it was opined that the security measures were contraindicated to inmate X's medical treatment.

[157] I note that CM Shaw testified that treatment meetings for inmate X should not proceed without CO involvement. I also emphasize CM Sullivan's testimony that replacing COs so that they can attend treatment plan meetings for inmate X can be done. In my view, there is no reason that this should be done on every occasion.

[158] Associate Clinical Director, Angela Weber testified that the treatment plan can change following discussion and the changes are communicated to COs by way of email, through the correctional managers. In my view, this form of communication does not permit the COs to have input regarding the changes.

[159] In my view, the willingness of management and clinical staff to formally review and reconsider a treatment plan in light of a CO's serious security concerns could be important for mitigating risk of injury to COs. How this would work, if practicable, would be established by the employer in consultation with employees through the joint health and safety committee.

[160] All of the evidence taken together persuades me that Management at RPC does not ensure that CO participation in the development and implementation of treatment plans and management plans is both meaningful and structured in a way as to ensure their maximum participation. The employer does not consistently ensure the participation of COs at inmate X's treatment plans so that COs may provide input on how the Treatment Plan will affect security and risk to the occupational health and safety of the COs who will assist in implementing the treatment plan. In this regard, I agree with Mr. Guenther's assessment that the inherent risk associated with inmate X at RPC can be better managed by ensuring more CO involvement in treatment plans for inmate X.

Finding regarding normal condition of employment

[161] The record of assaults and injuries to COs, previously discussed, demonstrates that injuries continue to occur despite CSC's directives, post orders, protocols, procedures, initiatives, models, and training and equipment provided to COs. These are simply not preventing injury to COs who are required to transfer inmate X to and from the PRS bed to the Broda chair and escorting her to showers and exercise.

[162] Taking all of this into consideration, it is my opinion that the employer has not taken all reasonable measures to protect the health and safety of COs and that the danger does not constitute a normal condition of employment.

Decision regarding appeals pursuant to subsection 129(7)

[163] Having found that a danger exists for CO Gresty et al. and CO Sabo, and that the danger does not constitute a normal condition of employment, I hereby rescind the decisions that a danger did not exist rendered by HSO Zachary on March 22, 2010 and by HSO Hood on October 20, 2010.

[164] I am empowered by paragraph 146.1(1)(b) of the Code to issue any direction that I consider appropriate under subsection 145(2) or (2.1). Subsection 146.1(1) reads:

> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[165] Subsection 145(2) states that, if a health and safety officer finds a danger, the officer is required under the Code to notify the employer of the danger and to issue written direction or directions directing the employer, immediately or within the period specified by the officer, to take measures to correct the hazard that constitutes the danger or, to protect any person from the danger. Subsection 145(2) states:

> (2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
>
> (a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
>
> (i) correct the hazard or condition or alter the activity that constitutes the danger, or
> (ii) protect any person from the danger;

[166] In reassessing the violence program in terms of inmate X, employer consultations with the joint health and safety committee at RPC must assess what amount of PPE is necessary and appropriate in the various circumstances to protect the health and safety of

Ix and of COs who work with this inmate. The balance of what is determined, however, must ultimately protect the health and safety of COs

[167] Coming to a final determination on the appropriate PPE will likely be a process that will include the testing of different options of PPE combinations.

[168] On that basis, I hereby direct the employer pursuant to paragraph 145(2)(a)(ii) of the Code to take measures to protect COs any person from the danger posed by inmate X.

[169] The focus for the employees who refused to work was the absence of sufficient PPE to safely perform their work when dealing with Ix. It is for this reason that approximately a month's time has been given to the employer to comply with this order and the direction to complete the violence protection assessment in order to deal with the issue of PPE and other factors addressed in this decision.

[170] In this matter, HSO Zachary issued a direction to CSC on March 22, 2010, regarding violence protection

II - Appeals by the CSC of the directions issued on March 22, 2010 and on June 22, 2010

Direction regarding violence protection issued to CSC on March 22, 2010

Appellants' submissions

[171] Mr. Desmeules submitted that I should rescind HSO Zachary's direction to CSC dated March 22, 2010 that directs the employer to develop and implement a policy for the prevention of violence in the workplace in conjunction with the OHS committee at RPC.

[172] Mr. Desmeules argued that the direction should be rescinded because the employer does not understand the contravention and does not know what compliance action is required. He added that directions must be clear so that the employer knows what there is to correct and the direction here is no direction.

[173] Mr. Desmeules held that the treatment of the inmate X is the best way to prevent her from being violent. He further submitted that issuing more PPE will not prevent or protect against violence

Respondents' submissions

[174] Ms. Caron argued that I should confirm HSO Zachary's direction to CSC dated March 22, 2010 and direct the employer, as did HSO Zachary, to develop and implement a policy for the prevention of violence in the workplace in conjunction with the OHS committee at RPC and to direct CSC to take into account the peculiar challenges and the high exposure to violence encountered on the Churchill Unit.

[175] Ms. Caron submitted that the direction, although insufficient, was warranted because the employer did not have a violence prevention program in place in March 20,

2010. She also submitted that that such a program could be useful in mitigating the risk to COs on Churchill Unit.

[176] Ms. Caron held that the employer's contention that it did not know where the contravention lies and that it did not know what it meant or what to do is absurd. She maintained that the fact that CSC claimed that it did not know how to respond to the direction does not impact on the validity of the direction or the necessity of the employer to comply. In this regard she cited subsection 145(1) of the Code that authorized health and safety officer to issue directions in respect of contraventions found by the HSO.

[177] Ms. Caron held that CSC's argument that a formal violence program is not needed because preventing violence is their correctional mission and all of their policies revolve around violence prevention is tantamount to giving CSC an exemption to the Code.

Finding regarding the Direction issued by HSO Zachary on March 22, 2010

[178] I agree entirely with Ms. Caron assessment that: the purpose of the violence prevention program is to establish a systematic approach in response to violence in the workplace; that reactions to violence posed by inmate X towards COs in the context of PRS placement and self-harming are determined on a case by case basis; and that COs issues are not always taken seriously. I further agree with her view that, when faced with a real threat of assault, COs receive different directions depending on the circumstances and the CM on the shift, and that in the current scheme of things: COs may not be able to talk to a psychiatrist or to reconvene the treatment team; the ERT may or may not be called or show up; there may or may not be enough spare COs to respond; and COs may or may not be given access to hard restraints.

[179] That stated, I accept the CSC's position that its: post standards; standard security equipment; deployment standards and rosters; training standards; Situation Management Model and the Use of Force continuum appear to address violence prevention measures in the workplace relative to COs dealing with the general population of inmates. However, the evidence persuades me that the CSC's violence prevention program does not address all of the extreme challenges that inmate X, a mentally ill and assaultive inmate, poses to their program and that this constitutes a contravention of paragraph 125(1)(z.16)of the Code and section 20.1 of Part XX of the *Canada Occupational Health and Safety Regulations*, entitled "Violence Prevention in the Work Place".

[180] Having considered the evidence in these appeals, I believe that the Direction issued by HSO Zachary is well founded. However, as I am empowered to do pursuant to paragraph 146.1(1)(a) of the Code, I have varied the direction that HSO Zachary issued to RPC on March 22, 2010, as per the Direction appended to this decision, so that it may be read to apply specifically to protection against violence in the workplace in the Churchill unit in connection with inmate X.

[181] As noted previously in my decision regarding my finding of danger, CSC should also consider in consultation with the joint health and safety committee for RPC my findings which have led me to decide that CSC has not taken all measures to mitigate the hazard relative to complying with the direction.

Direction regarding safety materials, equipment, devices and clothing issued to CSC on June 22, 2010

Appellants' submissions

[182] Mr. Desmeules submitted that HSO Zachary was implying in his direction to CSC that CSC is not providing COs responding to non-planned use of force incidents with the appropriate PPE to protect COs from the risk of injury to and through the skin.

[183] Mr. Desmeules held that this is a troubling direction because a CO would have to don a whole ERT suit before acting to preserve life because it was an unplanned use of force. He added that the direction is also troubling because it applies not only to the Churchill Unit but to the whole RPC notwithstanding variations of inmates or any other factor applicable to all the distinct units at RPC.

[184] Mr. Desmeules submitted that HSO Zachary made his direction without properly considering all of the mitigating factors and that there is, in fact, no contravention.

[185] Mr. Desmeules submitted that the direction should be rescinded for these reasons.

Respondents' submissions

[186] Ms. Caron submitted that HSO Zachary learned in his investigation that COs have a duty to intervene when inmate X is self-harming and that there is a risk that the COs may be injured by inmate X because they do not have access to the same PPE equipment that is provided to the ERT.

[187] Ms. Caron denied the employer's contention that HSO Zachary based his direction on purely hypothetical scenarios. She recalled that the Respondents have already argued in their submission on files 2010-11 and 2010-42 that COs on Churchill unit should be provided with equipment and training similar to that provided by CSC to ERTs to reduce the risk of injuries to the COs when dealing with an assaultive inmate.

[188] Ms. Caron stated that it is troubling to hear the employer argue that providing COs with the requested PPEs would unduly increase their response times as no one would blame firefighters for putting on their gear before acting. Ms. Caron clarified that the COs are not suggesting that the equipment would be required in every instance and the Code and Regulations only demand the appropriate PPE be made available to COs should there be a risk of injury to or through the skin.

[189] Ms. Caron argued that I should confirm HSO Zachary's direction to CSC dated June 22, 2010 and direct the employer, as did HSO Zachary, to make the appropriate PPE available to line COs should the situation demand that they be protected and to direct CSC to provide training to line COs on the use of the same PPE.

Finding regarding the direction issued by HSO Zachary oon June 22, 2010

[190] I have chosen to rescind the direction issued by HSO Zachary relating to skin protection, pursuant to s. 12.9 of the Canada Occupational Health and Safety Regulations (COHSR). My reasons for this decision are what follow.

[191] While I am sympathetic to Ms. Caron's overall submission in regards to the infliction of past and potential physical injuries to COs by inmate X , I am also satisfied by the argument of CSC that equipping COs with full regalia of an ERT may well be counterproductive to ensuring the health and safety of COs and counterproductive to Ix's well-being.

[192] Parties appear to agree that the greater issue regarding PPE and training on its use is the amount of PPE that is appropriate in situations of non planned use of force that may arise in connection with inmate X. I agree with this assessment. For example, Mr. Friezen stated that it may not be necessary for COs to have all of the PPE that is used by ERT members and it may not be necessary for COs to use the ERT-like equipment in connection with every involvement with Ix. Deputy Warden Linda Garwood-Filbert's testified that RPC has considered establishing a 2 person ERT Team in respect of Ix.

[193] In my view, instead of relying on s. 12.9 of the Canada Occupational Health and Safety Regulations, these issues are best addressed through compliance with the Part XX of the COHSR, which, of course, was the subject of the first direction discussed earlier.

[194] Section 20.4 of Part XX of the Regulations requires the employer to identify all factors that contribute to workplace violence, section 20.5 requires the employer to assess the situation and section 20.6 instructs the employer to develop and implement systematic controls to eliminate or minimize work place violence or the risk of work place violence to the extent reasonably practicable. Finally, paragraph 20.10(3)(d) of the Regulations requires the employer to provide information, instruction and training on the work place violence prevention measures that have been developed under 20.3 to 20.6 of the Regulations.

[195] Pursuant to my above reasons on this question, coupled with my finding of danger and issuance of a direction under section 145. (2)(a)(ii), I conclude that the direction issued by HSO Zachary relating to s.12.9 of the Regulations is redundant and unnecessary in this case. I therefore rescind that direction.

Douglas Malanka
Appeals Officer

APPENDIX 1

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On March 19 and 20, 2010, health and safety officer Brian N Zachary conducted an investigation in the work place operated by Correctional Service of Canada, being an employer subject to the *Canada Labour Code*, Part II, at 2520 Central Avenue, Saskatchewan, S7K 3X5, the said work place being sometimes known as Regional Psychiatric Centre Saskatoon.

The said officer is of the opinion that the following provision of the Canada Labour Code, Part II has been contravened:

No. / No: 1

125(1)(z16) - Canada Labour Code Part II, 20.1 – Canada Occupational Health and Safety Regulation.

The employer has failed to take the prescribed steps to prevent and protect against violence in the workplace in the Churchill unit in connection with inmate X.

The employer shall follow all of the provisions set out in Section XX of the Canada Occupational Health and Safety Regulations regarding the prevention of violence in the workplace taking into account all and any hazards that relate to the activities conducted by employees in the course of their duties related to inmate X.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not continue or reoccur, and do so no later than September 4th, 2012.

Varied as identified in underlined text above, at Ottawa, this 3rd day of August, 2012.

Douglas Malanka
Appeals Officer

APPENDIX 2

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

DIRECTION TO CORRECTIONAL SERVICE CANADA UNDER PARAGRAPH 145(2)(a)

Following an appeal brought under subsection 129.(7) of the *Canada Labour Code* (the Code), Part II, I conducted an inquiry pursuant to subsection 146.1 with respect to decisions that a danger did not exist, as rendered by a Health and Safety Officers, Brian Zachary and John Hood. These decisions were rendered on March 22, 2010 and March 29, 2010, following investigations into refusals to work made by Correctional Officers (CO) Kerry Gresty, Laurie Brussiere, Bonnie Lundgren, Jill Stedsman, Courtney Blais, Rhonda Hendricks, Kristen Recknell; and Meghan Hryhor and Holly Sabo, respectively. The named COs' right to refuse dangerous work were exercised in relation to their work in the Churchill Unit of the Regina Psychiatric Centre (RPC) in Saskatoon, Saskatchewan. This work place is operated by Correctional Service of Canada (CSC), of which the named COs are employees. As such, the employer is subject to the Code.

On the basis of my inquiry, conducted from June 6 to 10, 2011, I conclude that a danger exists in relation to work that includes transferring Inmate X to and from Pinel restraints to the Broda chair and, escorting her. Supporting this finding of danger is the record of assaults and injuries to COs enacted by Inmate X, a record which demonstrates that injuries continue to occur despite CSC's directives, post orders, protocols, procedures, initiatives, models, and training and equipment provided to COs.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145.(2)(a)(ii) of the Code, to take measures to protect COs and any person performing work in connection with their duties related to physical interaction with Inmate X.

You are FURTHER DIRECTED to report on those measures to a health and safety officer at the Saskatoon district office of the department of Human Resources and Skills Development Canada, Labour Program, by September 4, 2012.

Issued at Ottawa, this 3rd day of August, 2012.

Douglas Malanka
Appeals Officer

To: Correctional Service Canada
Regional Psychiatric Centre
2520 Central Avenue
Saskatoon
Saskatchewan, S7K 3X5