Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-10-14
Case No.: 2017-39

Between:

Margo MacNeal, Appellant

and

Correctional Service Canada, Respondent

Indexed as: *Margo MacNeal* v. *Correctional Service Canada*

Matter:	Appeal under subsection 129(7)of the *Canada Labour Code* of a decision rendered by an Official Delegated by the Minister of Labour
Decision:	The decision is varied
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant :	Ms. Corinne Blanchette, Union Advisor, CSN-Pacific
For the respondent:	Ms. Cristina St-Amant Roy, Counsel, Treasury Board Legal Services, Department of Justice
Citation:	2020 OHSTC 7

REASONS

[1] This concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the *Code*) against a decision of absence of danger rendered by Official Delegated by the Minister (Ministerial Delegate) Ms. Melissa Morden on December 15, 2017. That decision concerned the work refusal action undertaken by the appellant and a number of other employees on December 12, 2017.

[2] That refusal action and the ensuing decision of no danger concern the claim by the appellant that the practice in place at Matsqui Institution consisting in running at separate times the program lines for Suboxone and Methadone of the Opiate Substitution Therapy (OST) program represented an unsafe practice as it does not leave an adequate number of staff available to respond to an emergency occurring during the times the OST lines are running. Prior to November 27, 2017, both Suboxone and Methadone lines of that program were being conducted simultaneously.

[3] At the time of the December 12, 2017, work refusal, Correctional Officers (CO) at Matsqui Institution were all conducting their duties in accordance with the job description of two levels, CX-1s and CX-2s (CX). These duties include but are not limited to: patrolling routine inmate movement, controlling inmate activities, performing security checks and searches, supervising inmates in specific areas, escorting inmates outside of the institution, responding to incidents involving inmates, case management activities and functional supervision of activities.

Background

[4] The facts established by the Ministerial Delegate, as recounted in the investigation report, provide the needed background information. As such, it appears that based on a British Columbia Supreme Court decision concerning inmates of provincial correctional facilities not receiving Opiate Substitution Therapy (OST) in a timely fashion, Correctional Service Canada (CSC) had informed their federal institutions that wait lists for OST needed to be eliminated. Each institution with a wait list was mandated to develop a local plan to eliminate such wait list as soon as possible. Such a mandate was issued to Matsqui Institution at the beginning of October 2017, and the institution was asked to have the issue addressed by October 15, 2017. Matsqui Institution was the first establishment to act in this regard.

[5] Matsqui Institution, a federal medium security penitentiary, houses approximately 300 inmates with approximately 70 to 80 receiving OST. Prior to the change on November 27, 2017, Matsqui Institution administered the OST program in the morning, before breakfast, simultaneously for both Methadone and Suboxone, in the Visits and Correspondence (V & C)

area, but kept the inmates receiving each medication separate to ensure the appropriate after-care for each group as per Standing Order 800.1.

[6] The proposed changes were discussed at a meeting of the Work Place Health and Safety Committee on November 14, 2017, resulting in their approval by the Committee on November 21, with the understanding that issues might arise which could result in adjustments to the new OST program administration process. The new process of the two separate lines was implemented on November 27, 2017, resulting in adjustments to the daily routine for weekdays and weekends.

[7] The change to the administration of the OST program has the Methadone OST line being administered from approximately 7:20 a.m. to 8:15 a.m. and the Suboxone OST line administered from approximately 11:50 a.m. to 12:25 p.m., with four COs responsible for monitoring the inmates during those times. The correctional manager (CM) can make adjustments to assign another CX post to the area if necessary. Such adjustment(s) would be based on operational requirements and take into account operational needs to determine what post position would monitor the line if one of the four regular posts becomes unavailable at those times.

[8] There are 36 CX posts at the institution, of which ten are stationary posts that do not respond to incidents outside of their post locations. Of the remaining 26 mobile posts/officers, some may be unavailable as some may be out of the institution on escort duties and some may be medically accommodated with the CX not able to respond. It appears that CSC utilizes an algorithm to determine the number of CXs required to staff the institution at any given time and the mobile post positions are generally placed where the majority of inmate traffic occurs at any time. During the administration of the OST lines, the programs, hobbies and East Compound Areas are typically not operational.

[9] During the administration of the Methadone line in the morning, the P24 post (officer) takes part in the monitoring of such, resulting in the living unit (LU) five yard not opening until approximately 8:15 a.m. with the return of the P24 officer from the Methadone line. The supervision of the later Suboxone line is primarily executed by four main posts to wit, P17, V & C, Admissions and Discharge (A & D) and P15. Likewise, the P9 post is not one of the four main posts but is available to participate in the supervision of the line or response elsewhere when not supervising a sweat in the sweat lodge.

[10] At approximately 8:15 a.m., the P17 post (officer) moves to the breakfast meal line which starts at approximately 7:30 a.m. and ends at 8:30 a.m. Monitoring of the breakfast meal line is conducted by three of the six LU CXs, with one going back to the LU to assist with checks at

approximately 8:05 a.m., the remaining two CXs monitoring the meal line being then joined by the P17 post CX at approximately 8:15 a.m.

[11] In her investigation report, Ministerial Delegate Morden indicates that the meal line and the medication line post locations are visible to each other in their location in the outdoor corridor, and commented that the medication line (different from either OST lines) can be quickly closed with the medication area being closed in the event that the CX monitoring the medication line is required to respond to another location of the institution.

[12] Referring to Standing Order 567.2 titled "Use of and Responding to Alarms", Ministerial Delegate Morden pointed out that the section of said Standing Order titled "Response for Activated Alarms" outlines that the Main Communication Control Post (MCCP) has an officer-in-charge who is responsible for dispatching primary response officers to the location where an emergency has been identified, and that if required, secondary response officers will be dispatched as well.

[13] The procedure specifies that during response to an alarm, all inmate movements will cease and that prior to responding to an alarm, any responding officer is required to secure their post. Annex E to the Standing Order, titled "Alarm Response Plan" states that if *"*a designated responder is unable to respond to an alarm, they shall inform MCCP immediately". This annex also outlines how the MCCP officer-in-charge is to request responders according to zones, each zone equating to location(s) and a list of primary and secondary responders.

[14] In her investigation report, Ministerial Delegate Morden notes that while not mentioned in the Standing Order, she was informed that if further intervention is required after secondary responders have been requested, a general response call to all CXs will occur, and furthermore that CXs may be required to respond to an incident while they are on break. The report also notes that the Matsqui Security Post Orders for each post positions all outline the duties of the position, how specific tasks are to be completed as well as the alarm response designations for the position.

[15] Basing her conclusion on the present definition of "danger" in the *Code*, Ministerial Delegate Morden first commented that:

> In the event that an incident occurs in another area of the Institution during the OST lines that requires a secondary response a delay may occur when a secondary response call out is made which may result in a hazardous condition (source of harm).There is a reasonable expectation that a threat may exist in specific circumstances where a Correctional Officer in the institution is involved in an incident that requires staff assistance and staff assistance is not immediately deployed to the location.

[16] She then addressed the two basic questions that need be asked to wit, whether the hazard as described represented an imminent threat or a serious threat to the life or health of the appealing employee/CO.

[17] As to the first question, the Ministerial Delegate's conclusion was that the hazard did not represent an imminent threat to the life or health of the CO, as it was not likely to occur at any given moment. Ministerial Delegate Morden stated that no evidence had been provided to indicate that the potential delay in response could reasonably be expected to result in immediate harm to the COs, and that the staffing of the Institution focuses on ensuring that COs are posted in areas with the most offenders (inmates). It was her conclusion that the plan that had been implemented for the two OST lines ensured that there be officers available in the areas of high offender traffic and that the four COs assigned to the OST lines remained available as secondary responders to other areas of the Institution, while as always for any situation, still needing to ensure their post is secure and inmate movement has ceased prior to responding to an incident outside of their location at the OST line.

[18] As to the second question, the Ministerial Delegate concluded that the hazard did not represent a serious threat to the life or health of the CO given the established control measures serving to mitigate the risk of severe or substantial injury. Referring to Standing Order 567.2, the Ministerial Delegate noted that its Annex E outlines what post positions are responsible as secondary responders to incidents within the Institution and that it is the MCCP that is responsible for providing response to an alarm and initiating the call out to responders based on Annex E, which would be followed for a call out to all staff for response should secondary responders not be available to respond to the incident.

[19] According to the Ministerial Delegate, what precedes is supplemented by the control measure that is the training in the use of force and the personal protection afforded by safety equipment that includes puncture-resistant gloves, stab-proof vests, engineered barriers and other safety equipment such as pepper spray, as well as the measures in place through Post Orders 831.16 and 831.13 to manage the movement of offenders within the Institution and restrict to some extent the number of offenders within an area of the Institution.

[20] For these reasons, Ministerial Delegate Morden concluded that the alleged danger created by the change to the administration of the OST program does not exist.

[21] The appellant filed an appeal of the Ministerial Delegate’s decision to the Occupational Health and Safety Tribunal Canada (the Tribunal) on December 20, 2017.

[22] A hearing was held on May 27 to 31, 2019, and September 11 and 12, 2019. On May 27, 2019, the first hearing day of the present appeal, the undersigned as well as the parties attended

an extensive and complete site visit of the Institution and the surrounding grounds. I witnessed, in its entirety, the delivery of an OST program line from the control post adjacent to and in full view of the V & C room where inmates who have received the medication must remain for a period of time under the observation of the P-17 officer. It stands to reason, in my opinion, that given the joint acceptance by the parties of my presence at that time and in that place, with other officers, all providing answers and comments relative to any question the undersigned may have had, I am at liberty to use the information gathered as demonstrative of the situation existing at the time of the refusals and the Ministerial Delegate's investigation and invoked as justification for the refusals to work.

Issues

[23] This appeal raises the following issues: Did the change in OST delivery at Matsqui Institution create a danger for the appellant on December 12, 2017, which is the date of the refusal and, if so, does the danger constitute a normal condition of employment?

Submissions of the Parties

A) Appellant's Submissions

[24] In brief, the appellant submits that the decision by Ministerial Delegate Morden was not founded in facts and law and is based on mistaken facts, facts that are material and critical to the determination of the issue or rather the three issues that the appellant identifies as 1) whether a danger existed on December 12, 2017, 2) if finding in the affirmative to the first question, whether that danger constituted or not a normal condition of employment, and 3), in the event of my finding that there is no danger, whether a direction should be issued regarding contraventions identified by the appellant. The appellant submits that under the *Code*, the undersigned has the authority to review the matter on any evidence that the parties have submitted, regardless of whether it was or could have been made available to the Ministerial Delegate during the investigation.

[25] While the appellant has sought in its submissions to provide extensive background information, much of that information is part of the background information that forms the initial portion of this decision. What follows in this regard is solely additional details or amplification explanations to the above provided in the appellant's submissions.

[26] From a general perspective, the work refusal of December 12, 2017, was prompted by the fact that the employer decided and implemented on November 16, 2017, a change that would see the Suboxone and Methadone line of the OST program split into two separate and distinct lines to be operated at separate times of the day, with other inmate activities/programs running

concurrently, those being the meal line and the medication line, causing the appellant to claim that there could not have been a worse time to conduct an OST line than at lunch time. The appellant puts forth that the evidence by COs is to the effect that the OST, medical and meal lines offer highly volatile and conflictual conditions where most confrontational situations occur and where, on the meal line, the COs are vastly outnumbered by inmates.

[27] The appellant has submitted that as a result of conducting an OST line during the lunch break period, there are less available responders than when there was a single Suboxone and Methadone line in the morning, a fact the appellant claims is not addressed by the Institution response plan, since some officers designated to respond are already on the OST line or at their own lunch, with several responder positions (A & D, Escorts) not being backfilled and the P9 officer not being able to respond where a sweat (three out of five days) is ongoing.

[28] Detailing somewhat that claim, the appellant submits that at 12:00 hours, before the change to the OST line, there were 23 responders available, with the OST line conducted at 12:00 hours that number goes down to 20. That reduction continues over at 12:30 hours when with less responders available, some of the inmate activities or programs are conducted with less COs than prior to November 2017, this being more noticeable as regards the meal line where prior to the change, six officers would be present while after the change, that number is reduced to four with one of the four having to leave the meal line prior to its conclusion to assist in conducting rounds in the LUs, leaving three officers in the presence of large numbers of inmates. According to the appellant, such situation makes little sense when one considers that at 13:15 hours, once the OST, meal and medication lines are completed , thus when all inmate movements have ceased with inmates being either at their programs or returned to their units and secured in their cells or behind the barrier, the number of responders increases to 24.

[29] The appellant disagrees with the conclusion by the Ministerial Delegate that the two primary responders drawn to the meal and OST lines (P16 and P17) can quickly shut down their post and respond to an incident. In the appellant's opinion, the Ministerial Delegate's experience in the matter does not equal the contrary opinion and experience of the numerous COs on this particular issue.

[30] In addition, for that particular line (Suboxone), the appellant notes that not only are there less responders, but that they are less centrally located than when inmate activities are concurring and that as time is of the essence when responding to a call for assistance, having to run a longer distance would be a cause of a greater number of injuries, not to mention having to travel a longer response route likely to encounter more inmates loitering around, and delay intervention where it is viewed that a quicker and strong response by COs will serve as a deterrent and lessen the chances and severity of injuries.

[31] The appellant also argues that the employer practice at Matsqui, one that has increased since 2017, of assigning to primary and secondary responder posts employees who are restricted from responding to emergencies (accommodated employees) poses a significant challenge as it affects the overall response capacity and that it has not been examined through a formal Threat Risk Analysis (TRA). This poses a problem to the officers manning the MCCP who are tasked with deploying responders in case of emergencies because these MCCP officers do not know the identity or number of accommodated officers, and the suggestion that an accommodated officer can swap a responder post for a non-response post does not mitigate the risk created by the added delay, particularly where the static post to which a swap would be intended may very well be occupied by another accommodated officer.

[32] In this respect, the appellant argues that the evidence demonstrates that out of the 38posts of the Institution, taking into account the 10 static posts and the 8(10) operationally adjustable posts, close to a third of the response posts is occupied by accommodated officers unable to respond to emergencies, and that the rate of serious assaults against COs resulting in significant time-loss is around three to four per year.

[33] In support to this argument, the appellant notes the testimony of one officer manning the P17 post who, since November 2017, has had to occupy alone the V & C during the OST lines, thus in the presence of a considerable number of inmates who often are aggressive and confrontational, without any instructions on how to respond, while not being allowed to leave her post as a P17 is identified as a first responder.

[34] Along the same line, the appellant refers to testimony about the fact that before November 2017, four COs remained in the LU during the OST line, those officers conducting rounds in pairs in the LU. However, since the November 2017 change, that number has been reduced to three (one per floor) for LU 1, 2 and 3, reducing therefore greatly the immediacy of response, specially where in those LUs, inmates can return after completing their meal and be neither secured in their cell or behind a barrier. In that respect, the appellant refers to the testimony by the respondent's witnesses to the effect that a unit can be left with a single officer solely when inmates are secured in their cells or behind a barrier.

[35] It is claimed and submitted by the appellant that testimonial evidence from the respondent side establishes a number of points:

- Determination of the number of needed responders is made at the local level;
- No Job Hazard Analysis (JHA) was reviewed or TRA conducted to assess the impact of the changes to the OST on number of responders or working conditions;
- Staff security takes second place to public safety;

- No review of the number of inmates allowed out of cells was considered or implemented to account for the changes to the OST lines;
- Changes to the OST did not result in any adjustment in equipment, procedures, policies, training or staff level for COs or nursing staff, nor in any adjustment to COs lunch break schedule;
- There are no fitness requirements (timed run) for COs, contrary to a control measure in the JHA.

[36] As a whole, it is the position of the appellant that the personal protective equipment (PPE) and training that the respondent argues serves as sufficient protection all preceded the changes to the OST and do not take those in consideration, causing the appellant to conclude that the "control measures" remain status quo while there is an increase of inmates' activities and a decrease in available staff.

[37] Furthermore, the appellant submits that during the lunch break period, nearly 50% of the designated primary and secondary responders are not equipped with a radio and that those responders can take their break outside the Institution as long as they remain on the penitentiary reserve, leading to a simple inference that such officers are not readily available for response.

[38] The legal argument presented by the appellant is based on the definition of "danger" that became effective on October 31, 2014, and which reads:

> Any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.

[39] The appellant submits that this definition, and its application to any case, needs to follow the first interpretation that was made of such by the Tribunal in *Correctional Service of Canada* v. *Ketcheson*, 2016 OHSTC 19 (*Ketcheson*), where the following three-pronged test to apply to the determination of "danger" in any given case was developed:

1. What is the alleged hazard, condition or activity?
2. a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
   Or
   b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
3. Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[40] Applying that test to the present case, the appellant thus submits that in order to conclude that a danger existed for appellant, Ms. Margo MacNeal, one needs “to ascertain the circumstances in which the hazard, condition or activity could reasonably be expected to be an imminent threat to the life o[r] health of a person exposed to it” or “to ascertain the circumstances in which the hazard, condition or activity could reasonably be expected to be a serious threat to the life or health of a person exposed to it”.

[41] Applying the first question of the test to the facts of this case, the appellant defines the hazard (condition or activity) that needs to be examined as the hazard of:

> [...] being injured or developing a more serious injur[y] due to a reduced number of officers assigned to perform supervision of a conflictual inmates activities (meal line, medication line and/or OST line) and the reduced or delayed response to an emergency due to the inmate activities and programs concurrently running, the OST line, the meal line and the medication line as well as correctional officers meal breaks.

[42] As to whether the possibility the said hazard could reasonably be expected to be an imminent threat to the life or health of the appellant, the latter opts to make no representation on this point. The appellant's case thus rests on an affirmative answer to the question under the *Ketcheson* test of whether the hazard that the latter has identified could be reasonably expected to be a serious threat to the life or health of a person exposed to it.

[43] The appellant's argument in this respect is based on the premise that there is no doubt that the consequences of an assault by an inmate on a CO or any other employee come within the category of serious threat to life or health. To support this affirmation, the appellant refers to the considerable case law of this Tribunal involving COs and CSC that has dealt with the hazard posed by assaults from inmates and supports that premise and is closely linked to the notion of unpredictability of human behaviour.

[44] The fact that the definition of “danger” has changed does not, in the appellant's opinion, alter this premise. In *Armstrong* v. *Canada (Correctional Service)*, 2010 OHSTC 6 (*Armstrong*) for instance, the Appeals Officer stated that:

> [46] COs at Kent Institution are exposed to a potential hazard. That potential hazard is spontaneous assault by maximum security inmates. […] spontaneous attack by an inmate can occur without provocation and without warning. […] inmate behaviour can go from cooperative behaviour to behaviour causing grievous bodily harm or death without a progressive escalation of aggressiveness.

[45] In the same manner, while under the former definition of "danger" which spoke of "potential hazard or condition", the concept of "unpredictability of inmate behaviour" was recognized by the Federal Court in *Verville* v. *Canada (Correctional Service),* 2004 FC 767 (*Verville*), that concept continues to be applied in the Tribunal's more recent case law, as evidenced in *Correctional Service of Canada* v. *Laycock*, 2017 OHSTC 21 (*Laycock*), issued under the most recent definition, which speaks of "any hazard", with both definitions formulated around the notion of reasonable expectation.

[46] In *Verville,* the Court stated that:

> [41] [...] the customary meaning of "potential" [...] hazard or condition does not exclude a hazard or condition, which may or may not happen based on unpredictable human behaviour. If a hazard or condition is capable of coming into being or action, it should be covered by the definition. As I said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear that in this case, spontaneous assaults are indeed capable of coming into being or action.

[47] In *Laycock*, the words of the Appeals Officer at paragraph 110 amount to the same meaning:

> [110] [...]Assaults to correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated[...].

[48] The appellant puts forth that this notion of unpredictability or unpredictable inmate behaviour and violence was broached in the *Ketcheson* decision that developed the analysis test for the newly defined "danger":

> [202] It is probably true that we could call a potentially violent inmate a "hazard" (a "ticking time bomb"). […] However, it could be said that exposure to potentially violent inmate without being provided with PPE (handcuffs and OC spray) could be a hazardous "condition", and if the respondent was engaged in an activity with a potentially violent inmate, that could be a hazardous "activity".

[49] The appellant submits that with the changes to the OST delivery, there was a reasonable expectation that Ms. MacNeal could be exposed to a danger as the assessment of the risk by the employer, if any, was insufficient and the control measures invoked to be in place all predated the OST delivery changes. Considering that perspective, the appellant argues that since potential and future hazards are not excluded from the definition of "danger" if the risk to health is serious, materialization of a threat need not be time specific. This is clearly established

in many Tribunal decisions, among them *Laycock*, and *Keith Hall & Sons Transport Limited* v. *Robin Wilkins*, 2017 OHSTC 1 (*Keith Hall & Sons Transport Limited*).

[50] In *Keith Hall & Sons Transport Limited*, the Appeals Officer stated as follows:

> [52] However, the direction is based on the existence of a serious threat to Mr. Wilkins' life or health as opposed to an imminent threat. Again, to conclude to the existence of a serious threat, it is not necessary to establish precisely the time when the threat will materialize. One must assess the probability that the alleged hazard, condition or activity will cause serious (i.e., severe) injury or illness at some point in the future. The issue is whether the circumstances are such that the threat can reasonably be expected to result in serious injury or illness, even if the harm to the life or health of the employee might not be imminent.

[51] In *Laycock*, the Appeals Officer wrote:

> [107] As the Court reasoned in *Martin* and *Verville*, when attempting to ascertain whether a condition could reasonably be expected to be a serious threat, one is necessarily dealing with events that may only materialize in the future. In that sense, for a serious threat to exist, those potential events must be found to be reasonably expected to occur, as a reasonable possibility.

[52] As to the evidence presented by the appellant, it has put forth that most of the witnesses with operational experience have testified that a delayed response to an emergency could mean life-threatening injuries to a CO, and this despite all the protective equipment provided. Noting that this raises the issue of the type of evidence that can be accepted by an Appeals Officer to make a finding of danger, the appellant submits evidence need not come solely from professional types and that this issue was considered by the Federal Court in *Verville*, a case determined under the previous definition of "danger", with the Court formulating what was to become described as "job-experience-based opinion" in subsequent Tribunal decisions as follows:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on 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. It could even be established through an inference arising logically or reasonably from known facts.

[53] The appellant submits that this rationale has been consistently applied in the decisions of the Tribunal, even when rendered after the 2014 amendments to the *Code*, and that the COs who testified at this hearing had the necessary experience to establish what situation could bring about injury.

[54] The appellant submits that given the critical deterrent that constitutes a quick and efficient response capacity to an emergency, one can easily assert that any delay in responding carries the potential for injury and one may also assert that a reduction in staffing ratios without a parallel reduction in activities can result in injury. The appellant finds support for this assertion in a number of decisions by the Tribunal. In *Glaister* v. *Correctional Service of Canada,* CAO-07-008, where a CO was directed to make rounds by himself as opposed to the prior practice of doing rounds in pairs, the Appeals Officer concluded to danger and stated:

> [101] When an employer changes the conditions of employment by significantly modifying the responsibilities of an employee, those controls, security policies and procedures must be reviewed through a job hazard analysis, to determine if any new hazards can be identified, if the measures in place can adequately respond to those new hazards or if new measures will need to be put into effect.
>
> [102] Implementing a modification without doing so exposes the employees to a potential hazard for which there may be no procedures to deal with.

[55] Along the same line, in *Correctional Service of Canada* v. *John Carpenter*, CAO-05-012 where two COs were posted to a LU while four were dictated by policies, the Appeals Officer concluded to danger and added:

> [80]There is ample evidence that the employer modified his staffing policy. However, I was not given by the employer sufficient evidence that he mitigated this policy change by conducting a new evaluation of the level of risk that this staffing policy modification would bring about for the guards.
>
> [81]The employer did not demonstrate to my satisfaction that he measured the impact of this policy change on the normal working conditions of the guards. […]

[56] On this point, the appellant concludes that a reasonable expectation of serious threat can be established despite limited evidence of historical occurrence and despite the COs' job description emphasizing the dangerous nature of their work, as was the case in *Correctional Service of Canada* v. *Courtepatte*, 2018 OHSTC 9, where the Appeals Officer found that the condition or hazard that had been presented as a danger could reasonably be expected to pose a threat to the life or health of the COs before it could be controlled or altered nonetheless.

[57] In support of this last affirmation, the appellant refers to the words of the Appeals Officer in *Zimmerman* v. *Correctional Service of Canada*, 2013 OHSTC 34 (*Zimmerman*) to the effect that serious injury can be inflicted in a matter of seconds, thus reinforcing the need for rapid intervention. In that case, the Appeals Officer stated:

> [111] The unchallenged evidence of CO Strekenburg was that the use of weapons has increased at Kent and he has personally observed stabbings and the unchallenged evidence of COs Aulakh and Strekenburg was that it takes longer to respond to an incident in Pod 1 and that 33 stab wounds or 50 head blows could be delivered by someone in as little as seven seconds.

[58] Consequently, as regards the question of whether the hazard could be expected to represent a serious threat to life or health, the appellant submits that inmate assaults are a risk to COs as they have the duty to respond to incidents to provide first aid and to use force, and thus that the refusing employee's motivation was truly out of concern for her safety and that of co-workers and other employees at Matsqui. In that regard, and contrary to the claim of the respondent employer, the appellant submits that not a shred of evidence was presented that would support a claim that the work refusal process was resorted to by the appellant to promote a labour relations agenda, contrarily to what occurred in the situation that applied in the *Ketcheson* case.

[59] As a whole, the appellant submits that in determining this case, superior weight should be given to the evidence provided in person by the COs at the hearing, as such evidence is in harmony with the remainder of the evidence, was not significantly contradicted and the COs have the necessary experience to reach sound conclusions about the danger created by the changes to the OST.

[60] As to the question of whether the threat to life or health will exist before the hazard or condition can be corrected or the activity altered, the position of the appellant is simply that it has been shown that there is a reduction in the number of officers conducting the meal and the OST lines, a situation that represents a hazard, and that the impact of the reduction has not been analyzed by the employer nor have specific control measures been put in place to address such impact. Added to this, the hazard needs to be considered in light of the diminished response capability caused by the COs lunch break schedule, the growing number of officers prevented to respond to emergencies (accommodated officers) but nonetheless assigned to posts requiring response, the fact that a number of officers are not equipped with radios at certain times and what the appellant describes as the uselessness of an outdated Standing Order 567.2 concerning use of and responding to alarms.

[61] Considering what precedes, the appellant makes the argument that considering the absence of a thorough, comprehensive and exhaustive TRA and given the absence of preventive (control) measures required by Part XIX of the *Canada Occupational Health and Safety Regulations* dealing with a hazard prevention program, one cannot confidently conclude that the hazard can be corrected or the activity altered. Responding to incidents represents the most dangerous task for a CO under the JHA and yet, when CM Forseth was tasked with implementing the elimination of the OST wait list, which resulted in the splitting of the single/simultaneous morning OST lines into two separate lines at separate times, no regard was given to the increased hazard and how to address such through the hierarchy of controls mandated by section 122.2 of the *Code*.

[62] In addition to this question of the employer not having satisfied the requirements of what is commonly referred to as the hierarchy of controls, the appellant argues that in making the change to OST lines, the employer failed to proceed with a specific JHA, as required by the *Code*. In that respect, the appellant refers to the decision of the Tribunal in *Correctional Services of Canada* v. *Union of Canadian Correctional Officers-CSN*, 2013 OHSTC 11, in which it was determined that an employer having only a generic JHA that did not consider the specific issues of a workplace was in contravention of the *Code*, which the appellant states is exactly the situation that prevails in the present case. In that decision, the Appeals Officer stated the following:

> [145] The evidence is that CSC has developed such a prevention program as of 2008 in accordance with paragraph 125(1)(z.03). In the documentation provided by CSC, I found that the methodology retained by CSC to identify the hazards was a JHA. A generic JHA was eventually done on a national basis in consultation with the National Joint Occupational Health and Safety (NJOHS) Policy Committee. This generic JHA was to be finally fine-tuned by each CSC work place to include hazards which were specific to the individual work places, as required under paragraph 125(1)(z.04) of the *Code*. However, the evidence is that this fine-tuning has not occurred at Millhaven Institution.
>
> [148]The *Code* requires, under paragraph 125(1)(z.04), that in the event where the program referred to under 125(1)(z.03) does not cover certain hazards unique to a work place, the development, implementation and monitoring must be done in consultation with the local work place committee, which will also provide for the education of employees in health and safety matters related to those hazards.
>
> [...]
>
> [153] Based on the above, I believe that paragraphs 125(1)(z.03) and (z.04) of the *Code*, along with sections 19.4, 19.5, 19.6 and 19.7 of Part XIX of the *Canada Occupational Health and Safety Regulations* are the

> provisions that properly apply to the particular circumstances of this matter, and that Correctional Services Canada is in violation of these proceedings.

[63] Applying this rationale to the present case, the appellant argues that where clearly the local work place health and safety committee was to be involved, the unchallenged evidence is that the employer did not involve the committee in the limited and restrictive time frame it imposed, causing the changes to occur without modifying the CO staffing levels, adding nursing coverage or affecting the Corcan (an inmate rehabilitation employment program) hours of operation. The conclusion therefore, as drawn by the appellant, is that the identified potential hazard, could reasonably be expected to cause injury to a CO before it could be corrected, therefore meaning that a danger exists.

[64] The appellant is of the opinion that the danger did not constitute a normal condition of employment when one considers the meaning that the case law gives to the expression, as per the decision of Federal Court in *Canada* v. *Vandal*, 2010 FC 87, a pronouncement by the Court that continues to apply and which defines a danger that is a normal condition of employment as being residual in nature, one that remains after the employer has taken all the necessary steps to eliminate, reduce or control the hazard, condition or activity and for which no direction can reasonably be issued under subsection 145(2) of the *Code*.

[65] The appellant emphasizes that the obligation of an employer in this regard is to take all necessary steps to eliminate, reduce or control the hazard, condition or activity, and that the assessment must be based on the "low frequency, high risk principle" originally developed in the *Parks Canada Agency* v. *Douglas Martin* and *Public Service Alliance of Canada*, CAO-07-015, decision and found to be applicable to COs in the *Armstrong* decision, a principle grounded in the belief that where the consequences of a particular event are dire or critical for an individual, prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of the event occurring.

[66] It is the opinion of the appellant that given the high risk faced by COs and the absence of any specific or contemporary control measures, one cannot say that all necessary measures were taken to eliminate or reduce the hazard. Furthermore, the appellant submits that there was little in the evidence about steps taken to eliminate or reduce the hazard posed by the reduction in the number of officers conducting the meal and OST lines, the reduction of responders available and the added distance to run in case of an emergency during lunch time. While the employer may have stated to the Ministerial Delegate that the COs are trained and provided personal equipment (vests, handcuffs, OC spray), the appellant points to the fact that the former deputy warden of operations at the Institution was forced to admit during testimony that those measures existed before the changes to the OST line and that no action, measure, equipment, training or policy were developed to address the changes to the OST lines.

[67] The appellant thus requests that the undersigned find that a danger existed and consequently vary accordingly the decision of Ministerial Delegate Morden. In the alternative, should the undersigned conclude to the absence of danger, the appellant requests that a direction be issued pursuant to subsection 145(1) to have the employer cease contravening the *Code*.

B) Respondent's Submissions

Sealing Order

[68] Prior to attending to the merits of the appeal, the respondent is seeking by way of preliminary application that the undersigned issue a sealing order to protect the public interest, or more precisely to protect what it sees as confidential information related to security operations of federal correctional institutions. More specifically, the respondent submits that many exhibits on record demonstrate staff deployment standards, available security tools and infrastructure, various security policies and include schematic diagrams of the institution. The respondent submits that such information has the potential to compromise the security of the institution as well as the health and safety of employees, inmates and visitors.

[69] It is the opinion put forth by the respondent that while proceedings before the Tribunal are presumptively open to the public in adherence to the "open courts principle", an Appeals Officer may issue a sealing order or a confidentiality order, thus making exception to the said principle, where it is appropriate that certain information not be disclosed, and balancing in this manner the public interest of open courts against the private interests of parties to maintain the privacy of information as per the legal test established by the Supreme Court of Canada and restated in *Toronto Star Newspapers Ltd.* v. *Ontario* , 2005 SCC 41 (*Toronto Star Newspapers Ltd*.). The respondent recognizes that confidentiality orders are not automatic, even where the parties are in agreement and that there must be reasons put forth in the application of the said test.

[70] The respondent is thus of the opinion that a sealing order is necessary as regards Exhibit 1 (tabs 1, 2 and 9), Exhibit 4 and additional plan of the institution to prevent confidential security information about federal penitentiaries from entering the public domain. In addition, the respondent further submits that information about the number of security staff on site at a given institution, policies and protocols with respect to static security infrastructure and dynamic security interventions, as well as schematics of the physical layout of the institution, in the public domain and in the wrong hands, all have the ability to compromise security and safety of the institution.

[71] Additionally, it is the respondent's opinion that while there is a high public interest in ensuring that disputes under the *Code* are adjudicated properly, fairly and in a public forum, such interest is minimally impaired by the sealing of exhibits and redaction of identifying information from a published decision, such opinion finding support in a precedent set by this Tribunal in similar circumstances in *Patrick Weagant* v. Canada (*Correctional Service*), 2013 OHSTC 22, a decision not publicly available in unredacted form.

Merits

[72] The respondent's general description of the issue does not differ from that of the appellant. In a nutshell, the respondent states that the appellant resorted to the refusal to work process under the *Code* because the latter claimed that the plan to eliminate the OST program waiting list put in place at Matsqui did not leave an adequate number of staff available for response in the event of an emergency during the times the OST lines are running. The respondent's comprehension of Ministerial Delegate Morden's finding of no danger is that it was based on the latter's review of the employer's mitigation strategy, including training, communication protocols and contingency plans, the fact that there was no unique risk or circumstance at the time of the refusal, as well as the fact that the response plan and the dynamic post positions are not stationary and can adequately address the appellant's concern for response. It is the opinion of the respondent that the appellant is using the refusal to work process to challenge a policy decision.

[73] The summary of the facts offered by the respondent closely repeats that which was formulated by the appellant and therefore need not be repeated here. Accent, however, is put on the job description of COs and the essence of the respondent's position in this case closely turns on the substance of that document. On this, the respondent submits that at all relevant times, the appellant, as well as the other employees who refused to work and/or testified, were COs who confirmed that they have worked at different times in medium-security institutions and who were aware that working with inmates with a potential for violence is an inherent part of their job. The respondent draws specific attention to the generic work description of CO-2s which states in part, under the heading “Work Environment”, the following:

> There is direct, daily exposure to inmates who may be agitated, unpredictable or uncooperative or who may attempt to intimidate or resort to violence. ...
>
> […]
>
> … the work is carried out in a controlled access institution with multiple barriers and security controls, which can alternately create a sense of isolation or lack of privacy. There is exposure to unpleasant sights, sounds and odours on a daily basis.

> [...]
>
> There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of duties in direct contact with potentially volatile inmates ...

[74] On a more direct orientation, the respondent referred to the person who was essentially the principal witness for the appellant, Mr. Christopher Wright, CO, and pointed out that at various points in his testimony the latter acknowledged the inherent risks in the working conditions at a penitentiary, and specifically testified to working at times as a member of an Institutional Emergency Response Team, where he was required to use force to deal with potentially violent crisis situations involving inmates, yet confirming being trained specifically to address inherent risks in the job and to evaluate the situation to avoid putting oneself in danger.

[75] The respondent describes the refusal motivation in a manner that does not differ in substance from that of the appellant. Its submissions stipulate that the COs believe that the practice of running OST program lines at separate times is unsafe because this does not leave an adequate number of staff available for response in the event of an emergency during the times the lines are running. Adding specificity to that general description, the respondent itemizes the refusal rationale in three elements:

- a response plan is not in place for MCCP staff;
- the lunch Suboxone line has no response and secondary responders may not always be available;
- the morning Methadone line running with the meal line and the medication line leaves no immediate response to the LU.

[76] Stepping back to the employer's investigation that preceded the investigation conducted by Ministerial Delegate Morden, the respondent notes that upon consideration of these three elements, the employer had concluded that no danger existed.

[77] As regards the first element, the respondent's position put to the Ministerial Delegate was that a response plan did exist for MCCP in that Standing Order 567.2, outlined a response plan to any incidents within the Institution, this based on MCCP's responsibility to dispatch primary response officers to an emergency's location, and where required, to dispatch secondary response officers, with annex E to the standing order outlining how MCCP is supposed to request responders according to zones, with each zone having a list of primary and secondary responders.

[78] In an emergency, MCCP functions as a base station radio to relay communications between Multi-Function Officers and those officers requiring help, and also controls the barriers that can isolate a problematic area, as the procedure provides that during response to an alarm all inmate movement will cease. Should secondary responders not be available for some reason, a general call for all staff response would be the next step in the procedure, this including officers that may be on their lunch break. Referring to the past as a confirmation of the future, the respondent did argue before the Ministerial Delegate and does also before the undersigned that the number of immediate responders attending the lines is adequate since in the past, such number has been sufficient to address incidents that occurred on the line, noting that mobile positions are generally placed where the majority of inmate traffic is at any time.

[79] Concerning the second element to wit, the sufficiency of staff and secondary responders to respond in timely manner to an incident during the lunch Suboxone line, it was put to the Ministerial Delegate and to the undersigned that what had been raised at refusal was the occurrence of hypothetical scenarios in the Institution and that management at Matsqui had specifically identified as response options for that line that the staff complement had immediate responders built into the staff attending or monitoring the Suboxone line, those being P15, P17, V & C CO-2, CO-1, A & D/V & C. In addition to the four main posts, Escort posts are available for response and line supervision when not on escort, as is the P9 post when not supervising a sweat.

[80] Regarding the morning Methadone line and immediate response to the LU, it was put forth that the breakfast line is monitored by three of the six COs assigned to the LUs that the meal line and medication line posts are visible to each other in their location in the outdoor corridor, and that the medication line can be closed quickly in the event that the CO monitoring the line is required to respond to another location of the institution, with P16 being also identified as responders to LUs as well as multi-function post P24 who, while assisting with frisk searches on the line, is available for immediate response to LU 5.

[81] Additionally, on weekdays, the A & D/urinalysis officers are identified to attend the Methadone line, and the officer on P17 is not being left alone in the visiting area during the time of that line as the CX-2 officer at the V & C control post is directly observing, as are the P24 and the A & D/Urinalysis officers as they are frisking inmates. Those positions are described as dynamic and allow for movement and reallocation of resources according to institutional needs.

[82] The respondent submits that the above elements which were presented to Ministerial Delegate Morden and which form part of its submissions to the undersigned, resulted in a no danger finding by the Ministerial Delegate who concluded that such was based on her acceptance of the employer's mitigation strategy and her finding that the employees had

adequate communication tools, training and flexibility in how to undertake their duties in order to ensure their safety. In addition, the Ministerial Delegate did find that consultation had occurred with the work place health and safety committee which had approved the proposed changes and the respondent noted that the principal witness of the appellant (Mr. Wright) had agreed when cross-examined that the schedule that had been established was the best option at the time.

[83] The respondent acknowledges that the general right of refusal is described at subsections 128(1) and (2) of the *Code* and that "danger" is defined at subsection 122(1) of the *Code*. As is obvious by examining the submissions of both parties, both share the same view as to how "danger" is presently defined in the *Code*, that definition stemming from the 2014 amendments to the legislation. However, the respondent describes the test to be used in analyzing if "danger" is present in a given situation as that which was defined in 2008 by the Federal Court of Appeal in *Canada Post Corporation* v. *Pollard*, 2008 FCA 305, affirming the Federal Court's decision in *Canada Post Corporation* v. *Canada (Attorney General)*, 2007 FC 1362, in the same case on the basis of the previous definition of "danger". That test was sketched in four elements that read as follows:

- the existing or potential hazard or condition, or the current or future activity in question will likely present itself;
- an employee will be exposed to the hazard, condition or activity when it presents itself;
- exposure to the hazard, condition or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
- the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.

[84] In point of fact, this test differs from the three-pronged test that was developed in the *Ketcheson* decision which was based on the 2014 definition of "danger" and was invoked by the appellant as being the applicable test. According to the respondent, the Federal Court in *Verville* held in 2004 that the definition of "danger", that definition preceding the 2014 definition, requires proof that "[...] such circumstances will occur in the future, not as a mere possibility but as a reasonable one". The respondent further states that the Court, in the same case, held that a reasonable expectation of injury cannot be based on hypothesis or conjecture. Furthermore, the respondent notes that the work refusal provisions of the *Code* have been recognized as an emergency measure.

[85] According to the respondent, the above approach finds basis on the transitional provision accompanying the 2014 revisions to the *Code* which the respondent submits "makes it obvious that Parliament intended the former definition of danger (pre-2014) to continue to apply to

existing procedures and proceedings" such as the appeal being considered herein (presumably notwithstanding that such case/appeal originated after the coming into force of the 2014 revisions to the *Code*). It is thus the submission of the respondent that subsequent revisions to section 122(1) of the *Code* (and here one assumes that this concerns directly the definition of "danger"), and new tests for danger that flow from these revisions (presumably that developed in *Ketcheson*) do not apply in the present circumstances.

[86] In short according to the respondent, the old tests affirmed by the Court as outlined above continue to apply. The result of this, again as submitted by the respondent, is that the proper test to apply in the consideration of this appeal is "reasonable possibility" and not "mere possibility". The fact that the unpredictability of human behaviour cannot completely rule out the potential for an assault or other incident does not on its own elevate the concerns raised by the appellant beyond the speculative threshold of "mere possibility". While a certain risk is inherent in the job for employees in correctional institutions, particularly those working in security positions, the numerous dynamic and static security measures taken by the employer, including the fact that COs are professionally trained to respond to such risks, mitigates any associated speculative risk arising out of the unpredictability of human behaviour.

[87] In addition, in light of the appellant seeking a default direction regarding a contravention to the *Code* should the undersigned conclude to absence of danger, the respondent submits that an appeals officer acting pursuant to section 146.1 of the *Code* is precluded from making a finding of a specific violation of the *Code*, in essence does not have the authority to conclude to anything but "danger" or "no danger".

[88] The respondent has built its submissions on the merits on the five following points:

- at the time of the appellant's refusal on December 12, 2017, it was business as usual at Matsqui Institution;
- a hypothetical and speculative risk does not constitute a "danger" under the *Code*;
- any residual danger, to wit a danger that remains after the employer has taken "all reasonable mitigating steps", is a normal condition of employment;
- policy and training mitigate against risk;
- work refusals are not intended to address policy disputes.

[89] On the first point, the respondent notes that at the start, one needs to pinpoint the relevant time period to which the appeal decision must apply. In this regard, the latter points out that it is acknowledged at case law that a Ministerial Delegate needs to determine whether the danger raised at refusal still exists at the time of the latter's investigation, and that such investigation of the factual situation existing at the time of the investigation must exclude speculative and hypothetical situations, given that the right to refuse work is an emergency measure not meant

to address long-standing problems that may find justification in specific and exceptional circumstances that go beyond normal conditions of employment.

[90] In support of this, the respondent refers to paragraph 51 of the decision in *Stone* v. *Correctional Service of Canada,* Decision No. 02-019 (*Stone*):

> [51] [...] The right to refuse in the *Code* remains an emergency measure to deal with situations where one can reasonably expect the employee to be injured when exposed to the hazard, condition or activity. However, it cannot be a danger that is inherent to the employee's work or is a normal condition ... of employment. This statement alone is fraught with consequences for correctional officers. Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers, who are specifically trained to deal with these situations, it is very difficult to envisage a situation, in that environment, where a refusal to work for violence could be justified other than in a specific and exceptional circumstance.

[91] Aligned with this proposition, the respondent submits that in the "Corrections environment", it is well-established jurisprudence that the possibilities of a CO encountering inmate violence, weapons and/or assaults by inmates are all normal conditions of employment "within the meaning of the *Code*", this being linked with the unpredictability of human behaviour and the particular context of being in a correctional environment.

[92] Given the above, it is thus the submission of the respondent that the date that must be central to consideration is that of the actual refusal to work to wit, December 12, 2017 (even though it also claimed that the relevant time for assessment of the refusal validity needed to encompass the date of the investigation by the Ministerial Delegate, which was December 14, 2017). Be that as it may, the respondent submits that on the relevant date(s), the evidence put to the Tribunal clearly shows that nothing out of the ordinary was occurring at the Institution and, moreover, that while the changes to the OST lines had been implemented on November 27, 2017, the employee(s) worked for two weeks according to the new schedule without raising any issue and the refusal to work occurred only on December 12, 2017.

[93] The respondent submits that the evidence before the Tribunal, inclusive of the *viva voce* evidence provided by the appellant, demonstrates that nothing out of the ordinary was occurring in the Institution at the time of refusal and that no particular concerns had been raised about inmates or security activities that could lead to a specific incident, leaving as the sole reason for refusal the change to the OST line schedule, a change that had been approved by the workplace health and safety committee on November 21 following its meeting on November 14, 2017. The respondent ultimately submits that subsequent to the work refusal, the employer has continued with the implementation of the revised staffing complements for OST

lines, with employees continuing to work their assigned posts for the last three years with no evidence being provided of any incident resulting from this change in staffing the institution.

[94] It is the respondent's contention that the appellant's refusal to work is not based on any concern over a particular inmate or a specific situation occurring at the institution at the time of refusal, but rather on a belief that the institution should be staffed with more officers during the OST lines, and that due to the staffing levels in existence, a danger might occur if Multi-Function officers were involved in an incident requiring more than primary response. Such hypothetical and speculative risk cannot amount to danger in the opinion of the respondent, who submits that the evidence does not suggest that such an incident is likely to occur and that, moreover, the ability to redeploy staff within the institution mitigates such a risk. The speculative and hypothetical scenarios and situations that are painted by the appellant, as drawn from the employees' experience in the institution, either fall outside the purview of the *Code* or cannot form a proper basis for refusal, as pointed out by the Tribunal in *Arva Flour Mills ltd.* v. *Matthews*, 2017 OHSTC 2.

[95] It is put forth by the respondent that having the Methadone line, the Breakfast Meal line and the Medication line running simultaneously still leaves officers available for response to the LU when one considers the response plan and the dynamic posts positions that are not stationary. Along the same line and the allegation that the meal line is left short staffed when COs return to the LU, the employer is of the opinion that at the time when one CO returns to the LU, most inmates have completed their meal and there are still posts available for response to an incident that may occur within the institution. Furthermore, the respondent submits that the appellant did not demonstrate the existence of assaultive behaviour towards staff during the morning shift of December 12, 2017. On the contrary, there were no disturbances, no particular tensions in the institution and no threats towards staff.

[96] Regarding the allegation by the appellant that several responder positions are not backfilled or are used for employee accommodations, the respondent submits that no proof was offered that such was the case on the day of the refusal and adds that accommodated employees swap posts with COs capable of responding in lieu. As to the risk of assault by an inmate, it is put forth by the respondent that such risk is mitigated by the use of Personal Portable Alarms (PPAs), hand-held radios and patrol protocols that require Multi-Function officers to conduct rounds in tandem and in permanent contact.

[97] In that sense, while the risk of assault can never be fully mitigated, the respondent opines that an additional officer at the institution would not improve mitigation, particularly where the mitigation strategy clearly provides that where a tertiary response is required to assist Multi-Function officers, MCCP will deploy additional officers to assist with the situation, and that dynamic security (staff presence where inmates are present) ensures interventions in the nature

of observations, communications and promotion of responsible behaviour. In short, the opinion of the respondent is that risk mitigation to address violent and unpredictable human behaviour in a medium-security institution is achieved by inmate placement and dynamic security, not through staffing levels.

[98] Central to the position put forth by the respondent is the suggestion that what the appellant is claiming as "danger" is solely in the nature of mere or hypothetical hazards, conditions or activities. While the evidence at the hearing may have established that inmates at Matsqui Institution have been convicted of violent offences, the fact they are classified based on a demonstrated history of pro-social behaviour and placed in medium-security institutions such as Matsqui because they present a medium risk to employees and the public and are motivated to voluntarily comply with institutional rules serves to mitigate the hazard.

[99] In that respect, the respondent notes that none of the refusing employees or appellant raised any particular concern related to inmate contact or specific inmates beyond mere conjecture, be that at the investigation by the Ministerial Delegate or in their testimony or submissions before the Tribunal. The respondent submits that in order for the Ministerial Delegate or the Tribunal to find that a danger exists under the *Code*, such danger must be "actual and real" (*Canada (Attorney General)* v. *Lavoie* [1998] F.C.J. No 1285 (*Lavoie*)), more than the risk inherent in the work at issue, thus beyond what would already be factored in the normal working conditions of a CO, and be substantiated.

[100] It is submitted by the respondent that the concerns described at the hearing include speculative scenarios that did not occur at the time of the work refusal, had not occurred before the refusal to work nor have they occurred since and that such hypothetical hazards cannot reasonably be considered a danger. If the concern is about hazards that may only materialize in the future, there is an onus to show that such an event would be more likely than not to take place in the future. In this regard, the respondent submits that the evidence on record amounts to mere speculation and does not support an inference that an incident will occur in the future, thus does not amount to danger.

[101] Under the *Code*, an employee is precluded from refusing to work where the danger alleged represents a normal condition of employment, such representing a "residual hazard" (*see Stone*), left after the employer has taken all "reasonable steps" to mitigate the hazard. The respondent argues that it is well established at case law that the possibility that a CO will encounter inmate violence, weapons and/or assaults are all normal conditions of employment within the meaning of the *Code*, linked with the unpredictability of human behaviour and the particular context of being in a correctional environment, such risk being mitigated by numerous controls, security policies and procedures put in place by the employer.

[102] Accordingly, the respondent submits that in the case at hand, there is no evidence that the employer did not take all reasonable steps to protect the health and safety of the COs. Contrary to what the appellant has submitted, the respondent argues that all the protective measures put in place by the employer constitute reasonable steps aimed at ensuring the health and safety of staff working in the presence of inmates at the institution, with any residual danger being a normal condition of employment.

[103] Additionally, the respondent submits that the policies of the employer as well as the mandatory training provided to COs and CMs serve to prevent the risks identified by the appellant from effectively becoming a danger. The respondent describes those policies as a complex intertwined system that is very effective at continuously identifying, assessing and controlling hazards and reducing risks through the daily activities of staff within the institution, driven by Commissioner's Directives and local Standing Orders and processes that guide decision-making at all levels.

[104] With respect to those policies, the respondent emphasizes their flexibility, so long as actions are justifiable and deemed necessary. In addition to those policies, the respondent submits that the provision and mandatory utilization of PPE (safety boots, gloves, PPA, radio, handcuffs, OC spray and stab-resistant vest) serves to reduce hazards, and is substantiated by the presence of the approximately 200 cameras covering the institution and in constant supervision by the MCCP officer. As such and contrary to concerns raised by the appellant, the CM in place during an emergency has the authority to direct an officer at a specific post or any officer in the institution to assist Multi-Function officers in case of need. As a whole therefore, the respondent argues that given all the existing mitigating factors and institution needs, no danger existed at the time of the work refusal.

[105] As a last element of its submissions, the respondent puts forth that work refusals are not intended to address policy disputes and in stating so, suggests a limit to the authority of an Appeals Officer by stating that an appeal is not a conduit to challenge, “high-level policy decisions of the CSC”. It is the opinion of the respondent that appeals must be circumstance specific and that the present appeal is a challenge to policy in that it is based on a general claim that the staffing policy on morning/lunch shifts at a medium-security institution should provide for additional officers.

[106] The respondent finds support for this in the 2002 Federal Court of Appeal decision in *Canada (Attorney General*) v. *Fletcher* , 2002 FCA 424 (*Fletcher*), and in the Federal Court decision in *Lavoie* to argue that the refusal to work process ought to be reserved for emergency situations and not used as a tool to bring resolution to longstanding disagreements. It is the view of the respondent that the appellant, in the present case, is taking issue with the employer's policy decisions related to the OST lines and the corresponding changes to workplace

management structures as well as the employer's interpretation of its own management policies and the employer's duty to accommodate employees. On this last item, the respondent submits that the fact that accommodated employees are assigned to specific posts is not an issue raised by the appeal and that such issue represents a challenge to general procedures and policies that is not a matter under the *Code* that can serve as a basis for refusing to work.

[107] As a whole, the respondent concludes that just as was determined by the Ministerial Delegate, the appellant has failed at the present stage to show that there was a real danger in the institution on December 12, 2017. There was no unique circumstance that created a risk at the time of the work refusal, and those risks that were present were properly mitigated by training, policies, procedures and practices as well as communication tools available to the appellant and refusing employees. It is therefore the conclusion of the respondent that any remaining risk was residual and an inherent part of the workplace environment, thus rendering the work refusal as being, in essence, an overall disagreement with policy.

[108] In short therefore, the respondent is asking the Tribunal to reach the same conclusion as Ministerial Delegate Morden to wit, that the change in the working conditions did not amount to an imminent or a serious threat, given the mitigation measures in place.

C) Reply

[109] The appellant does not object to a sealing order being issued in this case and has suggested additional exhibits that should be included.

[110] The appellant, as could be expected, has argued in reply that the respondent has erred in its suggestion of the applicable law and jurisprudence, and therefore the criteria or test that the undersigned should apply in determining the issue(s) raised by the present appeal, particularly as regards the definition of “danger” finding application in this case and the proper interpretation test.

[111] Given the origin of the present case, the appellant sees as an aberration the suggestion that the applicable definition and interpretation test should be that which preceded the 2014 amendments to the *Code* by effect of the transitional provisions that came with these amendments, particularly where one considers that the present case originated after the coming into force of the amendments to the *Code* and thus more particularly, for the purpose at hand, the coming into force of the amended definition of “danger”.

[112] The appellant thus submits that the proper interpretation test is that which was developed in the Tribunal decision in *Ketcheson.* The appeals officer’s interpretation was reviewed with

approval by the Federal Court in *Canada (Attorney General)* v. *Laycock*, 2018 FC 750 (*Laycock 2*) in which the Court stated as follows:

> [9] […]The removal of the previous reference to a "potential hazard or condition" does not meaningfully alter the import of the current provision. Both are concerned with prospective risks to the life or health of employees exposed to a dangerous condition.

[113] In the appellant's opinion, applying in a practical manner these words of the Court would result in understanding that the case law developed since the Court's decision in *Verville* is applicable and thus allow for consideration of potential or prospective hazard, which would not be the case for the decisions rendered prior to *Verville* since the pre-2000 definition of danger did not include potential hazards. In the same line of thought, it is the appellant's view that to claim that a danger need be "actual and real", as claimed by the respondent on the basis of a 1998 precedent represents a test of another era since it was based on the pre-2000 definition of "danger".

[114] As to the continued claim by the respondent that there is a line of sight between the medication line and the kitchen/meal collection area, which would enhance the response/reaction capability, the appellant submits that this represents a physical impossibility since the two locations are inside separate buildings that are not even adjacent or across from one another and that as a consequence, an officer in one location would have absolutely zero view of the other location.

[115] The appellant also qualifies as false, as supported by the unchallenged evidence it adduced, the claim by the respondent that either the meal or the medication line can be closed quickly so as to ensure quick response, and adds that contrary to what the respondent has claimed, urinalysis and A & D officers are not backfilled and are frequently unavailable to attend the OST line , that the P17 officer in the V & C area is alone more often than not and has no view of the P24 officer or the Urinalysis or A & D officers who would be in the hallway, there having been no evidence that these officers have a view.

[116] Referring to the respondent's claim that the more than 200 cameras throughout the institution represent a danger mitigating measure, the appellant draws a distinction between the number of cameras and the monitoring capacity of only a small number of such in real time by one MCCP officer, as could be observed on occasion of the site visit. By the same token, the claim by the respondent that the same MCCP can control barriers to isolate a problematic area is only true in the case of the walkway, leaving out adjacent areas or building such as LUs, yard, gym, inmate hobby shops or work areas.

[117] As to the suggestion by the respondent that the employees and appellant have made use of the refusal process to dispute the policy regarding the OST line(s), the appellant sees this as not only offensive but not factual, as the concern is truly about exposure to a hazard. It is the appellant's position that apart from making the suggestion, the respondent has never tested the appellant's intention at the hearing and has provided no evidence to support such, rendering such suggestion inappropriate and without foundation.

[118] As to the "algorithm" used by CSC to determine staffing levels, the appellant submits that the evidence obtained from the respondent's own witness is to the effect that the levels were determined without regard to particulars regarding incidents and/or injuries, assaults or, generally speaking, the health and safety of employees. Noting that in fact, the tool that is the Deployment Standard was admittedly created to standardize/level the number of officers across institutions, the appellant submits that the work refusal did not concern the staffing levels established by the Deployment Standard.

[119] Where the respondent has argued that the danger is an inherent part of the CO's job, as per their job description which refers to numerous risks, and thus that the decision of no danger should stand, the appellant notes that such argument has been made on numerous occasions before the Tribunal, without much success, and draws attention to the words of the Appeals Officer in *Laycock* that call for looking beyond the words of the job description:

> [129] It is true that the job description of correctional officers highlights the risks and dangers inherent in the job. But the analysis must go one step further in my view: the question then is whether the appellant has, in the spirit of section 122.2 of the *Code*, taken all appropriate measures to minimize or reduce that particular threat to the health or life of employees, accepting the fact that the hazard cannot be completely eliminated, short, of course, in this case, of finding the snips.

[120] Regarding the argument by the respondent that this work refusal was based on a hypothetical situation, the appellant replies first that the case is not based on purely hypothetical threats and that those threats present a reasonable expectation of causing injuries. In addition, it is the position held by the appellant that the latter is not required to establish that incidents and the injuries suffered as a result occurred in the exact same circumstances potentially invoked in the present case.

[121] Stated differently, while the appellant claims that it would be false to claim that this has not been the case and while it claims that it was improperly prevented from adducing after the fact (refusal) evidence of such by the objections of the respondent and a ruling of the undersigned in this regard, the appellant principally submits that to satisfy the test, it is not mandatory to show that injuries have been sustained in the same circumstances as invoked in this case, a test that in the appellant's opinion belongs to another era, and that there is only a

need to establish a set of facts that could be expected to cause injury as more than a mere possibility.

[122] Dynamic security, which translates into staff presence where inmates are present, has been invoked by the respondent as an important concept in the corrections environment and one that is part of a number of factors that would validate a rejection of this appeal. The appellant does recognize the importance of the concept and agrees that the more staff that are present, the more effective dynamic security is. However, it also adds in reply that dynamic security does not quell all security incidents nor does it prevent assaults, and to suggest that there is no relation between the number of officers responding and the severity and length of incidents is not what experience has shown.

[123] It is the appellant's position that additional officers do absolutely reduce the risk, a position reinforced by the employer's own policy of having a minimum of two officers down range at all times. The latter submits that there was unanimity in COs evidence at the hearing that staff presence and the number of officers are determining variables to shortening the duration of an incident involving violence of inmates against employees, a factor that is corroborated by the respondent's own policies on the use of force which identifies staff presence as one of the first steps in the use of force continuum.

[124] In formulating its reply, the appellant also points to a number of elements that it claims have not been disputed by the employer. Of those is the fact that officers incapable of responding (accommodated officers) are frequently assigned to response posts, and that the officers responsible for deploying response (MCCP) are not aware of which officers and which posts. Contrary to what has been suggested by the respondent, the appellant is not disputing employees' right to accommodation but rather that accommodation in a response post represents a hazard that the Ministerial Delegate should have considered in her decision, this being made more relevant by the fact that the evidence has demonstrated that COs are not required to satisfy a minimum fitness level.

[125] The appellant also notes that the respondent did not challenge at the hearing that the changes to the OST lines and the concurrent addition of other inmate activities resulted in a decrease of the number of available responders, nor did the latter challenge the number of responders available before and after the OST lines, or the fact that a significant portion of the responders' positions are already assigned to the OST lines and are not manned during lunch break nor equipped with a radio in order to be alerted to respond, this showing that the number of responders on paper does not equate to reality.

[126] Furthermore, the appellant puts forth that the changes to the OST did not bring about a revision of the response plan, testimony that was not contradicted, and that the respondent's

document titled “First Officer on the Scene”, a generic document of limited practical impact, cannot be said to represent such a response plan as it does not identify who responds and where, thereby affecting the task of MCCP which must dispatch responders to alarm sites and be lacking information or clear direction on who to call, given post rotations, lunch breaks, assignments to meal and medication lines.

[127] It is also submitted by the appellant in reply that the respondent has not disputed that no additional or no mitigating measures were put in place after the changes to the OST lines. The PPE, policies and standing orders were all existing before and not only was there nothing new put in place, but testimony by the respondent's own witnesses demonstrated that changes to the OST lines did not result in the consideration, discussion or even review of the mitigation strategy.

[128] On this last point regarding consideration of the mitigation strategy, the appellant refers to decisions by this Tribunal in two particular cases, *Laycock* and *Zimmerman*, claiming that they both stand for the same argument of the necessary review of mitigation plans or policies. In *Laycock*, the appeals officer stated the following:

> [123] As I have observed earlier, the mitigation measures advanced by the employer address more generally the operations of the penitentiary and more generic measures such as static and dynamic security, inmate movement control, etc. For example, the classification system for the tools and corresponding supervision requirements and the metal detector risk of inmates working in the shop are designed to minimize the risk of the tools being taken out. There are fences and video surveillance of the perimeter and inside areas of the institution, but there are areas such as areas relevant to the present appeal, where there is no video surveillance and capacity for inmates to access the living units or pass the snips through the fence without being seen. While dynamic security approaches have proven effective, they are not always effective in providing forewarning indicators of an assault.
>
> [124] The hard fact remains that in spite of those measures, the quick snips were unaccounted for on October 30, 2014, and on the day of the refusal. Accordingly, I am not persuaded that the various policies, procedures, standing orders addressing dynamic and static security, control of inmate movement and protective equipment, mitigate the hazard of the possible presence of quick snips within the institution in the possession of an inmate.

[129] Noting that the general existence of general or generic measures such as policies, standing orders and others should not be depended upon without question, the appellant cites the following words of the Appeals Officer in *Zimmerman*:

> [99] […]The respondent held that any danger that might exist is mitigated by: the unique self contained design of Pod 1 which reduces inmate movement and enhances dynamic security; CSC's policies and in the form of Commissioner Directives, Standing Order, Post Orders, Job Descriptions; the training provided to COs; and the protective equipment issued to COs.
>
> [100] In this regard, I find the respondent did not demonstrate how the numerous policies, procedures, standing orders addressing dynamic security, control of inmate movement, CO training and CO personal protective equipment mitigate the absence of live feed from CCTV cameras in Pod1 to the MCCP especially after an assault or incident that has occurred despite all of the security measures in place. […]

[130] By way of general conclusion, the appellant therefore submits that the respondent cannot be said to have taken all steps to eliminate, reduce or control the hazards. According to the appellant, had the number of responders been restored to its pre-November 2017 level or had the OST lines been conducted at a different time, not concurrent with meal line, had the medication line been revised or had nurse coverage been prolonged, then the employer could potentially have advanced that the hazard was residual, which it is not, as demonstrated.

Analysis

Sealing order

[131] Before turning to the actual merits of the case, I will address the parties' joint request for a sealing order for certain exhibits that contain confidential information related to security operations of federal correctional institutions.

[132] The applicable legal test established by the Supreme Court of Canada and restated in *Toronto Star Newspapers Ltd.* provides as follows:

> [26][[...] a publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[133] Applying this test to the present case, I find that the benefits of maintaining the confidentiality of the requested evidentiary elements outweigh the deleterious effects on the rights of the parties and the public.

[134] Accordingly, I hereby issue an order sealing the following exhibits: E-1 (tabs 1, 2 and 9), E-2 (pages 81-94, Standing Order on responding to alarms), E-3 (tab 18), E-4 and E-7.

Merits

[135] The appellant engaged in a refusal to work pursuant to subsection 128(1) of the *Code*.

[136] That subsection reads as follows:

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

[137] In the present case, the danger invoked relates to a condition in the work place, that condition being, to use the words of the Ministerial Delegate, the "practice of running the [OST] program lines for Suboxone and Methadone at separate times" which the refusing employees/appellant consider, "unsafe because it does not leave an adequate number of staff available for response in the event of an emergency during the times the OST lines are running."

[138] I will first deal with two issues raised by the respondent, the resolution of which bears directly on the outcome of this appeal from my perspective. The first issue concerns the definition of "danger" in the *Code*, and more particularly the test applicable to the analysis of whether a "danger" as defined in the *Code* exists in the circumstances that have been outlined as having given rise to the refusal to work by the appellant.

The Applicable Test for Determining Whether a Danger Exists

[139] It stands to reason here that my consideration of this particular matter is not intended to formulate an interpretation that would apply solely to this case. It is clear from the parties' submissions that both share the view that at the time of the refusal to work in the present case,

the definition of “danger” that found application was that which came into effect on October 31, 2014, through amendments brought to the *Code* by the *Economic Action Plan 2013 Act, No.2* (S.C. 2013, c.40). That legislation contained transitional provisions relative to changes to the *Code* by that Act that provided, under the title “pending proceedings”, that:

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

[140] It is as regards the meaning and impact of the above provision, and in particular those words in the provision that I have enhanced, that the parties part ways. Where the respondent is concerned, while it did recognize in its submissions that the definition of “danger” that was in force at the time of the refusal(s) was the present one (post-2014), it, quite inexplicably in the undersigned's opinion, drew the conclusion from the previously cited transitional provision that Parliament had intended by that provision that the former (pre-2014) definition of “danger” would continue to apply to existing procedures and proceedings **“such as the appeals under consideration in the present case”** [my emphasis] and that therefore the subsequent revisions (2014) to the definition and the interpretation tests for “danger” developed in light of that 2014 definition would not apply in the present case, bringing the respondent to conclude that the “old” interpretation tests (pre-2014) would continue to apply.

[141] I made the comment above that the conclusion arrived at by the respondent was quite inexplicable to me for the reason that where the 2014 transitional provision speaks of “existing procedures and proceedings”, under title “pending proceedings”, in my opinion, this could not apply to the present case since the work refusal that eventually led to the present appeal occurred on December 12, 2017, to wit some three years after the coming into force of the 2014 definition and that consequently, could not be seen as being “existing procedures and proceedings” within the meaning of the transitional provision and thus, the interpretation test developed regarding the pre-2014 definition of “danger” that would apply to the interpretation of “existing procedures and proceedings”, cannot be applied in the case of proceedings that do not satisfy the meaning of “existing procedures and proceedings” in the transitional provision.

[142] However, while one can somewhat easily come to the conclusion that the respondent has erred in suggesting interpreting or examining the present case and the facts and circumstances of such using a test defined under a legislation that no longer finds application, one must nonetheless also accept that the respondent was not entirely wrong when suggesting that in assessing the possibility of injury in the circumstances noted or raised by the refusal action, one should be mindful of the needed distinction to be observed between mere possibility and reasonable possibility of injury occurrence, a distinction made by the Federal Court in *Verville* a decision rendered prior to the 2014 definition of danger but found by the same Court in *Laycock 2* to retain some legitimacy under the new definition in providing useful guidance for the interpretation of the concept of "reasonable expectation" that is at the core of the present definition of "danger". In that decision, the Court acknowledged that the notion of potentiality of hazard or condition that was present in the pre-2014 definition had been removed in the present definition but stated that this did not "meaningfully alter the import of the current provision" since both definitions are concerned with prospective risks to the life or health of employees exposed to a dangerous condition.

[143] Given what precedes, there is thus no question that the 2014 definition must apply to determine whether the situation described in the evidence presented a danger and that the test to apply to this determination is the one fashioned in the post-2014 case law of the Tribunal, most notably in *Ketcheson* as argued by the appellant. In that decision, the appeals officer noted the difference in nature between the pre-2014 and the post-2014 definition, adding that the new definition adds to the notion of probability a time frame for such probability:

> [193] The caselaw during the period 2000-2014 contained many expressions for probability: "more likely than not"; "likely"; "reasonable possibility"; and "mere possibility". What was often left unstated was the time period in which the probability was to be assessed: the day of the work refusal; the foreseeable future on the day of the work refusal; a year from the refusal? Is something likely? It may be almost certain to occur in the next five years, reasonably foreseeable to occur in the next year, but merely possible in the next five minutes. […]

[144] It was the conclusion of the appeals officer in *Ketcheson*, one that I am in agreement with, that the time frame for probability was achieved in the definition by distinguishing between imminent threat and serious threat. In that same decision, the appeals officer also noted that the new definition of danger accounts for two types of "danger" that are "both high risk, but for different reasons," adding to the notion of time frame previously mentioned, the concept of severity of harm ("serious"), generally concluding that "in the context of the rest of the *Code*, a "danger" is a direct cause of harm rather than a root cause."

[145] Based on what precedes, there is no question, in my opinion, that the legal test to be applied to the facts of this case in order to determine whether the appellant was exposed to a danger, as presently defined in the *Code*, may be set out as follows:

1) What is the alleged hazard, condition or activity?
    a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it? or
    b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it? and

2) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

Staffing Policy

[147] The respondent has also argued that this appeal has been made for reasons that do not open the door to an appeal to wit, in the respondent's words, "a general claim that the staffing policy on morning/lunch shifts at a medium-security institution should provide for additional officers," whereas appeals must be circumstance specific. The respondent argues that an appeal may not serve as a conduit to challenge high-level policy decisions of the CSC.

[148] I hasten to note here that while the respondent presented the matter at issue as a general claim concerning the staffing policy on morning/lunch shifts at a medium-security institution and equating it to a high-level policy decision of CSC, Ministerial Delegate Morden, more reservedly and precisely, in my opinion, described the matter as concerning the practice put in place at and within Matsqui of running OST program lines at separate times, a practice which was not generalized throughout CSC, at least at the time of the refusal, since it appears, again as verified by testimony that Matsqui was among the first, if not the first, institution to take action locally to respond to the request by CSC to institutions to develop their own measures or procedures to eliminate or reduce the OST program waiting lists, and no evidence was presented as to whether the same type of action as was taken at Matsqui was taken elsewhere.

[149] While the resolution of this apparent divergence of perception should not solely lie on semantics, given the respondent's use of the expression "staffing policy", one should be clear as to the proper meaning of the word "policy", a word often used to qualify a great variety of terminology. As such, in the Canadian Oxford Dictionary, "policy" is defined as "a course or principle of action adopted or proposed by a government, party, business, or individual." From that definition, one can first identify as general "policy" CSC's OST program (Specific Guidelines for the Treatment of Opiate Dependence, April 2015), and more specific to Matsqui Institution, Standing Order 800.1, under the title, "Opiate Substitution Therapy Program", and

which states as its objective, the provision of programs and services in accordance with CSC's Specific Guidelines previously mentioned and also to clearly outline the process and procedures for the administration of said OST program at Matsqui Institution.

[150] It is important to note that neither of these so-called "policies" is being challenged by the appellant and, more importantly, the OST program had been delivered throughout CSC for a considerable time prior to the decision by CSC to have waiting lists for participation to said program reduced or eliminated in the manner determined by individual institutions. In that last document, the sole CO Post that is mentioned is P-17, and that for the evident reason that said post/staff is clearly part of and essential to the delivery of the Program. Neither of those documents makes any mention of the assignment or deployment of personnel throughout the institution during delivery of the OST program at Matsqui which, to use the words of the respondent, is at the discretion of the local CM, thus quite distant from those high-level policy decisions that the respondent submits are being challenged by the appellant.

[151] The respondent cites as support for this argument the decision of the Federal Court of Appeal in *Fletcher*, which the respondent states held that neither the health and safety officer (nor the Public Service Staff Relations Board (the Board) could consider a "minimum staffing policy" since the mechanism provided by the *Code* called for a specific fact-finding investigation to deal with a specific situation not meant as a forum for an analysis of an employer's policy. Quite apart from the fact that the said case was determined according to a version of the *Code* and thus a definition of "danger" that predated the 2000 amendments to that legislation and is thus quite different from the present legislation in words and meaning, and also quite apart from the question of whether the action of the appellant relates to a staffing policy or constitutes a challenge to a policy of the employer, be it minimum staffing or other.

[152] In referring to the *Fletcher* decision for support the respondent did not specify that, while actually confirming that the refusal right is a limited right needing to be exercised in accordance with the particular context of a case and not meant to be used as a tool to obtain a ruling from a health and safety officer (as the *Code* referred to them at the time), something with which I am in agreement, the Board (which had jurisdiction at the time) and even the Federal Court of Appeal (majority) had opted not to make a determination where a policy, in that case a "minimum staffing" policy, had not been implemented at the time of the investigation, and thus no means or method of application had been formulated or established, thereby at the very least not conclusively, excluding from my jurisdiction the examination of the challenge to a "policy" of the employer where it entails elements of occupational health and safety, as the Court does not even decide on whether a health and safety officer was deprived of jurisdiction. In the words of the Court:

> [22] […] Whether a safety officer could find that a policy not implemented at the time of the investigation is nevertheless a "danger"

> giving an employee the right to refuse work because of bad faith on the part of the employer or because of a likelihood of implementation in the immediate future is an issue better left unresolved as it does not arise in this case. [...]

[153] This being said, the issue at hand is not, in my opinion, one of “minimum staffing”, as claimed by the respondent, nor of the assignment of personnel to monitor the delivery of the OST program pre-established by policy, but rather one concerning a condition potentially created by the locally decided alteration of the delivery method of said program that could affect adversely the personnel of the institution and thus the refusing employees/appellant part of that personnel.

[154] Given the nature and functioning of a correctional institution, there cannot realistically be a complete separation/distinction between elements of health and safety and aspects of administration that relate in some manner to policy. However, when those relate to the organization of work which obviously can relate to local assignment and even apportionment of personnel that is clearly linked to the safety of the institution, and by extension the safety of personnel, this can be the subject of refusal and appeal when considering the definition of “danger” and its time-based element. In my opinion, therefore, there is no validity to the argument raised by the respondent to prevent a review of this case at appeal.

Serious Threat

[155] This being said, and having duly noted that the appellant is not claiming that the refusal to work was founded on the existence of an imminent threat, the remaining query, under the *Ketcheson* test, is whether the condition raised by the refusal could be expected to be a serious threat to the life or health of the appellant and if so, whether the condition could be corrected before becoming a threat.

[156] Summarily, there is little dispute between the parties as to the circumstantial facts of the case, facts that have been described both to and by Ministerial Delegate Morden and at the appeal hearing. In a nutshell, and without wanting to oversimplify each parties' position vis-à-vis those facts, the appellant submits that those facts illustrate a change in the working situation that has the potential of generating a threat to the appellant's health and safety, as it has not been evaluated or analyzed, while in the case of the respondent, its general position is that the systems, methods, equipment, personnel and policies in place to respond to a hazard and threat, which were in place before the changes to the delivery of the OST program and not modified relative to the changes in OST program delivery method, are sufficient to alleviate the occurrence of such threat, whether minimum or serious. While I do not propose to go through an additional and detailed recitation of the facts that characterize the situation and which have been described at length in Ministerial Delegate Morden's report as well as at the appeal

hearing and by both parties in their submissions, there are, however, a number of those that I have taken particular note of.

[157] To start, it is clear from the Ministerial Delegate's report as well as from the evidence received at the hearing that the decision by CSC to have the OST waiting lists eliminated in short order gave little time to individual institutions, such as Matsqui, to develop their plan for that purpose and that as such, for Matsqui, while some consultation with the workplace health and safety committee did occur as per testimony heard at the hearing, and on this there is a difference of opinion as to the extent of such between what the Ministerial Delegate has stated in her investigation report and the position formulated by the appellant, clearly no joint hazard or risk analysis was conducted to evaluate the impact of those changes.

[158] Noteworthy is the fact that where Ministerial Delegate Morden indicates that Matsqui Institution was mandated at the beginning of October 2017 to address the issue of the waiting list(s) by October 15, 2017, in its written submissions, the appellant notes otherwise, stating that the decision to eliminate occurred in early November 2017 with a compliance date by November 16, 2017. Regardless of this, what is evident from the evidence is the short time frame in which to develop a plan, one that serves to illustrate to a certain point a sense of urgency to address the matter.

[159] Furthermore, the final OST line split that was implemented was not the only one that had initially been suggested, with previous suggestion(s), for other times of the day, being rejected by management, even if this would have meant availability of more and less disseminated response personnel, because the line change could not affect other aspects of the functioning of the institution, including staffing levels, the functioning of Corcan or the health/medical (nurse) care work schedule, to name only those.

[160] The parties, and mostly the appellant, repeatedly discussed the number of CX personnel with responding functions or capabilities within the institution at OST program delivery times, yet at no time did either enunciate what the total CX complement is at the institution, leaving the undersigned to fall back on the numbers enunciated in Ministerial Delegate Morden's report, which puts the number of CX posts in the institution at 36. Of those, the report states that 10 are stationary posts that do not respond to incidents outside of their post locations, leaving in principle 26 mobile posts, a number that is difficult to reconcile with the various numbers of available responders mentioned by both parties as being able to respond at various times.

[161] Be that as it may, there is commonality of view between Ministerial Delegate Morden and both parties that of the remaining 26 posts (or possibly slightly less), some may not be in a position to respond or to respond in time, either because some may be out of the institution on

escort duties (2), or unable to respond due to medical accommodation (in this case the number of such goes from one officer to possibly a third of the response posts, something not contested by the respondent) or certain functions such as P-9 supervising a sweat at the sweat lodge, thus outside the building even if inside the reserve perimeter, P-17 when observing inmates in the visitors-correspondence room, one officer assigned to assist-frisk inmates waiting to receive their OST medication, or even officers on lunch-break outside the building but within the perimeter and who may not have radios.

[162] I have found of particular interest the fact, not contested by the respondent, that so-called accommodated officers restricted from responding to emergencies are often assigned to primary and secondary responder posts, with their number and identity unknown to the COs who man the MCCP and are tasked with deploying responders in case of emergencies. While I recognize that such accommodated officers unable to respond can swap post with a non-response post, as argued by the respondent, in my opinion, this is a situation that is generative of delay, thus risk when one considers the environment, and also the fact, as argued by the appellant, that MCCP officers may not be aware of such exchange.

[163] The appellant's main argument is that the change to two separate OST lines has resulted in there being less responders available, primarily but not solely during the midday OST line and officer lunch break period, the evidence in this regard, uncontested, establishing that prior to the OST line changes, 23 responders (exclusive of those previously mentioned as unable to respond) were available whilst the number has been reduced to 20 and then goes back up to 24 when inmate movement has ceased (OST line completed, meal and medication lines ended) and inmates are either at their programs or have returned in their units secured in their cells or behind the barrier.

[164] It would appear also that some inmate activities or programs are conducted with less COs than prior to November 27, 2017. Ministerial Delegate Morden indicated in her report, and this was confirmed at the appeal hearing, that CSC utilizes an algorithm to determine the number of COs that is required to staff the institution. As can be drawn from the testimony heard at the hearing, this is a basic method applied nationally to determine and to standardize the level of resources needed to satisfy the level of security of an institution according to the institution's designated security level, but not in terms of determining the capacity within a given institution to respond to incidents/alarms.

[165] It has also been argued by the appellant, and essentially not contested by the respondent, that not only may there be less responders available at certain times of OST delivery, and here again the midday OST line appears more directly concerned, but also the responding posts may at times be more disseminated throughout the institution, thereby potentially requiring more time to respond to an alarm. In this regard, evidence received from the respondent through

testimony by CSC Deputy Director of Security Operations was to the effect that from the stand point of responding to alarms, it is the role of an institution's head to develop standing order(s) for primary and secondary response to alarms and that in this regard, some institutions have developed response procedures that prevent responding officers from having to crisscross an entire institution, something that it appears has not been done at Matsqui.

[166] The appellant has put much emphasis on the fact that apart from there being less responders, there are times when a number of those are not available for response for a variety of reasons beyond being medically accommodated, and their post is not necessarily backfilled to account for such unavailability. Examples of this by uncontested testimony noted COs designated to respond who would already be on the OST line or at lunch, A & D and escorts as well as a P-9 officer attending a sweat ceremony two or three times per week and even P-17 supervising inmates who have received the OST medication.

[167] Regarding what precedes, one can assuredly conclude that not necessarily all of these elements occur at the same time every time. However, as I previously noted, the undersigned had the opportunity to take part in a complete institution site visit on the first day of hearing and in this manner, while not drawing a conclusion that the situation that prevailed at the time of the visit could be considered as replicating the situation that prevailed at the time of the refusal and investigation, one could be confirmed that those elements were realistic. On occasion of that visit, the undersigned witnessed the P-9 officer attending the sweat ceremony at a site removed from the main institution building and thus prevented from response, two officers having lunch outside within the perimeter who did not appear to carry a radio, two officers collecting from the OST line for escort an inmate being transferred to a maximum security establishment.

[168] That visit also made it possible for the undersigned to walk along what is referred to in Ministerial Delegate Morden's report as the outdoor corridor situated between the inmate kitchen and the healthcare location and thus verify the exactness of the appellant's submissions that these are two separate “buildings”, and the partial exactness of the Ministerial Delegate's report that these two locations/“buildings” are visible to each other while at the same time confirming that from one location, one cannot see within the other, this translating in there being little visibility between the two post locations. That same visit also made it possible for the undersigned to become assured, contrary to the conclusion by Ministerial Delegate Morden that the medication line can be closed quickly with the medication area being closed where the officer monitoring the line is called upon to respond to another location of the institution, that such may not be the case as such closure needs to be authorized and inmates on the line need to be returned to a secured location and not left loitering without supervision.

[169] On the basis of the evidence that had been presented to her or that she had acquired through her investigation, Ministerial Delegate Morden first concluded to the possibility of there being a hazardous condition that could be reasonably expected to represent a threat in the following words:

> In the event that an incident occurs in another area of the Institution during the OST lines that requires a secondary response, a delay may occur when a secondary response call out is made which may result in a hazardous condition (source of harm). There is a reasonable expectation that a threat may exist in specific circumstances where a Correctional Officer in the institution is involved in an incident that requires staff assistance is not immediately deployed to the location.

[170] That hazard ("hazardous condition") is clearly the delayed response to a request for assistance, admittedly in the specific circumstances of the OST lines being active, viewed as a source of harm. In this first stage of her conclusion, Ministerial Delegate Morden simply referred to the singular concept of "threat" with no qualificative. From that very limited perspective and on the basis of the evidence provided to the undersigned at the hearing, I find that Ministerial Delegate Morden did not err in arriving at that conclusion. However, in order for a threat to constitute a "danger" under the *Code*, it cannot solely represent a stand-alone concept and must be capable of being qualified as "imminent" or "serious".

[171] The notion of a threat as found in the definition of danger was discussed in great detail by the appeals officers in *Ketcheson* and *Keith Hall and Sons Transport Limited*. In *Ketcheson*, the appeals officer stated that:

> [198] In the *New Shorter Oxford English Dictionary* (1993) the word "threat" is defined as "a person or thing regarded as a likely cause of harm". Thus, it can be said that based on that definition, a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.

[172] It is interesting to note that while the Appeals Officer in that case built his rationale on the definition of the word "threat" in the English version of the *Code*, that word is rendered in the French version, by the word "menace", which is defined in Le Petit Larousse Illustré as the "parole , geste, acte par lesquels on exprime la volonté qu'on a de faire du mal a [quelqu'un]" and as "signe , indice qui laisse prévoir un danger", and in Le Petit Robert as "signe par lequel se manifeste ce qu'on doit craindre de quelque chose", definitions that can clearly support the same rationale as was applied to "threat" in *Ketcheson.*

[173] Along the same line, in *Keith Hall & Sons Transport Limited*, the Appeals Officer made the following comments:

> [40] It also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former [pre-2014] definition required consideration of the circumstances under which the hazard, condition, or activity could be reasonably expected to cause injury or illness, the new definition requires consideration of whether the hazard, condition or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees.
>
> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e, that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.

[174] And again at paragraph 52 of the same decision:

> [52][...] to conclude to the existence of a serious threat, it is not necessary to establish precisely the time when the threat will materialize. One must assess the probability that the alleged hazard, condition or activity will cause serious (i.e. severe) injury or illness at some point in the future. The issue is whether the circumstances are such that the threat can reasonably be expected to result in serious injury or illness, even if the harm to the life or health of the employee might not be imminent.

[175] As stated above, the appellant has elected not to argue that the case is about an imminent threat and therefore I will not address that issue. On the question of whether the threat identified by Ministerial Delegate Morden could be seen as a serious threat, the Ministerial Delegate chose to conclude in the negative because of the "established control measures that mitigate the risk of severe or substantial injury", as well as the "training in the use of force and personal protection by safety equipment", leaving silent the important fact that all those were in place and predated the changes brought on by the splitting of the OST lines and the obvious

failure by the respondent to properly analyze the risk or hazard that might be brought on by such change.

[176] Consequently, I do not share Ministerial Delegate Morden's opinion and thus find that she erred in concluding that the COs were not exposed to a serious a threat. I will add in this regard that recognizing, even accepting, that following the changes to the OST lines and the consequent required changes to the apportionment and deployment of personnel, there could be some delay in the response to requests for assistance in an environment admittedly prone to spontaneous assaults that have been recognized as regularly resulting in serious injury satisfies, in my opinion, the second part of the *Ketcheson* test.

[177] This Tribunal has had numerous occasions over the years to recognize that assaults by inmates represent a distinct hazard for COs, such hazard being even recognized as liable to result in serious injury and even death in their job description, and that such may occur in the course of confrontation between officer(s) and inmate(s) or in the course of an intervention into assaults on an employee or between inmates requiring intervention of COs, and that such can, in many instances, be seen as spontaneous or, to use the words of the Appeals Officer in *Laycock*, "may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated".

[178] There is uncontested evidence and constant case law of the Tribunal to the effect that the consequences of an assault on a CO may represent a serious threat to the life or health of officers who have a duty to respond with haste to incidents, to provide first aid and in many instances to use force. In point of fact, one has to recognize the practical uniformity of the job-experience-based opinion or testimony provided at the hearing by COs with operational experience, to the effect that a delayed response to an emergency can mean life-threatening injuries to a CO despite all the protective equipment provided thereby enhancing, in the undersigned's opinion, the need to have local Post Orders governing local work conditions properly adapted to such local conditions and thus reviewed where such conditions are altered, as in the present case and making it clear that simply promoting the acceptability of changes by invoking the very nature of the correctional environment as a higher risk environment than most work places, is not sufficient. I am thus satisfied that under the circumstances that have been described, it has been established that a condition existed that could reasonably be expected to be a serious threat to the health or life of the appellant.

Whether the Threat to Life or Health Will Exist Before the Condition Can Be Corrected

[179] Given the above, there remains one question to complete the application of the test that being whether the threat to life or health will exist before the hazard or condition can be corrected (or activity altered), the "condition" involved here being the insufficiency of

response, more specifically during the activation and delivery of OST program lines, where assistance to a CO is required.

[180] While arguing the case on the basis of a test different than the *Ketcheson* case, the gist of the respondent's argument in this regard is that the employer's policies in place, driven by Commissioner directives and local standing orders, the provision and mandatory utilization of PPE and the policy flexibility to address situations where deemed justifiable and necessary, as reflected by a CM's authority to move personnel during an emergency, serve to mitigate risks from becoming danger.

[181] The appellant has not disputed that all of these are in place, actually were in place prior to the change, while noting their generic nature in many instances. Its position, however, stated generally, is that those measures cannot be considered as an automatic answer to every issue and that there must be a reassessment of those where change in the functioning of the institution occurs. I also am in agreement with this conclusion.

[182] I will add to this that while all those mitigation measures may be highly appropriate in the particular world that is a penitentiary, they only address the basic framework within which COs carry out their duties, in the normal scheme of things and in the day-to-day operations of the penitentiary. They do not, in my opinion, serve to alleviate the potentially grievous consequences of a delay creative condition in the work organization that would or could affect the celerity of response to needed assistance in an environment where time-of-the-essence characterizes such needed assistance and where serious consequences to health or life may be suffered in a matter of seconds.

[183] At the risk of repeating myself, a penitentiary, “is a world of its own” to use the words of my colleague Hamel in *Laycock*, at paragraph 109, that “in that very context, the Federal Court in *Verville* has recognized the importance of the opinion of certain witnesses who have more experience than the appeals officer in the subject matter at issue”. In the present case, while the employer centered its case on the mitigation already in place before the OST lines split, all the COs who testified were of one voice as to the essentialness of an undelayed response in avoiding serious consequences to health or even life. Consequently, in recognizing the potential for delay in the circumstances raised by this case, it follows that the condition put forth as the basis of the refusal to work and which is also described in this decision could present a serious threat to health or life before the condition could be altered and there is no need to belabour the point further here.

Normal Condition of Employment

[184] The next part of the analysis to be dealt with in the present appeal is the question of whether the condition identified above and the danger that it presents constitutes a normal condition of employment. In *Laycock*, the Appeals Officer explained the notion of "normal condition" as follows:

> [121] The issue therefore is whether the employer has taken the appropriate measures to guard against the danger identified above, and to reduce it to an acceptable level such that the activity and the residual hazard that it presents (the danger) can be said to be a normal condition of employment.

[185] That notion has been discussed at length in numerous decisions of this Tribunal as well as in decisions of the Federal Court. In *P&O Ports Inc. and Western Stevedoring Co. Ltd* v. *International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846, the Federal Court quoted with approval the description by the Appeals Officer of the proper analysis to be conducted to determine whether a danger constitutes a normal condition of employment:

> [46] The Appeals Officer held as follows at paragraph 152:
>
> > [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. [...]
> >
> > [153] Once all of these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred 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.
> > [...]

[186] Such analysis in essence repeats in different wording what is commonly referred to as the hierarchy of controls formally stated at section 122.2 of the *Code*. It is only when all the steps and safety measures relative to the identified danger have been taken that the remaining hazard that can then be viewed as "residual" may be referred to as a normal condition of employment. It is important to reiterate that in the present case, no evidence was presented that the respondent proceeded to a particular analysis or risk assessment in relation to the change in the OST program delivery at Matsqui.

[187] The analysis that is to be conducted in determining whether the identified threat qualified as serious represents a normal condition of employment, requires also consideration of the "low frequency, high risk" principle. In its decision in *Martin-Ivie* v. *Canada (Attorney General)*, 2013 FC 772, the Federal Court explained the relevancy of that principle to the "normal condition" analysis by stating the following:

> [47]As for the Appeals Officers' decisions, they apply the principle not in determining whether a "danger" exists but, rather, in assessing whether a work refusal is permitted under paragraph 128(2)(b) of the *Code*, which prohibits work refusals- even if a "danger" exists- in situations where the danger is a normal condition of the refusing employee's employment. These cases, as well as *Verville*, establish that before a risk may be said to constitute a normal condition of an employee's employment, the employer must have taken all reasonable steps to mitigate it. In such circumstances, the reasonableness of the steps taken by the employer will depend in part on the gravity of the risk: the greater the risk the further the employer must go to mitigate it. (see e.g. Armstrong at paras 62-63; Éric V at paras 295-297, 301). Thus the "low frequency, high risk" principle is applied to the assessment under paragraph 128(2)(b) of the *Code* but not to determining whether a danger exists. […]

[188] Quite apart from the risks to officers that are described in their job description, all the COs who testified and even witnesses for the respondent were of one opinion that serious injury is an ever-present risk to officers in the carceral environment. While I recognize that, as argued by the respondent, there may have been no sign of any prospective incident on the day of refusal where staff might have been put at risk, that is not determinative, in my opinion, particularly in the context of analyzing a potential serious threat, since the evidence that assaults against COs, viewed as a reasonable possibility in the context of their work, are characterized by spontaneity and lack of warning, and also considering that the claim by the appellant is not limited to potential assault directed at a CO but also of injury incurred in the course of intervention in incidents between inmates.

[189] The respondent has referred to a number of mitigation measures in place which it presents as purporting to minimize the risks of assaults on COs. Those address more generally the operations of a penitentiary and additionally, more generic measures such as static and dynamic security, inmate movement control, etc. In my opinion, while being highly appropriate in generally addressing the basic framework within which COs tend to operate in the normal scheme of things and the day to day operations of a carceral institution, the hard fact remains that those generic measures are not specific to a location and its circumstances where the *modus operandi* has resulted in a built-in potential for delayed response to needed intervention, one that has not been analyzed prior to establishment to assess the existence and/or severity of risk.

[190] This condition, which in my view is distinguishable from the “root causes” discussed by the Appeals Officer in *Ketcheson*, represents a locally instilled system or process that is generative of hazard and is not a normal condition of employment given that at least on the face of the record, the respondent failed to take every measure that could have reduced such hazard to a normal condition of employment.

Decision

[191] For the reasons above, my finding is that at the time of refusal, there existed a condition that constituted a danger to the appellant. Consequently, the decision of absence of danger issued by Ministerial Delegate Melissa Morden on December 15, 2017, is varied.

[192] Having concluded that a danger existed that does not constitute a normal condition of employment, 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). However, as considerable time has elapsed since the original refusal to work and the decision of Ministerial Delegate Morden, it would be sensible to allow the parties to resolve the matter jointly. I will therefore not issue a direction at this time, but will remain seized of the present matter to issue a direction that I consider appropriate in the event the parties are unable to agree within 60 days from the date of this decision. Should this be the case, I may decide this issue on the basis of written submissions and in an expedited fashion.

Jean-Pierre Aubre
Appeals Officer