Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No.: 2004-39
Decision No.: CAO-07-023

# *Canada Labour Code*
# Part II
# Occupational Health and Safety

Graydon S. Gillette
*appellant*

and

Correctional Service Canada
Matsqui Institution
*respondent*

June 21, 2007

This case was heard by Appeals Officer Pierre Guénette, in Abbotsford, British Columbia, on January 24-25, 2006.

## Appearances

### For the appellant
Corinne Blanchette, Union Advisor, Union of Canadian Correctional Officers Syndicat des agents correctionnels du Canada, Confédération des syndicats nationaux (UCCO-SACC-CSN)

### For the respondent
Harvey Newman, Senior Counsel, Treasury Board of Canada Secretariat, Legal Services, Ottawa, Ontario

[1] On November 1, 2004, fifteen Correctional Officers (COs) exercised their right to refuse dangerous work pursuant to section 128 of the *Canada Labour Code*, Part II (the *Code*), because they felt that it was unsafe to work in the living unit of the Matsqui Institution, a medium security facility. Following the unresolved matter, health and safety officer (HSO) Melinda Lum investigated the group's continuing refusal to work. The COs believed that the work environment presented a danger, as there was a potential for violence. They refused to work for the following reasons:

- a broken and altered kitchen knife had been found in an inmate's cell on November 1, 2004;
- a large quantity of heroin (approximately 30 grams) had been seized from an inmate's cell on November 1, 2004;
- an inmate had been assaulted by three others on October 30, 2004;

- brew[1] and brew material had been found even after the lockdown of October 25-26, 2004;
- on the days preceding the work refusal, COs had observed and reported verbally to their supervisors that a number of inmates were under the influence of various substances;
- there was a dramatic shift in inmate attitude towards staff as evidenced by more verbal confrontations.

[2] Following her investigation, HSO Lum concluded that the COs were not exposed to danger while performing their regular duties in the living unit. HSO Lum confirmed her decision in writing.

[3] On November 10, 2004, Graydon S. Gillette appealed the decision of HSO Lum pursuant to subsection 129(7) of the Code. COs nominated him to represent them during the appeal process.

[4] I retain the following from HSO Lum's *Investigation Report and Decision* and her testimony at the hearing.

[5] The group's work refusal happened on November 1, 2004, around 5 p.m. COs were working in the living unit or the Breezeway area and inmates were in their ranges for count.

[6] The following incidents led to the group's work refusal:

- on October 25-26, 2004, an institution lockdown occurred and an exceptional search was conducted after COs found evidence of brew in many areas of the living unit;
- during that search, COs found and removed amphetamines, five homemade weapons and an unspecified quantity of brew and brew making material;
- on the following days, more brew and brew making material was seized from inmate cells and common areas. The inmates' behaviour had become more confrontational and verbally abusive with CO's;
- CO's were concerned about the number of inmates under the influence of drugs and/or alcohol who were not being put in the segregation unit;
- on October 30, an inmate was assaulted by three others, who were put in the segregation unit following the incident;
- warden Wayne Marston indicated to HSO Lum that a cell search and a body search were conducted following that assault and three suspects were identified;
- on November 1, COs found a broken and altered knife in a cell. COs stated that no knives were reported missing and they were concerned that there might be other knives not accounted for;
- the same day, approximately 35 grams of heroin were seized from an inmate's cell; the inmate was not put in segregation because that unit was already full;

[1] Brew: illicit home-made alcohol.

- COs were concerned because inmates were clustering in different groups and were not behaving in a normal fashion;
- COs told HSO Lum that they received verbal threats from some inmates and they claimed that the institution environment had become a risk to COs because of the potential for violence.

[7] HSO Lum based her decision of absence of danger on the following reasons:

> The possibility of a homemade weapon being in the institution is an inherent part of a Correctional Officer's job… But when there is an actual presence of a weapon in the Institution, action is to be taken to locate the weapon. The employer has done this by conducting cell searches when accountable information was received that there may be weapons in the Institution. During the investigation, there was no evidence directly linking an increase of assaults against employees and the presence of brew and drugs in the Institution… The employer conducted an Exceptional Search on October 25-26 and also conducted cell searches when information is received. Also, the employer has removed some of the inmates that are under the influence for observation when it has been reported in an observation / incident report.
>
> The possibility of inmates assaulting Correctional Officers is an inherent part of the job. The risk of being assaulted by an inmate with a weapon should be minimized by performing routine cell searches to locate and remove weapons following the Institutional Search Plan. Routine cell searches should also be minimizing the amount of drugs and brew in the Institution.
>
> Working in the environment with verbally abusive and confrontational inmates and where homemade weapons, drugs and brew can be found would be an inherent part of a Correctional Officer's job. The potential threat of an inmate assaulting a Correctional Officer with a weapon has been minimized by the steps taken by the employer by conducting cell searches. The employer has done what is reasonably practicable to remove the weapons, drugs and brew they are aware of.

## Appellant's witnesses

[8] I retain the following from the testimonies and documents given in support of the appellant's position.

[9] Correctional Officer Matt Lister testified that he has been working as a CO for 10 years, the last nine ones at Matsqui Institution. He is also a member of the institution's Emergency Response Team. He declared that Matsqui Institution has the highest rate of drug seizures in the federal penitentiary system, *i.e.* 62.7 per 1000, compared to the national average of 16.7 per 1000[2]. In addition, there are more drugs coming into Matsqui Institution. He further said that from time to time, COs are subject to verbal threats from inmates.

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[2] As reported in the *Performance Summary by Security Level* – MED – Reporting Period: 2004-04 to 2005-08.

[10] Correctional Officer Catharine Russell stated that she is a member of the institution's Emergency Response Team. She knows from experience that inmates under the influence of brew have a more violent behaviour. She stated that, on November 1, 2004, she expressed her concerns to Randy Scott, who was Deputy Warden at the time, and requested a lockdown of the institution, but it was not granted.

[11] Correctional Officer Angela Cianni testified that, on November 1, 2004, the tension was escalating and COs were losing communication with inmates, which is an indication that something serious will take place sooner than later. She felt that COs would lose control of the institution, which means a riot could occur. That is why A. Cianni requested that management lockdown the institution, but it was refused. She said that the situation inside the institution was the worst she had seen in her career and that she had never experienced anything like it in the living unit or the segregation unit.

[12] CO Cianni declared that she wears a personal portable alarm (PPA), but during the afternoon shift, there is no response from COs because the institution is on minimum staff. Thus, someone could respond to an alarm but not quickly enough. She added that not all COs wear a PPA or a radio, because there are not enough to go around. She also explained that a CO would not have enough time to use the PPA if there was a sudden assault by an inmate.

[13] Correctional Officer Graydon Gillette testified that he is the employee representative on the Matsqui Institution workplace health and safety committee. He declared that the reason for determining that there was a danger on November 1, 2004 was related to the following situations:

- inmates became more aggressive than before;
- inmates had an uncompromising attitude with COs;
- there was an assault on an inmate;
- a large amount of heroin was found;
- there was a chance of retaliation from inmates to COs following the drug and brew seizure;
- a certain amount of brew was seized.

[14] According to CO Gillette, on November 1, COs agreed that the situation was going to continue to escalate and the only way to stop it was to perform an exceptional search.

[15] Correctional Officer Garth Kinsey testified that violent offenders are part of the Matsqui Institution and that COs are trained to deal with difficult inmates.

[16] CO Kinsey stated that there were no places to put intoxicated inmates, which created a situation where inmates exhibit more violent behaviours. Also, COs are in great danger when inmates are intoxicated with brew and some intoxicated inmates became verbally combative and potentially violent.

[17] CO Kinsey testified that COs were concerned about their own safety at that time, because different abnormal behaviours were being displayed within the inmate population. However, prior to the refusal to work on November 1, inmates had physically assaulted no CO.

[18] CO Kinsey also declared that the situation was getting worse and that he was scared on November 1. However, no direct threats from inmates were addressed to him on that day.

[19] CO Kinsey stated that management was aware of the existing situation in the institution and that he had never known of such a quantity of heroin being found inside the institution.

[20] Correctional Officer Sean Koch said that he has been a CO for eight years and is a member of the institution's Emergency Response Team.

[21] CO Koch testified that prior to the refusal to work, the general mood of inmates had changed. COs noticed smaller than normal groups of inmates forming. Inmates were going from group to group and it appeared that they were exchanging information. Based on his training as a member of the emergency response team, CO Koch stated that the situation could have been an indication of a riot in preparation. Also, when groups of inmates display unusual behaviour, it is normally an indication that something is going on and could happen.

[22] CO Koch stated that the following incidents occurred between October 24 and November 1, 2004:

- some inmates were assaulted by other inmates (attempted murder, possible broken nose);
- contraband was found;
- inmates were less open with COs;
- COs were getting more verbal abuse from inmates; and
- inmates were avoiding COs.

[23] CO Koch declared that the inmates' verbal abuse was reported to management at that time. However, when the refusal to work happened on November 1, there was no direct threat from inmates and there was no confrontation either with COs.

## Respondent's witnesses

[24] I retain the following from the testimonies and documents submitted in support of the respondent's position.

[25] Randie Scott testified that he has been Acting Assistant Warden, Management Services, at Matsqui Institution, since 2004.

[26] Randie Scott explained the two types of searches that could be performed in an institution. A routine search is a search done in a specific area. On a monthly basis, all areas of the institution have to be searched.

[27] A non-routine search, also called an exceptional search, is a search authorized by the Warden following information from the Security Intelligence Division that threats are being made. During that search, inmates are confined to their cells and their movements are restricted. Generally, the whole institution is locked down to facilitate the search.

[28] Randie Scott declared that the Warden will order a lockdown of the institution when he is convinced that threats are genuine according to the information received from the Intelligence Security Division. The Warden's decision will be based on the following information:

- review of all information available from staff;
- information obtained from the Security Intelligence Officer;
- information gathered from inmates actions;
- routine review, every morning, of all reports from the Correctional Supervisor.

[29] Randie Scott stated that an exceptional search has a negative effect on inmates. He explained that the following events led to the lockdown on October 25-26, 2004:

- large volume of brew found;
- edged weapons found;
- assaults on different inmates;
- threats against staff when normally, inmates do not make abusive remarks to COs.

[30] Randie Scott said that he was not aware of any order to expedite this exceptional search, which was completed on October 26, 2004, to the Warden's satisfaction. The search permitted to seize the following unauthorized things:

- brew and brew material;
- weapons;
- drugs;
- tattooing equipment.

[31] Randie Scott stated that some incidents happened between October 27 and November 1, 2004, but the situation at the institution was manageable and acceptable. He was aware of the following from observation reports:

- more brew found;
- seizure of heroin;
- abuse of staff from inmates.

[32] Douglas Jones, Unit Manager at Matsqui Institution, testified that he was involved in the employer’s investigation of the group's work refusal on November 1, 2004. The employer based its decision of no danger on the following:

- the danger was not imminent;
- COs jumped to conclusions based on their own reasons but there was no evidence to sustain them;
- management was dealing with each individual incident, which resulted in seven inmates being transferred to the Kent Maximum Institution, and then the risk was gone.

## Appellant's submission

[33] In her submission, Corinne Blanchette argued that on November 1, 2004, there were several indicators inside the institution to explain why COs felt that their safety was at risk. She identified the following ones:

- major shift in the mood in the institution;
- increased confrontations between inmates and staff;
- inmates acting up in front of supervisors;
- abrupt loss of communication and bad influence on friendly inmates or inmates assigned to the COs' caseload;
- inmates grouping and organizing;
- inmates gathering around staff;
- verbalized threats;
- high profile inmates displaying odd behaviours;
- increased number of inmates under the influence of brew and alcohol;
- prevalence of both brew and drugs;
- important seizures of brew and brew material even after a search;
- biggest seizure of heroin;
- signs of retaliation within the inmate population;
- inmates arming themselves;
- unusual number of inmates requesting protection.

[34] Corinne Blanchette added that I should give weight to the testimony of Correctional Officers Kinsey, Koch, Russell and Cianni, because the respondent has not contradicted them.

[35] Corinne Blanchette wrote that "no one disputed the fact that inmates' behaviours are unpredictable and volatile and that the use of drugs such as methamphetamine makes it worse." She added that COs have direct observation of inmates' behaviour and are therefore in a better position to identify situations of risk.

[36] Corinne Blanchette explained that HSO Lum was provided with statistics that demonstrated a rapid deterioration of the inmates' behaviour and an increase in the number of confrontations with COs at the Matsqui Institution. Between February and September 2004, there was an average of 4.7 inmates' confrontations with COs while there were seven confrontations on the week preceding the work refusal.

[37] Corinne Blanchette referred to Garth Kinsey's testimony, who stated that

> officers could deal with one or two of the risks mentioned but their concern was that the simultaneous presence of all mentioned risks at a higher level and the employer's refusal to put in place additional preventive measures after October 26, 2004, was creating an unnecessary and excessive danger.

[38] Corinne Blanchette pointed out that when a set of circumstances is repetitive, like an accumulation of incidents and tension in the institution, it raises the risk of injury to COs to an abnormal level. She declared that this is supported by the Federal Court decision in *Verville v. Canada (Service correctionnel)*[3], where, according to her, Justice Gauthier declared that an analogous set of facts is capable of constituting a "danger" within the meaning of section 128(1) of the Code.

[39] Corinne Blanchette argued that despite the lockdown of October 25 and 26, 2004, when brew was found, a larger than normal quantity of brew, brew material and drugs was still present and found shortly after that time. This was an indication that the lockdown had not been long enough to allow for their discovery. In addition, the duration of the exceptional search during the lockdown was nine hours and a quarter (555 minutes), which means that each cell was searched for less than two minutes. Corinne Blanchette compared the duration of that lockdown with another exceptional search following a similar situation in December 2004 that took more than twenty-five hours. She believed that a search and lockdown of some nine hours could not address any of the concerns expressed by COs on November 1, 2004.

[40] Corinne Blanchette declared that HSO Lum did not conduct a complete investigation. Furthermore, HSO Lum did not have all relevant information, like the duration of the exceptional search, to make a decision. There were some interruptions during the exceptional search of October 2004, which means it took less time (about 9 hours) than the one in December 2004 (25 hours).

[41] Corinne Blanchette argued that the COs who refused to work on November 1, 2004 were in a better position to determine whether or not there was a danger for them, because in the days preceding their refusal, they had observed a deterioration of the atmosphere in the living unit. She added that "COs have ascertained that if the condition of heightened tensions in the living units was continuing, they would be subject to injury."

[42] Corinne Blanchette stated that there were deficiencies in the employer's risk assessment process and investigation of the refusal to work on November 1, 2004.

[43] Corinne Blanchette concluded by saying that there was a danger on November 1, 2004 and the employer did not demonstrate that he put in place corrective measures sufficient to mitigate the level of tension in the living unit. Corinne Blanchette requested that HSO Lum's decision be rescinded accordingly.

## Respondent's submission

[44] Harvey Newman argued that despite the amendments to the Code in September 2000, the new definition of "danger" is similar to the previous definition. To support his position on this point, he referred to the decision of Appeals Officer Serge Cadieux in *Darren Welbourne and Canadian Pacific Railway Company*[4], who stated in paragraph 19:

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[3] *Juan Verville and Service correctionnel du Canada, Institution pénitentiaire de Kent*, 2004 FC 767, May 26, 2004
[4] *Darren Welbourne and Canadian Pacific Railway Company*, CLCAO Decision No. 01-008, March 22, 2001

> The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered.

[45] Harvey Newman said that the Appeals Officer has to look at the circumstances of the situation, as they existed at the time of the HSO's investigation. It is not the role of the Appeals Officer to carry out a new investigation.

[46] Harvey Newman argued that there has to be a reasonable expectation that the refusing employee could be injured either immediately or any time in the future. To support his statement, he submitted that in *Mr. Jack Stone and Correctional Service of Canada*[5], Appeals Officer Serge Cadieux spelled out, in paragraph 38, a three-point test to be addressed to determine the presence of a danger. They are:

- a hazard or condition will come into being or the future activity in question will take place;
- an employee will be exposed to the hazard or condition or activity when it occurs; and
- there is a reasonable expectation that
- the hazard or condition or activity will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition or the activity.

[47] Harvey Newman also referred to the statement of Appeals Officer Cadieux in *Stone, supra*, that when working in a medium security penitentiary, you can expect a higher risk environment and exposure to violence is a normal condition of work. In paragraph 46, Appeals Officer Cadieux added that the risk is mitigated by the measures put in place by the employer, which are the numerous controls, security policies and procedures.

[48] To support the respondent's position about the notion of normal condition of employment for correctional officers, Harvey Newman referred to the same decision, where Appeals Officer Cadieux stated in paragraph 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… 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 that in a specific and exceptional circumstance.

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[5] *Mr. Jack Stone and Correctional Service of Canada*, CLCAO Decision No. 02-019, December 6, 2002

[49] Harvey Newman argued that it is not unusual to experience different levels of tension in an institution. However, he pointed out that there were no reported threats of assaults against COs by the inmates on November 1, 2004.

[50] Harvey Newman declared that "management thoroughly reviewed the situation and concluded that there was no danger that was not inherent to the tasks of a CO and that any such conclusion to the contrary was hypothetical and speculative."

[51] Harvey Newman stated that there was no situation of danger on November 1, 2004, because at the time of the HSO's investigation, inmates were in a lockdown situation.

[52] Harvey Newman ended his final argument by requesting that the appeal be dismissed. However, if the Appeals Officer determined to rescind HSO Lum's decision of no danger, he argued that there would be no practical purpose in issuing a direction to the employer, because the situation that existed at the time of the work refusal and during the HSO's investigation no longer exists.

## Appellant's rebuttal

[53] Corinne Blanchette noted that the respondent had not referred to the Federal Court decision in Juan Verville, supra, and the Federal Court of Appeal decision in Martin v. Canada (Attorney General)6. She submitted the following regarding those two decisions.

[54] Corinne Blanchette argued that the respondent erred when he declared that the Appeals Officer does not have to carry out a new investigation and that his inquiry should begin with the HSO's investigation and decision. She maintained that the Federal Court of Appeal decision in *Martin, supra*, that the hearing before an Appeals Officer is *de novo* contradicts the respondent's position.

[55] Corinne Blanchette reasoned that contrary to the respondent's submission, the role of the Appeals Officer is not limited to looking at the circumstances prevailing at the time of the HSO's investigation. Justice Gauthier in *Juan Verville, supra,* does not support the respondent's argument and Corinne Blanchette offered the following interpretation: "Justice Gauthier found that the set of facts to establish the presence of danger are not limited to the circumstances at the time the employee refused to work."

[56] On that same question, Corinne Blanchette also referred to an analysis developed by Appeals Officer Michèle Beauchamp in her *Correctional Service Canada and John Carpenter*[7] decision, were she concluded in paragraph 78:

> [78] In other words, the HSO has to examine if what the employees invoked as a danger when they refused to work still exists at the time that he is investigating and/or has the potential to become a danger in the future.

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[6] *Martin v. Canada (Attorney General)*, 2005 FCA 156, May 2, 2005

[7] *Correctional Service Canada and John Carpenter*, CLCAO Decision No. 05-012, March 30, 2005.

[57] Another point made by Corinne Blanchette concerned the respondent's submission that there was no situation of danger at the time of HSO Lum's investigation, because inmates were already in a lockdown situation. She submitted that a lockdown does not necessarily eliminate the situation of danger.

[58] Corinne Blanchette argued that the respondent's reference to the three-point test raised by Appeals Officer Serge Cadieux to determine the presence of a danger is outdated and has not been supported by *Juan Verville, supra*, as evidenced by paragraphs 33 to 36:

> [33] In his decision, the appeal officer states that he relies on his decision in *Parks Canada Agency, supra,* where he found that:
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> "In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of the facts gathered during his investigation that:
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> - the future activity in question **will** take place [See Note 2 below];
> - an employee **will** be exposed to the activity when it occurs; and
> - there is a reasonable expectation that:
> - the activity **will cause** injury or illness to the employee exposed thereto; and,
> - the injury or illness will occur **immediately** upon exposure to the activity.
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> Note 2: This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.
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> (Emphasis added)
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> [34] The above statement is not entirely accurate. As mentioned in *Martin, supra*, the injury or illness may not happen **immediately** upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.
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> [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.
>
> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time

> frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[59] Corinne Blanchette argued that contrary to the respondent's position, the new definition of danger has a broader meaning than the definition that preceded the 2000 amendments to the legislation.

[60] Corinne Blanchette submitted that on the day of the refusal to work, the combination of tension and incidents was at an abnormal level and constituted a danger under the Code, as the exposure was well beyond the inherent risk of the applicants' occupation. She added that on November 1, 2004, the high level of tension in the living units reached a point of a high possibility of injury before the situation could be corrected.

[61] Corinne Blanchette ended her rebuttal by arguing that HSO Lum's decision was based on mistaken facts and mistaken interpretation of the law. Therefore, the appeals officer should rescind the decision of no danger.

## Decision

[62] The issue in this case is whether or not HSO Lum erred when she decided that COs were not exposed to danger on November 1, 2004 when they were performing their regular duties in the living unit.

[63] For deciding the matter, I must consider the facts of the case, the interpretation and application of the relevant provisions of the Code and the relevant jurisprudence.

[64] The *Canada Labour Code*, Part II, defines danger in subsection 122(1):

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

[65] There have been two major Federal Courts' decisions dealing with the concept of danger and its interpretation relative to the exercise of the right to refuse dangerous work. The appellant has referred to both, although not the respondent.

[66] The first decision is the decision of Federal Court Justice Gauthier in *Juan Verville, supra*.

[67] Madam Justice Gauthier stated, at paragraph 36, that it is not necessary to specify a time frame when the condition, hazard or activity will occur but to establish the reasonable expectation of occurrence:

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[68] The appellant has demonstrated that several incidents occurred on the day of the group's work refusal and in the preceding days. Corinne Blanchette listed them in her submission, as appears in paragraph 33 of the present decision.

[69] In the instant case, I believe that the higher level of tension and incidents could be expected to cause injury to COs and that there is a reasonable possibility that those circumstances will occur in the future.

[70] The appellant raised another point regarding the weight I should give to the testimonies of the correctional officers. According to Corinne Blanchette, as they were working in the living unit on November 1, 2004, they were in a better position to identify situations of danger, which they did on that day.

[71] This argument is supported by Madam Justice Gauthier in *Juan Verville, supra*, when she states, at paragraph 51:

> [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 the opinion. It could even be established through an inference arising logically or reasonably from known facts.
>
> [my underline]

[72] I have been convinced by the COs' testimonies that the correctional officers are well-trained employees and they have the experience and abilities to observe and identify situations and tension that are worsening. In addition, I give weight to Corinne Blanchette's argument that COs are in a better position to assess tension in the institution and to determine whether there is a situation of danger.

[73] As part of the appellant's case, it has been established that CO Koch is a member of the Emergency Response Team at Matsqui Institution. He is fully trained to assess situations and realize when they are worsening. He testified that, on November 1, 2004, he evaluated the situation and concluded that it could be a symptom of a riot in preparation.

[74] I therefore consider that the level of tension was not a normal condition of the work of the correctional officers who refused to work.

[75] The respondent did not submit sufficient arguments to contradict the position of the appellant on that point.

[76] In *Juan Verville, supra*, Justice Gauthier stated at paragraph 34:

> [34] As mentioned in *Martin supra*, the injury or illness may not happen **immediately** upon exposure, rather it needs to happen before the condition or activity is altered

[77] In my opinion, on November 1, 2004, there were conditions -- an accumulation of incidents and tension in the living unit -- that could reasonably be expected to cause injury or illness to any correctional officer exposed to them before the hazard or condition could be corrected or altered by the employer.

[78] Justice Gauthier added at paragraph 35 of *Juan Verville, supra*:

> [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version «susceptible de causer» indicates that it must be capable of causing injury at any time but not necessarily every time.

[79] Correctional officers had knowledge of COs being injured in the same circumstances as those prevailing on November 1, 2004. In addition, there were some assaults between inmates. In this kind of situation, COs could be caught in the middle of an inmate's assault and suffer injuries. In my opinion, those conditions could reasonably be expected to cause injury to a CO, but not necessarily every time.

[80] The second decision referred to by the appellant that I will comment on is the Federal Court of Appeal's decision in *Martin, supra*.

[81] Harvey Newman argued that an Appeals Officer's inquiry is limited to the circumstances that prevailed at the time of the HSO's investigation, adding that the Appeals Officer does not have to carry out a new investigation. In my opinion, this statement is in opposition to the decision made by the Federal Court of Appeal in *Martin, supra*, that the investigation carried on by an Appeals Officer is *de novo*. It is my role, as an Appeals Officer, to look at all circumstances that prevailed at the time of the work refusal of November 1, 2004. Furthermore, I have to consider all the facts that were submitted at the hearing and in the written final arguments.

[82] The Federal Court of Appeal made an important ruling on the definition of "danger" as amended in September 2000. Contrary to the position of the respondent, the definition of "danger" was significantly modified from the previous definition. In the present instance, to determine a danger, I have to consider whether a hazard, condition or activity could result in injury, thus constituting the danger. The Honourable Judge Rothstein wrote, in paragraph 37 of *Martin, supra*:

> [37] I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.

[83] It was established that the situation in the living unit was getting worse with the multiplication of incidents and that it was only a question of time before the level of tension and incidents from inmates could reasonably be expected to lead to an altercation between COs and inmates that could reasonably be expected to cause injuries to COs.

[84] The respondent did not submit any evidence to contradict the appellant's interpretation regarding the Federal Court's decision in *Juan Verville, supra*, and the Federal Court of Appeal's decision in *Martin, supra.*

[85] Based on the facts and the reasons cited above, I find that COs who were working in the living unit of the Matsqui Institution, on November 1, 2004, were exposed to conditions --existing conditions, *i.e.* circumstances -- that could reasonably result in injury to COs before the conditions could be corrected.

[86] Having decided that there was a situation of danger for COs working in the living unit on November 1, 2004, I will now address the issue of what constitute normal conditions of work for correctional officers.

[87] To determine if the conditions described previously were normal conditions of employment for COs, I must take into account Justice Gauthier’s decision in *Verville, supra*, who stated in paragraph 55:

> [55] The customary meaning of the words in paragraph 128(2)(b) supports the view expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?

[88] I agree with HSO Lum when she wrote in her report that it is a normal condition of employment for a CO to work in an environment where there are verbal abuses and confrontational inmates and where homemade weapons, drugs and brew can be found. However, on November 1, 2004, there was evidence that the tension was escalating and COs had the feeling that they could lose control of the institution, meaning a riot could occur.

[89] In my opinion, this was not a normal condition of employment for COs. In the present case, I do not see those conditions as something that happens regularly, that it is not out of the ordinary. Normally in an institution, you can expect the occurrence of some of the incidents mentioned by the appellant in paragraph 33 of the present decision. However, when they happen simultaneously and result in increased tension within the institution, it is my opinion that there is an increased risk of injury to COs, something that is not normal to the job of a CO working at the Matsqui institution.

[90] On that point, I agree with Corinne Blanchette's submission that the conditions of work for COs during the week prior to the refusal to work and on November 1, 2004 were not normal conditions of employment.

[91] On the other hand, I disagree with Harvey Newman's submission that, at the time of the group's work refusal, any danger was inherent to the job of a CO working at the Matsqui Institution. The notion of "inherent" is no longer in the Code, so I will not base my conclusion on that.

[92] The shift in the normal condition of work was supported by the fact that COs observed the changes and were in a good position to identify situations of risk. The respondent did not demonstrate to my satisfaction that management was in a good position to determine that there was no danger for COs.

[93] It is my opinion that correctional officers who worked in the living unit at Matsqui Institution, on November 1, 2004, were exposed to a situation of danger that did not constitute a normal condition of employment.

[94] For all the reasons expressed above, I conclude that correctional officers were in a situation of danger on November 1, 2004. Consequently, in accordance with paragraph 146.1(1)(*a*) of the *Canada Labour Code*, Part II, I rescind the decision of absence of danger rendered by HSO Lum on November 1, 2004.

[95] However, I will not issue a direction to the employer because the situation that existed at the time of the work refusal and during the investigation done by HSO Lum no longer exists.

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Pierre Guénette
Appeals Officer

# Summary of Appeals Officer's Decision

**Decision No.:** CAO-07-023

**Appellant:** G. S. Gillette

**Respondent:** Correctional Services Canada (Matsqui Institution)

**Provisions:** *Canada Labour Code***,** 122(1), 128, 129(7).

**Keywords:** Correctional Officer, refusal to work, danger, inmate, brew, drug, seizure, lockdown, threat, search, *de novo*, direction.

**Summary:**

On November 1, 2004, fifteen Correctional Officers (COs) refused to work because they felt that it was unsafe to work in the living unit of the Matsqui Institution. The COs believed that the work environment presented a danger, as there was a potential for violence.

A health and safety officer (HSO) investigated their refusal to work and determined that danger did not exist because the following are an inherent part of a COs job: the possibility of a homemade weapon, the possibility of inmates assaulting COs and a verbally abusive work environment.

Following his review, the Appeals Officer rescinded the decision of absence of danger rendered by the HSO. The Appeals Officer is of the opinion that that COs who worked in the living unit at Matsqui Institution, on November 1, 2004, were exposed to a situation of danger that did not constitute a normal condition of employment. Furthermore he stated that he would not issue a direction to the employer because the situation that existed at the time of the work refusal and during the investigation done by the HSO no longer exists.