Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2021-08-05
Case No.: 2018-22

Between:

Benoît Lachapelle, appellant

and

Correctional Service Canada, respondent

Indexed as: *Benoît Lachapelle* v. *Correctional Service Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a delegated representative of the Minister of Labour.
Decision:	The decision of no danger is amended.
Decision rendered by:	Jean-Pierre Aubre, Appeals Officer
Language of decision:	French
For the appellant:	Ms. Catherine Sauvé and Mr. Quentin Phaneuf, Laroche Martin, CSN Legal Department
For the respondent:	Mr. Stefan Kimpton, Department of Justice Canada, Treasury Board Secretariat Legal Services
Citation:	2021 OHSTC 2

REASONS

[1] This decision concerns an appeal filed on August 2, 2018, pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*) by Mr. Martin Bibeau, on behalf of the appellant Mr. Benoît Lachapelle, against a decision of no danger rendered on July 27, 2018 by ministerial delegate Ms. Jenny Teng, at the conclusion of her investigation into the appellant's work refusal in the workplace located at the Regional Reception Centre (RRC), Special Handling Unit (SHU), Sainte-Anne-des-Plaines Institution (Quebec). Contrary to the finding of the ministerial delegate, the appellant submits on appeal that a danger exists for a floor agent because of the increased power of the firearm recently deployed for use by the officers on the gallery without additional safety measures being put in place and taking into account the fact that the windows of the dayrooms would not be strong enough to stop a projectile fired with the said firearm.

Background

[2] The SHU is a maximum-security detention centre with five wings around a central control station. Each wing consists of rows of inmate cells on the ground floor (floor), a frisk-search area (vestibule), a dayroom with glazed partitions, and an outdoor courtyard (yard). These areas are overhung by a gallery network that enables correctional officers stationed there to monitor inmate activities in the dayroom or in the yard of each wing. Constant monitoring is provided by officers in the central control station and in the rooms via surveillance cameras, as well as by correctional officers conducting rounds on the galleries. The "floor" officers also walk the corridors connecting the various parts of the ground floor for various purposes, including monitoring the inmates. The SHU has five dayrooms, all with the same configuration, namely, a room sectioned off by a concrete wall and three walls with glazed partitions composed of polycarbonate and a security grate. These dayrooms are located between the search vestibule and/or the corridors leading to other rooms such as the gym. The galleries have gunports that are strategically located to cover critical areas of the dayrooms. These gunports are sized to accommodate a C-8 rifle and a 40 mm multi-shot launcher and allow for a 90-degree arc of fire without allowing for the firearms to be seized through the safety grid and from two positions providing a full line of fire into each dayroom.

[3] The background element that informs the present case is the replacement of the firearm provided for correctional officers stationed on the surveillance galleries overlooking the SHU dayrooms, namely, the replacement of the 9 mm rifle with the more powerful Colt 556 rifle (C-8), which, according to the appellant, was introduced without additional security measures. In short, in the event of a shot being fired into a dayroom by the officer stationed on the gallery with the Colt 556 rifle, this would create a "life-threatening" danger to an officer (or officers) who may be on the ground floor and deployed to handle an incident in a dayroom, or for any other reason, if the projectile fired from the gallery were to strike a glazed partition of the dayroom in any way. Specifically, the employee who refused to work claimed that the windows in the SHU dayrooms through which the floor officers (ground floor) are visible (except in the vestibule, where the window is frosted) would not be strong enough to stop a bullet fired from the gallery and that, as a result, there is a hazard that an officer standing outside the dayroom could be shot directly or by ricochet.

[4] In determining whether there was indeed a danger in relation to the circumstances evoked by the appellant in his work refusal, the ministerial delegate relied on decisions of this Tribunal examining, among other things, the concept of "serious threat" with reference to the notion of the likelihood of occurrence, namely, *Correctional Service of Canada* v. *Ketcheson*, 2016 OHSTC 19 *(Ketcheson*); and *Keith Hall & Sons Transport Limited* v. *Robin Wilkins*, 2017 OHSTC 1 *(Keith Hall & Sons Transport Limited*), as well as the decision in *Nolan et al.* v. *Western Stevedoring*, 2017 OHSTC 11 *(Nolan et al*.), in which the appeals officer stated:

> [60] In short, determining whether a hazard, condition or activity in the workplace can reasonably be expected to be a serious threat to the life or health of employees where, such as in this case, the exposure of the employees to the hazard, condition or activity is beyond dispute, entails the consideration of the following probabilities: (i) the probability that this hazard, condition or activity will cause an event or incident susceptible to causing injury or illness; and (ii) the probability that, if such event or incident occurs, it will cause serious (i.e., severe) harm to an employee.
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> [61] Given that the Code's definition of "danger" is based on the concept of reasonable expectations, the **mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat**. **There must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the alleged hazard, condition or activity.**
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> [62] The determination of whether the materialization of the threat is a reasonable possibility as opposed to a remote or hypothetical one, is not always an easy task. **It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is examined. It involves a question of appreciation of facts and passing judgment on the likelihood of occurrence of a future event. In my view, an acceptable way to make this determination is to ask the following question: would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is likely to occur?**
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> [emphasis added]

[5] Although at this stage of the decision we are only describing the structure of the findings of the ministerial delegate in this case, it is important to note at the outset the terminological difficulty caused by the legislator's use of the words "vraisemblablement" ("vraisemblable") in the definition of "danger" in [the French version of] the *Code*, to correspond to the expression "reasonably be expected" ("reasonable expectation") in the English version, an expression that has been rendered in numerous decisions of this Tribunal by the notion of reasonable expectation. For example, in the above quotation, which purported to draw a line between what is likely and what is not, within the meaning of the *Code*, the translated version of this decision (see *Nolan et al*.) uses the words "vraisemblablement" ("vraisemblable") "probablement" ("probable") and "possibilité" ("possible") to make distinctions, whereas the dictionaries Le Petit Robert and the Multi Dictionnaire de la Langue Française use the words "vraisemblable,"

"possible," "plausible," and "probable" as synonyms. I make this clarification because of the following passages in the ministerial delegate's conclusions, which illustrate a certain confusion of terms that leads one to question the validity of the conclusions:

> [Translation] In this case, there is indeed a possibility that a violent situation between fellow inmates in the SHU dayroom could escalate to the point where an armed intervention is required to bring the situation under control; however, the employer has put in place several measures to reduce the probability of this situation occurring…
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> …
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> ... Although there is a 7-step procedure for the safe handling of the C-8 rifle, it is plausible that due to high stress levels, tunnel vision, agitated inmate movements and lack of time to assess the situation, a correctional officer could miss the shot…
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> …
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> Based on a full analysis of the evidence presented and all the facts in this case, it is plausible that a bullet could be fired from the gallery and that an officer stationed in the vicinity of the dayroom could be shot through the glazed partition of a dayroom. However, the real question to be decided concerns the reasonable likelihood that such a situation would arise. The answer to this question is that this alleged situation is more of a possibility than a reasonable probability…

For clarification, it is important to note that the terms used in the *Code* in the definition of "danger" are "reasonably expected" in the English version, which is rendered in French as "vraisemblable" and not "probabilité raisonnable."

[6] In her report, the delegate confirmed that impetuous altercations, which imply violence, between inmates are likely to occur in the dayrooms and in the SHU in general. In this regard, the delegate referred to statistics covering the three years preceding the work refusal, during which 74 interventions at the SHU, including 19 in a dayroom, had required the use of force by officers, and specified that in none of the cases in a dayroom had the use of the C-8 rifle been required. The investigation report states that, based on the evidence presented, the use of firearms is unusual at the SHU and a shot fired in the direction of an inmate is even more unusual. The delegate explained this conclusion as follows:

> [Translation] While impetuous altercations can occur, it should also be considered that correctional officers are well trained to intervene. In principle, the employer has selected employees who have the necessary skills to perform their duties and respond quickly to emergencies and it provides them with annual training. According to the employer, the officers' reaction time is quick and the means at their disposal make it possible to resolve the majority of situations without the need to use the C-8 rifle. This statement is supported by recent statistics from the last three years, namely that there were 74 interventions requiring the use of force to control a situation at the SHU, including 19 interventions in a dayroom. Furthermore, according to statistics presented by the employer

> on shots fired in Canadian penitentiaries, no shots have been fired in the direction of inmates in recent years, since all the shots fired are warning shots aimed at a target provided for this purpose. **Based on the evidence presented, it is reasonable to believe that the use of firearms is unusual at the SHU and a shot fired in the direction of an inmate is even more unusual.**
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> [emphasis added]

[7] Based on the above, the delegate considered that, in order to find that a serious threat exists, there must be circumstances beyond a hypothetical threat or a mere probability, based on concrete facts, that would allow a reasonable person to conclude that there is a "reasonable possibility" that employees would be exposed to the alleged serious threat. It should be noted that whereas in the above excerpt from her report, the delegate spoke of "reasonable probability," she uses the expression "reasonable possibility" here. While recognizing that in this case, there is certainly a possibility that a violent situation between fellow inmates in a SHU dayroom could escalate to the point where armed intervention would be required, the delegate argued in her no-danger decision that the pre-emptive measures taken by the employer, whether in terms of officer equipment, procedures, operating methods or engagement model, are sufficient to reduce the "probability" of such a situation occurring.

[8] In summary, the delegate determined that to support the finding of the occurrence/existence of a serious threat, all of the following conditions would have to exist simultaneously, namely that arrangements to mitigate the hazards of a fight between inmates were not successful, that correctional officers failed to detect warning signs despite constant monitoring, that less lethal means than the C-8 rifle were not applicable to managing the situation, that the situation occurred in a dayroom in a location where there is a direct line of fire and/or a bullet could penetrate by ricochet, that the correctional officer failed to assess the hazards around the line of fire, that the correctional officer missed the shot, that another correctional officer was in the vicinity of the dayroom despite instructions to stay away from the dayroom in the event of an emergency and not to cross the safety zone, that the bullet fired passed through a dayroom window to strike a correctional officer. On the basis of these multiple conditions, the delegate concluded that there was no likelihood of a serious threat since, in her opinion, from the objective point of view of a reasonable person who is duly informed and aware of the circumstances of the SHU, it cannot be concluded that the evidence submitted establishes that there is a "reasonable probability" that all of these conditions would be concurrent in order for the alleged danger to arise.

Issue

[9] Was the decision of ministerial delegate Teng with regard to the danger claimed by the appellant at the time of the work refusal well founded, or, in other words, was the appellant exposed to a danger, as defined by the *Code*, at the time of exercising his right to refuse work? This definition stipulates that "danger" means "any existing or potential hazard or condition or activity that could reasonably be expected to present an imminent or serious threat to the life or health of the person exposed to it before the hazard or condition can be corrected or the activity modified, as the case may be."

Submissions of the Parties

A) Appellant's Submission

[10] The appellant's description of the facts and circumstances in support of his argument largely overlaps with that of the ministerial delegate, as reported above, and therefore need not be repeated. The appellant does, however, provide some clarifications that are worth highlighting.

[11] The appellant argues that the C-8 rifle was implemented at the SHU in 2015 to replace two rifles that were used previously, namely the AR 15 calibre .223 rifle and the Colt 9 mm rifle. It appears that the respondent's decision to replace these two firearms was based on the fact that they had reached the end of their life cycle and that Correctional Service of Canada (CSC) had decided to opt for a single calibre for all purposes, and not because the former firearm, the Colt 9 mm, was not powerful enough to be used inside the SHU, even though it was less powerful than the C-8 rifle. It appears that prior to May 2015, correctional officers used the AR 15 rifle only outside the walls of the institution while on patrol. This rifle is of the same calibre as the C-8 rifle and has the same barrel length, making them both powerful long-range firearms, unlike the Colt 9 mm rifle, which was deployed inside the facility at the gallery station and at the control station. On this point, the appellant argues that the C-8 rifle was introduced without any additional safety measures despite its superior power, the only testimonial evidence presented by the respondent being limited to the fact that the C-8 was introduced in partnership with the Royal Canadian Mounted Police (RCMP).

[12] According to the appellant, the crux of the problem raised by correctional officer Lachapelle's refusal lies in the fact that the officer stationed on the gallery, whose duty it is to preserve life, could fire the C-8 rifle at an inmate or inmates in a dayroom that has glazed partitions on three of the four sides (like all the others) and that the projectile fired from the said rifle could pass through the said partitions, which are not sufficiently resistant or proofed against the said projectiles fired by the said rifle, which might therefore strike an officer or officers stationed on the ground floor on the other side of one of those windows.

[13] In his submissions, the appellant presents a description of the SHU that echoes the description in the investigation report of ministerial delegate Teng cited above. However, the appellant points out that since a dayroom has windows on three sides, one window pane (the largest) is directly in front of the central corridor of the control station, where officers and other staff walk, while on the other two sides of the room there is a symmetrical arrangement of a door and large high windows, each of which opens into a vestibule with frosted windows, the location where searches and handcuffing take place. With respect to the gallery (2nd floor) where the armed officer(s) are located, the photographs in evidence show two small windows that can be used as gunports through which the officer stationed on the gallery can use the C-8 rifle on inmates in the dayroom and one of these windows faces window panes with a door opening onto the 1st floor (ground floor) corridors where the so-called "floor" officers work.

[14] The appellant called upon the services of an expert in forensic ballistics, Mr. Guillaume Arnet, to evaluate the ballistic capacity of the materials in place in the context raised by the

present case, namely, a shot fired from a gunport towards the windows of a dayroom and the corridor. Mr. Arnet was recognized as an expert witness by the Tribunal.

[15] Mr. Arnet testified that, apart from the permission given by the respondent to allow him to visit the premises to take certain measurements, calculate certain distances and angles of fire, and view the tape on the ground, the employer refused to provide him with a sample of the windows from the dayrooms and the ammunition used for the C-8 in order to conduct the laboratory assessment, to provide him with certain information, or to allow him to bring in or use certain equipment. The witness stated that he was able to obtain these samples elsewhere (in the case of the ammunition from the manufacturer General Dynamics), as he was familiar with these places since he had already carried out this type of expertise at the SHU and in other prisons. The expert took into account the fact that the window materials were not homogeneous, i.e. the polycarbonate material was about 12 mm thick in places in its "solid sheet" construction and in other "framing" (sections) it was composed of two thinner sheets with an air gap between them. For the purposes of his expert opinion, the witness focused his analysis on the most favourable scenario for stopping a projectile (stronger specifications), namely, a full thickness 12 mm MakrolonR polycarbonate sheet, and the least favourable firing angle of the gunport, namely, a downward trajectory with a maximum angle of 40 degrees. He used high-speed imaging (25,000 images per second) to determine the projectile's loss of velocity, its deflection and fragmentation on impact with the material. In this regard, the expert witness conducted a comparative study involving the C-8 rifle and a firearm of the same calibre as the former service rifle, the Colt 9 mm, which the C-8 replaced. In doing so, he took into account the materials of the windows. He also considered the most favourable and least favourable angle of fire to slow down a projectile.

[16] The witness's expert report, filed in evidence, established that the C-8 rifle was sufficiently powerful for a projectile of the same calibre as the one used at the SHU to pass through the windows of the dayrooms without really losing any speed. More specifically, according to the expert, the comparative results of the two expert reports establish the following: in the case of the C-8 rifle, [translation] "it appears that the projectile passes through the 12 mm MakrolonR polycarbonate panels almost without resistance. The deceleration was only 8.5%, the deflection was of 3 degrees and the fragmentation almost zero (almost complete mass retention). The energy of the projectile, after passing through the material, is around 1590 joules and the projectile completely shatters the synthetic cranium (serving as a target). This shot is lethal." In comparison, the laboratory test with a firearm of the same calibre as the Colt 9 mm rifle, which, like the previous test, was intended to determine whether the windows offered some resistance, this time to the calibre of the old Colt 9 mm rifle, gives the following result described by the expert: [translation] "This test... shows the very high deceleration (99.8% of the projectile's energy is absorbed by the polycarbonate) and the major fragmentation of the projectile (reducing the size and mass of the projected fragments). The 9 mm calibre projectile entered the polycarbonate with an energy of 559 joules and only two small fragments exited with a total residual energy of only 1.4 joules. These fragments do not have enough energy to puncture the skin." The expert concludes from his comparative assessment that: [translation] "the 12 mm polycarbonate was therefore likely an effective barrier to protect personnel in the corridor when the former service firearm was in operation." In the general conclusion of his expert opinion, Mr. Arnet stated: [translation] "There is a real danger to personnel, present in the corridor

adjacent to a dayroom, of being seriously injured or fatally wounded by a shot fired from a gunport on the gallery using the C-8 rifle and the current ammunition. This hazard is present whether personnel is positioned inside or outside the demarcations taped to the floor....”

[17] The appellant notes that the conclusions of the ballistics expert to the effect that the dayroom windows do not offer any resistance to a projectile fired from the C-8 rifle are not affected by the information that the respondent gave to the ministerial delegate to the effect that the windows in question are composed of a material 3 mm thick, whereas the expert found that the said material (polycarbonate) was composed of two sheets thinner than 12 mm, with an air space between the two for the framing and approximately 12 mm for the solid sheets. Given that the angle of fire from the gallery is better (more direct) than the 40-degree angle of fire from the gunport as measured by the expert, meaning that these windows would provide even less resistance to a projectile given their thickness, the appellant argues that this in no way affects the validity of the expert’s conclusions.

[18] The foregoing leads the appellant to postulate that a correctional officer working on the “floor” in the corridors adjoining the dayrooms is at [translation] “very great risk” should a shot from the gallery occur, because the windows in the dayrooms provide no protection. This conclusion of the appellant is therefore intended to answer to the first part of the test applicable to the determination of danger under the *Code*, which was established by the Tribunal’s decision in *Ketcheson*. This test or analysis grid, in addition to the initial identification of the alleged hazard, situation or activity, includes a determination of whether this hazard (situation or activity) could reasonably be expected to pose an imminent or serious threat to the life or health of the person exposed to it. This is followed by a determination of whether this threat will exist before, depending on the circumstances, the situation is corrected, the activity modified, or the hazard eliminated. Finally, the test requires a determination of whether the identified hazard is a normal condition of work.

[19] The appellant takes the position that the said hazard could reasonably present a “serious threat” to the life or health of a person exposed to it, omitting the question of whether the said hazard (situation or activity) could present or, in the context of the appellant’s July 16, 2018, work refusal, could have presented an imminent threat. The appellant is of the view that in considering the “serious threat” hypothesis, particular weight must be given to the concept of reasonable expectation, as explained by the Tribunal in *Correctional Service of Canada* v. *Courtepatte*, 2018 OHSTC 9 (*Courtepatte*):

> [42] ... I am of the opinion that the notion that has the uppermost importance in the said definition is that of "reasonable expectation", this linking, in the definition, the sources of threat ("hazard, condition or activity") and the characterization of the threat ("imminent or serious") and, giving the words their grammatical and ordinary sense in harmony with the scheme and object of the *Code*, making it clear that for danger to exist, a threat, as per any of its sources, need only have a reasonable potential of existence as opposed to existing positively, thus situating the defining moment of any hazard, condition or activity achieving the level of threat, whether imminent or serious, somewhere between certainty and hypothetical, with the facts and circumstances of each case determining how close or how far to either end of the spectrum the presence of hazard in the form of an imminent or serious threat is situated. Stated more

> directly, given the definition of "danger" in the *Code*, each case needs to stand on its own facts which, to attain characterization as threat, whether imminent or serious, need not be a certainty but cannot be simply hypothetical.

[20] The appellant argues that the term “serious threat” refers to the seriousness of the harm without specifying when the harm will materialize. He also submits that the phrase “to life or health” refers to harm to the individual, i.e., death, serious injury or significant illness, noting that the case law indicates that an examination of the facts allows for an assessment of the reasonable possibility of the hazard occurring. This assessment by the Tribunal should not be limited to whether or not an incident has already occurred, but rather must take into account the possibility of its occurrence by considering all the facts surrounding the situation or hazard.

[21] To substantiate his claim of a serious threat, the appellant highlights a number of elements, a significant portion of which were presented to the ministerial delegate during her investigation. Thus, the appellant describes the specific character of the Sainte-Anne-des-Plaines Institution as more than a maximum security institution, a “supermax” institution, where inmates who cannot be safely managed in any other maximum security institution are incarcerated in the SHU unit, as these inmates present a persistent danger to the public, staff or other inmates and are the most dangerous inmates in Canada. The appellant reinforces this description by pointing out the terminology used in the Commissioner’s Directive 706 on SHU detainees to the effect that the behavioural norms to which they are held provide that they are expected to “interact in a non-violent and non-threatening manner while normally subject to constant direct/indirect monitoring”, which is in contrast to the standards for maximum security inmates, which provide that they are expected to “interact effectively and responsibly while subject to frequent direct/indirect monitoring.” The appellant explains that SHU, which has a maximum capacity of 90 inmates, had approximately forty inmates at the time of the refusal in July 2018.

[22] In the framework of the fixed daily schedule at SHU, the possible presence of inmates in the dayrooms is about seven hours per day, divided into the following four time slots: 9:30-11:30 a.m.; 1:30-3:30 p.m.; 6:30-8:15 p.m. and 9-10:30 p.m. During these hours, two Level I correctional officers work on the floor and handle, among other things, the movement of inmates. All movement in the unit is done on a pro rata basis for two officers - one inmate and one movement at a time. All inmates are handcuffed and frisk-searched in the vestibule before leaving their cell row. Also, officers patrol the corridors during activities and may be accosted by inmates. In addition, two Level II correctional officers work on the floor where one coordinates floor movement and the other works on logistics in the office. There may be other individuals moving through the corridors during these periods, including the warden and the assistant warden for operations (AWO), who are each required to make rounds once a day, and the nurse who may be called upon to visit an inmate. It is clear, according to the appellant, that correctional officers are called upon to work in the corridors adjacent to the windows of the dayrooms, and while it is accurate to say that walking past a dayroom only takes a few seconds, the appellant points out that there are in fact five dayrooms and that the corridor the officers walk through revolves around the control station, leading to the conclusion that when the floor officers are patrolling or escorting along the corridor, they are exposed if a shot from the gallery occurs.

[23] A delineated area on the floor (taped off), noted by the expert witness, was explained by AWO Hodnick Supprien, testifying for the respondent. The latter notes that when the emergency siren sounds, announcing the occurrence of a situation, the officers' reflex is to go and see what is going on and thus approach the situation and consequently the windows, in this way approaching the dayrooms, a tendency that AWO Supprien confirms, explaining that it was precisely for this reason that he issued a specific memorandum (3092-1) and had a zone marked off with tape in front of the dayroom windows that look out onto the corridor, where officers must not stand or stop in such circumstances. However, the appellant recalls the AWO's testimony to the Tribunal that since correctional officers must react quickly on the floor in such cases, it is possible that these officers may not pay attention to the areas marked off by tape on the floor. Furthermore, with respect to the exposure of officers in such circumstances, the appellant notes that the ballistics expert witness at the hearing stated in his report filed in evidence that [translation] "the area marked off on the floor (with tape) in the corridor section does not in any way protect personnel from potentially lethal fire. When outside this zone, it is possible for an individual to be hit from the torso down in zone A and from head to toe in zone B... Also, after impact on the corridor floor, high-velocity fragments of projectiles are projected at the level of a person's legs, and over a significant section of the floor space of the corridor…" The appellant adds that there is also a hazard in the vestibule corridor, in front of the frosted windows with a door, as all searches in the vestibule take place in front of these windows and where floor markings indicate where the inmate should stand. Thus, the correctional officer conducting the search has his back to the windows and is therefore less visible and identifiable because of the frosted glazing.

[24] The appellant further argues that the duties and responsibilities of the correctional officers on the gallery are relevant in assessing the seriousness of the threat. He notes that the correctional officers stationed there during the aforementioned periods when inmates are in the dayrooms are required to patrol the five dayrooms, the five yards, the school and the staff meeting areas, and have a direct view onto all of these locations. One of them is equipped with the 40 mm, i.e., a gas or impact projectile launcher, and the other is armed with the C-8 rifle held by a strap over his shoulder. In addition to these two officers, the camera monitoring desk (central control station) is permanently manned by a Level II correctional officer who is never to leave his station and who, in this monitoring role, is to alert the officers to any problematic situations. In this regard, it is clear from the post orders in evidence that the use of a firearm by a correctional officer is not merely a possibility, and that as part of the officer's duties, he may be obliged or forced, to use a firearm ("he may have to use a firearm"). It is also clear that the deliberate use of a firearm (shooting) against an individual to prevent death, grievous bodily harm or escape should only occur if there are no other less drastic means available, if other measures have failed to produce results, or if they are not the safest and most reasonable response in the circumstances. This presupposes that the correctional officer is acting in accordance with the Engagement and Intervention Model (EIM) when attempting to actively neutralize inmate assaults, riots and escape attempts. The EIM is the overarching tool for any intervention involving the use of force and is intended to guide staff members in the performance of security and health related activities in a hazard-based manner to prevent, respond to and resolve incidents using the most reasonable interventions based on the principle of continuous assessment and re-assessment of a situation, i.e., the level of hazard versus threat, using the AIM

(Ability, Intent, Means) tool in relation to inmates.

[25] The appellant notes that according to a witness for the respondent, Mr. Benoit Juneau, correctional officers do not have to question the first element of the AIM tool (ability) with respect to the SHU inmates, since it is common knowledge that they have the necessary abilities to carry out a threat. In contrast, with respect to the other two elements (intent and means), the officers' assessment of the situation is based on what they observe, so that they can assess the hazard and determine the means to be taken, with the hazard spectrum ranging from low, requiring "dynamic security", to high, which can lead to the involvement of firearms. The appellant points out that it was clearly stated at the hearing that the use or recourse to the various means is not done according to a graduated order but according to the assessment of the hazard by the correctional officer(s) on site, signifying therefore that while the officers have several tools or means at their disposal, there is no predefined hierarchy or order as to their use. Thus, according to the witness Juneau, situations may arise that require the immediate use of the C-8 firearm without even firing a warning shot, the officer immediately going from "load to fire" in order to preserve a life, as an altercation may be very quick (ten seconds or less).

[26] In this regard, however, the appellant points out that once a correctional officer, as a peace officer, is authorized under the *Criminal Code*, R.S.C. (1985), c. C-46, to shoot directly at an assailant for the purpose of preserving the life of the victim, the corollary of this authority is the criminal liability of the officer based on his use of his firearm. Thus, the correctional officer must undergo initial training of approximately three days (handling, power, ammunition, locking, firing concepts, etc.) and qualify through a firing test that must meet certain criteria. Moreover, he must also requalify annually and again, obtain a minimum result on a fixed target at a distance of 50 and 100 meters. The appellant points to the trainer's book for the C-8 rifle, which states that [translation] "**you must be prepared to kill another individual in the course of your duties**." The testimonial evidence heard distinguishes between qualification shots and annual requalification shots, which occur under favourable and controlled conditions, and shots that occur in the stressful situation of an incident, which makes it difficult to shoot accurately because of the need to act quickly, which can cause the officer to have "tunnel vision", i.e., narrowing of the peripheral field of vision, whereas visual scanning is necessary to see threats that may exist outside the shooter's reduced field of vision.

[27] The statistical evidence presented by the appellant demonstrates the occurrence of several events where the C-8 rifle was deployed in dayrooms. Thus, the evidence shows that incidents (fights, assaults with handmade weapons) occur between inmates in these rooms, which are small and can be occupied by up to nine inmates together at a time during the only hours of the day when they are not isolated in their cells. The appellant notes in this regard that correctional officers have observed that in the dayrooms, inmates always stand with their backs to the wall, never turn their backs to other inmates, that their behaviour is unpredictable. The occupants of the SHU are dangerous, as in many cases they are serving life sentences and have nothing to lose. The appellant acknowledges, however, that even in cases where the C-8 was deployed in the dayrooms, there have never been any direct shots fired at an inmate at SHU. With respect to a shot that could be fired by an officer for the purpose of saving a life, even though officers are trained to remain calm, the appellant argues that it is difficult to predict an officer's "emotional" reaction to a high hazard event, and that in fact no one can predict whether a shot from the

gallery will hit its target every time, even if it is at close range and the officer has been qualified by shooting at a distant target. To suggest otherwise would be simplistic and would ignore external or situation-specific factors, such as the fact that detainees move while fighting or the fact that the situation may require a less comfortable shooting angle than in the qualification exercises.

[28] Coming back to the power of the C-8 rifle, the appellant refers to the testimony of a witness for the respondent, Mr. Robert Williams Ferguson, arguing that this firearm has a higher perforation power than the Colt 9 mm rifle it replaced, and to the testimony of the sole expert witness, Mr. Arnet, who, after firing the C-8, whose projectile passed through one of the dayroom windows composed of polycarbonate to subsequently explode a synthetic cranium filled with ballistic gel, states in his report that [translation] "the energy of the projectile after passing through the [polycarbonate] material is close to 1590 joules and the projectile completely shatters the synthetic cranium. This shot is lethal... Also, after impact on the floor of the corridor, fragments of high-velocity projectiles are projected at the level of a person's legs, and over a significant section of the floor space of the corridor." The appellant adds that such a projectile can thus inflict a hole in the body that would constitute a fatal "vacuum", and that a ricochet on the floor can similarly inflict serious injuries to the legs, even fatal injuries if the bullet hits a major artery. The appellant also adds that such a C-8 projectile passes through the 2A ballistic (bulletproof) vests of police officers and thus can even more easily puncture the puncture-resistant vests worn by correctional officers. In short, according to the appellant, the firing of the C-8 rifle by the gallery officer would likely expose a correctional officer on the floor to a serious threat to his life and health.

[29] This being the case, the appellant argues that this threat will exist before the situation is corrected, the activity modified or the hazard eliminated, as no control or mitigation measure can succeed in this case in fully eliminating the threat of a C-8 rifle shot from the gallery. In this regard, the appellant refers to what the respondent argued was a hazard mitigation measure, namely, Memorandum 3092-1 written by AWO Supprien. This document, quoted in full by the appellant, states in particular that [translations] "**[a]lthough recent tests show that the glazed partitions in the dayrooms provide resistance to a 5.56 calibre bullet**", personnel must observe certain safety measures, including wearing safety equipment and performing routine checks before taking up their posts, and that "when an incident is taking place in a dayroom, no employee should be near the windows or doors until the situation is under control and as long as the use of the C-8 rifle remains a likelihood. **A safety zone is marked off by tape on the floor.** Please make sure you stay out of this area." According to the appellant, what is specified in this memorandum does not achieve the intended purpose since the false assertion (which was confirmed *viva voce* at the hearing by the witness Supprien) that the resistance of the dayroom windows to a bullet fired from the C-8 rifle negates its effect, whereas under the so-called "internal responsibility system" (IRS), referred to by the Tribunal in *Ketcheson*, employees have the right to be informed of all the hazards to which they may be exposed. Thus, the false assertion in this directive of no hazard negates the seriousness of the preventive measure for the personnel and increases the danger to which they are exposed.

[30] The appellant also points out the respondent's lack of seriousness and thoroughness with respect to the said directive, recalling that the testimonial evidence heard by the Tribunal shows

that the positioning of the said tape on the floor was not measured or tested, that no expert was called in to determine its positioning, and that the expert's report filed in evidence maintains that the said tape does not add any additional measure of safety and creates a false sense of security. Acknowledging that there are other means that can be used, including the use of force, before the use of a firearm is required, the appellant states that these interventions may have no effect or that time may preclude their use, citing the decision of the Tribunal in *Courtepatte*. In that case, the Tribunal made it clear that not all incidents reach a level of severity where armed intervention becomes necessary and therefore progressive measures may be necessary, or be employed, but that in cases where this threshold is reached and therefore progressive measures cannot or can no longer be employed, which may cover a very short time, i.e., periods of several seconds, then "there exists no substitute for an immediate armed response when it is needed, to wit when officers and/or inmates are at risk of grievous bodily harm or death." The Tribunal found that in such cases, the third question of the *Ketcheson* test must be answered in the affirmative, namely, that the threat would exist before the hazard was removed, the activity modified or the situation corrected, even if the officers were trained to shoot safely, since factors such as the frosted coating on certain glazed partitions, the stress created by certain high-hazard situations, the nature of the SHU inmates, and "tunnel vision" in a shooting situation, all contribute to sustaining the threat. The appellant's position on this issue is therefore that the hazard cannot be removed before the threat exists and therefore, Mr. Lachapelle was, at the time of his refusal, exposed to a danger within the meaning of the *Code*. The appellant offers as a suggestion for curbing this danger the replacement of the C-8 rifle with a firearm that uses ammunition that would be harmless after passing through the windows of the dayrooms, given the expert report that showed that the polycarbonate of the windows of the dayrooms is unlikely to constitute an effective barrier, as had been the case with the former service firearm (Colt 9 mm).

[31] With respect to the last question of the criteria or "test" for analysis set out by the Tribunal in *Ketcheson*, namely whether the identified hazard constitutes a normal condition of employment, the appellant submits that this is not the case for the following reasons, namely, that the identified hazard is not residual in nature, and that the assessment of the reasonableness of the measures taken by the employer does not take into account the seriousness of the hazard to be removed. With respect to the notion of the residual nature of the normal condition of employment, the appellant relies on the Tribunal's consistent jurisprudence, including *Armstrong* v. *Canada* (*Correctional Service)*, 2010 OHSTC 6 (*Armstrong*); *Correctional Service of Canada* v. *Laycock*, 2017 OHSTC 21(*Laycock*); and *Courtepatte* to argue that despite the absence of a specific definition of this concept in the *Code*, the courts have repeatedly interpreted it to represent the danger that "remains after the employer has taken all 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* to protect employees." According to the appellant, in this case the employer failed to take necessary preventive measures to reduce the danger or hazard to a residual level.

[32] Furthermore, with respect to the assessment of the reasonableness of the measures taken by the employer, the appellant argues that this assessment must take into account the seriousness of the hazard, noting on this point that this is what section 122.2 of the *Code* provides by imposing on the employer a hierarchy of preventive measures which prioritizes the elimination of hazards,

meaning in summation that "the greater the hazard, the greater the effort the employer must make to mitigate it"; this principle is also referred to as "high risk, low frequency", which applies in this case. Thus, according to the appellant, the fact that the possibility of a direct hit on an inmate is not frequent does not mean that the seriousness of the harm resulting from that hazard should be taken any less seriously. In this regard, the appellant refers to the Tribunal's decision in *Armstrong* that states that "[t]his principle is 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." Relying on the testimony and the report of the expert witness he called to show that a shot from the C-8 rifle was lethal if it hit any part of the victim's body close to an organ, the appellant concludes that such a hazard is very serious and cannot be eliminated by an employer that has not taken fully effective control measures, thus leading to the conclusion that this danger does not constitute a normal condition of employment.

[33] The appellant therefore concludes that the decision of the ministerial delegate must be set aside, that the Tribunal must find that the appellant was exposed at the time of his refusal to a danger that was not and is not a normal condition of employment and asks the Tribunal to issue any direction it deems appropriate.

B) Respondent's Submission

[34] At the outset, the respondent asked the Tribunal to dismiss the appeal since it agreed with the ministerial delegate's finding that there was no danger, namely that there was no reasonable expectation of a serious threat.

[35] As for the facts of this case, the respondent describes them by reviewing the testimony of the three witnesses presented by the appellant (Messrs. Bibeau, Lachapelle and Arnet), as well as that of the four witnesses presented by the respondent (Mr. Juneau, Ms. Emily Greenfield, Mr. Ferguson and Mr. Supprien), introducing all this by reiterating that a hearing before the Tribunal is a *de novo* procedure.

[36] Regarding the oral evidence presented by the appellant, the respondent repeats much of what was said by the appellant's witnesses in the examination-in-chief, making it unnecessary to repeat it in full below. The respondent notes, however, that correctional officer Bibeau, having mentioned the initial training and annual qualification in the use of the firearm, acknowledged that he had never had to use the firearm in the course of his duties and that, to his knowledge, there had never been any shot fired at an inmate in the SHU, since many other tools were available to the officers to stop the actions of inmates.

[37] The latter situates the moment of hazard he fears between the moment he visualizes the scene, takes a breath, looks into the sights and pulls the trigger for a shot at the non-stationary target, a moment he acknowledges is very short lived.

[38] According to witness Bibeau, with regard to identifying targets, it is possible to discern shadows through some of the glazed partitions in the dayrooms that are coated with a film (vestibule), without being able to identify more precisely. With respect to the testimony of the

appellant Lachapelle, the respondent notes that the witness acknowledged that the use of a firearm had never been necessary to control a situation involving inmates in the dayrooms at the SHU, given the other tools or means available (audible alarm, gas gun, etc.), and that, in his case, he never had to use a firearm in the course of his duties. The respondent also notes that the appellant Lachapelle confirmed that there was no reason for a floor officer to stand still in front of a dayroom window since floor officers move around and their passages in front of dayroom windows last only a few seconds, while the inmates, whose distribution in rows of cells is determined according to their compatibility or incompatibility, do not all find themselves in dayrooms at the same time. The respondent also points out that Mr. Lachapelle, who had claimed in his work refusal that the heatwave at the time affected the behaviour of the inmates and increased the possibility of an armed intervention, could not explain in concrete terms how these temperatures could increase the hazard, except to say that he felt a heavier atmosphere at the time, which he linked to the said extreme heat, and admitting that no firearms had been used to his knowledge during that period.

[39] With respect to the appellant's evidence of the ballistics expert witness Mr. Arnet, the respondent points out that this testimony was allowed by the Tribunal as to its necessity and relevance, despite the respondent's objection that the Tribunal should not give any weight to the expert's report or testimony since it was neither necessary nor relevant to the real issue in the case, as the respondent does not claim that whether the dayroom windows can withstand a bullet from the firearm is at issue. The respondent reiterates that the windows in question were not designed to withstand fire from either the current (C-8) or previous firearms. Noting that the expert's report sought to assess the potential strength of the thicker glazed partitions in the dayrooms based on several assumptions, including the type of partition used for some of the dayrooms (in the absence of being able to obtain from the respondent a sample of the window used), the respondent states that other types of glazed partitions, less thick than what is described in the expert's report, are also used for these dayrooms, and that therefore the tests described in the expert's report are speculative and have no probative value with respect to the issue in dispute.

[40] Regarding the resistance of the windows, the respondent added that the resistance tests conducted by the expert on the same glazed partitions to projectiles from the previous firearm (9 mm) did not demonstrate an ability to stop a bullet from a 9 mm rifle, which moreover the respondent did not claim in this case.

[41] Concerning the question of ricochets or bullet fragments that would be dispersed once the glazed partition was pierced, the respondent maintained that the expert did not come to any conclusion on this, although he had stated, with regard to the firearm in question, that [translation] "after impact on the corridor floor, high-velocity fragments of projectiles are projected at the level of a person's legs, and over a significant section of the floor space of the corridor", since quantifying the energy and dispersion of the fragments would require additional laboratory tests, whereas these same fragments emanating from a shot fired from the previous rifle (9 mm) would not have sufficient energy to perforate the skin. In light of the foregoing, the respondent submits that the evidence relating to ricochets and fragments was rejected at the hearing and, accordingly, the arguments made by the appellant in this regard should not be

considered.

[42] The respondent also argues that, contrary to the appellant's submissions, the expert made a number of admissions in his testimony regarding the usefulness of the floor tape in the corridor, since he recognized that respecting this demarcation reduced the area where a person could be directly hit by a shot, and that if a person is behind the demarcation line, i.e., close to the wall, the shot from the gallery would have to come from a higher angle. Since the evidence shows that gallery officers are trained to aim at the largest target, the centre of mass, and therefore typically the torso, the appellant's assertions that the ground tape is of no use are inaccurate, according to the respondent.

[43] Through its first witness, Mr. Juneau, the respondent explains the EIM for use of force in the SHU as it applies to correctional officers. This model requires that a correctional officer constantly assess and reassess a situation to determine the appropriate remedy in the circumstances. Among other things, his testimony focused on firearm statistics at the SHU and the statistical data table presented by the witness illustrates that no shots at inmates occurred at the SHU between April 1, 2015 and November 20, 2019, therefore demonstrating that handling firearms (loading, aiming, and firing warning shots) rarely occurs. According to the statistical tables presented by the respondent and commented on by the witness, the following data are specified, based on blocks of roughly similar dates that reflect relatively short periods of time. Thus, with respect to the use of firearms in what appears to be the vast majority of maximum security penitentiaries, for the period between April 1, 2012 and March 1, 2016, the use of firearms, i.e., a shot, occurred 28 times, in many cases using the C-8 rifle, and on several occasions the shot(s) came from a gallery and involved an incident in a dayroom. The table in question is particularly instructive as it states in summary:

> Total of 28 incidents involving 28 shooters over a 4 year period, 2 occurrences where the officer fired more than 4 shots, plus one possible at Donnacona. In the case of the Donnacona incident, 6 shots were fired by 2 officers, however it was not reported how many each fired. One of the confirmed cases where 5 shots were fired was with a 9 mm carbine which is [notably] quitter [sic] than a C8, which is likely a contributing factor as to why 5 shots were fired**. Only one incident occurred at the RRC/SHU (USD), and only one shot was fired**.

Furthermore, with regard to the table prepared by the same witness under the title "Use of the C-8 firearm - Special Handling Unit (SHU)" covering the period from April 1, 2015, to November 18, 2019, it shows eight manipulations of the C-8 rifle, six of which were indoors, involving two warning shots in the dayroom and two warning shots outside (yard) in addition to three actions of aiming the firearm at an inmate in the dayroom and one action of loading a round in preparation for a shot, again in relation to an incident in a dayroom. In comparative terms, the table in Exhibit 2B shows 44 uses of force at SHU for the period April 1, 2015 through June 30, 2018, including a number of manipulations of the various firearms available to the gallery officers, including one shot into the yard with the C-8 rifle. Finally, according to the same document, 104 incidents have occurred at SHU between April 7, 2015 and November 14, 2019.

[44] In this regard, the respondent strongly disputes the appellant's assertion that these statistics are unreliable, arguing that the appellant has not presented any concrete evidence to support his

claim, as the appellant's witnesses (Messrs. Bibeau and Lachapelle) have, on the contrary, confirmed the infrequency of the use of firearms.

[45] The respondent's witness, Ms. Greenfield, CSC Senior Design Coordinator, Facility Standards and Planning (FSP), explained that the technical standards for CSC institutions provide for four levels of protection for windows in institutions and that these standards require that only the windows in armed control posts (Level A) facing each other need be bulletproof and meet a set of standards and laboratory tests. According to the witness, the glazed partitions in the dayrooms serve more to protect staff from objects that might be thrown from the rooms by inmates and also to provide some noise reduction. The particular point of this testimony is that the glazing in the dayroom is not designed to stop bullets from a firearm, either the current one (C-8) or the one that was previously used at the SHU, among other reasons because if a shot is fired, it is directed into a space occupied by inmates and not at the windows, such a shot only occurring when the shooter is fully aware of those in the space, possibly including correctional officers. Witness Greenfield submits that she is not aware of any dayrooms in a CSC institution that have bulletproof glazing and that the installation of such glazed partitions would make it more difficult for floor officers to hear what is going on in those rooms. The introduction of the new firearm resulted in the upgrading of the glazed partitions in the armed Level A control points to ensure resistance to the projectiles of this firearm, which was not the case for the windows in the dayrooms as it was not required by CSC specifications. According to the CSC recommendations, the glazing in the dayrooms with access onto "supervised areas", i.e., including the circulation corridors for ground floor officers, was to be composed of 12.7 mm thick monolithic polycarbonate panels supported by a reinforced pane, which would not provide bullet-proofing capacity.

[46] Witness Greenfield also referred to certain documentation and correspondence filed as part of the ministerial delegate's investigation and that is included in the ministerial delegate's report in evidence in these proceedings. This correspondence appears to relate to exchanges that occurred in the course of considering a complaint from another employee (Vaillancourt, December 2016) in relation to the same issue raised in this case. One of the reasons given for the lack of bulletproof glazing in the dayroom is that the corridors on the ground floor cannot be considered as "posts", like the armed control posts that face each other and are thus exposed to fire from a control post, which makes the corridors equivalent to open areas such as the yards, gymnasiums or the like ("the corridor outside the dayrooms does not qualify as a post, and the entire should be treated in the same way that a gallery position overlooking an open area (such as a yard, gymnasium or other interior area) would operate in terms of line of fire, as well as hazard to staff and inmates when weapons are being discharged"), as well as the fact that despite the replacement of the old firearm with the more powerful C-8, this change "has not caused any change in the infrastructure requirements for the dayrooms or its glazing, as these areas were never designed or required to have ballistic resistance to any type of firearm CSC has ever utilized." It is also pointed out that if the C-8 rifle were to strike a glazed partition in a dayroom and ricochet, the injury hazard would be less severe than a direct hit: "it should also be noted that while there is this low hazard of ricochet, it is not on the same level of hazard as a direct shot for which level control posts are built. A 5.56 mm (C-8) projectile will lose a significant portion of its energy and mass on initial impact, and although it still carries enough force to cause injury, it is significantly reduced in comparison to a direct shot." As part of this documentation from

witness Greenfield, her March 14, 2018 report on gallery positions and angles of fire illustrates that the issue of missed shots and ricochets potentially posing a danger was not unknown to the employer with respect to the SHU. Thus, Ms. Greenfield states:

> … the gallery positions are full cages with an operable glazed door that swings into the gallery to permit voice and weapon intervention. This gives a full line of fire into the dayroom from two positions. The site has put tape on the ground outside the dayroom glazing across from one of the gallery positions to denote it as an« out of bound » area that they would feel would pose a danger from a missed shot or ricochet through the glazing to staff or inmates on the other side. FPS provided photos to NHQ Operational Security to provide review against weapons training and use of force protocols…

The significance of Ms. Greenfield's testimony is that the glazing in the dayrooms did not have to be bulletproof according to CSC's technical requirements, regardless of the firearm in question, and therefore there was no need to test for direct fire or even ricochet resistance.

[47] According to Regional Administrator Mr. Rob Ferguson, it was the end of the life cycle of the old firearm that led to the introduction of the C-8, allowing for the use of a single calibre throughout CSC institutions, which was decided in consultation with the RCMP. According to Ferguson, training for use of the firearm consists of 24 to 30 hours of initial training with a written and practical component, followed by additional annual training. Correctional officers must pass this training with a 70% score, which includes shooting at distances of 100 and 50 metres, whereas the distance in the dayrooms is only a few metres, which, according to the witness, ensures that an officer who shoots will hit his target. In this regard, the witness explained that a correctional officer is trained to shoot at the largest body target (centre of mass) and that if this is not possible, i.e., not safe, the officer must use another tool, including inflammatory agents, gas guns, impact ammunition, audible alarms and verbal commands. According to the witness, a correctional officer must use the most reasonable strategy and method and therefore, before using a firearm, must consider several factors, including the seriousness of the situation, the injury hazard, the presence of other people and all other activities.

[48] AWO Supprien presented an overview of how the SHU works. He explained that the SHU has five dayrooms, i.e., one per unit, each unit having two rows of nine single-occupancy cells for inmates who are pre-screened by intelligence officers based on a hazard and threat assessment. Inmates have access to the dayrooms twice a day for about an hour and a half, the maximum number of inmates per dayroom being nine when the SHU is at maximum capacity, which may not be the case, resulting in fewer detainees in a room at the same time. Two galleries overlook and provide a view of the dayrooms, which also have cameras monitored by a correctional officer. On the ground floor, four officers conduct security patrols, official counts of inmates, cell and inmate searches, escorts and meal distribution. These officers, as well as the gallery officers, have radios to communicate with each other. In the centre of the dayroom floor is an armed control post staffed by a correctional officer who controls access to the floor and ensures that movements around the dayrooms are safe. The circumstances of the use of a firearm are governed by post orders that provide that "no deliberate shot shall be fired at an individual to prevent death, serious bodily harm or escape unless there are no other less drastic means of

responding, unless the action taken has been unsuccessful, or unless other actions are not the safest and most reasonable response under the circumstances." Central to Mr. Supprien's testimony and to the dispute is a memo he issued in February 2018 (3092-1), in response to concerns raised by the officers' union regarding the fact that the glazed partitions surrounding the dayrooms were not bulletproof. This memo instructs correctional officers to stay away from dayroom windows or doors when and as long as a dayroom situation is not under control. The witness indicated that a line (tape) was placed on the floor as a precautionary measure to prevent correctional officers from standing in front of the glazed partition in an emergency situation. The memo also reminds officers to wear employer-supplied safety equipment, including radio transmitters, and to check communication devices, cameras, alarms and sirens when they take up their posts.

[49] Upon the conclusion of this evidence, the respondent reiterates that the issue is whether the ministerial delegate's determination of no danger was well founded, in light of the definition of "danger" in subsection 122(1) of the *Code*. As the appellant had done, the respondent argues that the determination of this issue must be based on the analytical grid established by the Tribunal in its *Ketcheson* decision which, once the hazard (activity or situation) has been identified, requires a determination of whether the hazard could reasonably be expected to pose an imminent or serious threat to the life or health of the person exposed to it, and subsequently, whether that threat will exist before the hazard is eliminated (the situation corrected or the activity modified), and then whether it is a normal condition of employment.

[50] In application of the analysis grid mentioned above, the respondent identifies the hazard to be analyzed as the threat of being hit by a shot from a gallery officer when he (the appellant) is located on the floor surrounding the dayrooms of the SHU. This being the case, and again applying the said analysis grid, the respondent submits that the said hazard cannot (or could not) be reasonably expected to pose an imminent or serious threat to the life or health of the person exposed to it, in this case the employee who invoked this hazard as a reason for work refusal, Mr. Lachapelle.

[51] With respect to the imminent threat, and although a careful review of the appellant's representations clearly illustrates that he made no claim of such imminent threat, the respondent nevertheless argues that at the time of his work refusal, the appellant Lachapelle was not facing any imminent hazard (threat). According to the respondent, Mr. Lachapelle argued that the alleged situation had been going on for several years (the work refusal refers to a situation "that has been going on at SHU since May 2015"), whereas no shot aimed at an inmate in a dayroom had occurred either during that period (date of the work refusal: July 16, 2018), or subsequently. The respondent also relies on the fact that although he mentioned excessively hot temperatures at the time that could affect the behaviour of the inmates, the appellant did not present any objective or tangible evidence to show how such temperatures could have caused such an imminent hazard (presumably the respondent means "threat"), nor did he present any evidence of an incident involving the use of a firearm caused by such excessive heat. On this basis, the respondent concludes that there was no imminent threat in the situation described in the work refusal.

[52] With respect to the second element of the analytical grid, namely whether the hazard presents the probability of a serious threat to the life or health of the person exposed to it, the respondent argues that it does not. The respondent introduces its argument on this point by asserting that the appellant bases his argument in this regard primarily on the fact that a shot fired by a correctional officer is theoretically possible and on the lethal nature of firearms. According to the respondent, this situation of fact is the same for any situation where employees are entrusted with firearms. The real issue, according to the respondent, is not whether a shot at an inmate is likely ("vraisemblable"), but rather whether it is **reasonably** likely ("raisonnablement vraisemblable") that a correctional officer behind the glazing of the SHU dayrooms would be hit by a bullet fired from the gallery over the dayrooms, a question to which the appellant must demonstrate that the hazard represents more than a hypothetical situation. The respondent acknowledges that it is not necessary for the appellant to demonstrate precisely when the hazard will materialize but submits that he must still prove that there is a **reasonable** probability that it will occur, basing its argument on the words of the Tribunal in *Zimmerman* v. *Correctional Service of Canada*, 2018 OHSTC 14 (*Zimmerman*): "I agree that it is not necessary to establish precisely when the future hazard, condition or activity will happen, but it is, however, necessary to demonstrate the probability that the hazard identified by the appellant is more likely than not to materialize." The respondent submits that the appellant's evidence in this case does not support a finding that it is more likely than not that the hazard evoked will materialize in the coming days, weeks, months or years. For this to be the case, the respondent submits that all of the following circumstances must be concurrent:

> - that the preventive measures established to minimize inmate conflict, including triage and grouping by compatibility profile, as well as other measures to minimize violent situations in the dayrooms (including searches) have not worked;
>
> - that in the event of a violent confrontation between inmates despite the above measures, all other tools available to officers (verbal commands, audible alarms, inflammatory agents, impact ammunition, warning shots) have not been successful;
>
> - that the use of the firearm is the safest and most reasonable measure to resolve the situation in such a case, in accordance with applicable post orders and guidelines;
>
> - that the gallery officer did not perceive the presence of a person behind the glazed partitions of the dayrooms before firing, despite his obligation to look before firing;
>
> - that the gallery officer missed his target (inmate) despite his training, which is based on shooting at a long distance, whereas the target in the dayroom is only a few metres away;
>
> - that at the precise moment the gallery officer fires and misses, another employee is directly behind the glass and in his line of fire, despite the fact that there is little movement of personnel in the corridors, which are controlled by the control post, that correctional officers are equipped with radio transmitters to communicate with each other, that there is an alarm system to warn them, that there is a directive to stay away from the windows when a situation occurs, a directive backed up by floor tape; and

- that the projectile hits the person situated behind the glazing in the dayroom.

[53] In the respondent's view, each of these circumstances, taken in isolation, is unlikely, and the hazard of them all occurring concurrently is entirely hypothetical. Accordingly, the respondent submits that the evidence shows that there is no danger and, consequently, that the hazard alleged by the appellant is neither an imminent nor a serious threat. Rather, it is a hypothetical situation that does not meet the threshold of a danger under the *Code*, since there is no reasonable probability of concluding that the alleged hazard will materialize in the coming days, weeks, months or years. The alleged situation is not probable. With respect to the appellant's arguments regarding the change of firearms, the respondent questions the relevance of these arguments to the issue at hand, as the glazing in the dayroom was never designed to stop firearm projectiles of any calibre.

[54] With respect to this change, the evidence demonstrates, according to the respondent, that CSC has exercised due diligence. Consultations were held with the RCMP regarding the change and upgrades were made to the control posts that are designated as bulletproof, while the glazing in the dayroom was not upgraded because it was not designated to be bulletproof according to CSC technical specifications. As for the calibre of the projectiles for the new firearm, it was chosen because tests showed the tendency of these projectiles to remain in the body of the target, which the respondent presents as safer, obviously in the event that the target is hit. The respondent also adds that the notion of "high risk, low frequency", on which it claims the appellant bases his reasoning, cannot be applied to the determination of the very existence of a danger within the meaning of the *Code*, thus echoing the words of the Federal Court in *Martin-Ivie* v. *Canada (Attorney General)*, 2013 FC 772, to the effect that "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. Moreover, in applying this principle, the required analysis under the *Code* necessarily involves consideration first of whether a "danger" exists and then, if so, consideration of whether such "danger" is a normal condition of the employee's employment." The respondent therefore claims that this concept has no application in this case since the alleged hazard does not meet the definition of danger because there is no reasonable probability that it will materialize.

[55] In view of the respondent's conclusion that the said hazard does not constitute a danger, the respondent does not deem it necessary to consider the third element of the analysis grid, namely, whether the threat to life or health will exist before the situation is corrected, the activity modified or the hazard eliminated. However, notwithstanding this assertion, the respondent argues secondarily that any alleged hazard in the appellant's work refusal is reasonably set aside, based on the equipment, training, and guidance provided to correctional officers and other measures taken by CSC. Relying on the words of the appeals officer in *Zimmerman* to the effect that "[t]he task of the employer is to provide systems and equipment to its employees that will reduce to the highest degree reasonably possible that hazard", the respondent submits that the evidence shows that the employer provided a multitude of equipment to its employees in order to minimize the alleged hazard, including alarm systems, radio transmitters and intermediate weapons. In addition, correctional officers receive training, guidelines has been issued by the employer to stay away from glazed partitions in the event of a situation in the dayrooms, access to the corridor is controlled by the control room and cameras monitored by the officers are

installed in the dayrooms. The conclusion to be drawn from the foregoing, according to the respondent, is that any alleged hazard is thus reasonably set aside.

[56] The respondent also notes that in his written submissions, the appellant requests that the C-8 rifle be replaced with a firearm of a calibre (ammunition) that would be harmless after the projectile passes through the glazing of the dayroom, a request that diverges from the wording of the work refusal where the appellant requested "to proceed with the replacement of the dayroom windows." The respondent recalls that its witness Ms. Greenfield explained that the dayrooms were not designed to have bulletproof glazing, that such glazing meeting CSC specifications would be very thick, would require extensive work and would cause problems, particularly in terms of the ability to hear what was happening in the dayrooms. Such a solution would therefore be unrealistic, as would the change of firearm also requested by the appellant, as correctional officers have been trained for several years to use a single firearm, the calibre of which was chosen after consultations. Moreover, the respondent argues that the report from expert witness Arnet does not demonstrate that the existing glazing around the dayrooms, which vary in thickness, would stop a projectile of a different calibre.

[57] In conclusion, the respondent argues that the appellant's work refusal constitutes an abuse of process because, at the time of the refusal, Mr. Lachapelle was not under imminent threat but rather frustrated by the employer's failure to respond to his concerns about the C-8 rifle. In support of this argument, the respondent relies on the Tribunal's decision in *Canada* v. *Aldred*, 2019 OHSTC 11, specifically citing the following: "[t]he *Code* is not designed for: "If I can't get what I want in the workplace, I will try the appeals officer"," to conclude that the work refusal mechanism contained in the *Code* should not be used to force resolution of a problem or where an employee is upset by the lack of response to concerns. The respondent argues, based on *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424, that a work refusal is an emergency measure, a tool available to the employee when faced with a situation that could cause injury or illness before the situation is corrected. The respondent argued that the situation described in the refusal was not suitable for the said emergency procedure, since, according to the appellant, it had been ongoing for "several" years and had also been the subject of another remedy under the *Code* (a complaint under section 127 of the *Code*), as well as discussions with the employer on the issue of the floor markings. Noting in passing that a union representative had assisted the appellant in drafting his notice of work refusal, the respondent argues that the refusal action was a calculated procedure rather than a true emergency measure. The respondent also submits that the appellant's allegation that the extremely hot temperatures increased the potential for armed intervention, in the absence of any evidence other than impressions that these temperatures could create a danger in the situation, was merely a pretext for invoking a refusal to work in a situation with which the appellant Lachapelle had long been familiar, and which thus constitutes an abuse of process.

[58] The respondent concludes from all of the foregoing that the appeal should be dismissed, and the ministerial delegate's decision of no danger upheld.

C) Reply

[59] The appellant focuses his rebuttal only on those aspects of the respondent's representations that he believes to be unsound or erroneous. Thus, the appellant believes that the respondent's contention that the appellant's appeal represents an abuse of process is unsound in both fact and law. To begin with, the appellant argues that he initiated his action on the issue in question by registering a work refusal under section 128(1) of the *Code*, which was followed by the filing of an appeal under section 129(7) on the same facts, which is the normal course under the *Code*. In this sense, the appellant argues that there is no evidence that this is an "nth" appeal or that his intentions are to undermine the spirit of the *Code* or the integrity of the justice system. The appellant recalls that in the Tribunal's decision in *Schmahl* v. *Correctional Service of Canada*, 2017 OHSTC 3, where abuse of process was alleged in relation to a challenge to the process of issuing and monitoring razors to inmates, which was a long-standing issue and where several work refusals had been invoked by the employees involved, the appeals agent had declined jurisdiction, stating:

> [91] ... given my preceding conclusion, it is not necessary for this appeals officer to consider this particular matter, if only because doing so would be exceeding my jurisdiction under the *Code* and would be usurping the role of a party to the work place. In clear, under the *Code*, specifically section 147.1, an employer may exercise its disciplinary authority against an employee where the employer can demonstrate a wilful abuse of rights by the said employee once all investigations and appeals have been exhausted by the employee who has exercised his refusal rights under sections 128 and 129, with the validity of such disciplinary action being subjected to examination in a forum different from the one offered by an appeals officer.

[60] The appellant adds that, contrary to the respondent's contention, nowhere in his complaint or in his submissions in support of it did he argue that the hazard he claims to be or to have been exposed to at the time of the work refusal was an imminent threat, nor was his motivation limited to his frustrations with the situation. For the appellant, his reference to the extreme heat on the day of the refusal and for several previous days illustrated a greater likelihood of altercations between inmates. His reference to the union's approaches towards the employer and with respect to his concerns was intended to provide context, not pretext. Moreover, unlike the fact that timing must be well circumscribed where an imminent threat is alleged, where a hazard is alleged that can reasonably be expected to present a serious threat, as the appellant claims, the identification of timing is only of relative importance. What the employee must consider at the time of refusal is whether he is exposed to the hazard and whether the hazard is likely to pose a serious threat to his life or health, which is submitted to be the case here.

[61] The appellant believes, contrary to the respondent's contention, that the testimony and report of the forensic ballistics expert Mr. Arnet are relevant and reliable. Mr. Arnet, as a specialist in terminal and lesion ballistics, assessed the potential for fatality or injury with the C-8 firearm in the most conservative scenario, that is a direct hit to the windows looking into the control room corridor, with the clear result that "the shot is lethal." With respect to the injury potential of ricochet ammunition fragments, as the expert was unable to demonstrate this in practice, the appellant argues that Mr. Arnet simply explained a principle of ballistic injury that when a leg is hit by a ricochet, the injury may be lethal. With regard to the expert's report on the service firearm formerly used at the SHU (Colt 9 mm), the appellant notes that the expert's

report states that a shot through the window is less dangerous, hence the appellant's assertion that the employees were better protected with the old firearm and that, consequently, a firearm of lesser calibre than the C-8 could prove to be an effective solution to the problem raised in this case.

[62] Finally, the appellant wishes to rectify certain facts put forward by the respondent. Thus, with respect to the application of EIM, the appellant recalls that the witness Mr. Juneau for the respondent was explicit that there is no need for a gradual or hierarchical use of the means entailed in EIM, testifying that, depending on the assessment of the hazard, a situation could require the use of a C-8 shot without a prior warning shot and that, consequently, according to the appellant, it is false to claim that there is a predefined order or hierarchy to follow. In addition, although all correctional officers have a radio as a mitigating measure, in an emergency situation, this measure is of little help in the early stages of an occurrence since, due to the sharing of the airwaves, radio silence must be requested first.

[63] The appellant challenges the respondent's assertion that the principle of "high risk, low frequency" does not apply to the determination of the existence of a danger and therefore does not apply in this case. On the contrary, the appellant submits that this principle is applicable to the question under paragraph 128(2)(b) of the *Code*, namely, whether the danger is a normal condition of employment, since the Tribunal must determine whether the employer has effectively exercised all control measures in order to assess whether the danger remains. In this regard, he recalls the Tribunal's decision in *Wilkins* v. *Correctional Service of Canada*, 2016 OHSTC 7, recalling the importance, according to the Federal Court, of assessing the effectiveness of mitigation measures: "In *Union of Canadian Correctional Officers* v. *Canada (Attorney General)*, 2008 FC 542, the Federal Court ruled that it is not enough for the appeals officer to look at the mitigation measures CSC has in place to eliminate or control the hazard in question. The appeals officer must determine the effectiveness of these measures." According to the appellant, this "high risk, low frequency" principle applies to mitigation measures, which are intended to prevent the serious consequences of a hazard, regardless of the probability of occurrence. Thus, according to the appellant, in this case it cannot be concluded that the employer has taken all necessary steps to effectively eliminate, reduce or control the danger and that, as a result, the danger raised is not a normal condition of employment.

[64] The appellant therefore requests that the Tribunal set aside the ministerial delegate's finding of no danger, declare that in the circumstances the appellant was exposed to a danger within the meaning of the *Code* on July 16, 2018 that is not a normal condition of employment, and issue any direction it deems appropriate.

Analysis

[65] On July 16, 2018, appellant Lachapelle, employed as a correctional officer I at the SHU, part of the Regional Reception Centre at the Sainte-Anne-des-Plaines Correctional Complex of the Correctional Service of Canada, relied on section 128(1) of the *Code* to invoke a refusal to work due to a danger to which he claimed to be exposed in his workplace.

[66] For the sake of precision and understanding the essence of the appellant's approach, it is useful to quote the salient parts of the statement of work refusal to illustrate what the appellant presents as the essential elements of his claim of danger, that is, the hazard or threat to which he felt he was exposed. Thus, referring to the deployment at SHU in May 2015 of a new firearm (C-8) to replace the old 9 mm rifle, the work refusal statement asserts that the C-8 rifle "was implemented without any additional safety measures even though it is much more powerful than its predecessor", this greater power of the new firearm having, moreover, been established in evidence and in no way disputed. Endorsing the assertions made by another correctional officer regarding the strength of the windows in the dayrooms, the appellant also asserts that "the windows in the SHU dayrooms [are] not strong enough to stop a bullet fired from the gallery," which was established in evidence at the hearing and admitted by the respondent. The appellant adds that "this situation poses a life-threatening danger to officers who may be stationed on the main floor... this danger is present on a daily basis and can occur at any time."

[67] The appellant's reference to the assertions of another Labour Affairs, Health and Safety officer (Olivier Gadoua, April 25, 2018) made in the context of his handling of a complaint by another correctional officer (Vaillancourt), serves to demonstrate that this is not the first time the issue raised by the appellant's refusal has been under consideration. Thus, as part of the documentation in evidence, Officer Gadoua's communication with the Acting Assistant Director, Corporate Services, of the Regional Reception Centre, clearly characterizes the issue raised by the appellant in this case. Officer Gadoua states:

> [Translation] As we found during our site visit, employees are still exposed to the possibility of being hit by direct fire or ricochet. Despite the addition of tape to the floor, which mitigates the risk of being hit, the risk remains and the severity associated with it is very significant. An officer could be seriously or even fatally injured if hit by a projectile. It is, after all, the detention facility with the most dangerous inmate population in Canada, where situations requiring the use of the C-8 can arise at any time.

[68] It seems clear from Officer Gadoua's comments that he felt that modifications should be made to the glass in the dayrooms and that the employer had a responsibility to assess the hazards associated with switching to a more powerful firearm:

> [Translation] Based on the written submissions of Mr. Ferguson and Ms. Greenfield (both witnesses for the respondent in this appeal), it does not seem clear what modifications would need to be made to the glazing of the SHU dayrooms to make it resistant to bullets or ricochets from C-8 rifles. It is also unclear whether they could withstand a ricochet in their current state. It is the employer's responsibility to assess the risks when a change occurs: for example, a switch to a more powerful rifle. This can affect many aspects of employee health and safety. For example, acoustic levels, but also the solidity of the materials that were no doubt chosen and installed according to an older, less powerful firearm.

[69] On reading the foregoing, it is clear that the danger or hazard alleged by the appellant is an amalgam of the elements previously mentioned, and it is also clear that it is this amalgam that was at the heart of the assessment made by the ministerial delegate in this case. It is useful to point out that the statement of refusal as well as the evidence and the appellant's arguments

speak of a “shot” hitting the officer through the window, not a “direct” shot at the window.

[70] It is also important to note that evidence has been brought that in his shifts at the SHU, the appellant is regularly stationed on the ground floor and also regularly stationed on the gallery, armed with the said C-8 rifle. It is also important to state at the outset that on the evidence and arguments presented by both parties, and given the admission that the glazed partitions in the dayrooms facing the corridors are not bullet proof, there has been no contention that a shot per se through a glazing in a dayroom that strikes a correctional officer on the other side of said partition, in the absence of all the mitigation, training, protective, operative or other factors that the parties have dealt with extensively in their evidence and argument, might not injure or even kill the said officer. However, everything hinges on the notion of the likelihood or reasonable expectation of the occurrence of the shooting situation resulting in an imminent or serious threat, i.e., harm, in light of the presence of these elements, in whole, in part or not at all. The ministerial delegate concluded that while it was **plausible** that such a shooting situation could occur, the real issue was the **likelihood** of such an occurrence, which she associated more with a **possibility** than with a reasonable **probability**, thereby appearing, as noted above, to give different meanings to terms that are essentially synonymous.

[71] In his work refusal, the appellant claimed the existence of a danger that he equated with the absence of bulletproof protection for the dayroom windows of the SHU in the face of a shot from a firearm by a correctional officer posted on the observation and surveillance gallery overlooking the said rooms, such a shot occurring under the circumstances of such observation and surveillance. In addition to the type of glass in the said rooms and of the firearm involved, the analysis of the dangerousness of such a threat, whether imminent or serious, to use the terminology of the definition of “danger” in the *Code*, requires consideration of a number of factual and documentary elements of proof, as well as arguments that, although presented by opposing parties seeking to support opposing points of view, are in many cases far from contradictory and often even complementary. I am thinking in particular of the kind of place the SHU is, and the nature of its occupants, the resistance capacity of the dayroom glazed partitions/windows, the superior power of the firearm involved (C-8), the means, tools, procedures and protocols in place for the purpose of prevention and protection, the multiplicity (or lack thereof) of incidents and interventions in the dayrooms and the use (or non-use) of the firearm, to name but a few, so much so that there will be no need to return to this in great detail in what follows.

[72] Faced with the definition of “danger” in the *Code*, the central notion of which is the **reasonable expectation** that a situation, activity or hazard may present an imminent or serious threat, the Tribunal developed an analytical grid in its *Ketcheson* decision, which has been applied generally by appeal officers and commented on extensively in subsequent case law. It is useful to recall how it is set out in three points or questions (without omitting the one subsequently referring to the normal condition of employment) in the said *Ketcheson* decision:

> 1- What is the alleged hazard, condition, or activity?
> 2- Could this hazard, condition, or activity reasonably be expected to be an imminent or 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 condition can be

> corrected, the activity altered or the hazard removed, as the case may be?

[73] Before commenting on the meaning of "imminent" and "serious", the appeals officer in *Ketcheson* was careful to explain what he meant by the word "threat" in both the analytical grid and in the definition of "danger" in the *Code*:

> [198] In the New Shorter Oxford 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.

In this regard, it is useful to note that the Tribunal in *Margo MacNeal* v. *Correctional Service of Canada*, 2020 OHSTC 7(*MacNeal*), combines the definition of the term "**threat**" in *Ketcheson* with the meaning given to the term in Le Petit Larousse illustré: [translation] "word, gesture, act by which one expresses the will to harm (someone)" and "sign, indication that leads to an expectation of danger" and in Lee Petit Robert [translation] "sign indicating what is to be feared from something."

[74] In light of the foregoing, the appeals officer in *Ketcheson* considered the meaning of imminent threat and serious threat as follows:

> [205] An imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[75] With respect to a serious threat, the *Ketcheson* decision states that such a threat

> [210] ... is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). Something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[76] In *Keith Hall & Sons Transport Limited*, the Tribunal also considered the meaning of "imminent threat" and "serious threat", this time with attention to the meaning of "reasonable expectation" in light of what was then a recent amendment to the definition of "danger" in the *Code*, the previous version of which used the terms of reasonable expectation "likely" in relation to the causation of injury or illness. Thus, initially, the appeals officer in the said decision states

that it "also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former 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 [**therefore, that the hazard will materialize and cause injury or death**]. 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."

[77] From the above considerations, the appeals officer in the above-named decision determined that:

> [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.
>
> [emphasis added]

[78] One point is clear from the foregoing, which follows from the use of the term "vraisemblable" in the French version of the definition of "danger" in the *Code* and the expression "reasonable expectation" in the English version, and which is based on long-standing Tribunal case law and has not been challenged herein, namely, that in order to reach a conclusion of "danger" it is not necessary to find that the hazard has occurred, but that it is reasonably expected to occur. In this regard, the Appeals Officer in *Nolan et al*. states:

> [61] Given that the *Code*'s definition of danger is based on the concept of reasonable expectations, the mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat. There must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the alleged hazard, condition or activity.

[79] The appeals officer adds as to the analysis to be done:

> [62] The determination of whether the materialization of the threat is a reasonable possibility as opposed to a remote or hypothetical one, is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is examined. It involves a question of appreciation of facts and passing judgment on the likelihood of occurrence of a future event. In my view, an acceptable way

> to make this determination is to ask the following question: would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is likely to occur?

It is clear from the above that the meaning of the term “reasonable expectation” in application to particular facts, situations or circumstances is often fraught with difficulty, since distinctions are made when, in its etymological sense, "reasonable expectation" is associated with “plausible”, “possible” and “probable.” In my view, while I do not disagree with the criteria set out in *Nolan et al*., the exercise becomes somewhat futile when it consists of attempting to make distinctions by giving different meanings to terms that have essentially the same meaning, when in reality the only question to be asked is "is it likely or not?” and, with respect to the English version of the definition, “can it be ‘reasonably expected?’” without imposing a criterion of assurance or certainty of its occurrence. In this regard, I find it necessary to clarify that the expression “raisonnablement vraisemblable” used by the respondent to describe the threshold to be met for facts or situations to reach the level of imminent or serious threat represents a reductive approach that does not meet the criterion set by the *Code*, namely that of “vraisemblable” [“reasonably expected” in the English version of the *Code*].

[80] As the legal or jurisprudential framework in which the question raised must be considered has been defined by the foregoing, I will refrain, at this juncture, from considering whether what has been raised by the appellant could, based on the evidence, constitute an imminent threat, despite the fact that the respondent has presented arguments on the subject and claimed that this is not the case, for the simple reason that one could deduce from the report of the ministerial delegate, and certainly conclude even more clearly from the explicit statements of the appellant in his written submissions to the undersigned, that his only contention was that the facts and circumstances invoked in evidence as well as his argument were intended only to establish the existence of a serious threat. In this regard, and at the hazard of repeating myself, I would add that in order to conclude that there is a serious threat, as specified in the case law of the Tribunal and more specifically in the *Ketcheson* decision to which I have referred extensively in the preceding pages, one must consider both the hazard and the seriousness of its consequences, but that the occurrence of the hazard or situation is not essential, only the reasonable expectation that it could occur.

[81] That said, for the purposes of deciding the issue on appeal, I have considered both the evidence emanating from the very comprehensive investigation report of the ministerial delegate filed in evidence and the evidence submitted by the parties, all of which is extensively reported in the foregoing text, making it unnecessary to repeat it in detail at this stage of the analysis. In addition, I have also considered the comments of Labour Affairs Officer Gadoua regarding what has been referred to herein as the investigation of the Vaillancourt complaint, all of which was included in the investigation report of the ministerial delegate in evidence in this proceeding, and which, drawing on the writings of Mr. Ferguson and Ms. Greenfield, witnesses to this appeal, and in language seeming to indicate the need for changes to the glazed partitions in the SHU dayrooms, stated: “It is the responsibility of the employer to assess the hazards when a change occurs: for example - the change to a more powerful rifle. This can affect many aspects of employee health and safety, such as noise levels, but also the strength of materials that were

probably chosen and installed with an older, less powerful firearm in mind."

[82] With respect to the witness for the respondent, Mr. Supprien, his long service from CO I to his present position as AWO-SHU enabled him to present a full picture of the composition of the SHU, the day-to-day duties of the officers assigned to it and in particular the duties performed by the gallery officers. He specifies in passing that during interventions, these duties must be carried out with the aim of causing the least damage possible and must therefore be adapted to the particular circumstances of a situation to be as safe and reasonable as possible. In the case of a gallery officer, this means using less drastic means of control than the ultimate or last-resort measure of firing a firearm at an individual, unless the circumstances are such that there are no other safe and reasonable measures; this serves to confirm the fact that the range of measures and means at the disposal of officers enumerated by witnesses from both parties, including the progressive stages of intervention by the EIM, are not hierarchically ordered, and that, depending on what the circumstances require and within what is admittedly a very short period of time, direct escalation to the use of the firearm may be applied. As for movements or transitions in the corridor, which mean having to pass in front of the windows of the five dayrooms, his evidence established or confirmed that officers regularly move through the corridor during their shift for various purposes such as security patrols, escorts, searches or communication with inmates, but also freely and for no particular reason. The AWO-SHU stated that passing in front of each of these glazed partitions takes a very short period of time, which the witness estimated at one to two seconds each, and concluded that, apart from emergency situations requiring rapid intervention, the floor officers, of whom there are six per shift, regularly pass in front of these partitions.

[83] In addition to the foregoing, Mr. Supprien's testimony is of particular interest because he was at the origin of the local safety bulletin for the SHU to place coloured strips of tape on the floor in front of the glazed partitions of the dayrooms to mark out safety zones that correctional officers should not go beyond in the event of probable use of the C-8 firearm. This testimony is of particular interest for many reasons. First, the said bulletin is based on the erroneous premise that "recent tests (had shown) that the glazed partitions of the dayrooms provide resistance to the impact of a 5.56 calibre (C-8) bullet," a premise that was corrected during his testimony when the witness admitted that, on the contrary, the said glazing was not bulletproof and therefore did not provide this resistance. Secondly, the witness acknowledged that he had not carried out any consultations prior to the introduction of the measure and that no tests or expertise had been carried out to determine the effectiveness of the preventive measure (floor tape), suggesting that this measure was unique to the SHU since the witness indicated that he did not know whether such a measure existed elsewhere in another penitentiary.

[84] Furthermore, confirming that one of the functions of the floor officers is to possibly intervene in the dayroom during incidents, the witness stated that when the emergency siren sounds to signal an incident, the correctional officers have the reflex to go and see what is going on, thus approaching the situation and, in so doing, the windows. Based on his own experience, AWO Supprien pointed out that correctional officers always tend to go to the dayrooms when a situation arises, which explains why he had issued the local security bulletin. However, the witness simplistically stated before the Tribunal that since correctional officers must react quickly on the floor, it is possible that, in their activation, the said officers may not pay attention

to the tape strips on the corridor floor in front of the dayroom windows, certainly raising doubts as to the effectiveness of this measure, given that, in the event of a need to intervene, radio silence is the norm, and especially, if one relies on the expert witness Arnet's report concerning the exposure of the officers in the corridor, stating that: "the delineated (taped) area on the floor in the corridor section provides no protection to personnel from potentially lethal fire. When outside this zone (thus outside the tape demarcations), it is (also) possible to hit an individual from the torso down in zone A and from head to toe in zone B," these two zones being illustrated by photos in the expert's report.

[85] With respect to expert witness Arnet, although recognized as such by the Tribunal at the opening of the hearing despite the respondent's objection based on the usefulness and relevance of such testimony, at that time still to come, the respondent reiterated the said objection in its written submissions. The respondent reiterated that no weight should be given to the report and evidence in the examination-in-chief of the said witness, as it was neither necessary nor relevant to the real issue in question, since the respondent was not taking the position that the glazed partitions in the dayrooms would withstand a bullet from the firearm, as they were not designed to offer such resistance, either for the C-8 rifle currently in use or for the previous firearm. In short, according to the respondent, since the employer admits that the glazing in the dayrooms was not designed to withstand a shot from either the present or the previous firearm, the expert's testimony would no longer be useful and would have no probative value with respect to the issue in dispute. In my view, this approach or understanding falls particularly short of what the issue of the work refusal is. One only has to read the wording of the refusal to realize that the issue at stake is more than whether the glazed partitions of the SHU dayrooms are bulletproof and note that the issue is about a less powerful firearm (9 mm), used until it was replaced by a more powerful firearm (C-8), that the glazed partitions of the SHU dayrooms are not strong enough to stop a bullet fired from the gallery, and that this situation (the introduction of a more powerful firearm) poses a mortal danger to the officers posted on the ground floor, the differentiation in the higher-powered C-8 raising the question of whether a shot from the old firearm (9 mm) from the gallery, given that the glazed partitions have remained unchanged, presented the same potential for harm. These are interrelated questions raised by the refusal, either directly or by implication, to which an expert in ballistics and ballistic injury can provide answers on the basis of knowledge not available to the Tribunal and taking into account the fact that the respondent did not provide any further details that would have served to challenge the substance of the expert's conclusions. The respondent limited its arguments to the fact that the windows are not bulletproof because of CSC's technical specifications and that the C-8 firearm was adopted in consultation with the RCMP, which, in the opinion and to the knowledge of the undersigned, does not have a specific mandate in the area of occupational health and safety and prevention that would add any weight, in this case, to the statement to that effect made by the witness Ferguson for the respondent.

[86] There is no doubt that the testimony of expert witness Arnet represents a statement or testimony of opinion which, therefore, even if the Tribunal is acting in administrative matters and therefore is not bound as rigorously as the courts to observe certain rules of evidence, should meet certain criteria. In this regard, Macaulay & Sprague, in the third edition of "Hearings Before Administrative Tribunals," state the following (p.17-13):

> In a hearing an expert performs one, or both, of two functions. The expert explains how something works or operates and thus renders the complex understandable, or the expert offers opinions on matters beyond the knowledge of the layman, which opinions can serve as a form of proof of the thing in question.
>
> Obviously, as an administrative agency is not bound by the rules of evidence, the same strict standards do not apply to the admission of expert evidence as apply in judicial proceedings. In fact, since many agencies themselves are subject experts, if the rule were applied strictly, expert evidence would be received even less often than in courts.
>
> Agencies can accept opinion evidence of laypersons—subject to weight considerations, it follows then that they can also accept the evidence of experts as opinions—without complying with the same criteria as the courts must follow.
>
> But in accepting expert evidence, the agency should ask the purpose for which it is doing so. If the expert evidence is being admitted for the same reason as a court (i.e. because the issue is beyond your ability to understand unaided) then the agency may wish to adopt (the) same cautious approach as the courts in use of that evidence. If, for example, the decision-maker is going to make a particular finding on the basis of simply the word of expert A, the decision-maker should be satisfied of expert A's expertise, otherwise the decision may be built on quicksand. After all, if Expert A is not an "expert" in the judicial sense, why take his or her word over anyone else's.
>
> "Expert evidence" (is) an exception to the judicial rule against the receipt of opinion evidence. Expert evidence (can) be received by the court essentially because the issue on which the opinion (is) being given (is) beyond the ken of ordinary people.
>
> In a court, expert evidence can only be received in limited circumstances. Four general criteria have to be met before the opinion of an expert may be admitted into evidence in proceedings. The evidence
> -must be relevant,
> -must be necessary,
> -must not be excluded under some other exclusionary rule, and
> -the expert must be properly qualified.
>
> The judicial standard for admission is fairly strict. It is not sufficient that the expert evidence is merely relevant or helpful—it has to be necessary.

[87] It is on the basis of the criteria set out above that the undersigned, at the opening of the hearing, conferred the status of expert in forensic ballistics on Mr. Arnet and that he reiterates it at this stage of the appeal, as much for the expertise demonstrated as for the relevance, usefulness or necessity and the evidentiary value of the testimony/opinion presented by the witness, both verbally and in his expert report. I would also add, as noted above, that the respondent has not presented any evidence that would seriously contradict the validity of the expert witness Arnet's conclusions. Although Mr. Arnet's evidence is opinion evidence, it is opinion informed by both the witness's experience and his knowledge of the particular location and the conditions involved, and therefore constitutes a persuasive opinion, the value of which is not diminished by the arguments made by the respondent.

[88] Without wishing to repeat in full the elements of the expert report, it is important to underline the following points established therein:

-shots were fired in the laboratory with two firearms, one equivalent to the C-8 and the other similar to the earlier 9 mm rifle, in both cases using the same ammunition as that used for these firearms at the SHU, the aim being to test the capacity of the installations to contain a shot fired inside a dayroom;

-the shots were fired with a downward trajectory at a maximum angle of 40 degrees in a shouldered position to mimic a shot from a gallery and directed at part of a dayroom glazed partition;

-the expert had visited the SHU, and to reproduce the glazed partitions in the dayrooms, the shots in the laboratory were directed at solid sheets of polycarbonate of the same nature as the material (polycarbonate) used for the dayroom partitions (the respondent having refused to provide the expert, whose visit he had authorized, with a sample of the glazed partitions in the dayrooms for laboratory expertise). The polycarbonate used was 12 mm thick to replicate the thickness of the glazing in the SHU dayrooms, as this thickness offered more resistance than some of the thinner parts (frames) of these windows, and was therefore more likely to obstruct projectiles fired from the gallery;

-The high-speed imaging (25,000 images/second) used by the expert made it possible to determine the deceleration, deflection and fragmentation of the projectile at the time of impact with the material representing the glazed partition of a dayroom;

-In the case of the shot with the C-8 rifle, the polycarbonate panel through which the projectile passed offers practically no resistance, the deceleration being only 8.5%, the deflection three degrees and the fragmentation (mass retention) almost complete. Once through the panel, the projectile retains an energy of approximately 1590 joules and consequently completely shatters the target (synthetic cranium) installed for the purposes of the demonstration.

-As for the comparison with a shot from the old 9 mm rifle under the same conditions, the test with the 9 mm illustrates a very strong deceleration of the projectile on contact with the polycarbonate, i.e., 99.8% loss of energy, in addition to a major fragmentation decreasing the size and mass of the fragments. Indeed, the 9 mm projectile entered the polycarbonate with an energy of 559 joules and only two small fragments exited with a total residual energy of only 1.4 joules, meaning that these fragments do not have sufficient energy to puncture the skin.

[89] The foregoing leads the expert witness Arnet to conclude that the 12 mm polycarbonate was likely intended as an effective barrier to protect personnel in the corridor when the former service firearm was in use. This conclusion is consistent with the comments of labour affairs officer Gadoua, referred to several times here in reference to his examination report on the Vaillancourt complaint, as part of the ministerial delegate's evidentiary investigation file, and who commented, with regard to the strength of the materials composing the glazed partitions of the dayrooms, that they had most likely been "selected and installed based in an older, less powerful firearm" (9 mm), and who suggested that modifications (to be determined by CSC) should be made to the glazed partitions of the SHU dayrooms "so that they can withstand the

bullets and ricochets of the C-8 rifles."

[90] With respect to the areas outside the dayrooms that could be affected by a shot from the gallery, expert witness Arnet notes in his report that "the demarcated floor area (taped) in the corridor section does not protect personnel from a potentially lethal shot", a statement reinforced by the testimony of AWO Supprien, who confirmed that no resistance testing had been done in this regard. For areas of the corridor beyond the taped-off area, the ballistics expert states that it is also possible to hit an individual from the torso down or from head to toe depending on the location. He also stated that with respect to the C-8, "after impact on the corridor floor, high-velocity fragments of projectiles are projected at the level of a person's legs, and over a significant section of the floor space of the corridor."

[91] The hazard that an officer in the corridor adjacent to the dayrooms could be seriously or even fatally injured in the event of a shot from the gallery striking a dayroom glazed partition, whether the officer is inside or outside the demarcations taped on the floor, is established by the evidence presented, this hazard being much greater if the shot is fired from the C-8 firearm. The question that remains is whether such a shot could occur and moreover, whether it could occur while an officer is present in the corridor in front of the glazed partition(s) of a dayroom. The evidence received by the Tribunal shows that the use of firearms is a rare occurrence both in the SHU and in other maximum-security penitentiaries, although altercations or fights between inmates requiring the intervention of correctional officers are not rare. This same evidence, however, while serving to establish that the C-8 has not been used at the SHU for firing in/into a dayroom, shows that this was not the case at other maximum-security penitentiaries. In my opinion, this data must be considered in light of the particular character of the SHU, a "supermax" facility that receives the most dangerous inmates, that the number of incidents is small in comparison with the data for larger populations of other penitentiaries, and the statistical reference period for the said data relatively short, which reinforces the undersigned's perception that the past cannot be any guarantee of the future.

[92] The ministerial delegate, in deciding that there was no danger, acknowledged that it was still possible for a shot from the gallery into the dayroom to hit a glazed partition (not bulletproof) and cause an injury or worse to a correctional officer. However, she also concluded that, because of a long list of prior conditions ranging from the assessment, spatial distribution and monitoring of inmates to mitigate the hazard of fights, to the sliding scale of control measures and the positioning of the officer in the corridor and the target inmate in the dayroom when the shot is fired and missed, to name only a few of these contingencies, that this possibility was so reduced that it would not meet the level of probability for a threat to be considered serious, based on the objective opinion of a reasonable informed person being unable to conclude with reasonable probability that a long list of pre-conditions would occur concurrently. Such a conclusion, in my view, goes beyond the reasonable expectation criterion established by *Ketcheson*. The position upheld by the respondent before the undersigned is largely modelled on that of the delegate and, in short, is intended to lead the Tribunal to conclude that, because of the many measures and methods in place to signal, anticipate, control and prevent the occurrence of incidents in the dayrooms and thus diminish instances of use of force, particularly firearms, the serious threat invoked by the appellant did not exist.

[93] As to this particular point of mitigating measures in place to reduce the number of inmate altercations, or even altercations involving a correctional officer and therefore uses of force, these measures are not specifically directed at situation(s) involving the use of firearms, or, in the words of the appeals officer in *Laycock*: "while those measures are highly appropriate, they address the basic framework within which correctional officers carry out their duties in the normal scheme of things and in the day-to-day operations of the penitentiary", in other words, measures that could be described as upstream, and therefore cannot be decisive factors in relation to the issue before us. More recently, in *MacNeal*, where the same reasoning was used with respect to mitigating measures presented as pre-empting a finding of "danger," the appeals officer stated that he agreed with the general position 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." On this last point, it is useful to note that although little was said on the subject at the hearing, the new C-8 rifle was put into service without a hazard analysis, the undersigned not being of the opinion, as mentioned above, that an approval or consultation of the RCMP satisfied this requirement, especially since, except for saying that there had been a consultation, nothing was put in evidence with respect to the substance of this consultation.

[94] With respect to the resistance capacity of the glazed partitions in the dayrooms to withstand a shot from the C-8, or the firearm previously used, the respondent repeatedly returned throughout the hearing and subsequent written argument to the fact that said glazed partitions need not provide projectile resistance. The respondent argues, in so concluding, that in the event that a firearm is used to control or terminate an incident in a dayroom, the firing officer on the gallery is not aiming at the glazed partitions but rather at what is happening inside the dayroom. The ministerial delegate had noted that in addition to all the mitigation and control measures that would precede the use of the firearm, the shooter would also have to miss his shot to hit a glazed partition and strike an officer on the other side. With respect to the question of a successful shot, the respondent informed the Tribunal about the training and qualifications/re-qualifications of the officers in the use of the said firearm. On this basis, it argued that, given the requirements in this regard, the possibility of an officer missing his shot, and therefore his target in the dayroom, was very slim, if not virtually impossible, given the short distance between the gallery whence the shot would come from and the target in the dayroom, i.e., an inmate.

[95] While the undersigned takes due note of the training received and the qualifications of the officers, I do not share the respondent's opinion as to the assured success of an emergency shooting. In this regard, the annual qualification/requalification exercise on the firearm should be considered. According to the evidence heard, for each of these qualification/re-qualification sessions, the officers are allowed a certain number of practice shots before moving on to the actual qualifying shots (30) on fixed targets located at 50 m and 100 m, with the passing mark set at 70%, and therefore not for all the shots. It is obvious that 50 m and 100 m distances are much longer than the distance of a possible target in a dayroom. However, it cannot be ignored that according to the evidence heard, the qualification targets are immobile. On the other hand, in a live fire situation, it would be euphemistic to think that the intended target, a live target, would be or remain stationary, given the circumstances leading to the need to fire. Consequently, this implies the need for the officer to continuously adjust the aim at the moving target, without any assurance, given the limited size of the dayrooms, that the target will not be positioned in front of

a glazed partition (three of the four sides of the rooms have such partitions), and taking into account that, given the urgency of taking the shot, the officer cannot wait for the target to move to a less risky location. Furthermore, even if officers are asked during the training whether they are prepared to take a life if necessary, it cannot be ignored, and it has been proved, that there is stress associated with an officer taking aim and shooting at a person, for the purpose of injuring or even killing. The concentration required and the "tunnel vision" phenomenon that can lead to a reduced perception of the environment and especially the need to act in a very short period of time to try to save life in a context of unpredictable actions that inmates can take, especially in an institution housing the worst inmates such as the SHU, lead the undersigned to consider with a very critical eye the suggestion that such a shot could not be missed. I would add, with respect to the ammunition used in the C-8, that evidence was given at the hearing that it was selected for its ability to cause serious, if not irreparable, damage, described as a lethal "vacuum," to the person hit, and that the power of this ammunition allows it to puncture the protective bullet proof vests of police officers, which offer better protection than the puncture-resistant vests worn by correctional officers.

[96] Having considered all of the foregoing, I have concluded that the ministerial delegate erred in her finding and that the appellant in the circumstances of the refusal, which have not been shown to me to have changed at the time of the hearing of this appeal, was likely to face a serious threat within the meaning of the *Ketcheson* and *Keith Hall & Sons Transport Limited* decisions referred to above. In *Ketcheson*, the appeals officer clearly explained this concept of reasonable expectation, an explanation I agree with, and according to which it is appropriate to take into account "the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person." Without repeating in detail the evidence supporting the above conclusion, I have taken into account in particular the evidence provided by the expert witness Arnet, especially with respect to the non-resistance of the glazed partitions in the dayrooms to a C-8 rifle shot, as well as the seriousness of the consequences of being hit by such a shot, the untested and questionable effectiveness of the floor tape demarcation in the corridors in front of the glazed partitions of the dayrooms, the regular, if not continuous, presence of correctional officers and other personnel in those corridors and thus in front of said glazed partitions in the dayrooms, and the type of institution that the SHU is and the population that inhabits it. The evidence has established that the use of firearms in any way at the SHU is relatively rare, but did not establish that it has not occurred or will not occur. However, this must be seen in conjunction with the more frequent use of firearms in maximum security penitentiaries, which are less dangerous than the SHU, leading to the recognition that the question is not whether firearms will be used in the SHU, but when they will be used under the conditions raised by the appeal. In this regard, I would consequently adopt the words of the appeals officer in *Keith Hall & Sons Transport Limited* that:

> [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 may not be imminent.

[97] The *Ketcheson* analysis grid requires that a final question be considered, namely, will the threat to life or health exist before the situation is corrected, the activity modified, or the hazard removed? The respondent initially addressed this issue by arguing that since it believed that the Tribunal should find that there was no serious threat, and therefore no "danger" to the appellant, it was not necessary to consider this third element of the grid. The respondent then reversed its argument, saying that by default, any alleged hazard in the appellant's work refusal is reasonably set aside, based on the equipment, training, and guidance provided to correctional officers and other measures taken by CSC, and that the appellant's request that bulletproof glazed partitions be installed in the dayrooms was not a realistic solution because of CSC specifications, the extensive work that would be required, and the problems that such partitions would cause. The respondent argued, in passing, that the report from expert witness Arnet did not demonstrate that the current glazed partitions would stop a bullet of a different calibre, which, it must be said, was not the purpose of the expert report, and that replacing the C-8 would also create hazards, as the officers are trained with a single firearm and the calibre was chosen for specific reasons after consultations (with the RCMP), about which I have commented previously.

[98] The undersigned disagrees with the opinion expressed above for the reasons stated by the appellant that no amount of control or mitigation can entirely remove the threat of a C-8 shot. I agree with the appellant that what is presented as a mitigating measure, namely the memo from AWO Supprien, discussed at length above, cannot be seen as such given its false assertion, making it a breach of the "internal responsibility system" clearly discussed by the appeals officer in *Ketcheson*, since it does not properly inform employees of the hazards they are entitled to know about, and that in fact, what it presents as a protective measure (floor tape) has not been subject to any consultation or assessment and, according to expert evidence, does not add any additional safety measures.

[99] The appellant correctly recognizes that, in addition to the C-8, there are other means available to correctional officers. It should be noted, however, that some of these means may have no effect and that the time involved may not allow for their effective use. In this regard, I take into account the fact, repeated in evidence, that there is no hierarchy in the range of means and procedures available to officers, which leads the undersigned to repeat as applicable to the issue in the present case his own words set out in *Courtepatte*:

> [52] ... it is true that not all assaultive incidents will reach the level of seriousness that would require an armed intervention, thus accepting that likely in most instances the situation, whether an assault on inmate or one on staff can be controlled in the application of the graduated protocol actions in the SMM. However, should the incident reach the level of seriousness requiring such armed action, and I did earlier point out that this could occur in seconds or be of such a serious nature as to prevent a proper graduated application of the SMM, I do share the argument put forth by the respondent to the effect that under the SMM, "there exists no substitute for an immediate armed response when it is needed, that is, when officers (and inmates) are at risk of grievous bodily harm or death." It is thus my conclusion that the third question of the test must be answered in the affirmative in the situation at hand where EM-14 would not be manned.

[100] Taking into account the above, as well as my comments on the conditions that could lead to a "missed" shot, I am of the view that the hazard raised by this case cannot be removed before the threat exists.

[101] The final issue to be considered is whether the danger raised by the refusal, which is recognized above as a serious and reasonably expected threat, constitutes a normal condition of employment. On this point, it is important to note at the outset that the respondent did not see fit to make any representations whatsoever, and therefore, on this point alone, it would be possible for the undersigned to conclude in the negative. The appellant unsurprisingly argued that the serious threat constituting the danger is not a normal condition of employment, rightly maintaining that since subsection 128(2)(b) of the *Code* is an exception to the general right of refusal provided, it must be interpreted narrowly. With respect to this notion of normal condition of employment, I believe it is necessary to recall that even if the job description of a correctional officer specifies that the said job involves injury hazard or death, and that the acceptance of the said job by an officer represents an acceptance of the said hazard, this does not in any way diminish the obligation imposed on the employer in sections 122.1 and 122.2 of the *Code* to, first, “prevent accidents and injury to health arising out of, linked with or occurring in the course of employment” governed by said *Code*, and second, that said prevention consists of nothing less than the gradual “elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials” with the goal of ensuring the health and safety of employees. However, in the spirit of the application of these provisions, the Tribunal has repeatedly interpreted this notion of danger constituting a normal condition of employment as representing a residual danger, i.e., one that “remains after the employer has taken all the necessary steps to eliminate, reduce or control the hazard, condition or the activity”, which, by its nature, would preclude the issuance of corrective guidance under subsection 145(2) of the *Code*) (see *Armstrong*; *Laycock*; and *Courtepatte*).

[102] It was established in evidence that the use of a firearm is generally a rare event, and that this rarity is even greater when the firearm is used against an inmate, because of its potential to cause serious injury or death. There is also evidence that the SHU is an institution unlike others and that its occupants are the most dangerous in the prison system. In addition, although there has been no shot fired into the SHU dayrooms, this type of shot has occurred in other maximum-security facilities. It goes without saying that such a shot hitting an officer, obviously by accident, is likely to have the same consequences, especially considering the ammunition used with the C-8. The Tribunal’s case law recognizes that infrequency, whatever its degree, cannot serve as a reason for not taking all the measures within the hierarchy of control set out in section 122.2 to try to eliminate it, since the potential seriousness of the hazard legitimizes the importance of mitigating measures, according to the Court in *Martin-Ivie* v. *Canada (Attorney General)*, 2013 FC 772, thus legitimizing the principle of “high risk, low frequency.” This is in fact consistent with the Tribunal’s repeated endorsement of the “high risk, low frequency” principle, which states 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 that event occurring.” The evidence has shown that the employer in this case did not take any mitigating or preventive measures that would have made the risk or danger residual and thus a normal condition of employment. I do not consider the application of floor tape, particularly in circumstances where no consultation or assessment has taken place, to be such a

measure.

[103] In closing argument, the respondent submitted that the refusal by the appellant Lachapelle, not because he faced an imminent threat, which he did not claim before the Tribunal, but because of his dissatisfaction with the employer's response to his concerns, represented an abuse of process. Such an allegation is regularly made in cases of this nature and in the case of an employee using the refusal procedure who has previously followed a certain course of action including discussions with the employer, union or other interventions or functions, drafting or other assistance from representatives, claiming continuation of a problem and other similar actions or steps. According to the respondent, this deprives the work refusal of its essential characteristic as an emergency measure, without which it cannot be used. The appellant, on the other hand, contests this claim, submitting that although other remedies may have been exercised elsewhere concerning the same issue, Mr. Lachapelle did not exercise these or any other remedies and that there is no evidence of any intention on his part to undermine the spirit of the *Code* or the integrity of the system. Furthermore, noting that he does not claim an imminent threat, the appellant argues that in the case of a claim of a serious threat, the timing of invoking the existence of the danger is of relative importance when compared with a claim of an imminent threat. The undersigned certainly does not disagree with the principle that the right to refuse work, a personal right, should not be used for other purposes, but this must be proved, which has not been done here.

[104] In *Schmahl* v. *Correctional Service of Canada*, 2017 OHSTC 3 (*Schmahl*), the undersigned was faced with this same claim of abuse of process, although in that case, unlike the present one, several work refusals concerning the same issue had occurred. It is clear that there are elements in this case that are similar to the situation in *Schmahl*, particularly the claim that the problem is one that has been ongoing for some time, even though the appellant does not claim an imminent threat in this case. That being said, I remain of the same view as in *Schmahl*, even if my conclusion in this case is that there was a serious threat and danger. I therefore consider that it is not necessary for the undersigned to consider this issue of abuse, "if only because doing so would be exceeding my jurisdiction under the *Code* and would be usurping the role of a party to the workplace." What I mean by this is that if the claim of abuse of process is made in earnest and is not a matter of automatism, the *Code* establishes certain distinct roles,

> [91] ... specifically section 147.1, an employer may exercise its disciplinary authority against an employee where the employer can demonstrate a **wilful abuse of rights** by the said employee once all investigations and appeals have been exhausted by the employee who has exercised his refusal rights under sections 128 and 129, with the validity of such disciplinary action being subjected to examination in a forum different from the one offered by an appeals officer.
>
> [emphasis added]

I would add that while it is clear from the *Code* that the employer has a role to play in making this claim, the exercise of which may be controlled by someone other than an appeals officer, if the party whose role it is under the legislation is not exercising it, the appeals officer should not be expected to substitute in any way for it.

Decision

[105] For all the reasons above, I conclude that at the time of the refusal to work, there was a danger that did not represent a normal condition of employment for the appellant Lachapelle. Consequently, the no-danger decision issued by Ministerial Delegate Jenny Teng on July 27, 2018 is amended.

[106] Having determined that a danger exists that is not a normal condition of employment, paragraph 146.1(1)(b) of the *Code* empowers me to issue such directions as I consider appropriate under subsection 145(2) or (2.1) of the legislation. I believe, however, given the considerable period of time that has elapsed since Mr. Lachapelle's work refusal and the decision of the ministerial delegate, that it would be more appropriate to allow the parties to arrive at a joint resolution of the matter. I therefore choose not to issue a direction at this time, but remain seized of the matter and have jurisdiction to issue any direction deemed appropriate if the parties fail to resolve the matter within 90 days of the date hereof and such request is made to me. In such a case, I may consider the parties' written submissions on an expedited basis.

[107] Following the parties' joint request to that effect at the opening of the hearing, it is hereby ordered that the entire file be sealed.

Jean-Pierre Aubre
Appeals Officer