Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2021-12-17
Case No.: 2018-40

Between:

Justin Kelsch and Union of Canadian Correctional Officers (UCCO), Appellants

and

Correctional Service of Canada, Respondent

Indexed as: *Kelsch et al v. Correctional Service of Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision that a danger does not exist issued by an official delegated by the Minister of Labour.
Decision:	The appeal is dismissed on the grounds of mootness.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellants:	Mr. Franco Fiori, counsel, UCCO-SACC-CSN
For the respondent:	Mr. Kieran Dyer, Counsel, Treasury Board Secretariat, Legal Services Unit
Citation :	2021 OHSTC 5

REASONS

[1] The present decision concerns an appeal filed by Mr. Justin Kelsch (the appellant), correctional officer (CO) and Union of Canadian Correctional Officers (UCCO) president, employed by the Correctional Service of Canada (CSC) at Stony Mountain Institution (SMI), a clustered maximum/medium/minimum security institution located in Stony Mountain, Manitoba, and comprising 899 cells. Ninety-six of those cells make up the maximum-security unit, part of which is J range which has 24 cells with solid doors.

[2] This appeal was filed pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*) against a decision of absence of danger rendered by the Official Delegated by the Minister of Labour, Ms. Courtney Wolfe (the ministerial delegate) on December 13, 2018, at the conclusion of the latter's investigation into the work refusal registered by Mr. Kelsch on behalf of all employees of the institution members of the UCCO-SACC-CSN-SMI on December 4, 2018.

[3] In light of COVID-19 pandemic and Public Health prevailing circumstances, there was no public *in persona* hearing conducted and the decision that follows was arrived at on the basis on the ministerial delegate's investigation report, the voluminous documents and documentary evidence submitted by the parties as well as their lengthy and complete written submissions.

Background

[4] That decision of absence of danger concerns a situation at the said institution where, on occasion of the lockdown of both medium and maximum security units to facilitate the quarterly routine search of the institution, the right to refuse dangerous work was invoked following discovery of a single "live" Remington .22 ammunition round on the stairs between J1 and J2 levels of J range in Unit 6 of the institution by a correctional officer performing security patrols on J range of said unit. At the time of said discovery, the search of the 96 inmates maximum security unit (Unit 6), and in particular of J range of said unit, had been completed. The refusal to work stemmed from the respondent employer's decision not to proceed with a further and more exhaustive search of the institution "at high risk threat protocol" also described as a section 53 search.

[5] The information that follows, necessary to understand the issue at hand, is drawn from the ministerial delegate's investigation report as well as from the employer and the joint health and safety committee investigation reports. It shows that on December 3, 2018, SMI had entered into a lockdown situation in the medium and maximum security units in order to facilitate a routine quarterly search as per the Institutional Search Plan, with the search of the 96 bed maximum security unit (Unit 6) being completed on the same date. During the search, inmates were individually removed from their cells, frisked, moved on and off the range, escorted to the common area where they were searched using the Body Orifice Scanning system and then placed in a separate area while cell searching took place. While the search of the common area was "cursory," all

cells were searched, with the inmate-occupied cell searches requiring an average of four minutes, the unoccupied cells three minutes and the search of J range commencing at approximately 19:55 hours, with the video footage of the process from three cameras (front J1, front J2 and common area) being viewed by Security Intelligence Officers (SIO).

[6] Once the search was completed, video surveillance has shown that in two separate instances, an inmate was allowed access to the area outside their cells. In the first case, while being watched by correctional officers, an inmate was allowed to descend from J2 to J1 of J range common area to retrieve a television set and then ascend to J2 with the item. In the second case, Inmate X was allowed access to the same common area to use the laundry facilities to wash his personal items and allow cleaning and mop-up of his cell that had incurred flooding when the toilet had been flushed during the search. Towards that purpose, on three occasions, Inmate X ascended and descended the stairs from J1 (lower range) to J2 (upper range) of which there are two sets.

[7] On the same day, at approximately 23:23 hours, thus after Inmate X had used the stairs between J1 and J2, a correctional officer performing security patrols on J range in Unit 6 and descending the set of stairs (one of two) leading from J1 to J2, discovered and retrieved what appeared to be a firearm round which eventually was determined by SIOs to be a live Remington .22 caliber long round.

[8] On December 4, 2018, in an effort to address this security matter internally, a meeting between members of UCCO-SACC-CSN and members of the Institution's senior management team occurred throughout the day to discuss the Ballistic Threat Risk Assessment (BTRA) search action to be conducted, while during the same period, Unit 6 Correctional Manager, Mr. Paul Thompson and A/SIO, Ms. Jennifer Elyk, conducted interviews with J range inmates to gather additional security information. A first inmate source indicated that Inmate X had one bullet that the latter had managed to bring into the Institution in August upon being returned to Stony Mountain as a Parole Violator. That same source indicated that Inmate X was showing off the bullet and that there was no zip-gun or other weapon on the range.

[9] On the same day**,** the two officers proceeded to interview Inmate X who confessed to having brought the one bullet into the Institution on August 25, 2018, upon his readmission, with no other purpose than describing this action as "cool." Inmate X explained that upon his arrest by Winnipeg Police, he had three bullets in his possession but that the police had only recovered two and that he had managed to bring the third into the Institution undetected by keeping it in his mouth. Inmate X stated having had no intention of ever using the bullet and having no firing device in his possession. To confirm his story, Inmate X provided a copy of his arrest report which showed that at the time of arrest, Inmate X had a .22 sawed-off firearm in his possession and that police had recovered one round on the sidewalk where Inmate X had travelled on foot prior to arrest and one round in the latter's jacket pocket. He had kept the remaining third bullet, smuggled it hidden in his mouth and had kept the smuggled round wrapped in tinfoil in a medicine bottle in his cell since August 2018. He was leery of handing it over, fearing

putting himself in serious trouble. Following the routine search of his cell during the quarterly search and after being once again contained in his cell, Inmate X discovered that the bullet remained in the medicine bottle, took it out and hid it in the waistband of his shorts.

[10] Inmate X was subsequently allowed out of his cell to move around the range to attend to mopping up his cell and wash his personal items as a result of the minor flooding of said cell during the routine search as well as to pass out milk to inmates for their cereal. According to video footage, for those purposes, Inmate X ascended and descended the stairs from J1 to J2 three times. Furthermore, based on corroboration from other inmate sources as well as the Winnipeg Police arrest report, Security Intelligence concluded to the information obtained from Inmate X being credible. After his confession, Inmate X was moved to segregation.

[11] A security incident review that was completed at the time confirmed that none of the inmates on J range, including Inmate X, had any incidents on file related to ballistic threats and no evidence on record was obtained relative to possession of firearms or threat of use of firearms against correctional employees relative to inmates housed in J range, Inmate X included. Furthermore, a Preventative Security file review concerning Inmate X spanning a period of two years previous to the incident provided no intelligence information related to threats against correctional employees during that time frame, nor was there revealed any recent intelligence linked to ballistic threats in the Institution by a general review of Statements of Observation Reports submitted within the preceding three months.

[12] In the course of its investigation, the Job Hazard Analysis (JHA) for conducting cell searches was assessed by the employer, taking into account the hazards associated to each task as well as the preventative measures for each, and given those measures, the JHA received a "low" rating. However, given that a JHA does not directly concern ballistic threats, a BTRA was conducted, also resulting in a "low" rating, those results being shared with the employee representatives.

[13] At the end of her investigation into the refusal, Ms. Wolfe concluded to the absence of danger as defined by the *Code*, and this for the following reasons:

- no evidence to suggest the availability of additional bullets;
- no evidence to suggest availability of a firing mechanism;
- no evidence supporting the suggestion there was a "drone drop" to introduce the bullets or a firing mechanism;
- no evidence supporting the suggestion of a ballistic threat to correctional officers from Unit 6 inmates;
- no evidence suggesting that the inmate who had been allowed to retrieve a television set under supervision was the source of the bullet;
- evidence that the round came from Inmate X, who confessed to the fact, provided evidence to support his story and then was placed in segregation;
- all inmates being kept in lockdown after discovery of the bullet;

- employees not asked to perform activities that are outside of their Post Orders or Work Descriptions for CX01 and CX02;

[14] Ms. Wolfe thus found that the concerns of the correctional officers were based on speculation and hypothetical situations and not on the evidence obtained or the facts of the case.

Issue

[15] As previously mentioned, the hearing of this appeal proceeded by way of written submissions. In addition to providing full and complete submissions on the merits of the case, the respondent also raised a preliminary objection seeking the dismissal of this appeal based on mootness.

[16] Before turning to a consideration of the substantive issue raised by this appeal, which is to determine whether there a existed a danger for the appellant on the day of the work refusal, I will deal first with the issue of mootness. To that end, I will need to first determine whether the appeal has become moot considering the multiple searches that have been conducted at the institution since the day of the work refusal. If I conclude that this appeal has become moot, I will need to determine whether I should nonetheless exercise my discretion to hear and provide a decision on the merits of the case.

Appellant's Submissions

[17] The description of events, in other words, the facts of the case, offered by the appellant in its submissions, does not generally detract from that which is part of the ministerial delegate's own description, and therefore it is not necessary to repeat what has been enunciated above. This being said, the description offered by the appellant in its submissions does bring into focus the relative short time span that these circumstances cover. As such, where the December 3, 2018, quarterly search of J range of Unit 6 began around 19:55 hours and ended at approximately 20:45 hours, the .22 bullet at the center of this case was found at 23:23 hours on occasion of the Unit 6 hourly security patrol (walks outside cells) with inmates secured in their cells. The matter at hand came to a head on December 4, 2018, at the 7:00 hours start of the new shift briefing and briefing report where it would appear that correctional management failed to include in the report and inform new shift personnel of the so-called ballistic finding until rumour-informed staff raised the issue. This was followed with a 9:00 hours meeting with senior management (Warden and Deputy Warden) leading on the same day to a BTRA, the results of which are disagreed upon by the appellant, and the 18:50 hours work refusal by the appellant on behalf of all correctional officer members of the UCCO-SACC-CSN SMI local union.

[18] In addressing the issue first from a legal standpoint, the appellant briefly enunciates the questions to be decided by the appeal as first, whether in the circumstances that prevailed, a danger existed and second, where there would be an affirmative answer to the first question, whether the employer mitigated the danger enough so as to represent

a normal condition of employment. As for the questions or test to be applied to determine the existence of danger, the appellant submits that it was determined by the Tribunal in *Ketcheson*, 2016 OHSTC 19, to require answers to the following questions:

> [199] …
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could said hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) could said hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[19] Supplementing the application of the above test, the appellant submits that additionally, one is to determine whether the danger identified has been mitigated or reduced by the employer to the point that it represents a normal condition of employment.

[20] The view put forth by the appellant is that it is the presence of the bullet (ammunition) itself in the institution, which the latter equates to an "indisputably" dangerous weapon, that represents the hazard, condition of activity that is a health threat, since its only function or purpose is to be shot at a target, such being in this instance, a correctional officer. In this regard, the appellant refers to *Ketcheson*, *supra*, where the Tribunal distinguishes between a serious and an imminent threat on the basis of the possibility of corrective action:

> [197] Imminent threats from hazards means those hazards are less likely to be corrected than hazards resulting in serious threats can be corrected. There is simply very little time to correct hazards whose risks are imminent. The level of harm can be quite low (but not trivial) but the risk is still an imminent threat where the hazard cannot be corrected in time. A serious threat, not being imminent, means that the hazard that produces the serious threat is more likely to be corrected than hazards resulting in imminent threats can be corrected.

[21] On this particular point, the appellant also refers to the decision of the Tribunal in *Keith Hall and Sons Transport Limited,* 2017 OHSTC 1 (*Keith Hall and Sons*), where it is stated:

> [40] … [T]he new definition requires consideration of whether the hazard, condition or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees.

> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. […]

[22] In short therefore, the appellant considered that the presence of a bullet (ammunition) within the institution, particularly Unit 6, constituted a hazard.

[23] Having specified what it considers to be the hazard (condition or activity), the appellant, applying the *Ketcheson* test, submits that there needs to be determination as to whether such hazard could reasonably be expected to represent an imminent or a serious threat to the life or health of the appellant on December 3, 2018.

[24] In the case of an imminent threat, the appellant submits that this entailed, on December 3, 2018, that there was a reasonable expectation that injury or illness would be caused "soon," referring in this manner to the words of the Appeals Officer in *Ketcheson*, *supra*, dealing with "reasonable expectation" as including "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 [minor to severe] to a person" and specifying that "imminent" entails two aspects to wit, that "something can happen or exist soon and that something has a high probability of happening or existing." The appellant suggests regarding this part of the test that existing tensions in the institution on December 3, 2018, coupled with the abnormal activity (quarterly search) that went on that day as well as the behavioural unpredictability of a maximum security population would suffice to base a finding of imminent threat.

[25] In the alternative, the appellant submits that the Tribunal needs to turn to whether the facts of the case can support a finding of serious threat, i.e. one that represents a reasonable expectation that the hazard will cause serious injury or illness at some time in the future. On this, the appellant refers to the words of the Appeals Officer in *Keith Hall & Sons*, *supra*, to the effect that for a serious threat to constitute "danger," "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 life or health of employees." On this, the appellant also finds support in the words from the Appeals Officer in *Ketcheson*, *supra*, at paragraphs 130 and 192, to the effect that a "serious" treat refers to the severity of the harm with no time frame as to when the harm might occur. Along the same lines, the appellant retains also that a conclusion of danger must be based on more than a hypothetical threat, be it imminent or serious (see *Arva Flour Mills Limited*, 2017 OHSTC 2), as commented in the same manner in *Correctional Service of Canada* v. *Courtepatte*, 2018 OHSTC 9:

> [42] … 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.

For the same conclusion, the appellant also refers to the Tribunal decision in *Zimmerman* v. *Correctional Services of Canada,* 2018 OHSTC 14 (*Zimmerman*), at paragraphs 96 and 102. On this point, the appellant offers the opinion that when examined, the facts demonstrate that the situation prevailing on December 3, 2018, was more than hypothetically susceptible of creating a serious threat to the staff's health and that by deciding to resume activities as if the issue was not abnormal, the respondent caused staff to incur an unnecessary risk where a bullet is a rare occurrence in a penitentiary, contrary to jail-made weapons, and is lethal.

[26] The appellant is of the view that the threat (imminent or serious) would materialize before the hazard can be corrected, given the sudden and unpredictable possibility of an inmate making use of the ammunition to cause injury. It is the opinion put forth that it is not possible to correct the situation when it occurs. Ammunitions are prohibited and lethal, and there are risk assessment procedures in place for the employer to use as part of its risk mitigation responsibilities. It is the view put forth by the appellant that the employer failed to take proper mitigating measures.

[27] The final legal issue in the evaluation of "danger" concerns risk mitigation and whether the hazard has been reduced to being a normal condition of employment to wit, a condition that is residual in nature and thus, by that residual nature, one that cannot be protected against, i.e. "the danger that remains after the employer has taken all the necessary steps to eliminate, reduce or control the hazard, condition or activity" (see *Zimmerman*, *supra*) meaning the danger that remains after having gone through what is referred to as the "hierarchy of controls." The appellant submits that this has not been achieved as the employer did not take the necessary measures to mitigate the risk that the presence of a bullet in the institution presented.

[28] It is the position put forth by the appellant that when the principles enunciated above are applied to the facts, a finding of danger must be arrived at. The appellant describes the supporting elements of such a conclusion in the following manner.

[29] The appellant is of the view that the employer failed to acknowledge the risk posed by the ammunition that was found. To support this, the appellant argues that no proper investigation was conducted and that the employer failed to meet its safety rules and downplayed the danger. In this respect, the appellant notes that once the bullet had been found on the night of December 3, 2018, no search was conducted, no information transmitted to the union or staff and no ballistic threat was assessed until the matter was brought up by an officer at the December 4, 2018, morning briefing (7:00 hours). Given the number of prohibited items discovered and reported during the quarterly search of

Unit 6 on December 3, 2018, the appellant suggests as rather irregular that the employer failed to report the finding of the bullet, even more so given the fact that there is a specific protocol to address this type of finding when it occurs, i.e., the ballistic threat risk assessment (BTRA).

[30] The appellant submits that it is clear from the employer's initial investigation of the refusal as well as that of the workplace committee that the employer's investigation was fraught with irregularities. First, the discovery of the bullet once the quarterly search had been completed demonstrates that the regular search mode used was insufficient and yet, the employer was not preoccupied and saw no need for extra measures or search. The employer's investigation report notes that while the interview of Inmate X by Mr. Thompson and Ms. Elyk described that Inmate X had three bullets in his possession and many more weapons when arrested by Winnipeg Police, the employer's investigation report makes no mention of any follow-up with the Winnipeg Police and yet, a bullet was smuggled into the penitentiary undetected, kept inside and hidden successfully for months and not discovered until after the quarterly search. Noting that Inmate X admitted to smuggling the bullet into the penitentiary only after being caught, the employer nonetheless did not want to further investigate nor provide a reasonable explanation as to why it believed sufficient to rely on the word of the inmate that only one bullet was not seized by police.

[31] The appellant maintains that the arguments put forth by the respondent to demonstrate its threat risk assessment are inconsistent with the facts and non-supportive of their conclusions. As such, the fact that inmates are confined does not address the risk faced by COs when conducting a routine quarterly search since the danger is present when the search is being conducted or if activities resume without correcting the fact of an ineffective search. The Unit search (quarterly routine) failed to reveal the contraband bullet and the inmate's confession occurred only after the discovery and does not correspond with the contents of the arrest report. Only the Emergency Rescue Team (ERT) has the necessary equipment to conduct a high threat protocol search and regular COs have no particular personal protective equipment (PPE) or training to search for ammunition, which does not constitute "everyday duties," contrary to what the employer suggests when referring to the training of COs in the use of PPEs when executing so-called everyday duties. Although the evidence through the SIO of a single inmate being allowed on the range after completion of the search proved erroneous as two inmates had access to the range, one being Inmate X who had successfully hidden the bullet, no additional search was conducted or inquiry made relative to the flooding of Inmate X's cell.

[32] The appellant also finds support for its position in what the latter describes as the irregularities of the employer's BTRA, its claim being that the employer breached a number of the eight principles on which the assessment protocol is based in order to standardize the risk analysis by failing to evaluate the risk with the necessary diligence in not conducting the assessment immediately, by not communicating the discovery of the ammunition to staff, by failing to consider key elements provided for under the protocol and not applying the adequate response (appropriate mitigation strategy). Noting that a

BTRA calls for one of three possible conclusions, i.e., low, medium or high, each level calling for a different type of response, the appellant opines that contrary to the employer's response to the BTRA it conducted, a high threat response would have been appropriate, such therefore necessitating the involvement of the ERT with their special equipment including ballistic protection and more stringent measures in furthering the search. The appellant notes that contrary to ERT members, "regular" COs have never received training associated with ammunition or been provided PPE adapted to such threat. Drawing attention to the fact that a quarterly search had been conducted during the same day the bullet was found, but not found through said search, the appellant argues that such search would not render actions required through a high risk assessment irrelevant since being moment-specific to the finding of the bullet.

[33] The appellant thus enunciates that following a high threat risk assessment, only ERT members would remove inmates from their cells, using ballistic helmets, vests and shields in applying their specific training, conduct a thorough search with the help of detector dogs and metal detection equipment before clearing the cell, after which correctional officers would be able to make a cell search. According to the appellant, since a bullet and its use can be the source of an immediate or a serious threat, not immediately preventable, the employer has the responsibility to evaluate an appropriate response under the BTRA. In that respect, the appellant notes that where the employer initially rated the threat and needed response as medium, it subsequently downgraded to low but failed to apply any of the actions associated with a low threat assessment.

[34] Referring to the employer's failure to immediately conduct a BTRA as a "contravention," the appellant emphasizes that such was not the basis for the work refusal as the union did not file such refusal exactly at that time and afforded the employer time to come up with solutions. It is after the ultimate disagreement about how to reduce or mitigate the danger that the union opted for the refusal action due not to the contravention but to the employer's reluctance to reduce the danger and offer sufficiently credible justification.

[35] As part of the BTRA, the appellant draws attention to the review of information and analysis developed by a SIO concerning the finding of the ammunition and the source of such (Inmate X), which it claims raises concerns regarding the imminence of threat. In that regard, while commenting that it does not want to discredit the employer and is solely seeking added protection within the purview of the *Code*, the appellant raises concern about the employer's silence on elements that suggest a threat. More specifically, the appellant points to the fact that CSC has neglected to explain why it did not even consider whether there can be a link between the jail-made stabbing weapon (metal rod) found in Inmate X's toilet and the latter's statement that if he wanted to harm someone, he would stab him. The appellant also points to CSC not addressing the fact of another stabbing-weapon being found on the same day nor giving weight to the SIO's mention that zip guns can be made by anyone who knows how and that drones can go undetected. In short, the appellant comments that CSC omitted key evidence and concluded that a lack of such rendered the danger hypothetical, and that since a search

had been completed earlier in the day, the sought-after high threat search and consequent additional measures under the BTRA were useless.

[36] The appellant submits that in the present case, the danger is not merely hypothetical and can reasonably be expected to materialize. Along that line, the appellant submits that the situation at issue in the case called for the completion of a BTRA, such in effect having been conducted only after the union had realized that the employer had tried to downplay the finding of the bullet. Noting that the definition of "danger" in the *Code* does not exclude potential and future hazards, as long as such present serious risk to an employee's health, the appellant submits that the work of a CO entails a high degree of risk which cannot be treated lightly and must be addressed within the objectives of safety and prevention called for in the *Code*, thereby signifying that there are limits to exposure. The appellant finds support for this in the Tribunal's decision in *Zimmerman*, *supra*, stating:

> [97] I must first point out that one cannot ignore the particular context of working in a correctional setting, more particularly the risks associated with working in a maximum-security institution. Correctional officers are constantly exposed to assault and harm by inmates, an exposition that is mainly due to the unpredictability of human behaviour. The risk of being assaulted is always present and is inherent to a correctional officer's job. The risks to health linked to the performance of a correctional officer's duties are detailed in both the CX-1 and CX-2's work descriptions submitted at the hearing:
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> […]
>
> [98] Despite the risks to health specified in the work descriptions of CX-1 and CX-2, the respondent is under the legislative obligation to drive down the risks related to the duties of correctional officers as low as possible by first eliminating hazards, then reducing hazards, and finally, by providing personal protective equipment to correctional officers in order to prevent accidents and injuries that could occur in the course of the performance of correctional officers' duties. This concept is commonly referred to as the hierarchy of controls and is codified at section at section 122.2 of the Code, along with the purposive clause of Part II of the Code at section 122.1.

[37] In the opinion of the appellant, even in the context of said work description(s), the presence of ammunition is not part of what an officer should expect as a normal working condition, and on the contrary, a specific procedure is in place to address this.

[38] The appellant asserts that the correctional officers have a real concern for their safety, one that should not be disregarded in light of the register/report of violent incidents and contemporaneous assaults in evidence and cannot be dismissed as hypothetical and unworthy of a search using the equipment called for in a high threat protocol. The officers are the ones facing hazards daily and their experience, knowledge and capacity to read danger and tensions need to be accounted for. The appellant notes that case law has recognized repeatedly the importance of experienced ordinary witnesses and their interpretations arising reasonably from known facts. The appellant makes the

point that the COs are truly preoccupied, this underscored by the fact that the work refusals are not motivated by rivalries with the employer, as witnessed by the fact that the union has been a voice in the standardization of risk assessment when a ballistic threat is involved and the fact that there is no history of unnecessary work refusals, as was the case in the *Ketcheson*, *supra*. While weapons can be found at SMI, ammunitions are rare and COs are not properly equipped to face such hazard.

[39] The appellant refers to the union's history in resorting to work refusals (section 128 of the *Code*) by arguing that it demonstrates that the union does not revert to work refusals as a labour relations agenda and has resorted to the present refusal in the legitimate fear of the employer being inconsequential to the risk the employees were exposed to. The appellant advances the opinion that the BTRA has had an inconsistency in the low threat protocol because the employer never trained COs to conduct searches using ballistic vests to face such threat. The appellant submits that the union did not engage in abstract policies, root causes or budgetary issues, rather arguing that the employees faced danger and asked not to take any chances in an unpredictable milieu based on their assessment that evidence was leading to an abnormal hazard.

[40] According to the appellant, zip guns represent an issue at SMI, and the discovery of a bullet demonstrates the need for increased vigilance in that regard, vigilance that would be served by the BTRA as, given the latter's testimony, inmates have easy access through trade shops, schools, programs and work departments to all the necessary elements to make such weapons that would hence go undetected. On this, the appellant notes the words of the SIO, Mr. Christer McLauchlan, in the case, according to whom anyone who knows how to make a zip gun can make one.

[41] The appellant thus submits that when the bullet was found on December 3, 2018, a rare occurrence in itself, the employer failed to inquire further and was satisfied with the SIO's statement to there being no indication of a zip gun having been made. Referring to the difficulty posed by increased use of drones for the purpose of contraband, which can include firearm related components, and thus the need for increased vigilance, the appellant submits that not following the finding of the ammunition with extra searches or extra protection in the search of cells exposes COs to an "imminent danger" or, failing such a conclusion by the Tribunal, to a serious threat. The appellant complements this by arguing that weapons can be shared between different units as inmates from such different units are allowed in Unit 6 and mingle with inmates, food is distributed three times a day between units and newspapers are delivered, thus allowing for the spreading of weapons between sections of the building. In line with this, the appellant recalls Inmate X's statement that he had tried to sell the bullet within Unit 6.

[42] On the issue of whether "danger" exists, the appellant submits that case law has recognized that elements such as internal tension and unpredictability of human behaviour need to be taken into account and that the opinion evidence provided by more experienced personnel than the Tribunal, even if not meeting the criteria of expert, should be considered (see *Verville* v. *Canada (Correctional Service of Canada),* 2004 FC 767).

[43] On the issue of internal tension, the appellant challenges the position of the employer that there was no “current unrest” or “issue within the population” at the time of the refusal, referring in this regard to a number of contemporaneous serious events (murder and attempted murder) being registered. The appellant also notes that Inmate X himself had been involved in violent incidents and has an extensive history of violence and violations. In the opinion of the appellant, such evidence demonstrates that there was a reasonable expectation that the appellant could be exposed to violence from inmates on the day of the work refusal. Furthermore, the appellant contends that case law has determined that in determining whether “danger” existed, an appeals officer can consider the risk of spontaneous assaults by maximum security inmates without provocation, intelligence or warning (see *Correctional Service of Canada* v. *Laycock*, 2017 OHSTC 21 (*Laycock*)) and that the words of the Court in *Verville*, *supra*, to the effect that if a hazard is capable of coming into being, it should be covered by the definition of danger, without the need to predict when the danger will happen, should find application in the present case.

[44] The appellant essentially pinpoints the central question raised in the case as being between a hypothetical danger or an absence of diligence in conducting an insufficient risk assessment. Noting that both the employer (CSC) and Ms. Wolfe shared the view that the alleged danger was hypothetical and speculative, given the lack of information about additional bullets, firing mechanisms or intelligence about violent plots, the appellant submits that the review of the facts by the appellant demonstrates that such conclusion was not based on the rigorous risk assessment required under the *Code*, such being demonstrated by the lack of proactivity in the investigation, the reluctance to further the inquiry by a high threat protocol search, the lack of investigation in Inmate X’s version, the disregard to drones and zip gun reports and the incapacity to find the ammunition on that same quarterly search, all demonstrating that the claimed danger was not hypothetical.

[45] As a whole, the appellant submits that the Tribunal must conduct a *de novo* inquiry not tied to the conclusions arrived at previously, particularly those of the delegate. It is the view of the appellant that the delegate did not conduct a thorough revision of the inquiry done by the employer and only relied on the employer’s rationale, one based on inaccurate or incomplete elements. To support this, the appellant refers to the delegate’s report and notes that the delegate did not address the minimal employer consideration of the so-called metal rod found in Inmate X’s toilet and the cell flooding it caused, the lack of a BTRA or discussion of the event at the December 4, 2018, morning briefing, the acceptance by the employer of the so-called confession by the inmate and the lack of attention to details of the Winnipeg Police arrest report of the inmate, the delegate’s acceptance of the claim that no inmate on J range had any ballistic incident on file regardless of Inmate X’s past history including those regarding fire arms and the delegate’s view of this as an attenuating factor.

[46] As a whole, the appellant views the delegate’s decision as failing to address the essence of the union’s argument by focusing solely on the legitimate preoccupation that the presence of such weapons is likely to indicate the presence of other weapons,

especially that a bullet is in essence used with other items, such as other rounds, guns or zip guns to conclude that such "fears" are hypothetical. It is however the view of the appellant that the essence of the union's argumentation is that the presence of a weapon (bullet) triggers a danger assessment, calling for steps by the employer to reduce the danger to a normal condition of employment, something it failed to do properly by conducting a complacent BTRA and disregarding relevant facts.

[47] To conclude its submissions, the appellant argues that the "danger," which it equates to the uncommon presence of a bullet (ammunition) in a maximum-security establishment such as SMI, does not correspond to a normal condition of employment to wit, the danger that remains when the employer has taken all necessary steps to eliminate, reduce or control the hazard. The appellant is of the opinion that for the employer to have resumed normal activities or having continued searches everyday and with no extra equipment, represented an imminent threat or a serious threat that the employer refused to mitigate.

[48] The appellant finds support for such position in the Tribunal decision in *B. Armstrong et al* v. *Canada (Correctional Service)*, 2010 OHSTC 6, referring to the "low frequency, high risk" principle as governing the use of protective equipment, where the Tribunal stated that the 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. It also holds that, where the potential outcome of exposure to risk is dire or critical for a person, mitigating measures to prevent that dire outcome must be taken, regardless of the likelihood of the exposure occurring." The appellant is of the view that this principle should apply to the present case due to the unpredictability of an assault on a CO and the fact of the employer opting instead to resume activities without additional measures, on the basis that COs already had the appropriate training and PPE for searching according to everyday conditions.

[49] For its part, referring to *Ketcheson*, *supra*, the appellant considers that the refusal action was directly in line with the object of the *Code* as the union's genuine objective was only to enable that further searches continue with the intervention of the ERT and the use of a detector dog so as to effectively reduce the danger. In that decision, the Tribunal, distinguishing between the notion of danger "in the abstract" and an actual factual situation, stated that:

> [140] […] The right of employees to refuse to work is not a normal, routine manner in which risk is to be driven down; it is an emergency "back up" mechanism when the main elements of the IRS have not been effective. Except when some unpredictable high risk hazard presents itself, an employee should never be faced with a high risk hazard, a danger. […]

[50] The appellant, referring to the issue at bar as being whether, following discovery of the bullet, a search to find "missing ammunitions and/or firearms" was warranted in order to reduce the "serious threat to the life or health" represented by such discovery,

and whether such search needed to be conducted under high threat protocol, maintains that the employer failed to reduce the “imminence of the danger” which kept staff from working under normal conditions of employment by not conducting such search, contrarily to the principle of diligence and the case law of the Tribunal such as *Laycock*, *supra*.

[51] By way of summarizing its position, the appellant submits that on December 3, 2018, a danger existed, the hazard being exposed by the finding of the bullet. The latter argues that the threat risk analysis made by the employer did not meet the requirements of a proper assessment that would have been consistent with its own policies and thus exposed staff to an unnecessary hazard. The employer was satisfied not to conduct an inquiry when the bullet was found, to keep things as is, to disregard the employees’ genuine concerns as being hypothetical and never conducted an enhanced type of search. As such, the danger was never mitigated, the employer choosing the easy solution of disregarding the legitimate preoccupation of those who are in direct contact with inmates.

Respondent’s Submissions

[52] The description of the background facts of the case by the respondent does not differ, for the most part and with a few precisions, from that offered by the appellant. Therefore, it serves little to no purpose to reiterate it here. By way of succinct description, the appellant offers the general description that during CSC’s investigation of the incident of the finding of the bullet, the institution remained in lockdown and correctional officers continued to do their rounds, thus not demonstrating a feeling of being in danger.

[53] Describing the situation in a nutshell, the appellant states that CSC obtained a confession from the inmate who introduced the round into the institution, corroborating testimony from other inmates and corroborating documentary evidence. According to CSC, all the evidence indicated that there was no intent to use the round, there was no mechanism available to fire the round and there were no other rounds in the institution, causing the employer to determine that there existed no danger to the institution. The respondent refers to appellant Mr. Kelsch who, as UCCO president, registered a work refusal on behalf of all correctional officers, as being the sole appellant of the ministerial delegate’s no danger decision found to be based on speculation.

[54] The respondent specifies that while correctional officers became informed of the lockdown situation during the all-staff morning briefing at 7:00 hours on December 4, 2018, the Unit 6 staff, where the bullet was found, attended a meeting with Mr. Thompson at 7:15 hours, at which time the manager discussed the incident with his staff. Mr. Thompson indicated in a witness statement that his staff advised him of their feeling that there was no danger. Furthermore, on J range, Mr. Thompson discussed the incident with what he describes as a reliable inmate he had known for 18 years, the latter informing him of the provenance of the bullet and of the absence of any intention to use it.

[55] Concurrently and on the same day and time, the Security Intelligence Department became involved through SIOs Mr. McLauchlan and Ms. Elyk and an investigation was conducted throughout the day. This involved obtention of certain documents, interview of a source inmate different from the one interviewed by Mr. Thompson, viewing of security footage and new interviews with previously interviewed two inmates as well as Inmate X, those interviews and briefings documented in statements part of the record, review of security incident information regarding J range inmates as well preventative security file review concerning Inmate X also recounted in statements part of the record, all in essence leading to the conclusion of absence of intelligence, be it from Inmate X or more general, of threats against staff or ballistic threats within the institution.

[56] Again concurrently, discussions were held between Mr. Kelsch and Mr. Brad Smith, as UCCO representatives and senior management regarding a BTRA. This assessment was completed by Assistant Warden, Operations, Mr. Ritchie and Warden Mr. Robert Bonnefoy in consultation with the Security Intelligence team, taking into account all of the intelligence gathered through the investigation. The respondent notes that a BTRA has only three possible outcomes or levels to wit, low, medium or high. Its submissions indicate that initially, Mr. Ritchie considered the bullet incident to represent a medium threat.

[57] However, since the inmate had later confessed and been moved to segregation, he ultimately concluded that "the threat no longer exists and is now viewed as low. Regular institutional searching as per our search plan will continue," an assessment that was agreed upon by Mr. Bonnefoy. That assessment was shared with COs, Messrs. Kelsch and Smith, who expressed disagreement and indicated wanting the institution to be searched at the high threat level or protocol. The respondent submits that at that time, the two COs stated that their position would not change regardless of whatever additional information was presented. The respondent also submits that at that time, as per the witness statement of Mr. Thompson, correctional officers continued to do rounds without additional concern for their safety. It is as a result of such disagreement that the work refusal was registered.

[58] The results of the employer and the workplace health and safety committee investigations that followed were described in the initial part of the present decision. Of note, according to the respondent, is that the conclusion of "no danger" by the employer rested on the following elements: no evidence of additional bullets, no mechanism to fire bullets, no information that an inmate was prepared to use any of those items against a staff member, availability of appropriate PPE and proper search training for staff. As to the health and safety committee investigation, the employer-side conclusion of "no danger" that was disagreed upon by the appellant rested on the same elements as well as on the results of another interview of Inmate X who indicated where he hid the bullet on his person and confirmed having had no intention of making use of the bullet for which there was no interest by other inmates ("warned not to ask around"), and interviews with Mr. McLaughlan who viewed as believable the explanations of Inmate X and offered the opinion that there existed little to no threat and that given all elements gathered, he was personally willing to have contact with inmates without ballistic protection.

[59] As regards the investigation by the ministerial delegate, the respondent does not digress in any manner from the description made in the background section above, but comments that in its submissions to the ministerial delegate, the appellant never identified a precise alleged danger, as the closest the appellant came to doing so was:

> "[…] we find that there is an existence of danger, the fact that there was a live round found within Maximum Security Unit, that there is documented information to deem that a firing mechanism could be made out of something as simple as a pen body to fire additional bullet and that the intelligence information cannot be deemed credible based on previous serious events within the Maximum Security Unit."

[60] That description caused the respondent to comment that it was not clear whether the alleged danger is the .22 round that was confiscated, or other hypothetical rounds. In the case of other rounds, the respondent employer maintained its position that the alleged danger was hypothetical, an opinion that was shared by the ministerial delegate who, in concluding to absence of danger, found that the concerns of the COs were based on speculation and hypothetical situations rather than on the evidence that was collected.

[61] The respondent is of the opinion that the appeal should be dismissed on three grounds, those being that the work refusal was not done in good faith, that the appeal is moot and that a danger did not exist.

[62] On the first ground, that of bad faith work refusal, the respondent makes a distinction between maximum security correctional manager, Mr. Thompson, whose staff work in the maximum security unit where the bullet was found and communicated to him that they did not feel in danger and continued to do walks throughout December 4, 2018, and Mr. Kelsch, who does not work in that unit and who, as UCCO president, registered the group refusal on their behalf, leaving COs with no option but to follow UCCO's direction. In the respondent's opinion, as no staff member testified being supportive of the appellant's claim that many could testify to feeling their safety jeopardized, there is no truth to such a claim since if it were true, correctional officers would not have continued their hourly rounds for the better part of December 4, 2018, until the refusal was registered on their behalf. In contrast, the respondent notes that Mr. Kelsch is the sole appellant and does not appear to have the support of the membership at appeal.

[63] It is the opinion of the respondent regarding this first ground that the repeated statements of Mr. Kelsch and another union member to Mr. Bonnefoy or Mr. Mclauchlan that regardless of what information the employer presented, UCCO would go forward with their labour action and assess the BTRA as high, are consistent with the employer's investigation report stating that "[d]espite having shared the above information with a copy of the [BTRA], during discussions with the Employee representatives they continued to raise concerns that staff are in danger. They noted that their position would remain that it is a high-risk threat regardless of whatever additional information was presented."

[64] The respondent submits that refusals done in bad faith run counter to the purpose of Part II of the *Code* and are injurious to effective labour relations. More specifically, the *Code* recognizes at paragraph 129(1)(c) that work refusals cannot be brought in bad faith and allows the Minister and delegate to discontinue an investigation if of the opinion that the refusal is in bad faith. The respondent is thus of the opinion that the Tribunal should dismiss the appeal on that ground. It submits that there was nothing that CSC could have done short of giving in to the appellant's demands for a high threat search to prevent the work refusal.

[65] On the second ground, that of mootness, the respondent premises its opinion on the fact that since the work refusal in December 2018, there have been at least 18 institution-wide searches and Inmate X has been transferred to another institution. Referring to the Tribunal's decision in *Correctional Service of Canada* v. *Mike Deslauriers,* 2013 OHSTC 41 (*Deslauriers*), for support to its claim that the danger must continue to exist at the time of the appeal, the respondent submits that based on this, the appeal should be dismissed on the basis of mootness as meeting the test established by the Supreme Court of Canada (SCC) in *Borowski* v. *Canada (Attorney General),* [1989] 1 SCR 342 (*Borowski*), calling for a two-step process. That process would first see the Tribunal determining whether the tangible concrete dispute has disappeared and the issue become academic, followed, where the issue is found to be academic, with the Tribunal then determining whether to exercise its discretion to hear the case nonetheless.

[66] As regards the first step, the respondent's argument is founded on the claim that the situation that exists today is entirely different than the situation that existed in December 2018 when the refusal occurred. As such, the substance of what was sought then by the appellant, i.e. an additional search to ensure that other rounds were not present in the institution, has been granted since the institution has been searched at least 18 times since December 2018. As to the fact that in December 2018, the appellant was seeking a search at high risk threat protocol, the respondent submits that such searches are no more effective than searches made at low risk threat protocol since the difference solely concerns mandatory PPE. The respondent thus argues that under high threat risk protocol, as in low threat risk protocol, other search methods, including detector dogs, remain discretionary. The respondent notes in this regard that since December 2018, several searches have used detector dogs. In addition, the respondent also notes that the inmate who was at the center of the incident of December 3, 2018, has since been transferred to another institution.

[67] In light of what precedes, the respondent argues that the live controversy has disappeared and consequently the issue has become academic, meaning that the appeal is moot. According to the respondent, the appellant retains the right to refuse to work in the future, should dangerous events occur. In that perspective, such events would be assessed under their specific facts and circumstances.

[68] The second step of the process concerns the discretion of the Tribunal to hear the appeal even if it finds the appeal to be moot. Underlining the fact that acting in this manner would represent, as per *Borowski*, *supra*, a departure from the usual practice of

courts and tribunals, the respondent notes that the SCC has determined that three factors need be considered in determining whether discretion should be exercised to wit, (1) the presence (or not) of an ongoing adversarial relationship, (2) judicial economy and (3) whether the Tribunal would, should it decide to exercise its discretion to hear the appeal, be exercising a legislative rather than a judicial function.

[69] The respondent submits that taken as one, those factors suggest that the Tribunal should not exercise its discretion to proceed with hearing the appeal which should thus be dismissed on the basis of mootness. **First**, the adversarial relationship has disappeared. A large number of searches have been conducted since the refusal and no firing devices or additional bullets have been located. An order by the Tribunal would have no direct or collateral consequence for the appellant. **Second**, the scarce judicial resources of the Tribunal should be conserved as a decision would have no practical effect on the rights of the parties and this case is not one of a repetitive nature that would be evasive of review. The appellant himself has conceded that the finding of a round is a very rare occurrence and no issue of public importance is raised herein. **Third**, the Tribunal should remain sensitive to its adjudicative role. The respondent submits that pronouncing a judgment in the absence of a dispute may be viewed as the Tribunal departing from its adjudicative role. According to the respondent, there is nothing in this appeal that suggests that this would not be the case.

[70] The third ground on which this appeal should be dismissed, should the Tribunal decide to exercise its jurisdiction to hear and decide the case on the merits, raises a single question to wit, whether a danger existed. The respondent initiates its arguments relative to this by submitting the following:

- the appellant's argument that the Tribunal must determine whether a danger existed when the bullet was found on December 3, 2018, is incorrect as case law has established that what needs to be determined is whether the danger existed at the time of the refusal to wit, the evening of December 4, 2018, or in the future.
- the Tribunal is not tasked with determining whether a search should have been conducted at high threat risk protocol, using the ERT, detector dogs or other methods.
- the Tribunal is not tasked with determining whether the appellant had a reasonable cause to believe that a condition or activity presented a danger.

[71] The respondent submits that examination of the question of whether a danger existed must be conducted according to the test established by the Tribunal in *Ketcheson*, *supra*, as also submitted by the appellant, making it unnecessary to examine at length its substance. However, the respondent underlines that according to the test, the following is central:

- there must be a reasonable expectation that the hazard will be an imminent or a serious threat and as such, 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;

- there must be a reasonable possibility that the alleged threat will imminently cause injury, or a reasonable possibility that the alleged threat will cause severe injury at some point in the future;
- if there is no reasonable expectation of imminent or serious threat, the alleged danger will be hypothetical. The *Ketcheson*, *supra*, decision has not altered this premise and the Tribunal has since continued to recognize that there must be more than a hypothetical or speculative threat. The potential for injury must be more likely than not.

[72] Having underlined the above, the respondent submits that in order to establish a reasonable expectation of injury in cases where a bullet is found in an institution, the appellant needed to establish three elements to wit, (1) the presence of additional rounds, (2) a mechanism to propel the rounds, such as a zip gun, and (3) an inmate prepared to shoot a CO. In the absence of any of these, the respondent argues that the danger remains hypothetical or speculative. The respondent finds support for this in the decision of the Tribunal in *Dan Bradford and Correctional Service of Canada*, 2013 OHSTC 38 (*Bradford*), at paragraph 71.

[73] The first step of the *Ketcheson* test requires the identification of the alleged hazard, condition or activity at the source of the claim of danger by the appellant. It is put forth by the respondent that this needs to be done by the refusing employee. The submission of the respondent is that the appellant's identification is as vague on appeal as it was before the delegate. According to the respondent, the appellant appears to take the position that the .22 calibre round that was found and confiscated on December 3, 2018, is the alleged hazard, citing in this regard the actual words of the appellant's submissions: "On the 3rd of December 2018, the bullet constituted an imminent threat to life or health and was reasonably expected to be a serious threat to life or health." The respondent thus points out that the appellant never states whether other hypothetical rounds are the alleged hazard. The respondent is of the view that the appeal could be dismissed on this basis alone, as this evidences that the appellant's submissions are based on the flawed assumption that the Tribunal should consider whether a danger existed on December 3, 2018, when the round was found, instead of December 4, 2018, when the work refusal was registered.

[74] Proceeding nonetheless to apply the test, regardless of whether the alleged hazard was the confiscated bullet or, in the alternative, the hypothetical additional rounds, the respondent argues that the appellant has nonetheless failed to indicate how the .22 calibre round ever put him in danger since when he refused to work, Unit 6 where the bullet was found had already been searched and he was not being asked to go in and re-search Unit 6. The respondent submits that the case law of the Tribunal stands for the principle that the right to refuse work constitutes an individual right which applies solely to the employee invoking it and that the consequent determination is made on the basis of the facts, circumstances and evidence that apply specifically to that employee. In this regard, the respondent notes first that on the day of the search, the appellant was not working in

Unit 6, that at the time of the refusal, the unit had been completely searched and further, even if there was a danger in the said unit, which was not the case according to the respondent, it would not affect the appellant since at the time he was working in a separate building.

[75] On the question of whether the hazard could reasonably be expected to represent an imminent threat, which would require that the hazard cause injury soon, the respondent submits that there was no imminent threat to the appellant at the time of refusal. Referring to *Ketcheson*, *supra*, where the employee believed always being in danger and where the Tribunal commented that the employee did not appear to appreciate the difference between a hazard that is a danger and one that is not, the respondent submits that the same situation prevails in the present case of the appellant who believes that "a bullet in an institution constitutes a danger" and associates the fact that it was located during a range walk and out in the open as being even more of a danger, while all the while ignoring the lack of evidence of an intention to use it, the means to fire it and the fact that it was confiscated.

[76] The respondent approaches the question of an imminent threat initially in relation to the bullet that was found. According to the respondent, it is virtually impossible for that round to represent an imminent threat as in a matter of a short span of time, this would entail an inmate breaking into the contraband room to recover what is otherwise not readily available, a remote possibility when one considers that Inmate X had been moved to segregation before registration of the work refusal and that the decision to maintain the lockdown preceded the refusal and such was maintained until the Minister's delegate had rendered her decision on December 7, 2018.

[77] Furthermore, even if the round could be recovered, no evidence was presented that a zip gun could be created within minutes or hours of the refusal nor was any evidence presented that Inmate X or any other inmate knew how to fabricate a zip gun, nor of any intention to shoot a correctional officer. As to the appellant possibly basing its claim on the potential existence of other rounds, the respondent submits that no evidence was brought forth regarding the existence of such hypothetical rounds, as Unit 6 had been entirely searched on December 3, 2018, with no additional rounds found, this demonstrating that no injury or threat could have occurred within minutes or hours of the work refusal. Referring to the Tribunal decision in *Bradford*, *supra*, the respondent emphasizes the speculative and hypothetical nature of such claim, noting that it is well established that "the assumption that if one bullet was found then 'there must be others' is speculative and is not supported by any evidence. Because of its speculative nature, it does not meet the threshold of a reasonable expectation of injury as applied in *Verville*" (see *Verville*, *surpa*).

[78] Regarding the potential existence of other rounds, as claimed by the appellant, it is put forth by the respondent that this is in direct contradiction with the fact, recognized numerous times by the appellant, that finding ammunition at SMI is a rare occurrence that the appellant has not been able to challenge since the latter has provided no evidence of any ammunition, short of the one found on December 3, 2018, ever having been found

at SMI which remained in lockdown after the refusal, thereby making it unclear how a hypothetical round could have been smuggled to another unit.

[79] The respondent emphasizes that when making its submissions, more than 18 months had gone by since the incident and refusal and that during that time, there have been numerous searches of the institution, many with detector dogs with no other round or device to fire a round ever found. According to the respondent, the situation in the present case is identical to the one that existed in *Bradford*, *supra* where the Tribunal concluded that the possibility of finding a zip gun was speculative where a zip gun had never been found in the institution and there was no security intelligence suggesting that such a zip gun existed.

[80] The respondent challenges the suggestion by the appellant, based on suspicion that such a zip gun may have been used in a 2005 incident, that a zip gun existed in 2018, arguing the absence of any credible evidence that a zip gun has ever been found in SMI and the fact that such 2005 incident predating the arrival on staff of the appellant possibly explaining the exhibits provided by Mr. Kelsch being in contradiction with the latter's claim of such zip gun's presence where it is stated that "no device or improvised firearm was found."

[81] Along the same line, the respondent puts in doubt the declaration by CO Mr. James Bloomfield to the effect that since all items seized are logged, the institution can provide a list of such which would indicate the presence of zip guns and components of such. The challenge from the respondent stems from the fact neither the appellant nor Mr. Bloomfield have provided any documentary evidence that zip guns have ever been located at the institution or sought any disclosure of such alleged logs. This is also countered by the unequivocal statements by Mr. McLauchlan and Mr. Bonnefoy that no zip gun has ever been found in the institution.

[82] The respondent suggests that the appellant's statement that "anyone who knows how to make a zip gun can make one" should be viewed with the same doubt as the apparent position by the appellant that making a zip gun is fairly easy and leaves aside the reality of institutions such as SMI that have extensive security measures, ranging from surveillance towers to metal detectors and others, as well as extensive security policies. It is the opinion of the respondent that the fact no zip gun has ever been found in the institution may be attributable to said combination of measures.

[83] Along the same line, the respondent is of the opinion that the appellant improperly interprets the statement by Inmate X that if he wanted to harm someone, he would stab them as evidence of an intention to shoot a CO, thus not taking into account the additional words of the inmate before the health and safety committee to the effect that stabbing would do a better job than a .22 calibre round which "would not do anything."

[84] For the respondent, the reality comes down to all the evidence, including Inmate X's arrest report, his confession, the information provided by other inmates and the CCTV footage all point to confirming that Inmate X introduced the round in the

institution because he thought it would be "cool." Given what precedes, the respondent reaffirms that there was no evidence of any intention to shoot a correctional officer, and that as such, whether the alleged hazard is viewed as the confiscated round or other hypothetical rounds, the immediate danger in terms of imminent threat remains speculative.

[85] The respondent also challenges the interpretation put by the appellant on the notion of unpredictability of inmate behaviour as a factor in determining whether, under the *Ketcheson*, *supra*, test, there is an imminent threat/danger, making the point that in citing for support the Tribunal's decision in *Laycock*, *supra*, stating "[a]ssaults of correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated," the appellant conveniently failed to cite the other part of the statement that says "[c]learly, the threat can therefore materialize before the condition can be corrected, thereby **satisfying the third element of the test as set out in Ketcheso**n" [emphasis added], said third part of the *Ketcheson* test having to do with whether, once a threat has been found imminent, such threat will exist before the hazard or condition can be corrected. The respondent thus views the appellant's interpretation as contradicting the case law on hypothetical and speculative threats and submits that the appellant cannot simply rely on unpredictable inmate behaviour to avoid the requirement that the threat not be hypothetical.

[86] The respondent also challenges the argument by the appellant that the belief by correctional officers is relevant in determining whether a danger exists, a position the respondent sees as being at odds with the Tribunal's mandate under the *Code*, a mandate that calls for an objective determination of whether a danger existed, as per *Gartner* v. *Canada Border Services Agency*, 2015 OHSTC 10, as opposed to a subjective belief by correctional officers in that regard.

[87] In the respondent's opinion, accepting the appellant's argument would delegitimize the Tribunal and diminish the integrity of the work refusal process as this would be tantamount to delegating the Tribunal's decision-making power to an employee refusing to work. By way of conclusion on the matter of imminent threat, the appellant alludes to the rights of inmates, arguing the importance of remembering that inmates must be treated with respect and dignity, submitting that in the case of such searches where inmates are confined to their cells, the employer cannot lengthen the duration of a lockdown simply to assuage the appellant's alleged safety concerns which are entirely unsupported by the evidence.

[88] On the question of whether a serious threat existed, one that signifies that there exists a hazard, condition or activity that at some time in the future will result in injury or illness, the respondent argues that the .22 calibre bullet could not represent a serious threat at the time of refusal or at any time after that since the bullet had been confiscated prior to the work refusal and there is no evidence of the existence of a zip gun or intention to shoot a correctional officer. The respondent adds, respecting zip guns, that the only evidence as to their effectiveness comes from Mr. McLauchlan who put forth

that they are not particularly effective or accurate, are prone to malfunction and their projectile may have little stopping power. As it is clear that in assessing whether danger exists, a zip gun must exist, it is argued by the respondent that in the absence of information as to one's effectiveness, the Tribunal cannot assess whether a zip gun, particularly a hypothetical one, would have contributed to the existence of a danger.

[89] As the evidence points to there having been only one bullet introduced in the institution, that being the one introduced by Inmate X, and the appellant has not provided evidence that would show otherwise, i.e. other rounds, relying on hypothetical rounds as the danger does not establish a reasonable expectation of a serious threat to the health of the appellant. This is compounded by the absence of evidence of other rounds, zip gun or intention to shoot a CO.

[90] The next part of the *Ketcheson* test raises the question of whether the threat to life or health will exist before the hazard or condition can be corrected or the activity altered. In this regard, the respondent formulates an argument that essentially centers on the time span between the round being found and the time the appellant registered its work refusal. On the claim that the round that was confiscated on December 3, 2018, constituted the threat, the respondent submits that since the refusal was registered on December 4, 2018, this is fatal to the appellant's position since it would appear difficult to consider a threat existing before the condition could be corrected when the condition did not exist at the time of refusal.

[91] It is the respondent's view that a danger cannot exist where the alleged hazard (the .22 round) was corrected before it became a threat, before a zip gun could be manufactured and before an inmate formed the intention to make use of it. Citing the Tribunal's decision in *Hassan* v. *City of Ottawa (OC Transpo)*, 2019 OHSTC 8, the respondent notes that the Tribunal has recognized that a complaint of danger can be dismissed when the condition has disappeared before the work refusal takes place. The result should be the same where the alleged hazard is a hypothetical round, the respondent arguing that even in such a case, such hazard was corrected before it became a threat as the matter was thoroughly reviewed and assessed under the ballistic threat risk assessment protocol with assistance from security intelligence officers. Furthermore, since that time, the institution has been searched a minimum of 18 times with no rounds or zip guns ever found and no ballistic incidents taking place.

[92] As for the last element of the analysis, it is the submission of the respondent that even if a danger was found to exist, such was a normal condition of employment as contraband represents an unfortunate reality of correctional institutions despite significant prevention measures being put in place by the employer. According to the respondent, CSC has taken all appropriate measures to minimize the level of risk to employees, this in accordance with its established policies and within the *Corrections and Conditional Release Act,* any remaining risk being residual. The matter was thoroughly assessed under CSC's BTRA protocol, created with the participation of UCCO, with the assistance of trained and qualified SIOs. The risk was determined to be low and the controls in place commensurate with the level of risk assessed. The SMI has implemented extensive

security measures in accordance with Commissioner's Directives, and officers have appropriate PPE and are properly trained and equipped for searching. Furthermore, in addition to inmates being searched upon admission to prevent contraband, searches of the institution are conducted on a regular basis in accordance with the institutional search plan and in accordance with the Commissioner's Directives.

[93] As a last point of its submissions, the respondent submits that the appellant's submissions as well as witness' statements focus on erroneous and irrelevant factors. The respondent thus notes that the appellant's submissions bear significantly on alleged irregularities of the investigation and the BTRA, among others, although those are inaccurate and have no bearing on the determination of whether a danger existed. By way of examples, the respondent notes the question raised by the appellant on whether the other weapons mentioned in the police arrest report of Inmate X are secured in the police station, possibly implying their return to the inmate, an argument described as without merit.

[94] As to the claim by the appellant that the employer downplays the finding of a jail-made stabbing device in Inmate X's cell, the respondent clarifies that no such device was found as only material that could be used to fabricate such item had been found. Furthermore, as to the claim that the delegate did not take into account the fact that the BTRA failed to consider the so-called "jail-made stabbing device," the respondent submits that not only was the material found not a stabbing device, but also that as a BTRA concerns ballistic weapons, information about stabbing weapons has no place in a BTRA. As to the BTRA not considering that the .22 round was not detected by the BOSS chair used for personal searches, the respondent qualifies this as being unrelated to the determination of the existence of danger as when the said apparatus was used on the inmate, the round was still in the latter's cell.

[95] On the same matter, the respondent refers to the appellant's argument that the BTRA ignores the fact that other rounds (shotgun) were mentioned in the arrest report, and the latter's reference to news articles put in evidence by the appellant that he states indicate that more than three bullets were concerned. As for the BTRA, the respondent notes that the SIOs involved explained that those additional shotgun rounds were irrelevant as the purpose of the investigation was to determine how Inmate X had introduced the .22 round in the institution, noting also the size of a shotgun round making it impossible to hide even one under his tongue as the latter did for the .22 round.

[96] As for the mention of other rounds in news articles, the respondent clarifies that such concerned a different arrest of a different person that occurred after the work refusal. On the claim of ongoing tensions in the inmate population, the respondent contends that such evidence is contradicted not only by the fact that information in this regard would be routed through the security intelligence office that had not received a single CO report in this regard, but also is contradicted by the appellant's own statement to the effect that "there is always violence at Stony Mountain, however before this date, it felt a bit (calmer) and less tension before this."

[97] As to the investigation report improperly stating inmates not having any ballistic history, Mr. McLauchlan explained that this referred to history of ballistic incidents within the institution which is entirely different from the fact that maximum security inmates would have a ballistic history outside the institution, a fact recognized by the SIO department. The respondent submits also that the suggestion by the appellant that ammunition could be introduced in the institution by drones is at best speculative as there is no evidence that drones have ever been used to smuggle ammunition into SMI.

[98] Finally, relative to the claims by the appellant that the delegate failed to assess, in relation to the finding of a metal rod in and the flooding of Inmate X's cell, whether this was indicative of a plot, failed to consider the fact that staff were not informed immediately at the 7:00 hours briefing of the finding of the bullet or that the bullet was not found for three months after introduction into the institution, the respondent views those as speculative and irrelevant to the true nature of the refusal, noting the fact that staff learned of the find at the end of their 7:00 hours meeting, that Unit 6 staff discussed the matter at their 7:15 hours meeting of the same day, that the institution had remained under lockdown at the time and that extensive evidence supports the claim that no other rounds were present in the institution.

[99] The respondent submits that the existence or presence of hazards does not automatically translate into the existence of danger, and that the employer must act upon facts and evidence, as opposed to hypothesis and speculation, when making decisions, such as conducting exceptional searches, that have an impact upon the health, safety and security of staff, inmates and the public, given the legal and security ramifications linked to such decisions.

[100] The respondent thus concludes that the appeal should be dismissed, primarily because the issue has become moot, as more than 18 searches of the entire institution have occurred since the work refusal and the inmate concerned has been transferred to another institution. However, should the Tribunal opt to exercise its discretion, the respondent submits that the appeal should be dismissed as the right of refusal was exercised in bad faith, and the appellant is not faced with an imminent or serious threat. Should a conclusion of danger be arrived at, the respondent submits that this would constitute a normal condition of employment.

Reply

[101] The appellant premises its reply by stating that there is no reason to repeat the same arguments or to offer arguments differing from those offered in its initial written submissions. This said, in addition to clarifying certain elements of its previously submitted evidence and commenting on the probative force of the respondent's submissions and the credibility of the its witnesses, the appellant will limit its submissions to those matters it considers relevant and significant to the legal issues raised in the appeal, noting in particular what it describes as CSC's constant silence on the main issues and its preference to base its analysis on imaginary scenarios, without answering to what it calls the employer's disregard for human safety.

[102] As to its legal argument, the appellant contends that the work refusal was done in good faith, that the present appeal is not moot and that as part of the mootness consideration, the Tribunal should exercise its discretion to hear the appeal.

[103] On the respondent's claim of a bad faith refusal, the appellant argues that the respondent failed to satisfy the burden of proof and has contradicted itself. The appellant is of the view that this unfounded bad faith assertion by the respondent is based on a false/unsupported statement by Mr. Thompson to the effect that correctional officers continued rounds in Unit 6 while the matter was being investigated, thus before the work refusal, and that they did not feel they were in danger, and Mr. Bonnefoy's admission that the lockdown of the whole institution for the quarterly routine search had remained in place while additional information was gathered concerning the bullet incident, such being confirmed by the BTRA conducted by CSC.

[104] If it was the case that the rounds by COs did continue while inmates remained locked up, the appellant submits that this evidences CSC's lack of regard or knowledge of what a threat assessment (BTRA) signifies, since even for a low scale threat, the BTRA provides that "if it is determined that a lockdown is required, the institution will conduct a search in the same manner as section 53 or quarterly search of the area in question." The appellant submits that in contradiction to Mr. Thompson's claim that COs felt secure, the mere fact that they inquired about the ammunition at the morning briefing of December 4, 2018, shows their concern. The appellant's claim is thus that while no work refusal had been registered on that morning, no rounds were performed by staff. In light of this, the refusal was registered by Mr. Kelsch on behalf of all members of the Union as he is the union president and his election needs to reflect staff's approval of his actions. It is thus false to claim that his refusal is abusive and that he is acting, at appeal, alone and without member support. As the elected president of UCCO-SACC-CSN at SMI, he represents the local membership and enjoys members' support. CSC, in its claim regarding the appellant, thus confuses an individual right to appeal with acting alone and against the will of the members one represents.

[105] In furtherance of its submissions on this bad faith issue, contrary to the allegation by Warden Bonnefoy that Mr. Kelsch had indicated that only the performance of a search under "high threat protocol" would be satisfactory regardless of the evidence that was gathered and that the threat risk was high regardless of the information provided, the appellant submits that he never formulated such a position and that Mr. Bonnefoy's version of events is not credible, this for reasons that range from the fact that the BTRA was drafted jointly, that the attitude of the Warden in not questioning the appellant's lack of explanation as to the three levels of risk assessment provided under the BTRA would be nonsensical, that the appellant's filing of a refusal would have been in contradiction of such a set position by the appellant who asserts that "[he] could have accepted a different conclusion to ballistic threat assessment." The appellant further submits on this that while the warden may have explained that "[we] felt that the intelligence information that [we] gleaned would have lessened the risk significantly," the warden does not conduct

searches. In the case of those who do (COs), they did not feel that the risk had been reduced to a normal condition of employment.

[106] In support of its challenge to the claim of bad faith refusal by the respondent, the appellant also submits that the employer (CSC) failed to be transparent as no BTRA was initiated or discussed on December 3, 2018, no written mention of the finding of a bullet was made at the December 4, 2018, morning (7:00 hours) briefing nor was this mentioned orally at that time, something that is incompatible with CSC's internal practice. Referring to the statement by Mr. Bonnefoy that: "if we had received such intelligence, we would have advised the correctional officers carrying out the search so that they knew what to look for. We also would have met with UCCO and conducted a Ballistic Threat Risk Assessment at that time," the appellant concedes that one can understand that the BTRA was not conducted during the night of the find but submits that management was purposely not transparent in not advising COs orally or in writing of such find at the December 4 morning briefing, nor informing the Union or initiating a BTRA. Furthermore, while the Ministerial Delegate characterized the metal rod found in Inmate X's cell toilet as a jail-made stabbing weapon, the employer failed to communicate such information to employees even though the plumber who found it characterized it as compatible with the type used to make a stabbing weapon.

[107] Regarding the arrest of Inmate X and the finding of only two rounds on his person at the time, the appellant submits that in failing to consider it important to share with the Union the fact that the inmate had other weapons in his possession, thus constituting an apprehension of other rounds being smuggled into the institution, the respondent was not transparent in the process even though such information would be of interest in conducting a BTRA. As to the employer's claim, in having the correctional officers resume the routine search, that COs are trained in the use of PPE and how to apply such equipment to their everyday duties, thus without the extra protection and training of the ERT members, the appellant submits that no proper training or specific PPE under ballistic threat was ever provided at SMI to employees other than the ERT team, justifying the appellant's request, in the circumstances, to have an enhanced search with the properly trained and equipped ERT team.

[108] The appellant submits that the respondent incorrectly aligns the facts of the case with the provisions of the *Code* dealing with bad faith and fails to support such allegation, arguing that since section 128 applies solely to safety while the "High Threat Risk Protocol" enables enhanced search and safety measures, all operations could have resumed using extra protection while inmates were already locked down. The appellant finds support for this in the words of Mr. McLauchlan wondering "what the point of the entire process (was), and whether this actually was an issue related to safety" yet accepting as appropriate the Union's propositions. Additionally, the appellant submits that the employer is in contradiction with its claim as it admits that Union representatives and management engaged in a dialogue towards a mutually agreeable resolution that continued during the whole investigation.

[109] Given what precedes, the appellant submits that the appellant did not refuse to work in bad faith, adding that the Union has no history of acting in this manner.

[110] In addressing the question of whether the present appeal is moot, the appellant first submits that the Tribunal should distinguish the case at hand from the case dealt with in the Tribunal decision in *Deslauriers*, *supra*, on which the respondent has based its submission that the present appeal is moot, noting that in that case, the finding of mootness had been made by the Tribunal on the basis that the penitentiary where CO Deslauriers had been working had closed and the officer had moved to a different workplace before the Tribunal had the opportunity to make a decision. The appellant is of the view that the Tribunal should instead take primary account of its decision in *Nelson Hunter* v. *Canada (Correctional Service),* 2013 OHSTC 12, wherein the Tribunal did not conclude to mootness even if the employee no longer worked at a particular establishment but where there remained an employment link, as in the present case. The appellant submits that in the present case, "ammunition, firearms, intent to use ballistic weapon or any weapon are likely to happen," such serious health threat justifying the putting in place of a BTRA, which the appellant describes as a "mandatory process in order to assess danger that is likely to happen and take the appropriate means to reduce it."

[111] The appellant argues that its claim that the legal dispute is concrete and not academic needs to be accepted on the basis, for the most part, of the witness statement by Mr. Bonnefoy. The appellant claims that the employer has submitted that the substance of the appeal has been granted because additional searches have been performed since the refusal, that a high threat protocol would not be more effective and that enhanced techniques, such as detector dogs have been used. These conclusions, which the appellant describes as incorrect, demonstrate that CSC has hindered the efficiency of the searches and exposed its staff to danger.

[112] It is the opinion put forth by the appellant that the warden's statement corroborates the fact that there is danger, that the dispute is ongoing and that the employer's decision had consequences as regards the efficiency of the searches that followed since following the refusal, continuation of the quarterly searches was rescheduled for a later date, the warden stating that the unannounced quarterly searches are meant to prevent inmates from hiding or destroying contraband, and that given said purpose, "there does not have to be intelligence of an existing weapon in the institution to trigger a routine search." The respondent thus submits that the words of the warden establish the likelihood of the presence of weapons and of a threat to safety and support the view expressed by the appellant that failure to proceed immediately with the thorough and immediate search exposed the COs to danger as no one will ever know what the launch of the immediate and extensive search (high threat risk protocol) sought by the Union would have produced.

[113] The appellant submits that the employer has not contested the increase in violent occurrences in the areas of the institution that the union wanted searched under the high threat risk protocol and that its decision to cancel the continuation of the routine search

hindered its ability to detect and prevent different threats. Noting the existence of violent occurrences in other parts of SMI, a fact the appellant claims is not denied by the employer, the latter submits that the request for a complete search under that protocol by Mr. Kelsch was justified by the need to reassess danger following discovery of the .22 bullet, whereas the employer's comprehension of "danger" is that once an ammunition is confiscated, it cannot be fired by an inmate waiting in his cell and thus there is no danger and anything else is speculation or moot. The refusal by the employer to continue the search of SMI using enhanced tools and protection, its refusal of any compromise in this regard and its cancellation of the routine search until later, let inmates adapt and increased the likelihood of contraband being hidden or destroyed in the future. To accept the position put forth by the respondent would translate into a refusal always being moot except if a bullet was fired with the intent of harming a CO on a continuous basis until the hearing of an appeal.

[114] The respondent is of the view that if the Tribunal finds that there is no longer a concrete dispute, it should nonetheless exercise its discretion to hear and decide the appeal. The respondent justifies such view on its opinion that an adversarial relationship between the parties still prevails since by cancelling the quarterly search process throughout the institution, this resulted in an increased possibility of inmates hiding or destroying evidence. CSC not applying the BTRA, as it should have been, in the manner of a section 53 search, regardless of the threat level, may have compromised the finding of other elements. The appellant submits that instead, the employer, after the round was found, refused to apply even the low threat action plan because it had already done a quarterly search, even if the method used had proven unsuccessful. According to the appellant, CSC does not contest that violent incidents have increased at SMI, but simply opines that such is not related to the finding of the .22 round and Unit 6. For the appellant, the BTRA is a protocol meant to reassess danger, thus has a prevention function that exceeds the mere finding of an ammunition in a particular unit where the third component of such is titled "Intent to Carry Out Threat."

[115] Since quarterly searches occur more or less once a month, the appellant points to the fact that if Inmate X did in fact introduce the bullet after his arrest, this signifies that he managed to hide the round in the course of four searches, this demonstrating that CSC compromised its own ability to find successfully hidden ballistic material and thus failed to apply its safety policies.

[116] Additionally, the appellant argues that the Tribunal should exercise its discretion because the question at hand concerns the serious health threat to which the COs were exposed, that ballistic threats carrying an undoubtable lethal potential are likely to occur in the foreseeable future, that other violent occurrences are to be assessed, that CSC failed to respect its safety policies on numerous occasions and finally, because of the public importance of the matter.

[117] Finally, the appellant argues that the Tribunal has an adjudicative role since the dispute is concrete and likely to reoccur and that COs cannot be left in a dangerous

situation where access to a “trial” would not be possible unless ballistic threats occur on a regular basis between the actual work refusal and the appeal hearing.

[118] On the actual “danger” that would be argued, should the Tribunal elect to proceed on the merits, the appellant submits that the respondent erred in its comprehension of the appellant’s submissions since the latter clearly argues that danger indeed existed at the time of the refusal. The appellant thereby claims that the danger assessment was triggered when the bullet was found, that the Union attempted in good faith to negotiate measures to reduce the risk to a normal condition of employment, that CSC failed to apply its safety policies or to reach a compromise about the appropriate measures with the danger still prevailing when the work refusal was registered.

[119] In this case, there is a reasonable expectation of imminent or serious threat and the appellant opines that the Tribunal should not base its decision on the rationale it applied in *Bradford*, *supra*, as the “danger” presented in that case does not correspond to the situation in the present case and the ability to establish the evidence was hindered by CSC’s BTRA and danger assessment. The appellant submits that the position put forth by the respondent shows that CSC confuses the notion of imminent or “foreseeable” serious threat with the notion of certainty which is at odds with the jurisprudence of the Tribunal and a misconception that does not equate to a potential for injury. According to the appellant, a workplace refusal does not require that additional rounds or firing mechanism be present nor an inmate prepared to make use of those. In *Bradford*, *supra*, this was the criteria developed by the applicant with the Tribunal required to decide whether all elements were reunited.

[120] The appellant argues that the situation in this case is different in that the notion of danger is wider and not limited. The finding of a round that had been successfully hidden represented the triggering event of an assessment that was not conducted by CSC and that required another search, whether under low threat risk protocol in the manner of a section 53 search, a repeated quarterly search or under high threat risk protocol involving enhanced safety and search methods. Referring to the statement of Mr. Bonnefoy that “the safety protocols and protection for staff are enhanced under a high threat risk search. Increased PPE and tighter control does not necessarily equate or correlate with search effectiveness and increased odds of finding contraband,” the appellant submits that the enhanced search methods sought by Mr. Kelsch would only have helped as he did not seek a risk free environment but only that the danger be reduced to a normal working condition.

[121] The position of the appellant is that a number of questions were left unanswered where Mr. McLauchlan, referring to the “inmate code” of silence, found it useless to attempt to interview inmates in regard to these questions (note by AO-one needs however to note that such interviews were conducted by Ms. Elyk with answers to those questions). The appellant thus argues that the following questions were left unanswered: were other rounds or firearms smuggled, was there an intent to carry out a threat, is there another reason why Inmate X’s toilet was flooded and the bullet left in the main where another inmate could have picked it up, is there a reason why an exceptional ratting and

confession occurred, was there an intent to attack different inmates, was it a sign of increasing tensions and violence, was there an intent to stab, is a violent occurrence on an inmate likely to cause a serious health injury to a CO, was there an inmate ready to smuggle other ammunition and preparing to shoot, did someone else smuggle the ammunition, did Inmate X smuggle other weapons, were ballistic components moved around the penitentiary, is there an undetected plot?

[122] The appellant argues that it is not asking the Tribunal to find that what constituted "danger" was the fact of not performing a search under a high threat risk protocol without the ERT, detector dogs or other methods. Its view is that in this case, there was danger which required the putting in place of safety policies and actions to reduce it, and search measures could have brought said danger to a normal working condition level. Yet, the latter claims that CSC failed to apply any measure until after the delegate's decision and cancelled the quarterly search in the aftermath. For the appellant, the actions of CSC prevented a thorough BTRA and danger assessment and compromised the gathering of evidence. As such, the appellant submits that CSC cannot invoke its own negligence to claim that the refusal was based on hypothetical reasons.

[123] On the question of whether Mr. Kelsch could invoke a work refusal, the appellant qualifies as a narrow comprehension of the situation the claim by the respondent that such avenue was not open to the appellant since he was not working in Unit 6 "on the morning of the 4 of December" (note by AO: the respondent states "on the day of the search") and that the area had been completely searched the day before the work refusal. For the appellant, the refusal was about "continuing a search with enhanced protection and tools in all of the units, as the tension and danger in the penitentiary needed to be reassessed following discovery of the ammunition." The appellant refers in this regard to the witness statement of Mr. Bonnefoy that the Union "wanted the entire institution (Maximum as well as the Main) searched utilizing a High Threat Risk Protocol" (Note by AO: the full statement goes on: "However, the live round was found in J Range of the Maximum Security Unit, and the inmates in the Maximum Security Unit and the Main were confined to their cells and had no access to each other. As such there was no logical reason to involve the Main in the ballistic threat").

[124] Additionally, the appellant submits that the fact that the search had been performed shows that it and the intelligence were ineffective as the danger existed while the search was being conducted on December 3, although unknown at the time, and the discovery triggered the necessity to conduct a BTRA to reassess the risk. As such, the appellant disagrees with the respondent suggesting that, as in *Ketcheson*, *supra*, where the employee believed he was always in danger, thus not appearing to appreciate the difference between a hazard that is a danger and one that is not, Mr. Kelsch is in the same position in believing that the sole presence of a bullet in an institution constitutes a "real big danger." The appellant's view is that the employer confuses the notion of danger and that of direct harm happening in real time.

[125] On the argument by the respondent that there is no direct evidence of the danger, the appellant submits that the respondent arguing that no additional round was found

ignores the fact that the .22 round was successfully hidden during the December 3, 2018, search and that this fact should have been sufficient reason for CSC to evaluate its intelligence and to conduct further search of Unit 6 or any other unit, something the employer refused to do. For the appellant, the irregularities that it highlighted in its submissions made it impossible to properly assess the danger and find the evidence. It is the view of the appellant that the respondent CSC uses its own investigation mistakes to argue that no evidence of additional rounds was found and cancelled the quarterly search after the ministerial delegate's decision instead of conducting different search approaches between December 3 and 7, 2018.

[126] In answer to the respondent arguing that the presence of a zip gun in the institution was hypothetical, the appellant suggests that the documentary evidence submitted by the employer as well as the statement by Mr. Bonnefoy demonstrate that the possibility exists as an inmate did confess to having made two that were never found and that projectiles were actually fired at a fence, even though the warden raises questions as to the reliability of such evidence and SIO documents demonstrate that one should not expect to find such item in order to assess "danger" as a zip gun is made of objects commonly available in a prison and can be disassembled. According to the Appellant, CSC's BTRA concludes there is no evidence of a firing mechanism but admits they refused to analyse this component as they did not agree to conduct an enhanced methods search. The appellant puts forth that finding other ballistic evidence is difficult when CSC does not investigate. In such a case, ruling out danger represents a mere unsafe conjecture.

[127] The appellant submits that Inmate X's confession, a rare fact but one recognized as having occurred, should not have been taken in isolation and should have been accompanied by an investigation of the different aspects of danger. In this regard, the appellant opines that the witness statements of Mr. McLauchlan and Ms. Elyk support the appellant's argument that CSC failed to search for the evidence on which it now relies in describing the danger as hypothetical. That danger was never reduced to a normal condition of employment as CSC's BTRA disregards major aspects needed to assess a threat, such as information that (additional) ammunition is available, intent to carry out the threat, the information obtained by the SIO, the profile of the individuals, a documented threat, behaviour history, motivations and aggravating factor(s).

[128] As concerns Inmate X's arrest report, the appellant recognizes that it provides confirmation of the possession of .22 caliber ammunition but submits that the employer has persisted in ignoring and attempting to hide that upon his arrest, the inmate had been found with other ammunition and firearms in his possession and never considered that fact in its evaluation. Noting that in his statement, Mr. McLauchlan admitted that the investigation only sought to link Inmate X to the round that had been found and that the BTRA made no mention of shotgun rounds or other items mentioned in the arrest report because the investigation did not concern those items, the appellant submits that this should have warranted establishing whether the said items were a sign of any intent or plot or represented a reason to carry out a thorough and immediate search of the institution using the tools provided for under the High Risk Threat assessment.

[129] On the *Ketcheson* test question as to whether the hazard could reasonably be expected to constitute a serious threat to the life or health of a person exposed to it, the appellant notes, as regards the confiscated bullet, that it has already dealt with this in its main submissions regarding the repeated claim by CSC that the confiscated round could not be fired and that a zip gun is ineffective, as stated by Mr. McLauchlan. As to the lethality of said zip guns, the appellant refers the Tribunal to CSC's internal documents as the best evidence that they can be lethal. The appellant does admit that it has no direct evidence that rounds were "waiting to be shot from a cell" on December 4, 2018, when the refusal to work was registered. Its position however to counter the claim that the rounds are hypothetical is that:

- weapons and gun components are likely to be found and moved around the institution;
- the police arrest report concerning Inmate X is to the effect that the latter was in possession of other ammunition when arrested;
- Inmate X's confession was limited to the evidence he was confronted to;
- projectiles were shot at SMI by what was alleged to be a zip gun;
- if a zip gun was not found at SMI, evidence is that it could have been destroyed, hidden or disassembled;
- the investigation that was conducted was limited to the .22 caliber round;
- inmates in unauthorized areas can be there to visit inmates in other ranges and pick up weapons;
- Inmate X was seen on numerous occasions in unauthorized areas.

[130] The appellant addresses the question of whether the threat will exist before the hazard or condition can be corrected or the activity altered by pinpointing the exact time of the refusal to work registration to wit, 18:50 hours on December 4, 2018, and submits that between the discovery of the ammunition at 23:23 hours on December 3, 2018, and the work refusal, the threat risk was never properly addressed. Noting that inmate behaviour unpredictability cannot be questioned, particularly in a maximum-security institution, the appellant submits that once a threat is initiated, it cannot be corrected but has to be prevented and investigated. The searches that were conducted later cannot serve to demonstrate that the area was safe and had always been safe. During the period between December 3 and December 7, 2018, when the delegate issued her decision, no search was conducted by CSC and searches were cancelled after that date. The appellant submits that the employer did nothing during the lockdown and cancelled the search after the delegate's decision. It is the view put forth by the appellant that such conduct by the employer goes against CSC's ability to discover weapons as the concept of quarterly search is based on an element of surprise to prevent contraband from being destroyed or hidden.

[131] Was the danger a normal condition of employment? The appellant challenges the suggestion that this was the case, arguing that a BTRA was instituted because of a bullet's lethality and points to the uncontested witness statements by Mr. Kelsch and Mr. Bloomfield that apart from the ERT team, there is no training or equipment for

searches by COs under ballistic threat, noting that when he had the opportunity, Mr. Bonnefoy did not differentiate the training and tools provided to COs from that of the ERT team.

[132] As a final point of its reply, the appellant sees as relevant the underscoring of what he describes as inconsistencies in the investigation and refers to the following few. Thus, the appellant makes reference to previously described imaginary scenarios by CSC to underscore that on the day of Inmate X arrest, while the latter had more than only three rounds on himself, CSC did not consider that smuggling more than one round was a possibility. Along the same line, the appellant considers of no interest the fact, raised by the respondent, of referring in its submissions to wrong news articles on the number of bullets since it claims that numerous other sources are applicable and the evidence is easily accessible on Google.

[133] On the subject of ongoing tensions and violence within the institution, the appellant sees as inaccurate the claim that the appellant himself had recognized there was no increase since Mr. Kelsch, having stated that SMI is a violent place, noted that after a period of lesser tension over the summer and fall of 2018, tensions had increased and remained high following a violent murder in November 2018. According to Mr. Kelsch, the evidence is that, as one of the most violent penitentiaries in the country, SMI is subject to human tragedies and that the period of time surrounding the discovery of the ammunition saw an increase in such events.

[134] The appellant further adds that the respondent does actually recognize there were increased tensions in the institution when referring to incidents of violence occurring in areas other than J Range of Unit 6 but nonetheless part of the Maximum Security Unit or the Main. As to the employer finding "no logical reason" to enhance protection and extend the search to the Main section because the round was found on J Range, the appellant points to the statement by Mr. Bonnefoy to the effect that "large knives to small gun components (…) may be hidden by inmates with the intention of moving them around the institution" as supporting the submission by the appellant that there can be contacts and contraband between inmates from different units.

[135] As a whole therefore, the appellant submits that finding an ammunition triggered a danger assessment and that the danger was never reduced to a normal condition of employment. The appellant's summary of its position is that COs were exposed to danger as a consequence of the employer's refusal to continue the quarterly search of the whole institution using the enhanced tools and protections that are possible under a high-risk threat assessment.

[136] According to the appellant, an immediate and sudden search is effective to reduce the danger that COs face and prevents inmates from hiding and destroying illegal things while assisting in keeping the institution safe and secure. Weapons and gun components are likely to be found and moved around the institution. The danger is not a normal condition of employment. The Union only asked that the search be continued with enhanced tools and protection.

Analysis

[137] As Appeals Officer, my consideration of this appeal is to proceed on a *de novo* basis, as established at case law, thus signifying that in making a determination in the present case, I am not restricted to the information and evidence that may have been provided to the ministerial delegate at the time of her investigation into the refusal and may include relevant information and evidence that would not have been made available to the delegate when she conducted the said investigation (see *DP World (Canada) Inc*. v. *International Longshore and Warehouse Union, Local 500,* 2013 OHSTC 3). In addition, all the information and evidence provided to the undersigned for the purpose of deciding the present case, taken as a whole, needs to be evaluated objectively according to the standard of balance of probabilities.

[138] This appeal pursuant to subsection 129(7) of the *Code* concerns, as previously described, the decision rendered by ministerial delegate Wolfe with regards to the appellant's refusal to work made pursuant to subsection 128(1) of the *Code,* where the delegate concluded that a danger did not exist and thus the appellant was not exposed to a danger at the time of the refusal, as per subsection 129(4) and paragraph 128(13)(c) of the *Code.*

[139] I find it necessary to briefly consider and comment on the application of a basic element of the *Code* to the matter, that being the definition of "employee" at subsection 122(1) of the legislation. That provision makes it abundantly clear, and this has been recognized repeatedly at case law and through the evolution of the legislation over the years, that the notion of "employee" refers exclusively to a "**person** employed by an employer," to wit a physical person, which one must distinguish from the capacity, role or function held or exercised by the person vested with such capacity, role or function.

[140] In my opinion, such reaffirmation is rendered necessary by the fact that Mr. Kelsch, who is or was president of the local SMI component of the Union designated as UCCO-SACC-CSN at the time of the refusal, registered said refusal using the formulation: "**Justin Kelsch on behalf of UCCO-SACC-CSN-SMI**" [emphasis added], thus presenting himself as representing and acting for all 257 members of the local union, that throughout the appellant's submissions at appeal, the latter repeatedly noted or emphasized as central the purpose, intent and understanding of the Union as well as what the Union was seeking, which was the execution of an institution-wide search at "high threat risk protocol" regardless of the conclusion arrived at by the employer through the BTRA process developed with the Union.

[141] He also noted that as the elected president of the Union, he was the representative of the local's membership and enjoyed the support and approval of its members in relation to the refusal action taken on their behalf, thus challenging the employer's claim that he did not have the support of his members at appeal, all this raising the question of whether the refusal was made by Mr. Kelsch the employed person, as the latter assuredly

is, or the local president of UCCO-SACC, in the person of Mr. Kelsch acting in this capacity, implicating all 257 members of the Union in the action. such being relevant, in light of the respondent's claim of bad faith refusal action by the appellant, the contemporaneousness of the adjunct of 257 employees to a refusal to work registered only hours after completion of a ballistic threat risk assessment by the employer in consultation with the appellant who disagreed with its conclusions. This also raises a question as to whether any specific assent had been obtained from the 257 employees who were added to the refusal by Mr. Kelsch once the decision of the employer to not have a high threat risk search conducted, and the fact, argued as irrelevant by the appellant, that Mr. Kelsch was not working in Unit 6 at the time of these occurrences.

[142] Having in mind the definition of "employee" and the recognized and accepted individual/personal nature of the right to refuse to work, that right was exercised pursuant to subsection 128(1) of the *Code* reading as follows:

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

[143] The language of subsection 128(1) of the *Code* takes on particular importance in this regard given the actual formulation of the refusal to work by the appellant and the absence of any attempt by either party to the appeal to link the particulars (i.e. the wording) of said refusal to any of the three factors listed in the legislation that open the right to refuse to work, seemingly accepting that as long as there is an expression of intent to refuse, one need not link the action to one of the paragraphs of subsection 128(1).

[144] Upon consideration of the factual circumstances of the case, as described by the ministerial delegate in her investigation report as well as by the parties in their submissions at appeal, I have come to the understanding that the danger claimed to base the work refusal cannot be linked to paragraph (a) of subsection 128(1) of the *Code* having to do with the use or operation of a machine or thing, nor does it concern paragraph (c) of 128(1) presenting the performance of an activity as constituting a danger since when the contentious bullet was found, Unit 6 had already been fully searched, that a lockdown was in place, that the completion of the disagreed upon BTRA and the refusal that immediately followed caused searches part of the quarterly program to be cancelled.

[145] In my view, it is the lack or absence of a high threat risk protocol search being executed ("refusing to do rounds until a search has been completed at high-risk threat protocol"), said search to be executed not by regular COs but by a special search team (ERT) having access to specialized equipment and means, that must be seen as the cause

of refusal. In my opinion, this meets with the cause for refusal formulated by the *Code* at paragraph (b) of subsection 128(1) to wit, a "condition" in the workplace presented as constituting a danger. The distinction that precedes is, in my opinion, relevant to the determination that follows since pursuant to paragraph 128(1)(b) of the *Code*, the person exercising the individual (personal) right of refusal can only exercise that right on one's behalf and therefore not presume to act in a certain capacity, in addition to being an "employee," to act automatically on behalf of other employees by reason of the capacity held.

[146] In view of this, I am of the opinion that in acting as he did, undeniably establishing as the sole precondition to the resumption of normal duties by the 257 employees representing the full local complement of the Union the execution of the high threat risk protocol search, which would require a high threat risk conclusion to the BTRA exercise by the employer, the appellant confused and failed to maintain the distinction between his status as employee and his capacity as president of the local union in the exercise of the work refusal.

[147] The respondent has claimed that the first ground for dismissal of the appeal is the fact that the work refusal was done in bad faith and has based this contention in great part on what precedes which it describes as labour action, noting that once the union president had registered the refusal, which it refers to as a group refusal, all 257 employees were obliged to follow the union's directive.

[148] In this regard, I remain in agreement with the words of the Federal Court of Appeal in *Canada (Attorney General)* v. *Fletcher,* 2002 FCA 424, which, although somewhat dated, still find application in my opinion. In that decision, making reference to the case law of the Public Service Staff Relations Board standing for the fact that the right of work refusal "must not constitute the preferred way to promote a healthy and safe environment," the Court added that "the mechanism is a continuing one available whenever, and as often as, an employee has reasonable cause to remove himself from the workplace. It follows: […] that the right of an employee to refuse to work for safety reasons is an important but limited right that has to be exercised in accordance with the particular context. The right is not meant to be used as a tool to obtain a ruling from a safety officer, the Board [Tribunal] or this Court with respect to a policy which is not implemented at the time of the investigation."

[149] While one could probably derive from what precedes that the undersigned is inclined to agree with the employer's argument there remains the fact that a finding of "bad faith" necessitates at least a minimal examination or analysis of intention, which is not the task of an appeals officer seized of an appeal under section 146.1 of the *Code*. In any event, is not needed in the circumstances, as on the basis of all the evidentiary elements and submissions provided, my conclusion is that this appeal should be dismissed on the basis of mootness.

[150] As Appeals Officer, my purpose under section 146.1 of the *Code* is limited to inquiring into the specific circumstances of the case or situation that gave rise to the

appeal with a view to rendering a decision regarding those circumstances and not seek to make pronouncements intended to have a wider or more general effect or application. The notion or doctrine of mootness has been discussed numerous times in Tribunal decisions which recognize the capacity of the Tribunal to invoke such doctrine in its own exercise of jurisdiction and is based on the principle that the authority of a tribunal to render a decision is better served when it addresses a live controversy unless, absent such actual controversy, the tribunal elects to nonetheless make a determination on the case.

[151] The leading decision regarding that doctrine is that of the Supreme Court of Canada in *Borowski*, *supra*, where the Court adopted a two-step analysis, the first consisting in determining whether the tangible dispute or live controversy has disappeared, thus rendering the issue(s) academic. Regarding this particular notion of tangible dispute or live controversy, the Court described it as an "essential ingredient" that must be present not only when the action or proceeding is commenced but also when the court (or tribunal) is called upon to reach a decision. In this respect the Court did recognize that issues in contention may be of short duration, resulting henceforth in an absence of live controversy by the time of an appellate review, such absence rendering the case moot. The second step, in the absence of a live controversy, will have the Court (or tribunal) determine if it should nevertheless exercise its discretion to determine the issue(s), having consideration to:

- the presence of an adversarial context;
- the concern for judicial economy;
- the need for the Court to be sensitive to its role (effectiveness or efficacy) as an adjudicative branch in our political framework.

Regarding this second step, the Court noted that such process is not mechanical, that the principles may not all support the same conclusion and that the presence of one or two of the factors may be overborne by the absence of the third, and vice versa. The Court was of the view regarding the applicability of such factors, particularly that of judicial economy, that "the mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."

[152] On the first step of the mootness analysis, I have formed the opinion, based on all the evidence relative to the specific situation raised by the work refusal seeking an additional search based on a more stringent BTRA, as well as the submissions by both parties, that the issue raised by the appellant has become academic, and this for the following reasons.

[153] In proceeding to evaluate the academic nature of the issue, one cannot ignore the decision by the ministerial delegate and the reasons for it, even if this is being challenged at appeal. Those reasons have been described above and need not be repeated here. That consideration must in some manner set face to face what has been retained by the

ministerial delegate to make her decision and what has been brought forth by the parties at appeal, to determine whether what has been submitted to the Tribunal is substantially more convincing or compelling to cause the Tribunal, on analysis, to potentially arrive at a different conclusion in the present case.

[154] This has not been so, as where the decision of the delegate was based on the specifics of the case relative to Inmate X, the bullet discovered in Unit 6 and the situation that prevailed at Unit 6 and SMI, the appellant sought to establish the foundation for seeking a different and more extensive search on more general, albeit relevant, penitentiary and SMI evidentiary elements, some often based on speculation, hypothesis and partial and even out of context excerpts from respondent's witness statements, and founding its assertions on generalities such as the nature of the penitentiary environment and the type of occupants as well as the obvious, even if not specifically enunciated, postulate that the presence of one bullet must translate into there being others.

[155] By his refusal to work, the appellant, while generally seeking a finding of "danger," is actually seeking that a new search be conducted according to a high-threat risk protocol. The statement of refusal clearly indicates that this is the case where it spells out that no rounds will be conducted by COs until such a search is completed. Under the assessment of threat or risk system in place at the employer's SMI institution, such search would normally represent a finding or conclusion of "high" risk at the conclusion of the BTRA required in the presence of a so-called ballistic threat situation, such BTRA process envisaging three possibilities, that of "high," "medium" or "low" risk. Clearly, the claim of "danger" by the appellant finds its origin in the conclusion of the BTRA that was conducted on December 4, 2018, that concluded to "low" risk

[156] Were the undersigned, upon consideration of the merits of the case, come to a conclusion of "danger" due to the absence of the search sought by the appellant, there would be an obligation under paragraph 146.1 (1)(b) the *Code* to envisage the issuance of any direction considered by the undersigned to be appropriate under subsections 145(2) or (2.1) of the *Code*. Such a direction by the undersigned, resulting from the finding of "danger," would obviously require that the situation representing the "danger," be corrected, in essence requiring that a new BTRA occur that would take into account all the elements advanced by the parties. While I may have the authority to direct that such a BTRA be conducted, I most assuredly do not have the authority to dictate what the result of such BTRA would or should be.

[157] Clearly therefore, my corrective capacity in the circumstances of the present case may prove to be minimal to even non-existent as there is no assurance that a new BTRA would not arrive at the same conclusion as the one already completed. Finding otherwise would also signify that the employer would retain no flexibility in its conclusions to a BTRA since where such BTRA carries a possibility of high, medium or low risk conclusion, the position taken by the appellant would signify that the result of any BTRA would always entail a conclusion of high risk, regardless of circumstances, the special search that this would bring about serving to attempt to validate such conclusion.

[158] There is also a time or timeline element in finding that the issue raised by the appeal has become academic. The *Code*, at subsection 146.1(1), provides that an appeal shall proceed to inquire into the circumstances of the case "without delay," Parliament no doubt seeking by this obligation that the corrective authority of the Tribunal remain meaningful. In that regard, one cannot avoid noting that at the time of writing the present decision, almost three years have passed since the initiation of the work refusal that eventually led to the present appeal. There is little doubt therefore that the conditions and circumstances that prevailed at the time of the refusal may have considerably changed. Furthermore, where the appellant was seeking a particular type of search at that time, the uncontradicted evidence has shown that at least 18 searches have been conducted since, some being of the same nature as what was sought at the time.

[159] In addition, one must be aware of the nature of a BTRA which is a process to be repeated every time a situation that may be "ballistic" in essence develops, thus regarding circumstances in existence at the time for such individual process, with the consequence that should a BTRA or other assessment measure result from an affirmative decision by the undersigned, this would need to proceed on the basis of circumstances that prevailed some three years ago, circumstances that undoubtedly differ from present circumstances. Finally, while this is not a determinative element or factor in reaching a decision, one cannot ignore the fact that Inmate X, who was certainly central to at least the start of this case, has been transferred to another institution and is thus no longer a factor. My conclusion is therefore that the live issue or controversy that prevailed at the time of refusal is no longer.

[160] The second part of the mootness analysis requires consideration of whether the undersigned should exercise one's discretion to decide the merits of the case despite the absence of a live controversy. In doing so, I have taken into account all three underlying elements of the mootness doctrine rationale previously stated, with particular concern for judicial economy where the resources of the Tribunal have become minimal with the recent amendments to the *Code,* as well as the need to be sensitive to the effectiveness or efficacy of "judicial" intervention and, have decided not to use my discretion to hear the case on its merits.

[161] In arriving at this conclusion, one has been conscious of the fact that while it has been argued that a situation or event such as the presence of ammunition within the institution, with or without the necessary means to shoot it and/or a definite target in the person of a correctional officer, may be a rare event, one that evidence has shown has never occurred within SMI, such is not unheard of where one considers the penitentiary environment across the country. As such therefore, however remote, the possibility exists that an issue such as the one at hand may arise at some time in the future, with the possibility of such matter being examined under a review process established by the *Code*, meaning that such a case would not be evasive of review.

[162] In that regard, should other similar situations occur, be it at SMI or other institutions, the present case, decided on its own circumstances, would only be of negligible interest to other cases presenting some similarity as those would need to be

decided on their own specific circumstances and facts as things stand, with the length of time since the initiation of the refusal as well as the numerous searches of various sort that have occurred since then, with no firing device or other ammunition being found, this has caused the undersigned to form the opinion that a decision on the merits at this time would most likely be of minimal impact on the rights of the appellant.

Decision

[163] For the reasons above, the appeal is dismissed on the grounds of mootness.

[164] Following the appellant's request to that effect, I hereby order sealed all the exhibits submitted in this file.

Jean-Pierre Aubre
Appeals Officer