Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2022-06-08
Case No.: 2018-31

Between:

Kenneth Turner et al., appellants

and

Canada Border Services Agency, respondent

Indexed as: *Turner et al.* v. *Canada Border Services Agency*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision by an official delegated by the Minister of Labour.
Decision:	The decision is confirmed
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the appellants:	Ms. Jessica Greenwood and Mr. Zachary Rodgers. Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l.
For the respondent:	Ms. Nour Rashid. Treasury Board Legal Services, Department of Justice
Citation:	2022 OHSTC 3

REASONS

[1] This case concerns an appeal brought by employees of Canada Border Services Agency (CBSA), under subsection 129(7) of the *Canada Labour Code* (the *Code*) of a decision of "no danger" issued on October 3, 2018, under subsection 129(4) of the *Code*, by Ms. Michelle Sterling, an official delegated by the Minister of Labour (ODML or Ministerial Delegate).

Background

[2] The decision of "no danger" followed an investigation by the ODML into refusals to do dangerous work by 21 Border Services Officers (BSOs), on or around October 1, 2018, pursuant to section 128 of the *Code*. The work refusals took place at, or in the vicinity of, the Ambassador Bridge Port of Entry in Windsor, Ontario.

[3] The 21 appellant employees are listed in the ODML's investigation report. Each of these employees submitted a statement setting out the circumstances of their refusals. There are no significant differences between the situations of each of the appellants, and this decision applies to them all. The refusing employees have delegated Mr. Kenneth Turner to represent them in the appeal proceedings.

[4] The question of whether name tags on the uniforms of the BSOs constitute a danger to the BSOs has a relatively long history. Prior to 2012, the BSOs did not have name tags. Instead, they wore a five-digit badge number on their uniforms, which could be used to identify them if a traveller had an issue with the interaction they had with a BSO.

[5] In December of 2012, the respondent instituted a name tag policy, requiring name tags on uniforms. The respondent's rationale was that name tags would improve customer service or "service excellence." A second reason was a desire for consistency with uniforms of other federal law enforcement agencies.

[6] In response to the 2012 name tag policy, there were work refusals at 13 locations across the country involving 251 employees. The refusing BSOs believed that name tags on their uniforms could lead to stalking, harassment and personal injury to themselves and their families off-the-job by ill-intentioned travellers. Various Health and Safety Officers (HSOs—at the relevant time of the work refusals called ODMLs) investigated these cases and all came to the conclusion that the name tags did not represent a "danger" within the meaning of the *Code*.

[7] There was an attempted appeal of one of the "no danger" decisions, made by HSO Chris Wells, but the appeal was not received in time by the Occupational Health and Safety Tribunal Canada (the Tribunal), and the appeals officer dismissed the

appeal as untimely (see *Alex Hoffman* v. *Canada (Border Services Agency)*, 2013 OHSTC 19). Given his conclusion that the appeal was untimely and his decision not to extend the time limit for instituting the appeal, the appeals officer did not address the merits of the appeal.

[8] In another of the 2012 cases, HSO Paul Danton made a finding of "no danger." At the same time, however, he issued a direction under subsection 145(1) of the *Code* requiring that preventive measures be taken with respect to the hazard caused by the introduction of name tags. The employer appealed the direction, which was heard by appeals officer Pierre Hamel. The employer's appeal was dismissed and the direction was confirmed in a decision dated July 3, 2014 (see *Canada Border Services Agency* v. *Public Service Alliance of Canada*, 2014 OHSTC 11 (*Canada Border Services Agency*)).

[9] To be clear, the issue that was before the appeals officer in that case was whether the employer had put in place preventive measures in accordance with paragraph 125(1)(z.03) of the *Code* and subsection 19.5(1) of the *Canada Occupational Health and Safety Regulations* (the *Regulations*) to address the hazard related to its name tag policy. It is important to note that the appeals officer did not address the issue of whether the wearing of a name tag by the BSOs constituted a danger.

[10] It is also worth noting that the 2012 cases were based on a definition of "danger" in the *Code* that was changed in 2014.

[11] In response to HSO Danton's direction and the decision of the appeals officer, the respondent put in place a number of countermeasures to reduce the risk presented by the name tags. For example, guidance was provided as to how employees could choose to un-list their personal telephone numbers and reduce their "internet footprint" to make it more difficult for an ill-intentioned traveller to track down a BSO off-the-job.

[12] Nevertheless, between 2014 and 2018, the issue of name tags, and the employer's response to HSO Danton's direction, continued to be a source of contention at the Canada Border Services Agency (CBSA).

[13] On August 30, 2018, as a result of an Access to Information and Privacy (ATIP) request, certain information about all staff employed by CBSA was released to the requestor. The following information for each employee was then posted on a Twitter account:

- first and last name
- security clearance

- classification
- work location

[14] The respondent became aware of the ATIP release on September 28, 2018, and communicated this information to CBSA employees. This led to a number of BSOs initiating work refusals on or around October 1, 2018.

[15] The reasons invoked by the employees for exercising their right to refuse to work are the employer's policy requiring BSOs to wear name tags in conjunction with the publication on the internet of personal information about the BSOs. The concern was that, with this information, an ill-intentioned traveller could track down a BSO off-the-job, and do harm to the BSO and/or his or her family.

[16] The respondent concluded after its investigation of the work refusals, pursuant to subsection 128(7.1) of the *Code*, that a danger does not exist. The workplace health and safety committee came to the same conclusion following its own investigation, pursuant to subsection 128(10.1).

[17] The refusing employees disagreed with the results of the internal investigations and continued to refuse to work. The matter was referred to the Minister (subsection 128(16) of the *Code*) on October 2, 2018. The matter was assigned to ODML Michelle Sterling on October 2, 2018. During her investigation, other employees joined the work refusal process. Following her investigation, she issued a decision of "no danger" on October 3, 2018.

[18] On October 11, 2018, the appellants appealed the ODML's decision pursuant to subsection 129(7) of the *Code*.

[19] The hearing of this appeal was held in two sittings. I first held an in-person hearing between February 18 and 21, 2020, in Windsor, Ontario, and then, because of the COVID-19 pandemic, continued in a virtual hearing by Zoom on October 13 to16, 2020.

I-Preliminary Issue

[20] Before turning to the merits of the appeal, I will first deal with the appellants' request for anonymization of the names of certain witnesses.

Appellants' Position

[21] The appellants request that this decision be anonymized to delete reference to the names of six of their witnesses, the ones who gave evidence about their personal involvement with travellers. In this regard, the appellants rely on what is known as the "Dagenais/Mentuck test" as set out by the Supreme Court of Canada (SCC), as the basis for balancing the public interest in open hearings and the

privacy interests of the parties. In *Toronto Star Newspapers Ltd.* v. *Ontario*, 2005 SCC 41 (*Toronto Star*) at paragraph 26, the SCC restated the relevant principles in its previous decisions, *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 SCR 835 (*Dagenais*); and *R.* v. *Mentuck*, [2001] 3 SCR 442 (*Mentuck*).

[22] The appellants make reference to Tribunal decisions where anonymization has been granted. For example, anonymization has been granted where an alleged perpetrator of workplace violence was not given an opportunity to refute the allegations *Maritime Employers' Association* v. *Longshoremen's Union, CUPE, Local 375*, 2016 OHSTC 14 (*Maritime Employers*). As well, it has been granted where the exhibits, if made public, could compromise the safety of employees and the safety of institutions—for example, details of correctional institutions (see *Stayer* v. *Correctional Service of Canada*, 2018 OHSTC 8 (*Stayer*)).

[23] The appellants are concerned that individuals could use information from this decision to track them down and cause harm. The appellants also point to a strong anti-police sentiment in the broader culture which could contribute to the likelihood of retaliation because of their evidence.

Respondent's Position

[24] The respondent submits that the appellants' request for anonymization should be rejected on the basis of the open court principle.

[25] The respondent argues that there is a presumption that all judicial proceedings be heard publicly as recognized by the SCC in *Vancouver Sun* (re), [2004] 2 SCR 332 (*Vancouver Sun*). This presumption applies to quasi-judicial proceedings as well (see *Lukas* v. *Canada*, 2015 FCA 140).

[26] The respondent also relies on the Dagenais/Mentuck test, as reformulated in the case of *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 SCC 41 (*Sierra Club of Canada*), wherein the SCC held that a party seeking a limitation on the open court principle must demonstrate that there is a risk of harm that is "real, substantial, and well-grounded in evidence" (see *Dagenais*, *supra*; *Mentuck*, *supra*; and *Sierra Club of Canada*, *supra*). The respondent argues that there is no such evidence in the present case. The appellants' concern is for harm by ill-intentioned travellers because of the BSO's enforcement actions. It does not follow that a witness named in this decision would result in any risk to the witness.

[27] In the respondent's view, in the *Maritime Employers* and *Stayer*, *supra*, decisions, there was evidence of serious risk to important interests, unlike in the current

case. Further, the benefits of concealing the witnesses' names would not outweigh the negative effects on the public's right to open proceedings.

Reasons

[28] For the reasons that follow, I have decided partially in the appellants' favour by ordering the anonymization of one of the appellants' witnesses.

[29] In their written submissions, both parties refer to the Dagenais/Mentuck test, which was recently reformulated by the SCC in *Sherman Estate* v. *Donovan*, 2021 SCC 25, as follows:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[30] The appellants' witnesses gave evidence of how their personal information was, or may have been, used to locate them outside of the workplace. These witnesses are concerned that the information about them in this decision could be used in a similar manner.

[31] The appellants are not asking that the exhibits be sealed, as I ordered in the *Stayer*, *supra*, decision. They are asking that the witnesses' names be concealed. In *Stayer*, *supra*, the exhibits contained maps and floorplans of a correctional institution, the location of concealed cameras and intelligence procedures. The need to safeguard the safety of the institution was obvious. In the *Maritime Employers*, *supra*, decision, the evidence that was sealed had to do with a person allegedly engaged in workplace violence, where the person had no opportunity to counter such allegations. These cases are not directly applicable to the present situation.

[32] In the case at hand, some of the evidence adduced at the hearing was of a shocking nature, having to do with online defamatory images and statements

about a female employee where sexual violence was advocated. It is necessary to describe that evidence in order to illustrate the nature and severity of threats towards identifiable employees. However, the name of that employee is not relevant.

[33] I believe that allowing the female witness, who will be referred to as "X," to be identified will serve no public interest and will pose a risk to her privacy and security. A large number of participants in the online chat room increases the probability of retaliation towards X if her identity and theirs were revealed, particularly as the users of the forum were, and likely still are, frequent users of the port of entry. Additionally, no reasonable alternative measure would prevent the risk and the benefits of granting the request to anonymize the name of this particular witness outweighs its negative effects.

[34] The other witnesses were not involved with similar evidence to that of X, and there is no evidence of a risk if their names appear in the decision. I am therefore not convinced that an anonymization order is required for the other five witnesses.

II-Merits

Issues

[35] I have to determine the following issues:

1. Whether the ODML's decision was well-founded; more specifically, whether the appellants were exposed to a danger, as defined under the *Code,* when they exercised their rights to refuse to work on or around October 1, 2018.

2. If a danger existed, whether the danger was a normal condition of employment so as to preclude the appellants from exercising their right to refuse to work under the *Code*.

Submissions of the Parties

Appellants' Submissions

[36] The appellants called the following witnesses to testify primarily about the respondent's efforts to record incidents relating to the name tag policy:

1. Mark Webber, National Vice-President, Customs and Immigration Union (CIU)

2. Kenneth Turner, BSO, and local CIU Branch President Windsor

3. Fred Nechitaluk, Health and Safety Committee member

[37] The appellants called the following witnesses to testify about various incidents they were personally involved with that they believe occurred as a result of wearing a name tag:

1. Maggie Gwiazdowski, BSO, Toronto Pearson Airport
2. Mohammed Farhat, BSO, Ottawa Cargo Services
3. Alissa Howe, BSO, Windsor POE
4. Kathleen Hunter, BSO, Sault Ste Marie POE
5. Sheri Cody, BSO, Edmonton Airport
6. X, BSO, Windsor

[38] The appellants do not believe that the respondent has accurately recorded the incidents that have arisen from the wearing of name tags. The appellants' witness, Mr. Mark Webber, had identified 19 security incidents in March 2018 wherein 14 of those incidents did not have a Security Incident Report (SIR) on file, thus indicating under-reporting. It was said that the current version of the SIR form no longer asks about injuries resulting from the security event. The appellants' witnesses also pointed to some confusion as to the use of the Hazardous Occurrence Investigation Reports (HOIRs) or the LAB 1070 form, leading to under-reporting.

[39] The appellants called six witnesses who provided details about various incidents they believed occurred as a result of wearing name tags.

[40] The appellants' position is that the respondent failed to provide evidence of a legitimate business purpose for the name tag policy other than that the name tags contributed to "service excellence." It was said that the respondent also failed to provide evidence that a problem with service excellence existed prior to the name tag policy implementation, nor was there evidence that service excellence improved after the name tag policy was introduced.

[41] The appellants believe that the respondent does have continuing concerns about the release of information as the respondent is currently attempting to find ways, other than the removal of name tags, to limit the release of information to the BSO's last name on documentation provided to travellers.

[42] The appellants pointed to the testimony of the respondent's witness, Chief Security Officer Pierre Lessard, to the effect that instances of stalking have risen ten-fold since the introduction of name tags in 2012.

[43] The appellants distinguish between information about themselves that an employee has some control over, such as whether the employee chooses to have an unlisted telephone number or not, and information about themselves that may exist online, put there by third parties, over which they may have little or no control over; for example, membership in, or activities involving, clubs, societies and associations. The appellants state that there is no evidence that the respondent has provided any countermeasures that could address the latter aspects of an "internet footprint."

[44] It is the appellants' position that there was a danger within the meaning of the *Code* present on the days of the work refusals. The appellants referenced the three-prong test for "danger" set out in *Canada (Correctional Service)* v. *Ketcheson*, 2016 OHSTC 19 (*Ketcheson*), as approved by the Federal Court in *Canada (Attorney General)* v. *Laycock*, 2018 FC 750. The appellants rely on the *Ketcheson*, *supra*, decision for the following points:

- There are two separate types of danger in the *Code*'s definition of danger—where there is an "imminent threat" or where there is a "serious threat."
- The right to refuse dangerous work supplements the working of the Internal Responsibility System, a philosophy upon which the *Code* is based; that is, there are many ways in the *Code* to address hazards routinely other than the right to refuse dangerous work. Where the IRS has not adequately addressed a danger, the right to refuse work functions as a failsafe mechanism.
- "Danger" refers to direct causes rather than root causes, but the definition does not rule out dangers that involve long term or chronic harm.
- Hazards can avoid becoming "threats," and therefore "dangers," by the application of what is called the "hierarchy of controls" set out in section 122.2 of the *Code* and subsection 19.5(1) of the *Regulations*.

[45] The appellants distinguish between the prospect of physical injury and of mental injury. The appellants point out that most of the Tribunal's decisions where injury to mental health is at issue are concerned with cases where injury to mental health arose from interpersonal conflicts and harassment issues between employees. The Tribunal has not dealt with the possibility of mental health injuries in a broader context. The appellants view the following as novel issues:

- the risk of mental health injury to employees that results from stalking, assault or defamation caused by members of the public;
- the possibility of mental health injury caused by the on-going stress of knowing that one may be recorded by a telephone's camera in the course of one's duties, and that one is responsible for protecting oneself and one's family outside the workplace.

[46] The appellants make reference to HSO Danton's direction and appeals officer Hamel's confirmation of that direction in *Canada Border Services Agency*, *supra*. As mentioned, HSO Danton made a decision of "no danger," but determined that the employer had not complied with subsection 19.5(1) of the *Regulations*. Appeals Officer Hamel identified the hazard presented by name tags as follows:

> [77] [...] The "new" hazard created by the name tag is rather that the family name now pinned or "velcroed" to the BSO's uniform allows a person who may be angered by the BSO's enforcement action, to quickly and surreptitiously obtain, with the assistance of modern technology and the Internet, his/her personal information such as residential phone number or home address, with criminal intentions against the BSO and/or his family. That is the hazard directly resulting from the name tag, over and above the risk, in more general terms, of being harassed or assaulted by a disgruntled client. Hence, personal identification of the BSO by his/her name tag renders them more vulnerable to the occurrence of those situations. As the employer itself assessed it, the potential or likelihood for such a hazard to materialize may be low, however the severity may be critical [...].

[47] Appeals officer Hamel also stated that the proper way to deal with the hazard of name tags was to follow the order in which preventive measures are to be taken, as set out in subsection 19.5(1) of the *Regulations*.

> [86] [...] I reiterate that the increased vulnerability of BSOs and their family to being intimidated, harassed or assaulted as a consequence of the greater ease of access to their personal information is the direct consequence of the requirement by the employer that they wear a name tag. As a result, **the preventive measures in this matter ought to be geared towards first eliminating that hazard**, then if not possible to do so without eliminating the function altogether, reducing the hazard to the fullest extent possible [...]
>
> (emphasis added)

[48] In the appellants' view, the ability of the ill-intentioned traveller to access the internet and track down a BSO off-the-job has only increased since appeals officer Hamel's 2014 decision in *Canada Border Services Agency*, *supra*.

[49] ODML Sterling's investigation report included a copy of a decision concerning the wearing of name tags made by the Ontario Labour Relations Board in *Toronto Police Association* v. *Toronto Police Services Board*, 2010 CanLii 76072 (*Toronto Police Association*). The appellants do not believe that the decision is relevant, contrary to the respondent's position. The appellants point out that:

- *Toronto Police Association*, *supra*, did not involve the *Code*, but the

Ontario Occupational Health and Safety Act.

- *Toronto Police Association*, *supra*, did not involve a work refusal.
- The BSO's work environment is quite different from that of a municipal police officer:

    - the risks are different
    - BSOs are in a controlled environment
    - BSOs are not on duty 24/7
    - BSOs do not take their firearms home
    - BSOs do not use the port of entry as their home address
    - BSOs do not regularly have their names released to the public
    - BSOs do not use business cards
    - the internal complaint process at CBSA does not regularly allow disclosure of BSOs' names
    - BSOs are less likely to appear in court or have their names disclosed in pre-trial disclosure.

[50] In applying the test in *Ketcheson*, *supra*, the first step is the identification of the hazard or activity that is the subject of the work refusal. The appellants characterize the hazard initially as the existence of a name tag on the BSO uniform, coupled with an ill-intentioned traveller's use of the BSO's name to seek out the BSO or their family off-the-job for the purpose of causing harm. This hazard alone is said to be a danger. The ATIP release of further information about BSOs makes it easier to track down a BSO, and so compounds the danger. By ill-intentioned, the appellants include the situation where a traveller becomes "destructively infatuated" with a BSO.

[51] As mentioned, the appellants characterize the potential harm that can flow from the hazard as consisting of two types—physical harm and mental harm. The physical harm may arise if a BSO is stalked and harassed or assaulted off-the-job. The mental harm may arise from the long-term effects of the fear and stress that comes from the BSOs constantly looking over their shoulders. It is said that there may also be acute, traumatic mental injury flowing from an incident that could involve physical harm.

[52] The *Ketcheson* test then asks whether the hazard could reasonably be expected to be either a "serious threat" or an "imminent threat." Regarding the question of a "serious threat," the appellants state that it is obvious that very serious harm could result if an ill-intentioned traveller did track down a BSO off-the-job. The more significant issue is the probability that such harm could occur—that is, could it reasonably be expected to occur.

[53] On the question of the probability of physical harm, the appellants take issue with the respondent's use of statistics. The respondent's evidence was that there were 62 incidents that have occurred since 2012 which could be related to name tags. The incidents involved varying level of severity. The respondent's argument was that approximately 7,000 BSOs across Canada encounter travellers about 90 million times a year. The implication is that the probability of any single encounter giving rise to an incident involving a name tag is very low. The appellants argue that the opposite conclusion should be reached with these statistics; that the sheer number of interactions make it a "near certainty that eventually the most extreme outcome will come to pass."

[54] Regarding the probability of mental injury, the appellants state that while "the evidence of the severity is less clear," the evidence of probability is stronger. The appellants' witnesses provided testimony that the prospect of a traveller causing harm off-the-job "causes them stress daily." The appellants are of the view that the impact of such daily stress over the course of a BSO's entire career cannot be effectively evaluated.

[55] The appellants distinguish between two types of mental injury, the aforementioned chronic stress and the acute mental health reaction of a BSO who has actually experienced some kind of threat, stalking, assault, or defamatory statements on social media. The appellants state that while there was no evidence of an employee suffering an acute mental health reaction, given the number of BSOs nationally, the probability of such occurring is "not difficult to imagine."

[56] The appellants point out that the respondent's evidence showed that the respondent does not track mental stress or acute mental health injuries. This is said to be a "significant blind spot" on the part of the respondent. The appellants note that there was some evidence that the culture at CBSA is one "disincentivizing the reporting of mental health injuries."

[57] The second part of the second step of the *Ketcheson* test is whether the hazard could reasonably be expected to be an "imminent threat." The appellants are not arguing that the hazard is an imminent threat of physical injury to BSOs, but that the threats to BSOs' mental health are "both constant and imminent."

[58] The appellants state that their six witnesses all testified that the name tag hazard causes them "to go through life with a heightened sense of vigilance." The appellants summarized their witnesses' testimony:

- BSOs are regularly filmed by travellers while wearing their name tags;
- Images and videos of BSOs, including their names, have been posted on social media in order to criticize or defame them;

- Travellers have contacted BSOs directly via social media to directly threaten the BSO;
- The posting of a female BSO's image and name on social media resulted in unwanted and violent comments from viewers, who were, in some part, truckers who used the Windsor port of entry;
- In a number of incidents travellers used the BSO's name to intimidate them.

[59] The appellants state that the respondent's witnesses gave evidence that mental health injuries are not considered security issues and that the respondent's OHS processes do not identify or track mental health injuries that do not rise to the level of a disabling injury.

[60] The next step in the *Ketcheson* test is the question of whether the threat exists before the hazard can be corrected. The appellants' position on this point can be summed up by saying that the problem is not whether the hazard can be corrected, it is that it has not been corrected, and the respondent is refusing to correct it. The appellants are of the view that the respondent's countermeasures do not correct the hazard.

[61] The appellants point to the unpredictable human element involved in the hazard. BSOs are in daily contact with individuals who may wish to harm them and there is no means of predicting which interaction could result in harm.

[62] The appellants are critical of the respondent's risk mitigation efforts in response to appeal officer Hamel's decision in *Canada Border Services Agency*, *supra*. The respondent merely provided training to assist BSOs with reducing their online footprints and de-listing their telephone numbers.

[63] The appellants point out that BSOs do not have complete control over their online footprints. They may be involved in their communities and so information about them may be posted by organizations they are involved with. The difficulty of reducing one's online footprint is compounded by family members with the same name being online.

[64] Another aspect that the appellants say cannot be mitigated is the photographing of BSOs performing their duties. The appellants note that the respondent has taken the position that it cannot legally prevent travellers from taking pictures at a port of entry.

[65] The appellants also note that a BSO cannot always identify a dangerous individual. Even where a BSO could report such an individual, there is no certainty that responses such as notifying the police would be sufficient to neutralize the threat.

[66] The appellants argue that the respondent must take all measures necessary to protect its employees, and the manner and order in which the respondent should take those measures is captured in the concept of the "hierarchy of controls," which is set out in section 122.2 of the *Code*.

[67] Regarding the application of the hierarchy of controls, the appellants referred to the analysis in *Ketcheson*, *supra*, regarding section 122.2 of the *Code*:

> [196] If the hazard can be corrected before the threat (risk) exists then the hazard is not a danger. The hazard can be corrected via many forms of controls (countermeasures, precautions). As mentioned, the *Code* sets out one version of the "hierarchy of controls" in section 122.2. A hazard can be eliminated or isolated. A lower risk hazard can be substituted. Then correction of the hazard through engineering controls should be considered – putting physical barriers between the hazard and the employee. Then correction of the hazard is done through administrative controls and PPE. The logic of the hierarchy of controls has been widely accepted and used in OHS practice for many decades. The *Code* reflects this practice. So, a hazard is not a danger if there is a reasonable expectation that the hazard can be corrected before there is an imminent or serious threat from the hazard.

[68] The appellants are of the view that the respondent did not properly apply the hierarchy of controls concept when it responded to appeal officer Hamel's decision in *Canada Border Services Agency*, *supra*. The employer did not seriously consider eliminating or substituting for the hazard, but merely chose to train employees about their online behaviours and de-listing of phone numbers. In other words, it is said that the respondent skipped to the last of the options in the hierarchy of controls by implementing administrative controls and providing training.

[69] The appellants point out that appeals officer Hamel had emphasized the hierarchy of controls, specifically the initial option of eliminating the hazard. Appeals officer Hamel stated that the respondent had not properly considered that option. The appellants state that the respondent has continued, since then, to fail to meet its obligation to apply the hierarchy of controls.

[70] The appellants are critical of the respondent's reasons for refusing to remove the requirement that BSOs wear name tags. The appellants are of the view that the respondent has not shown that the wearing of name tags is an essential or integral part of a BSO's duties.

[71] The respondent's witness, Mr. Denis Vinette, gave evidence that the introduction of name tags was to increase accountability; that it was important for travellers to "know who they were dealing with." The appellants state that the name tag is not

integral to the complaints process, and that since the CBSA uses a video surveillance system, it can investigate using a traveller's description of the BSO. The appellants note that Mr. Vinette did not believe that name tags would change the perception of members of the public or the conduct of BSOs.

[72] The appellants state that the respondent's primary concern in implementing the name tag requirement was to bring BSOs' uniforms in line with other federal agencies where name tags are used.

[73] In conclusion, the appellants request that I determine that ODML Sterling erred in making a decision of "no danger" and that I substitute a finding of "danger." The appellants also request that, independent of a finding of danger, that I issue a direction confirming that the name tags constitute a hazard and that the respondent be required to properly apply the hierarchy of controls.

Respondent's Submissions

[74] The respondent's position is that the work refusals were based on hypothetical concerns that a disgruntled traveller would use an officer's name tag to find additional information online (the ATIP Twitter release) and, with further research on-line, locate and threaten or harass the employee on social media or in their home. It was submitted that the probability of such a threat is very low. The statistics do not show an increase in threats following the ATIP release. Even if it is found that there is a high level of risk, the respondent submits that the risk is mitigated through additional preventive measures taken by the respondent.

[75] The respondent noted that only two of the nine witnesses for the appellant engaged in the work refusal in October 2018. Of the two, Mr. Turner, testified that he had not encountered a threat on the day of his work refusal and he did not submit either a SIR or a LAB 1070 report. The second witness, Ms. Alissa Howe, testified concerning two incidents where a traveller left flowers or a greeting card for her at the workplace. The respondent points out that management intervened and no harm resulted. Further, the witness stated that she did not feel directly threatened by the travellers.

[76] The respondent also noted that the remaining seven witnesses did not refuse work following the release of the ATIP information on Twitter and most of the incidents they referred to occurred prior to the ATIP release. The respondent states that none of the incidents resulted in an injury to a BSO. The respondent also notes that despite testimony about stress and anxiety as a result of the incidents, there was no evidence of mental injury.

[77] The respondent's witness, Mr. Vinette, testified that the name tags "serve the broader goals of accountability, transparency, gaining and retaining the trust of the public." He also stated that the following law enforcement agencies have a name tag policy:

- the RCMP;
- the Canadian Forces;
- Correctional Service of Canada;
- the Department of Fisheries and Oceans;
- the Ontario Provincial Police;
- many local police forces such as the Ottawa and Toronto police services; and
- US Customs and Border Protection Officers

[78] The respondent emphasized the history of the name tag policy. When the name tag policy was first implemented in December 2012, there were a number of work refusals in response, all of which resulted in findings of "no danger" by HSOs. At that time, HSO Danton issued a direction for the employer to implement preventive measures. The employer appealed that direction, and the appeal was dismissed (see *Canada Border Services Agency, supra*).

[79] The respondent provided the following list of the preventive measures that the employer put in place in response to HSO Danton's direction:

- a Preventative Measures Action Plan (PMAP) was prepared;
- under the PMAP, the employer developed an Officer Personal Safety Quick Reference Guide which provided information on how employees could protect their personal information;
- guidance was provided as to how employees could protect their personal telephone numbers (how to un-list their phone numbers from their service providers), "reduce their online footprint, improve situational awareness, and how to make reports of incidents"; and
- a communications strategy was developed.

[80] The respondent also stated that the PMAP was developed in consultation with the OHS and the Policy Health and Safety committees. In addition, in his testimony at the hearing, Mr. Jeremy Adams, who is a senior health and safety advisor at CBSA, stated that HSO Jimmy Ammoun advised the employer that the preventive measures it had put in place complied with the HSO's direction that was issued.

[81] In addition to the above preventive measures taken in response to the direction and the decision in *Canada Border Services Agency, supra*, the evidence of the respondent's witnesses, Ms. Lisa Coughlin and Mr. Vinette, indicated that other

preventive measures help reduce or minimize the risk of injury to BSOs as follows:

- BSOs are required to take training regarding violence in the workplace, security awareness, and how to respond to situations of abuse, threats, stalking and assaults;
- guidance is provided on how to deal with incidents involving telephone abuse, threatening correspondence and other types of threats outside the workplace;
- an IT Security Awareness Bulletin was circulated;
- BSOs receive training on when and how to complete Security Incident Reports.

[82] The respondent's witness, Mr. Pierre Lessard, provided five years of statistical data on security incidents where name tags were possibly a factor. Specifically:

- only 14 of 62 incidents (22%) could be considered "real or serious threats," and these involved:
    - potential stalking;
    - repeated threats to a BSO; and
    - direct or generic threats to a BSO.
- a large portion of these incidents would have occurred with or without the name tag policy;
- none of the incidents resulted in personal injury to an officer; and
- given the number of travellers per year (90-100 million) the probability of an incident is "extremely low."

[83] He also testified that the data for the period from January 2018 to February 2020 showed similar trends to the above five years' worth of data. He stated that none of the incidents post-August 2018 were related to the ATIP release.

[84] Mr. Lessard, provided an analysis of incidents pre-and-post implementation of the name tag policy and concluded:

- the number of incidents appeared to be steady pre-and-post implementation of the name tag policy;
- there was no discernible trend in the types of incidents;
- while the number of incidents fluctuates year to year, the number remains low overall; and
- following the ATIP release on August 30, 2018, the number of incidents went down.

[85] Regarding the question of potential mental health issues related to the name tags, the respondent's witness, Mr. Jeremy Adams, testified that:

- injuries, whether physical or mental are to be reported by employees through the LAB 1070 form;
- training is provided to employees on mental health and on reporting injuries;
- specifically, that training includes coverage of the Employee Assistance Plan;
- there have been no reports of mental or physical injuries related to name tags; and
- there have been no claims of mental stress involving name tags reported to the workers' compensation system.

[86] The respondent does not agree that the hazard should be characterized as the name tag policy alone, but as the name tag plus the ATIP release of information. It is said that the situation has changed since the decision in *Canada Border Services Agency*, *supra*, which involved the name tag alone as the hazard. The respondent states that additional preventive measures have been put in place since the latter decision.

[87] The respondent states that there was no evidence that the name tag plus ATIP information would be used to target a BSO in their personal life, and so the risk from the hazard is hypothetical or speculative. Possible scenarios that are not reasonably likely to occur are not "dangers" within the meaning of the *Code*.

[88] At the time of the work refusals, there was nothing unusual happening, and nothing untoward had happened in the several weeks that had passed between the ATIP release and the work refusals.

[89] The respondent made reference to the decision in *Wade Unger* v. *Correctional Service of Canada*, 2011 OHSTC 8, where it was said that if it were necessary for a series of events to occur between the materialization of the hazard and the eventual harm, then the probability of all the steps aligning correctly would decrease the overall probability of the final harmful outcome. There were many steps a disgruntled traveller would have to take between seeing a name tag and tracking a BSO down to the point of locating them off-the-job. The probability of a traveller specifically using the ATIP information is low given other, easier, means of tracking down a BSO.

[90] The respondent cites the *Ketcheson, supra*, decision regarding what is meant by "imminent threat" and "serious threat" in the definition of "danger" in the *Code*. For both types of threats there must be a reasonable expectation that the hazard will cause harm. The respondent states that the statistical evidence provided shows that the probability of harm to be too remote for the hazard to amount to a danger. No incident could be linked to the ATIP release. In the five years between

the introduction of the name tag policy and the ATIP release, only 14 incidents could be potentially and significantly harmful and which could be said to be possibly related to the name tag policy. Even so, the respondent states that the causal connection between the name tag and the occurrence of the incident is not clear. Given that the 14 incidents occurred over five years and in the context of 90 million travellers a year, the probability of harm to a particular BSO "is infinitesimal."

[91] The respondent points out that there is no evidence that the frequency of incidents increased after the introduction of the name tag policy.

[92] The respondent notes that a similar finding occurred in the *Toronto Police Association*, *supra*, decision; the introduction of name tags did not increase the risk of harm to the police officers. The respondent does not believe that differences in the work done by police officers and BSOs, as emphasized by the appellants, are relevant.

[93] The respondent does not believe that social media, in terms of the ability of an ill-intentioned traveller to track a BSO, is more dangerous than it was in 2012; people generally take more precautions to protect their privacy today than in 2012.

[94] Regarding physical injury, the respondent emphasizes the fact that there has not been a single event related to name tags, since 2012, in which a physical injury to a BSO has resulted. The respondent concedes that the severity of such an event may be high, but states that the low probability of such an event means that there is no imminent or serious threat resulting from the name tags.

[95] Regarding mental injury, it is the respondent's position that there is also no reasonable expectation of mental injury arising from name tags. The respondent relied on the Tribunal decision in *Nina Tryggvason* v. *Transport Canada*, 2012 OHSTC 10 (*Tryggvason*), for the principle that medical evidence is needed to substantiate a claim for mental injury. The appellants did not provide any evidence of acute mental injury, hence there can be no basis for a finding of imminent threat.

[96] While some of the appellants' witnesses gave testimony regarding their experience of chronic stress as a result of wearing name tags, there was no evidence that the severity of this stress met a minimum threshold of severity required for a finding of danger. The respondent notes that chronic stress was not raised at the time of the work refusal and was not the subject of investigation by the ODML. As such, the Tribunal should not consider this new issue on appeal.

[97] Further, regarding chronic stress, the respondent made the following points:

- there were no reported mental health injuries in the Lab 1070 forms;
- CBSA system of reporting injuries is adequate and compliant;
- there is no culture at CBSA that disincentivizes the reporting of injuries;
- BSO are required to report injuries;
- BSOs are trained on how to report injuries;
- no workers' compensation claims for mental stress are related to name tags;
- stress is inherent to any law enforcement role; and
- CBSA provides resources to employees to cope with stress.

[98] With respect to the third step of the *Ketcheson* analysis, the respondent states that if there is an expectation of injury from the name tags, the respondent's preventive measures mitigate the risk. In response to HSO Danton's direction, the respondent put in place a Preventative Measures Action Plan. The Plan included a Guide to assist BSOs in lowering the risk of being located by travellers outside of the workplace. Guidance was provided on how to protect identities on Facebook and how to un-list phone numbers. The plan also included officer safety training. A communications strategy to raise awareness among BSOs of these preventive measures was developed. It is the position of the respondent that these actions amounted to compliance with HSO Danton's direction.

[99] In addition, the respondent pointed to other policy instruments and training on issues such as workplace violence prevention, security awareness, reporting and responding to incidents such as abuse, threats and stalking. Managers have the ability to take measures on a case-by-case basis such as changing an officer's work location or allowing an officer to use a pseudonym instead of a name tag. The respondent believes the measures it has taken are proactive and not reactive, as claimed by the appellants.

[100] The respondent argues that it cannot be responsible for mitigating all risks that occur outside the workplace. The respondent relies on the SCC decision in *Canada Post Corporation* v. *Canadian Union of Postal Workers*, 2019 SCC 67. In that decision, the SCC held that an employer was not responsible for inspecting letter carrier routes as the employer had no control over that part of the workplace. Similarly, the respondent states that it has no control over events (e.g., threats, stalking, assaults) occurring outside the workplace; those are under the jurisdiction of the police.

[101] Regarding the "hierarchy of controls" set out in section 122.2 of the *Code*, the respondent states that a hazard need not be completely eliminated in order to be in compliance. It is recognized that some hazards associated with unpredictable and

unlawful human behaviour may be impossible to completely eliminate. The respondent believes that it is impossible to control the prospect of disgruntled travellers and that some level of risk is inherent to law enforcement work. The respondent believes it is unrealistic to expect the respondent to completely eliminate the hazard as it is presented in the current case.

[102] The respondent believes that it is not possible to eliminate the hazard without "eliminating the function." The respondent believes the name tag policy is an essential one. The name tag policy is not solely about "service quality." BSOs have significant legal powers, the exercise of which can cause serious harm to members of the public. Therefore, the actions of BSOs must be fully transparent; BSOs must be fully accountable to the public. The respondent concludes that the exercise of the BSOs' powers should not occur in anonymity.

[103] The respondent does not believe that it should be directed to eliminate the name tags prior to the respondent updating the hazard assessment it completed on January 28, 2013. The respondent states that the hazard assessment needs to be reviewed in light of the ATIP release.

[104] It is the respondent's position that work refusals are not intended to address policy disputes, as stated by the Federal Court of Appeal (FCA) in *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424. The appellants are disputing the respondent's name tag policy. Similarly, any dispute about the use of cell phones and other recording devices in the workplace would also constitute a dispute about the respondent's policies.

[105] The respondent believes that if the name tags, plus the ATIP release, do create a danger, the appropriate remedy would be for a declaration that a danger existed at the time of the work refusal, but it would not be appropriate to declare that the name tag policy independent of the ATIP release is a danger.

[106] The respondent requests that the appeal be dismissed and the ODML's decision of "no danger" be confirmed.

Appellants' Reply

[107] Regarding the respondent's assertion that HSO Ammoun had confirmed that the respondent's preventive measures were in compliance with HSO Danton's direction, the appellants note that there is no documentation supporting this "approval." Further, they state that I am not bound by any such purported approval.

[108] The appellants state that the witness, Mr. Adams, said he did not have access to all relevant reports, hence it is not accurate to say that he testified that CBSA has no reports of mental or physical injuries relating to name tags.

[109] The appellants disagree with the respondent's claim that the number of incidents before and after the implementation of the name tag policy appeared "to be steady." Instead, the appellants state that the respondent's statistics show a "marked increase" in incidents of stalking following the implementation of the policy.

[110] The respondent has stated that there is no evidence of mental stress resulting from the wearing of name tags. The appellants point out that many of the appellants' witnesses testified to the mental health outcomes that BSOs experienced following incidents with travellers.

[111] The appellants take issue with the respondent's implication that BSOs seek anonymity at work; rather BSOs seek anonymity while they are at home.

[112] The appellants state that accountability of BSOs is important but that there is no evidence that there was a problem with accountability when BSOs wore a badge number instead of a name tag, nor was there evidence that name tags have improved accountability.

[113] The appellants are not challenging the respondent's policies on the use of cell phones by travellers, and they are not expanding the scope of the appeal by raising issues about the recording of BSOs since HSO Sterling had included various social media posts in her file.

[114] Regarding the cases referred to by the respondent, the appellants object to the respondent's submission that the appellants' concerns are hypothetical. The appellants state that the FCA decision in *Martin* v. *Canada (Attorney General)*, 2005 FCA 156 (*Martin*) does not support the respondent on this issue, but rather *Martin, supra*, was based on evidence very similar to the evidence in this case. The *Martin, supra*, decision had to do with providing national park wardens with handguns.

Analysis

[115] The appellants engaged in a work refusal pursuant to subsection 128(1) of the *Code*:

> 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; or
> (c) the performance of the activity constitutes a **danger** to the employee or to another employee.
>
> (emphasis added)

[116] As can be seen above, "danger" is a key concept in the exercise of an employee's right to refuse to work.

[117] The appellants filed an appeal under subsection 129(7) of the *Code* of the decision of "no danger" issued by ODML Sterling on October 3, 2018. Subsection 129(7) reads:

> 129 (7) If the Minister makes a decision referred to in paragraph 128(13)(b) or (c), the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to the Board within 10 days after receiving notice of the decision.

[118] Subsection 146.1(1) of the *Code* sets out the authority of an appeals officer when seized of an appeal under subsection 129(7):

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

[119] The appellants request that I set aside the Ministerial Delegate's decision of "no danger." As such, I must determine if a danger existed at the time of the work refusal. If there was a danger, then I must rescind the Ministerial Delegate's decision and may issue any direction that I consider appropriate under subsection 145(2) or (2.1) of the *Code*.

[120] Section 122 of the *Code* defines danger in the following manner:

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

[121] The test for "danger" set out in the *Ketcheson, supra*, decision is as follows:

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

[122] It should be made clear that the appellants' request for a finding of "danger" does not constitute a request for a ruling contrary to the decision of appeals officer Hamel in *Canada Border Services Agency*, *supra*, as he did not deal with the substance of an appeal on that issue. Moreover, I am requested to determine whether the situation is a "danger" in accordance with the new definition of "danger" introduced to the *Code* in 2014, some time after the earlier work refusals, but prior to the work refusals at issue in the current case. Further, the appellants argue that circumstances today are different than they were years ago due to the changes in technology and the increased use of the internet.

1) What is the alleged hazard condition or activity?

[123] The parties were not in agreement as to what the "hazard" was that could be a "danger." The appellants say that the name tag alone is a danger, and that the ATIP release of information merely adds to the danger. The respondents say that the work refusals were based on the name tags plus the ATIP release, not the name tags alone. It may seem like a difference without much significance, but the respondents point out that much of the testimony given by the appellants' witnesses was concerned with events which occurred before the ATIP release. If we are to focus on whether there was a danger to the refusing employees on or around October 1, 2018, shortly after the ATIP release, then, according to the respondent, what transpired years prior would be of little relevance.

[124] The hazard should be expressed in the same manner as articulated by the refusing employees: the hazard is the name tags, plus the ATIP information release, plus the possibility of an ill-intentioned traveler using the name and the information to track down and harm an employee off-the-job. The name tag alone is not a hazard. A hazard is primarily a source of energy capable of doing harm. That energy is supplied by the ill-intentioned traveler. The traveler needs the

information, primarily the employee's name, to act. The hazard is the package of causes that must occur together.

[125] Even though the hazard is formally expressed as the name tag plus the ATIP information plus the ill-intentioned traveler, it is the name tag plus the traveler that raises the probability of a harmful outcome enough to be a hazard worthy of further enquiry. In the end, I do not believe that the differences between the parties on this issue are significant.

[126] In conclusion, I find that the hazard is the name tags, combined with the ATIP information release, and the possibility of an ill-intentioned traveler using the name and the information to track down and harm an employee off-the-job.

2) Could this hazard reasonably be expected to be an imminent threat?

[127] Having concluded that the refusing employees were exposed to a hazard when they exercised their right to refuse dangerous work, the next question to be asked is whether this hazard could reasonably be expected to be an "imminent threat."

[128] In *Ketcheson, supra,* I described what an "imminent threat" is as follows:

> [205] An imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes 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.

[129] Was there an imminent threat on the days the employees exercised their right to refuse dangerous work? The concern is not harm in the workplace, but harm outside the workplace—off-the-job. There may be a threat in the workplace, but almost entirely unconnected to the name tags. One of the appellants was subject to an infatuated traveller who came looking for her in the CBSA offices at the port of entry, but the main concern seemed to be that such an inappropriately deluded traveller would be motivated to stalk the employee outside the workplace. Beyond this example, in general, since an ill-intentioned traveller would have to do some research and then take steps to track down an employee off-the-job there is some delay. The potential harm is not of minutes and hours, but more long-term.

[130] The appellants have conceded that there was no imminent threat to BSOs' physical security on the days they refused to work. However, the appellants argue that the use of name tags coupled with the availability of BSOs' personal

information on the internet could potentially cause mental health injuries of varying degrees of severity every day.

[131] The appellants alleged that for BSOs who do experience a threat, stalking or assault, the possibility for a mental health injury is immediate. However, the appellants have also conceded, in their written submissions, that no evidence was presented of an employee who experienced an acute mental health reaction as a result of the nametag policy. Furthermore, and as I will discuss below, based on the Tribunal's jurisprudence, medical evidence is normally required to support an allegation of mental harm, and none was put forward in this case for acute mental injury.

[132] For these reasons, I cannot conclude that the appellants were exposed to an imminent threat on the days they exercised their right to refuse to work.

3) Could this hazard reasonably be expected to be a serious threat?

[133] In *Ketcheson, supra*, I described a "serious threat" as follows:

> [212] In order to conclude that the respondent was exposed to a serious threat to his health or life, the evidence has to show that there was a reasonable expectation that the respondent would be faced in the days, weeks or month ahead with a situation that could cause him serious harm as a result of not being able to carry OC Spray and handcuffs on his person.

[134] A serious threat could be soon, but its significance is that the severe harm could materialize at any time, including days, weeks or even longer after the initial situation. The main concern of the appellants' witnesses was of a serious threat—a threat of serious harm that could materialize at some time in the future.

[135] The appellants argue that the potential serious harm that can be caused is both physical and mental. According to the appellant, a BSO is exposed to the risk of being physically assaulted outside the workplace because of a traveller with ill intentions researching and finding their name and home address. The harm that could result from such an attack would be serious or critical. In addition to the risk of physical injury, the appellant also argues that the long-term effects on the mental health of BSOs created by the potential harassment and stalking that they are subjected to over a long period of time also poses a serious threat to their mental health.

[136] The real issue here is the claim that chronic stress would make the threat a "serious threat." The respondent has several objections to considering chronic stress as a serious threat. Of note is the alleged lack of evidence of mental harm,

the need for medical evidence, and the view that chronic stress that may exist does not reach a sufficient level to be of concern.

[137] While there was anecdotal evidence of chronic stress in the testimony of the appellants' witnesses, no expert medical evidence was provided. As argued by the respondent, medical evidence has often been required by this tribunal to establish mental injury. In previous decisions, appeals officers have stated that clear and compelling evidence is required for a finding of danger related to the refusing employee's mental health (see *Hassan* v. *City of Ottawa (OC Transpo)*, 2019 OHSTC 8 (paragraphs 59 and 60); and *Tryggvason*, *supra*, paragraph 88).

[138] I would not deny the reality of chronic stress and its importance. I would not disagree that the employer should do something about chronic stress where it exists. However, I am unable conclude that there was a reasonable expectation of serious threat to the BSOs' mental health on the days they exercised their right to refuse dangerous work.

[139] Regarding the serious threat to the BSOs' physical health, an ill-intentioned traveller could well inflict harm of a physical nature off-the-job that could be categorized as "serious"—death or a disabling injury. The appellants point out that even the respondent's witness testified that the potential harm could be "critical," which can be taken to be synonymous with "serious." As mentioned, serious threat refers to the potential severity of the injury or harm.

[140] The crux of the matter is the question of "reasonable expectation." The threat is severe in the sense that harm to BSOs and/or their families could result in serious injury or even a fatality. But is there a reasonable expectation that a severe injury could occur? The appellants say that the probability is high to the point of inevitability, considering the millions of interactions that occur between BSOs and travellers. The respondents say that for any individual, on any given day, the probability is very low.

[141] In *Brinks Canada Limited* v. *Dendura*, 2017 OHSTC 9, the appeals officer stated the following:

> [143] **The determination of whether a threat is a real possibility as opposed to a remote or hypothetical possibility is not always an easy task.** It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is executed. **Statistical information is relevant to make an informed factual finding on that question, although in the final analysis, it involves a question of appreciation of facts and judgement on the likelihood of occurrence of a future event,** in the present case an event that is linked to unpredictable human behaviour.

(emphasis added)

[142] In my view, the testimony of the appellants' witnesses went to the nature and severity of the potential harm to employees by ill-intentioned travelers, rather than to the probability of the harm occurring. Their testimony was successful in the sense that if the worst-case scenario unfolded, then I believe the harm to employees would be severe. The respondent was not seriously contesting the severity of the potential harm. The respondent is concerned with the probability of harm.

[143] It is true, as was pointed out at the hearing, that an ill-intentioned traveler would not need the employee's name in order to do the employee harm off-the-job. The traveler could engage in surveillance and follow the employee home, or, perhaps, recognize the employee off-the-job (say, at the grocery store) and follow the employee home. The probability of these scenarios occurring is very low. It is possession of the employee's name that increases the probability of a traveler finding the employee off-the-job. The ATIP information release makes the traveler's tracking efforts easier, but not by much. It is very unlikely that a traveler would first see the ATIP information on-line and then decide to obtain the employee's name from their name tag. The ATIP information did give both the employee's first and last names, and in many cases, but not all, this would assist the traveler in using other information sources to find out where an employee might be off-the-job. It is probably fair to say that the distinctiveness of an employee's name would affect the likelihood of being tracked down. A "Smith" or a "Tremblay" may be hard to find, whereas a "Strahlendorf" would not. For a distinctive last name, the extra information in the ATIP release would not add much.

[144] On the question of statistics, there was disagreement between the parties as to their accuracy and significance. The appellants' witness, Mr. Turner, made the point that even if the statistics showed a decline in incidents possibly related to the name tags, that merely indicated a decline in reporting, because, in his opinion, employees become discouraged when action is not taken on their complaints, and stop reporting incidents.

[145] The difficulty for the appellants' position regarding statistics is that the right to refuse dangerous work is an individual right. The question is, at the time of the work refusals, was an individual refusing employee, facing a reasonable expectation of a severe injury? The answer to that question must be "no." I do not accept that the proper approach to assessing probability for a work refusal by an individual is to consider all CBSA employees at all times. It is not reasonable to expect a specific individual will be hit by a meteorite in the next few minutes. It is

reasonable to expect that someone, out of billions of people, will be hit by a meteorite over the course of a century.

[146] It may be reasonable to expect that any BSO across Canada could be harmed by an ill-intentioned traveller off-the-job over the course of 10 years, but based on the evidence submitted I cannot conclude that there was a reasonable expectation on or around October 1, 2018 of a serious threat materializing as a result of the presence of name tags and the ATIP release. As has often been said, the *Code* has other mechanisms than the right to refuse dangerous work that can be used to address hazards that do not reach the threshold of a danger.

[147] Having found that the refusing employees were not exposed to a serious threat at the time they exercised their right to refuse dangerous work, I do not need to consider the final part of the test in *Ketcheson*, *supra*, as to whether the threat to life or health exists before the hazard or condition can be corrected or the activity altered.

[148] For these reasons, I conclude that the refusing employees were not exposed to a danger as defined in the *Code* when they exercised their right to refuse dangerous work.

Contravention Direction

[149] The appellants have requested that I issue a direction even if I do not find there was a "danger." The appellants have asked that I require the respondent to properly comply with the hierarchy of controls set out in Part XIX of the *Regulations* and that I order the elimination of the requirement to wear name tags.

[150] Subsection 146.1(1) of the *Code* only grants the appeals officer the express power to issue a direction under subsection 145(2) (commonly referred to as a danger direction) and not under subsection 145(1) (commonly referred to as a contravention direction). In *Rudavsky* v. *Public Works and Government Services*, 2016 OHSTC 1 (*Rudavsky*), I reviewed at length the issue of whether an appeals officer has the power to issue a contravention direction and came to the following conclusion:

> [73] In conclusion, while it can be argued that pursuant to the Federal Court of Appeal's decision in Martin an AO has the authority to issue a subsection 145(1) contravention direction if a subsection 145(2) or (2.1) danger direction is appealed and is rescinded, I am of the view that an AO does not otherwise have the authority to issue a completely new subsection 145(1) direction for an issue the HSO did not consider or for an issue the HSO considered but was not the basis of a direction or for an issue that arose from compliance with the HSO's direction. In

> the latter scenario, the path anticipated by the *Code* is further investigation and directions by the HSO or prosecution. There is nothing in the *Code* to suggest that the AO's function is to monitor the entire enforcement process.

[151] In light of the reasons explained in *Rudavsky*, *supra*, I conclude that this case is not an appropriate one in which to exercise my power to issue a contravention direction. In my view, it would be more appropriate for an ODML to determine whether the respondent has complied with appeals officer Hamel's decision in *Canada Border Services*, *supra*, or to determine whether the respondent is overdue for a review of its hazard assessment.

[152] However, I wish to make the following comments. Appeals officer Hamel in *Canada Border Services*, *supra*, indicated in no uncertain terms that the respondent should consider the elimination of the requirement to wear a name tag when upholding the HSO's direction to develop a hazard assessment. While it is not my role to enforce appeal officer Hamel's decision, it seems quite clear to me that the respondent did not fulfill the spirit of appeals officer Hamel's decision. The respondent does not believe that it can eliminate the hazard, and so the preventive measures it has taken have been further down the hierarchy of controls.

[153] The respondent invoked reasons such as accountability, transparency, gaining and retaining the trust of the public as well as consistency among the family of federal law enforcement agencies for the name tag requirement. I do not believe that these reasons relate to OHS issues. The *Code* does not generally allow for a balancing of OHS and non-OHS concerns. However, some OHS measures may not be reasonable because of non-OHS concerns. In my view, the employer's concerns about service quality and consistency of federal agents' uniforms are worthy in themselves, but they do not suffice to over-ride the importance of eliminating or reducing hazards when engaging in a hazard assessment of the name tag policy.

Decision

[154] For these reasons, I confirm the decision that a danger does not exist issued by ODML Sterling on October 3, 2018.

Peter Strahlendorf
Appeals Officer