Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2022-01-24
Case No.: 2019-04

Between:

Jim Heaney, Chris Langman and Mark Love, Appellants

and

Correctional Service of Canada, Respondent

Indexed as: *Heaney 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. Kerwin J. Myler, Union Advisor, CSN
For the respondent:	Mr. Patrick Turcot, Counsel, Treasury Board Secretariat, Legal Services Unit
Citation :	2022 OHSTC 1

REASONS

[1] The following decision concerns an appeal filed by appellants Jim Heaney, Chris Langman and Mark Love, Correctional Officers (CO) employed by the Correctional Service of Canada (CSC) at Collins Bay Institution (CBI), a maximum/medium security establishment located in Kingston, Ontario.

[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 Official Delegated by the Minister of Labour Peter Mahase (the ministerial delegate) on January 23, 2019, at the conclusion of the latter's investigation into the work refusal registered by the appellants on January 16, 2019. That decision of absence of danger concerns a situation at the said institution where the appellants invoked their right to refuse dangerous work following intelligence obtained by the Security Intelligence Department that inmates housed in Unit 9 (medium security) were in possession of ammunition (six .22 caliber bullets) that the appellants believed could be used as a weapon against correctional officers conducting a search pursuant to section 53 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, requiring the opening of cell doors and the extraction of inmates from their cells.

[3] At the time of the refusal, appellants Love and Langman worked in the medium security unit of the Institution while appellant Heaney was employed in the maximum security unit of the same establishment.

[4] On March 12, 2021, I held a teleconference with the parties to discuss, among other things, how the matter would proceed given the COVID-19 pandemic and public health circumstances. Further to the teleconference, I decided that it was appropriate to determine the appeal on the basis of written submissions. The decision that follows was arrived at on the basis of the evidence gathered by the ministerial delegate and the latter's investigation report as well as the documentary evidence and written submissions of the parties.

Background

[5] On January 15, 2019, CBI Security Intelligence staff (SIO) informed assistant warden A. Hale of reliable information to the effect that "approximately half a dozen .22 caliber ammunition" was present in the medium security unit, a fact that was examined through an evaluation process referred to as a Ballistic Threat Risk Assessment (BTRA). That assessment was formalized and signed by assistant-wardens Jack Coimbra and A. Hale on January 16, and security intelligence officer L. Collette on January 17, 2019.

[6] At approximately 14:30 hours on January 15, 2019, the assistant warden met with local union representatives to apprise them of the situation, following which the decision was made to confine the medium security unit inmates to their cells for the purpose of facilitating a search akin to a "section 53" lockdown search of said unit, said search to

occur immediately after the 16:00 hours institutional count, such requiring that all inmates return to their cells to ensure that all are present and/or accounted for.

[7] The institutional count proved correct and following its completion, inmates in the medium security unit remained confined to their cells while inmates in the maximum and minimum security units remained under normal operational routines. The medium security unit inmates' meal was thus delivered door-to-door with correctional officers wearing ballistic vests attending each cell, directing inmates to remain at the rear of their cells and to keep their hands visible prior to opening the cell door to deliver the meal.

[8] Under the BTRA which had concluded to a "low" threat level based on the fact that there was information as to the presence of ammunition but none indicating the presence of a ballistic firing mechanism or existence of intent to carry out a threat, the action plan that was adopted at the outset by the respondent provided that a lockdown and a search in the same manner as a section 53 search would be conducted. It stated:

> The medium unit has been contained. The initial assessment supported a lockdown and a search in the same manner as a section 53. Personal protective equipment (i.e. use of ballistic vests) would be provided to staff searching and moving inmates off range/units where the threat currently exists. Each inmate will be individually searched with a hand metal detector, DDH, strip searched and then moved to Unit # 4 which has been cleared of the ballistic threat. Once all inmates have been removed from their respective unit, those cells will be searched using qualified staff.

[9] Section 53 of the *Corrections and Conditional Release Act* mentioned in the BTRA action plan previously mentioned reads as follows:

> 53(1) Where the institutional head is satisfied that there is reasonable grounds to believe that
> (a) there exists, because of contraband, a clear and substantial danger to human life or safety or to the security of the penitentiary, and
> (b) a frisk search or strip search of all inmates in the penitentiary or any part thereof is necessary in order to seize the contraband and avert the danger,
> the institutional head may authorize in writing such a search, subject to subsection (2).

[10] What flows from the ministerial delegate's report as well as the parties' description of the facts of the case is that line staff, including the appellants, felt that the approach enunciated in the action plan was dangerous considering the presence of live ammunition, even with ballistic vests, as well as the lack of training to staff for performing searches under these ballistic conditions, thereby constituting a serious threat. This resulted in the warden summoning, at 20:00 hours, the Emergency Response Team (ERT) to conduct the section 53 search, said team arriving at 23:00 hours. At that time, the ERT leaders determined that to conduct such search, their activation standards required that they be equipped with sidearms in addition to their other equipment, i.e. ballistic vests, helmets and shields. Such request was denied by the assistant warden with ERT members

objecting to proceeding under those conditions. As a result, the ERT left the institution at around 01:00 hours on January 16, 2019, without conducting the section 53 search, advising the employer that a section 53 search by the ERT was not required as the BTRA risk was deemed to be low.

[11] At approximately 01:05 hours on January 16, 2019, as the section 53 search still had not been conducted in the medium security unit, a lockdown of the unit was initiated as personnel maintained their refusal to conduct a section 53 search under those prevailing conditions. The lockdown of the medium security unit was followed later in the day with the confinement at cell level-lockdown of the maximum security unit as personnel in that unit also refused to conduct the search. The appellants formalized their refusals to work at 8:45 hours on January 16, 2019, with all alluding to the relative porosity between security levels at CBI to suggest that the ammunition may have been moved by inmates to several units, including the maximum security unit and seeking that a section 53 search be conducted by the ERT which is equipped to handle ballistic threats.

[12] Where the employer conducting its investigation into the refusals arrived at a conclusion that no danger existed, the employer (Hyndman) and employee (Bakker) representatives on the joint committee who conducted the subsequent committee investigation split on the issue, the employee representative finding that danger remained until a section 53 search was completed, such danger not being a normal condition of employment, and the employer representative concluding to the absence of danger and that if such danger existed, it represented a normal condition of employment.

[13] The investigation that followed by the ministerial delegate, which led to a conclusion of absence of danger, was essentially based on the rationale adopted by the Tribunal in *Dan Bradford* v. *Correctional Service of Canada*, 2013 OHSTC 38 (*Bradford*), offering a similar situation on many points, and where the Appeals Officer concluded at paragraph 71:

> [71] Therefore, in my view, and taking CO Bradford's testimony into consideration, in order for a CO to have been injured during a cell search as described above, the presence of the following elements would have been required:
> (i) the presence of an **additional** bullet(s);
> (ii)) a mechanism to propel the bullet such as a zip gun; and (3) an
> (iii)inmate prepared to shoot a CO.
>
> (emphasis added)

[14] On these three points, the ministerial delegate first accepted, based on the SIO report, that a number of .22 caliber bullets were present in the institution, but concluded regarding the two other points that there existed no probative information as to the presence or existence of zip guns or makeshift guns within the institution. A .22 caliber bullet by itself, in the absence of a firearm or makeshift firearm is not considered hazardous and capable of seriously injuring a person. additionally, there was no security intelligence information regarding intent by an inmate to shoot a CO, although taking into

account the unpredictability of human behaviour, one could logically infer that an inmate in possession of a .22 caliber bullet could spontaneously make use of such to inflict harm on a correctional officer, should the inmate have the means to do so. In the end, the actual search was conducted by correctional managers wearing ballistic vests.

Issue

[15] Was there a danger for the appellants when, having received intelligence information as to the presence of .22 caliber ammunition (six bullets) within the institution (medium security unit), the respondent employer required the appellant employees wearing ballistic vests to conduct a search for said ammunition which involved opening cell doors and extracting inmates from their cells. What precedes would represent the substantive issue raised by this appeal, said issue to be determined upon consideration of the merits of the case on a balance of probabilities.

[16] However, before turning to such consideration, I will need to deal first with the issue of mootness that has been raised by the respondent in its written submissions. Normally, such matter would be dealt with in preliminary form and even a separate first decision. The unusual circumstance of the Tribunal dealing with this appeal on the basis of written submissions, makes it more practical to have the full submissions of the parties listed hereafter with the undersigned dealing first with the mootness issue in his decision.

Submissions of the Parties

Appellants' Submissions

[17] The appellants first challenge the conclusion of no danger arrived at by delegate Mahase by arguing that the latter erred in relying on and applying to the present case the *Bradford, supra*, Tribunal decision rationale/test because in doing so, the delegate failed to take into consideration a fundamental difference and crucial distinguishing factor between the two cases. Unlike in the present case where the suspected and sought ammunition had not been found and thus the potential for inmates to be in possession of such remained, in *Bradford, supra*, the only live round ammunition that was known of had actually been found and seized at the very outset of the matter, causing the Appeals Officer in that case to conclude that "in order for the circumstances to lead to injury, additional bullets were required inside the institution," and to find that he had not been provided with any evidence that would have suggested the presence of additional ammunition in the institution.

[18] The appellants thus buttress their position of a fundamental difference between the cases by pointing out that in the present case, the projected search originated from intelligence of the presence of ammunition (six bullets) within the institution and in the possession of inmates, while there was no such intelligence that inmates were in possession of live ammunition in *Bradford, supra*.

[19] The appellants however recognize that as regards the three required elements noted in *Bradford*, *supra*, to lead to a conclusion of danger, both cases are similar in that in both cases, there was no evidence there was a ballistic device in inmates' possession, leading the appellants to submit that delegate Mahase failed to adequately consider the comparatively increased potential in 2019 of ballistic devices being surreptitiously introduced into or constructed in a carceral *milieu* such as CBI.

[20] Referring to the BTRA that was conducted, the appellants note that the presence of ammunition or a ballistic device are threshold indicators or requirements for the application of such CSC's BTRA. This analytical framework systematically applies in the presence of a ballistic threat. This is a further differentiation between the present case and the *Bradford*, *supra*, case since in that case, there was never any clear obligation to perform a BTRA as the single round had been found and thus there was no longer any ammunition to justify resorting to a BTRA. The appellants suggest additionally that the *Bradford*, *supra*, decision constitutes a "deficient" precedent since it offers an incomplete analysis of the third object of a BTRA inquiry, to wit the presence of "an inmate prepared to shoot…" or "an intent to harm." Rather, the appellants suggest that guidance should be found in the Federal Court's decision in *Verville* v. *Canada (Correctional Service)*, 2004 FC 767 (*Verville*), and in the Tribunal's decision in *Correctional Service of Canada* v. *Mike Laycock*, 2017 OHSTC 21 (*Laycock*), confirmed in the Federal Court decision *Canada Attorney General* v. *Laycock*, 2018 FC 750 (*Laycock* 2) on the question of spontaneous attacks on correctional officers.

[21] It is submitted by the appellants that a BTRA analysis can be triggered by the presence of three factors, those being the presence of ammunition as well as, in the alternative, the presence of a ballistic device in the institution or the presence of "an intent to carry out a threat," i.e. an intent to harm. That being the case, the appellants argue that once apprised of the presence of live ammunition inside CBI, there was an obligation on CSC management to carry out a BTRA on January 15, 2019, which it performed.

[22] This being the case, referring to the *Verville*, *supra*, and *Laycock*, *supra*, decisions, the appellants argue that those precedents support the view that the evidentiary bar for determining the presence of "intent to carry out a threat" should be very low due to the unpredictable nature of the prison environment and of the inmates themselves, and that consequently, given sustained tensions at CBI and the institution's status as a medium-maximum institution, that bar was easily reached, meaning for all practical purposes that in the present case, the sole presence of ammunition or of a ballistic device sufficed for the BTRA to be engaged.

[23] In that respect, the appellants refer to the words of the Appeals Officer in *Laycock*, *supra*, to the effect that "assaults of correctional staff may occur without warning, in a matter of a few seconds, and without having received any intelligence or indicators that attacks against staff were contemplated." Given the definition of "threat" ("[a] person or thing that might well cause harm"), the appellants thus maintain that management's recourse to a BTRA was, in and of itself, indicative of the fact that the mere presence

inside the institution of illegally introduced and concealed ammunition represented something that might cause harm, and that considering the three possible outcomes of a BTRA (low, medium or high risk), thus excluding an outcome of "no risk," one could logically conclude that the refusing correctional officers were exposed, at the very least, to a "low risk" of being assaulted by a firearm of some type.

[24] Supporting this conclusion, according to the appellants, is the fact that once informed of the presence of the six rounds of live ammunition, assistant-warden Hale concluded that while the ballistic threat was low, it was implicitly present, hence the suggestion that staff wear ballistic vests, his ultimate decision to call upon the ERT and ultimately the extraordinary step of having correctional managers wearing ballistic vests to carry out the search and duties of the refusing correctional officers.

[25] The appellants find support for their claim that the six rounds of ammunition represented a serious threat in the country's *Criminal Code*, the manner in which that legislation deals with unauthorized possession of ammunition and how it strongly stigmatizes and punishes its illegal possession, even in the absence of a device to fire said ammunition, alluding to the implicit recognition that "where there is smoke, there is fire" and suggesting that in the case of an inmate having illegal possession, there exists a real possibility that there is a ballistic device at the ready to use or soon to be.

[26] The appellants thus point to subsection 88(1) of the *Criminal Code* dealing with possession of a weapon for a dangerous purpose which also makes it an offence to be in the possession of "any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence." Similarly, the appellants note that subsection 92(2) of the *Criminal Code* makes it an offence to knowingly possess without being the holder of a license to do so "a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition," as would be the case for any inmate in an institution such as CBI, inmates that would most likely be subject to prohibition orders to possess either firearms or ammunition under section 109 of the *Criminal Code*.

[27] The appellants submit that the Tribunal's case law, particularly the decisions in *Correctional Service of Canada* v. *Ketcheson*, 2016 OHSTC 19 (*Ketcheson*), *Keith Hall & Sons Transport Limited* v. *Robin Wilkins*, 2017 OHSTC 1 (*Keith Hall & Sons Transport Limited*) and *Laycock, supra*, stands for the proposition that in the determination of the presence of danger, hazard assessment needs to consider not only the probability of injury, but also the potential seriousness of the injury that may occur before the taking of appropriate mitigation measures. As such in this respect, time frame needs to be considered, given the above mentioned case law interpreting the notion of "serious threat" part of the definition of "danger" in the *Code* as tending to be a type of danger that can occur over a more extended period of time, meaning that danger can exist without immediacy, this giving credence in the present case that the .22 caliber bullets are hidden awaiting an eventual reunion with some type of ballistic device.

[28] On this point of a serious threat deriving from items such as prohibited ammunition being hidden, the appellants argue that the situation that prevailed in *Laycock*, *supra*, represents a prime example of the distinction between a "serious threat" and an "imminent" one, that case having to do with the continued unaccountability of quick snip cutters from the shop to which certain inmates had access, such being capable of penetrating the stab-proof vests usually worn by correctional officers and where the Appeals Officer had found that such vests provided no protection for the face, neck and arms of correctional officers, as had been evidenced by the face-stabbing with a "shank" of a correctional officer.

[29] It is thus submitted by the appellants that the situation is the same where ballistic vests are concerned and that those provide no protection to correctional officers where shots are fired at their heads, arms, necks or other parts of their body. This is also compounded in the case of a ballistic assault because, unlike a stabbing attack, such assault can be launched at long range. In *Laycock*, *supra*, the Appeals Officer thus concluded that "intent to carry out threat," which is the third criterion in a BTRA, is normally present in a penitentiary in Canada. It can therefore be derived, according to the appellants, that such intent could equally be presumed to have been present at CBI on January 15, 2019, as well as on the days that followed.

[30] The appellants submit that the completion of a "safe" section 53 search to find the said ammunition represented a necessary step to returning CBI correctional officers to a normal condition of employment. The appellants recognize, as was done in *Laycock*, *supra*, that in a correctional environment such as CBI, there exists no guarantee that a search will lead to the discovery of what is being sought, since inmates may choose to dispose of the contraband rather than being caught. However, once a section 53 has been completed, the remote possibility of said ammunition having escaped discovery and thus remaining for future nefarious purposes represents, as stated in *Laycock*, *supra*, the residual risk that can then be considered a normal condition of employment. While the job description of correctional officers may draw attention to the dangers faced by correctional officers, under section 124 of the *Code*, the employer needs to go beyond pointing out the inherent risks of the job and thus, when there exists a means of eliminating those risks, for instance by allowing the performance of a section 53 search by COs, the employer is obligated to do so.

[31] By way of conclusion to their submissions, the appellants note that in the BTRA, the employer repeats that safety is paramount, a philosophy shared by the appellants who, however, opine that the employer did not respect such commitment nor did it respect its obligations under Part II of the *Code*. In their opinion, CSC was overly concerned with minimizing inconvenience for inmates that such a search would cause, even where the BTRA (item 7) explicitly recognizes that the protection of staff "must include preparedness for collateral or indirect hazards that may arise in the process of the search, such as potential for inmate disturbances (damage to property, escalation of inmate behaviours and tension levels," this representing an understanding that an exceptional search performed for exceptional reasons in seeking to abide by the employer's

obligations pursuant to section 124 of the *Code* will likely cause inmates discomfort and inconvenience.

[32] This, according to the appellants, cannot be avoided, even with the duty of the employer under the *Corrections and Conditional Release Act*, there may be an apprehension of lawsuits by inmates. While this may be so, the appellants argue that correctional officers' right to safe working conditions under the *Code* must generally take precedence even in the presence of the employer's duty under the above mentioned Act .

[33] Given all that precedes, the appellants submit that the Tribunal should rescind the decision of "no danger" issued by ministerial delegate Mahase and further rule that the danger does not constitute a normal condition of employment.

Respondent's Submissions

[34] The respondent's submissions raise three points. First, the respondent claims that the present appeal should be dismissed as the issue that was raised at refusal has become moot. Second, whether such a conclusion is reached, or not, by the undersigned, the respondent submits that where I would discretionarily elect to hear the appeal notwithstanding a conclusion of mootness, a finding of danger cannot be arrived at solely on the basis of information regarding the presence of ammunition (six .22 caliber bullets) within the institution where, at the time of refusal, there existed no intelligence as to the presence within said institution of a zip gun or mechanism capable of shooting such and an intent to harm. Finally, should the undersigned conclude to the presence of danger, the respondent argues that the appellants were prohibited to exercise their right of refusal because such danger constitutes a normal condition of employment.

[35] On the first argument, that of mootness, the respondent submits that the guiding principle in examining the said issue is that the danger alleged to have existed at the time of refusal must continue to exist at the time of appeal, support for this being found in the Tribunal's decision in *Correctional Service of Canada* v. *Mike Deslauriers*, 2013 OHSTC 41, or, stated another way by the Tribunal in *Foster* v. *CSC*, 2018 OHSTC 15, and by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (*Borowski*), that there must be or remain a live controversy at the time of consideration by the Tribunal.

[36] In this regard, the respondent submits that since the work refusal, application of the Institutional Search Plan required that a search of living units and areas accessible to the inmates be conducted every thirty days and additionally, that a total of 50 searches characterized as section 53 searches by the respondent were conducted since January 2019, none of these searches having led to the discovery of ammunition or a gun, zip gun or similar mechanism or revealed an inmate's intent to harm.

[37] The respondent submits that the appellants themselves have maintained that it must be taken for granted that one of the effects of a section 53 search is that contraband gets

flushed in the toilets by inmates. The respondent argues consequently that since the ammunition was never found and that over two years have passed since the work refusals, the balance of probabilities dictates that the alleged danger no longer exists at the time of this appeal, thus justifying a finding of mootness, given the absence of a live controversy affecting the rights of the appellants.

[38] Referring to the words of the Supreme Court in *Borowski*, *supra*, to the effect that where a finding of mootness is arrived at, the Tribunal or a court nonetheless retains the discretion to hear the case on the merits, the respondent submits that should the undersigned choose to exercise that discretion, the burden falls on the refusing employees to identify the hazard(s) on which the work refusals are based.

[39] As to the second argument relative to whether a danger existed at the time that would have legitimized the refusals, referring to the definition of "danger" at subsection 122(1) of the *Code*, the respondent points to paragraph 128(1)(b) of the *Code* as the basis of refusal to wit, the belief by the employee(s) that the performance of an activity constituted a danger. The respondent is of the view that the danger invoked by the appellants is (was) hypothetical and speculative.

[40] In the respondent's words, the Tribunal must determine whether a danger existed for the appellants when, once informed about the presence of approximately six .22 caliber bullets inside the medium security unit at CBI, they were asked to conduct searches in the absence of the ERT. The respondent submits that such determination by the Tribunal needs to apply or be based on the three-part test developed by the Tribunal in its *Ketcheson*, *supra*, decision, an objective test requiring that the "danger" determination be based on a set of objective facts, as professed by the Tribunal in *Hassan* v. *City of Ottawa (OC Transpo)*, 2019 OHSTC 8.

[41] The respondent, referring to the wording of the definition of "danger" in the *Code*, thus submits that such determination must consider whether there is (was) a reasonable expectation that the hazard will represent an imminent or serious threat where what is to be examined is (1) the probability of the hazard, condition or activity being in the presence of a person, (2) the probability the hazard will cause an event or exposure and (3) the probability such event or exposure will cause harm to a person, the distinction between imminent and serious threat being relative to the seriousness of injury as an imminent threat meaning being on the point (imminently) of causing injury, even minimal, whereas serious threat carries the potential for severe injury at some point in the future.

[42] The respondent consequently claims that in order for a reasonable expectation of injury to be real in the circumstances of the present case, and thus avoid a finding of hypothetical or speculative danger, one must establish the following three elements that were identified by the Tribunal in its *Bradford*, *supra*, decision, those being (1) the presence of an additional bullet(s), (2) a mechanism to propel the bullet, such as a zip gun, and (3) an inmate prepared to shoot a CO, making no distinction between the situation that existed in *Bradford*, *supra*, where the finding of a single bullet had occurred

prior to refusal and the case at hand where the presence in the unit of six bullets is supported by intelligence but none have been found or searched for.

[43] As first part of the *Ketcheson, supra,* test, the respondent identifies the alleged hazard as being the actual information regarding the bullets in the institution. According to the respondent, this is demonstrated by the actual wording used by all three appellants in their work refusal which emphasizes that intelligence has been obtained as to the presence of the said bullets in the medium security unit (unit 9), that the size of this type of bullet facilitates its transportation without detection between units, including maximum security units, and that inmates from one section can come into contact with inmates of another section as inmates can be escorted through areas where maximum and medium security inmates may be present and additionally, certain areas are shared between various inmates. The respondent also emphasizes that while the appellants identified the danger as being the six .22 caliber bullets circulating between the medium and maximum security units, their work refusals make no mention of a gun , a zip gun, a firing mechanism or the intent of an inmate to make use of the actual bullets.

[44] As to the second part of the test regarding whether the threat is imminent or serious, the respondent starts by submitting that there is no reasonable expectation that ammunition without a gun or similar mechanism or intent may represent an imminent threat to the life or health of a correctional officer. The imminent part of the test requires that the hazard will cause injury soon, meaning within minutes or hours of the refusal and the respondent submits in this regard that such was not the case since the source of the information as to the presence of the bullets also confirmed that there was no gun, zip gun or components of a weapon and that he did not know why or how the ammunition had been brought into the institution. Furthermore, as per the Institutional Search Plan, a section 53 search of the whole medium security unit had been completed between December 29, 2018, and January 4, 2019, while the information was obtained shortly thereafter on January 15, 2019.

[45] Referring to the situation that had prevailed in the *Ketcheson, supra,* case where the employee (a correctional officer) had believed he was always in danger, eliciting from the Tribunal 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 this appears to be the situation in the present case since the appellants believe that information regarding the presence of six bullets in a CSC institution creates a danger.

[46] It is the view of the respondent that ammunition without the means to shoot it and without an intent to harm cannot reasonably be expected to represent an imminent threat to the life or health of a correctional officer. It may represent a hazard, but not one that is a danger. It is the opinion of the respondent that all three elements noted above in the *Bradford, supra,* decision need to be present simultaneously for danger to be more than speculative or hypothetical.

[47] In that respect, the respondent submits that no evidence was put forth that an inmate had access to a gun or zip gun, or even knew how to make one, or to any other firing

mechanism contemporaneously to the work refusal. The suggestion by the appellants that the absence of such information does not mean that there was not a firearm is simply untenable according to the respondent as the source which informed as to the presence of the bullets had confirmed that no such gun, zip gun or weapon components was present nor did he know why or how the bullets were brought into the institution, pointing out that in *Bradford*, *supra*, the fact that no zip gun had ever been found in the institution and the absence of intelligence as to the existence of such had supported a conclusion that finding such apparatus within the institution remained speculative.

[48] In the case of CBI, the respondent submits that no credible evidence exists that a zip gun was ever found in said institution, noting that what the appellants had presented as evidence to the contrary, such did not relate to a CSC institution, constituting no more than a red herring having nothing to do with the reality of correctional institutions in Canada. It is thus the position of the respondent that the appellants' arguments are not based on fact but rather on speculation.

[49] On the appellants' claim that some metal piping from the CORCAN metal shop could have been removed to serve in the construction of a zip gun, the respondent argues that this constitutes a mischaracterization of the facts since, upon further search of the shop on January 21, 2019, said piping was actually located in the metal shop where it had been appropriately stored until its removal from the institution, thus not found in the possession of an inmate and having remained under the control of the institution. Contrary to the appellants' apparent opinion that making a zip gun is an easy task, the respondent suggests that, in reality, the extensive security measures in place in an institution such as CBI, including observation posts, cameras, frequent searches, metal detectors, dynamic security, intelligence information and others represent a combination of measures that serves to explain why a zip gun has never been found at CBI.

[50] In addition to the presence of ammunition and of a mechanism to shoot, in *Bradford*, *supra*, the Tribunal stated that there needed to exist an intent to harm, signifying, according to the respondent, that the appellants would have to demonstrate that an inmate at CBI, at the time of the work refusal, had the intent to shoot a correctional officer. Noting that the appellants have invoked the unpredictability of inmate behaviour in support of their contention, the respondent, while recognizing such unpredictability, argues that this represents a mere hypothetical speculation by the appellants who, in citing the Tribunal's decision in *Laycock*, *supra*, regarding the intent aspect, failed to cite the entirety of the Tribunal's pronouncement. The appellants improperly stated that unpredictability of behaviour may serve to establish the existence of imminent danger whereas the words of the Tribunal stand for the proposition that where imminence of danger has been established, such unpredictability of behaviour applies to consideration of the final part of the *Ketcheson*, *supra*, test which goes to the determination of whether the threat will exist before the hazard or condition can be corrected. To accept the interpretation of the appellants would mean, according to the respondent, contradicting the case law on hypothetical and speculative threats. Henceforth, the respondent argues that one cannot simply rely on unpredictable inmate behaviour to avoid the requirement that the threat not be hypothetical.

[51] On the question of whether there existed a serious threat to the life or health of correctional officers, the respondent submits first that this part of the *Ketcheson*, *supra*, test requires that the hazard, condition or activity will cause serious injury or illness at some time in the future and second, that ammunition without a gun or similar shooting mechanism as well as an intent to harm cannot reasonably be expected to constitute a serious threat to life or health of correctional officers. Where the absence of a shooting device is concerned, the respondent notes that such was confirmed both through the BTRA completed by the acting warden which indicated the absence of any security intelligence to that effect and a section 53 search that had been completed between December 29, 2018, and January 4, 2019, thus somewhat contemporaneously with the actual refusal on January 16, 2019.

[52] The respondent also finds support in the mention made by the ministerial delegate in his report that an inspector of explosives with the Explosives Regulatory Division of Natural Resources of Canada had advised that a .22 caliber bullet could be dismantled without tools but that he total quantity of smokeless powder in six such bullets would not be enough to manufacture an effective explosive device to wit, one that could inflict serious injury according to the delegate who, while recognizing that inmates may have some access to workshops and common areas, was informed by the employer of the existence of controls in place that would detect .22 caliber ammunition at points between secured areas, workshops and common areas. Finally, as to the third element mentioned in the *Bradford*, *supra*, decision to wit, intent to harm, the respondent recognizes that the unpredictability of inmate behaviour must not be overlooked in this case but that this does not alter the fact that there was no information regarding intent. As to the last part of the *Ketcheson*, *supra,* test regarding whether a threat would exist before the hazard could be corrected, the submission of the respondent stands simply for the proposition that since no threat existed, therefore it could not exist before the hazard could be corrected. The view expressed by the respondent is that there was no threat as there was no gun, zip gun, firing mechanism nor any intent to harm, in addition to which, if such threat had existed at the time, it would have been remedied by the section 53 search that was conducted which had revealed no ammunition or shooting device and no intent to harm. The respondent also notes that while the refusal was actually filed in mid-January 2019, since then some 50 section 53 searches have been conducted by the respondent with none of those resulting in the discovery of ammunition, a gun, zip gun or firing device or an intent to harm.

[53] Finally, the respondent points to the fact that under section 128 of the *Code*, an employee cannot refuse to work where the alleged danger represents a normal condition of employment. In the case at hand, the respondent submits that even if a danger existed, it represented a normal condition of employment as contraband is a reality in all correctional institutions despite numerous measures put in place by CSC, such appropriate measures, taken in accordance with CSC's established policies and within the *Corrections and Conditional Release Act* towards minimizing the level of risk to its employees and causing any remaining risk to be residual. Such risk was assessed as low through the BTRA with the assistance of security intelligence officers with controls commensurate with such assessed level of risk being put in place. According to the

BTRA and the CBI-Employer-Employee report, correctional officers were to wear personal protective equipment, including ballistic vests, while removing Unit 9 inmates from their cells.

[54] Further, inmates are searched upon admission to the institution and regular searches are conducted in addition to those that may be required based on intelligence information, in accordance with the Commissioner's Directives and the institutional search plan, all with the intent of finding contraband and unauthorized items and ensuring the safety and security of the institution, its staff and inmates.

[55] As final part of its submissions, the respondent has sought to respond to the appellant's arguments. As such, the respondent refers to the appellants' argument that CSC failed to consider the possibility that ammunition and/or guns or other shooting devices could be introduced by using drones. The respondent qualifies such argument as hypothetical and speculative, based on "coulds and mays" and other speculative and hypothetical arguments rather than factual findings. While acknowledging a rise in the number of drones incidents at CBI, the respondent submits that none of the exhibits brought forth by the appellants reveal that any gun, zip gun, components thereof, or firing mechanism was ever dropped at CBI. Rather, the contents of the drone drops are primarily drugs, drug paraphernalia, cellphones/chargers and ceramic blades, all being contraband but not the subject of the present case and brought out solely for the purpose of deviating from the real issue.

[56] Regarding the possible circulation of the contentious bullets between the medium and maximum security units, the respondent points to the fact that the section 53 search that was to occur would have been planned to be conducted after the 16:00 hours count, thus when medium security inmates would have been confined to their cells as they need to be for that count. Since such searches are not commonly announced and thus inmates are not forewarned, the respondent submits that in such circumstances, it was very improbable that the ammunition could have been passed from one unit to the other, this reinforcing the conclusion of no danger regarding appellant Heaney who was working in the maximum security unit.

[57] Given all that precedes, the respondent employer submits that its decisions need to be based on facts and evidence instead of hypothesis and speculation, as those decisions that may impact on the health, safety and security of staff, inmates, the institution and the public have legal and security ramifications. The issue is thus moot as some 50 section 53 searches since the refusals have not led to the discovery of ammunition, gun, zip gun or firing mechanism, nor demonstrated the presence of an inmate intent to harm. It is the respondent's opinion that the appeal should be dismissed on that ground. However, as per the mootness doctrine, should the undersigned opt to proceed on the merits, the respondent argues that the appeal should be dismissed due to the absence of danger or, should danger be established, that such represents a normal condition of employment.

Reply

[58] While the appellants dispute the conclusion of no danger arrived at by the ministerial delegate, at this reply stage the appellants submit first that the appeal is not moot, and second, where the undersigned disagreeing with such a conclusion would decide to exercise his discretion to hear the appeal, that said danger is/was not speculative and hypothetical and not a normal condition of employment.

[59] Central to the arguments made by the appellants at this stage is the distinction they make between the facts and circumstances underlying the *Laycock*, *supra*, Tribunal and Federal Court decisions on the one hand, and the those underlying the Tribunal decision in *Bradford*, *supra*, pinpointing that in *Laycock*, *supra*, danger had been found to continue to exist mostly because the item (quick snips) that had disappeared remained unfound regardless of searches and other measures, as is the case for the ammunition involved in the present case, whereas in *Bradford*, *supra*, where the matter had been found moot, refusal to work had occurred following the discovery of a single bullet with no additional ammunition being discovered following searches and other measures.

[60] As to the first part of the reply, the appellants submit that there is no evidence that the contentious bullets are no longer present within the institution since, while the respondent may argue that the numerous infructuous searches that have since been conducted would support such conclusion, such result cannot serve to demonstrate the opposite, to wit that the said bullets or a ballistic device do not remain within said institution.

[61] The appellants point out that while the respondent itself recognized that it had obtained reliable information as to the presence of the said six bullets, it had presented no evidence that the said ammunition was no longer present within the institution. While the appellants and the respondent may both accept that said bullets may have been permanently disposed of in some manner, the appellants submit that there is no evidence of this except for possibly the passage of time.

[62] On the other hand, the appellants find support in *Laycock*, *supra*, for the proposition that the lack of discovery of such contraband may indicate instead that it has been hidden away for future use. The Appeals Officer stated the following at paragraph 105:

> [105] We must therefore fall back on basic principles and on the fundamental objective of the Code which is to prevent workplace accidents and injuries. I am unable to rule out the possibility advanced by the respondents that the snips may have found their way in the general population or be hidden purposely for future use. I do not agree with appellant's contention that the risk is purely hypothetical or speculative [...]

[63] The appellants thus submit that it is hypothetical and speculative to argue that the ammunition is no longer present within the institution, this being reinforced by the exceptional adeptness of inmates at concealing contraband and the easy and intermittent

needed concealment of items as small as .22 caliber bullets, which are the smallest of well-known ammunition types, thus allowing escape of detection for long periods of time.

[64] On the third required element noted in *Bradford*, *supra*, which is the intent by an inmate to harm a correctional officer, the appellants submit that the argument by the respondent that no such intent had been detected by Intelligence at the time of the refusal or since is untenable as such intent should be presumed. It is the opinion of the appellants that the Tribunal should take notice that in medium or maximum security institutions, such intent represents a latent condition of employment, as opposed to a normal condition of employment, a distinction the appellant claims has been retained by the Federal Court in *Laycock 2*, *supra*, where the Court stated that the Appeals Officer had "acknowledged that there are ever-present dangers in the prison environment" (at paragraph 4). The appellants thus maintain their opinion that the *Laycock*, *supra*, decision supports the view that the Tribunal can conclude to the existence of an intent to harm given the unpredictable nature of inmate behaviour and the latent potential for violence, thus satisfying that part of what the appellants refer to as the *Bradford*, *supra*, test.

[65] On the claim of mootness by the respondent, the appellants submit that the foregoing serves to show that a live controversy subsists in the case and that there remains an adversarial context, therefore justifying a continued intervention by the Tribunal. Furthermore, given the respondent's major reliance on *Bradford*, *supra*, the factual circumstances of which the appellants claim are fundamentally different from the present case, the Tribunal in their opinion should exercise its discretion to hear the case on the merits as its decision would provide necessary health and safety guidance to the parties and clarify or set aside the so-called *Bradford*, *supra*, test.

[66] In the appellants' opinion, the Tribunal choosing to act in this manner would be particularly of use since its *Bradford*, *supra*, decision dates back to a period where drones and other types of technology such as 3D printers had not become common place, such technologies having substantially increased the feasibility of introducing and concealing firearms in institutions such as CBI. Furthermore, the appellants are of the view that the mere passage of time and the normal course of business should not be serve as reasons to prevent a ruling from being rendered in the case.

[67] Should the Appeals officer find for mootness, the appellants submit that rendering a decision on the merits would represent a judicious use of resources and consequently that the Tribunal should nonetheless exercise its discretion to adjudicate on the issues raised by the appeal, as otherwise, there will be nothing standing in the way of the respondent repeatedly raising the same mootness argument in the future in the case of similar factual circumstances. The appellants maintain that in light of the relative ease with which ammunition can be introduced in an institution, even if merely by the traditional "throwover" method, there is a high potential for the parties to be adversaries in a similar dispute. Consequently, a decision on the merits would represent a significantly useful use of judicial resources and usefulness of a decision represents another reason for the Tribunal to exercise its discretion to proceed on the merits.

[68] On the merits, the appellants submit that the danger is not hypothetical or speculative and that the respondent, in stating that "the potential for injury must be more likely than not," thus claiming that such potential needs to be determined on the balance of probabilities, fails to identify the correct burden of proof. It is argued by the appellants that neither of the authorities *Robitaille* v. *Air Canada*, 2019 OHSTC 1, and *Keith Hall & Sons Transport Limited*, *supra*, cited by the respondent in this regard suggest that such is the burden to be met in establishing the presence of an imminent or serious threat rather than "reasonable possibility." As to the "possible harmful consequences" referred to in those precedents, the appellants suggest that being shot with one or more .22 caliber bullets represents the most serious threat imaginable and that such factor must be taken into consideration in determining the appropriate burden to apply, which the appellants suggest needs to be "far lower than the balance of probabilities" as pertains to the existence of a serious threat, this contrary to the assertion by the respondent. In fact, the appellants take the position that the greater the seriousness of a potential harm related to the threat, the lower must be the burden of proof[1] that the threat will materialize.

[69] The appellants submit that the respondent's actions are compatible with the presence of an imminent or serious threat. In that regard, the respondent did assess the threat through the BTRA, deeming such to be "low" despite its opinion of absence of information regarding intent to harm or existence of any type of ballistic device. "Low" risk, as opposed to zero risk, justifies the appellants benefiting from the protection of the *Code*. It is clear for the appellants that the respondent must have considered the risk to be sufficient since it made the exceptional decision of equipping correctional officers with ballistic vests to conduct a search and alternatively, call upon the institution's ERT to conduct said search. There follows from this, in the appellants' opinion, that a "low" risk of potentially serious, even catastrophic, harm suffices to trigger the protection of the *Code*, regardless of the *Bradford*, *supra*, test validity or applicability. The danger is thus not speculative.

[70] The appellants also submit that the application of the *Bradford*, *supra*, test to the case by the respondent is erroneous and inappropriate, firstly because factually, that case was fundamentally different from the present case. In *Bradford*, *supra*, one bullet was found and no additional information obtained as to the presence of additional ammunition whereas in the case at hand, the respondent had reliable information of the presence of six .22 caliber rounds in the institution at the time of refusal, with no evidence that such ammunition does not remain within the institution, drawing attention to the *Laycock*, *supra*, decision supporting the suggestion that the said bullets may have been squirrelled away for future use against correctional officers. The appellants however submit that if the Tribunal finds for application of the *Bradford*, *supra*, test, part one of such test has been established as evidence has been brought forth that ammunition is/was present within the walls and none presented that it no longer is.

[1] What is referred to as the "burden of proof" should more properly be referred to as the "standard of proof".

[71] The appellants are of the same view regarding the second part of the *Bradford*, *supra*, test, which they consider has also been met, considering the saying of the Tribunal in *Laycock, supra,* regarding the latency of inmates' intent to harm and therefore do not agree with the respondent's suggestion that they have relied on the unpredictability of inmate behaviour to establish that the danger was imminent. Rather, their position is that said unpredictability leads to a reasonable determination that such intent to harm is present, most particularly in a medium/maximum security institution such as CBI with the heightened tensions that can be attested by the appellants. The view of the appellants is that since intelligence officers have difficulty in even detecting material contraband, they cannot be expected to be greatly successful in pinpointing inmate intentions, and thus making such element a test in determining whether COs can benefit from the protections afforded by the *Code*, as was done in *Bradford, supra*, is ridiculous and speaks to the actual validity of such test.

[72] On the third part of the *Bradford, supra*, test concerning the presence of a ballistic device, the appellants submit that they have mostly referred to the introduction of a firearm by throw-over, smuggling or drone drop rather than to zip guns, and that the increasing frequency of such drops as well as the increased use and development of drone technology contradicts the claim by the respondent that this only represents a "red herring," particularly where the respondent has recognized that drones may be used to introduce "ceramic blades," leading to a conclusion that they may already be used to introduce ballistic devices or parts of such, particularly where functioning plastic firearms may be produced and are capable of evading detection for extended periods of time.

[73] The appellants thus offer the argument that it is not unreasonable to conclude that a ballistic device capable of firing .22 caliber projectiles is or was already inside CBI. In essence, the appellants' argument regarding this third part of the test is that the potential for the eventual introduction of a ballistic device is so great that the third part of the *Bradford, supra*, test should be dropped in light of the potential for catastrophic harm. Given the appellants submissions regarding the two parts of the test, they submit that the said test "is no longer good law in 2020 and beyond," i.e. that the presence of ammunition, combined with the latent intent to harm COs, intertwined with the potential for catastrophic injury associated with ballistics, entitles the appellants to the full protection of the *Code* and consequently the overturning of the ministerial delegate's finding.

[74] The appellants find support for such conclusion in the words of the Federal Court in *Laycock 2, supra*, to the effect that "if the loss of a lethal object, possibly into the general prison population, does not justify taking full mitigation measures, one is left to wonder when such measures will ever be required going forward." Referring to those words from the Court, the appellants rationalize that if such statement is seen as applicable to what they describe as a hand-to-hand combat range weapon such as the "snip" in the *Laycock, supra*, case, it should apply to .22 caliber ammunition which, in combination with a ballistic device, represents a much greater risk for correctional officers as it does not require to be used at close quarters.

[75] As a final point to their reply submissions, the appellants challenge the position taken by the respondent to the effect that interacting with inmates who have access to ammunition represents a normal condition of employment, qualifying such as untenable" and finding support for such opinion in the fact that the respondent has developed an emergency policy, whether adequate or not, to deal with this type of situation, i.e. the BTRA. The appellants thus raise the following question: if this were a normal condition of employment, what would be the need for the respondent to mobilize its emergency response team? For the appellants, the obvious answer is that the situation in the present case does not constitute a normal condition of employment, such being confirmed by the fact that in addition to having first called upon its ERT, the respondent subsequently offered to equip ordinary line officers with ballistic vests instead of the normal stab-resistant vests that they would normally wear.

[76] In conclusion, the appellants request the Tribunal to rescind the delegate's finding of "no danger" and find that the danger was not a normal condition of employment.

Analysis

[77] The process before an Appeals Officer, as established at case law, is a *de novo* process. The parties in the present case have not challenged this. Nonetheless, while it is true that under the appeal process and in making my determination, I am not restricted to the information presented as evidence that may have been provided to ministerial delegate Mahase investigating the appellants' refusals and thus may include relevant information and evidence that would not have been made available to the latter at that time there remains the fact that whatever information is provided to the Tribunal for an evidentiary purpose towards determination needs to have a probative value of some degree of threat exceeding mere hypothesis, speculation or postulation that will be subject to analysis and evaluation on a balance of probabilities.

[78] In that respect, the following words of the Tribunal in *Keith Hall & Sons Transport Limited*, *supra*, still fully apply:

> [40] …to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees.
>
> [41] …For a danger to exist, there must therefore be a reasonable threat that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (…), or that it will cause severe injury or illness at some point in the future […]

[79] The present appeal has been brought pursuant to subsection 129(7) of the *Code* and concerns, as previously stated, the decision rendered by ministerial delegate Mahase which concerned the appellants' refusal to work pursuant to paragraph 128(1)(b) of the *Code* and where the delegate concluded that a danger did not exist and thus that the

appellants, at the time of refusal, were not exposed to a danger, as per subsection 129(4) and paragraph 128(13)(c) of the *Code.*

[80] Before going any further, it is important in my opinion to draw a very brief picture of the matter at hand from the standpoint of the bearing of the refusals and to circumscribe what, generally speaking, has been at the heart of the opposing views formulated by the parties. As such, it is necessary to point out once more that all three appellants based their refusals on paragraph 128(1)(b) of the *Code*, claiming therefore that at the time of refusal, a condition existed or was present in their workplace that represented a danger for the refusing employees, this paragraph of the legislation providing that a refusal motivated by such reason (condition) was open to and concerned solely the refusing employee(s), therefore could not be invoked relative to the refusing employee(s) "and another employee(s)." It is also necessary to understand what was the "condition" invoked by those employees. That "condition," briefly stated here and obviously described more extensively by the parties in their submissions, consisted in the employer, having been apprised of intelligence (inmate) information, that for the purpose of discussion it considered credible, concerning the presence of a number (six) of bullets in its medium security unit, and having assessed that situation through a process described as BTRA as constituting a "low" risk for correctional officers, required line staff (correctional officers) to conduct a cell by cell search akin to a section 53 search of the locked down unit(s) wearing proper PPE, including ballistic vests.

[81] The actual refusals by the appellants were formalized after the ERT which had been called for the purpose of conducting said search after employees had expressed concern at conducting the search in the manner provided for under the BTRA, opted not to proceed in the absence of being authorized to wear sidearms yet, in withdrawing, indicated that given the "low" risk assessment, they (ERT) were not needed. One needs to specify here that under the BTRA process, which can serve to determine a threat risk as either low, medium or high risk, it is solely at the high threat risk level that the ERT in full ballistic protection must proceed to the extraction and search of inmates in a locked down environment, with the other two levels of threat risk calling for line personnel to execute such task wearing proper PPE including ballistic vests.

[82] It is thus evident that while the BTRA had concluded to "low" risk, the refusing employees, by seeking that the search be conducted by the ERT, wanted the situation of the six suspected bullets to be considered a "high" threat risk. On this particular point, this makes the present case practically identical to that which is dealt with by the Tribunal in its recent decision in *Kelsch et al.* v. *Correctional Service of Canada*, 2021 OHSTC 5 (*Kelsch*).

[83] In the formulation of the parties' submissions regarding the merits of the appeal, what could be described as a preliminary issue was raised by the respondent, an issue to which the appellants, having not addressed such in their initial submissions, presented a response in their reply to the respondent's submissions. The substance of the said issue raised by the respondent was that the undersigned should not deal with the merits of the

appellants' appeal as the matter or situation at the origin of the refusal to work by the three employees had become moot.

[84] I will consequently deal first with the issue of mootness raised by the respondent. Regarding this, there is importance in reiterating to some extent what the authority of an Appeals Officer under the *Code* entails. As such, the words of the Tribunal in its recent decision in *Kelsch*, *supra,* are relevant:

> [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 a pronouncement 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 nonetheless to make a determination on the case.

[85] The Supreme Court of Canada, in its decision in *Borowski*, *supra,* has set the corner stone of that doctrine in the Canadian legal system. In the decision, the Court adopted a two-step analysis. The first step would have any tribunal where the doctrine is invoked to determine whether the tangible dispute or live controversy at the root of the matter of which it is seized has disappeared, thus rendering the issue, controversy or dispute academic. Regarding this particular notion of tangible dispute or live controversy, the Supreme Court stated that it is an "essential element" that must be present not only when the action commenced but also when the court (or tribunal) is called upon to reach a decision. It is true that in this respect, the Court did recognize that there may be issues in contention that, by their nature, 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.

[86] In the present case, this is precisely what the appellants have claimed as one reason for the Tribunal not to entertain the application by the respondent for a declaration of mootness, the length of elapsed time between the decision of the ministerial delegate, which the latter issued just days after the refusals, and the present consideration and decision by the undersigned approaching three years and the issue(s) before it, potentially repetitive, being likely to disappear or have disappeared, become academic, at the time of the appeal hearing. I will simply respond to this by pointing to the fact that this Tribunal, being an administrative entity vested with decisional authority, is master of its own procedure and thus, apart from the *Code* requiring that it proceed to hear the matters before it in a summary way and without delay, is certainly not prevented from entertaining applications from any party to proceed more expeditiously and even in an accelerated and abbreviated fashion towards effectively avoiding such a situation of an issue becoming academic due to the passage of time. I would add in this respect that to the undersigned's knowledge and experience as Appeals Officer, I am not aware of such application for that purpose ever having been made.

[87] The second step of the doctrine, should there first be a conclusion of mootness for lack of live controversy, would have the Court (or Tribunal) decide whether it should nevertheless exercise its discretion to determine the issue(s). In deciding this, consideration will have to be given to three elements or factors, those being:

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

[88] Where this second step is concerned, the Court noted that this 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 a the third, and vice versa. One must point in this regard to the view expressed by the Court regarding the applicability of those factors, and in particular 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," this last comment of the Court bringing into proper perspective in the present case the above comments by the undersigned regarding the authority of the Tribunal to hold an early and/or accelerated hearing on request.

[89] On the first step of the mootness analysis, I have formed the opinion, based on all the evidence relative to the workplace condition raised by the work refusals, as well as the submissions by both parties, that the issue raised by the appellants has become academic.

[90] Evaluating the academic nature of the issue requires taking account of the ministerial delegate's decision and the reasons for it, even if this is being challenged at appeal. In *Kelsch, supra*, the employees refused to work after a single bullet (.22 caliber) was found in the institution. The employees disagreed with the conclusion of the BTRA, which served to launch the request by said employees to have a high threat risk search conducted by the specialized unit to search for other ammunition on the postulate that if one bullet was found, there was bound to be others within the institution (none were ever found). The refusing employees also claim that the inmates had internal access to materials capable of serving to fabricate a shooting mechanism or were able through contraband to obtain such or a firearm, be it by throw-over, by drone transportation or other means. In addition, the employees argued that the intent, within the inmate population, to harm correctional officers generally exists due to the accepted unpredictability of inmate behaviour. In the institution concerned by that case, there existed no history of a shooting mechanism or firearm ever having been present or used.

[91] In the present case, the employees exercised their right to refuse to work because they disagreed with the low risk conclusion of a BTRA conducted following the receipt of intelligence/information that six bullets (.22 caliber) were present in the institution.

The low risk conclusion would have resulted in line personnel with proper PPE, including ballistic vests conducting a section 53 search instead of the ERT (necessary where the BTRA concludes to "high" risk), this equally coupled with the general claim of so-called inmate access to materials capable of serving to fabricate a shooting mechanism or the possibility through contraband of obtaining such or a firearm, be it by throw-over, by drone transportation or other means and the argued generally existing latent intent, within the inmate population, to harm correctional officers. Clearly, the differences between the two cases are sufficiently minimal to be negligeable.

[92] In the *Kelsch*, *supra*, decision, the undersigned commented at paragraph 153, and this applies in this case, that consideration of the decision by the ministerial delegate and the reasons for it "must in some manner set face to face what has been retained, in other words the rationale, 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." This has proven even truer in the case at hand as the gist of the parties' contentions sets face to face two decisions of the Tribunal, one being *Bradford*, *supra*, which serves essentially as the basis for the rationale of the ministerial delegate and the respondent, and *Laycock*, *supra*, which the appellants claim, as more adapted case law, would better serve the determination to be made by the undersigned.

[93] As regards this case law "confrontation" where the appellants have suggested that the so-called *Bradford*, *supra*, test "is no longer good law in 2020 and beyond," and that the Tribunal should consider in this case the *Laycock*, *supra*, rationale as determinative, I hasten to state that I disagree with this conclusion as I find that there is no contradiction between the two since where in the present case, the contentious bullets have not been found, as was the case in *Laycock*, *supra*, for the contentious quick snips, and was not the case in *Bradford*, *supra*, where the finding of a single bullet had served to initiate the situation, there exists a fundamental difference between the two cases. As was recognized by the parties in this case to wit, that a bullet is not, in and of itself, an object that represents a hazard as there is a need for such to be coupled with some shooting mechanism or gun to achieve hazard status in the hands of an inmate with intent to harm, whereas an inmate intending to harm a correctional officer can do so simply by handling an item such as the quick snips that was central to the situation in *Laycock*, *supra*, without any other item being needed, all other elements such as inmate latent intent to harm, if such can be accepted as a generally existing factor, being present.

[94] The position put forth by the appellants has not, in the undersigned's opinion, proven more compelling than that which has been put forth by the respondent which, as previously stated, essentially replicates that which has based the ministerial delegate's decision. That decision was closely aligned, as stated before, on the so-called *Bradford*, *supra*, three elements test, where the delegate accepted as credible the information as to the presence of the six bullets in the institution (those not ever being found), the lack of any intelligence/information regarding the existence of some shooting mechanism and the inefficiency of the contents of dismantled bullets as explosive device as well as the

relevance of the unpredictable human behaviour of inmates as a factor in the assessment of intent to harm, to conclude that "it is logical to infer that an inmate in possession of a .22 caliber bullet can spontaneously use the bullet to inflict harm on a correctional officer, should he or she have the means to do so," thereby clearly rendering the dangerousness of a bullet conditional upon having the material capacity to shoot such.

[95] The appellants, on the other hand, sought to obtain a finding of danger which would validate their claim that they should not have been required in the circumstances to conduct a search akin to a section 53 search, meaning that such should be or have been conducted by the ERT. The appellants based their claim on the following: the intelligence held by the employer, the potential for the presence of a gun or shooting mechanism linked to the inventiveness of inmates or the potential outside intervention through contraband or use of drones, and what should be accepted as latent intent to harm a correctional officer that should be considered generally present in every inmate. Noteworthy is the fact that no specific evidence in this regard was brought forth.

[96] In reference to the *Laycock*, *supra*, rationale, be it that of the Appeals Officer or of the Federal Court, the appellants have put great stock on the suggestion that the credible bullets that have remained unfound could have been successfully squirrelled away pending acquisition in some manner of a shooting mechanism that would materialize at some time a threat that could not be ignored given a latent intent to harm, thus justifying a more forceful search or searches. Such a scenario is assuredly possible, given that everything is possible in some sense, particularly in a penitentiary environment. However, "possible" is not "probable" and does not satisfy the applicable threshold of reasonable expectation under the *Code* that would need to be applied, should I consider the matter on the merits. I would add that even if one agrees that a bullet or bullets on their own do not represent a danger as such, and that to reach that level, there needs to be a means of shooting such as well as an intended target, in this case a CO, in the present case no factual, as opposed to speculative or hypothetical, evidence of this reasonable probability could be provided as this would for all intents and purposes represent the purpose of the search that the appellants refused to execute and wanted the ERT to conduct.

[97] Whatever the perspective under which the case is perceived, in the end while generally seeking a finding of "danger" where they were asked by the employer, at the time of refusal, to conduct a search that they claimed should have been conducted under the high risk assessment, thus by the ERT, what the appellants are seeking is essentially that a new, a distinct or different risk assessment be arrived at, given the circumstances, that would of necessity have led at the time, and obviously would be expected to lead in the future under the same circumstances, to a different search.

[98] It must be noted at this juncture that where, for a mootness application to be granted, the original issue would have to still be live at the time of consideration of such application, on determination of the merits of a case, it is the circumstances as they were at the time of refusal that must serve as the basis of the determination as to whether a danger existed at the time of such refusal.

[99] In this respect, in *Kelsch*, *supra*, the undersigned commented as follows:

> [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) of 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 authority to direct that such BTRA be conducted, I most assuredly do not have the authority to dictate what the result of such BTRA would or should be.

[100] In my opinion, the same rationale applies in the present case and I would add that even if the ultimate end was to have a new search conducted, this would represent a futile exercise where the actual search that was refused by the appellants was in the end conducted by correctional managers wearing ballistic vests and that since then there appears to have been more than 50 such additional searches with no bullets found.

[101] I have no difficulty therefore in concluding that my corrective authority in the circumstances of the present case is somewhat minimal to non-existent. There is no assurance that a new BTRA would conclude differently. Again, I consider the comments made in *Kelsch*, *supra*, to find application here:

> [157] […] 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.**
>
> (emphasis added)

[102] One also cannot ignore the timeline element in considering whether the issue raised by the appeal has become academic. If one considers the wording of subsection 146.1(1) of the *Code* to the effect that the circumstances of the case at hand need to be inquired into "without delay," such obligation inscribed by Parliament in the legislation, in my opinion, attesting to an intent that the corrective authority granted to appeals officers remain meaningful. One therefore should not disregard the fact that at the time of writing the present decision, some three years have elapsed since the actual initiation of the work refusals that eventually led to the present appeal. It would therefore amount to being blind to realities to act as if the circumstances that prevailed at the time of refusal had not considerably changed, also having in mind that since those refusals were initiated, a large number of section 53 searches have been conducted with no evidence that the contentious bullets were ever found. Having this in mind, I would further comment that one cannot

count limitlessly on the suggestion that those may have been squirrelled away for future potential use.

[103] Finally, the nature of a BTRA is an element that cannot be ignored. Such process is situationally dependent, meaning it needs to be repeated every time a situation that may be "ballistic" in essence develops, thus regarding circumstances present at the time of such exercise. Consequently, where a BTRA or other assessment measure would be called upon as a result of an affirmative decision rendered by the undersigned in this case, this would require proceeding on the basis of the circumstances that prevailed at the time of refusals, thus some three years ago and as a consequence undoubtedly differing from present circumstances. My conclusion is therefore that the live issue that prevailed at the time of the refusals is no longer.

[104] In light of the above conclusion, there remains for the undersigned, in accordance with the *Borowski*, *supra*, decision, to consider whether I should exercise my discretion to decide the merits of the case despite the absence of a live controversy. In deciding this, all three underlying elements of the mootness doctrine, as enunciated previously, have been considered, noting also, as per the dictum of the Court, that a decision on this need not depend on the application of all three. The matter of judicial economy has been of particular concern in this regard as the resources of the Tribunal have become minimal with the recent amendments of the *Code* becoming in effect. I have also been particularly conscious of the need to be sensitive to the effectiveness or efficacy of "judicial" intervention. As a result, I have made the decision not to use my discretion to hear the case on the merits.

[105] In *Kelsch*, *supra*, the undersigned broached the question of potential review of issues of this nature in the future by stating:

> [161] In arriving at this conclusion, one has been conscious of the fact that while it has been argued that a situation 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.

It is my opinion that this reasoning finds application in the present case, particularly given the comments made above as to the possibility open to parties to seek to obtain an accelerated hearing to avoid being repeatedly faced with a claim of mootness related to the passage of time.

[106] I would add that should there be other such situations occurring, whether it be at CBI or another institution, my deciding on the merits in the present case, thus based on

the particular circumstances of the case, would be of negligible interest to other cases of some similarity, as those would also need to be decided on their own facts and circumstances. Given this and taking account of the length of time since the initiation of the refusals as well as the numerous searches of various sort that have been conducted since then, with no firing device or ammunition being found, the undersigned has formed the opinion that a decision on the merits at this time would most likely be of minimal impact on the rights of the appellants.

Decision

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

Jean-Pierre Aubre
Appeals Officer