Canada Appeals Office on **Bureau d'appel canadien en**
Occupational Health and Safety santé et sécurité au travail

165 Hôtel de Ville, Hull, Quebec, K1A 0J2 – Fax : (819) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Paul Chamard
Simon Ruel
applicants

and
Correctional Service Canada
Donnaconna Institution
employer

Decision No. 05-004
January 20, 2005

Appeal heard by Michèle Beauchamp, appeals officer, in Quebec City, Quebec, on February 18, 2004

Appearances

For the employees
Céline Lalande, union advisor, *Confédération des syndicats nationaux*
Pierre Ross, Correctional Officer I, Correctional Service Canada (CSC), Donnaconna Institution
Karl Ruel, Correctional Officer II, CSC, Donnaconna Institution
Paul Chamard, Correctional Officer II, CSC, Donnaconna Institution
Simon Ruel, Correctional Officer I, CSC, Donnaconna Institution

For the employer
Neil McGraw, legal counsel, Department of Justice, Treasury Board
Claude Lemieux, Director and Acting Assistant Commissioner, Operations, CSC
Denis Bélanger, Unit Manager, CSC, Donnaconna Institution

Health and safety officer
Katia Néron, Human Resources Development Canada, Investigations Directorate, Quebec City

[1] This appeal was filed under subsection 129(7) of the *Canada Labour Code* Part II by Yves Therrien, of the Union of Canadian Correctional Officers -CSN (UCCO-SACC-CSN), on behalf of Paul Chamard and Simon Ruel, correctional officers (CO) employed by the Correctional Service of Canada at the Donnaconna Institution, located in Donnaconna, Quebec.

[2] The union was appealing the written decision of no danger issued by health and safety officer Katia Néron on October 1, 2002 after investigating the refusal to work by correctional officers Chamard and Ruel on September 30, 2002.

[3] Health and safety officer Néron conducted an in-depth investigation into the employees' refusal to work, in the presence of both employees and Denis Bélanger, Unit Manager (UM), Yves Therrien, employee co-chair of the local health and safety committee, Francis Brisson, Preventive Security Officer (PSO) and Serge Émard, Supervisor, Correctional Operations and employer member of the local health and safety committee.

[4] On October 10, 2002, health and safety officer Néron also sent a detailed investigation report to the two employees and to Claude Lemieux, Director, Donnaconna Institution. The following are key points from her investigation report and from the testimony provided at the February 18, 2004 hearing.

[5] On September 30, 2002, employees Chamard and Ruel refused to work, both for the same reason, stated as follows in the investigation report by health and safety officer Katia Néron:

Text of Paul Chamard's refusal to work

> Unsafe escorted outing destination (hospital). We are exposed to danger. Inadequate hospital infrastructure. No secure area. Inmate at maximum rating on code "26". On June 5, 2002, this same inmate was escorted by three armed officers. On September 16, 2002, no measures were taken. Escorted by two officers without any training. Unclear memo. Environment and sector (Hôpital l'Enfant-Jésus) at risk (+ see appendix).

Text of Simon Ruel's refusal to work

> (see appendix) + the hospital where we were to escort the inmate is an unknown area and open to the public. Moreover, we have no control over the movement of people. Anyone who might be hostile to what we represent could confront us while we had none of our working tools (weapon).

[6] During her testimony at the hearing, health and safety officer Néron explained that the refusals to work were based on the following five main reasons:

- it is always dangerous to escort an inmate[1] when unarmed, regardless of the rating assigned to the inmate in the escort assessment;
- the hospital where the inmate was to be taken did not have a detention area and could only receive the inmate in a small room with a standard lock;
- the two escort officers had not been properly trained in unarmed escorts;

[1] The inmate's name will not be disclosed in this decision to protect his privacy.

- the parking arrangements at the hospital for the CSC shuttle bus were inadequate; and
- the CSC shuttle bus provided for the escorted outing was identifiable because the CSC logo was still legible.

[7] In terms of the risk presented by the inmate, health and safety officer Néron indicated in her written report that:

- the inmate's appointment at the hospital had not been cancelled despite the employees' refusal to work;
- the inmate had been assessed by Denis Bélanger, manager of the inmate's unit, on the basis of the official procedure in force at the institution; and
- Mr. Bélanger had consulted preventive security officer Brisson on this matter, the correctional officers who worked in the unit where the inmate was housed, and parole officer Perreault, who was assigned to the inmate and who, at the PSO's request, had prepared the profile to assess the level of risk he presented to the escort officers.

[8] Health and safety officer Néron also noted that Mr. Bélanger had taken into account the following points in determining whether the escort officers should be armed:

- the inmate was serving a second 16-year sentence;
- he had tried to escape in 1996;
- he had had a medium security rating since February 2000, but refused to be transferred to a medium security institution;
- he behaved in compliance with the regulations;
- he had participated in internal programs and collaborated with his case management team;
- he was not affiliated with any organized crime gang;
- the hospital where he was supposed to go was located in a high crime area;
- the risk of escape or attempted escape was moderate;
- the risk he presented in the institution was moderate; and
- the risk he presented to the public was high because he had committed several armed robberies and might re-offend when released.

[9] On September 27, the institution's director, Claude Lemieux, signed the assessment prepared by Mr. Bélanger, thereby approving his decision that the escort officers be unarmed.

[10] Mr. Bélanger presented his recommendations to the participants at the September 30 morning briefing, which included management, unit managers, preventive security officers and correctional supervisors, who accepted them. The safety instructions were prepared that morning to reduce the risk of overlooking any last-minute information. They indicated that the escort had to include two unarmed guards and that the inmate had to remain under constant visual supervision and be restrained.

[11] Mr. Bélanger and PSO F. Brisson also conducted a physical assessment of the site on September 27 to review the parking and waiting areas at the hospital. As a result of this assessment, the employer identified two other areas where the escort vehicle could park close to the emergency exit and changed the parking procedures for the shuttle bus.

[12] Health and safety officer Néron went to the hospital and found that:

- the officers could park the shuttle bus next to the door used by ambulances or on the other side, a few steps away from it;
- after identification, the hospital security officer would open the ambulance parking garage barrier, as well as the doors to the emergency garage in case the automatic opener at the garage entrance malfunctioned;
- at the emergency entrance, where the escort officers admitted the inmate, there was a small room, reserved for them, with a window in the door and a telephone for added security;
- Mr. Brisson believed that this area was not appropriate because anybody could enter it, and felt that it would be advisable to set up a holding area to ensure that the escort officers and the inmate did not have to wait in the public area and to better control risks and waiting times; and
- the employer agreed that a holding area should be set up and took steps to have this done.

[13] Health and safety officer Néron also reviewed an investigation report that the institution's health and safety committee had prepared following a refusal to work on the preceding September 16 by two officers who were to provide an unarmed escort to the same inmate to the same hospital. One of the recommendations in the report was to use a third escort officer at the hospital until a cell block was built, which, according to an employer member on the committee who had taken part in the investigation, meant, as everybody knew, that one of the three escorts was armed.

[14] On September 10, 2001, the employer set up and transmitted to all officers responsible for security escorted outings a procedure describing the steps to follow when escorting an inmate to that hospital, including the procedure for arrival at the emergency and for the waiting period in the security area reserved for the CSC, which was to be locked at all times.

[15] In this regard, and in light of the procedure for individual assessments of inmates for escort purposes, health and safety officer Néron believed that the waiting room provided for the officers and the inmate was acceptable.

[16] With respect to the CSC shuttle bus, health and safety officer Néron noted that inside, a locked door separated the inmate from the employees, which prevented all contact, and that a window in the door enabled escort officers to check the restraints worn by the inmate before letting him out of the shuttle bus. In addition, although the CSC logo remained legible on the shuttle bus, the employer had agreed to correct this problem.

[17] In terms of the two employees who refused to work, health and safety officer Néron noted that Paul Chamard had been a level 2 correctional officer for twenty years and Simon Ruel a level 1 correctional officer for four years. Both of them had served as security escorts before but never as part of an unarmed two-officer escort.

[18] Paul Chamard stated that he was somewhat familiar with the assessment procedure used to decide on the type of escort. Thus, he knew that it involved taking into consideration the sentence being served by the inmate, his release date, external contacts, the internal and external danger levels and the risk the inmate presented to employees. However, Simon Ruel indicated that he knew nothing about the inmate assessment process.

[19] The two employees in this case accompanied health and safety officer Néron on her visit to the hospital. They explained that when three officers accompany an inmate, the escort officers must first ensure that the latter is always restrained by checking through the window of the door to the compartment where he is being held, and then two officers take him out of the shuttle bus and accompany him to the emergency ward while the third one parks the vehicle.

[20] The procedure is different when there are only two officers because the shuttle has to be parked closer to the entrance or exit to the garage used by the ambulances. Then, both officers take the inmate out of the shuttle bus after ensuring that both his hands and feet are properly restrained. Once inside the emergency area, one officer enters the waiting room located to the right of the entrance to inspect it, and if everything is in order, he brings in the inmate, who is always accompanied by the other officer. In addition, as soon as they enter the hospital, the escort officers seat the inmate in a wheelchair, and the inmate is wheeled, restrained, to his appointment, where they remain with him.

[21] In addition, before each escorted outing, the escort officers must meet with the correctional supervisor, who informs them of the security procedures and instructions for the inmate. However, in this case, the escort officers refused to work as soon as they heard that they would not be armed, so the correctional officer was unable to explain the instructions to them.

[22] Moreover, for each security escorted outing, the employer provides the correctional officers with protective equipment, including a bullet-proof vest, which is mandatory, an irritant (normally pepper spray), cuffs and chains, which the inmate wears on his hands and feet, and any other protective equipment indicated in the exit permit.

[23] After all the necessary facts and testimonies had been collected and the investigation completed, health and safety officer Néron decided that there was no danger in having the two correctional safety officers Chamard and Ruel escort the inmate unarmed for the following reasons:

- according to the assessment done for the escorted outing, the inmate presented a medium risk of escape and a high risk to public safety;
- this assessment had been conducted by a qualified person, in consultation with all of the stakeholders who knew the inmate well and in full consideration of the changes he had undergone during his incarceration;

- the assessment had been done only a few days before the authorized outing with the escort officers;
- in addition to the daily consultation process under way in the institution, the final decision on security instructions relating to the outing had been taken during the briefing held on the morning of the day of the planned outing, which reduced the chances that any last minute information might be overlooked in the inmate's assessment;
- the employer had developed and applied established procedures to properly protect the correctional officers conducting the escorted outings;
- the institution's different stakeholders followed these procedures;
- the employees had been trained in the security escort procedures used with inmates and, before each outing, the applicable security instructions had been explained by the correctional supervisor to the escort officers;
- the employer had changed the location for parking the shuttle bus used for the escorted outing because it was being done with two unarmed officers, in order to enable the officers to accompany the inmate together;
- according to the employer's assessment of the waiting room provided to CSC, the risk of holding an inmate in this room was acceptable under the circumstances; and
- the reasons provided by the employees were based on a hypothetical risk of occurrence of a dangerous situation.

Union's argument

[24] Ms. Lalande pointed out that the work of a correctional officer was dangerous in itself, largely because of the unpredictability of human behaviour.

[25] The Donnaconna Institution is a maximum security institution, where inmates are more closely supervised, the inmates are more dangerous and the risk of escape is high. Inside the walls, armed CO1s patrol the corridor, and every officer on duty in the control towers has weapons within reach. The purpose of these weapons is to help prevent the loss of life and to protect staff, the public and inmates.

[26] Since the new unarmed escort procedure was introduced, the employer has asked escort officers to leave the institution without the protection they have inside its walls. It has assured them that, if necessary, the police will intervene, but has not specified any timeframes.

[27] Ms. Lalande also believed that the assessment criteria used to decide on the use of weapons during the escorted outing had not been applied. The inmate had already tried to escape, he presented a medium-to-high risk of escape and, as a consequence, required special protection.

[28] Moreover, the area where the hospital was located was a high crime area, and the hospital did not have a holding area where the inmate and correctional officers could be isolated from the public. In addition, the escort officers presented an easy target because they were readily recognizable by their uniforms.

[29] In order to show that correctional officers who are not armed during an escorted outing do not have the protection to which they are entitled, Ms. Lalande referred to various legal decisions issued by appeals officer Serge Cadieux. In *Vancouver Wharves Ltd.*[2], appeals officer Cadieux stated that a person may present a danger to employees. In *Correctional Service of Canada, Warkworth Institution*[3], the appeals officer stated that the risk of violence against correctional officers increased as soon as they stepped outside the institution.

[30] As a consequence, Ms. Lalande indicated that she believed that the risks associated with an escorted outing and the corresponding protective measures had to be assessed based on the escorted outing destination, the route used to get there, and the possibility of identifying the escort vehicle and officers. According to Ms. Lalande, the risk of violence was far from hypothetical, the possibility of injury was real, and the danger remained because of the unpredictability of the inmate's behaviour.

[31] Moreover, when on May 26, 2004, Justice Gauthier of the Federal Court issued her decision (not translated) on *Juan Verville*[4], following a judicial review of a decision by appeals officer Serge Cadieux, and addressed the notion of potential danger in a CSC facility, Ms. Lalande sent the appeals officer and the CSC lawyer, Mr. McGraw, her position on this decision and its impact on this appeal.

[32] After briefly explaining the facts surrounding *Verville*, Ms. Lalande stated that, according to Justice Gauthier, the new notion of "danger" did not require precise knowledge of when the situation would lead to injury, only that there was a reasonable, and not necessarily inevitable, probability of it, and that the definition did not exclude the unpredictability of human behaviour. Ms. Lalande wrote the following:

> Justice Gautier believes that, in order to satisfy the new definition of "danger" under the Code, it is not necessary to establish precisely when the situation, task or risk will lead to injury. All that is needed is that a person be able to show the circumstances in which we can expect a reasonable probability that the injury will occur. Moreover, according to this ruling, the definition of danger does not exclude the unpredictability of human behaviour. Hence, it is not necessary to demonstrate that injury is inevitable. The justice stated the following in paragraphs 41 and 43 of her decision:
>
> "With respect to i) in paragraph 40 above, the customary meaning of "potential" or "eventual" hazard or condition **does not exclude a hazard** or **condition, which may or may not happen based on unpredictable human behaviour. If a hazard or condition is capable of coming into being or action, it should be covered by the definition. As I**

---

[2] *Vancouver Wharves Ltd.* v. *Syndicat international des débardeurs et magasiniers*, appeals officer Serge Cadieux, decision 97-014, April 25, 1997

[3] *Correctional Service of Canada, Warkworth Institution,* v. *Public Service Alliance of Canada*, appeals officer Serge Cadieux, decision 97-006, June 2, 1997

[4] *Juan Verville and Correctional Service Canada, Kent Institution,* 2004 FC 767, May 26, 2004

said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear in that case, that spontaneous assaults are indeed capable of coming into being or action." [underlining ours] par 43:

"Thus, if those assaults could reasonably be expected to cause injury, they will come within the definition of danger. However, if that danger constitutes a normal condition of his employment, the employee will not have the right to rely on it to refuse to work (s.128(2)(b)). But, that is very different than saying that unpredictability of inmates' behaviour is alien to the concept of danger in the Code."

With respect to the exception to the right to refuse to work because the danger is a normal condition of the employee's employment, as provided under paragraph l28(2)(b), the justice stated as follows in paragraph 55 of her decision:

"The customary meaning of the words in paragraph l28(2)b) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?"

In our case, it is a matter of assessing whether the correctional officers of a maximum security institution were justified in refusing to work under subsection 128(1) of the Code at the point when the employer asked them to conduct a medical escort of an inmate without weapons.

[33] Ms. Lalande then reiterated the conditions under which correctional officers Chamard and Ruel were to escort the inmate, as follows:

- hospital located in a high crime neighbourhood;
- inmate entering the hospital through the ambulance entrance;
- no holding area in the hospital;
- proximity of public at point of admission and when moving about the hospital;
- risk of meeting incompatible provincial inmates;
- presence of several uncontrolled public entrances;
- inmate having shown behavioural problems within the past year; and
- inmate having a history of escape and continued risk of escape.

[34] Ms. Lalande argued that she could not demonstrate that injuries would inevitably result under these conditions since the danger was mainly due to the unpredictability of human behaviour, including that of the inmate and that of other people who could come across the inmate and the officers during the escorted outing. However, she indicated that the

situation had to be analyzed based on Justice Gauthier's interpretation of the definition of danger, which, according to her, included injuries that could happen precisely because of the unpredictability of human behaviour.

[35] According to Ms. Lalande, there were many opportunities for attacks against the correctional officers or the public, for instance in the event of an escape attempt or encounters between incompatible inmates. The 1997 murders of two provincial correctional officers and a recent attack against a security guard by an inmate were provided as examples of this. Even the director of Donnaconna had recognized this possibility by indicating that the correctional officers could call the police if the situation deteriorated during an escorted outing. However, if that were to happen, the officers would be injured before the police would get a chance to intervene.

[36] Ms. Lalande argued that the danger faced by correctional officers during an unarmed escorted outing did not constitute a normal condition of employment. The officers had to watch the inmate, prevent any escape attempts and protect the public, staff and the inmate. Even if, in their work, they are expected to react to unpredictable violent situations, she does not believe that it is "normal" for them to bring inmates who are being held in a maximum security penitentiary into an unsecured environment without the working instruments needed to do their work and avoid injuries, or without even being able to carry a weapon to protect themselves from a violent outburst, as do provincial correctional officers and police officers.

[37] Therefore, Ms. Lalande is fully in agreement with Justice Gauthier's opinion in *Juan Verville, supra*. According to her, it is logical that paragraph 128(2)(*b*) not apply when the risk does not represent an essential feature of the work but is a function of the work procedure. However, in this case, the risk exceeded the normal conditions of employment because, during a medical escort, CSC was leaving correctional officers to face potential dangers that might cause them injury without providing them with a handgun.

Employer's argument

[38] Mr. McGraw essentially pointed out that the hearing on the appeal was designed to determine whether the health and safety officer's decision of no danger was correct, not to decide whether measures could be taken to improve health and safety at CSC.

[39] Mr. McGraw referred to several legal decisions to defend CSC's position, which I have summarized below. Thus, in *Schellenberg*[5], appeals officer Douglas Malanka confirmed that the risk must not be hypothetical, whereas in this case it is.

[5] *Canada (Correctional Service) and Schellenberg*, appeals officer Douglas Malanka, Decision 02-005, May 9, 2002

[40] In *Hoovey*[6] the point is made that only case-by-case analyses can be used to decide on the type of escort. However, in this case, Mr. Bélanger was not questioned on the procedure he followed for his assessment, nor was any effort made to determine whether it was correct.

[41] In *Fletcher* [7], contrary to what the union suggested, the Federal Court clearly established that the purpose of the appeal was not to revisit the employer's policy that unarmed escorted outings should be individually reviewed. The choice of the type of escort must be based on the facts.

[42] Finally, *Byfield* [8], decided by appeals officer Douglas Malanka, showed that the existence of danger can be based on a hypothetical risk.

[43] Mr. McGraw also replied to the arguments advanced by Ms. Lalande following Justice Gauthier's decision in *Juan Verville, supra.* The key arguments are summarized below.

[44] According to Mr. McGraw, the decision rendered in *Verville, supra*, did not change the interpretation of the law in this area, nor was it intended to do so. As a consequence, the employer used the arguments presented in the original hearing in this case.

[45] In her letter, Ms. Lalande claimed that Justice Gauthier had overturned the decision of appeals officer Cadieux because she found that the latter had incorrectly applied the definition of danger. According to Mr. McGraw, this position is clearly incomplete and inconsistent with the ruling of Justice Gauthier.

[46] Clearly, she said, Justice Gauthier referred the case to another appeals officer because she had found that officer Cadieux omitted to consider some of the evidence, contrary to what is required under the *Federal Court Act*. In paragraph 57 of *Verville, supra,* Justice Gauthier wrote:

> In my opinion, the decision under review is unreasonable, in particular in that **the appeal officer failed to consider evidence** on a core issue on which his final conclusion rests. **Therefore, I find that the decision must be set aside** and that the appeal should be redetermined by a different appeal officer. [our underline]

---

[6] *Hoovey* v. *Treasury Board (Solicitor General Canada – Correctional Service)*, Canadian Public Service Staff Relations Board, File No. 43 2002 PSSRB 56, June 5, 2002

[7] *Canada (Solicitor General)* v. *Fletcher*, Federal Court of Canada - Court of Appeal, ACF No. 1541, November 5, 2002

[8] *Byfield and Canada (Correctional Service)*, appeals officer Douglas Malanka, Decision No. 03-007, March 10, 2003

[47] According to Mr. McGraw, *Verville, supra,* confirms the Federal Court's previous position in *Douglas Martin*[9] and, essentially, the decision rendered by appeals officer Cadieux in *Welbourne*[10]. While renewing the former definition by adding the concept of potential danger, the new definition of danger retains two essential features: the likelihood of danger must be (a) "reasonably expected" and (b) "before the risk is removed, the situation corrected or the task changed". Justice Gauthier's decision confirms the case law that excludes hypothetical or speculative situations from the definition of danger.

[48] Moreover, the new definition added two notions, the first one related to the potential danger, whereby it is not necessary that the danger manifest itself immediately, and the second whereby the danger only exists if there is a reasonable expectation that it will occur before measures are taken to protect employees against this risk.

[49] Justice Gauthier rendered her decision in *Verville, supra*, which involved 15 correctional officers at the Kent Institution. The employees had refused to work because the employer had not allowed them to carry handcuffs to be used at their discretion. The issue was the subject of an investigation by a health and safety officer, who determined that there was no danger, but decided that the employer had contravened section 124 of the Code, and issued a direction under subsection 145(1). The employer appealed the direction, and the employees appealed the conclusion of no danger.

[50] Appeals officer Cadieux determined that the safety officer was right in his finding of no danger. Moreover, the appeals officer withdrew the direction because the employer was not contravening section 124 of the Code. The matter was referred to the Federal Court for judicial review, and was heard by Justice Gauthier, who rendered her decision on *Verville, supra*, on May 26, 2004.

[51] According to Mr. McGraw, Justice Gauthier, in paragraph 34 of her decision, confirmed the legal criterion established in *Douglas Martin, supra,* in light of the oversight referred to by Justice Tremblay-Lamer. Mr. McGraw believes that *Verville, supra,* is clearly an application of *Douglas Martin, supra,* and that there is no contradiction. Thus, in paragraph 36, the Court noted:

> " … the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances **will occur in the future, not as a mere possibility but as a reasonable one**." Based on the notion of reasonable expectation, the Court also indicated in paragraph 43: "Thus, if those assaults could **reasonably be expected** to cause injury, they will come within the definition of danger."

---

[9] *Martin* v. *Solicitor General of Canada*, 2003 FC 1158, Justice Tremblay-Lamer, October 6, 2003
[10] *Welbourne and Canadian Pacific Ltd.*, Appeals Officer Serge Cadieux, Decision No. 01-008, March 22, 2001

[52] Mr. McGraw submitted that in *Verville, supra,* the Court's decision was consistent with Justice Tremblay-Lamer's intent in *Douglas Martin, supra.* As a result, he indicated, in order to conclude that there is a danger in terms of a potential risk, situation or future activity, the health and safety officer must conclude, based on the facts gathered in his investigation, that:

- the potential risk, situation or future activity in question will probably occur;
- an employee will probably be exposed to the risk, situation or activity when it occurs;
- exposure to the risk, situation or task will probably lead to an injury or illness for the employee who is exposed to it; and
- the injury or illness will probably occur before the risk is removed, the situation corrected or the task changed.

[53] In terms of the danger being a normal condition of employment pursuant to paragraph 128(2)(*b*) of the Code, it is important to point out that, according him, the Court did not reach a conclusion on the issue of whether the facts supported that conclusion. Justice Gauthier criticized the appeals officer because he did not take into account the evidence and indicated that::

> Obviously, these reasons should not be construed as giving any indication or opinion as to whether or not in this particular case, the circumstances fall within paragraph 128(2)(b).

[54] Justice Gauthier's comments in paragraphs 54 and 55 of *Verville, supra,* do not change the interpretation of the law in this area, nor were they meant to, indicated Mr. McGraw. Thus, he indicated that, without any concrete evidence that the escorted outing would probably lead to violence on the part of the inmate or a member of the public, it was not possible to conclude that the unarmed escorted outing constituted a danger under the Code.

****

Decision

[55] The issue to be addressed in this case is whether the two correctional officers, Chamard and Ruel, faced a dangerous situation, as understood under the *Canada Labour Code* Part II when they refused to escort the inmate.

[56] Subsection 122(1) of the Code defines danger as follows:

> 122(1) "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be connected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[57] Subsection 128(1) authorizes employees to refuse to work under the following conditions:

> 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.

[58] Subsection 128(2) does not allow employees to refuse to work in the following situations:

> 128(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if:
>
> (*a*) the refusal puts the life, health or safety of another person directly in danger; or
>
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.

[59] In *Verville, supra*, Justice Gauthier analyzed three issues that are fundamental to understanding, on the one hand, the control standard applicable to a decision by an appeals officer and, on the other, the notion of danger under the *Canada Labour Code* Part II.

[60] I summarized these three issues in the following table, as Justice Gauthier addressed them in *Verville, supra*, indicating my reading and interpretation of Justice Gauthier's analysis.

[61] These three issues are the following:

- the control standard applicable to the decision by appeals officer Cadieux,
- the danger, as defined in section 122 and as it applies in connection with the refusal to work under subsection 128(1), and
- the fact that it is forbidden to refuse to work if the danger constitutes an "inherent risk" under subsection 128(2).

Citation		My Interpretation
Judicial Review Standard		
[24] In her recent decision in *Martin v. Canada (Attorney General)*, 2003 FC 1158, [2003] F.C.J. No. 1463 (T.D.) (QL), Tremblay-Lamer J., using the pragmatic and functional approach recommended by the Supreme Court of Canada, determined that the question of whether or not there was danger as defined in the Code in a particular	According to Tremblay-Lamer J. in *Martin v. Canada*, the issue of absence or presence of danger under the Code is normally evaluated according to the **standard of a "patently unreasonable" decision**	because it is a mixed question of fact and law, that is very much fact-based

situation was a mixed question of fact and law, which would normally be subject to the patent unreasonableness standard because it is very much fact-intensive.		
[25] However, because the definition of danger has recently been amended and had never been judicially considered, she held that, exceptionally, the mixed question of fact and law before her was more law-intensive and should be reviewed on the reasonableness simpliciter standard.	**Exceptionally,** Tremblay-Lamer J. applied the **standard of "reasonableness *simpliciter*"**	because the decision was more law-intensive since the notion of danger was new and the Court was considering it for the first time
[26] I agree with this analysis of my learned colleague. I also believe that, in the present case, the mixed question of fact and law under review involves a critical legal component. The appeal officer in this case was the same as in Martin, *supra*. He based the decision before me on the legal interpretation he developed in his decision in *Parks Canada Agency v. Doug Martin and the Public Service Alliance of Canada* (Canada Appeals Office, Decision No. 02-009, May 23, 2002), which was before Tremblay-Lamer J. in *Martin, supra* and which he had issued just one month before. I will thus review his determination of whether or not there was a danger in this particular case on the standard of reasonableness simpliciter.	In this case, Justice Gauthier applied the **standard of "reasonableness *simpliciter*"** to the appeals officer's decision because the mixed question of fact and law involves a critical legal component	appeals officer Cadieux • had based his decision on the interpretation he had used in *Parks Canada* v. *Martin* and • had rendered this decision one month before Tremblay-Lamer J's decision was brought down
[27] As to the alleged error with respect to the standard of proof applied by the appeal officer, this is a question of law for which appeal officers do not have any special expertise and which does not call for any special deference. But I do not have to determine whether I should apply the standard of reasonableness or correctness because I conclude that the decision is correct in that respect. With respect to pure findings of facts, the standard of review will be patent unreasonableness.	Justice Gauthier applied the "**patently unreasonable" standard** strictly with respect to the facts	the Court does not have to defer to appeals officers on matters of law because they do not have any special expertise in that area

Danger and refusal to work under 128(1)

[32] With the addition of words such as "potential" or "éventuel" and future activity, the Code is no longer limited to specific factual situations existing at the time the employee refuses to work.	The Code is no longer limited to situations (facts) existing at the time the employee refuses to work	with the addition of the terms “potential” and “éventuel”
[34] The above statement is not entirely accurate. As mentioned in ***Martin**, supra*, the injury or illness may not happen **immediately** upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.	The injury or illness must occur before the condition or activity is altered	the injury or illness might not occur immediately upon the employee’s exposure to the condition or activity
[35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.	The condition or activity must be capable of (in French “susceptibles de”) causing injury each time they occur	it is not necessary to reasonably expect the condition or activity to cause injury every time they occur
[36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in ***Martin*** above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.	It is not necessary to establish the time when the condition or activity or potential hazard will occur	it is enough to ascertain in what circumstances the condition, activity or hazard could be expected to cause injury and that such circumstances will occur in the future – not as a mere possibility but a reasonable one

[41] With respect to i) in paragraph 40 above, the customary meaning of "potential"[4] or "éventuel"[5] hazard or condition does not exclude a hazard or condition, which may or may not happen based on unpredictable human behaviour. If a hazard or condition is capable of coming into being or action, it should be covered by the definition. As I said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear that in this case, spontaneous assaults are indeed capable of coming into being or action.

In its customary meaning, the "potential" hazard or condition does not exclude a hazard or condition that may or may not happen based on unpredictable human behaviour

If a hazard or condition is capable of occurring – and we do not need to be able to ascertain exactly when –, it should be covered by the definition of danger under the Code

[43] Thus, if those assaults could reasonably be expected to cause injury, they will come within the definition of danger. However, if that danger constitutes a normal condition of his employment, the employee will not have the right to rely on it to refuse to work (s. 128(2)(*b*)). But, that is very different than saying that unpredictability of inmates' behaviour is alien to the concept of danger in the Code.

If those assaults could reasonably be expected to cause injury, they will come within the definition of danger under the Code

if the danger constitutes a normal condition of his employment, an employee will not have the right to refuse to work under 128(2)(*b*), which does not exclude the danger caused by the unpredictability of inmates' behaviour

Inherent risk [128(2)]

[51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.

There is more than one way to establish that one can reasonably expect a situation to cause injury

through expert opinions or ordinary witnesses who are in a better position than the trier of fact, or even through logical or reasonable deduction based on the facts

[52] Turning now to the conclusion in ii) at paragraph 40 above that the risk was inherent to the applicant's employment, the applicant concedes that his job description involves a risk of possible hostage taking, injury or danger when dealing with violent and hostile offenders. But he argues that the order given to him on September 24, was a variation of his normal conditions of employment and constitutes an increase

The current interpretation of this expression under 128(2)(*b*) is based on the opinions expressed in different decisions, i.e.

Public Service Staff Relations Board in *Fletcher v. Treasury Board (Solicitor General Canada – Correctional Service of Canada)*, [2000] PSSRB No. 58; *Danberg*

The work description includes the risk of being taken hostage, but the situation went beyond what is "normal" and standard risk

of the risk or danger described above. The applicant relies on the Public Service Staff Relations Board's decision in Fletcher *v. Treasury Board (Solicitor General Canada - Correctional Service)*, [2000] C.P.S.S.R.B. No. 58; *Danberg and Treasury Board (Solicitor General Canada),* [1988] C.P.S.S.R.B. No. 327 and *Elnicki v. Loomis Armored Car Service Ltd,* 96 di 149, CLRB Decision No. 1105, in which the Board acknowledged, in the context of refusals to work by correctional officers and security guards, that even though risk of injury or death was a normal condition ofemployment for these employees, an increased danger resulting for example from a change in the employer's policy (such as minimum staffing), was not automatically excluded under paragraph 128(2)(*b*)[7].

and Treasury Board (Solicitor General), [1988] PSSRB No. 327; *Elnicki v. Loomis Armored Car Service Ltd.,* 96 di 149, CLRB, Decision No. 1105

in *Elnicki*, the Board recognized that if the employer's policy resulted in increased danger, it would no longer be the inherent danger addressed in 128(2)(*b*)

[53] There is no indication in the decision under review that the appeal officer considered this argument. His finding appears to be based on the simple fact that a risk of assault is always present in an environment such as the Kent penitentiary. As mentioned, he could not evaluate if the increased risk of injury was a normal condition of employment because he did not consider it to be more than an unproven hypothesis.

The appeals officer's decision appears to be based on the simple fact that a risk of assault is always present in a penitentiary environment

he could not assess whether the increased risk of injury was a normal condition of employment because he considered it as being purely hypothetical

[54] There appears to be little jurisprudence from this Court on this issue. In *Canada (Attorney General) v. Lavoie*, [1998] F.C.J. No. 1285 (T.D.) (QL), cited by the appeal officer, the argument with respect to an increased risk over and above the normal conditions of employment was not raised, nor did the Court consider the decisions of the Board referred to by the applicant, two of which were issued after the decision in *Lavoie, supra* (see paragraph 52 above).

There is little jurisprudence on the issue of danger as a normal condition of employment

[55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out

According to the customary meaning of the terms in 128(2)(*b*), "normal" refers to something regular, that is not out of the ordinary

would one say that it is a normal condition of employment for a security guard to transport money from a bank if changes

of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?	It would, therefore, be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform the job or activity	were made so that this had to be done without a firearm, without a partner and without an armoured vehicle?

[62] With respect to the standard of control applicable to an appeals officer's decision, it is important to stress that Justice Gauthier's decision clearly shows the high standard the appeals officer must adhere to when dealing with an appeal and conducting an investigation. On the one hand, the Court routinely applies the standard of "patent unreasonableness" because the question of the presence or absence of danger is a mixed question of fact and law that is essentially based on the facts. On the other hand, in this case, it applies the "reasonableness *simpliciter*" standard to the questions of law because the notion of danger was new and being submitted for the first time.

[63] This decision also brings out two points that, in my opinion, are particularly relevant to this case. On the one hand, it is not necessary to know precisely when a situation will occur, but rather when one can reasonably expect it to do so. On the other hand, the customary meaning of the term "potential hazard" does not exclude the unpredictability of human behaviour.

[64] In this case, before rendering her decision, health and safety officer Néron conducted an in-depth investigation during which she

- reviewed the procedure used in the assessment of the inmate, the escort destination and the type of escort,
- questioned all of the stakeholders involved in the matter, including employees, the correctional supervisor, preventive security officers, hospital security staff, etc.,
- visited the escort destinations,
- reviewed the investigation report prepared by local health and safety committee on the September 16 refusal, and
- analyzed the procedure established for the escorted outing.

[65] After finding that the inmate presented a medium risk of escape, that the employees had been trained and knew the procedure to follow for the escorted outing, that the employer was applying the exact written procedures for assessing the risks related to the escorted outing, the health and safety officer concluded that the reasons given by the employees were based on a hypothetical risk of danger.

[66] In *Verville, supra,* Justice Gauthier clearly established that the decision regarding the existence or absence thereof of hazard essentially and strictly depended on the facts surrounding the situation.

[67] In this case, the union essentially alleged that

- the hazards and protection measures had to be assessed based on the inmate, the escort procedure and the escort destination,
- the risk of violence was far from hypothetical,
- there was a possibility of risk of injury, and
- the danger was always present because of the unpredictability of the inmate's behaviour.

[68] However, it has not been demonstrated to my satisfaction that the facts were sufficiently compelling to establish that, at the time of the unarmed escorted outing, there was a real or potential danger and that the risk represented by the unarmed escorted outing surpassed the level of a normal condition of employment.

[69] In light of the procedure used to assess the risk of the unarmed escort used by the employer and the facts reviewed by health and safety officer Néron in her investigation, I agree that the danger presented by the unarmed escort was a hypothetical one.

[70] As a consequence, I uphold the decision of no danger rendered by health and safety officer Néron.

_____

Michèle Beauchamp
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-004

Applicants: Paul Chamard
Simon Ruel

Employer: Correctional Service of Canada
Donnaconna Institution

Key words: Refusal to work, unarmed escort, normal condition of employment

Provisions: *Code* 122(1), 128(1), 128(2), 129(7)
Regulations

Summary:

Two correctional officers of the Donnaconna Institution in Quebec refused to work pursuant to subsection 129(7) of the *Canada Labour Code* because they believed that if they escorted, without being authorized to wear a firearm, an inmate to a hospital that did not have a holding block, this would constitute a dangerous situation. After her investigation, the health and safety officer found that there was no danger.

The appeals officer confirmed the health and safety officer's decision of no danger because the union did not demonstrate that the facts were sufficiently compelling to establish that, at the time of the unarmed escort outing, there was a real or potential danger, and that the level of risk presented by the unarmed escort outing exceeded that of a normal condition of employment.