Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en 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

Brent Johnstone, Allen Allain and Tim Martin, represented by John Mancini, Counsel, CSN
applicants

and

Correctional Service Canada, Atlantic Institution, represented by Karl Chemsi, Counsel, Department of Justice Canada
respondent

Decision No. 05-020
May 3rd, 2005

Appearances:

Applicant:
Brent Johnstone, Allen Allain and Jim Martin, employees, Correctional Service Canada, Atlantic Institution
John Mancini, Counsel and Union representative, UCCO-SACC-CSN

Respondent:
Greg Brown, Deputy Warden, Atlantic institution
Karl Chemsi, Counsel, Department of Justice Canada

Health and safety officer:
Denis Mador, Human Resources and Skills Development Canada (HRSDC), Moncton, New Brunswick

Preliminary request:

On the request of Mr. Chemsi and with the agreement of Mr. Mancini, all witnesses testifying at the hearing were excluded from the hearing and asked to remain available in a separate room.

[1] This case concerns three appeals that were brought under subsection 129(7) of the *Canada Labour Code*, Part II (hereafter the *Code*). The appeals were considered timely. A hearing was held on March 22 and 23, 2005 in Miramichi, N.B. The appeals follow the decision of absence of danger rendered on April 11, 2003 by health and safety officer Denis Mador.

[2] The health and safety officer decision of "no danger" was given following his investigation into the three consecutive refusals to work exercised around 07:50 hrs on April 10, 2003 by correctional officers Tim Martin, Allen Allain and Brent Johnstone of the Atlantic Institution in Renous, N.B. The Atlantic Institution is a maximum-security penitentiary.

[3] The correctional officers refused to carry out an escort of a maximum- security and violent inmate because the escort security level had been lowered the day before their refusals to work from an armed escort to an un-armed escort. The correctional officers believed the inmate was in possession of a handcuff key (and possibly a "shank[1]") that would jeopardize their health and safety unless the escort was armed. The health and safety officer carried out a single investigation in the instant case.

Health and Safety Officer Investigation and Report

[4] The health and safety officer began his investigation by obtaining statements of refusal to work from each correctional officer. The statements read as follow:

> Tim Martin: The writer had first hand knowledge that the I/M[2] was in possession of a handcuff key and weapon and had removed restraints on escort not long before. The writer felt the I/M posed a serious threat to myself because of his mental outlook and his past record and my knowledge of this I/M. It would be unsafe for me to take this escort without a weapon.
>
> Allen Allain: At approximately 800 hrs on 03/04/10 I was ordered to escort inmate B…. on a medical temporary absence to Miramichi hospital. This inmate had been an armed escort previous to this one and since the escort would not be armed I felt that my personal safety would be at risk.
>
> Brent Johnstone: On April 10.03 @ 0830, Deputy Warden Greg Brown came into my office and ordered me to escort I/M B--- --- to Miramichi Hospital unarmed. I was not informed that 2 officers had already refused and invoked section 128. Based on the information on file I felt my personal safety was at risk.

[5] Mr. Johnstone represented the two refusing employees and himself during the investigation. He supplied the health and safety officer with a number of documents (Docs. #1 to #20) that were considered by Mr. Mador. The health and safety officer obtained other documents (Docs. #21 to #28) that were determinative in rendering his decision.

> **Note from appeals officer**: See **APPENDIX A** for the list of documents supplied to the health and safety officer with a short description included by myself for clarity purposes.

---

[1] Any instrument that could be used as a weapon such as a homemade knife made out of wood, metal or paper. Shanks can kill.

[2] I/M stands for inmate.

[6] Mr. Mador submitted a thorough Investigation and Decision Report that narrates, among other topics, the following:

i) Employee's description of the events

ii) Employer's description of the events; and

iii) Facts established by the health and safety officer.

[7] Under the heading "Employee's description of the events", the health and safety officer reported the following:

> "On the afternoon of 08 April 2003 an escort request for the morning of the 10th was received via E mail by Officer Johnstone for inmate B[3]… and another inmate to be escorted to Miramichi Hospital for a medical appointment. Officer Alain (*sic*) and Martin were scheduled along with officer in Charge Barry Matchett to perform this duty. On the morning of the 10th Doc # 15 was received. This document indicated that this was to be an un-armed escort as indicated by a circled **"No"** on the form and initialed by Dan Newton, acting coordinator of Correctional Operations. This was contrary to a memo from Deputy Warden, Greg Brown dated 14 February, 2003 that indicated that the inmate to be escorted was to be considered an armed escort until he is reviewed by the Unit Review Board. In the meantime Officer Barry Machett (*sic*) was re-scheduled to other duties and officer Brent Johnstone was to be the Officer in Charge. Upon receiving this document (Doc #5) the officers confronted management and refused to perform the duty. Deputy Warden Greg Brown then ordered Officer Johnstone to take the escort. He failed to advise Officer Johnstone of the refusal of the other officers as he was under the impression that Officer Johnstone already knew of the refusal by the other two officers. Officer Johnstone, aware of the inmate profile, refused to take the escort unarmed as well. In addition it was thought that inmate B… was in possession of a handcuff key which would make an escape attempt easier."

[8] Under the heading "Employer's description of the events", the health and safety officer reported the following:

> "Deputy Warden Greg Brown stated that the Institutional Preventive Security Officer[4] Kevin Hare and Warden Simone Poirier had a meeting in the afternoon of 09 April, 2003 and decided at that meeting that inmate B… was not a threat to the public and as such the escort would go un-armed. In order for an escort to be armed it must be demonstrated that the inmate to be escorted must be a danger to himself, a danger to the public and a risk of escape. In any event the Warden is the only person who has the ultimate deciding power on whether an escort is to be

[3] In order to protect the name of the inmate, he will be referred to as "inmate B…".or simply the inmate.
[4] Institutional Preventive Security Officer, also referred to as **IPSO**

armed or not. When shown Doc #2 he emphatically stated that he had no knowledge of this memo being sent to anyone and that in any event it wasn't signed. When later confronted by this safety officer with Doc #28, he stated that he may have sent it but could not remember.

(safety officer note: during the first interview with Mr. Brown, Kevin Hare interrupted and said to Mr. Brown that Inmate B… had given the handcuff key to a correctional officer and produced the key.)

[9] Under the same heading, the health and safety officer added the following information:

Kevin Hare confirmed that there had been an altercation between Inmate B… and correctional officers approx (*sic*) one month before with Inmate B… taking a pair of handcuffs away from a correctional officer and running away with them into the recreation yard. A short time later Inmate B… had thrown the handcuffs back to a correctional officer but the key had never been found.

Bob Taylor [Acting Unit 1 Manager] stated that the review committee had met the afternoon before the refusals but that inmate B… had not been discussed. (Doc #21)

[10] The health and safety officer considered the facts gathered during his investigation to render a decision of absence of danger. Those facts are as follow:

- The three statements of refusal to work by the three correctional officers were congruent in nature.
- Documents #1 to 20 clearly indicated that inmate B… required an armed escort.
- Previous escorts for this inmate had been armed (Docs #3, 11 and 16)
- The correctional officers were unaware that Inmate B…'s security status had been lowered the previous afternoon.
- The acting Unit 1 Manager (Bob Taylor) confirmed that the inmate's status had not been discussed at a Unit Board meeting held on April 9, 2003
- The inmate was actually in possession of a handcuff key as produced by Kevin Hare.
- The inmate's name never appeared on any Institutional Preventive Security Officer 's High Security Needs on Escort Lists.
- Document (Doc #15) provided to escort team was not signed by the Warden.
- The Warden has responsibility for determining the security equipment (including firearms) needed.

- Two documents (Docs #26 and 27) supplied by the Warden indicate the change in security status for the inmate.

[11] On the basis of those facts, the health and safety officer decided that danger as defined in the *Code* did not exist for the refusing employees. His reasons are expressed as follow:

> As a result of the mis-communication and based on documents #12[5], 26 and 27, a decision of no danger was rendered.

Testimony of the Health and Safety Officer

[12] The health and safety officer testified that although correctional officer Martin alleged having knowledge that inmate B… was in possession of a handcuff key, there was no physical evidence of this. He considered this hear say evidence since none of the witnesses could indicate the location of the key although it turned out that the key in question was found the next day after his decision was rendered.

[13] The fact that there were reports indicating that the inmate was in possession of a handcuff key was not a major concern to the health and safety officer. The three criteria to be met for armed escorts are that the inmate must be

- a danger to himself;
- a danger to the public; and
- a risk of escape.

Since the inmate's status had been lowered the afternoon before the refusals to work, the inmate was not considered a risk to the public any longer. Also, the fact that the inmate had attempted recently to escape by removing his restraint equipment was not an important consideration for the health and safety officer since the inmate was no longer an escape risk as indicated by the change of status of the inmate.

[14] The health and safety officer admitted that he was not cognizant of the mental outlook of the inmate, a characteristic referred to by Mr. Martin in his statement of refusal to work. He was however aware that the inmate had taunted correctional officers in the past indicating that the firearm carried by the officers would not be useful to stop him (see Doc #5, Case Documentary).

---

[5] Doc #12 Commissioner's Directive 566-6. dated 2001-10-17 Para 12 reads as follows:

> The Institutional Head shall determine the level of supervision and the security equipment (including firearms) which can be used during the escort, based on an objective assessment of risk, including:
> a) the inmate's security classification;
> b) the inmate's physical and mental health;
> c) the inmate's demonstrated behaviour and characteristics;
> d) the purpose and destination of the escort, mode of travel and time in transit; and
> e) intelligence information.

[15] The health and safety officer acknowledged the past record of this inmate i.e. that he is a violent offender within the Institution, that he attempts to escape and that he is violent to personnel and to staff. When asked whether these were elements of danger, the health and safety officer answered that correctional officers' job requires that they work with dangerous people.

[16] The health and safety officer added that the amount of force necessary to deal with these people (the inmates) is determined by Correctional Service Canada. If the Warden decides that physical force is enough, he cannot argue with that determination. The health and safety officer felt that he was not qualified to decide the level of force to be used as long as the three criteria for armed escorts had been considered. In his opinion this was the prevailing situation in the instant case.

[17] When asked why the security level of the inmate had been lowered, the health and safety officer acknowledged that in final analysis, he did not know why. He said that he did believe that *"inmate B… was not a threat to the public"* as stated in the first line of the "Employer's description of the events". However, the health and safety officer testified that he did not believe the Deputy Warden Mr. Greg Brown who "*When shown Doc #2 he emphatically stated that he had no knowledge of this memo being sent…"* since he had a copy of that document.

[18] Furthermore, the health and safety officer stated that he could not ascertain that there was a Unit Board review of inmate B…'s. security level. In his opinion, this would be the normal process but acknowledged that in cases of emergencies, there would not be a Unit Board review.

[19] The Warden, Mrs. Poirier, informed the health and safety officer that a meeting was held the day before the refusals to discuss inmate B's… security level. She also supplied the health and safety officer with Documents #27 and 28 in this regards.

[20] The health and safety officer explained that his decision of "no danger" was rendered in part because of the mis-communication arising from the letter from the Warden indicating a change in status of inmate B…and because the amount of danger did not warrant a firearm i.e. that the correctional officers did not need a firearm to be safe. He added that, in rendering his decision, he considered the three elements to be met for armed escorts i.e. that the inmate must be a danger to himself; a danger to the public and a risk of escape. If one of these elements is missing, it was his understanding that the escort would not be armed. The health and safety officer agreed that the decision to arm or not arm an escort has little to do with the personnel's safety.

[21] The health and safety officer stated that the level of security of the inmate was not part of his mandate. He stated that it is not his job to question the decision made by experts with respect to questions of security. He did however acknowledge that inmate B… had a propensity towards violence particularly when reviewing his profile (Doc #17).

[22] He noted that beside the firearms there are many other procedures and protective equipment that the officers can use to avoid safety problems. However, he determined that on three previous occasions, the escorts were armed. He was not aware whether other escorts of inmate B… were armed or un-armed.

[23] The health and safety officer stated that he took into consideration the fact that inmate B… was not on the high security profile lists (Docs# 22, 23, 24 and 25). Those inmates are the ones that require armed escorts. It was therefore the health and safety officer's understanding that armed escorts are not the normal procedure for inmates that are not on the list.

[24] In regards to the handcuff key, the health and safety officer testified that at the time of his investigation, he was not certain whether or not there was a handcuff key at the time of the escort. There may have been one, but he testified that he did not know this for a fact. It is only the following morning that the key turned up when Kevin Hare walked in during an interview that the health and safety officer was having with Greg Brown on the morning of April 10, 2003 and produced the key. In final analysis, the health and safety officer recognized that the key was found but admitted that he did not know where it was found.

[25] The health and safety officer stated that his role in this case was to determine whether the proper procedures were followed. He looked at who had authority to make decisions regarding the security level of the escorts and determined this was the Warden's responsibility. He reiterated that it was not his mandate to question the procedure with respect to security since he had no control over this aspect.

Testimony of Witnesses for the Employees

[26] Mr. Brent Johnstone testified that he has been with CSC since December 2, 1987 and has eighteen years of experience. At the time of the refusals to work he was the Escort Coordinator. As such, he is given information by management and other departments and the health care unit. He sets up escorts and provides staff to do the escorts. He coordinates the escorts and makes sure there are not too many of them at one time.

[27] Mr. Johnstone explained that on April 10, 2003, he was informed that the escort for inmate B… had not left the Institution. While attempting to inquire about the situation, Deputy Warden Greg Brown, accompanied by another Supervisor, entered his office and told him to take care of this situation. Greg Brown ordered him to take the escort. Mr. Johnstone testified that it is only later that he found out that the escort was going to be un-armed. He was then told that the officers that had been initially deployed to do the escort had invoked section 128 of the *Code* (Refusal to work if danger).

[28] When asked to elaborate on the absence of inmate B… from the lists for High Security Needs on Escorts (Docs #22 to 25), Mr. Johnstone explained that there are times when appendixes are added to the lists. For example, he had received a memo (Doc #2) from Greg Brown that asked Correctional Supervisors, including Mr. Johnstone, to attach the memo to the armed escort list. This is considered, in his opinion, an appendix that has the effect of including the inmate on the list.

[29] Mr. Johnstone testified that he did not recall receiving Doc #15, a document that he would normally receive the day prior to the escort. He refused to do the escort because he felt he was in imminent danger. He based his decision to refuse on the inmate's priors i.e. the inmate was on prior armed escorts when on temporary absence. Mr. Johnstone confirmed that although the inmate is not on the [High Security Needs on Escorts] lists, he is on the addendum (the appendix) to the lists and that such addendums are not unusual.

[30] With regards to his knowledge of inmate B…, Mr. Johnstone stated that the inmate had made previous statements to him that he would attempt to escape, that he had no fear of escaping, that he had an escape history and that he was a violent inmate. He had assaulted staff and police officers. He had taunted the officer stating that he could not be stopped if he wanted to escape (see Doc #19).

[31] At the time of his refusal to work, Mr. Johnstone was aware of the extensive profile of inmate B…as found on Doc #18. According to Mr. Johnstone, this document is used in preparation for an escort and is given to correctional officers doing the escort. Mr. Johnstone could not remember whether he had the TA (Temporary Absence Doc #26) at the time of the escort.

[32] Some of the incidents listed on Doc #18 indicate that the inmate threaten to stick a piece of broken halogen bulb in an officer's neck. Another incident indicates that the inmate slipped out of his handcuffs, and on another occasion he broke apart one set of handcuffs etc.

[33] With regards to the issue of the handcuff key, Mr. Johnstone was very concerned with the presence of the key on the inmate particularly since the key was actually found. However, Mr. Johnstone indicated that he was not aware of the presence of any shanks on the inmate.

[34] Mr. Johnstone stated that he was only aware that in three instances this inmate was out on an armed escort (Doc #5). However, it was shown to Mr. Johnstone that there were previous un-armed escorts. Also, depending on the circumstances, Mr. Johnstone conceded that it is possible that an inmate would be escorted without the escorting officers being armed.

[35] Mr. Johnstone acknowledged doing hundreds of escorts. He is aware that the Institution probably does two to three hundreds escorts every year. In the last year, he himself probably performed over one hundred escorts. There has not been an incident during those escorts that, he admitted, were not all armed escorts.

[36] Mr. Johnstone said he was familiar with paragraph 12 (see Footnote #5) of Commissioner's Directive 566-6 for Security Escorts. He is also familiar with paragraphs 19[6] and 17[7] of the Directive. Mr. Johnstone agreed that inmates are searched systematically. When asked what else could be done if there is a concern for the safety of the escort officers, Mr. Johnstone replied that vehicles are searched to ensure there is no contraband that can comprise the safety of the escort, staff is advised of the conditions that apply and of the profile of the inmate as well as any other concern. If there are concerns, full restraint might be indicated and applied. Full restraint would include leg irons and body irons. Additional staff could also be recommended however this has only happened once.

[37] With respect to the training of correctional officers, Mr. Johnstone stated that all officers receive the correctional officers training program. They also receive on-the-job training from senior officers in the application of proper security measures. They also have weapons such as restraints, chemical agents, firearms and use of force such as self-defense training. Correctional officers also receive an annual certification for use of chemical agents such as OC spray.

[38] Mr. Johnstone declared that he never refused to work before. However, given the same facts, he would not take out the inmate without an armed escort. When asked what was the purpose of carrying a firearm in escorts, Mr. Johnstone replied that, ideally, it is to prevent escape and harm to the public and staff involved by the use of lethal force. People have been murdered during such escapes even though officers were trained and the inmate was restrained.

[39] Mr. Tim Martin is a correctional officer at the Atlantic Institution. He has eighteen years of experience. His involvement started on the day prior to his refusal to work when he and another officer, Mr. Mullen, a junior manager, were made aware through an inmate informant that inmate B… had in his possession one handcuff key, one padlock key and two shanks. He and officer Mullen were working with the inmate informant trying to get the contraband off inmate B…because he was transporting[8] it through the rectum. Mr. Martin testified that he knows that inmates carry the contraband in this manner and that they can pull it out very quickly. He testified that he knows this by experience and because he has seen it happen on the job. The officers managed to find one padlock key and one shank and remove them from the inmate. When Mr. Martin came in the next day, he found out that he was assigned to the escort. Having the knowledge of the previous day about the remaining handcuff key and the shank, knowing that the inmate posed a threat and was volatile on previous escorts, he refused to work.

---

[6] "Para.19 The officer in charge can terminate the escort and return the inmate to the institution at any time for just cause"

[7] "Para. 17 The officer in charge shall ensure that the inmate is searched prior to leaving and upon returning to the institution, as per the *Corrections and conditional Release Act* and the Regulations.

[8] The expression used by Mr. Martin is "suit-casing" meaning to use one's body to conceal and transport the contraband.

[40] When asked why he believed that on this particular escort the inmate may be in possession of a shank, Mr. Martin replied that the fact that the informant, who is considered reliable at the Institution, had given him information that proved to be correct in the past and the fact that inmate B… had taken a handcuff key from staff just prior to the search convinced him of that. Mr. Martin stated that, in addition to him being aware that inmate B… would be in possession of a shank, the IPSO[9], Mr. Kevin Hare, and Mr. Mullen, the Unit Supervisor, were also aware of this.

[41] With regards to the behaviour of inmate B…prior to the escort, Mr. Martin was concerned with statements made by Inmate B… about firearms not being able to deter him, his classification within the Unit due to the fact that he was posing a threat, his general demeanor indicating his behaviour was getting worse etc. In the Unit, he would be identified as posing a physical threat. Recently, Inmate B… would be handcuffed with his hands in the back of his body because of his status. Depending on their status, special procedures have to be applied to the inmates.

[42] Mr. Martin testified that he has carried out well over one hundred escorts in his career. An incident occurred only on one un-armed escort. A firearm is used on these escorts when inmate has a seriously high profile or if there is a danger to the escorting party. Contrary to the safety officer's declaration that there are only three (3) elements to be considered to decide on armed escorts, there are nine elements (Doc #22 to 25) to be considered. Inmate B… meets almost all of these elements as described by Mr. Martin.

[43] An important aspect of the job of correctional officers is to be able to report on indicators of inmates relative to their behaviour such as change in inmate mood. With regards to the escort, the behaviour of inmate B.. spoke for itself and he is a self-declared escape risk.

[44] Mr. Martin corrected the health and safety officer statement with respect to who had retrieved the handcuff key. Mr. Mullen, the officer in charge of the Unit told Mr. Martin that he was given the key by inmate B… on approximately noon of that day i.e. April 10, 2003. He also corrected the health and safety officer's statement that it is the Warden who determines the amount of force necessary in dealing with an inmate, it is the *Criminal Code of Canada* and Commissioner's Directive 567 that determines the amount of force that can be used by a correctional officer.

[45] Mr. Martin demonstrated how easily it is possible to get out of restraints since it is easy to make a key. He also demonstrated how this can be done in the vehicle while being transported to a location even though the inmate is in direct sight, hearing or supervision of the escorting officers (Doc #15). The inmate has techniques for removing a shank from their anus even under the constant watch of an officer.

[9] Institutional Preventive Security Officer

[46] Furthermore, Mr. Martin testified that although he is responsible to search the inmate, he cannot conduct an intrusive search as this is illegal. The *Correctional and Conditional Release Act* does however allow for strip searches but the officer cannot perform an intrusive search such as touching the anus of an inmate. Inmates know this. Hence, 90% of contraband is moved this way.

[47] Mr. Martin explained that although an inmate may not be on an armed list, the situation changes rapidly and the inmate can be put on the list as a result of reports of correctional officers to the shift supervisor. Mr. Mador feels that he must assume all risks in his job. Mr. Martin disagreed. He said he must be given the tools to do his job safely.

[48] On the morning of the refusal, Mr. Martin feels that inmate B... had set a pattern. Mr. Martin had first hand knowledge that the inmate was in possession of a key and a weapon therefore. He had no way of knowing if the weapon was on him since the inmate can swallow the key and regurgitate it later at will.

[49] Mr. Allen Allain is a correctional officer CO-2 at the Atlantic Institution. The testimony of Mr. Allain is similar to that of Mr. Martin. It was agreed that his testimony should not be repetitive.

[50] He testified that when he found out who was to be escorted on April 10, 2003 and what it was, he exercised his right to refuse under section 128 of the *Code* for safety reasons.

[51] Mr. Allain explained that in order to make the armed list, the risk must be very high. To be off the list requires a certain amount of good behaviour, which did not happen in the case of inmate B…

[52] Mr. Allain confirmed that he received training with respect to escorts. He agrees with the testimony of Mr. Martin about having access to the protective equipment such as gloves, OC Spray, restraints, trucks with cage, search prior to escorts.

[53] Mr. Allain also admitted that, had there been a valid concern about inmate B… carrying a weapon, he would have been strip searched before leaving the Institution. The weapon would have been found if it was outside his body. It would not have been found if he was carrying the weapon inside his body.

[54] Mr. Allain confirmed that he follows the procedure on Doc #15 and that the inmate was not out of his sight, hearing and supervision. He did however say that the inmate is not always in the officer's sight in the vehicle because it is difficult to see the inmate clearly. Also, when driving with the seat belt on, the inmate is not always in sight. Mr. Allain stated that he looks inside the vehicle before opening the door to see that the restraint equipment is on. He understands that if something is wrong, he can stop the escort as provided by paragraph 19 of Commissioner's Directive 566-6 (Doc #12).

Testimony of Witness for the Employer

[55] Mr. Greg Brown is the Deputy Warden of the Atlantic Institution and has been so for a little less than 3 years. Before that, he was at Regional Headquarters for 4 years as the Regional Administrator for Security for the Atlantic Region. He has 301/2 years of experience with Correctional Services Canada.

[56] On the morning of April 10, 2003, it came to Mr. Brown's attention that staff was refusing to escort an inmate to the local hospital. Prior to that, on the day before, it came to his attention that there had not been a threat risk assessment done on this offender. Therefore, the question was whether this would be an armed escort or an un-armed escort. It was decided that it would be an un-armed escort (Doc #15).

[57] Mr. Brown opined that the employees refused to work because they felt it should have been an armed escort. It was brought to his attention that the employees believed that the inmate might be in possession of a handcuff key.

[58] In reference to the memo in Doc #2 (Covering page E-Mail dated February 14, 2003, then the memo on second page), Mr. Brown explained that having been informed that inmate B… might be in possession of a handcuff key and not having the time to do a complete threat risk assessment at the time, he issued the memo. At the time, he was Acting Warden and not Deputy Warden. The Warden, who was absent at the time, was Mrs. Simone Poirier.

[59] The memo was issued after the IPSO provided him with information that inmate B… may be in possession of a handcuff key. The information available at the time was that the inmate was in segregation. He had removed the restraint equipment i.e. the handcuff, and had provided the security officer with the restraint equipment but had not returned the handcuff key.

[60] Mr. Brown's decision at the time was that the inmate should be considered an armed escort if the inmate is to be out on an emergency, a medical TA (temporary absence). The correction supervisor would be the decision maker on the security equipment to be used. That would be the immediate step to be taken until there was sufficient time to make a full threat risk assessment. That risk assessment was made on April 9, 2003. No risk assessment was made of inmate B… before April 9, 2003 because the inmate had left the Institution for a period of time and was returned to the Atlantic Institution on March 17, 2003 as recorded on Doc #10.

[61] Mr. Brown confirmed that he told the health and safety officer that he did not remember issuing the memo two months previous. He realized that there was no threat risk assessment for this inmate because it was brought to his attention on April 9, 2003 that the inmate was still not on the armed escort list. On the afternoon of April 9, 2003, he, the IPSO[10] Mr. Kevin Hare and the warden concluded the threat risk assessment on the inmate to determine the level of security equipment that would be required for the escorted temporary absence.

[62] The threat risk assessment was performed based on Commissioner's Directive 566-6 (Doc #12) in accordance with paragraph 12 which gives the authority to the Institutional Head to "…determine the level of supervision and the security equipment (including firearms) which can be used during the escort, based on an objective assessment of the risk". And it goes on to list the five factors to be considered. The assessment also included the elements found in Doc #22 to 25. Other elements may also be considered in the risk assessment. On this basis, the decision was that there is no requirement for firearms on the escort for temporary absence.

[63] After confirming that some escorts for this inmate were armed escorts and some were un-armed escorts, Mr. Brown explained that a decision to arm an escort is based on the threat risk assessment, which indicates that that level of equipment is necessary. It is necessary when the risk assessment indicates there are various reasons such as assistance in the community to escape, the profile of the offender that indicates a danger to the public or if there was to be an intervention from the outside. Mr. Brown declared that for the Atlantic Institution, the norm is unarmed escorts.

[64] In terms of the type of protective equipment or procedures available to staff, Mr. Brown referred to Doc #12, Commissioner's Directive 566-6,

- Paragraph 14-in possession of documentation related to inmate,
- Paragraph 15- inspection and search of vehicle,
- Paragraph 16- in direct sight and hearing of inmate,
- Paragraph 17- searching of inmate
- Paragraph 18- checking restraint equipment
- Paragraph 19- termination of escort

[65] The equipment given to officers includes handcuffs, leg irons, portable metal detector, specialized vehicle, pepper spray and search gloves. The officers receive training in escort procedures during the training program, in arrest and control, in self-defense techniques and in the use of pepper spray on a yearly basis. The pepper spray is used to control unruly behaviour of inmates.

[10] Title of IPSO has changed to Intelligence Security Officer.

[66] Mr. Brown estimated that the Institution conducts around 200-250 escorts per year. He affirmed that he is not personally aware of any incidents with the staff during these escorts. He added that the handcuff key issue was taken into consideration during the threat risk assessment. He was aware of the information that the inmate may have been in possession of the handcuff key two months earlier. Nonetheless, inmate B… was out on Temporary Absences to be escorted to court, unarmed, by provincial authorities or to another medical centre without incidents during these escorts.

[67] When inquired as to whether inmate B… is searched before leaving the Institution in accordance with paragraph 17 of the Commissioner's Directive (Doc #12), Mr. Brown confirmed that he is. The search consists of a strip search, which is the removal of all clothing, of a visual inspection of the body and in being scanned with a metal detector.

[68] Mr. Brown stated that the normal process that would result in a decision of arming or not arming an escort (Doc #15) involves an indication by the Coordinator of Correctional Operations who would indicate whether it should be an armed or un-armed escort prior to going to the Warden for a decision. Every permit goes to the Warden for his/her signature for pre-planned temporary escorts. A treat risk assessment is not performed every time.

[69] There is also the process of a Unit Board, which meets on a weekly basis, where a decision or recommendation is made however, in this case and, according to Mr. Brown, for unknown reasons, it had not gone to the Unit Board. That is why a treat risk assessment was performed. The relevant information pertaining to inmate B… would have been checked such as the documentation in OMS (Doc #1) from his parole officer and information that the IPSO had at the time. It should be noted that a meeting of the Unit Board took place on the same day, the same afternoon, however the issue relative to inmate B… was not addressed, possibly because the Correctional Supervisor did not apprise the Unit Board of the situation.

[70] At the time of the meeting with the Warden, Mr. Brown testified that he could not recall whether they considered the allegations with respect to the handcuff key and the two alleged shanks in the inmate's possession. However Mr. Brown stated that the IPSO would be in possession of that information. While Mr. Brown may not have looked at the observations reports indicating the threats of escape made by the inmate, he did recall statements that were made by the inmate on the previous escort, probably February 13, 2003, where the offender made statements about escaping. This led to the issuance of the Warden's memo (Doc #2) to Correctional Supervisors given the information about the inmate and the absence of a threat risk assessment.

[71] As to whether a decision to arm the security escort would have been made on April 9, 2003 if it had been known that the inmate might have been in possession of a handcuff key depends on several factors. Mr. Brown explained that the memo of February 13, 2003 (Doc #2) was issued because all the information was not available and time did not permit a full threat risk assessment. On April 9, 2003 the Warden had decided on an un-armed

escort after completion of the threat risk assessment. It should be noted that Mr. Brown affirmed that when the memo was presented to him by the health and safety officer (see Employer's description of the events, paragraph 8 above) he had no recollection of having issued the memo.

[72] On April 7, 2003 inmate B… was escorted out of the Institution on an emergency basis and the escort was armed although the inmate is not on the armed lists (Doc #22 to 25). On April 10, 2003 the inmate was scheduled for temporary absence with an un-armed escort. When asked what had changed, Mr. Brown answered that there had been a threat risk assessment. He later explained that a threat risk assessment takes into consideration the global risk of the inmate and as a result a decision is rendered as to whether the escort should be armed or not.

[73] Pre-incident indicators for example for an escort would include the past behaviour on escorted temporary absence (3 to 6 months or more depending on inmate), the history of the inmate on temporary absence (6months to a year), community contacts, public safety concern of inmate, escape risk, most recent behaviour in Unit (days or weeks prior to escorts) etc. The correctional officer is to report these indicators and to make recommendations.

[74] These indicators were applied to inmate B…and it was shown that inmate B… was generally violent. It was shown that inmate B… has a history of attempts to escape and that he has escaped lawful custody twice i.e. in 2001 and in 1996 (Doc #17). This, according to Mr. Brown, is indicative of a maximum-security inmate.

[75] The inmate also has contacts in the community since he is involved in the traffic of contraband in the Institution. His parole officer has reviewed the inmate profile and has assessed him as a medium security risk to the public. The parole officer had concluded that this inmate would probably not re-offend in a violent fashion once released. It is Mr. Brown's opinion that inmate B… is not a public safety concern but he is an escape risk. In fact he is rated a very high escape risk as most maximum-security offenders are. However, the point was made that most maximum-security offenders are not on the armed lists.

[76] Mr. Brown testified that the dangerousness of the inmate is considered but for public safety purposes. His strength is also considered. The inmate has a history of self-mutilation and for this reason there were a number of cell extractions in the past.

[77] Mr. Brown agreed that it was possible that the inmate was in possession of the handcuff key for the last two months. At the same time, Mr. Brown indicated that an inmate does not need a handcuff key to open the handcuff. For this reason, universal precautions must be used. Every inmate could have something on his person to open up handcuffs and consequently, it should be assumed that he can get out of the handcuffs or of restraint equipment. The correctional officer must always maintain visual contact with the inmate.

Arguments for the Employees

[78] Mr. Mancini referred the appeals officer to Madam Justice Gauthier's decision in *Juan Verville vs. Correctional Service Canada*, Federal Court, Trial Division, Decision # 2004 FC 767, March 26, 2004.

[79] This decision indicates that correctional officers are experts in their particular field. Mr. Mancini has also referred me to the same decision with regards to the definition and interpretation of danger. It is his submission that correctional officers have the expertise to determine when they are in danger under the *Code*.

[80] Mr. Mancini notes that until the morning of April 10, 2003, the escort was to be armed. When looking at all the offenses of the inmate, it is clear we are dealing with a very disturbed and violent individual. Mr. Mancini asserts that, on the morning of April 10, 2003 the inmate was in possession of the handcuff key and two shanks as testified by Mr. Martin.

[81] Mr. Mancini submits that the health and safety officer did not believe Mr. Brown who "emphatically" stated to him that he could not recall having issued Doc #2 which states "*that inmate B… should be an armed escort from this date until he is reviewed by the Unit Board*." Mr. Brown had a meeting on April 9, 2003 with the IPSO and the Warden which resulted in a change of status of the escort for the inmate. Mr. Mancini questions the motive of the employer for changing the decision of the armed escort since a decision about the escort which was to be armed already existed. There were no emergency to do this. Inmate B… was on the armed escort list through the addendum attached to the list.

[82] Nothing had changed with the inmate that would warrant a change of status of the escort from an armed to an un-armed escort. On the contrary, the inmate's behaviour re taunting officers about escape, about having a key and shanks and his priors should lead to an armed escort.

[83] Once the two employees had refused, Mr. Brown goes to Mr. Johnstone and orders him to take the escort. He does not inform him of the previous refusals. The only thing that happened was that Mrs. Poirier changed the status of the escort after a meeting with Mr. Brown and the IPSO and simply sends a note to file confirming the change of status. She is authorized to do so under the Commissioner's Directive and suggests that this is very convenient for them. Mr. Mancini opines that if a change of status of the escort is to take place, this is a very serious issue requiring more than a note to file.

[84] The fact that the key turned up the next day is also very suspicious. Mr. Mancini questions whether the inmate was pressured in producing the key. Given the behaviour and profile of this inmate, it is not normal for him to return the key. This inmate is intent on escaping and has done so as recently as December 2001. He has contacts in the community and this should be another consideration for an armed escort since he does

drug trafficking. He is amongst the most dangerous criminals in the country. The decision of the Warden, in the circumstances, is totally unreasonable. It does not consider that correctional officers are experts who know that the escort needs to be armed. Why refuse this if it is not that management wanted to show they are the boss.

[85] Under the new definition of danger in the *Code*, the potential for danger is encompassed. Mr. Mancini made a reference to the recent incident where four RCMP officers were killed. They were involved in a routine investigation that happens all the time. It could have been said that the type of incident that happened never happened before.

[86] There is a need to weigh all the evidence and decide on the existence of danger. The fact that correctional officers are trained is insufficient to justify absence of danger. Neither does the provision of restraint equipment. It was shown how easily the inmate can escape from his restraint equipment. He is an expert in escaping and he has a key to do this.

[87] Mr. Mancini requests that the appeals officer accepts the appeal and explains in detail the decision and the factors considered. The attitude of management in the circumstances is not good for correctional officers. It is Mr. Mancini's allegation that in the future, management is going to do something like this again. It will require that correctional officers put their lives and safety in danger. Somebody someday will be killed: it happened in the past and it might happen again.

Arguments for the Employer

[88] Mr. Chemsi submitted a number of documents to be used as reference in his closing arguments. They are:

- The *Corrections and Conditional Release Act*, 1992, c.20, cover page and paragraphs 45 to 57 of the Act
- *Welbourne and Canadian Pacific Railway Co.* Appeals Officer Decision No. 01-008, March 22, 2001
- *Martin v. Canada (Attorney General) (FC)*, Federal Court, Trial Division, Decision No. 2003 FC 1158, October 6, 2003
- *Chapman and Canada (Customs and Revenue Agency)*, Appeals Officer Decision No. 03-019, October 31, 2003
- *Chamard et Canada (Service correctionnel)*, Appeals Officer Decision N0. 05-004, January 20, 2004
- *Canada (Correctional Service) and Schellenberg*, Appeals Officer Decision No. 02-005, May 9, 2002
- *Canada (Attorney General) v. Fletcher (C.A), Federal Court, Trial Decision No. 2002 FC*, November 5, 2002

- *Parks Canada Agency and Martin*, Appeals Officer Decision No. 02-009, May 23, 2002

[89] Mr. Chemsi considered the definition of danger found at section 122 (1) of the *Code*. It is his submission that in this case there are no facts linking them to the definition. The issue, according to Mr. Chemsi, is not whether there should have been an armed escort or not. The real issue is whether when correctional officers escorted the inmate, there was a potential danger to their safety. Hence, the issue to be determined is whether without the arm, there will be a potential danger i.e. condition or situation. Furthermore, this potential situation must reasonably be expected to cause injury.

[90] Also, the purpose of the hearing is not to question the employer's policy which, in this case, deals with arming escorts. The Fletcher decision, *supra*, which dealt with the minimum staffing policy at the Dorchester Maximum Security Penitentiary, makes it clear at paragraph 38:

> Moreover, neither the safety officer nor the Board, could consider the "minimum staffing policy". The mechanism provided by the *Code* calls for a specific fact-finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy.

[91] Mr. Chemsi argues that carrying an arm is not determinative for the safety of correctional officers. The appeals officer must analyse the factual situation to determine if there was a danger to see if correctional officers need a sidearm to protect themselves. The officers allege it is the only way to protect themselves. Mr. Chemsi submits it is not the only way.

[92] Another key aspect of the definition of danger is that hypothetical or speculative situations are excluded from the definition. Mr. Chemsi relies on the Welbourne decision, *supra*, in which I concluded at paragraph 19:

> Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.

[93] The definition of danger does not mean that there is no risk as stated at paragraph 23 of that decision. Some risks are expected to exist. In the Martin decision, *supra*, park wardens felt at risk because they were not provided with sidearms. Although appealed at the Federal Court, Justice Madame Tremblay Lamer confirmed, at paragraph 53, the following:

> Therefore, although the danger can be prospective, the doctrine of reasonable expectation still excludes hypothetical or speculative situations.

[94] In the Chapman decision, *supra,* Mr. Chemsi referred me to paragraph 73 which provides that:

> … the future activity in question will take place;
>
> an employee will be exposed to the activity when it occurs; and

there is a reasonable expectation that:

the activity will cause injury or illness to the employee exposed thereto; and

the injury or illness will occur immediately upon exposure to the activity

[95] Considering these two main criteria, the facts are that there is a rumor of the possession of a key and there is a rumor the inmate may be in possession of two shanks. We need to look at the profile of the inmate and we need to determine what are the probabilities that something will happen that can reasonably be expected to cause injury. Mr. Chemsi argues that all the evidence on hand is hypothetical and speculative.

[96] Let's not forget, said Mr. Chemsi that this is a maximum security Institution and as such, all inmates are dangerous. With this in mind and since they are all escorted all the time, the escorts follow certain procedures as found in Commissioner's Directive 566-6. Mr. Chemsi submits that these procedures are there to protect them and to protect the public. There is also the protective equipment to be used during the escort e.g. O.C. Spray, gloves, a truck with a cage with the inmate isolated from the escort. Also, the inmate is in restraint equipment such as handcuff and leg irons. These are key elements in deciding on the existence of danger. Given the equipment, the training and the procedures, Mr. Chemsi asks whether it is possible, or probable, that something could happen that would cause injury. It is his opinion that this is a speculative possibility.

[97] Mr. Chemsi acknowledges that inmate B... is a violent person but argues that this does not justify an armed escort by itself. Carrying a sidearm is not the only solution to eliminate the potential risk or danger. He is not on the high profile security list where an armed escort is required. The only information is that of a rumor about the possibility that he may have a handcuff key. When Mr. Brown was initially made aware of this, he decided on an emergency basis to recommend armed escorts for this inmate since he did not have the time to do a threat risk assessment.

[98] Subsequently, the employer reacted by taking into consideration the information provided about the handcuff key and decided that on April 10, 2003, to go with an un-armed escort. They performed a threat risk assessment and determined that the issue of handcuff key was no longer sufficient to arm the escort. If the escort had gone out as planned, the handcuff key would have been found because the inmate would have been stripped searched in accordance with the Commissioner's Directive and sections 47 and 48 of the *Corrections and Conditional Release Act*. The same thing can be said for the shanks. It should be noted however that Mr. Mancini strongly opposes this argument stating that the key would not have been found because correctional officers are not authorized to conduct intrusive searches. It is habitual for inmates to conceal weapons of this kind in the anus.

[99] With regards to the rumor[11] that the inmate may be in possession of the handcuff key – or the shanks-, this is a hypothetical situation. Assuming it is a possibility, it does not mean that the handcuff key and shanks would not have been found. Assuming this equipment had gone undetected, the inmate is in the vehicle, alone, with restraint equipment on him and in sight. To say that the inmate may have something in his anus is an over exaggeration. There is no reasonable expectation that injury would occur.

[100] Also, this inmate was often escorted by provincial authorities with an un-armed escort without incidents. The profile of the inmate is looked by professionals at the Institution, the Unit Board, the Warden the parole officers and psychologists. He has never been put on the high profile security list even though his profile for all these years was taken into consideration. The fact that the inmate is a high escape risk is not essential to require an armed escort since the inmate has always been a high escape risk. Nothing is changed.

[101] The sidearm is used for specific purposes such as protecting the correctional officer if there is a threat on his life, which is not the case. It is provided if there is a real concern for public safety and not only to protect themselves. They have other tools for that purpose. In the decision Chamard, *supra,* the exclusion of hypothetical situations is reaffirmed. In Verville, *supra*, the Court ruled that the appeals officer ignored evidence offered by the correctional officers with regards to their experience. At paragraph 50 of the decision, the Court stated:

> In the circumstances, the Court is not satisfied that the appeal officer considered the opinion expressed by the correctional officers based on their experience particularly that of Correctional Officer Hnetka. This evidence was clearly on point and we have no idea how it was dealt with.

[102] According to Mr. Chemsi, there is a difference between considering evidence and giving it the appropriate weight. With regards to the feeling of employees, the Schellenberg decision, *supra,* clarifies that feelings could be genuine but do not necessarily meet the definition of danger. There must be an objective and factual determination of danger.

[103] The danger must exist at the time of the investigation and not at the time there was an armed escort in the past. When Mr. Mador investigated, there only existed a hypothetical situation. The health and safety officer decided that a danger did not exist at the time of his investigation. He looked at the profile of the inmate, at the tools and procedures in place and concluded there was no danger. The issue of arming or not arming the escort was not a key point in his determination.

[104] Therefore, we must determine the existence of danger depending on three factors i.e. whether a potential situation or condition is likely to present itself, whether the employee is likely to be exposed to that situation or condition and whether that situation or condition is likely to cause injury.

---

[11] In counter argument, Mr. Mancini replied that this was not a "rumor" but a confirmed reported fact since the key was actually found the next day.

[105] In summarizing the facts to these three conditions, we have as follows:

- Potential condition likely to present itself: this would require the inmate to free himself from the cage, having been searched prior to the escort and having the correctional officer not notice any unusual movement. The employees have powerful tools to deal with this type of situation.

- The employee likely to be exposed to the situation: not tenable to say that when the truck with a cage is open, the correctional officers would be exposed to the inmate who would just have freed himself. This is impossible unless the officers are not trained and do not follow the procedures.

- The situation is likely to cause injury: this would mean that the officers were not able to control the inmate with pepper spray or any other tool.

[106] The main argument of the employees is based on three speculative situations. Therefore their argument is a complete speculative argument. The appeals officer should dismiss the appeal.

*****

[107] The issue to be decided in this case is whether danger, as defined in the *Code*, exists for the three correctional officers that refused to work on April 10, 2003. In order to make this determination, I must consider the applicable jurisprudence, particularly the Federal Court Decisions of *Martin v. Canada (Attorney General) (FC)*, Federal Court, Trial Division, Decision No. 2003 FC 1158, October 6, 2003 as well as *Verville v. Canada (Correctional Service)*, [2004] F.C.J. No. 940, per. Gauthier J. Then I need to apply the facts of this case to the law and render a decision.

[108] Before proceeding with this analysis, I believe that a clarification is in order respecting the application of two[12] legislations that regulate federal penitentiaries i.e. the *Corrections and Conditional Release Act* (hereafter the Act) and the *Canada Labour Code*, Part II (hereafter the *Code*). For the purpose of this exercise I would differentiate between the inmate population which is regulated by the Act and the staff which is regulated by the *Code* for the purpose of occupational health and safety. Although there may be overlaps in the application of both legislations, I will consider their applications separately.

[109] The *Corrections and Conditional Release Act* is "An Act respecting corrections and conditional release and detention of offenders…" The administration of the Act is facilitated by a variety of policies and procedures such as Commissioner's Directive 566-6 for Security Escorts. This latter Directive is issued under the authority

[12] I am well aware that other legislations apply to federal penitentiaries. However, I only wish to distinguish between the application of these two legislations.

of the Commissioner of the Correctional Service of Canada who is appointed under subsection 6(1) of the Act. The administration of the Act requires the involvement of Correctional Service staff for the purpose of ensuring efficient management and control of the inmate population.

[110] The *Code* on the other hand is legislation with a stated purpose. The purpose of the *Code* is stated at section 122.1 and provides as follows:

> The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> Subsection 123 (1) clarifies the extent of application of Part II of the *Code*. It provides:
>
> (1) **Notwithstanding any other Act** of Parliament or any regulations thereunder, this Part applies to and in respect of **employment**… (emphasis added)
>
> Clearly then, regardless of any other legislation that may apply in penitentiaries, health and safety issues, where an employer-employee relationship exists, are to be regulated under the *Code*. This obviously does not preclude other legislations to exceed the occupational health and safety requirements of the *Code* but they should not fall below. In those cases where the *Code* requirements are not met, the *Code* provisions would apply. Also, the fact that two or more legislations apply to the same workplace does not prevent simultaneous and harmonious co-existence of the legislations.

[111] When the health safety officer investigated the three refusals to work on April 10, 2003 he found himself investigating a situation covered by the two legislations. He attempted to incorporate the requirements of one legislation into the other when in fact he should have concentrated on the application of the *Code* and the procedure outlined in the *Code* for refusals to work. Although the health and safety officer should not ignore the requirements of the Act, his mandate is to investigate refusals to work under the *Code*, not the Act. As a result, he issued a decision based mainly on elements that should have been restricted to the application of the Act. He concluded as follows:

> As a result of the mis-communication and based on documents #12, 26 and 27, a decision of no danger was rendered.

[112] In accordance with the testimony of Mr. Brown, it should be understood that, when acting under the Act, the Warden of an Institution is authorized to decide the level of supervision and the security equipment needed to carry out a security escort. Paragraph 12 of Commissioner's Directive 566-6 (which is also Doc #12) is clear on this. It reads:

> The Institutional Head **shall determine** the level of supervision and the security equipment (including firearms) which can be used during the escort, based on an objective assessment of risk, including:
>
> *(a)* the inmate's security classification;
>
> *(b)* the inmate's physical and mental health;
>
> *(c)* the inmate's demonstrated behaviour and characteristics;
>
> *(d)* the purpose and destination of the escort, mode of travel and time in transit; and
>
> *(e)* intelligence information.

[113] The other two documents referred to in the decision of the health and safety officer merely reflect the Warden's ensuing responsibilities in complying with the Commissioner's Directive i.e. that a Temporary Permit (Doc #26) was issued indicating under what conditions the security escort would take place, including whether this would be an armed or un-armed escort, and a note (Doc #27) was sent to file by the Warden indicating that she had complied with the Directive. Although these documents can be useful for the health and safety officer's investigation, they are not determinative of whether the correctional officers were in danger as defined in the *Code* because, as we will see later, their focus is the safety of the public and the inmate. Also, the health and safety officer's reference to "mis-communication" in his decision is, in my opinion, indicative of the apparent mistrust that the health and safety officer observed between management and the correctional officers. It is not however a factual determination of the existence or not of danger under the *Code*.

[114] The unchallenged testimonies on record indicate that the Warden decides whether a security escort is to be armed or un-armed on the basis that an inmate must meet the following three criteria, i.e. he is

> a danger to himself;
>
> a danger to the public; and
>
> a risk of escape.
>
> If one of these three criteria is not met, it is my understanding, like the health and safety officer before me, that the escort would normally[13] be un-armed. In line with this, the Warden sent a note to file (Doc #27), dated April 10, 2003, which is the day of the refusals to work, that states:

[13] I suspect that, in accordance with paragraph 12 of Commissioner's Directive 566-6, the Warden can probably decide to arm or not to arm an escort even if one of those three criteria is not met. However, the focus of the decision would be the same.

> A discussion regarding inmate B… was held between SIO Kevin Hare, Deputy Warden Greg Brown, and myself yesterday afternoon. After consultation and discussion re the risk to public safety which is indicated as moderate in the security classification, and the nature of the crime, I made a decision that this inmate would not be an armed escort. (my underlining)
>
> Also, Mr. Brown testified at paragraph 63 above:
>
> …that a decision to arm an escort is based on the threat risk assessment, which indicates that that level of equipment is necessary. It is necessary when the risk assessment indicates there are various reasons such as assistance in the community to escape, the profile of the offender that indicates a danger to the public or if there was to be an intervention from the outside.

[115] Given that correctional officers have many tools and procedures to protect themselves, it is evident that the decision to arm or not arm a security escort really has, as noted by the health and safety officer "little to do with the personnel's [read correctional officers] safety". I say this notwithstanding Mr. Chemsi's comment (paragraph 101 above) that "…the sidearm is used for specific purposes such as protecting the correctional officer if there is a threat on his life, which is not the case". One would hope that if a correctional officer's life can be directly put into jeopardy by carrying out a security escort, special and, probably, exceptional measures would be taken to protect the officer. This would be a requirement under the *Code*.

[116] Consequently, the decision to arm or not to arm a security escort in accordance with the Act and the Commissioner's Directive cannot by itself lead to a finding of danger or no danger under the *Code* because the primary purpose of that decision is not to protect the correctional officers but to protect the public and to a certain extent, the inmate. I must therefore put aside the issue of arming or not arming the security escort as a deterrent and look at whether the correctional officers were in danger as defined in the *Code*. If I find that they are in danger, I should direct the employer, if it is appropriate, to take measures to protect the employees.

[117] Whenever an employee invokes his or her right to refuse to work under the *Code*, a number of things must happen. Firstly, the refusing employee must report the circumstances of the matter to the employer without delay (ss. 128(6)) which was done in the instant case. Following the report to the employer of a continued refusal to work (ss.128(9)), the employer must investigate the matter in the presence of the employee who refused to work and at least one member of the work place committee who does not exercise managerial functions (ss.128(10)). There is no evidence on file or from the testimonies that this crucial part of the refusal to work process happened even though Mr. Johnstone said that he had begun looking into the refusals of Mr. Martin and Mr. Allain. Rather, the evidence suggests that after being notified of the refusals to work of Mr. Martin and Mr. Allain, the employer went directly to Mr. Johnstone and ordered him to take the security escort without informing him of the previous two refusals to work, contrary to subsection 129(5) of the *Code*. When Mr. Johnstone was ordered to escort inmate B… he also refused to work. Again, the evidence suggests that rather than

attempting to resolve the matter internally as required by the *Code*, a health and safety officer was called in to investigate. The employer was still under the obligation, after notifying a health and safety officer (ss. 128(13)), to inform the work place committee (ss.128 (14)) of any steps taken, if any, to protect the employees from the danger feared. It is evident that the health and safety officer did not benefit from an internal investigation that could have focused his attention on the real issue of danger.

[118] The concept of danger and its interpretation has been the object of two analysis by the Federal Court. The two Federal Court decisions to date i.e. the Martin decision, *supra*, and the Verville decision, *supra*, are detailed and constitute the leading jurisprudence on this subject. I will rely on their decisions for interpreting and applying the definition of danger to the facts of this case.

[119] Danger is defined in the *Code* at subsection 122 (1) as follows:

> "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 corrected, or the activity altered, whether or not the injury or illness occurs immediately after 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.

[120] The central issue before me, in order to establish the existence or absence of danger under the *Code*, is whether the risk to the escorting officers of being injured in the circumstances of this case would occur before it could be corrected and that there exists a reasonable possibility that those circumstances will occur in the future. To achieve this, I must establish whether there was sufficient evidence to believe that inmate B… was in possession of a handcuff key and/or shank that could escape detection before being transported and be used, during his transport to the hospital, to inflict injury to the correctional officers escorting him. There is no issue before me as to whether inmate B… constitutes an escape risk. I would only point to Mr. Brown's testimony (paragraph 75 above) on this subject:

> It is Mr. Brown's opinion that inmate B… is not a public safety concern but he is an escape risk. In fact he is rated a very high escape risk as most maximum-security offenders are.

[121] The decision to lower the status of the security escort from an armed escort to an un-armed escort was based on a summary threat risk assessment, notwithstanding Mr. Brown's contention that a global assessment was performed, that concluded that the inmate no longer represented a danger to the public. This assessment assumes, in part, that correctional officers are sufficiently trained and equipped to prevent an attempt to escape. This is, in my opinion, a reasonable assumption to make under normal conditions. However, I note that the Warden by-passed the process in place, the Unit Board review, for deciding the status of the escort for inmate B… I also note that the threat risk assessment was performed the same afternoon that the Unit Board met to discuss the same

issue for other inmates. I further note that the Warden only sent a note to file on April 10, 2003 i.e. the day that the refusals to work took place and that it contains no mention of concern or consideration for the safety and health of the staff. Given that there was no urgency in this case to lower the escort status, I can understand Mr. Mancini's suspicion with the manner in which the status of the escort was changed and his concern with the significant impact the change has on the health and safety of the escorting officers. It is not my role to question a decision of a Warden that affects public safety. However, if the process involved results in a decision that directly affects the health and safety of correctional officers, appeals officers and health and safety officers should scrutinize the process under the provisions of the *Code*.

[122] The health and safety officer noted that the job of a correctional officer is dangerous. According to Mr. Martin, the health and safety officer feels that correctional officers must accept the risks associated with their job. Mr. Martin objects strongly to this assertion by stating that although he accepts the risks associated with his job, he cannot be expected to accept all the risks unless he is given the tools to do it safely. I agree with Mr. Martin. Under the *Code*, the employees' health and safety is paramount. In a maximum security institution, the margin for error is very small. Ignoring this fact can result in serious injury or death of an escorting officer. If there exists evidence or at least credible information that a maximum security inmate is in possession of a handcuff key and/or shank, it is the responsibility of the employer to do a threat risk assessment of this situation as it applies specifically to the escorting officers with a view of ensuring that they can execute the escort safely. Anything less than that, in this environment, is not acceptable under the *Code*.

[123] I am satisfied that there existed sufficient evidence in this case to justify the existence of a potential hazard or condition i.e. the handcuff key and a shank. The evidence shows that:

- Inmate B… had removed his restraint equipment in the recent past and had stolen a handcuff key in the process and did not return it.

- A reliable informant had confirmed to correctional officer Martin that inmate B… was in possession of a handcuff key, one padlock key and two shanks. The padlock key and one shank were found therefore leaving the handcuff key and one shank in inmate B's… possession.

Furthermore, it turns out that the handcuff key was subsequently given by inmate B… to the Officer in Charge of the Unit, Mr. Mullen, around noon on April 10, 2003, therefore confirming its existence and giving credibility to the intelligence.

[124] As to whether the remaining key or shank could escape detection, I must rely on the evidence submitted by the correctional officers to the effect that although they are authorized to conduct a full search (a strip search) of the inmate, they are not authorized to conduct an intrusive search. It is their testimony, based on their experience, that inmates can either swallow the key or a shank and regurgitate it later or conceal the key or shank in their anus and retrieve it at will. In this respect I accept Mr. Martin's testimony (para. 39 above)

…that he knows that inmates carry the contraband in this manner and that they can pull it out very quickly. He testified that he knows this by experience and because he has seen it happen on the job. (my underlining)

[125] I do not doubt that inmate B… can perform either technique or more. Given the intelligence reported and the experience of the correctional officers, I am dismissing Mr. Chemsi's repeated submission that possession of the key and/or shank by the inmate is only a rumor. Inmate B… is an expert in escape and is a self-declared risk of escape. He has escaped twice in the past notwithstanding that all measures were applied to him. For these reasons, I am prepared to accept their evidence that inmate B… is in possession of and can conceal a key and/or shank on himself and escape its detection notwithstanding the employer's statement (paragraph 98 above) that "If the escort had gone out as planned, the handcuff key would have been found because the inmate would have been stripped searched in accordance with the Commissioner's Directive and sections 47 and 48 of the *Corrections and Conditional Release Act.* The same thing can be said for the shanks."

[126] This statement relies on the full search, including the use of a metal detector, which would have been conducted if the inmate had been escorted outside of the Institution. I agree that the metal key, or any other piece of metal, would likely have been detected if the inmate had been scanned, although Mr. Allain testified to the contrary. I note however that the employer did not carry out a search of the inmate after the refusals to work. This would have certainly alleviated the concerns of the refusing employees particularly if there had been an investigation conducted in the presence of the employee who refused to work and at least one member of the work place committee who does not exercise managerial functions (ss.128(10)). It was incumbent upon the employer to investigate the allegation of employees and do whatever was necessary to establish the presence or absence of the handcuff key and the remaining shank in the presence of the representative of the refusing employees. Also, the statement ignores the correctional officers' testimonies that inmates have been capable in the past of concealing and retrieving contraband hidden in their anus or elsewhere on their body which suggests that, under certain conditions, contraband such as a shank made out of non-metal can escape detection. On the basis of the above, I give greater weight to the correctional officers' contention that the inmate was in possession of the key and/or a shank and that the key or the shank could and, given this inmate's expert talent and determination to escape, would escape detection.

[127] I believe that inmate B…, who is well aware of the search procedures for having been escorted numerous times before, would not have concealed the metal key on him to use for escape purposes, because he probably suspected that it would likely be detected. In any event it would have been found. However, from the perspective of an escape, it has been shown that inmate B… does not need a key to escape. His abilities to escape with or without a key are not an issue. While the key would have been found, it is a different story for the remaining weapon i.e. the shank which is not necessarily made of metal. On this basis, I accept that there exists a reasonable possibility for the inmate to conceal at least a shank and escape detection prior to leaving the Institution. This is important because in the Verville decision, *supra*, Madam Justice Gauthier stated:

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. (my underlining)

[128] Contrary to Mr. Chemsi's argument (paragraph 103 above) and given Madam Justice Gauthier's decision above, time is no longer the determining factor for danger to exist under the *Code*. I must therefore look at the circumstances where injury could reasonably be expected to occur and establish that there is a reasonable possibility that the circumstances will occur in the future. These circumstances would happen during transportation of the inmate outside of the Institution. If the inmate is capable of retrieving the weapon on him, injury could reasonably be expected to occur when the door is open before the employer can correct the hazard. This brings us to the transportation of the inmate in the specially designed transportation vehicle. It also causes me to look closely and the Commissioner's Directive 566-6, paragraph16 which reads, in English and in French:

16. The officer in charge shall normally ensure that the inmate(s) remain in direct sight and hearing of the escorting officers. Any exception shall be documented in the decision record.

16. L'agent responsable doit voir à ce que les agents accompagnateurs aient constamment le ou les détenus à portée de la vue et de l' ouie. Toute dérogation à cette norme doit être consignée dans le registre de décision.

[129] I interpret the expression "normally…remain in direct sight and hearing" in light of the French paragraph to mean to take place in a manner that is continuous and frequent. This is what correctional officers normally do. However, Mr. Allain's and Mr. Martin's testimonies on this subject are eloquent. Those paragraphs read as follow:

Paragraph 54 above

Mr. Allain confirmed that he follows the procedure on Doc #15 and that the inmate was not out of his sight, hearing and supervision. He did however say that the inmate is not always in the officer's sight in the vehicle because it is difficult to see the inmate clearly. Also, when driving with the seat belt on, the inmate is not always in sight. Mr. Allain stated that he looks inside the vehicle before opening the door to see that the restraint equipment is on. He understands that if something is wrong, he can stop the escort as provided by paragraph 19 of Commissioner's Directive 566-6 (Doc #12).

Paragraph 45 above

Mr. Martin demonstrated how easily it is possible to get out of restraints since it is easy to make a key. He also demonstrated how this can be done in the vehicle while being transported to a location even though the inmate is in direct sight, hearing or supervision of the escorting officers (Doc #15). The inmate has techniques for removing shanks from their anus even under the constant watch of an officer.

[130] Although the inmate is "normally… in direct sight and hearing of the escorting officers", it is my opinion that, given the design of the vehicle, it is difficult, if not impossible, to have constant control over the movements of the inmate in the cage. I agree with the correctional officers' concern expressed above. Given the current design of the vehicle, based on the limited description I was given at the hearing, I believe that it allows the inmate to move freely and unobserved at times particularly as stated by Mr. Allain above that "…when driving with the seat belt on, the inmate is not always in sight." Evidently, this suggests that the officer is seated in the front of the vehicle looking forward. I would also agree with Mr. Allain that, if it is difficult to see inside the vehicle, it must be difficult to ascertain that the restraint equipment is safely fixed to the inmate. Opening the door of the vehicle in such circumstances places the escorting correctional officers at undue risk of injury.

[131] I believe that the recent behaviour of inmate B… justified the concerns of the correctional officers that they would be injured by him during the escort. For example, Messrs. Martin, Allen and Johnstone testified that:

> Para. 39: Having the knowledge of the <u>previous day</u> about the remaining handcuff key and the shank, knowing that the inmate posed a threat and was volatile on previous escorts, he [Mr. Martin] refused to work. (my underlining)
>
> Para. 53: Mr. Allain explained that in order to make the armed list, the risk must be very high. To be off the list requires a certain amount of good behaviour, which did not happen in the case of inmate B…
>
> Para. 29: He [Mr. Johnstone] refused to do the escort because he felt he was in imminent danger. He based his decision to refuse on the inmate's priors i.e. the inmate was on prior armed escorts when on temporary absence.
>
> Para. 30: Mr. Johnstone stated that the inmate had made previous statements to him that he would attempt to escape, that he had no fear of escaping, that he had an escape history and that he was a violent inmate. He had assaulted staff and police officers. He had taunted the officer stating that he could not be stopped if he wanted to escape (see Doc #19).
>
> Given the existence of the above circumstances, I believe that opening the door of the vehicle to inmate B…, with less equipment to protect them, results in a reasonable possibility that correctional officers would be injured before the situation can be corrected. In the case of a maximum security inmate who has just recently shown to be volatile, violent, disturb and intent and capable of escaping,

> this is a frightening thought, particularly with regards to an inmate who assaults correctional officers and threatens them with broken glass. As it stands, the correctional officers were basically expected to put their health, safety and possibly life, at risk to stop the inmate in the event of an attempt to escape. The *Code* does not require anyone to go so far as to put their health, safety or life on the line even if their job entails working with dangerous offenders.

[132] In summary, it is my opinion that correctional officers Johnstone, Allen and Martin were in danger as defined in the *Code*. On April 10, 2003, there existed a potential hazard or condition i.e. possession of at least one shank that could reasonably be expected to cause injury to them before it could be corrected. The risk of injury arose from the evidence that inmate B… was in possession of at least one shank that could reasonably (i) be concealed, (ii) escape detection, (iii) transported in the vehicle and (iv) used against the escorting officers. Given the recent volatile behaviour of the inmate and his intent on escaping, it was reasonable to expect that he would cause injury to the escorting officers before the hazard would be corrected i.e. upon opening the door of the escorting vehicle.

[133] I am satisfied that the circumstances reported by the correctional officers meet the definition of danger under the *Code*. I have considered their testimonies and given it the appropriate weight. In Verville, *supra*, Madam Justice Gauthier stated at paragraph 51 of the decision:

> 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. (my underlining)
>
> Contrary to Mr. Chemsi's argument, this is not a hypothetical or speculative situation because, in my opinion, it is based on facts that existed when the employees refused to work and when the health and safety officer investigated.

[134] There has been no issue submitted to me with regards to this situation constituting a normal condition of employment. Nonetheless, before concluding this matter, I should consider whether the danger above is a danger that does not authorize correctional officers to refuse to work on the basis that the danger feared constitute a normal condition of employment as provided by paragraph128(2)(*b*) of the *Code*. That provision reads:

> (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)* …
>
> *(b)* the danger referred to in subsection (1) is a normal condition of employment.

> I would refer to Madam Justice Gauthier's comment in the Verville decision, *supra*, at paragraph 55 where she notes, in referring to 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 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?

[135] In the normal course of things happening in a maximum security institution, one has to presume that the inmates would attempt to escape if given an opportunity every time they are escorted. Therefore, special precautions need to be taken every time and all the time to deal with this possibility. Mr. Brown explained (at paragraph 77 above) that there exist universal precautions to deal with such possibilities. However, this does not mean that correctional officers have to put their life, health and safety on the line under any and every condition.

[136] The normal business of a maximum security institution implies working with dangerous people. The level of risk is very high. However, where the circumstances demonstrate that there exists evidence that one inmate has the means and intent to carry out a criminal act, that increases the level of risk to an abnormal level. In response to such a threat, additional measures must be taken that will meet or exceed the level of risk normally associated with this environment. It is not reasonable to decide to change the status of an escort without fully considering the impact this decision will have on the health and safety of correctional officers and not taking measures that correspond to the level of risk. In this regard, while correctional officers are prepared to accept that the normal danger of their job is a normal condition of their employment, it is not a normal condition of employment to have to face a violent inmate that is suspected to actually be in possession of weapons without additional measures taken to protect them from injury. In my opinion, if there exists a reasonable possibility that injury can occur outside the normal conditions of employment, then danger exists that is not a normal condition of employment.

[137] For all the reasons expressed above, I conclude that correctional officers Martin, Allen and Johnstone were in danger on April 10, 2003. Consequently, I rescind, in accordance with paragraph 146.1(1)(*a*)[14] of the *Code* the decision of absence of danger, dated April 11, 2003, rendered by health and safety officer Denis Mador and replace it with a decision of danger under the *Code*.

[138] However, given the passage of time, issuing a specific direction at this time to the employer to protect the employees would serve no practical purpose since the security escort for inmate B… is over. In accordance with paragraph 146.1(1)(*b*) of the *Code* (*ibid*), I will not issue a direction to the employer since it is not appropriate to do so in the circumstances of this case which is a refusal to work exercised by three specific employees for escorting a specific inmate. I would also add that the fact that the employer could be directed in the future to take measures to protect the employees does not necessarily mean that a sidearm has to be provided. In light of the circumstances described above, a sidearm is not the only solution to the problem.

[139] In *obiter*, I would add that I am concerned that, throughout the hearing, there was no mention of the role of the work place health and safety committee in the refusal to work process provided by the *Code*. I am also quite disturbed to realize that there appears to be no corresponding health and safety policy or procedure developed by the policy health and safety committee (para. 134.1(4) (*a*) and (*h*)) or, if one does not exist, the work place health and safety committee (para. 135 (7) (*i*) and (*l*)), to address the impact that Commissioner's Directive 566-6 for security escorts has on the health and safety of correctional officers. I am confident however that the parties will take appropriate action to remedy the situation.

_____

Serge Cadieux
Appeals Officer

[14] 146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(*a*) vary, rescind or confirm the decision or direction; and
(*b*) issue any direction that the appeals considers appropriate under subsection 145(2) or (2.1).

APPENDIX A

List of Documents supplied to the Health and Safety Officer
(with a short description of each document added by the Appeals Officer)

Doc #1: Inmate profile Web OMS
One page document providing a summarized profile of inmate B…

Doc #2: Memo from D/Warden Greg Brown dated Feb 13, 2003
This document was sent to Correctional Supervisors and states that inmate B… should be an armed escort from this date until he is reviewed by the Unit Board. The covering page to this memo is an E-Mail dated February 14, 2003. The E-Mail is sent by Greg Brown to Correctional Supervisors and to Brent Johnstone and reads: "Please attach this memo to your armed escort lists."

Doc #3: Escorted temporary absence doc dated Feb 11, 2003

Doc #4: Escorted temporary absence doc dated April 7, 2003
These two documents are forms that are filled out for the purposes of escorted temporary absences and which indicate on the forms the safety measures to be taken including whether the escorts are armed or un-armed escorts.

Doc #5: Case Documentary
Exchange of correspondence between Brent Johnstone and the Deputy Warden Greg Brown about escorts and the policy of arming the escorts. Includes a reference about inmate having been on previous absences with armed escorts. Also comments made during escorts by inmate B… about firearms not stopping him from escaping (see Doc #19 below).

Doc #6: Officer's Statement dated Feb 11, 2003
Comments made by inmate B… to officer Brent Johnstone re: the concealment of shanks on their person.

Doc #7: Standing Order 545 dated April 24, 1998
Preparation of list of high security profile inmates. Inmates on list to be escorted under armed escort.

Doc #8: Post Order #021 dated March 06, 2001
Rules and authorities for external escorts.

Doc #9: Alerts Identification dated April 10, 2003
Inmate B… identified as an escape risk.

Doc #10: Custom Report dated April 10, 2003
Description of inmate B… profile and his various movements.

Doc #11: Escort briefing #3120-2 dated April 7, 2003
Indicates this is an armed escort.

Doc #12: Commissioner's Directive 566-6 dated October 17, 2001
Policy of CSC regarding escorts in general. Paragraph 12 provides as follow:

The Institutional Head shall determine the level of supervision and the security equipment (including firearms) which can be used during the escort, based on an objective assessment of risk, including:

(f) the inmate's security classification;
(g) the inmate's physical and mental health;
(h) the inmate's demonstrated behaviour and characteristics;
(i) the purpose and destination of the escort, mode of travel and time in transit; and
(j) intelligence information.

Doc #13: Standing Operating Practices (SOPs) dated January 31, 2002
Standard operating practices for temporary escorts.

Doc #14: Memo Dan Newton dated 2003-02-13
Memo sent to Brent Johnstone, Escort Coordinator, for the purpose of identifying inmates for armed escorts.

Doc #15: Escorted temporary absence permit V20A00019163
Form indicating conditions and instructions to escort inmate B… which were:

1. Inmate to be in restraint equipment at all times.
2. Double escort while in travel status.
3. Inmate is to proceed directly to destination shown on this permit
4. Escorting officers shall under no circumstances allow inmate(s) in their custody out of their sight, hearing or supervision.
5. This is an armed escort? **No**

Doc #16: Escorted temporary absence permit V20A00018282
Same as Doc #15 except indicates this is an armed escort.

Doc #17: Escort briefing
To be used for each escort. It is a profile of inmate B… It is provided to the escorting officer who can add comments after the escort is completed.

Doc #18: Custom Report 4/9/2003
Similar to Doc #10. Printed earlier. Provides a detailed description of each offense (violent actions) of inmate B… It is a comprehensive profile of inmate B…

Doc #19: Post temporary absence dated 2003/02/13
Evaluation report subsequent to an escort with comments from escorting officer: The officer reported that the inmate said "*You people could never catch me if I wanted to escape and that gun wouldn't slow me down either.*"

Doc #20: Meeting note March 14, 2002
Meeting of the Security Group. With regards to security escort, the minutes indicate that "CSC will continue to use individualized risk assessment of each inmate."

Doc #21: Minutes Unit 1 operational meeting (dated April 3, 2004)
Bob Taylor is the A/UM (acting unit manager). Minutes refer to search for shanks in cells of inmates.

Doc #22, 23, 24 and 25: High security needs on escorts sheets.
Lists of the names of inmates that mandate a member of the escorting team to be armed. The elements to be considered for an inmate to make the lists are:

ELEMENTS

(A) DANGEROUSNESS OF INMATE (POTENTIAL FOR VIOLENCE)
(B) CONTACTS IN THE COMMUNITY(OUTSIDE HELP AVAILABLE)
(C) PRIOR ESCAPES AND ATTEMPTS
(D) EXISTENCE OF ACTUAL PLAN TO ESCAPE
(E) DISRUPTIVE BEHAVIOR ON PAST ESCORTS
(F) ACTUAL PHYSICAL STRENGTH
(G) CURRENT FRAME OF MIND AND BEHAVIOUR
(H) LENGTH OF SENTENCE
(I) SELF DECLARED ESCAPE RISK

Note: The name of inmate B… is not on these lists.

Doc #26: Escorted temporary permit submitted by Warden
Identical to Doc #15.

Doc #27: Memorandum note to file by Warden dated 2003, 04, 10
Note confirms that a meeting took place on the afternoon of April 9, 2003 to discuss risk to public safety, and that a decision was made not to arm the escort for inmate B… for April 10, 2003.

Doc #28: Memo from Greg Brown extracted from Team Links by safety officer
Identical to Doc #2.

Summary of Appeals Officer's Decision

Decision No.: 05-020

Applicant: Brent Johnstone, Allen Allain and Tim Martin

Respondent: Correctional Service Canada, Atlantic Institution

Key Words: Maximum security, security escort, handcuff key, shank, escape risk, restraint equipment, public threat, armed escort, un-armed escort, Commissioner's Directive, inmate informant, sight, hearing, supervision, strip search, threat risk assessment, metal detector, Unit Board, rumor, hypothetical, speculative.

Provisions: *Code* 122(1), 122.1, 123(1), 128(2), 128(6), 128(9), 128(10), 128(13), 128(14), 129, 134.1(4)(*a*) and (*h*), 135(7)(*i*) and (*l*), 146.1(*1*) (*a*) and (*b*).
Regulation

Summary:

Three correctional officers refused to carry out an escort of a violent inmate after considering that the inmate was likely in possession of two shanks, one padlock key and one handcuff key and that the escort status had been lowered by the Warden from an armed to an un-armed escort. The health and safety officer (HSO) who investigated concluded there was no danger because he felt that the Warden of the Institution had the authority to decide the amount of force necessary to carry out the escort and that he had no authority to decide otherwise.

The appeals officer (AO) analysed the situation and disagreed with the HSO. He found that the HSO should have concentrated on investigating the matter of the refusals to work under the *Canada Labour Code*, Part II (the *Code*) and not under the *Corrections and Conditional Release Act* (the Act). The AO concluded that danger to the correctional officers existed after establishing, in light of the recent violent behaviour of the inmate, that injury would occur as a result of the inmate being in possession of a least one shank that could reasonably (i) be concealed, (ii) escape detection (iii) transported in the vehicle and (iv) used against the escorting officers. However, given the passage of time, the AO did not feel it was appropriate to issue a direction in the instant case to the employer.