Case No.: 2006-65
Decision No.: OHSTC-08-031

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

R. L. Correctional Officer
appellant

and

Correctional Service Canada
respondent

_____
December 13, 2008

This case was decided by Appeals Officer Douglas Malanka.

For the appellant
C. Blanchette, Union Advisor, CSN-Pacific

For the respondent
N. McGraw, Counsel, Legal Services, Treasury Board Secretariat

[1] This case concerns an appeal made pursuant to subsection 129(7) of the *Canada Labour Code, Part II* (Code) on December 22, 2006, by R.L., a correctional officer employed by Correctional Service Canada (CSC) at Abbottsford, British Columbia. On January 4, 2007, R. L. appealed the written decision of health and safety officer Melinda Lum that a danger did not exist for the correctional officer in response to the officer's refusal to work made pursuant to section 128 of the *Code*.

[2] On December 18, 2006, R. L., a correctional officer with Correctional Service of Canada (CSC) at Pacific Institute and Regional Treatment Centre (PI), Abbottsford, British Columbia, had continued to refuse to work pursuant to section 128 of the Code. Specifically, the officer refused to conduct an unarmed escort with another correctional officer to transport inmate X (I/M X) from PI to Vancouver General Hospital (VGH) for dialysis treatment. He held that to conduct an unarmed escort of I/M X in the circumstances constituted a danger.

[3] Health and safety officer (HSO) Melinda Lum investigated the continued refusal to work of R. L. on December 19, 2006. Following her investigation, HSO Lum decided that a danger did not exist for R. L. with regard to the officer's refusal to work and confirmed her decision to the parties on January 4, 2007.

[4] According to HSO Lum's *Investigation Report and Decision* dated January 4, 2007, and testimony during the hearing, R. L. refused to carry out the unarmed escort as he felt that it is was unsafe for the following reasons:

- the previous four (4) escorts of I/M X to VGH conducted by R. L. had been armed;
- I/M X was rated as a medium security inmate but was not required to wear restraints normally applied to such inmates for escorts due to I/M X's medical condition, unless there was an emergency;
- I/M X had advanced knowledge of escorts and could alert outside help or have a plan of escape with outside help;
- I/M X had an extremely long sentence and there was an extreme potential for escape risk. In this regard, the employer confirmed that I/M X's initial sentence was increased from 5 years to 35 years in prison and I/M X was re-assessed from a low escape risk to a medium escape risk;
- I/M X was involved in a series of violent bank robberies with an accomplice who had subsequently served his sentence and was released and believed to be in the Vancouver area;
- I/M X has an extensive criminal background with the use of firearms;

- I/M X could gain access to needles in the dialysis room at VGH and use the needles as weapons against the unarmed correctional officers since the inmate would not be restrained;
- I/M X had several medical issues, one of which is low blood sugar, and is therefore susceptible to mood swings that could make the inmate combative;
- The correctional officer supervisor of R. L. recommended in the trip's *Threat Risk Assessment* (TRA) for I/M X that the escort be armed due to I/M X's lengthy sentence and recent behaviour that indicated instability.

[5] R. L. added later that a dialysis machine could be purchased and set up in a home anywhere so the need for dialysis did not preclude I/M X from trying to escape.

[6] HSO Lum further noted in her *Investigation Report and Decision* that a correctional officer had told her that R L could not use oleoresin capsicum (OC) spray in a hospital setting to control I/M X who would not be restrained. The same correctional officer held that I/M X is passive aggressive in nature and told her that I/M X yells at others but does not get physical.

[7] The employer told HSO Lum that R.L. was armed during his previous escorts of I/M X due to a collective agreement that was ratified on July 26, 2006, months prior to R. L.'s refusal to work. The collective agreement specified that correctional officers must be armed when escorting medium security prisoners if the TRA for the inmate is not completed 72 hours before the scheduled escort. I will refer to this as the 72 hour rule.

[8] The employer pointed out to HSO Lum that I/M X had previously gone out on over 100 escorts for medical treatment without incident. They stated that the majority of those escorts involved two unarmed escorts with no physical restraints on I/M X.

[9] The employer acknowledged that CO supervisor M. Ouellet had recommended on the TRA that the escort be armed due to I/M X's lengthy sentence and recent behaviour that indicated instability. However, the employer told HSO Lum that Commissioner's Directive 566-6 gives the Institutional Head authority to finally decide whether: additional staff is needed; if restraints are to be used on a medium security inmate; or if firearms are needed for an escort.

[10] HSO Lum was advised that P. Ouellet acting for the Executive Director, had disregarded M. Ouellet's recommendation that the escort be armed both because the TRA had been completed 72 hours prior to the escort and because there had not been any contrary intelligence information on

I/M X since the TRA had been completed. The employer added that restraints and OC spray were provided to the escort officers to use in case of emergency.

[11] The employer also told HSO Lum that the Security Intelligence Officer had no new intelligence regarding increased risk, outside threats or increased escape risk since September 2006 and I/M X has not had any contact with the inmate's accomplice to the crimes.

[12] The employer pointed out to HSO Lum that up to the end of September 2006, I/M X had had no institutional charges; I/M X had not acted out violently or threatened anyone; and I/M X had not caused any incidents while on previous escorts. It was noted, however, that I/M X had refused to go on medical escort a few times.

[13] HSO Lum learned from the employer that an appeal hearing to review the length of I/M X's sentence had been held on November 2, 2006. I/M X's parole officer stated to HSO Lum that if the inmate's sentence was not reduced, I/M X's risk to escape would remain moderate, but the inmate's health condition would have to be considered.

[14] The A/Associate Chief Medical Officer, K. Dick, told HSO Lum that I/M X suffers from a kidney condition and requires dialysis 3 times per week to survive. Without dialysis, I/M X could survive only for one week.

[15] K. Dick explained that I/M X cannot wear hand cuff restraints because the inmate has a fistula in the forearm to facilitate dialysis, and that if it is moved abruptly, it could lacerate the artery and result in extensive bleeding or death.

[16] K. Dick added that I/M X is a brittle diabetic and correctional officers must monitor the inmate's condition for low blood sugar. A symptom of low blood sugar is moodiness and combativeness.

[17] K. Dick stated that I/M X has a circulation problem that could be further compromised by the use of physical restraints possibly leading to injury or death. As such, I/M X is not required to wear a body belt or leg irons during escorts.

[18] K. Dick opined to HSO Lum that I/M X would not have enough knowledge to set-up and run a dialysis machine and would not have the supplies to run the machine. He was of the view that the police could track down I/M X when the inmate finally went to a hospital for dialysis.

[19] The employer acknowledged to HSO Lum that I/M X is manipulative and has a low frustration tolerance, but also that the inmate is willing to work through issues.

[20] HSO Lum additionally learned that hospital security is informed when I/M X is at the hospital. However hospital security is unarmed and does not stay with the correctional officers. Additionally, correctional officers have no way of communicating with hospital security to request backup.

[21] She also learned that I/M X undergoes a *pat down* prior to going out on an escort, but correctional officers opined that it is possible for I/M X to conceal a weapon in a body cavity.

[22] HSO Lum stated in her *Investigation Report and Decision* that she decided that a danger did not exist for R. L. related to his escorting I/M X from PI to the VGH on December 18, 2006 for the following reasons:

- Management based their decision not to authorize an armed escort for escorting I/M X to VGH on December 18, 2006 on CSC policies, and on the CX collective agreement relative to the 72 hours provision;
- The employer minimized the risk by conducting a *Threat Risk Analysis* before the escort;
- R.L. has been a correctional officer for 5 years and has completed core training requirements to perform the work and is experienced in conducting escorts;
- Even though I/M X knows which days the escorts will take place, I/M X does not know the time;
- I/M X has gone out on over 100 escorts without incident;
- The potential risk of I/M X escaping was low because there was no indication in the past of previous escape risk in I/M X's history and the Security Intelligence Officer had no new intelligence on I/M X;
- I/M X's many health issues that require medical treatment contribute to the low possibility that I/M X would plan an escape with outside help;
- CSC provided R.L. with OC spray and restraints to use in case of an emergency; and
- The possibility that an inmate might become non-compliant or physically aggressive towards R.L. is an inherent risk connected to the job.

Appellant's Case

[23] Appellant R.L. held that HSO Lum had erred in her interpretation and application of the definition of danger in the Code in respect of the facts of

the case and asked that her finding of no danger be rescinded and replaced with a finding that a danger existed in the circumstances.

[24] R.L. testified that when an escort trip will occur, an inmate is typically called to the Administrative and Discharge Processing Unit and frisked and scanned with the use of a metal detector wand for concealed weapons. In accordance with CSC policy, COs cannot do routine body searches where clothing is removed and so there is always the possibility that an inmate is hiding a weapon in a body cavity.

[25] R.L. stated that inmates are normally unaware of the date and time that the escort will occur. He stated that the escort is automatically cancelled by COs if the inmate learns when the escort will be conducted.

[26] R.L. stated that, except when an inmate is released from prison, all medium security inmates, other than I/M X, are handcuffed to the front and double locked and placed in leg irons for an escort, so as to prevent the inmate from attacking the COs and escaping. Inmates are also normally transported in a caged vehicle.

[27] R.L. testified that he had three issues with the Threat Risk Assessment (TRA) for I/M X.

[28] First, he felt the TRA for I/M X was incomplete because it did not include an appendix referenced in the TRA regarding the intelligence information on I/M X. According to the TRA, *Intelligence Information* includes: police; contraband; drugs; gang affiliation; immigration; deportation; community concerns; and external threat.

[29] R.L. testified that COs are required to review all security documents in the TRA related to the inmate being escorted and to ensure they are properly briefed on the security information. The security intelligence appendix referenced in the TRA was not provided to him nor was he briefed on the intelligence information.

[30] Second, R.L. was concerned that the person who had completed the *intelligence information* portion of the TRA was a *Health Services* Clerk at the Institution who was not a security officer.

[31] Third, R.L. reiterated that his CO supervisor had recommended in the *Recommendation* section of the TRA that the escort be armed because I/M X was serving a lengthy sentence and because I/M X's recent behaviour indicates *instability*.

[32] R.L. testified that COs are provided with a cell phone for escorts but these cell phones do not work in the VGH, so COs are unable to call for backup

if help is needed. Additionally, the two-way radios provided do not function in every location outside Abbotsford center due to lack of communication signal.

[33] R.L. noted in his testimony that I/M X had been rated in the TRA as having low institutional adjustment.

[34] R.L. held that for deciding what security requirements apply to an escort, the designated manager/warden is supposed to consult with the Security Intelligence Officer who works with police, reviews CO reports on inmates, and gives information regarding gangs, drugs and other illegal activities in the Institution. He testified that he had learned second hand that I/M X's accomplice to the armed robberies had been released from prison and was thought to be in the Vancouver area. It also appeared that the accomplice had attended I/M X's appeal hearing of November 2006.

[35] R.L. proffered a risk assessment document that documented the violent tendencies of I/M X during the inmate's armed bank robberies carried out with an accomplice.

[36] During his testimony, R.L. submitted a document that was signed by Executive Director Arthur Gordon, PI and dated February 2, 2007. The document confirmed that all future medical escorts of I/M X would be armed. A. Gordon noted in the document, that a variety of staff, including Correctional Supervisors, continued to believe that armed escorts were appropriate and desirable for escorts involving I/M X. He also indicated that weight was given to several factors, including the following:

- All current ETAs are to a fairly open hospital environment with relatively easy access to materials that could potentially be used as weapons;
- Inmate X's crimes were consistently and meticulously planned suggesting that if he were to plan an escape, it might be well planned and might involve community assistance;
- Because of medical concerns, normal restraint equipment (hand and leg irons) are not authorized to be used except in emergency circumstances;
- The Correctional Supervisor group who are most experienced in evaluating risk consistently felt that, in the absence of restraint equipment, arming the escorts represented appropriate due diligence.

[37] R.L. stated that HSO Lum was incorrect when she wrote in her decision report that I/M X did not know the hour when the escort would occur. R.L. held that the dialysis process at VGH was always at the approximate same time of day and so I/M X knew the approximate hour when the escorts to VGH would take place.

[38] R.L. also referred to the decision report of HSO Lum where she reasoned that a danger did not exist for R.L. because R.L. had completed the core training requirements and had experience in conducting escorts. R.L.

stated that he did not receive training with regard to the use of non-caged vehicles for escorts.

[39] R.L. referred to a CSC document entitled *Officer's Statement Observation Report*, dated August 26, 2006, where another CO commented on a medical escort involving I/M X that he conducted on August 24, 2006. The CO reported that a nurse at PI had told him that I/M X had spoken to I/M X's mother before the escort and she had contacted a doctor at VGH regarding the escort appointment. The CO who signed the *observation* stated:

> This information brings to attention a serious security concern with *(*I/M X*)*. Due to (I/M X's) medical condition, escort officers are forbidden from using restraint equipment on (I/M X). It also has become routine for (I/M X's) escort to go out unarmed, without a sidearm or OC spray. As I stated in a previous observation report dated 2006-07-28, (I/M X) is serving a 35 year sentence that commenced in 2001, (I/M X) is rated as a medium security inmate, and (the inmate) is being treated as though a minimum security. It is now apparent that he is making telephone calls to outside contacts and informing them of when and where he will be proceeding on an escort. This places the escorting officer in a dangerous situation, made significantly worse by the fact that the escorting officers are completely unarmed during the escort and the inmate under escort is completely unrestrained. In my opinion, this needs to change immediately before (I/M X) is allowed to proceed on another escort.

[40] R.L. testified that the risks associated with an unarmed escort of I/M X include the risk of: grievous bodily injury or death; being taken hostage; or being exposed to Hepatitis or HIV virus.

[41] Notwithstanding this, R.L. conceded that he was not aware of any incidents of physical violence at the hand of I/M X; not aware of any escape efforts by I/M X; and not aware of any incident where I/M X was violent against a CO. R.L. also confirmed that the vehicle used to transport I/M X was caged exactly like a police car.

Respondent's Case:

[42] J. Campbell, Warden, PI, stated that PI is a multilevel prison that holds approximately 400 medium and maximum and some minimum rated inmates.

[43] J. Campbell testified on a broad range of topics which included:

- the organization and structure of PI;
- the criteria and process of determining the security level assignment given to inmates;
- the criteria related to determining the escape risk of a prisoner;
- the criteria related to determining the risk an offender represents to the public;

- the process for determining the diverse needs of offenders at PI;
- the concept of medical escorts; and
- the CSC Security Bulletin on Security Escorts dated August 15, 2006, which amended the previous Bulletin on the subject dated August 3, 2006

[44] J. Campbell stated that the Bulletin specifies that all security escorts of inmates classified as a maximum security level must be armed with a service firearm effective July 27th, 2006. She stated that the Bulletin further specifies that in the case of male medium security level inmates, the Institutional Head must ensure that a TRA is completed 72 hours prior to the scheduled departure time of the escort (the 72 hour policy). If the TRA has not been completed 72 hours prior to the escort, the escort must be armed. The escort must also be armed where the TRA specifies arming the escort.

[45] J. Campbell stated that she is responsible for deciding the security level assigned to inmates and does this in consultation with managers of the various services at the Pacific Institution. She added that security intelligence information in the TRA is being updated on an on-going basis and new information could cause the escort to be cancelled.

[46] The CSC Security Bulletin on Security Escorts states that sections A and B of the TRA can be completed by staff designated by the Institution Head, except in the case of the Intelligence Information. The section reads:

> Additional Information:
>
> - Sections A and B <u>with the exception of the intelligence information</u> [My underline] may be completed by staff designated by the Institution Head.
> - The intelligence information from Section B plus the Section C recommendations must be completed by a Correctional Supervisor or Assistant Team Leader.

[47] J. Campbell confirmed that the basic training that COs receive includes: weapons qualification; weapons retention; use of restraints; use of firearms; and legal opinions regarding the use of force by COs.

[48] She stated that there are no formal refresher courses but reiterated that correctional officers are pre-briefed and briefed on the offender to be escorted and the inmates' characteristics.

[49] She also testified that medical security escorts are very frequent at PI with 5-6 escorts per day, Monday to Friday.

[50] J. Campbell confirmed that she was at PI the day of R.L.'s refusal to work but had not signed the TRA as Institutional Head for the I/M X escort.

[51] P. Ouellet, Psychologist, Pacific Institute, testified at the hearing.

[52] He stated that he signed the TRA in this case for A. Gordon, Executive Director, PI, because A. Gordon had left for the day and, because of the 72 hour policy, the TRA had to be completed before he left work.

[53] He confirmed that the Health Unit clerk had completed the security information portion of the TRA after collecting information from correctional officers and the Security Intelligence Officer. P. Ouellet testified that he had decided that the I/M X escort would be unarmed because he felt there was no new evidence to warrant arming the escort.

[54] S. Cater, Assistant Warden, Management Services, PI, testified at the hearing.

[55] She stated that she became involved in the issue of escorts for I/M X on September 15, 2006 and September 25, 2006. On September 15, 2006, a CO assigned to escort I/M X without a nurse advised his supervisor that he did not believe that it was safe for him to escort I/M X to VGH because: I/M X was a medium security inmate; I/M X was not to be restrained; and there was not enough staff to deal with I/M X if there was an emergency. The escort was subsequently cancelled.

[56] On September 25, 2006, a CO refused to work to escort I/M X to VGH. The escort was completed by two other COs who were advised of the refusal to work and the circumstances. The CO who refused to work stayed behind and participated in the investigation of his refusal to work by S. Cater and the employee representative.

[57] S. Cater testified that the investigation included consultations with the A/Chief Health Care, the Security Intelligence Officer and the CO Supervisor. She stated that following the investigation of the refusal to work, she decided for the employer that a danger did not exist for the CO who had refused to work. Notwithstanding this finding, S. Cater stated that the refusal to work investigation committee recommended that:

- a security escort vehicle be used for escorting I/M X where reasonable and practicable;
- restraint equipment should be available to escorting officers in the event of an emergency where exceptional control measures are required to control I/M X;
- OC spray be issued to the escorting officers.

[58] She further testified that the CO who refused to work subsequently accepted the employer's decision and the Warden accepted the three recommendations.

[59] S. Cater's next involvement was in the investigation of R.L.'s refusal to work on December 18, 2006, following which she decided that a danger did not exist for R. L.

Submissions-Appellant

[60] C. Blanchette, Union Advisor, CSN-Pacific, argued that HSO Lum erred in fact and in law when she decided that a danger did not exist for R.L.. She requested that I rescind the decision and find that a danger existed.

[61] C. Blanchette stated that the definition of danger in the Code was amended and expanded in year 2000. She stated that the decision of the Federal Court of Appeal in the case of *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada (Parks Canada)*, 2005 FCA 156 and the decision of the Federal Court in the case of *Juan Verville and Correctional Service of Canada, Kent Institution*, 2004 FC 767, have provided guidance as to how the term danger is to be interpreted and applied. She argued that both dealt with the risk of spontaneous assault and the risk of grievous bodily harm or death and hold that it is not necessary for injury to occur immediately upon exposure to the hazard for a finding of danger.

[62] In this regard, C. Blanchette cited paragraph 34 of the *Verville supra* decision wherein Justice Gauthier stated:

> [34] …As mentioned in *Martin supra*, the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered….

[63] C. Blanchette maintained that the circumstances in this case, where R.L. refused to conduct an unarmed escort of I/M X to VGH, were not normal because I/M X would not be restrained during the escort and because I/M X knew both the date and approximate time of the escort.

[64] C. Blanchette maintained that the TRA was problematic because the Intelligence Information section, contrary to CSC policy, had been completed by a clerk in the Health Unit instead of a security intelligence officer and the Intelligence Information Appendix was not included in the TRA that was provided to R.L.. She added that the CO supervisor had recommended in the TRA that the escort be armed.

[65] C. Blanchette pointed to the evidence that the TRA did not mention the previous refusals to work by other correctional officers relative to I/M X

escorts or the refusal by I/M X to go on an escort due to dissatisfaction that a car would not be used for the transport.

[66] She added that R.L. was not provided with the intelligence information referenced in the TRA and was not briefed on the information.

[67] She then referred to the evidence that the behaviour of I/M X is unpredictable as he has mood swings, is manipulative and is argumentative.

[68] C. Blanchette added that the evidence shows that I/M X was known to have communicated with people on the outside and that I/M X's accomplice in crime was believed to be in the Vancouver area and appears to have attended a sentence hearing for I/M X in November 2006. She reiterated that the evidence shows that I/M X was known to have the ability to plan and execute activities, was known to be violent and had a fascination with firearms.

[69] Finally C. Blanchette pointed out that A. Gordon had later agreed that escorts involving I/M X be armed because the environment at VGH is not controlled and the inmate has access to numerous implements that could be used as a weapon.

[70] She held the objective of the Code is eliminating risk and argued that HSO Lum erred when she decided that a danger did not exist for R.L. because CSC had taken all reasonably practicable measures to mitigate the risk connected with security escorts. C. Blanchette argued that CSC offered no reason why it was not reasonable in the circumstances to issue a firearm to R.L. for safety. She additionally argued that CSC provided no evidence that providing R.L. with a sidearm would add unacceptable risk.

[71] C. Blanchette added that HSO Lum erred when she stated that the potential threat of an inmate assaulting a correctional officer had been minimized by the employer through the use of the TRA and by providing training to R.L.. She held that HSO Lum did not consider the uncontrolled environment at the VGH in her decision and did not accept that I/M X knew both the date and time of escorts. She added that the evidence showed that a third party, I/M X's mother, was aware of a particular escort before it had taken place and that possibility added risk to any escort.

[72] C. Blanchette held that the training that CSC provided to R.L. did not deal with situations where restraints could not be used and where the normal security vehicle for escort could not be used. She asked the undersigned to consider the evidence that there is little or no refresher training provided to COs.

[73] C. Blanchette added that CSC did not offer any evidence that the OC spray provided to R.L. was effective to mitigate the risk added by the fact that I/M X is not restrained. She pointed to the evidence that OC spray could not be used in a hospital and communication devices were limited with respect to calling for assistance.

[74] C. Blanchette held that the Code requires the employer to inform employees of known risks associated with the work and held that CSC is in contravention of the Code because it did not inform R.L. of the risks related to the escort. She held that this was a contravention under section 145.1 of the Code.

Submissions-Respondent

[75] N. McGraw, counsel for CSC, argued that the issue before me in this case is whether or not a danger existed in accordance with the Code.

[76] N. McGraw maintained that CSC respects the collective agreement provision that an escort is automatically armed if the TRA is not signed 72 hours prior to the time of the scheduled escort. He argued that deciding to arm an escort as a result of the collective agreement is not about preventing an escape or preventing possible injury to a CO.

[77] N. McGraw referred me to section 4 of the *Corrections and Conditional Release Act* (CCRA) which outlines the principles that guide the Service. He noted that paragraph 4(d) states:

> (d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

[78] He stated that the evidence shows that decisions whether or not to arm an escort are taken seriously at CSC and follow an established process for deciding the issue.

[79] He held that the Appellant had not established that a danger, if it existed, would be mitigated by providing the CO with a firearm.

[80] N. McGraw stated that the CSC officials responsible for providing input into the TRA and those making the decision whether or not to arm an escort have vast experience in the prison environment.

[81] He argued that much of C. Blanchette's arguments were based on hearsay evidence and she did not see fit to call the author of the documents that R.L. had referenced in his testimony.

[82] He also argued that the evidence confirmed that I/M X had no history of violence at PI and that the inmate's medical situation essentially precluded

an escape such that the risk to R.L. did not exceed a mere possibility. He held that whether the actual number of escorts for I/M X was 50 or 100, there was no evidence of violence during any escort. He added that the reason that escorts were armed in the past was a result of the 72 hour rule and not due to a concern for the safety of the COs.

[83] N. McGraw maintained that C. Blanchette had not proffered any evidence to show that the provision of OC spray was ineffective with regard to mitigating risk to the COs. He pointed out that the recommendation that escorts of I/M X be equipped with OC spray was a joint recommendation of the employer and employee representatives who investigated the refusal to work. He added that C. Blanchette had not seen fit to call the employee health and safety committee member who agreed with the OC spray recommendation if she doubted the usefulness of providing OC spray to Correctional Service officers.

[84] N. McGraw held that the fact that CSC subsequently agreed, following the refusal to work, that all I/M X escorts would be armed is not and should not be regarded as evidence that a danger existed for R.L..

[85] He maintained that where the employer has taken all reasonable measures to mitigate risks, a finding of danger applies only where it is established that a hazard, condition or activity exists that could reasonably be expected to cause injury or illness before the hazard or condition could be corrected or the activity altered as a reasonable possibility as opposed to a mere possibility.

[86] N. McGraw referenced the decision of Appeals Officer S. Cadieux in the case of *Brent Johnstone, Allen Allain, Tim Martin and CSC*, Decision No. 05-020 on May 3, 2005 and the decision of Appeals Officer M. Beauchamp in the case of *Paul Chamard and Simon Ruel and CSC Donnacona Institute*, Decision No. 05-004, dated January 22, 2005. He held that the Johnstone supra decision is dissimilar from the case at hand because the Johnstone case dealt with heightened risk that led to reconsideration of the decision to arm.

[87] N. McGraw held that this case is similar to the case of *Paul Chamard and Simon Ruel and CSC Donnacona Institute supra* because there was no heightened risk in that case and the risk of injury or illness was a mere possibility.

Determination

[88] The issue in this case is whether or not the unarmed security escort of I/M X to VGH constituted a danger in the circumstances.

[89] To make a determination, it is necessary to consider the evidence in the case, the applicable legislation and applicable jurisprudence for interpreting and applying the legislation to the circumstances in the case.

[90] The term danger is defined in subsection 122(1) of the Code 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 the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[91] Justice Gauthier stated in paragraph [36] of the Verville decision (supra) that the definition of danger only requires that one determine the circumstances in which the potential hazard or condition or future activity could reasonably be expected to cause injury to any person exposed thereto before the hazard or condition can be corrected or activity altered, and establish that the circumstances will occur as a reasonable possibility and not as a mere possibility. Paragraph [36] reads:

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential hazard or condition or the future activity will occur. I do not construe Tremblay-Lamer's reason 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 ascertain 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.

[92] Thus, for a finding of danger in this case, it is necessary to determine the circumstances in which the potential hazard could reasonably be expected to cause injury to any person exposed thereto before the hazard or condition can be corrected or activity altered and establish that those circumstances will occur as a reasonable possibility and not as a mere possibility.

[93] In this regard, I find that the following circumstances applied in respect of R.L.'s refusal to work on December 18, 2006, to escort I/M X to VGH without a firearm.

[94] **I/M X's was armed and violent during the well planned and executed crimes that led to the inmate's incarceration:**

- The uncontested evidence of R.L. was that I/M X had meticulously planned and executed a series of armed and violent bank robberies in the Vancouver area and I/M X had ultimately received a 35 year prison sentence;

- The document entitled *Case Status, Inmate X*, submitted at the hearing includes a statement by Mr. Justice Warren that I/M X robbed the bank tellers at gun point under circumstances of "threats and extreme violence"; [My underline]

- R.L. testified that I/M X had a fascination with firearms; and

- I/M X was rated at PI as a medium security inmate and rated as having low institutional adjustment.

[95] **The security escorts for I/M X departed from normal escort security procedures due to I/M X's medical issues:**

- Medium security inmates are normally handcuffed to the front and double locked to prevent the inmate from attacking the COs or escaping unless the inmate is being released from prison. Medium security inmates are also placed in leg irons to prevent them from kicking or escaping. I/M X, a medium security inmate, was not required to wear mandatory handcuffs and leg restraints during escorts due to numerous medical conditions. As a result, I/M X had greater opportunity to gain access to needles or other implements in the dialysis room at VGH that could be used as weapons against unarmed correctional officers.

- For security reasons, inmates are not informed of the date and time of a security escort. If the inmate learns of the date or time, the escort is cancelled. R.L. testified that I/M X's dialysis were conducted at VGH on Monday, Wednesday or Friday at the same time with few exceptions. Thus, I/M X had prior knowledge of the date and approximate time of escorts to VGH for dialysis treatment. As a result, I/M X had the ability and opportunity to formulate a plan of escape.

- I/M X was, in fact, known to have previously informed an outsider of the time of an escort.

- The above noted status report entitled *Case Status, Inmate X*, indicated that I/M X's accomplice was thought to be in the Vancouver

area and appeared to have attended a recent sentence appeal hearing for I/M X.

[96] **The TRA for the medical security escort of I/M X on December 18, 2006, was flawed:**

- The TRA for I/M X was incomplete because it did not include the Appendix referenced in the TRA regarding the security intelligence information on I/M X. According to the TRA, Intelligence Information includes information regarding: police; contraband; drugs; gang affiliation; immigration; deportation; community concerns; and external threat;

- Contrary to CSC Security Bulletin No. 2005-5, a clerk in the *Health Services* unit at the Institution who was not a security officer completed the *intelligence information* portion of the TRA on the subject of *Security Escorts,* dated August 15, 2006.

[97] **CO Supervisor to R.L. recommended that the escort be armed stating that I/M X's recent behaviour indicated instability:**

- Correctional Officer Supervisor of R.L. recommended in the trip Threat Risk Assessment (TRA) for I/M X that the escort be armed due to I/M X's lengthy sentence and recent behaviour that indicated instability;

- A/DW P. Ouellet, Psychologist, Pacific Institute acting for the Warden at the time testified that he received the TRA for signature at approximately 17:40 hour when most senior officials had left for the day. He confirmed that the TRA did not include security information documents including the *Appendix* referenced in the TRA. P. Ouellet stated that he rejected the recommendation of CO Supervisor Ouellet because he had no information regarding a heightened level of risk in connection with I/M X. However, P. Ouellet did not testify to having consulted anyone regarding CO Supervisor Ouellet's reference to "*I/M X's… recent behaviour that indicated instability*."

[98] **R.L. was not properly briefed regarding the security intelligence information that ought to have been included in the TRA**:

- CSC Commission Directive 566-6 entitled, Security Escorts, requires in item 9 and 14 that COs be thoroughly briefed on all security documents related to the inmate being escorted. Item 9 and 14 read as follows:

> 9. The Institutional Head shall ensure that escorting officers are thoroughly briefed on the inmate being escorted using the Escort Briefing Form CSC/SCC 753;
>
> 14. The officer in charge of the escort shall ensure that he/she is in possession of all pertinent documentation related to the inmate and the escort.

- While I was not provided with evidence regarding Escort Briefing Form CSC/SCC 753, I would interpret Item 14 to include the CSC document entitled Threat Risk Assessment (TRA) for Security Escorts and the CSC document entitled Escorted Temporary Absence Work Release Permit;

- R.L. was not provided with the security intelligence information *Appendix* referenced in Part B of the TRA and was not briefed regarding the escort in this case;

- R.L. further testified that COs may not always be briefed by their supervisor regarding an escort and must rely on the information in the TRA.

[99] **The ability of R.L. to summon backup assistance in the event of an attack or escape by I/M X was not assured**:

- The cell phone provided to COs for escorts does not work in the VGH and so COs are unable to call hospital security officers for backup if help is needed; and

- The two-way radios provided for the security escorts do not function in every location outside the Abbotsford centre.

[100] **The effectiveness of the OC spray as a mitigating measure in respect of the medical security escort of I/M X to VGH was not established**:

- The evidence of R.L. was that OC spray could not be used in a hospital;

- CSC did not offer any evidence that the OC spray provided to R. L. was effective to mitigate the risk connected to the fact that I/M X would not be restrained during the escort and while at the hospital.

[101] **CSC applies the CCRA principle to use *the least restrictive measures* with regard to searching inmates for weapons**:

- When an escort trip will occur, an inmate is typically called to the Administrative and Discharge Processing Unit and frisked for

concealed weapons and scanned with the use of a metal detector wand. In compliance with CCRA principles, COs cannot perform routine body searches on inmates where clothing is removed. As a consequence, there is always the possibility that an inmate is concealing a weapon in a body cavity.

[102] In my opinion, the above noted evidence establishes the circumstances in which the potential hazard related the unpredictability of behaviour of I/M X during medical security escorts could reasonably be expected to cause injury before the hazard could be corrected.

[103] In connection with this, I was not persuaded of the absence of danger by the evidence that: I/M X suffered from multiple illnesses and required weekly medical intervention that would be very difficult to get outside a hospital; I/M X had gone out on more than 50 security escorts without incident; I/M X had no institutional charges up to the end of September 2006; and there was no new intelligence information regarding increased risk, outside threats or increased escape risk.

[104] With regard to the fact that I/M X required weekly dialysis and this would be very difficult for I/M X to get in the event of an escape, the evidence did not establish that this would necessarily deter I/M X from attempting an escape given: the inmate's unusually long sentence; violent history; and the fact that his medical condition could adversely affect his frame of mind.

[105] Similarly, I was not persuaded by the fact that I/M X had gone out on past medical escorts without incident. The evidence was that many of the escorts were armed and, again, the inmate had an unusually long sentence; a violent history; and a medical condition could adversely affect his frame of mind. In addition, there was the evidence that I/M X's accomplice may have attended I/M X's sentence appeal hearing.

[106] Finally, I was not persuaded by the evidence that I/M X had no institutional charges up to the end of September 2006 or that there was no new intelligence information regarding increased risk, outside threats or increased escape risk.

[107] The evidence was that I/M X had low institutional adjustment and the day before R. L. exercised his right to refuse, his Correctional Supervisor recommended in the TRA that the escort be armed because the inmate's recent behaviour indicated instability. I was not satisfied by the evidence that CSC had sufficiently assessed those comments to justify disregarding them as was the case.

[108] Based on these facts, I find that a danger existed for R.L. when he refused to escort I/M X on medical escort to the VGH.

[109] Notwithstanding this finding, the evidence established that following the refusal to work by R.L., A. Gordon, Executive Director, RTC, reviewed the issue of arming medical security escorts of I/M X and concluded that all future escorts of I/M X were to be armed. A. Gordon noted in his decision that the Correctional Supervisor group who are most experienced in evaluating risk consistently felt that, in the absence of restraint equipment, arming the escorts represented appropriate due diligence. Based on the evidence before me, I would agree with A. Gordon's conclusion to arm future medical security escorts of I/MX as a necessary mitigation measure. On that basis, I see no need for further consideration of this on my part.

[110] That stated, I feel compelled to comment on HSO Lum's statement that the possibility that I/M X might become non-compliant or physically aggressive towards R.L. is an inherent part of the job.

[111] Justice Gauthier stated at paragraph 55 of her decision in the *Juan Verville* case (supra) that it would be logical to exclude a danger as a normal condition of work that depends on the method used to perform a job or activity. In my opinion, this case turned on the circumstances related to the CSC procedures connected with the medical escort of I/M X that R.L. was assigned to conduct on the day of his refusal to work. Paragraph 55 reads:

> [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?

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Douglas Malanka
Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Decision	OHSTC-08-08-031
Appellant	R.L.
Respondent	Correctional Service Canada
Provisions	
Canada Labour Code	124, 128, 129.1 129(7),
Keywords	potential hazard, danger, medical escort, violent, medical conditions, Threat Risk Assessment, physical restraints, advanced information of escorts, staff recommendations, institutional charges.

SUMMARY

A Correctional Officer refused to conduct an unarmed medical security escort of an inmate known to have committed armed and violent bank robberies who, for medical reasons, had advance knowledge of the date and approximate time of day of the medical escorts and, for the same medical reasons, could not be physically restrained during the escorts as normally required.

The health and safety officer who investigated into the refusal to work of the correctional officer decided that a danger did not exist for the correctional officer because the inmate had previously gone out on numerous medical escorts without incident, the inmate had not caused problems in the recent past, and because the measures taken by the employer to mitigate any risk were adequate.

Notwithstanding the officer's finding of absence of danger, the employer subsequently reviewed the question of armed escorts for the inmate in question and decided that all future escorts of the inmate would be armed.

The appeals officer concluded that a danger existed for the correctional services officer relative to medical escorts of the inmate in question because of the inmates armed and violent crimes that led to incarceration; the inmate had prior knowledge of the date and approximate time of the escorts and thus had the opportunity and means to communicate with persons outside the prison for the purpose of planning and executing an escape; for medical reasons, the inmate could not be physically restrained in accordance with normal practice; the assessment form related to the escort of the inmate was flawed; the correctional

supervisor had recommended that the escort be armed due to the inmate's recent behavioural stability and because of the absence of certain ability to call for back-up at all times during the escort.

The appeals officer heard evidence that CSC assessed the risk of an attempted escape by I/M X to be low based on the fact that: I/M X had gone out on more than 50 security escorts without incident; I/M X had no institutional charges up to the end of September 2006; there was no new intelligence information regarding increased risk, outside threats or increased escape risk since September 2006; and I/M X suffered from multiple illnesses. However, the appeals officer did not find this sufficiently compelling to alter his finding of danger.

In consideration of the fact that the employer conducted a risk review subsequent to the decision of absence of danger by a health and safety officer and decided that all future medical escorts of the inmate would be armed, the appeals officer decided that no further action was necessary on his part.