Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2007-09
2007-10
2007-11
2007-12
Decision No. OHSTC-09-009 CORRECTION

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Éric V. and al.

appellants

and

Correctional Service of Canada

respondent

April 9, 2009

For the appellants
John Mancini, Counsel, UCCO-SCOC-CSN

For the respondent
Nadine Perron and Nadia Hudon, Justice Canada

CORRECTION OF DECISION

Canada

[1] The Appeals Officer rendered a decision in the present case on February 27, 2009.

[2] That decision contains text mistakes that need to be corrected.

[3] In the decision numbering on the title page, the decision number reads:
Decision no OHSTC-07-009.

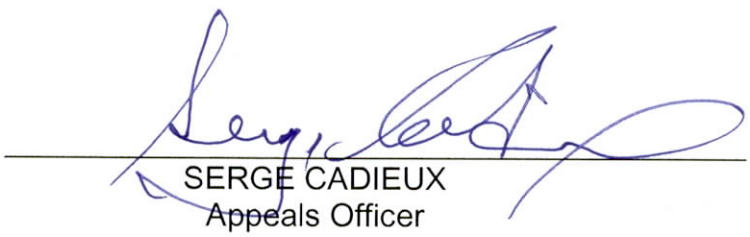
[4] It should have read:
Decision no OHSTC-09-009.

[5] At paragraph [31] of the French text, second line, the date reads:
[...] i.e. celle du 17 avril 2008.

[6] It should have read:
[...] i.e. celle du 17 avril 2007.

[7] At paragraph [36] of the French text, first line, the date reads:
[...] soit le 4 mai 2008

[8] It should have read:
[...] soit le 4 mai 2007.



SERGE CADIEUX
Appeals Officer

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February 27, 2009

This case was decided by Serge Cadieux, Appeals Officer.

For the appellants
John Mancini, Counsel, UCCO-SCOC-CSN

For the respondent
Nadine Perron and Nadia Hudon, Justice Canada

[1] The following pertains to four appeals filed under subsection 129(7) of the *Canada Labour Code, Part II* (the Code) by four Correctional Officers (COs) employed by the Correctional Service of Canada (CSC). The four COs are Messrs. E.V., J.S.P., J.T., and P.G.[1]

[2] In this case, the four COs in succession refused to escort a high-profile inmate (the inmate) to a local health care facility. The facts are that there were two occasions, i.e. April 11, 2007 and May 4, 2007, when each escort team, composed of two COs, refused to carry out the escort. The reason that each CO gave for refusing was that the escort was to be unarmed, thus putting their health and safety in danger given that the inmate to be escorted had a price on his head.

[3] The four appeals were heard jointly because they dealt with identical circumstances.

Preliminary matters

[4] Three preliminary objections were raised by the employer.

[5] The first objection that Ms. Perron put forth was that, according to the appeal documents[2] received by the Canada Appeals Office (CAO)[3] on Occupational Health and Safety, two of the four appeals, i.e. those of E.V. and J.S.P., were untimely and therefore inadmissible. Ms. Perron argued that the decision by health and safety officer (HSO) Régis Tremblay was dated May 4, 2007, while the appeal form was dated May 16, 2007, a total of 12 days separating the decision from the appeal in each case. This would make the appeals untimely given that the Code requires that appeals be filed in writing with an appeals officer (AO) within ten days after receiving notice of the decision (129(7)).

[6] Ms. Perron's second objection pertained to the presence of L.T., a union representative and member of the work place health and safety committee, as Mr. Mancini's assistant and advisor during the proceedings. The objection was based on the fact that L.T. was also acting as the appellants' union representative, which in Ms. Perron's opinion was unacceptable.

[7] I dismissed those two objections for the following reasons.

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[1] Initials alone will be used in the text in order to protect the persons' identities.
[2] Exhibit R-3
[3] The CAO is now known as the Occupational Health and Safety Tribunal Canada. However, for the purposes of this case, which dates from 2007, I will continue to use the designation "CAO" to refer to the Tribunal as an entity and the more general designation "tribunal" with reference to the appeals officer who is hearing the appeal in this matter.

[8] In response to the first objection, I determined that the two appeals were filed on time and I decided to hear them. The HSO did not actually hand his "decision" to the appellants in person but rather faxed it to them at the penitentiary's offices. However, the offices were closed until May 7, 2007. Thus, the appellants were not informed individually of the HSO's decision (they did not receive the fax) until several days later. In fact, L.T.'s notes indicate that the appellants were not informed of the decision dated May 4, 2007 until seven days later. L.T. stated that the two appellants did not receive the decision until May 11, 2007. I chose to accept this uncontradicted explanation.

[9] Accordingly, under the powers conferred on me by paragraph 146.2(f)[4] of the Code, I extended the applicable time and I accepted to hear the appellants' appeal for the above-mentioned reasons. The appeal was deemed to have been filed within the ten-day period as prescribed in subsection 129(7) of the Code.

[10] In response to the second objection, I authorized L.T. to assist Mr. Mancini in the appeal process. It was agreed that L.T. would testify before the appellants came to testify. This would eliminate a perception of bias in favour of the appellants that L.T. might have cast as union representative. Moreover, as a member of the health and safety committee, L.T. had previously taken part in the investigation that followed the appellant's refusals to work. Therefore, he had a good knowledge of the circumstances to be discussed in this case. Furthermore, under the Code L.T. was entitled to represent employees in matters pertaining to occupational health and safety. Accordingly, there were no reasonable grounds for preventing L.T. from assisting Mr. Mancini.

[11] In any event, further to Ms. Perron's and Mr. Mancini's representations I decided to proceed in camera but not to exclude the key witnesses. Accordingly, only the four appellants and L.T. were authorized to be present during the proceedings before the AO. The proceedings were held in camera after the HSO's testimony.

[12] The third objection pertained to the tribunal's jurisdiction.

[13] The employer argued that the AO did not have the authority to hear this appeal in light of the HSO's finding of normal condition of employment

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[4] 146.2 In connection with the procedure prescribed in subsection 146.1(1), an appeals officer may

"(f) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence."

under paragraph 128(2)(b) of the Code, which constituted an exception to the right of refusal. The employer argued that this finding precluded the right of appeal set out at subsection 129(7) of the Code, which must necessarily be based on the absence of danger as a condition. The objection[5] was detailed by Ms. Perron at the hearing of November 1, 2007.

[14] Ms. Perron argued that, pursuant to section 128, an employee may not refuse to work when the circumstances of the refusal constitute normal conditions of employment, which the HSO's preliminary inquiry had confirmed. Ms. Perron maintained that at that point the HSO was not obliged to conduct an investigation to decide on whether or not a danger existed. That is what the HSO stated he had done, i.e. he did not investigate the danger alleged by the complainants under subsection 129(1), a danger referred to in subsection 128(1), which Ms. Perron stated was not the same as that referred to in paragraph 128(2)(b). The danger was not investigated because subsection 128(13), which calls for an HSO's intervention, refers to an investigation into the matter, which is broader than an investigation of the danger. Accordingly, the HSO did not determine whether or not there was a danger because, according to Ms. Perron, paragraph 128(2)(b) serves as a filter that authorizes an HSO not to render a decision on the danger.

[15] In response, the employees' representative argued that the tribunal, i.e. the AO, should proceed in this matter since the appeal to the AO's decision was a *de novo* statutory appeal. Furthermore, Mr. Mancini maintained that if the HSO's determination were to be accepted, it would no longer be possible to determine that a danger existed with reference to a particular escort since under the new policy the HSO would no longer investigate the matter of danger. Whatever a CO did, such as escorts, whether armed or not armed, would always be a normal condition of employment. The sophistry being submitted to the AO was that there was no determination as to danger and thus no right of appeal.

[16] In reply, Ms. Perron argued that this was the first time that a filter had been identified and that it had to be taken into account. In that regard, Ms. Perron cited the Federal Court decision in *Dragseth v. Canada (Treasury Board),* [1991] F.C.J. No. 1074 (hereinafter *Dragseth*). Mr. Mancini had referred to that decision in stressing the importance of holding an investigation. Ms. Perron stated as follows:[6]

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[5] Transcript of recording of November 1, 2007, p. 209, line 18 to p. 215, line 23
[6] Transcript of recording of November 1, 2007, p. 240, lines 12-20

[Translation]
And the decision in *Dragseth*, I have read it, and in that case it was noted that the employees had informed a safety officer regarding the refusal to work, but he did not investigate. He did not initiate anything. I think that we are not – that this does not apply in this case. Mr. Tremblay intervened, he met with people, he submitted an investigation report, and he rendered a decision with reasons.

[17] On November 13, 2007, Ms. Perron objected to the continuation of the hearing. She referred to two Federal Court decisions that in her opinion would be determinative in the debate over the Appeals Officer's authority in the present appeal and that would support the employer's position. Those two decisions are

Sachs v. Air Canada, 2006 FC 673; and
Sachs v. Air Canada, 2007 FCA 270

[18] I dismissed Ms. Perron's objection, for reasons that are explained in the AO's decision in CAO-07-041(I). That decision was the subject of an application for judicial review, which the Federal Court dismissed in *Sa Majesté la Reine du Chef du Canada c. Éric V. et autres, [2008] CF 1116* (hereinafter *Éric V. et autres*). In the ruling by Mr. Justice Maurice E. Lagacé, the Court held that the application for judicial review was premature and that the AO had to conclude his investigation and decide on the matter of jurisdiction.

[19] Additional arguments on the matter of jurisdiction were adduced by the parties when they made their final arguments. I disposed of this matter in the first part of my analysis on "The matter of jurisdiction" (see REASONS below).

Investigation by Health and Safety Officer

Summary of HSO's investigation

[20] The HSO conducted two investigations referred to as *preliminary* in response to the COs' refusals to work of April 11, 2007 and May 4, 2007. He found that the conditions cited by the COs were normal conditions of employment under section 128 of the Code.

[21] In fact, after being notified of the COs' refusal to work, the HSO conducted what he referred to as a preliminary inquiry in order to determine whether the stages in the procedure for refusing to work where a danger exists had been followed. In conducting that inquiry, the

HSO used a form[7] originating from an OPD (Operations Program Directive), i.e. OPD 905-1[8] (Response to a Refusal to Work in Case of Danger). The document in question had been issued by of the Labour Program of Human Resources and Social Development Canada (HRSDC) and he was required to apply it. Using this form the HSO determined as follows:

> [Translation]
> The refusal to work is not authorized under paragraph 128(2)(b).

[22] The HSO therefore stopped his inquiry at that point and withdrew from the refusal to work procedure since, according to the form, the refusals were not authorized under the Code. As well, the HSO stated that he did not make a determination regarding the danger alleged by the COs. In fact, in his reply to the CAO's email[9] requesting a copy of his investigation report, the HSO wrote as follows:

> [Translation]
>
> To make everything official in writing, I did not render a decision under 129(4) and I did not even investigate under 129(1) of the CLC Part II. I followed OPD 905-1, amended on March 7, 2007, according to which I had to determine whether the employee's reason or reasons for refusing to work constituted a normal condition of employment. If so, 128(2)(b) provides that an employee may not refuse to work and I am rendering a decision in writing to that effect.
>
> I have rendered 4 decisions to the effect that the refusals pertained to a normal condition of employment and therefore the employees could not invoke 128(1) in refusing to perform their work.
>
> The employees must apply to the Federal Court (Federal Court Act, sections 18 and 18.1) to contest my decisions.

[23] The HSO explained that before the implementation of OPD 905-1 (as amended on March 7, 2007) and the IPGs[10] associated with it, namely IPG 062[11] (Definition of danger) and IPG 070[12] (Normal condition of employment), there had been a different procedure for investigating a refusal to work. In fact, he had never conducted a preliminary inquiry intended to determine the existence of normal conditions of employment. He stated as follows:[13]

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[7] Document D36, "ANNEXE G, RAPPORT D'ENQUÊTE PRÉLIMINAIRE" [Annex G, Preliminary Inquiry Report].
[8] Exhibit S-11
[9] See Document D4, p. 1 of 2.
[10] English abbreviation for Interim Policy Guideline
[11] Exhibit S-9
[12] Exhibit S-10
[13] Transcript of recording of November 1, 2007, p. 87, lines 13-21

[Translation]
Therefore, as provided under the Code, what we normally did was make a determination regarding the existing danger, the existence of danger. Now the OPD has to be applied, and a preliminary inquiry needs to be carried out to determine whether the circumstances in which the refusal was made constitute a normal condition of employment – if we had normal conditions of employment.

HSO's testimony

[24] The HSO informed us that on April 11, 2007 J.T. and P.G. invoked their right to refuse to work and that the employer reported the refusals to work to an HSO that same day, as required under the Code (subsection 128(13)). The HSO stated that, because the employer had taken temporary measures, i.e. the escort had been cancelled, he did not go to the COs' work place until April 17, 2007 to investigate, given that there was no longer an emergency.

[25] When questioned about the reasons for P.G.'s refusal, the HSO referred Mr. Mancini to question 8 of the preliminary report.[14] It should be noted here that question 8 and the reply to it are essentially the same in the four cases of refusal to work. They read as follows:

> 8. Describe the activity the employee is refusing to perform and highlight the circumstances that the employee believes constitutes a danger. (Refer to Appendix A, Form LAB/TRAV 1069, Question 12)
>
> [Translation]
> "An unarmed medical escort of an inmate. The inmate is an informant who reportedly has a contract on him and who could be attacked, thereby endangering the escorting officer's safety."

[26] The HSO testified that he did not verify, and was not required to verify, whether it was true that the inmate in question had a contract on him. He stated as follows:[15]

> [Translation]
> Listen, I didn't– at that moment I didn't check into it. I would if I had to determine whether there was a danger. My job is to conduct the preliminary inquiry...

[27] The HSO went on to explain that conducting escorts, whether armed or unarmed, was a normal condition of employment for the COs. A Threat Risk Assessment (TRA) is carried out by specialists, i.e. the unit board, to determine whether or not the escort should be armed. The TRA takes the following three criteria into account:

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[14] Exhibit A-8
[15] Transcript of recording of November 1, 2007, p. 102, lines 8-15

- the institutional adjustment risk,
- the escape risk, and
- the risk to the inmate's safety.

[28] The HSO stated that the possibility of an outside attack against the inmate was related to the matter of danger and that he was not obliged to make a determination to that effect. According to the new directive, his role was simply to determine whether the activity in question, i.e. carrying out an escort, was a normal condition of employment, an assertion he repeated a number of times.

[29] The HSO confirmed that the inquiry involving E.V. and J.S.P. had taken place on May 4, 2007. He admitted that he had conducted his inquiry by telephone and had not gone to the work place because the situation was identical to that of April 11, 2007.

[30] The HSO acknowledged that the inmate was a contract killer associated with a criminal organization, was an informant, was responsible for having the head of the organization incarcerated, and was a high-profile case. The HSO acknowledged that everyone present at the investigation was aware of the fact that the inmate had a price on his head.

[31] The HSO testified with regard to the subject of his first inquiry (that of April 17, 2007) that J.T. went to the control post to take control of the inmate to be escorted. He was aware of the comment[16] made by another inmate to the effect that, [translation] "*How much fun – there are inmates here with a price on their heads*", which, among other reasons, led to his refusing to perform the escort. The HSO testified that G.F., the Intelligence Officer present during the investigation, had set this quote in context. The HSO reported that, according to G.F., the case dated back a number of years and was not necessarily current.

[32] As part of the prevention process, no one (including the inmate) knew that the inmate would be leaving the institution or when this would take place. A permit for an escorted temporary absence (ETA) is prepared in advance and is part of the Threat Risk Assessment (TRA) process. The HSO informed us that those present at the investigation had discussed the possibility of an information leak on the inside. For example, inmates clean the offices and have access to certain information regarding the offices. The HSO reported that during the discussion a consensus had been reached that an information leak was a possibility but was difficult to quantify. Accordingly, the risk was not

[16] It should be noted that J.T. did not refer to this comment during his testimony. See his reasons below under **Employee's Evidence**, **J.T.**

assessed but was taken into consideration. However, in the HSO's opinion this information pointed to a normal condition of employment as far as an investigation into the danger was concerned. He therefore compiled such information but kept it separate.

[33] The HSO indicated that the inmate had had other identities because he had been released into the community but was reincarcerated because he failed to comply with his undertakings. The HSO reported that the escape risk was low according to the TRA. However, in the discussions that took place as part of the investigation, [translation] "*it was clear to everyone that because of the situation there was a greater risk of an outside attack.*"[17]

[34] The HSO reported that the risk assessment was based on the inmate. However, if the TRA had indicated that there was in fact a risk from the outside, the escort would have been armed. Ms. Perron added that the assessment by the unit board, a multidisciplinary committee, had indicated that there was no risk. There was no doubt.

[35] The HSO's inquiry continued on April 17, 2007 with the obtaining of documents pertaining to the inmate's temporary absence and to employee training as well as documents from CSC such as the OPD 905-1. The HSO left the institution without making a decision at the premises. He stated that he had to read and analyze the documents and speak with other officers and with his technical advisor. A group decision was made. However, the HSO stated that ultimately he was the one who made the decision. A meeting was set for May 8, 2007 to meet with the parties and render his decision in the case of J.T and P.G.

[36] In the meantime, on May 4, 2007, there were the refusals of E.V. and J.S.P., which were reported by the employer. The HSO stated that the situation was identical to that of the previous refusals. The reasons were the same, the inmate was the same, the situation was the same, and the documents were the same. The HSO stated that he had rendered his decision immediately by telephone. All of the same persons were present during the telephone conversation with the two new COs and according to him there was nothing new, i.e. no new facts.

[37] The HSO rendered a decision[18] to the effect that this was a normal condition of employment. The HSO stated that his decision had been rendered as follows:

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[17] Transcript of recording of November 1, 2007, p. 169, lines 7-8
[18] Transcript of recording of November 1, 2007, p. 184, lines 20-25 and p. 185, lines 1-2

> [Translation]
> For the same reasons as in the other case. In other words, when a correctional officer performs a type 1 task, whether armed or not, and when a Threat Risk Assessment has been carried out beforehand, it's a normal condition of employment. And I told them there was no right of appeal, that I was not making a decision regarding the danger. And it's all the same thing.

[38] After E.V.'s and J.S.P.'s refusals, the escort took place with two replacements without any problems. The HSO added that the same inmate had had a temporary absence in December 2006 with an unarmed escort and that once again there had not been any problems.

Employees' Evidence[19]

L.T.

[39] L.T. is a Correctional Officer II (CO-II). He also serves as employee member and co-chair of the health and safety committee at the correctional facility involved in this matter (hereinafter the institution).

[40] On April 11, 2007, L.T. was contacted by the employer's representative, E.B., regarding the fact that P.G. and J.T. had refused to work. L.T. explained that he was present only as a member of the health and safety committee and a witness to the application of the relevant procedures by the employer. The HSO did not show up that day to investigate.

[41] The HSO went to the institution on April 17, 2007 to investigate. L.T. was not there that day, and G.R. participated in the HSO's inquiry in his place. The HSO left the institution without making a decision.

[42] On May 8, 2007, the HSO returned to the institution with another HSO to render his decision. In fact, the two HSOs explained to the COs what they had agreed to call the "preliminary inquiry". L.T. said that he had not seen this type of inquiry referred to in the Code. They discussed this at length because this approach was new for everyone, including the HSOs, who did not agree with it but who had to apply the department's new directives.

[43] L.T. asked why they did not use the definition of danger as set out in the Code. His conclusion was that the COs were being stripped of the right to refuse to work as provided for in the Code. In fact, the notes from

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[19] Given that the parties have established the importance of this case, I have tried to relate the witnesses' testimony and the parties' submissions as accurately as possible without taking this to the extreme.

May 4, 2007[20] indicate that during the telephone call that took place at that time the HSO notified the complainants that as of that point they no longer had the right to refuse to work. The HSO also informed L.T. that the employer could therefore take disciplinary measures against the COs if they did not comply with the employer's orders.

[44] The HSO stated to L.T. that he could no longer determine whether a danger existed because he was bound by his employer's policy. In the past, when the HSO intervened it was to assess whether there was a danger in order to make a determination to that effect. Although the HSO asked the COs questions about the danger, he admitted to them that he could not take such information into consideration.

[45] The escort of May 4, 2007 took place without incident with representatives of the employer.

[46] L.T. testified that the inmate to be escorted was known as a high-profile case, a protection case. People knew that there was a contract out to kill him. According to the witness, the COs had to be aware of such information for their own safety. They learned about it because they had to work at various posts within the institution and they had to manage a number of different cases.

[47] L.T. had not been familiar with the P program. He heard about it during the employer's investigation with E.B. He learned at that time that when an inmate is to be released the name is changed for the inmate's protection. This led L.T. to conclude that, if the inmate had to change his identity under the P program, it was because the people administering it thought [translation] "...that the threat is real still today."[21] According to L.T., the Security Intelligence Officer (SIO), G.F., was aware of all of this information, or should have been.

[48] L.T. testified that he was aware of the inmate's history of violence. The inmate was part of a criminal organization as a contract killer, he had informed against members of the organization and he was responsible for having the leader incarcerated.

[49] L.T. informed us that when an emergency escort [22] (for a medical problem, for example) is to take place, it is always an armed escort. In other instances, CSC conducts a TRA to determine whether or not the escort will be armed. However, L.T. stated that this assessment has

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[20] Document A-2.
[21] Transcript of recording of November 2, 2007, p. 59, lines 3-10
[22] G.R. explains below the 72-hour rule that applies to armed escorts.

nothing to do with the Code, i.e. that it does not take into account the danger that performing an escort on the outside presents to the officer.

[50] L.T. explained that the above three criteria[23] that CSC uses in conducting a TRA do not take into consideration the danger that COs face in escorting the inmate. L.T. further testified that COs are not offered any training on risks originating from the outside, aside from the fairly general training they receive.

[51] With regard to question 8 of the form the HSO used during his preliminary inquiry, L.T explained the connection it established with the danger originating from the outside. He testified that there was a direct connection,[24] i.e.

> [Translation]
> ...it's the danger the inmate presents, to us and to himself, of carrying out an escort, of not having the necessary equipment if intervention is needed.

[52] COs receive training on a risk management model. However, L.T. explained that it was impossible to assess the threat from outside and to conclude that he needed a weapon. In response to the threat from outside, i.e. if they were to be shot at, CSC gives them bullet-proof vests. L.T. concluded from this that they were a target.

[53] L.T. confirmed that the four COs all gave essentially the same answer to question 8 on the documents[25] pertaining to their refusal to work. L.T. pointed out to the employer's representative at the investigation, E.B., that the three TRA criteria they took into account had no bearing on dangers from the outside. This problem had been raised with the employer for quite some time. The employer's response was that, on the basis of the three criteria for performing the TRA, there was no risk.

S.H.

[54] Mr. Mancini called S.H. to testify in place of G.F., who was a Security Intelligence Officer (SIO) at the institution at the time of the refusals to work. The tribunal had directed that G.F. submit certain documents, but he explained at the hearing that he was not authorized to do so, whereas S.H. was. Although S.H. was not in possession of the documents that G.F. had been asked for, Mr. Mancini decided to have him testify on the content of the documents in question.

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[23] Document A-13, pages 2 and 3
[24] Transcript of recording of November 2, 2007, p. 80, lines 24-25 and p. 81, lines 1-3
[25] Documents A-5 to A-8

[55] S.H. is an SIO at the institution. He described his role as SIO by drawing a parallel with the police. SIOs are in some sense the investigators at institutions. They are in contact with the police. They work on all incidents that arise in the institution. They investigate drug trafficking and anything that might be an incident or that can hamper institutional security.

[56] S.H. confirmed that he knew the inmate and that in the past he had been a contract killer for the criminal organization in question. The inmate's record shows multiple convictions for extremely violent offences. In addition, the case received a great deal of media coverage. The P program had to be applied to this inmate because his life is in danger outside the institution.

[57] S.H. indicated that there was a price on the inmate's head but he could not say the amount of the contract or whether it was still in effect. He nonetheless admitted that there was no information indicating that the contract had been cancelled.

[58] At the time of the refusals, S.H. was the Correctional Supervisor in charge of the institution. In that capacity he was the one who gave the necessary documentation to the COs who were to carry out the escort. The first document they are given is titled "Permission de sortir avec escorte"[26] [Escorted Temporary Absence]. This document indicates to the COs where they are to go and with which inmate and the control measures they are to use. The document is signed by the institutional head, i.e. the Warden. The second document given to the COs contains the framework that the case management team used in conducting its assessment. It explains the case, identifies the people who participated in the assessment and gives the criminal profile of the inmate to be escorted.

[59] The P program is coordinated by a person referred to colloquially as the inmate's controlling officer. This officer has a contract (not to be confused with the contract on the inmate's head) with the inmate for certain temporary absences on the outside. In response to Mr. Mancini's questioning, S.H. admitted that the inmate would need to change his identity when he was released from prison.

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[26] Documents A-14 (for the April 11, 2007 temporary absence) and A-15 (for the May 5, 2007 temporary absence). The abbreviation used in the text to refer to this escorted temporary absence is ETA.

G.R.

[60] G.R. is a CO-II at the institution. He is also president of the union local at the institution and is a member of the work place health and safety committee.

Objection to G.R.'s Testimony

[61] During the hearing of this witness as well as when the employer was making its submissions, Ms. Perron objected to G.R.'s testimony and suggested that the tribunal disregard it. Ms. Perron argued that G.R. had indicated he did not agree with the risk assessment and had suggested that escorts should be armed. She added during her submissions that the witness had also spoken to us about the inmate's case but not about the criminal organization. He did not know anything about this inmate. Ms. Perron argued that G.R.'s comments should not be given undue importance.

[62] The tribunal decided to hear G.R.'s testimony on the ground that it is relevant and useful in understanding the facts in light of his experience with the world of corrections. It is also important that G.R.'s testimony be heard given that, in his capacity as representative of the work place health and safety committee, he had replaced L.T., who was not present on April 17, 2007 during the HSO's inquiry into the refusals to work by P.G. and J.T. Accordingly, I will grant this testimony the weight that is warranted.

[63] Nonetheless, during the employer's submissions Ms. Perron elaborated further on the reasons for her objection regarding the nature of the COs' testimony. Referring to the Federal Court decision in *Verville v. Canada*, 2004 FC 767 (hereinafter *Verville*), Ms. Perron argued that the COs, including G.R., did not have the status of experts because they were talking about their own jobs. The tribunal will not comment after the fact on its decision to accept G.R.'s testimony but will issue some general comments on the nature of the COs' testimony in the part of the "Reasons" section below entitled "The notion of danger".

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[64] According to G.R., the COs refused to perform the escort unarmed because they were afraid for their safety and that of the inmate. The COs knew the inmate well and were aware that there was a price on his head: [translation] "... it seems that contract was still in effect."[27]

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[27] Transcript of recording of November 2, 2007, p. 159, lines 22-23

Management had nonetheless suggested that they wear bullet-proof vests even though the COs were told the inmate was not dangerous.

[65] The manager in charge of the employer's investigation, E.B., called G.F. (the SIO who had reportedly informed P.G. that the inmate was dangerous) to her office to find out whether there was a contract on this inmate's head. G.F. stated that if he had known that this information would be used for the escort he would not have given it. In response to this statement G.R. accused G.F. of being a [translation] "...vicious liar."[28]

[66] During the investigation the HSO elaborated on the new interpretation he had to give to section 128 of the Code, namely that from that point on COs could no longer refuse to work because conducting escorts was a normal condition of employment. Not long after the refusals to work in question, two Sûreté du Québec officers came to get the inmate for questioning. They were armed with 9 mm weapons and were wearing bullet-proof vests. The inmate was chained and handcuffed. G.R. commented ironically that according to CSC that same inmate did not present a danger to the COs.

[67] G.R. commented on the importance of having an armed escort in this case. G.R. explained that the COs' work entailed checking with the SIO, on the basis of the relevant documentation, whether there had been any new information regarding the inmate within the 72-hour period prior to the temporary absence. The documents adduced at the hearing indicate that the TRA had been carried out well in advance, but not within the 72-hour period prior to the escort. In his opinion this should have been done, given the danger this inmate presented. Therefore, if there had been a specific incident in this inmate's case they would not have known because this was not verified.

[68] That is what P.G. did, on his own initiative, when he called the SIO, G.F. He confirmed that there had been no change regarding the existence of a contract on the inmate's head. As well, it was common knowledge among the various criminal gangs inside the institution that there was a contract on the inmate's head. There were informants in the penitentiary who were in contact with the outside, and everyone knew the inmate. All of these peopled talked to one another. Therefore, according to G.R. the risk of danger was very much present when they refused to work.

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[28] Transcript of recording of November 2, 2007, p. 164, line 4

M.C.

[69] M.C. is a correctional services officer with the Quebec Ministère de la Sécurité publique (hereinafter the Ministère).

Objection to M.C.'s Testimony

[70] Ms. Perron objected to M.C. testifying in this case to provide us with comparisons with another correctional service. She reiterated that objection in her submissions. According to Ms. Perron, M.C.'s testimony was not relevant in the instant case. His experience pertained to legislation other than the Code. Refusals to work at the federal level must be heard on a case-by-case basis.

[71] That objection gave rise to a discussion between Ms. Perron and Mr. Mancini regarding the application of the Federal Court ruling in *Verville*, supra, and the Federal Court of Appeal's decision in *Martin v. Canada (Attorney General)*, 2005 FCA 156 (hereinafter *Martin)* for the purpose of having the objection resolved. Mr. Mancini argued that in *Verville*, supra, Madam Justice Gauthier stated that she attached a great deal of importance to the testimony of correctional officers. She talked about the proof of danger, which could be established on the basis of an industry standard. Mr. Mancini therefore wanted to have M.C. testify and he maintained that, according to Madam Justice Gauthier, evidence of that type could be adduced to establish that a danger was present.

[72] After hearing and weighing the parties' submissions in this regard, I determined that M.C.'s testimony was relevant and decided to hear it, while granting the appropriate weight to it.

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[73] M.C. had been working for the Ministère as a correctional services officer for the past 18 years. He was currently posted at the Montreal courthouse. He took charge of the accused during their trials or legal proceedings. Some of those people had been arrested and were appearing in court for the first time while others came from provincial or even federal prisons.

[74] M.C. was responsible for transporting persons charged with offences, even if they came from federal penitentiaries. In the case of high-profile inmates, special measures were taken on an individual basis. For example, there might be a second vehicle with two other officers; the person might travel alone or might be accompanied by an escort from the Sûreté du Québec.

[75] Certain informants who have a price on their head had to travel alone. They were always isolated. Special transportation was provided for such individuals. There was a minimum of two armed officers in the vehicle. Other special measures were taken as well, such as escorts with flashing lights and police escorts.

[76] M.C. testified that he was responsible for transporting inmates as part of his duties, that he had a permit to carry a weapon, and that both the driver of the vehicle and the escorting officers were armed during transport. This was standard procedure and it had been in place for a number of years in the wake of some tragic events. All of their transports were armed.

[77] M.C. described the tragic events that led the Quebec authorities to arm correctional service officers who transport accused individuals and inmates. In the past, officers were not armed during transport. Then, in 1997, two correctional service officers were murdered on orders from the leader of the Hell's Angels biker gang.

[78] Following those incidents the officers realized they were in danger, not because they had a personal conflict with an inmate, but because of the uniform they were wearing. It was not until the trial of the leader of that criminal gang that they observed that the gang's leader and the Hell's Angels as a whole were directly attacking the prison system as part of the judicial process. Further to decisions by the Commission des lésions professionnelles and an agreement[29] between the Ministère and the correctional services officers' union it was decided that officers would be armed when transporting inmates.

[79] With regard to the informant[30] who was responsible for having the head of the biker gang incarcerated, M.C. stated that he had been transported to his trial under heightened supervision and under high protection for the precise reason that he was an informant witness.

[80] The agreement provides as follows, at clause 3:

> [Translation]
>
> 3. When incarcerated persons such as those referred to in the previous clause are released temporarily, the escort shall comprise two correctional services

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[29] Exhibit A-21: Agreement (reached by a parity committee) between the government and the union with respect to outings requiring an escort (dated October 5, 1998 and amended on April 25, 2000)

[30] See also C.A.'s testimony regarding the execution of this witness.

officers equipped with bullet-proof vests, one of whom is armed, when any one of the following criteria is present:

- the person is awaiting trial;
- the person is an inmate who is a member of a criminal organization;
- the person is an inmate listed in the Sûreté du Québec's inventory of outlaw biker gangs;
- the person is an inmate whose history includes one of the following elements:

  ◊ incarceration in penitentiary within the past 5 years;
  ◊ escape or attempted escape;
  ◊ history of violent offences (provincial sentence) within the past 5 years;

- the person is an inmate whose current conviction entails one of the following elements:

  ◊ violence (e.g. assault, assault with a weapon, threats, bodily harm, robbery)
  ◊ importing narcotics;
  ◊ escape or attempted escape;
  ◊ extradition;
  ◊ penitentiary sentence where the person still has time to appeal and where it is known the person will be transferred to penitentiary in the very near future.

[81] Under this agreement the mere fact that a person has been incarcerated in penitentiary or, as Mr. Mancini noted, is awaiting trial in a case, is sufficient for there to be an armed escort. M.C. indicated to Ms. Perron that in fact all escorts were armed because the persons to be transported always met one of the above criteria.

P.G.

[82] P.G. is currently employed as a CO-II at the institution. According to P.G., the inmate was a compliant inmate. He did not create any problems for the officers and was polite with them. From a security standpoint, all of the COs knew that the inmate was an informant and that there was a price on his head on the outside. It was the criminal organization that had initiated this contract. All of this was known in the institution. Therefore, the above information was also known to the prison population.

[83] There are all sorts of people at the institution. There are many street gang members, and those people have no rules and no hierarchies. There are all sorts of criminal organizations, and there are also people affiliated with biker gangs. There is a wide variety of people at the

institution. P.G. informed us that he had received training on all of these criminal groups, with photos of the people inside.

[84] P.G. explained that on the day of the refusal, April 11, 2007, he was supposed to escort the inmate to a local health care facility. He was the senior officer in charge of the escort and he was to be accompanied by J.T. He knew at that time that it was an unarmed escort. They were at the control post. While P.G. was busy inside the control post, J.T. contacted the SIO, G.F., to find out whether the contract on the inmate's head was still in effect. G.F. confirmed that there was still a contract for a large amount of money on the inmate's head. At that point they went back into the institution with the inmate and refused to perform the escort. They submitted their refusals to the employer's representative on duty, S.H.

[85] The reason for the refusal was stated in writing during the HSO's inquiry in response to question 8 on the form used by the HSO. In the circumstances in effect on the day of the refusal, P.G. stated that in light of the information he had obtained he was unable to ensure his own safety or that of the inmate against a threat from the outside, which he described as more than plausible. He considered the threat so great that he believed he might end up in a shoot-out on the outside and would not be able to ensure anyone's safety.

[86] P.G. stated that he received firearms training annually.

[87] When the HSO came to investigate his refusal to work, he told P.G. that he had to apply the new policy that been implemented. He said that escorting inmates was part of a CO's duties and that he could not go beyond that. He could not look at how dangerous the inmate was but only at the COs' duties and not the reasons for their refusals to work. P.G. was clear: the HSO could do nothing other than apply the new policy.

[88] P.G. stated that, aside from a checklist, a full risk assessment had not taken place, although he was aware that this type of risk assessment existed. According to Ms. Perron, that there is in fact a bundle of four documents[31] that is given to COs before an escort:

1. Escorted temporary absence form (2 pages)
2. Assessment of control measures (7 pages)
3. Standard profile (3 pages)
4. Instructions for escorting officers (1 page)

[31] Exhibit A-14

[89] The checklist that P.G. was referring to is the Escorted Temporary Absence (ETA) form, which is given to COs before they take custody of the inmate. It provides a brief description of the conditions of the escort, i.e. the control measures to be used (chains, handcuffs, gas), the number of escorting officers, whether irritants are authorized, and whether or not the escort is armed.

[90] P.G. testified that he had been willing to perform the escort until he received the information pertaining to the contract on the inmate's head, which did not appear on any of the documents he had been given. It was not until he had confirmed the information with the SIO that he decided not to perform the escort unarmed.

[91] P.G. explained the reasons he was afraid for his own safety as follows:

> [Translation]
> ...with someone who is part of the criminal element, who has a price on his head, when officers have been shot at for much less than that. I can be afraid for my life...but I have reasonable grounds to believe that, yes, things can happen. Especially when you're on the outside with no resources.

[92] According to P.G., a firearm is a work tool. The threat came from outside. He stated that CSC had not taken this threat into account in the three criteria used to conduct the TRA.

J.T.

[93] J.T. has been a CO-I at the institution since 1988. He stated that he did not see anything that needed to be changed in P.G.'s testimony. J.T. confirmed that he was in fact the one who had called the SIO and that after the call he decided to refuse to perform the escort unarmed.

[94] J.T. explained that he had been instructed to prepare to conduct an escort, which he did. He went to the control post and he saw his co-worker arriving with the inmate. At that point he wanted further information regarding the inmate given that his case had received a great deal of media coverage. He called the SIO and they discussed the matter of a contract on the inmate's head. J.T. said that he wanted to confirm whether the contract was still in place. The SIO, G.F., assured him that it was still in place and that it was for a large amount of money. J.T. then invoked his right to refuse to work in order to protect his safety since the escort was to be unarmed.

[95] J.T. then discussed the inmate's case with the SIO, G.F. He reviewed the escort document authorizing the temporary absence, which G.F. had signed. J.T. told G.F. that it did not make sense to authorize an

unarmed escort in this case after informing him on the phone about the danger associated with the fact that the contract was still in place. G.F.'s reply was that if he had known it was J.T. who would be carrying out the escort he would never have told him that the contract on the inmate's head was still in effect.

[96] Ms. Perron adduced the general work description for the CO-I position[32] and that signed by[33] by J.T. J.T. acknowledged that he had received the CO training and that it had included a module on escorts.

E.V.

[97] E.V. stated that on the morning of May 4, 2007, he had been assigned to the outside escorts with his co-worker J.S.P., who informed him they would be going out with the inmate in question. E.V. knew that for the previous escort on April 11, 2007 there had been a refusal to work because the inmate was an informant and therefore had a price on his head. When he learned that his escort would not be armed, he automatically refused to perform it.

[98] The reason for his refusal, which was also entered in response to question 8 on the form the HSO used, was that he was afraid for his safety. He learned from S.H. at that time that the escort was unarmed because the inmate's security classification had been set at minimum. E.V. checked into this and found that the inmate's security was referred to as minimum[34] but that he could not be transferred to a minimum-security penitentiary for his own safety and that of his family.

[99] E.V. acknowledged that he would have carried out the escort if it had been armed. Weapons were available at the control post.

[100] Like all the other COs, E.V. acknowledged he had taken the CSC training. He had received the training on escorts but not necessarily outside escorts.

J.S.P.

[101] J.S.P., one of the four appellants in this case, did not testify at the hearing.

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[32] Exhibit R-27
[33] Exhibit R-28
[34] In the original French document, the term "minimum" is interchangeable with the term "minimale"

Objection against J.S.P.'s Appeal

[102] Ms. Perron asked the tribunal to dismiss J.S.P.'s appeal because, in failing to appear at the hearing to testify, he had not discharged the burden of proof that rested on him. She reiterated that request in the employer's submissions. However, Mr. Mancini argued that the tribunal could rely on the whole of the evidence on the record to determine this case. Ms. Perron indicated that ultimately what she was asking was that J.S.P. not come to testify after she had started her evidence. He would have to suffer the consequences of his absence. Mr. Mancini did not object to Ms. Perron's position on this matter.

[103] I decided that J.S.P. would not be able to testify after Ms. Perron had started her evidence. However, I rejected Ms. Perron's request to dismiss J.S.P.'s appeal for the following reasons. To my knowledge, J.S.P. had not withdrawn his appeal with the AO. Therefore, the appeal he had filed was still valid even if he did not come to testify in his own case. Furthermore, it is not unusual for an AO to rule in a case solely on the basis of the information available to him. That is what I will do in the instant case. All of the information I obtained would be used in my investigation *de novo* to dispose of this matter.

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Employer's Evidence

P.L.

[104] P.L. is employed at the institution as a Manager, Assessment and Intervention, a position previously known as Case Management Coordinator (CMC). Before holding that position he worked as a Parole Officer (PO). The CMC was described as the specialist who advised the COs while performing certain duties that pertained to supervision of POs.

[105] Escorted and unescorted temporary absences are part of the case management function. In the case of security escorts, when an inmate requires surgery, for instance, the *Corrections and Conditional Release Act* (hereinafter the CCRA), provides at paragraph 4(d) that the release measure, for example a temporary absence, shall be the least restrictive measure for the offender, for the public and for institutional security. Section 17 of that same statute sets out specific criteria for a temporary absence: for example, that the inmate's behaviour does not preclude

authorizing the absence and that the offender not present an "undue" risk.

[106] Commissioner's Directive 566-6[35] (Security Escorts) also applies. Paragraph 12 of that Directive provides that the Institutional Head shall determine the level of supervision and the security equipment which can be used during an escort. It reads as follows:

> 12. 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.

[107] For a trip to hospital, the temporary absence is planned in advance. The PO, who is the person who knows the inmate best, is informed of the temporary absence. At that point the PO makes a summary assessment of the risk. The PO's recommendation regarding control measures is discussed by the unit board, which also makes a recommendation as to whether or not the board agrees with the recommended measures. The main issue is the recommendation concerning an armed or unarmed escort for security escorts, i.e. an escort with two COs, with supervision within sight and hearing, and during which the COs have gas with them and the inmate is generally chained.

[108] This procedure applies to medium-security penitentiaries. Escorting officers are given a copy of the procedure.

[109] There is also a Regional Directive that complements Commissioner's Directive 566-6 and that applies to escorts unrelated to security, including escorts for medical reasons. The Regional Directive is entitled "Escorte et Surveillance de Détenus"[36] [Inmate escorts and supervision]. According to that document, the unit manager signs the assessment report to indicate approval. The Warden then signs the report as well.

[110] There is also bulletin 2006-05[37] on security, which essentially restates what is stated at paragraph 12 of Commissioner's Directive 566-6 with regard to the Threat Risk Assessment. The bulletin reiterates that the

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[35] Exhibit R-29
[36] Exhibit R-30
[37] Exhibit R-31

Threat Risk Assessment is to take place 72 hours before the time the escort is scheduled to leave. However, according to the bulletin

> [Translation]
> The following changes apply to inmates with a security classification of maximum or medium. Note that it is the inmate's security classification and not his penitentiary placement that is to be taken into consideration.

[111] On the day of the escort, the supervisors' office receives a number of documents, including the document that contains the assessment, the permit and the inmate's photo. The supervisor decides who will conduct the escort and gives that person the documents in question. Ms. Hudon confirmed with P.L. that the procedure for handing over the documents (the escorted temporary absence form, the assessment of control measures, the standard profile, and the instructions for escorting officers) was consistent with standard practice and in accordance with the Commissioner's Directive. All of the documents were in the inmate's file. Such files are normally given to escorting officers. However, P.L. was unable to confirm that this had been done by the person in charge.

A.S.D.

[112] A.S.D. is a staff instructor at the Staff College in Laval. His primary responsibility entails training the COs starting at CSC. The training lasts 11 weeks and is followed by a two-week placement at an institution. After successfully completing all of the exams the COs graduate and are designated as peace officers.

[113] The training comprises 30 modules, all of which are inter-related. The modules cover all of a CO's duties. All aspects of security at a penitentiary that will become the CO's workplace are covered in the modules. There are two modules on escorts and they pertain to inside and outside escorts.

[114] Outside escorts are escorts that involve going outside the penitentiary perimeter to a specific location. Session 18 of module 3[38] deals with outside escorts and control measures and lasts 3-1/2 hours. The module on inside escorts lasts one day.

[115] A.S.D. explained that the training on outside escorts is based on the CCRA, the Corrections and Conditional Release Regulations and Commissioner's Directive 566-6, Security Escorts. Officers are instructed on such things as how to put on and remove restraints and where to position themselves in relation to the inmate. The COs are

[38] Exhibit R-32

also instructed to contact the Correctional Manager if an escort turns out badly or, if the risk is too high, to end the escort and return immediately to the institution. As well, there are simulations of outside escorts.

[116] The COs are also informed of the various documents they will have to take into account during an escort, such as the ETA form. The training also covers the decision-making process involved in an escort, which encompasses the risk assessment and the control measures to be used, such as pepper spray, firearms and an additional CO.

[117] As regards firearms training, the students have 8 days on firearms qualification. A.S.D. explained that through the various modules the use of force is covered using the Situation Management Model. However, this is not referred to in the module on outside escorts because the use of force is also covered for inside escorts. In terms of communications, the COs assigned to an outside escort can use walkie-talkies or cell phones.

[118] A.S.D. stated that in the scenarios used during training there are no scenarios involving an outside attack or assault with a weapon against escorting officers. However, other scenarios deal with similar situations, such as an outside medical escort in which the inmate is uncooperative and aggressive.

[119] There is theoretical training on the application of the Criminal Code and the relevant provisions involving the use of firearms and the circumstances in which a peace officer can use them.

C.A.

[120] C.A. is a Parole Officer (PO) at the institution. Although she is a PO, currently she also fills in for the manager and gives training.

[121] As a PO, she is responsible for 25 inmates who are assigned to her. She manages the inmates upon arrival until they are granted some form of release. She explained that her case management responsibilities primarily involved assessing risk, monitoring progress and engaging in correctional planning. Her work also pertains to what an inmate needs to do during his incarceration to earn release. Thus, for the duration of his stay in penitentiary, whenever there is a problem the inmate is to refer to his PO. C.A. stated that in principle the PO should have all of the information concerning an inmate.

[122] C.A. was very familiar with cases involving informants. Although she did not go so far as to describe herself as a specialist in this field, she knew enough about this that people consulted her on such cases.

[123] C.A. informed us that she became the PO for the inmate in question in 2005. The security classification assigned to the inmate was minimum, whereas the institution is a medium-security institution. He is not at a minimum-security institution because there are no such institutions in Quebec.[39] He would have been transferred to such an institution where there were fewer incompatibles, i.e. inmates who cannot be put together for various reasons.

[124] The inmate in question was part of a criminal organization. It is obvious that once he became an informant he could not be put in contact with certain persons for his own safety and that there were people affiliated with that organization at certain institutions. He could have been transferred to another minimum-security institution but he would not have been able to participate in any programs because managing an informant is more complicated than managing other inmates.

[125] C.A. has the authority to recommend release measures pertaining to the inmate in question, for all types of release. Release measures include day parole (such as going to a halfway house), temporary absences, transfers and measures in the community. In some cases the decision-making authority lies with the Warden and in other cases with the National Parole Board (the NPB).

[126] For a medical appointment during a given month, the clerk at the institution's infirmary notifies the PO that there will be a temporary absence for medical reasons. The infirmary is the only party that knows the date. Unless there is an emergency, the assessment is carried out at the beginning of the month in question. At that point, if the visit is to take place within 72 hours, no assessment is conducted. The assessment in question is the TRA, which takes into account the three criteria[40] set out above (see HSO's testimony). The assessment is then submitted to the unit board, which includes all of the unit's Preventive Security Officers (PSOs).

[127] C.A. confirmed that she had prepared the memorandum, i.e. the second document given to the COs to perform the escort. The memo is dated November 30, 2006 because the inmate was to take part in a temporary absence for medical reasons in December.

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[39] Transcript of recording of April 15, 2008, p. 40, lines 5-6
[40] Exhibit A-14

[128] C.A. added that the inmate's security classification was minimum and he was at a medium-security institution. The security bulletin[41] of August 15, 2006 clearly indicates as follows under the heading [translation] "What has changed?":

> [Translation]
> The following changes shall apply to inmates with a security classification of maximum or medium. Note that it is the inmate's security classification and not his penitentiary placement that is to be taken into consideration.

[129] C.A. stated that, given that the inmate's security classification was minimum, the assessment was carried out only because he was at a medium-security institution. This was done for all cases. However, she summed up the instructions in the bulletin as follows:

> [Translation]
> ...is that the escort should not be armed systematically because his classification is minimum. So we should conduct the Threat Risk Assessment only for individuals with maximum and medium classifications. So we did not have to do the assessment.[42]

[130] In order to leave the institution, a permit setting out the conditions of the temporary absence is needed. This document is given to the escorting officers.

[131] The purpose of the memorandum prepared by C.A. was to assess the need for control measures. It is comprised of the following parts:

> Part A: Details regarding escort
>
> Part B: Inmate's profile
>
> Part C: Recommendations based on the assessment of information for the person in charge of the institution
>
> Part D: Review by person in charge of the institution
>
> Part E: Communication of TRA report[43]

[132] C.A. gave a detailed explanation of the significance of each of the above parts of the document. Her explanations covered such aspects as technical details, the changes in the risk factors behind his security classification and the offences, i.e. everything relevant to Parts A and B above. The following points emerged from her testimony:

- The inmate had spent many years in the community under an alias. There had been no retaliation against him. Checks were carried out under the P program. Although it was not

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[41] Exhibit R-31
[42] Transcript of recording of April 15, 2008, p. 49, line 25 and p. 50, line 1-4
[43] Threat Risk Assessment

non-existent, the threat had decreased because the inmate had reached some agreements with the criminal organization. Accordingly, there was not an undue risk.

- C.A. downplayed the risk that the contract on the inmate would be carried out because there was no longer any reason to do so; there was no longer the same sensitivity regarding his having informed.

- The SIOs who made up the Preventive Security Department had been consulted. The inmate's case was no longer a source of interest to them because there had been no changes in relation to his safety.

- The unit board discussed the information that had been collected in order to determine whether or not the escort would be armed. In this case, it recommended an unarmed escort to the Warden.

- The Warden endorsed the recommended for the following reason:

  > [Translation]
  > "The inmate's security classification is minimum."

- The TRA was forwarded to the escorting officers.

[133] With regard to the inmate's status as an informant and the presence of incompatibles, C.A. admitted that there had been some ramifications with the criminal organization at a number of minimum-security institutions and that as a result he could not be sent to those institutions.

[134] Although she was not aware of many cases of informants who had a price on their head and who were subsequently killed, C.A. admitted that this had happened. She acknowledged that very recently the informant responsible for the imprisonment of the head of the Hell's Angels biker gang had been killed in prison at a penitentiary in western Canada. She also acknowledged that when the word "contract" was used in that setting it was in the broad sense of the term. It is not a written contract. It can also be carried out for future considerations other than money, such as a chance to move up in the hierarchy or for revenge. In short, C.A. admitted that there were all sorts of good reasons for carrying out a contract in those circles.

[135] C.A. acknowledged that the inmate was part of the P program. However, the agreement (i.e. the contract) that the inmate had under the P program was a moral one because that type of agreement with informants no longer exists. At the time, there was no signed document

attesting that the inmate would be taken care of. Thus, upon his return to the institution the agreement was upheld by the people who administered the institution, simply as a moral agreement with the inmate.

[136] However, Mr. Mancini commented that when the inmate left the institution he did so under the P program. Mr. Mancini added that the danger was so current for the inmate that under the P program his identity had to be changed to protect him. Mr. Mancini argued this point in order to contradict the witness's testimony suggesting that it was no longer overly dangerous for the inmate because he had informed and the contract had been put out a long time ago. C.A. corrected Mr. Mancini by clarifying that she had said the danger had decreased but that she had never said there was no longer any danger. According to her, there would always be a risk because he was an informant. This situation is also true with regard to the presence of incompatibles at minimum-security institutions because the inmate could be located. C.A. therefore acknowledged that the danger had not been eliminated.

[137] With regard to the three TRA criteria, the risk factors were all rated as low. The inmate himself did not present a danger to the COs or to the public. However, Mr. Mancini pointed out to C.A. that those criteria do not reflect the risk of an attack from the outside. C.A. attested that this type of risk is assessed nonetheless since it is discussed by the unit board.

[138] C.A. stated in closing that because the inmate's security classification was minimum the decision not to arm the escort had been based on that security classification.

G.F.

[139] G.F. is a CO-II at the institution. On November 11, 2006 he was Correctional Supervisor and a member of the unit board that recommended that the escort of the inmate in question be unarmed. His role on the unit board was to state whether or not he was in favour of a temporary absence and in this case whether or not it should be armed. G.F. stated that he agreed with the recommendation

> [Translation]
> "...that all ETAs [escorted temporary absences] for medical purposes be UNARMED with restraints (chains and handcuffs) and with gas being carried."

[140] In April 2007, G.F. was an SIO. He testified that on that day he received a call from J.T., a CO, asking for information regarding the inmate.

G.F. stated that he had told J.T. that in the past the inmate had had a price on his head but that there was nothing special in his case at that time. He later learned that J.T. had used this information without his knowledge to refuse to escort the inmate. He felt that J.T. had trapped him into this situation in light of the existence of the TRA. If he had known that this information would be used to invoke a refusal to work, G.F. would have explained to J.T. that his safety and that of the staff were not in danger because of the inmate. G.F. testified that he could not remember if J.T. had asked him whether the inmate still had a price on his head.

[141] G.F. stated that he did not know if the institution had requested in April 2007 that the inmate be able to go to a minimum-security institution and that the proposed transfer had been rejected because his safety could not be assured at a minimum-security institution. He acknowledged that this was possible but stated that he was not responsible for case management.

[142] G.F. indicated that he did not know whether CSC, or his own group, was afraid that the criminal organization might seek revenge against the inmate by going after him when he returned to the community. He then added that supposedly everything had been resolved between the organization and the inmate following meetings between the two parties. According to the witness, the matter of the inmate having informed and having a price on his head was now finished, even though the inmate's name had to be changed when he left the institution.

[143] G.F. was an SIO at the time when the inmate arrived. He was given all of the documents that comprised the inmate's security file in the form of police reports and information from other sources. G.F. admitted that he knew about the P program that applied to the inmate, i.e. that his identity would be changed when he left prison. He acknowledged that he had been in possession of that information in April and May 2007 and had not been informed of any kind of change in the application of the P program, which was therefore still in effect. However, G.F. clarified that in the wake of a meeting between the inmate and the head of the criminal organization the risk was no longer as strong.[44] Therefore, if the people who administered the P program chose to maintain it, they should be asked for their reasons.

[144] G.F. acknowledged that many escorts were performed at the institution and that most of them are not armed. Nonetheless, armed escorts do take place fairly often.

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[44] Transcript of recording of April 15, 2008, p. 180, lines 12-14

[145] Mr. Mancini adduced a copy of Commissioner's Directive 568-3[45] (Identification and Management of Criminal Organizations). CSC provided training on criminal organizations, i.e. how they identify themselves, the symbols they use, how to recognize them, and so forth. In the past it was the Hell's Angels and the Rock Machine, and now it is the Reds, the Blues, the young punks. In short, there is a new contingent of criminal organization members. All of those groups are represented at the institution, which also accommodates protection cases. The latter are more complex given that the people in question hold a grudge against their own gang or rival gangs. To some extent this applies to the inmate in question, who had a conflict with the criminal organization.

[146] G.F. testified that the inmate had no influence within the institution or in society. According to G.F., that was why he had been placed at a institution with a lower risk. Mr. Mancini's response to this statement was that he now understood why the three TRA criteria had been assessed as low in the three cases. The inmate no longer exerted any influence at institutions or in the community. He was not causing trouble, he was nice and polite, he did not present an escape risk and he did not present a risk to the public.

[147] G.F. testified that even in his capacity as SIO he did not know that the criminal organization had ties with other criminal organizations, that CSC gave its officers training on the connection between that particular group and other criminal organizations in the community, and so forth. After a fair amount of hesitation, G.F. acknowledged that it was possible that criminal elements were in the community and would be able to obtain information regarding the fact that the inmate was leaving the institution.

[148] In response to the filing of Commissioner's Directive 568[46] (Management of Security Information), with specific reference to paragraph 12(c)(iv) pertaining to the influence that criminal organizations can have in institutions and in the community, G.F. repeated that the inmate in question no longer had any influence within the institution or in the community. There was no indication that the inmate might present a specific risk during a temporary absence. With regard to the contract on the inmate, G.F. reiterated that there was information indicating that it was no longer in place because of the agreement between the inmate and the head of the criminal organization.

[149] Commissioner's Directive 003[47] (Peace Officer Designations) indicates that any officer at a correctional facility is a peace officer. Pursuant to

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[45] Exhibit A-33
[46] Exhibit A-34
[47] Exhibit A-35

subsection 25(4) of the Criminal Code, a CO can use force, including the use of firearms, in certain circumstances. According to G.F., even without firearms the COs had the necessary tools that had been authorized to perform the escort. G.F. stated with regard to escorts of this particular inmate that they were [translation] "...managed on the premise that there was no undue risk."[48]

[150] Mr. Mancini focused on the matter of the COs' protection during an escort, with reference to Commissioner's Directive 567[49] (Management of Security Incidents). How were the COs to ensure that this directive was to be applied without being armed? G.F.'s response was that the COs had gas with them and that the possibility of being shot at was hypothetical. He stated that the bullet-proof vests they were provided with were sufficient to respond to a hypothetical attack.

S.H.

[151] S.H. previously testified as part of the appellant's evidence, above. In November 2006 he worked alternately as a Correctional Supervisor and an SIO.

[152] On April 11, 2007, S.H. held the position of Correctional Supervisor, now Correctional Manager (CM). He was in charge of the institution on the day shift. On that day there was a refusal to work on an unarmed outside escort to hospital. He was the one who had to give the documents to the escorting officers, explain the procedures to them and identify the inmate upon leaving, which he stated he had done that morning.

[153] The officer in charge of the escort was P.G., a CO-II.[50] P.G. went to the supervisor's office as usual and S.H. gave him the documents identified as Exhibit A-14, namely

1. Escorted temporary absence form (2 pages)
2. Assessment of control measures (7 pages)
3. Standard profile (3 pages)
4. Instructions for escorting officers (1 page)

[154] The escort was to be unarmed, the inmate was to be handcuffed and wearing leg irons and the COs could have gas with them. P.G. was aware of the type of escort and did not make any specific comments

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[48] Transcript of recording of April 15, 2008, p. 226, lines 7-8
[49] Exhibit A-37
[50] In the past correctional officers were designated as CX rather than CO. I will use the abbreviation CO even though S.H. used the abbreviation CX.

about this even though he was not happy about performing the escort unarmed.

[155] S.H. identified his signature and that of P.G. on document No. 4 above. He could not recall whether they had talked about the case at that point, before the CO left his office. S.H. stated that he could not remember whether the normal practice of going to get the inmate and escorting him to the control post where the vehicle and the other escorting officer were waiting had taken place. The only thing he could remember was that P.G. had called him from the office at the control post, where the other escorting officer (J.T.) was waiting to inform him that he was refusing to conduct the escort.

[156] According to S.H., J.T. had received information from G.F., who was the SIO at that time, regarding the inmate, i.e. that the inmate was connected with the criminal organization, had informed on them and had a price on his head. The COs believed that their safety might be in jeopardy and they therefore refused to conduct the escort.

[157] S.H. stated that he knew the inmate in question because he was the SIO when the inmate came to the institution. The SIO always meets with this type of inmate upon arrival because such individuals have special status. In many cases they have a large number of incompatibles and the administration wants to ensure there will be no problems. The necessary checks were performed to ensure there was nothing new and no incompatibles and that institutional security was not in danger.

[158] S.H. stated that he knew the inmate had previously been part of the P program but admitted he did not know whether this was still the case. As discussed earlier, he explained that the people who administer this program had had a longstanding moral contract or agreement with the inmate. However, CSC was not a party to the agreement. CSC simply facilitated contact between the people who had the agreement but was not kept up-to-date on it. On a reciprocal basis, if the people who administered the P program obtained any new information regarding the inmate, they voluntarily shared it with CSC and S.H., particularly when that information involved the inmate's contract.

[159] S.H. acknowledged that it was possible that the notion of moral agreement or contract was not referred to in CSC's files. He explained that it was the people who administered the P program who discussed it with the case management officer.

[160] S.H. stated that the fact that the inmate had worked for the criminal organization was a current fact, but he had no idea as to whether or not the contract on his head was still in place. He was inclined to think that it was not, because the key players had since died or were no longer

involved with the criminal organization. However, he admitted to Mr. Mancini that he did not know whether the people who administered the P program shared that opinion.

[161] The fact that a price had been put on the inmate's head in the past had been a concern to CSC in the past. Everything needs to be taken into consideration when a decision is made regarding an inmate. However, this case was a longstanding one. He had been on release and had gone unlawfully at large (after he failed to report to his PO) for a long time and he was still alive. The inmate himself stated that he was not afraid to go to the area where he was born or elsewhere. He even stated that with a single telephone call he could resolve the problems he had with incompatibles.

[162] S.H. stated that initially the authorities had wanted to transfer the inmate to a minimum-security institution because he did not really belong in a medium-security environment. However, the inmate had bothered the CSC people in his life as an inmate so much that those people, who are now managers in strategic positions at minimum-security institutions, remember the case and no longer want anything to do with him. According to S.H., that is why they are now having difficulty sending him to a minimum-security institution.

[163] S.H. also remembered the escort of May 4, 2007 that had been assigned to E.V. and J.S.P. He stated that the reasons for the refusal were the same as those of April 11, 2007.

[164] As to whether the change of identity for the inmate was still in effect, S.H. explained that inside the institution the inmate used his real name. However, S.H. did not know whether there would be a change of identity when he was released. Although he had access to the PO's file, he did not look at it.

[165] S.H. resisted Mr. Mancini's attempts to make him say that in reality the inmate was afraid to go to a minimum-security institution and that it was not simply because of personal conflicts with management that he could not go there. Nonetheless, the witness did acknowledge that if the inmate had expressed such fears to his PO the PO would have recorded them in a file. The inmate had never expressed such fears to S.H.

[166] The inmate left the institution on May 15, 2007 accompanied by two escorting officers who were police volunteers. The temporary absence had been granted for compassionate reasons. Further to the moral agreement with the inmate, he had established ties with these people who work with this type of inmate. The police officers in question assisted these inmates by, for example, performing compassionate acts such as bringing the inmate's spouse to the institution so that he could

spend time with her or when there was a death or illness in the family. S.H. explained that he considered these police officers to be volunteers because CSC does not pay them for this work. The temporary absence was therefore treated as an escort carried out by volunteers, in this case police officers. However, the witness insisted that he did not know whether the officers were armed.

[167] On May 4, 2007 there was a temporary absence for medical reasons for the inmate. The escort was performed by two managers, one of them being S.L., after J.S.P. and E.V. refused to work. The escort was carried out in accordance with the escorted temporary absence (ETA) form, i.e. unarmed.

Employees' Rebuttal

Objection to Employees' Rebuttal

[168] Mr. Mancini asked the tribunal to allow him to submit a rebuttal to the testimony of G.F. and S.H., which, according to him, ultimately was not consistent with the information in his possession. Mr. Mancini suggested that the PO's files in this matter be requested, in particular four documents identified by Mr. Mancini, which he indicated would clarify the inmate's status with regard to the various points that were discussed and that were downplayed by the employer's witnesses.

[169] Ms. Perron objected to Mr. Mancini's request to proceed with a rebuttal. She stated that there were specific criteria that applied in a rebuttal. A rebuttal could not be used to enhance one's evidence. Ms. Perron argued that she would raise an objection regarding the nature and the documents that Mr. Mancini was seeking in the inmate's case.

[170] I chose to grant Mr. Mancini's request. The reasons for my decision and the accompanying order are set out in the AO's decision in No. OHSTC-08-010(I). Under that order the tribunal directed CSC to submit four documents identified by Mr. Mancini as having probative value in this case. Mr. Mancini asserted that the documents would show that the inmate still had a price on his head.

[171] During the employer's submissions, Ms. Perron also objected to that interlocutory decision and the order accompanying it. The tribunal rendered that decision and the order after making a negative determination with regard to the credibility of the employer's witnesses in

their testimony as to whether there was still a price on the inmate's head.

[172] The tribunal has decided not to comment after the fact on Ms. Perron's comments regarding that decision and the accompanying order.

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[173] The PO, C.A., was identified by the parties as being the person in the best position to adduce the documents and to testify about what was in them, since she had intervened in each of the four cases.

[174] The four documents of probative value in this matter were identified and filed as follows:

1. Correctional Plan Progress Report[51] (7 pages)
2. Memorandum[52] (8 pages)
3. Assessment for Decision[53] (7 pages), and
   Recommendation/Decision for Escorted Temporary Absence[54] (2 pages)
   Decision #14
4. Security Reclassification Scale[55] (6 pages) and
   Recommendation /Decision for Inmate's Security Level[56] (2 pages)
   Decision #13

[175] Further to the above order rendered by the tribunal, C.A. adduced the documents identified above, i.e. Exhibits A-39 to A-42, and testified again.

[176] C.A.'s testimony regarding those documents also clarified certain facts. She testified as follows:

- All CSC employees had access to the documents, although she could not confirm whether the two SIOs, G.F. and S.H., were aware of this information in April and May 2007.

- In light of the number of years that had elapsed since his informing, rather than talk about a contract to kill him (information that even the police did not have), CSC talked about ongoing concerns when the inmate left. Checks with the police, i.e. the inmate's controlling officer, were carried out for the inmate's compassionate temporary absence.

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[51] Exhibit A-39
[52] Exhibit A-40
[53] Exhibit A-41(A)
[54] Exhibit A-41(B)
[55] Exhibit A-42(A)
[56] Exhibit A-42(B)

- She assessed the overall risk presented by the temporary absence as 0.1%. She stated that they were professionals who were paid to assess the risk that temporary absences represent.

- The inmate experienced stress when the time came to leave the institution and this would stay with him until the end of his days.

- A minimum-security institution had been contacted to take the inmate. The case had been submitted but had been turned down on security grounds, mostly owing to the fact that it would be possible to track down the inmate because he would have to associate with other inmates. Even the local police did not want a high-profile informant in their area.

- The ability of potential assailants to track down the inmate would always be a safety concern.

- The inmate has had a number of identities in the past and C.A. knew that he would have a new identity when he was released from prison. That responsibility did not lie with CSC.

- Under the P program, the police followed up with the inmate after his release, i.e. there was a need for intervention to protect the inmate once he had been released, and the police would intervene and take the necessary measures to relocate him or to oversee his case.

- With regard to escorts, the following factors were taken into account: the extremely violent offences the inmate had committed, the fact he had gone unlawfully at large and the fact that he had been diagnosed as manipulative and as a person with grandiose ideas.

- The temporary absence would be a compassionate ETA rather than a security ETA because the inmate's security classification was minimum and there was no undue risk.

- The inmate's controlling officer was acting as a "volunteer", even though the escort was carried out by investigators assigned under the P program.

- The officers were not really "volunteers", but were simply classified as such. They were on duty and did not do this on their own time; they were paid to perform this work.

- When they conducted a risk assessment it entailed more than the three criteria referred to earlier. The risk assessment was comprehensive.

- When she was asked whether she had taken the *Canada Labour Code* into account in her risk assessment, she replied that she had relied on the Commissioner's Directives governing compassionate escorts. She added that

  > [Translation]
  > "...those aren't the guidelines we use in preparing an assessment report."

- The danger an inmate represents is different when the inmate is going out only once as opposed to a series of temporary absences with the same destination.

- The people from the P program were always involved for all release measures. C.A. had recommended to the NPB that the inmate be released into the community on full parole. The NPB turned down that recommendation because he had to re-establish his credibility after going unlawfully at large.

- The safety of the COs who perform escorts was taken into account in light of the specific information in their possession at the time of the escort, such as the escape risk and the fact that the situation could not be controlled at a specific location.

- The ability of potential assailants to track down the inmate varied depending on the release measure. This factor comes into play when an inmate takes part in a series of temporary absences at regular intervals. The issue arises at that point because it is no longer a matter of chance.

SUBMISSIONS

[177] I have decided to group the parties' submissions under the following headings:

(i) AO's authority
(ii) Evidence
(iii) Jurisprudence
(iv) Conclusion

EMPLOYEES' SUBMISSIONS

(i) AO's authority

[178] According to Mr. Mancini, the first issue to be resolved pertained to the employer's objection regarding the AO's authority in this case. The AO is not bound by the policy applied by the HSO. If that policy were to be applied to the facts in *Verville,* supra, *Martin*, supra, or *Johnstone*, supra, the outcome would be the same: there would be no more cases in which a danger were determined to exist. Therefore, the AO had to take jurisdiction in this matter.

[179] The perspective that the employer presented to the AO whereby paragraph 128(2)(b) of the Code constitutes a filter is a new way of looking at things that suggests that all Federal Court and Appeals Office decision are in error on this point. For Mr. Mancini, this notion of a filter is inconceivable.

[180] In *Verville*, supra, the issue for the COs was handcuffs. Mr. Mancini argued that if the reasoning behind the policy had been applied to the facts in that case, it would have been concluded that the circumstance in question was a normal condition of employment. There could be no investigation of danger because it was a normal condition of employment. The same thing would apply to the ability of park wardens to carry sidearms, as discussed in *Martin*, supra, as the circumstance in that case would also be considered a normal condition of employment. The same determination would also apply to the armed escort in *Johnstone*, supra, which involved inmates who had hidden some keys in order to escape. In other words, the finding would have been that the circumstance was a normal condition of employment.

[181] Mr. Mancini added that when the HSO was asked what was normal in the matter of armed and unarmed escorts, his answer was that conducting escorts was always a normal condition of employment. According to Mr. Mancini, halting the investigation at the point of determining whether or not the escort should be armed, as was done in this case, makes no sense because everything would be considered a normal condition of employment. The entire process as set out in the Code would then be blocked by an interpretation conceived of by a bureaucrat.

[182] In *Martin*, supra, it was confirmed that the appeal was a *de novo* proceeding. Accordingly, the AO had all of the decision-making

authority at first instance. With the objection, the employer tried to convince the AO not to exercise his jurisdiction because the decision-maker at first instance had refused to render a decision on the danger. A policy written by a bureaucrat would therefore have overturned the legislation and jurisprudence and blocked the appeal. Mr. Mancini asked the tribunal to indicate clearly in its decision that this is not in compliance with the obligations assigned to the AO by the Code.

[183] According to Mr. Mancini, that was the policy's very purpose, i.e. to limit the number of cases that could be the subject of a decision. That is not what the Code says. The Code provides that in the event of danger the investigator at first instance, or the AO in the event of an appeal, must investigate if a danger is alleged.

[184] Mr. Mancini also raised the HSO's lack of independence in that the decision did not lie with him alone. Accordingly, the HSO was not impartial in this matter.

(ii) Evidence

[185] Mr. Mancini referred to M.C.'s testimony as being among the most relevant evidence. M.C. was a correctional services officer with the Quebec Ministère de la Sécurité publique. Two of their officers had been killed by criminal organizations. In the wake of those events an industry standard whereby all escorts were to be armed was adopted in Quebec.

[186] The inmate was a former contract killer for a criminal organization and was responsible for having the head of the organization incarcerated. He was a manipulator and a liar. C.A. testified that this was the only case she had known of during her lengthy career in which the informant had been protected by the police. According to her, all escorts should be armed because this work is dangerous. She noted that the case had been covered extensively in the media and that other inmates were aware of the price on the inmate's head. The significance of that evidence is that the inmate was known in the community and in the institution. The tribunal's attention was drawn to the inmate's high profile and the possibility that he could be tracked down. There were many people who still had a grudge against the inmate. Mr. Mancini argued that when COs conduct an escort with this type of inmate, who has a price on his head and who is very easy to locate, has received a great deal of media attention and has a very high profile, the escort should be armed as a minimum precaution.

[187] Then there was the testimony of the SIOs, G.F. and S.H. Mr. Mancini argued that neither of them was very credible. Mr. Mancini asserted that they had tried to have the tribunal believe that the inmate was no longer afraid. However, the documents that were adduced in evidence indicated that the inmate was still afraid for his life in the community and at a minimum-security institution. They tried to lead the tribunal to believe that the inmate no longer had a price on his head. J.T.'s uncontradicted testimony was that at the time of his refusal G.F. could not confirm that there was no longer a price on the inmate's head.

[188] Mr. Mancini stated that it was difficult to follow the SIOs' reasoning, and to a certain extent that of C.A., given that according to the P program the contract was still in effect. It was inconceivable that the contract on the inmate would no longer be in effect but that the police would have to intervene or be consulted under the P program every time the inmate left the institution. Mr. Mancini added that was simply not possible given that the police were still concerned about protecting the inmate to the extent that his identity would have to be changed when he was released from prison. He was so well known and so easy to locate that even the inmate himself was aware of this and expressed fears about going into the community or into minimum-security institutions. None of this was consistent with the SIOs' versions that the inmate no longer had a price on his head.

[189] Mr. Mancini argued that the tribunal had been led to believe that the police officers who had escorted the inmate during his compassionate temporary absence had been acting as volunteers. In reality, they were doing their duty under a program that related directly to the inmate's high profile and the danger associated with his release.

[190] Mr. Mancini argued that C.A. had stated that it was impossible that the SIOs would not be aware of the information in documents A-39 to A-42. CSC had implemented an extremely costly program that required a great deal of organization and felt obliged to consult with the people from the P program every time the inmate left the institution. According to Mr. Mancini, none of this would take place unless the contract were still in effect. Mr. Mancini concluded that this was impossible.

[191] The other important point with regard to the inmate's status and the ease of locating him is that he is referred to as a "minimum" case. Mr. Mancini noted ironically that, even though the inmate was classified as minimum, he could not be placed at a minimum-security institution. He stated that this was the case because he could be tracked down and killed. He was too high profile. He could not go into the community as there were resources who did not want him because having him there would be too dangerous. Those resources were not people who had no

knowledge of the criminal element, but rather a federal institution under the same employer and community resources that were accustomed to accepting inmates. They also considered it too dangerous to accept this inmate.

[192] Mr. Mancini noted that the inmate was classified as minimum in this case. CSC used three criteria in making that determination. Those criteria related to the inmate's behaviour in the institution, i.e. whether he was violent, whether he was following his program, and so forth. Mr. Mancini stated that the three criteria had nothing to do with the danger raised in this case. Regardless of the information from outside the penitentiary, the inmate could still be classified as minimum. That changes nothing because there is nothing in the criteria that takes into account the danger that may exist outside the penitentiary.

[193] According to Mr. Mancini, this is a major consideration in this case. It is fine to state to the tribunal, as the employer's witnesses did, that the inmate's classification was minimum, but such an assertion counts inside the penitentiary only. The COs refused to work for reasons directly linked to the danger associated with factors originating outside the institution. No matter how dangerous the situation outside the institution, the inmate would still be classified as minimum because such considerations did not fall under the three criteria that CSC used. There was a problem associated with taking the inmate's minimum classification without any further thought. The danger that the COs referred to had nothing to do with the three assessment criteria used in determining the classification of minimum. The COs were afraid that a contract originating outside the institution would be carried out.

[194] Mr. Mancini noted that C.A. had testified that the police and the employer had ensured the security of the inmate's destination. This shows that CSC, in conjunction with the police, was acting as if the contract were still in place. According to Mr. Mancini, it was normal and highly appropriate to proceed in this manner. However, the same thing was not done for the COs. They were not even told that the inmate had a price on his head. When the compassionate escort was to be carried out using volunteers they took the trouble to inspect the premises, but the COs were not even armed and had not even been told there was a price on the inmate's head. There was obviously a major security problem, especially given that the inmate had been escorted with draconian security measures that very month, as M.C. had reported. None of this was consistent with the Code.

[195] G.F. acknowledged during his testimony that, if he had known that the information he had shared with J.T. would be used for a refusal to work, he would not have given him that information. Mr. Mancini indicated to

the tribunal that this is indicative of the culture that exists within the organization.

[196] The evidence also revealed that the SIOs are the main contacts with the police. How, then, can their testimony be explained? Did their memories fail them? They are not credible. They were trying to minimize the fact that the inmate had a price on his head.

(iii) Jurisprudence

[197] Mr. Mancini adduced various AO and Federal Court decisions in order to advise the tribunal on the criteria to be followed in disposing of this matter.

[198] Mr. Mancini referred to the tribunal's decision in *Brent Johnstone et al v. Correctional Service Canada,* [2005], AO Decision No. 05-020 (hereinafter *Johnstone*). According to Mr. Mancini, that decision was the only one that involved armed escorts in a correctional environment. Its significance lies in the distinction that was made between the CCRA,[57] which governs an inmate's incarceration and the applicable security rules, and the Code, i.e. that all of the rules that originated with the CCRA applied to the inmate, while the Code applied to the COs. According to Mr. Mancini, this was an extremely significant distinction.

[199] *Johnstone* involved a violent inmate incarcerated at a maximum-security institution who was believed to have in his possession a handcuff key or an instrument, i.e. a concealed weapon. Three COs refused to escort the inmate because the security level for the escort had been downgraded from an armed to an unarmed escort. Mr. Mancini asked the tribunal to follow the same reasoning as that applied in that case and to establish the same distinction set out above.

[200] *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) v. Attorney General of Canada*, 2008 FC 542 pertains to exposure to second-hand smoke in a penitentiary. The Federal Court set aside the AO's decision in the matter because he had not taken into account the evidence on the record. The evidence indicated that three COs had testified that their work places, which encompassed 95% of the prison population, were full of smoke every day.

[201] In *Verville*, supra, the judge commented that it would be inconceivable for a security guard transporting money not to be armed or to have an

[57] See above, *Corrections and Conditional Release Act.*

armoured car, for example. That ruling, which is now well known, supported Mr. Mancini's arguments in the instant case. Mr. Mancini asserted that, if the new policy established by HRSDC's Labour Program were to be applied to the circumstances in *Verville*, then the fact that handcuffs were not worn in the circumstances in effect at the unit would be considered a normal condition of employment, thereby rendering the Code completely useless. The outcome in *Verville* would be impossible with such a policy.

[202] The decision in *Martin*, supra, is also well known. The most important element in that decision is the fact that the appeal to the AO is a *de novo* proceeding. When applied to the facts in *Verville,* the test of the policy clearly would have led to the finding that the circumstance was a normal condition of employment. The danger could not be investigated because of a normal condition of employment, which is inconceivable.

(iv) Conclusion

[203] Mr. Mancini asked the tribunal to allow the four COs' appeals. He also asked the tribunal to rule on the policy applied by the HSO because the consequences of its application were disastrous for the COs.

EMPLOYER'S SUBMISSIONS

(i) AO's authority

[204] Ms. Perron asserted that the employer's arguments had been submitted subject to the preliminary objection regarding the authority of the AO seized of this matter. In addition to the arguments submitted in connection with the preliminary objection, Ms. Perron made the following arguments.

[205] According to Ms. Perron, the HSO had determined that the four appellants could not avail themselves of subsection 128(1) of the Code in refusing to work because the circumstances that their refusals applied to constituted normal conditions of their employment within the meaning of paragraph 128(2)(b). The HSO testified that in initially determining the circumstances that constituted normal conditions of the employees'

employment, he was simply applying a new directive that had been introduced by the Labour Program of HRSDC.

[206] It can be seen that at paragraph 128(2)(b) there is an exception regarding normal conditions of employment. Subsection 128(1) states as follows:

> 128. (1) Subject to this section...

According to Ms. Perron, this indicated that, before looking at the essence of 128(1), it was necessary to proceed with the analysis set out at subsection 128(2)(a) or (b), as the case may be. That is what the policies filed as Exhibit S-10 and S-11 state. Therefore, to argue as Mr. Mancini had done that there would no longer be a right to refuse to work because everything would be a normal condition of employment was going too far. The directive did not prevent HSOs from doing their jobs and deciding, if they were not dealing with a normal condition of employment, to proceed to the next step, namely 128(1). Ms. Perron added that, even if such a policy were not in place, this would not have prevented the HSO from proceeding step by step as he did.

[207] Ms. Perron proposed that the question that the tribunal had to ask first, as the HSO did, was as follows: did the circumstances that the appellants described constitute normal conditions of their employment?

[208] The HSO testified before the tribunal that the information he had obtained during his inquiry pertained essentially to the nature of the appellants' refusal to work, i.e. that the inmate was an informant, that there was a price on his head, and so forth. The HSO confirmed that the employer had a certain manner of proceeding, that the employer had assessed the risk and that, in his opinion based on the assessments that had been conducted, the circumstances that the appellants reported constituted normal conditions of their employment.

[209] Ms. Perron asked the tribunal to uphold the HSO's decision. If the tribunal were to find that these were not normal conditions of employment, it would need to proceed to the second step and ask whether the employees had reasonable cause to believe that performing this task would constitute a danger to themselves.

[210] Ms. Perron indicated her intention not to elaborate on the notion of danger at length. In any event, she noted that the notion of danger was not limited to an immediate danger but to a danger that could arise, to a potential risk and to the likelihood of injury. The Federal Court stated in its decision in *Verville*, supra, paragraph 36, that there must be a reasonable possibility and not a mere possibility and that exposure to the risk or to the situation would likely end in injury to the employee

exposed to it, that the injury or illness would likely arise before the risk could be eliminated.

[211] Ms. Perron indicated that the tribunal had stated in other decisions to be adduced later that the risk could not be hypothetical and that a determination of danger could not be based on mere conjecture or hypothesis. Ms. Perron argued that the facts adduced in evidence before the tribunal were not sufficiently probative to satisfy the tribunal that there was a potential danger that might arise in the instant case.

(ii) Evidence

[212] Ms. Perron suggested that the appellant's testimony exaggerated the existence of a contract on the inmate's head. They did not bring any probative evidence indicating that there was any information or that there had actually been an attempt to exact vengeance or that the contract would be carried out during the escort or shortly afterward.

[213] Ms. Perron explained the legislative framework governing escorts of inmates outside a CSC penitentiary. She stated that this framework had given rise to a number of refusals to work for unarmed escorts at CSC. Ms. Perron noted that nonetheless CSC's decision-making process had not been challenged in any AO decisions. The entire process was based on the CCRA, the Regulations and the Commissioner's Directives, and the task of deciding on the potential and real risk of escorting an inmate outside penitentiary was the responsibility of security specialists.

[214] Ms. Perron argued that the tribunal could not call into question these policies in effect at the employer's work place.

[215] Ms. Perron noted that Mr. Mancini had referred to the decision in *Johnstone*, supra, and had asserted that the CCRA was not in line with the Code. That assertion is not true. The Code addresses the health and safety of employees, and the CCRA does the same. Section 4 of the CCRA sets out the principles that guide CSC in fulfilling its mission. More specifically, paragraphs 4(a) and 4(d) provide as follows:

> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> a) that the protection of society be the paramount consideration in the corrections process;
>
> [...]
>
> d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders; (My underlining)

[216] Therefore, according to Ms. Perron, the CCRA provides for the officers' safety. That provision is to be read with section 70 of the CCRA, which states as follows:

> 70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

[217] Ms. Perron asserted that the CCRA and the Code are compatible. Furthermore, C.A. testified that when she conducts her risk assessment she takes the escorting officers' safety into consideration. The ultimate decision regarding escorts lies with CSC, which takes into account the CCRA, the Code and the well-being of its employees. The Warden takes all of that into account, as she is obliged to do, in deciding whether an escort should be armed or unarmed.

[218] As well, there are specific procedures regarding escorts. Escorting inmates is part of a CO-I's or CO-II's duties, and this was acknowledged by the three COs who testified in the instant case. They had received specific training to that effect, the and inter-related training modules were referred to and were adduced in evidence.

[219] Furthermore, *Escorted Temporary Absences* are governed by section 17 of the CCRA, and the institutional head may authorize escorts in certain circumstances. As well, Commissioner's Directive 566-6 (Security Escorts) details the procedure to be followed and the objective of the policy set out at paragraphs 1 and 2, which reiterate the requirements set out in sections 4 and 70 of the CCRA. Accordingly, staff safety is taken into account.

[220] Ms. Perron stated that the procedure for a temporary absence for medical reasons is as follows: as part of a risk assessment, the PO prepares an assessment report and makes recommendations to the unit board (composed of experts), which decides on the PO's recommendations. Everything is then forwarded to the institutional head for decision-making.

[221] Ms. Perron argued that C.A. was the PO assigned to the inmate in question and the specialist on the inmate's case during his time at the institution. She was the one with comprehensive and in-depth knowledge of the information concerning the inmate who was the subject of the escorts that gave rise to the refusals to work. She had access to all of the information. As per *Verville*, supra, a great deal of importance and deference had to be granted to C.A.'s testimony, which was credible.

[222] Ms. Perron argued with regard to the inmate that there were criteria that determined whether an inmate was a high-profile case whose violent crimes had been reported in the media. This had nothing to do with his status as an informant. Ms. Perron observed that it had been reported that there was a contract with the police under a program that CSC was not a part of and that the inmate's change of identity was a condition of the contract that CSC had nothing to do with. The reasons for that contract were not known. C.A. testified that the inmate's safety could never be assured one hundred percent but that the risk was not undue. There would always be a possibility of revenge because he was an informant. That was something that would stay with the inmate until his dying day. Ms. Perron stated that this was in fact a source of concern for CSC. However, it was important to grant a certain value to this information based on the circumstances and not to generalize as the appellants were doing. C.A. testified that she took this into account whenever she conducted risk assessments for a temporary absence.

[223] Ms. Perron pointed out that C.A. testified that she had assessed the risk with regard to the officers when she decided to recommend an escorted temporary absence for compassionate reasons pursuant to paragraph 4(d) and section 70 of the CCRA. She also testified that one of the factors she took into account in assessing the risk was the possibility that the inmate's whereabouts could be determined. That factor, which was to be considered in relation to the desire to seek revenge against the inmate, differed according to the type of temporary absence. It was different at a hospital, for a compassionate temporary absence or for an outing in the community. C.A. testified that for every temporary absence she also checked on whether there was any new information concerning the inmate. She contacted the police, the SIO, and all of the caseworkers in the best position to have up-to-date and relevant information.

[224] With regard to the medical ETAs of April 11 and May 4, 2007, Ms. Perron noted that C.A. stated that she had conducted a risk assessment for those ETAs (an assessment that also took the COs into account) for an appointment at the hospital. This was a one-time ETA, i.e. not part of a series. C.A. admitted during her testimony that if it had been part of a weekly series (for example, for chemotherapy treatments) the situation might have been different. No one knew about this type of temporary absence aside from the hospital staff. Even she did not know the date of the temporary absence, and neither did the inmate himself. Therefore, the possibility of the inmate being tracked down was very low and there was no undue risk. In the end, on the day of the ETA she did not have any new information to suggest that someone was intending to carry out the contract. This was an old story and the risk was not undue.

[225] Ms. Perron stated that C.A. had set the matter of the price on the inmate's head into context in determining that there was no undue risk. The inmate had spent several years in the community and nothing had happened. Therefore, the risk was not undue and for that reason she recommended that the escort take place with certain control measures but not armed. She testified that if she had had the slightest doubt about safety she would have recommended that the escort be armed. There was nothing new.

[226] According to Ms. Perron, Mr. Mancini had adduced five documents, i.e. Exhibits A-39 to A-42 above, for the purpose of instilling fear. However, those documents had to be put into perspective and it had to be determined whether the objectives of each document were different.

[227] Exhibit A-39, the Correctional Plan Progress Report, discussed a return to the community for a potential NPB hearing. C.A. testified that it would be easier to find the inmate in the community because he would be there permanently, in contrast with the security escorts to the hospital on April 11 and May 4, 2007.

[228] Exhibit A-40 is a memorandum briefing the minister in the event questions were raised in the House of Commons because of the high-profile nature of the case.

[229] Exhibit A-41 is an assessment in view of a compassionate escort to the hospital, i.e. a public place. C.A. had taken all of the same steps to ensure the security of the escort. The same comment applied to Exhibit A-42, which pertained to a security classification. There was nothing new in either case.

[230] Ms. Perron reminded us that we were in an environment that managed inmates and that the person who focused specifically on the inmate's case had conducted a thorough assessment of the case for the temporary absences that were the subject of the refusal to work. She had considered the information regarding the inmate and had determined that there was no undue risk.

[231] Lastly, Ms. Perron noted that G.F. was part of the unit team in November 2006 when it was decided to recommend that the escort that was the subject of the refusals be unarmed. G.F. testified that at that time he was not in possession of any information that would have called for special attention with regard to the inmate or a staff member. He had fulfilled his responsibility as an SIO.

(iii) Jurisprudence

[232] Ms. Perron supported her arguments with the following case law.

[233] In *Jack Stone v. Correctional Service Canada*, [2002], AO Decision No. 02-019, (hereinafter *Stone*), the inmates were working in shops where they had the opportunity to make objects that could endanger staff safety. In that decision it was determined that the COs were exposed to specific risks as part of their duties and that the risk of being attacked was an integral part of their work. The decision nonetheless recognized that the risk of attack had been mitigated by measures that the employer had implemented. That decision also referred to the fact that the risk of violence was a normal condition of employment that precluded exercising the right of refusal other than in exceptional circumstances.

[234] In *Paul Chamard v. Correctional Service Canada, Donnacona Institution*, [2005], AO Decision No. 05-004, (hereinafter *Chamard*), two COs refused to conduct an unarmed escort of an inmate to hospital. The AO stated at paragraphs 65 and 68 of the decision as follows:

> [65] After finding that the inmate presented a medium risk of escape, that the employees had been trained and knew the procedure to follow for the escorted outing, that the employer was applying the exact written procedures for assessing the risks related to the escorted outing, the health and safety officer concluded that the reasons given by the employees were based on a hypothetical risk of danger.
>
> [...]
>
> [68] However, it has not been demonstrated to my satisfaction that the facts were sufficiently compelling to establish that, at the time of the unarmed escorted outing, there was a real or potential danger and that the risk represented by the unarmed escorted outing surpassed the level of a normal condition of employment.

[235] In *Bouchard and Canada (Correctional Service)*, [2001], AO Decision No. 01-027, (hereinafter *Bouchard*), two COs refused to escort an inmate to the hospital to visit his sick mother. The AO asked whether the danger that the COs alleged constituted a normal condition of employment. The AO noted that the inmate to be escorted was a violent inmate but that violence was a normal condition of the COs' employment. Since the employer had implemented control measures sufficient to address the danger, the AO found that the risk the COs were facing did not go beyond the context of normal condition of employment.

[236] In *Moore and Canada (Correctional Service)*, [2002], AO Decision No. 02-031, (hereinafter *Moore*), two COs refused to escort an inmate to

his father's funeral because the escort was to be unarmed. It is noted that the police had indicated that there was no cause for concern regarding a newspaper report that $20,000 had been offered to anyone who killed the inmate. The AO stated in AO decision No. 01-023 that it was not for him to determine whether or not COs should be armed when conducting escorts because that responsibility lay with CSC under the CCRA. The AO upheld the HSO's decision that there was no danger in that case.

[237] In *Jeanson and Canada (Correctional Service)*, [2001], AO Decision No. 01-023, (hereinafter *Jeanson*), a CO refused to escort an inmate unarmed to an outside clinic that had few if any emergency exits. Further to the AO's comment as reported in *Moore*, supra, the AO found that the alleged danger did not exceed the framework of normal condition of employment because the alleged danger was hypothetical.

[238] Ms. Perron argued that the COs worked with inmates and that therefore there would always be a risk. However, CSC had implemented measures to reduce that risk to a minimum. That security process was based on the CCRA, the Commissioner's Directive on Security Escorts and the risk assessment prepared by the PO whenever a temporary absence was planned for an inmate. There was no evidence establishing that the procedure had not been followed.

(iv) Conclusion

[239] Ms. Perron asked what the AO could do in this case: stand in the PO's place and say that the escort should have been armed? That responsibility does not lie with the tribunal, the appellants or their counsel. C.A. was the specialist who took all of the information into account. She determined that there was no undue risk and she recommended that the temporary absence be unarmed, taking the security of the escorting officers into account.

[240] Ms. Perron argued that in the instant case, on the basis of the PO's risk assessment, escorting the inmate without being armed constituted a normal condition of the COs' employment that prevented them from invoking their right of refusal as set out in section 128 of the Code. The tribunal should dismiss the appeals.

[241] Ms. Perron wondered if the tribunal were to decide that there was a danger, what direction could be issued given that the inmate was no longer at the institution. The tribunal could not decide that all escorts should be armed because a refusal to work is an individual right that is not intended to call the employer's policies into question. Ms. Perron

suggested that the tribunal follow the decisions in *Moore, Jeanson* and *Bouchard,* supra, and find that it is not within the tribunal's authority to revisit the policies in effect at the employer.

REASONS

[242] My analysis will address the following points:

A. The matter of jurisdiction
B. The notion of danger
C. Danger that constitutes a normal condition of employment
D. Conclusion regarding the merits

A. The matter of jurisdiction

[243] The tribunal dismissed Ms. Perron's preliminary objection as to the AO's jurisdiction to determine this matter on the grounds that the HSO did not issue a decision on the danger. According to Ms. Perron, the AO does not have the authority to hear an appeal made under subsection 129(7) of the Code regarding the existence of a danger if no decision on the existence of danger has been rendered under subsection 129(4) of the Code.

[244] The reasons for my decision regarding the preliminary objection include (i) the interpretation and application of section 128, (ii) the HSO's investigation and (iii) the HSO's decision regarding the danger.

(i) <u>Interpretation and application of section 128</u>

[245] The right of refusal (to work in case of danger) is a fundamental element incorporated into the Code by Parliament. The statutory bar to exercising that right of refusal as set out at paragraph 128(2)(b) [normal condition of employment] constitutes an exception to that right. Contrary to what Ms. Perron proposed, it is therefore my opinion that it would run counter to that fundamental element to give a broad interpretation to such provisions regarding normal conditions of employment, i.e. to grant a broad meaning to what constitutes an exception to the individual right to refuse to work. In my opinion, paragraph 128(2)(b) must therefore be interpreted narrowly so as to limit to the fullest extent possible the

circumstances in which an employee cannot invoke the general rule (refusal to work) set out in subsection 128(1) of the Code.

[246] The effect of the application of the OPD 905-1 (Response to a Refusal to Work in Case of Danger) directive has been to eliminate the right of employees to appeal the HSO's "decision", a determination regarding the danger that he stated he did not render, contrary to what he was required to do under section 129 of the Code. In my opinion, the imposition of this directive, a purely administrative measure, by senior management at HRSDC cannot obstruct the application of the Code.

[247] In the Federal Court ruling in *Éric V. et autres*, supra, the Honourable Justice Lagacé described the employer's perspective as restrictive and literal. The Court stated at paragraphs 25 and 26 of that decision that it could not support such a perspective.[58] Those paragraphs read as follows:

> [Translation]
>
> [25] In his decision the AO simply interpreted the appeal procedure from which his jurisdiction arose, and he was perfectly entitled to do so. And if he decided that this procedure authorized him to hear the appeal, he did not at the same time decide on his authority with regard to the dispute between the parties. On the contrary, the AO refrained from revisiting the matter of his jurisdiction, but only after a summary investigation of the circumstances of the dispute, as the appeal procedure requires. The employer's remedy arises from a restrictive and literal perspective regarding certain provisions of the *CLC* and of the role this statute grants to the appeals officer in a dispute between parties.
>
> [26] The Court cannot adhere to such a perspective. The appeal procedure set out in the *CLC* must be given a broad interpretation to enable employees to make representations. To that end, let us allow the AO to investigate and decide afterwards what he has the authority to decide.

[248] The Honourable Justice Lagacé also clarifies the exercising of the right to refuse to work in his decision:

> [Translation]
> [27] Let us note nonetheless that, even if the AO has the authority to determine this matter, the appeal provided for at subsection 129(7) seems to apply to the situation of the employee with regard to whom the **HSO did not recognize** the right to continue to refuse to work under section 128, **as appears to be the case here**. However, that provision does not exclude a danger associated with a normal condition of employment as provided for at section 128 of the *CLC*. (My bolding)

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[58] It is important to distinguish the Honourable Justice Lagacé's comments regarding the employer's restrictive perspective from the principle that section 128(2)(b) is to be interpreted narrowly. These are two entirely different concepts.

[249] The relevant provisions of sections 128 and 129 of the Code therefore need to be reviewed in order to clarify the confusion generated by the OPD 905-1 directive. The relevant provisions at sections 128 and 129 of the Code read as follows:

> **128.** (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that:
>
> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> (b) a condition exists in the place that constitutes a danger to the employee; or;
> (c) the performance of the activity constitutes a danger to the employee or to another employee.
>
> **No refusal permitted in certain dangerous circumstances**
>
> (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if:
>
> (a) the refusal puts the life, health or safety of another person directly in danger; or;
> (b) the danger referred to in subsection (1) is a normal condition of employment
>
> **Employees on ships and aircraft**
>
> (3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that
>
> (a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,
> (b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or
> (c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee,
>
> the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.
>
> **No refusal permitted in certain cases**
>
> (4) An employee who, under subsection (3), is informed that the employee may not discontinue the use or operation of a machine or thing or cease to work in a place or perform an activity shall not, while the ship or aircraft on which the employee is employed is in operation, refuse under this section to use or operate the machine or thing, work in that place or perform that activity.
>
> [...]

Report to employer

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

[...]

Employer to take immediate action

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

Continued refusal

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

Investigation of report

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of:

> (a) at least one member of the work place committee who does not exercise managerial functions;
> (b) of the representative;
> (c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.

[...]

Continued refusal to work

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer).

Notification of steps to eliminate danger

(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).

[...]

129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to

investigate the matter in the presence of the employer, the employee and one other person who is (a) an employee member of the work place committee.

[...]

Decision of health and safety officer

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

Continuation of work

(5) Before the investigation and decision of a health and safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work, and shall not assign any other employee to use or operate the machine or thing, work in that place or perform the activity referred to in subsection (1) unless:

(a) the other employee is qualified for the work;
(b) the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and;
(c) the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

Decision of health and safety officer re danger

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

Appeal

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

[250] It is worth noting here that section 128 of the Code does not provide for the HSO to be directly involved in applying this provision but obliges the employer to inform the HSO if an employee continues to refuse to work. That said, the HSO still has a role to play in applying this provision. The HSO's role originates from the information he receives regarding the employee's continued refusal to work and gives rise to the obligation to investigate and to decide ("shall ... investigate", "shall ... decide") as part of the procedure set out in the Code for handling a refusal to work where a danger exists. This is important, because Ms. Perron argued that the HSO who intervened in the procedure for investigating a refusal to work under section 129 had to apply subsection 128(2)(b) of the Code even

before investigating the danger and had to decide that the refusal to work was not permitted because it was allegedly based on circumstances that constituted normal conditions of employment, with no regard to the danger. I find that the approach suggested by Ms. Perron impinges on the ability of employees to invoke their right to refuse to work when they maintain there is a danger and their right to obtain a decision as to the existence of that danger.

[251] Ms. Perron argued as follows:

> [Translation]
>
> ...that there is an exception regarding normal conditions of employment under paragraph 128(2)(b). Subsection 128(1) states as follows:
>
> > 128. (1) Subject to this section...

This indicates that before going to the heart of 128(1) it is necessary to conduct the analysis provided for at subsection 128(2)(a) or (b), as the case may be.

[252] I do not share Ms. Perron's opinion on this point. The introductory words at subsection 128(1) do not refer only to the exceptions provided for at paragraphs 128(2) (a) and (b) but to all other relevant provisions of that section as well. If an employee has reasonable cause to believe that a danger exists, he can continue to refuse to work under subsection 128(9) or 128(13), i.e. until an HSO intervenes to determine the nature and the existence of the danger under subsection 128(1). This is because the right to refuse to work is an employee's fundamental right and that right is always activated by the employee's legitimate belief, i.e. when the employee has reasonable cause to believe that a danger exists.

[253] Section 128 of the Code informs us that the procedure for refusing to work takes place in stages, as follows:

- An employee who has reasonable cause to believe that a danger exists and who refuses to work (128(1)) notifies his employer (128(6)). The employer shall investigate and take action if it agrees with the employee (128(8)).
- If there is disagreement regarding the danger, the employee can continue to refuse to work if entitled to do so under section 128 (128(9)). At that point the employer shall investigate in the presence of the employee and a member of the work place committee (128(10)).
- If the employee has reasonable cause to believe that the danger continues to exist despite the employer's action, he may continue to

refuse to work. At that point the employer shall notify (128(13)) a health and safety officer, who shall investigate (129(1)).

[254] Each step set out above is initiated by the employee on the grounds that he has reasonable cause to believe that there is a danger or that a danger continues to exist. This constitutes the basis for the right to refuse to work. An employee who refuses to work has no option but to follow this procedure. It is the employee who, on the basis of the subjective criterion of "reasonable cause to believe", initiates all of the steps set out in section 128 up to the point where a health and safety officer is notified of the refusal to work (subsection 128(13)).

[255] The second step of the procedure for invoking the right to refuse to work as set out above is that, "...if otherwise entitled to under this section...", the employee may continue to refuse to work. In the Gage Dictionary of Canadian English, 1983 edition, the second of two definitions for the word "entitle" reads as follows: "give a claim or right to; provide with a reason to ask or get something".

[256] That definition equates with the wording in the Code to the effect that the employee "has reasonable cause to believe" that a danger exists. The right to refuse to work is based on that subjective test, which constitutes the basis for it. Furthermore, an exception to a right, as under paragraph 128(2)(b), cannot constitute the basis of a right such as the right to refuse to work where a danger exists. Accordingly, the tribunal has adopted the position that the second step in the refusal to work process is also based on the subjective test "has reasonable cause to believe".

[257] However, even if it were possible to interpret this reference to the word "entitle" differently by referring to paragraph 128(2)(b), in my opinion such an interpretation would also be subject to a subsequent determination regarding the danger by the HSO. This is so because the wording of paragraph 128(2)(b) allows an employee to conclude that, as part of the process for refusing to work, he is facing a danger that is not normal in the circumstances and therefore does not constitute a "normal" condition of his employment and that this danger justifies his refusal to work. That is what the COs are claiming in this case.

[258] Ms. Perron and the HSO maintained that the **circumstances** of the COs' refusal were normal conditions of employment, i.e. that conducting escorts after the threat risk that the inmate represents had been assessed through a TRA was part of the COs' duties and therefore they could not refuse to work. However, the COs maintained that there was nothing normal about conducting an unarmed escort of a high-profile inmate, a contract killer with a price on his head when, according to them, the contract on him was still in effect. All of the COs testified that

they would not have refused to escort the inmate if they had been armed. There is thus a disagreement as to how the exception provided for at paragraph 128(2)(b) is to be interpreted, i.e. whether the exception applies when the **circumstances** of the refusal to work constitute a normal condition of employment or when the associated **danger** constitutes a normal condition of employment. In short, should the analysis required under paragraph 128(2)(b) take into account only the work itself or should it include the manner or the conditions in which the work is to be performed?

[259] In my opinion, allowing the employer to apply paragraph 128(2)(b) with no regard to the notion of danger would hamper the COs in invoking their right to refuse to work where a danger exists. Under section 128, an employee can still disagree with his employer and initiate the following step of his refusal to work up to the point where an HSO investigates.

[260] Ms. Perron asserted that the HSO was not required to decide on the matter of danger in order to determine whether the circumstances of the refusal to work were normal conditions of employment, thereby preventing an employee from invoking his right to refuse to work in case of danger. Mr. Mancini stated that this approach made no sense because it meant that everything a CO did would be considered a normal condition of employment. In support of her position, Ms. Perron argued that [translation] "...it is important not to misinterpret the notion of danger as set out at 128, and the word "danger", as written at 128(2)(b), which is not the same thing, and that leads to a new way of proceeding."

[261] Under paragraph 128(2)(b), an employee may not refuse to work when a danger referred to in subsection 128(1) is a normal condition of employment. Contrary to what Ms. Perron and the HSO have asserted, Parliament has stated that it is not simply the circumstances referred to in subsection (1) that prevent an employee from refusing to work. Parliament has stated that those circumstances must constitute a danger to an employee who is refusing to work in order for that provision to take effect. If Parliament had wanted the situation to be otherwise, it would have used words similar to those it used in paragraph 128(2)(a), i.e. "...the refusal puts...", or it could have changed the wording at paragraph 128(2)(b) from "the danger referred to" to "the circumstances referred to". Instead, Parliament used the word "danger" at paragraph 128(2)(b). Those carefully chosen words are highly significant in that the word "danger" entails a determination of danger by the HSO.

[262] Contrary to what Ms. Perron has argued, there is only one notion of danger set out in the Code. The term is defined in subsection 122(1) of

the Code and it has been the subject of a large body of case law, as we will see later. The very term itself, "danger", which is used elsewhere in the legislation that defines it, must have the same meaning whenever it is used in that same piece of legislation. Accordingly, I find that a determination by the HSO as to the existence of danger, as defined in subsection 122(1), is an essential condition for such a provision to apply. It was not until later, after verification of the facts that the HSO should have determined whether the danger constituted a normal condition of the COs' employment. Should that prove to be the case, the HSO would have had to determine that the danger did not warrant invoking the right to refuse to work, and thus that a danger that would justify invoking that right did not exist.

[263] To add to that interpretation, it is necessary to ask what can happen if an employee wilfully abuses the right to refuse to work, i.e. if he refuses to work for reasons other than those set out in the Code. Obviously, the employer could take disciplinary measures against the employee in question. The employer did in fact notify the COs that if they refused to perform unarmed escorts in future, after a TRA had taken place, disciplinary measures would be taken against them. However, the Code sets out specific conditions that must be in place before such measures can be taken. To that end, an employee can be subject to disciplinary measures if the employer is of the opinion, after all investigations and appeals under sections 128 and 129 have been exhausted, that there has been abuse on the part of the employee who refused to work (subsection 147.1(1))[59] and that the employee's refusal is not justified. (My underlining)

[264] Accordingly, the employer must wait for the refusal to work and appeal process to end before being able to take disciplinary measures against an employee and may do so only if the employee wilfully refused to work when the refusal was not justified under paragraph 128(2)(b). Therefore, paragraph 128(2)(b) does not preclude invoking the right to refuse to work if an employee has reasonable cause to believe that a danger exists, but rather prevents the unjustified use or even abuse of that right in specific circumstances. If that provision does in fact serve as a filter, it is only with regard to the unjustified use or abuse of the right to refuse to work. The right to refuse to work in case of danger cannot be extinguished by such a provision.

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[59] 147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.

[265] Such an approach is fully consistent with other provisions of the Code that trigger proceedings in the event of a refusal to work. Even on a ship or aircraft, when the person in charge (the captain or the pilot) decides and informs that an employee cannot refuse to work while the ship or aircraft is in operation and informs the employee to that effect, the employee's right to refuse to work is not extinguished since the employee's refusal to work will be analyzed once the ship or aircraft is no longer in operation (subsection 128(4)). It is clear that Parliament wanted to protect the right of employees to refuse to work where a danger exists.

[266] An employee who has refused to work and who has reasonable cause to believe that a danger continues to exist, notwithstanding his employer's investigation and the action the employer is proposing, can continue to refuse to work (subsection 128(13)). At that point the employer must inform an HSO so that the latter can investigate. The Code thus imposes a mandate on the HSO when he is informed that an employee is continuing to refuse to work. That mandate is both simple and clear. The HSO is obliged to investigate and to determine whether a danger exists.

(ii) HSO's investigation

[267] The HSO's mandate when an employee invokes the right to refuse to work in case of danger starts with notification by the employer (subsection 128(13)), which was done in this case. Once the HSO has been informed that the employee is continuing to refuse to work, the HSO has a statutory obligation to "investigate without delay" the matter, i.e. the danger alleged by the employee who is continuing to refuse to work (subsection 128(13)), in accordance with the requirements set out at subsection 129(1). Ms. Perron argued that the reference to "the matter" at subsection 129(1) is a reference to the normal condition of employment. However, in reading subsection 128(13) it becomes clear that "the matter" refers to the fact that the employee still believes that "the danger continues to exist" even though the employer has "take[n] steps to protect employees from the danger" or "disputes [the] matter." There is no reference at subsection 129 (1) to the exception set out at paragraph 128(2)(b) of the Code. Furthermore, subsection 129(1) is activated by subsection 128(13), and that latter subsection is the provision that should be referred to for an explanation of what is meant by "the matter".

[268] There is no reference in the legislation, as Ms. Perron argued, to a preliminary inquiry stage whereby an HSO could begin by considering

the application of the exception provided for at paragraph 128(2)(b) without determining under section 129 the existence and the nature of the danger alleged by an employee who is refusing to work under subsection 128(1) of the Code. In the instant case, all the COs testified that they would not have refused to perform the escort if it had been armed. However, they all testified that in the circumstances they were missing a piece of protective equipment essential to their ability to perform the escort at an acceptable level of safety, namely a firearm. In my opinion, the HSO had to begin by deciding whether the circumstances at the time of the refusal constituted a danger to the employee refusing to work.

[269] The terms and conditions of the investigation are simple: the HSO investigates the matter in the presence of the employer, the employee and a member of the work place committee or causes another HSO to investigate the matter (subsection 129(1)). The requirement that the HSO investigate "in the presence of" those individuals indicates that the HSO must appear in person at their work place. Therefore, the HSO was not justified in conducting his investigation by telephone as he did on May 4, 2007.

[270] The HSO stated that he did not investigate the danger at the time of the refusals to work. He testified that he had investigated by conducting what he referred to as a "preliminary inquiry". The Code does not provide for a preliminary inquiry in the event of a refusal to work in case of danger. The Code provides for only one type of investigation when there is a refusal to work: the investigation referred to in section 129 of the Code, namely an investigation into the danger alleged by the employees who have invoked their right to refuse to work under subsection 128(1) of the Code. Conducting such an investigation is a statutory obligation ("the health and safety officer shall") set out in the legislation, and the HSO is required to comply with it. In my opinion, when an HSO chooses to take into account only the circumstances of a refusal to work, as the HSO did in the instant case, he is exercising his authority under section 129 of the Code only partially. The HSO must exercise that authority fully, which he neglected to do in failing to make a determination regarding the danger (129(1) to (7)).

[271] Although he refused to make a determination with regard to the essential point of an investigation under subsection 129(1), namely the alleged danger, the HSO nonetheless conducted the required steps of an investigation under that provision. In other words, he

- was informed, pursuant to the Code, of the refusals to work of the four COs and exercised his authority in part;

- received the employer's investigation reports and met with the employer's representatives in that regard;
- met with the COs who refused to work and discussed with them their reasons for refusing to work;
- conducted a partial analysis of the circumstances of the refusals to work and made a determination regarding them;
- took into account the TRA[60] carried out by the employer's representatives;
- received from CSC certain documents relevant to the refusal to work;
- received the COs' testimony regarding the danger presented by the inmate and the proposed escort; and
- concluded his investigation by determining that the circumstances of the refusals to work, i.e. escorting an inmate during a temporary absence, were normal conditions of the COs' employment and that they could not refuse to work.

[272] It must also be noted that Ms. Perron took a conflicting position in response to the HSO's written statement regarding this lack of an investigation when she made the following comments in relation to the decision in *Dragseth*, supra. In contrast to what the HSO stated in his reply to the email[61] from the CAO asking him for a copy of his investigation report, i.e. that he had never rendered a decision under 129(4) and had not investigated under 129(1) of the Code, she stated as follows:

> [Translation]
> And the decision in Dragseth, I have read it, and in that case it was noted that the employees had informed a safety officer regarding the refusal to work, but he did not investigate. He did not undertake anything. I think that we are not – that this does not apply in this case. Mr. Tremblay intervened, he met with people, he submitted an investigation report, and he rendered a decision with reasons. (My underlining)

[273] Accordingly, the tribunal considers what the HSO referred to as a "preliminary" inquiry in the instant case to be a formal investigation carried out under subsection 129(1) of the Code despite the HSO's assertion that he had not conducted such an investigation. Furthermore, the conclusions that the HSO derived from it will be treated as conclusions of the investigation that the HSO was required to perform pursuant to subsection 129(1) of the Code.

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[60] As we will see later, the Threat Risk Assessment was inadequate with regard to the COs' protection.

[61] See Document D4, p. 1 of 2. See also the HSO's investigation summary

(iii) HSO's decision regarding the danger

[274] The HSO repeated countless times that he did not make a determination regarding the danger. He also confirmed this in writing in his reply to the CAO's email[62] asking him for a copy of his investigation report.

[275] However, the Code does not give an HSO the authority to choose whether or not to make a determination regarding the danger. As I stated earlier, an HSO has a statutory obligation to fulfil the mandate set in the Code, namely to investigate and determine whether or not a danger exists. I have already decided that the HSO's investigation was a formal, albeit incomplete, investigation under subsection 129(1) of the Code. It remains for me to decide what type of decision the HSO can render and what, for all practical purposes, he did render.

[276] Under subsection 129(4) of the Code, the HSO is required to render a decision. That provision reads as follows:

> (4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide **whether the danger exists** and shall immediately give written notification of the decision to the employer and the employee. (emphasis added)

[277] There are only two types of decision that an HSO can make in the context of the refusal process set out in the Code. He can determine that the danger exists (subsection 129(6)) or that the danger does not exist (subsection 129(7)). Those provisions read as follows:

> (6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part. (My underlining)
>
> (7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision. (My underlining)

[278] In the present case, ultimately the HSO did not determine that a danger existed. If he had done so, he would have been obliged to continue his analysis to determine the nature of the danger. In other words, he would have had to make one of the following two determinations:

- that the danger could reasonably be expected to cause injury, in which case he would have had to issue directions under

[62] See Document D4, p. 1 of 2.

subsection 145(2) as he deemed appropriate to protect the employees; or

- that the danger constituted a normal condition of employment, which would amount to a finding of no danger, since the danger in question did not justify a refusal to work.

An appeal is possible in either case.

[279] The HSO stated that he could not make a determination regarding the danger but that he had conducted an inquiry and found that the circumstances of the COs' refusal were normal conditions of employment. However, as I stated earlier, the HSO went through almost every step of the investigation process required of an HSO when he investigates whether or not a danger alleged under the Code exists. He completed his inquiry and ultimately determined that he was not making a decision regarding the danger. I infer from this that the HSO made an implicit determination that the danger did not exist. I therefore find that, for all practical purposes, the HSO determined that the COs were not in danger since he

- made a determination regarding the circumstances of the COs' refusals to work;
- notified the COs that they could no longer continue refusing to work because of danger and therefore had to return to work; and
- withdrew without issuing any directions regarding danger under subsection 145(2).

[280] Lastly, since the HSO did investigate under the Code and his finding amounted to a finding that the danger did not exist, subsection 129(7) of the Code applies in full. The tribunal has therefore decided to entertain the COs' appeals.

[281] This conclusion is based on the following comments by the Honourable Justice Lagacé at paragraph 24 of the Federal Court decision in *Éric V. et autres,* supra:

> [Translation]
> [24] Let us not forget that this is an appeal under subsection 129(7) of the *CLC*. Pursuant to subsection 146.1(1) of that same Code, an AO who is to hear such an appeal shall, in a summary way and without delay, inquire into the circumstances of the case. And logically, it is not until after his investigation, and once he has learned more about the facts giving rise to the dispute, that he can vary, rescind or confirm the decision or direction or issue any direction that he considers appropriate (paragraphs 146.1(1)(a) and (b)). The AO must also be given the time to conduct his investigation and must have the authority to decide

later with full knowledge of the facts what the *CLC* has entrusted him with deciding.

[282] For all of the foregoing reasons, Ms. Perron's objection is dismissed.

B. The notion of danger

[283] Before a detailed analysis of the evidence can be carried out, it is necessary to establish a framework. The notion of "danger", which goes to the heart of this matter, has been the subject of recent interpretations by the Federal Court as well as the Federal Court of Appeal.

[284] To determine whether a danger existed within the meaning of the Code, I need to refer to the definition of the word "danger" as found at subsection 122 (1) of the Code:

> "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;

[285] The parties in this case cited the decisions in *Martin*, supra, and *Verville*, supra. Both of those decisions address the notion of "danger" within the meaning of the Code. It should be stated that the ruling in *Verville*, supra, is an important decision with respect to the interpretation to be given to the word "danger" as set out in the Code. At paragraphs 34, 35 and 36 of that decision, the Honourable Justice Gauthier set out the principles to be applied in interpreting the notion of danger. She writes as follows:

> [34] The above statement is not entirely accurate. As mentioned in *Martin, supra*, the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.
>
> [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. ..Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. (My underlining)

[286] I must therefore consider the evidence adduced in this case and decide whether an unarmed escort of the inmate in question could reasonably be expected to cause injury to the COs before the situation could be addressed. I must also determine whether there is a reasonable possibility that the circumstances that could reasonably be expected to cause such injury will arise in future. Furthermore, I must determine not only whether the unarmed escort that the COs were to perform constituted a danger within the meaning of the Code but also whether that danger constituted a normal condition of their employment. A finding that the danger constituted a normal condition of employment would mean that the COs' refusals were unjustified and would amount to a finding that no danger existed for the purposes of giving rise to the right of appeal.

[287] Ms. Perron cited earlier the decision in *Verville*, supra, with reference to the tribunal's allusion during the hearing of November 2, 2007[63] that the COs' testimony in their field could be considered expert testimony. Ms. Perron referred to paragraph 51 of that decision, in which the Honourable Justice Gauthier refers to expert witnesses as follows:

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

[288] I agree with Ms. Perron's contentions in reference to the decision in *Verville*, supra, that the COs were not, strictly speaking, experts. They were nonetheless ordinary witnesses with a great deal of experience in the field of corrections. I therefore find that they had significant knowledge of inmates and of the applicable policies and procedures and accordingly I will attach special importance to their testimony.

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[63] Transcript of recording of November 2, 2007, page 180, lines 13-21

[289] I agree with Ms. Perron that the CCRA and the Code are compatible. However, with regard to the protection of the COs' occupational health and safety, the Code takes precedence over the CCRA. The Code sets out specific measures relating to their protection, such as invoking the right to refuse to work where a danger exists, the issuing of directions to protect employees and an entire series of obligations imposed on the employer in the workplace that it controls, whereas the CCRA sets out general objectives for the protection of staff. If those objectives were set out in detail and if they exceeded the obligations set out in the Code, it could then be maintained that the CCRA was more effective in protecting the COs, which is not the case. The object of that legislation is entirely different, and it is normal that CSC would focus on meeting the objectives of the CCRA. However, CSC must also acknowledge and accept that the Code also applies to the COs and that compliance with the Code is mandatory.

[290] I agree with the principle as set out in *Jack Stone*, supra, and *Bouchard*, supra, that violence is a normal condition of employment and that a refusal to work on that basis alone is not justified. I also agree with the principle established in *Chamard*, supra, and *Jeanson*, supra, that a hypothetical risk does not justify invoking the right of refusal. However, I am less convinced of the rationale in the decision in *Moore*, supra, to the effect that the AO did not need to determine whether the COs should be armed during escorts because that responsibility lay with CSC under the legislation. In *Martin*, supra, a different determination was made, with the Court stating as follows at paragraph 42 of its decision:

> [42] It is not for this Court to weigh that evidence or to come to any conclusion about whether the evidence rose to the level of a reasonable expectation of injury, or indeed whether park wardens should be issued handguns. That is for the appeals officer to decide. (My underlining)

[291] I do not agree with Ms. Perron's suggestion that the tribunal follow the decisions in *Moore, Jeanson* and *Bouchard,* supra, to the effect that it is not within the tribunal's jurisdiction to review the employer's policies. If those policies disregard the COs' safety or place them at risk, the tribunal has no choice but to take the actions needed to protect those employees.

C. Danger that constitutes a normal condition of employment

[292] In my opinion, the interpretation to be given to paragraph 128(2)(b) in the case at hand needs to be clarified. To begin, it must be stated that this exception is one that applies in a situation in which there is a refusal to work. Thus, for a danger to be deemed to constitute a normal

condition of employment, that danger must be one that cannot be controlled through the protective measures set out in the Code. As we will see below, such a danger would not justify invoking the right of refusal. However, only a comprehensive analysis of the evidence will enable me to decide whether the measures taken by the employer to protect the COs while escorting the inmate minimized the reasonable possibility of injury, regardless of whether a danger that constituted a normal condition of employment persisted. In short, danger cannot and must not be assessed in a "vacuum".

[293] The danger referred to in subsection 128(1) must first be subject to an overall investigation by the HSO that takes into account the working conditions and the measures taken to protect the employee who is refusing to work. After all, a refusal to work is never based on a belief that the circumstances are normal conditions of employment but rather on the employee's legitimate belief that a danger exists. There is always an allegation that the work to be performed presents a danger that is not normal in the circumstances because the manner of proceeding does not correspond to the usual manner of performing the work as safely as possible. That is what the COs have asserted. They all stated that it was not normal for them to escort the inmate in question without the protective equipment essential to their safety, namely a firearm. They maintained that they would have performed the escort if it had been armed. Mr. Mancini also noted that all of a CO's duties are a normal condition of employment as such and that accepting the HSO's interpretation would therefore impinge on the COs' right to refuse to work when a danger exists.

[294] In my opinion, that assertion by the COs touches on the position adopted by the Honourable Justice Gauthier at paragraph 55 of the decision in *Verville*, supra:

> ¶ 55 The customary meaning of the words in paragraph 128(2)(b) supports the view 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? (My underlining)

[295] Hence, as part of the process for determining whether a danger is a normal condition of employment, the task to be performed, in this case, escorting an inmate during a temporary absence, cannot be separated from the method or the manner in which the task is to be performed or from the tools required to do so. For that reason, the HSO must conduct an overall investigation of the situation that is the subject of a refusal to

work in order to determine at what point a danger constitutes a normal condition of employment that does not justify a refusal to work.

[296] In his investigation, the HSO is to determine whether the measures taken by the employer have minimized the reasonable possibility of injury to the employee who must perform the work.

[297] In a recent Federal Court decision in *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500,* 2008 FC 846, the Court upheld the AO's interpretation in that case with regard to a danger that constituted a normal condition of employment. Like the Court, I fully share the interpretation of this notion by the AO, which is explained as follows:

> [152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.
>
> [153] Once all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.
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> [154] For the purpose of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[298] The principles that must guide the employer in its intervention and in the priority to be given to the measures to be taken to protect employees are set out in sections 122.1 and 122.2 of the Code, and the employer's general obligation is stated at section 124 of that same enactment. Those provisions are as follows:

> 122.1 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.
>
> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.
>
> [...]

> 124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected. (My underlining)

[299] An employer that intervenes to protect its employees must first be guided in its analysis by the Code's primary objective: to prevent accidents and injury to health arising out of, linked with or occurring in the course of the employment (section 122.1). The employer must operate in accordance with that objective. With that objective in mind, the employer should then determine whether its intervention is in line with the order of priority established for the purpose of preventing accidents (section 122.2). The employer must initially try to eliminate hazards, and if that is not possible, it must then focus on reducing them. If the employer succeeds in reducing hazards, or even if that is not possible, it must also implement measures for addressing the risk by providing the personal protective equipment, clothing, devices or materials needed to ensure the health and safety of employees – in this case, the COs.

[300] Lastly, the employer must consider that its responsibility under the Code is to ensure that the health and safety at work of its employees is protected (section 124), an extremely high standard that obliges the employer to be rigorous in its analysis of the hazards that might affect the health and safety of employees.

[301] It is clear that the employer must ensure that its employees are protected at work. Accordingly, the protective measures put in place by CSC must be sufficient to protect the COs from any situation that could reasonably be expected to cause injury to them, regardless of whether or not they are actually injured. The protective measures that are adopted must be proportional to the severity of the potential injury.

[302] To state, as Ms. Perron and the HSO did, that conducting escorts is a normal condition of employment is misleading. It is true that conducting escorts is a normal condition of the COs' employment in the sense that it is a normal task that they perform as part of their employment, as their work descriptions indicate. However, there is an important distinction to be made between a task, such as an escort, and a danger that is part of that task, i.e. the reasonable possibility that an injury will occur during the performance of the task before it can be addressed. There is also an important distinction to be made between such a danger and a danger that constitutes a normal condition of employment that would preclude a refusal to work. The latter presupposes that the employer has first determined that a danger exists during escorts and has then taken all of the measures necessary to protect its employees, i.e. it has identified and controlled all of the factors that could have a major negative impact on the duty of conducting escorts. At that point there is nothing more the employer can do to protect its employees any further.

[303] I would consider the residual danger that persists after all of those control measures to be a normal condition of employment. That danger alone, which cannot be controlled and for which no directions can reasonably be issued under subsection 145(2) to protect the employee any further, would not justify a refusal to work because such a danger constitutes a normal condition of employment. In all other cases a finding that a danger exists is called for and directions must be issued to the employer to protect the employees. A refusal to work is thus justified in such cases.

[304] To simplify what is meant by a danger that constitutes a normal condition of employment, I will use the following example of a firefighter's work.

[305] In response to the very general question, "Can a firefighter refuse to go to put out a fire?", we would instinctively be inclined to answer that he could not. After all, a firefighter's work entails putting out fires. This is similar to CSC's and the HSO's approach in the present case. Both of them maintained that it was part of the COs' work to conduct escorts, whether armed or not, and that therefore they could not refuse to work. However, if the question were to be asked in greater detail, such as "Can a firefighter refuse to go to put out a fire if he does not have all of his protective equipment or adequate training to protect himself?", the answer would likely be very different. It would be unthinkable to require that a firefighter go to put out a fire without all of his protective equipment and without adequate training because that is not the usual or safe method of performing this work. No one would expect a firefighter to risk his life at any cost to do the work for which he was hired. The same holds true for the COs, who maintained that conducting an unarmed escort of the inmate in question would have placed their safety in danger and that such a danger was not a normal condition of employment because CSC has not provided them with the equipment needed for their protection, namely a firearm. My comments are in line with those of the Honourable Justice Gauthier in *Verville,* supra, when the judge asks the following question at paragraph 55 of that decision: "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?"

[306] However, that same firefighter could not refuse to perform his work if he was qualified to do so and if every measure had been taken to ensure his protection, including providing the protective equipment needed in any possible situation, thereby maximizing the firefighter's chances of being able to put out the fire as safely as possible in the circumstances. At that point there would still be a reasonable possibility of the firefighter

being injured or even killed because of the very nature of the work to be done, namely putting out fires, but the residual danger that persists after the employer's protective measures have been implemented is one that cannot be controlled or eliminated. That residual danger exists for all situations in which a firefighter must put out a fire and is an essential characteristic of the work. It can thus be said that this danger, i.e. the residual danger, is a normal condition of employment.

[307] Hence, in the case at hand the employer will have to demonstrate to the tribunal or to the HSO investigating the matter that it has put in place all of the protective measures necessary to minimize the reasonable, and not hypothetical, possibility that an injury could arise during the course of the COs' duties in the specific circumstances of this case. The residual danger that persists after those protective measures have been implemented is a danger that constitutes a normal condition of the COs' employment.

D. Finding on the merits

[308] It is important here to proceed with a detailed analysis of the evidence adduced. To that end, I will consider the primary factors that have been raised by the parties in this case: (i) the inmate, (ii) the contract on the inmate's head, (iii) the possibility of the inmate being located, (iv) the Threat Risk Assessment and (v) the protective measures.

[309] I note nonetheless that neither Mr. Mancini nor Ms. Perron raised the issue of training and that this issue was not in dispute. Ms. Perron simply stated that the COs had received training on escorts, that it was part of their duties and that the training modules were inter-related. Accordingly, the tribunal will not focus any further on that issue, although I will refer to it as needed.

(i) <u>The inmate</u>

[310] The inmate is a high-profile inmate/criminal, a protection case. He was a contract killer for a criminal organization, and as such he committed crimes of extreme violence. His case was extensively covered in the media, largely because he became an informant and the information he provided led to the incarceration of members of the criminal organization and even its leader. The inmate also engaged in other acts that increased his profile. Everyone at the institution, including the COs, management representatives and the prison population, knew him and was aware that there was a price on his head.

[311] The testimony confirmed that this inmate was also a liar, a con man, a manipulator, a person with grandiose ideas, and that many people did not trust him at all. Nonetheless, P.G. asserted, as did all of the other witnesses, that the inmate was polite with them and did not create any problems with the officers.

[312] The inmate had been on release in the community for a long period of time. During that period he went under a different identity. During that same release period the inmate fled and stopped reporting to his PO. He was therefore considered to be unlawfully at large. Ms. Perron asserted that nothing had happened to the inmate during that entire period. However, it was established that the inmate had fled to a place where no on knew who he was and had been outside the country for a long period of time. The tribunal also notes that C.A.'s recommendation that the inmate be granted full parole was rejected by the National Parole Board on the grounds that he had lost his credibility after going unlawfully at large.

(ii) Contract on the inmate's head

[313] What sets this inmate apart from every other inmate is that the COs asserted that he had a price on his head, that the contract on him was still in effect and that this would have put their health and safety in jeopardy during an escort. As C.A. acknowledged, the contract was not in writing or official. Furthermore, most of the people who knew about this type of contract were part of the criminal element, and for good reason. It was therefore possible for the employer's representatives to question whether it actually existed. However, C.A. testified that this possibility existed and that in any case CSC had ongoing concerns about the inmate's safety because of his status as a high-profile informant. Although the HSO confirmed that he did not verify whether there was a contract on the inmate's head, he nonetheless acknowledged that the employer admitted during the investigation that such a contract existed.

[314] The testimony of P.G. and J.T. adds credibility to the assertion that there was in fact such a contract. In their work as COs they were and had to be aware of this type of information given that they worked closely with inmates and performed case management duties. Furthermore, G.F., the SIO on duty on the day of their refusal, had confirmed to them that the contract was still in effect. S.H., who was also an SIO at the institution, stated that there had been a price on the inmate's head in the past but added that he did not know whether the contract was still in effect. He also acknowledged that the fact that there had been a price

on the inmate's head had been a concern for CSC in the past. He further stated that the P program had to be applied to this inmate because his life was in danger outside the institution, a statement with very serious implications.

[315] That contract was common knowledge. P.G. testified that everyone in the institution knew about it, which meant that the prison population was aware of it. Furthermore, an inmate had commented that certain inmates had a price on their heads in the institution, a reference to the contract on the inmate in question. That statement also played a part in J.T.'s refusal. However, it was the subsequent confirmation and the assurance he obtained from G.F., the SIO on duty on the day of his refusal, that the contract was still in effect, that the amount of money involved was significant and that the escort was to be unarmed that were the reasons for P.G.'s and J.T.'s refusals.

[316] The contract, which was apparently for a large sum of money, was downplayed by the employer's witnesses as an old story. According to them, the contract no longer seemed to have the same importance because the inmate had spoken with the head of the criminal organization on two occasions and some of its members, seemingly to call a truce. However, even if we acknowledge that the inmate, a notorious liar, had had such conversations, we do not know the nature of them. Even if those conversations did in fact take place, no one came to report what had been said. Furthermore, once such a contract has been issued, it is not necessarily clear when it will end. There is no proof that anyone called off the contract or that the criminal organization took any kind of steps to terminate it, even if this were possible.

[317] The tribunal gives a great deal of weight to the appellants' fear regarding the existence of such a contract. Having regard to the evidence adduced, the tribunal accepts the COs' statement to the effect that there was in fact a price on the inmate's head.

[318] C.A. testified that there was no longer the same sensitivity on the part of the people in the criminal organization given the number of years that had passed since the inmate had informed on them. Many of those people were no longer part of the organization in question or had simply disappeared. According to C.A., the inmate himself had heard that if he had the chance he could speak with any member of the organization and deter him from exacting revenge against him. Given how little credibility the inmate had, the tribunal gives little weight to that assertion. Furthermore, such an assertion would have little impact at the time when the contract was being carried out. The tribunal also notes that no one came to testify or file any kind of evidence to the effect that the contract had been cancelled. It was also shown that many people would not

hesitate to carry out the contract for various reasons, such as making a name for themselves among the criminal element, for money or for revenge etc..

[319] In fact, no one stated that the contract was no longer in effect. The tribunal notes that everyone agreed that the P program applied to the inmate while he was at the institution and would continue to apply after his release. It is obvious that the people from the P program were acting as if the contract existed and was still in effect. The tribunal accepts Mr. Mancini's argument that the people who administered the P program and CSC were taking strong measures to protect the inmate's identity and his safety. Therefore, it matters little that the agreement with the inmate under the P program was referred to as a *moral* contract, a label that does not appear in CSC's files, as Mr. Mancini noted, and that in my opinion has no bearing. The important point is that the only reason for such measures was that as an informant the inmate had to be protected because his life was in danger whenever he left the institution. The people who administered this "moral" contract were doing so as part of the duties of their employment, as C.A. acknowledged. Absent any evidence that would prove otherwise, and contrary to what S.H. suggested, in my opinion they are armed as all on-duty police officers are.

[320] P.G. testified that the SIO on duty on the day of his refusal had confided in J.T., his fellow escort team member, that the contract on the inmate's head was sill in effect, as J.T. subsequently confirmed. During his testimony G.F. tempered that information by stating that he had told J.T. that the inmate had had a price on his head in the past but that there was nothing special about his case at the present time. It is important to note here that G.F., the SIO at the institution, acknowledged the existence of the contract on the inmate, which C.A. did not openly acknowledge during her testimony, simply stating that CSC had ongoing concerns about the inmate's safety.

[321] I give more weight to the testimony of P.G. and J.T. than to that of G.F., as the appellants' testimony was more credible. Furthermore, notwithstanding Ms. Perron's objection, I have also taken into account the uncontradicted testimony of G.R. , who accused G.F. of being a "vicious liar"[64] on this matter during the employer's investigation into the refusals to work by P.G. and J.T. in the presence of E.B., the manager in charge of the investigation.

[322] In light of the testimony on the record regarding the fact that the P program would continue to apply even after release (which C.A. stated was very rare) and CSC's ongoing security concerns, the tribunal

[64] Transcript of recording of November 2, 2007, p. 164, line 4

accepts Mr. Mancini's assertion that the contract on the inmate was still in place.

(iii) Possibility of the inmate being located

[323] The possibility of the inmate being located as a security concern is a major factor in this case. C.A., the specialist on the inmate's case, quantified the risk associated with a one-time temporary absence for the inmate in question as 0.1%. Nonetheless, CSC and the police implemented stringent measures, which in my opinion would not be warranted by a 0.1% risk, to ensure that the inmate's identity would not be disclosed because this would jeopardize his safety and even his life. The tribunal notes that if the inmate's safety was in danger outside the institution the same would hold true for the COs who had to escort him to a local health care facility.

[324] The inmate went under his real name in the institution. There are many people in the institution who are part of street gangs, and those people have no rules and no hierarchy. All sorts of criminal organizations are represented. There are also people affiliated with biker gangs. All of those people knew the inmate and would not hesitate to inform on him. The HSO testified that there had been a consensus[65] during his investigation that it was possible that other inmates might leak information but that this possibility was difficult to quantify. In the face of Mr. Mancini's insistence G.F. had to acknowledge that it was possible that criminal elements in the community might obtain information regarding the inmate's leaving the institution. The HSO deliberately disregarded that information because, in his opinion, it would have been relevant to an investigation of danger, an investigation he stated he had not conducted. Such information would factor heavily into the ability to track down the inmate because during a one-time temporary absence his identity might be revealed intentionally and not simply be the result of chance, as Ms. Perron submitted. That information was not taken into account in the TRA.

[325] The inmate indicated that he was afraid to go to a minimum-security institution because he was a high-profile informant and might be located. He was afraid for his safety and above all for his life. Even in the institution it was necessary to ensure that there were no incompatibles who would place the safety of the inmate or the security of the institution at risk. It was established from C.A.'s testimony that, for his own safety, the inmate could not go to a minimum-security institution because of the ramifications with the criminal organization and not, as S.H. claimed,

[65] Transcript of recording of November 1, 2007, p. 167, lines 15-22

because he had gotten on the wrong side of the managers and they wanted nothing more to do with him. He therefore had to be hidden at a protective facility with security measures that were much more stringent than those in place at a minimum-security institution and where serious cases such as his could be managed. Furthermore, even halfway houses, which have knowledge in this field and in the management of inmates and which are overseen by CSC, and the local police did not want the inmate, precisely because he was a high-profile case who brought some major security problems with him.

[326] In short, the tribunal is of the opinion that the inmate could be tracked down. That element, combined with the fact that there was a contract on the inmate and it was still in effect, considerably increases the reasonable possibility that the inmate might be assaulted during an outside escort. As a result, there was reason to believe that the COs escorting the inmate could be injured before the threat from the outside could be countered.

(iv) Threat Risk Assessment

[327] CSC carried out the Threat Risk Assessment (TRA) on the basis of the following three criteria:

- the institutional adjustment risk,
- the escape risk, and
- the risk to the inmate's safety.

[328] The TRA is geared to the particular inmate. The parties acknowledged that the inmate was polite and did not cause any problems for the COs. His personal growth in the institution had caused the inmate to change his perspective on life to the extent that C.A. considered that he would be a candidate for reintegration. The HSO stated that the escape risk was low. C.A. reported that the above three criteria were low for the inmate. In short, the inmate no longer presented an obvious threat to the COs, notwithstanding the tendency towards extreme violence he had displayed in the past. J.T. asserted that he had always had confidence in the TRAs conducted when an inmate was to be escorted. In this case, however, the appellants refused to perform the escort unarmed, not because of the inmate, but rather because of the prospect, which in P.G.'s opinion was more than plausible, of an outside attack against the inmate and the fact that the escort would be unarmed. The COs maintained that the three criteria applied to the inmate alone and not to the possibility of an attack from outside.

[329] On the basis of those criteria the inmate's security classification was determined to be minimum. All TRAs are subject to such classification, and that contention is confirmed in security bulletin 2006-05. The only reason a TRA was carried out for the inmate's escort was that the institution was classified as medium security and such assessments are carried out for all temporary absences from such institutions.
C.A. acknowledged that the decision not to arm the escort had been based on the fact that the inmate's security classification was minimum. The Warden endorsed the recommendation not to arm the escort on that basis. C.A. also stated that it had been decided that the inmate's compassionate temporary absence would be carried out with a compassionate escort rather than a security escort in light of his security classification.

[330] Accordingly, and as Mr. Mancini argued, regardless of the risk outside the institution, the inmate would always be assessed as minimum, which meant that security escorts would systematically be unarmed.
The tribunal notes that the inmate's security classification was a major component of the TRA, which had the effect of trivializing the prospect of an attack from outside and the risk that such an attack would present for the COs. However, in accordance with the Code and the notion of danger found therein, a danger existed not only when a hazard was actually present but also when there was a potential [In French "...éventuelle..."] hazard if it could reasonably be expected to cause injury to the COs exposed to it before the hazard could be eliminated.

[331] C.A. stated that when a TRA was carried out it entailed an overall assessment. Thus, the COs' safety was taken into account. The people from the P program had been contacted to determine whether there was any new information pertaining to the inmate's safety. Those people had even gone so far as to ensure that the destination of the temporary absence was a safe place. However, although such an analysis was in compliance with sections 4 and 70 of the CCRA, it was far from meeting the requirements of the Code because its primary purpose was not to ensure the employees were protected in the performance of their duties, which included outside escorts, but rather to address the risk that a particular inmate represented on the basis of his institutional behaviour. It is important to note here that when Mr. Mancini asked C.A. whether the Code had been taken into account when the TRA was carried out, she admitted that, as far as the provisions of the Code were concerned,

> [Translation]
> "...those aren't the guidelines we use in preparing the assessment report."

[332] According to C.A., no one knew that the inmate was taking part in a temporary absence at a local health care facility. However, at the time of the HSO's investigation it was established that the risk of an

information leak was a major concern for everyone and that such a risk had not been assessed. Furthermore, everyone at the institution knew the inmate and was aware that there was a contract putting a price on his head. The risk of that information being sold or simply given out for future considerations was not part of the TRA. The fact that the inmate was a high-profile case held little importance for the unit board that conducted the TRA because the inmate's case was no longer a source of interest to the SIOs. According to them, this was an old story; the inmate no longer held any influence in the institution or in the community and there was no new information indicating that someone might try to kill him.

[333] The HSO reported that it had emerged from the discussions that [translation] "*it was clear to everyone that because of the situation there was a greater risk of an outside attack.*" He stated that if the TRA had indicated that there was in fact a risk originating from the outside then the escort would have been armed. However, the HSO did not assess that risk and the employer simply stated that they had conducted a comprehensive TRA.

[334] It is not sufficient to state that it had been determined from consulting the people from the P program that there was no new information pertaining to the possibility that the contract on the inmate's life would be carried out during the escort. As Mr. Mancini argued, the people who would want to execute the contract would not have notified the police that they were intending to kill the inmate. Only an assessment of the risk represented by escorting the inmate outside the institution would be able to properly qualify and quantify the risk and establish the protective measures needed to perform the work as safely as possible in the circumstances. Moreover, this type of risk assessment would need to be conducted in accordance with the criteria set out in the Code and in consultation with the work place health and safety committee.

[335] The tribunal notes that, in addition to C.A.'s statement regarding the application, or rather the non-application, of the Code as part of the TRA, no analysis of the specific risks associated with outside escorts and with the protection of the COs performing the security escorts was submitted to the tribunal by the employer in support of its assertion that the COs' safety had been taken into account. It is therefore impossible for the employer to establish that it assessed the existing or potential risk to the COs in relation to an outside attack in the context of an unarmed security escort of the inmate in question.

[336] Accordingly, the employer's TRA does not meet the requirements of the Code and does not constitute a risk assessment carried out under the

Code. For all of the foregoing reasons, the tribunal finds that the TRA that CSC carried out is deficient with regard to the COs' protection.

(v) Protective measures

[337] Inside the penitentiary the inmate is protected by the system that CSC has put in place. On the outside, it is the responsibility of the escorting officers to protect him and to protect themselves. Part of the issue in this case is to determine whether the protective measures implemented by the employer were sufficient to minimize the reasonable possibility that the COs would be injured in performing the escort before the hazard or condition could be corrected or the activity altered, as the case may be.

[338] To fulfil that responsibility, the employer would have had to ensure that the COs had been provided with, not only training and instruction on the task to be performed, but also the equipment they would need to deal with every eventuality. The evidence on the record indicates that such eventualities included the reasonable possibility, and not merely a hypothetical one, contrary to what G.F. suggested, of an attack against the inmate from outside and at the same time against the COs.

[339] The appellants acknowledged that they had received the CO training, which had lasted approximately three months. The training included firearms training. It also included a component on internal and outside escorts, although the component on outside escorts lasted only 90 minutes. Moreover, according to A.S.D., all of the training modules were inter-related. A.S.D. stated that the COs were also taught about the various documents they would have to refer to during an escort.

[340] When an inmate has to go to hospital, a circumstance on which the refusals to work were based in the instant case, the escort is planned in advance. At that point the inmate's PO – in this case C.A. – is notified and prepares a summary risk assessment and makes a recommendation regarding the security and control measures to be applied during the escort. That recommendation is reviewed by the unit board, which also makes its own recommendation as to whether or not the board agrees with the recommended measures. In the case of the two escorts that were the subject of the refusals to work, the two ETA forms (Exhibits A-14 and A-15) indicated that there would be an escort with two officers, that the COs would have gas with them and that the inmate would be handcuffed and chained. The escort was to be unarmed.

[341] Further to the refusals to work, a report (Exhibit A-13) was prepared by the employer's representative E.B., co-chair of the work place health and safety committee. The report accurately reflects the employer's position in these cases, as follows:

- The inmate was known for his previous involvement in a criminal organization.
- The inmate's security classification was minimum. Therefore, the TRA recommended that the medical escorts be unarmed.
- The three risk criteria were assessed as low. The inmate's security classification was therefore reassessed and remained minimum.
- It was management's opinion that there was no reasonable cause for refusing because the risk had been assessed by the case management team and the SIO. Furthermore, security bulletin 2006-05 stated that chains and handcuffs were to be used when the inmate's security classification was minimum.

[342] It is clear from the above report, the testimony of the employer's representatives, the Commissioner's Directives that were adduced in evidence as well as security bulletin 2006-05 that the inmate's security classification was a predominant factor in the recommendation regarding the security and control measures to be used. If the inmate had a minimum security classification, it mattered little that there was an undetected threat from the outside; the recommendation would still be not to arm the escort, as Mr. Mancini pointed out a number of times. In fact, G.F., who was an SIO and a member of the unit board that recommended that all medical escorts for inmates with a security classification of minimum take place unarmed, agreed with that recommendation. The tribunal notes that the recommendation was made without an analysis of the risks associated with the security or compassionate escorts as required under the Code. In my opinion, the effect of such a recommendation was to trivialize any threat coming from the outside, especially in this case when the threat was omnipresent given that there was a contract on the inmate's head. Furthermore, and as P.G. noted, the three TRA criteria do not take into account the threat from outside, whereas the reason for the refusals did not pertain to the inmate himself but to the plausible possibility of an attack from outside.

[343] The institutional head can still recommend that an escort be armed after consulting such people as the PO or the SIOs, whom C.A. referred to as security professionals. In this case, the institutional head endorsed the

recommendation not to arm the escort on the basis of the inmate's minimum security classification. Moreover, the professionals the institutional head consulted had contradictory positions on the level of danger that the inmate represented. The SIO, G.F., held an official position based on the inmate's minimum security classification and a personal position that the contract to kill the inmate existed and was still in effect, an assertion that does not appear in the documents given to the COs to help them prepare for the escort. The PO also held an official position that she presented during her testimony. Officially, she complied with the Commissioner's Directives, which provided for a TRA based primarily on the inmate and prepared by professionals. Despite her statement that she consulted the people from the P program for all temporary absences, she confirmed that ultimately the decision not to arm the escort was based on the inmate's minimum security classification. However, her personal position regarding security escorts was that they should all be armed because they are dangerous. Another SIO, S.H., stated that the inmate's identity would have to be changed when he was released from the institution because his life was in danger outside the institution. However, S.H. was the Correctional Supervisor in charge when J.T. and P.G. refused to work and, that assertion notwithstanding, he applied those same Commissioner's Directives without regard to the existing or potential threat from outside.

[344] It is obvious that the recommendation from the SIOs and the PO was biased in favour of strict compliance with the Commissioner's Directives, which fall solely under the CCRA and not the Code.

[345] For an institutional head to change his mind, there would need to be specific information to the effect that the COs' safety was in jeopardy. Ms. Perron maintained that the appellants did not provide probative evidence that there was such information, that there would actually be an attempt to exact revenge or that the contract would be carried out during the escort or shortly afterwards. C.A. explained that at the time of the compassionate temporary absence,

> [Translation]
> "...if we had had any information indicating that there might be some kind of risk, it's too bad, but we wouldn't have let him out."[66]

[346] However, as Mr. Mancini noted, they would not have received any notification to the effect that the contract was to be executed. It might be possible to obtain such information for an escort inside the institution, where the Preventive Security Department is aware of threats. Obtaining that type of information from the outside would not be as easy. As I explained earlier, it was not necessary to have proof that the threat

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[66] Transcript of recording of May 1, 2008, p. 128, lines 2-5

from the outside would materialize during the escort in order for the danger, as defined in the Code, to exist.

[347] When the inmate's controlling officer, who was very familiar with the situation, came to get him for a temporary absence he was armed. In fact, not only was the police officer armed, but the inmate's identity was changed. The police officers who came to get the inmate to question him or for any other reason were also armed, even if they were given all of the relevant information. The same thing applies to Quebec correctional services officers who may have to transport the inmate to the courthouse. If an inmate has been federally incarcerated within the past five years, as in this case, or if the inmate has a history of violence during that same period of time, they are armed. In fact, not only are they armed, but special measures are taken in the case of high-profile inmates, as we saw earlier. In my opinion, this approach to escorting an inmate is more in line with what is considered to be normal and safe under the Code than is the TRA process implemented by CSC.

[348] In the absence of specific security information, the institutional head is subject to the application of Commissioner's Directive 566-6 (Security Escorts). Paragraph 12 of that Directive provides that the institutional head shall determine the security measures to be applied during a temporary absence. It reads as follows:

> 12. 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.

[349] That Directive pertains to the risk that an inmate represents. Furthermore, the inmate's security classification is always a determining factor in such an assessment as well. In fact, in the present case, the inmate's minimum security classification was essentially the sole determinant of the security and control measures to be applied in order to protect the COs from him. It had very little impact on the measures to be taken, including the protective equipment, i.e. firearms, to protect the COs against a potential armed assault during outside escorts. With regard to the intelligence information referred to under item "e" above, the SIOs and the PO had previously expressed their official positions on this matter, positions which we noted earlier were somewhat contradictory and biased, in the tribunal's opinion.

[350] The tribunal finds that in this case a firearm was an essential work tool for protecting the COs from any assault or crisis situation during escorts outside the penitentiary.

[351] In contrast with the security and control measures recommended, a firearm is the form of protective equipment that can maximize the protection of a CO who is confronted with a crisis situation that requires a reaction to an armed assault. In an instance such as this the COs, who are also peace officers, would need to react with force at least equal to if not greater than that of the aggressors in order to protect themselves and the inmate. In such a situation, a firearm is more than necessary: it is essential.

[352] The fact that firearms are used when the police must escort an inmate outside or even when the Quebec correctional service transports an inmate confirms to the tribunal that a firearm is an essential work tool for the protection of COs during security escorts that may turn out badly. Although it would not totally eliminate the risk of injury, having such a work tool would maximize the level of protection for COs and thereby minimize the risk of injury from crisis situations during outside escorts.

DECISION

[353] It has been established that in the present case the threat did not come from the inmate but from outside. If that threat were to materialize, as might reasonably be expected, it could jeopardize the COs' health and safety and their very lives before being eliminated. Some of the factors that I took into account in rendering a decision in this case are as follows:

- As a hired killer, the inmate had committed excessively violent crimes, and the fact that he had provided information that led to the incarceration of the leader and other members of a criminal organization made him a high-profile case.

- There was a price on the inmate's head and the contract was still in effect.

- The inmate could be tracked down, which considerably increased the reasonable possibility that he would be attacked during an outside escort along with the COs.

- The P program had to be applied to the inmate even after his release because his life was in danger outside the institution and therefore the safety of the COs escorting him during temporary absences would be as well.

- The inmate's minimum security classification played a central role in the TRA and in the recommendation regarding the protective measures, including security equipment, to be adopted, thereby trivializing the reasonable possibility of an attack from outside.

- The TRA did not take the Code into account.

- The risk of an outside attack was not assessed even though the risk was significant.

- The TRA was deficient in that no analysis of the risks specific to the outside escorts that addressed the COs' protection was carried out under the Code or was submitted to the tribunal.

- In this case, a firearm is protective equipment essential to the COs in order to minimize the risk of injury arising from crisis situations during outside escorts, such as the execution of the contract against the inmate.

[354] Accordingly, I am of the opinion that, taking into account the factors referred to above, a danger as defined in the Code existed for the **four** COs who refused to escort the inmate. The danger stemmed from the fact that, as the factors described above suggest, the employer did not eliminate or sufficiently reduce the existing or potential hazard represented by the reasonable possibility that an attack from outside would arise and cause injury to the COs. Furthermore, the employer did not take reasonable action to address the existing or potential hazard represented by the reasonable possibility of an armed attack from outside by failing to provide the protective equipment, such as firearms, that would have enabled the COs to maximize their chances of escorting the inmate as safely as possible. There was therefore a reasonable expectation that the COs could be injured during an unarmed escort of the inmate before the existing or potential hazard referred to above could be corrected or eliminated.

[355] In my opinion, as a result of that danger the COs were justified in invoking the right to refuse to work because it did not constitute a normal condition of their employment as provided for at paragraph 128(2)(b) of the Code. Therefore, a direction regarding the danger should normally

be issued under subsection 145(2) or (2.1) of the Code in order to protect the COs by directing the employer to provide them with a firearm while escorting the inmate outside the institution.

[356] However, the inmate in question is no longer at the institution. The tribunal has not been informed of the inmate's current location and thus the tribunal can only assume that other COs will be required to escort him. That said, the four COs named in this case will no longer be required to escort this specific inmate. A direction to protect these COs from the danger associated with escorting the inmate would no longer be useful in this case.

[357] However, a direction to ensure that, regardless of the institution at which he is incarcerated, the COs charged with escorting the inmate are armed would be appropriate. That said, given that the evidence that was adduced does not enable me to know with certainty whether the inmate is still under the employer's responsibility, I am unable to issue a formal direction to that effect. In any event, on the basis of the evidence that was adduced in the present case, I strongly suggest that the employer arm the COs charged with escorting the inmate if he is still in its custody.

SERGE CADIEUX
Appeals Officer