Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Eugenia Martin-Ivie v. Canada Border Services Agency, 2011 OHSTC 6

Date: 2011-04-14
Case No.: 2005-52
Rendered at: Ottawa

Between:

Eugenia Martin-Ivie, Appellant

and

Canada Border Services Agency, Respondent

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer.
Decision:	The decision that a danger does not exist is confirmed.
Decision rendered by:	Mr. Serge Cadieux, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Mary Mackinnon, Counsel - Raven, Allen, Cameron, Ballantyne & Yazbeck LLP
For the respondent:	Mr. Richard Fader, Counsel - Legal Services Treasury Board Secretariat

REASONS

Background

[1] This case arose from the combined refusals to work exercised by a group of Customs Officers[1] (COs), currently referred to as border service officers (BSOs)[2], at the Coutts Border Crossing, Alberta, late in the afternoon on November 10, 2005. The group designated one of its members, Ms. Eugenia Martin-Ivie, to represent them in the investigation carried out by Health and Safety Officer (HSO) Douglas A. Gould on November 11, 2005.

[2] At the conclusion of his investigation, the HSO decided that danger, as defined in the Canada Labour Code, Part II (the Code), did not exist to the refusing employees. In accordance with subsection 129(7) of the Code, Ms. Eugenia Martin-Ivie appealed the decision of the HSO on November 21, 2005.

[3] The testimony of the HSO was heard by teleconference. There were three issues raised initially by the group of refusing BSOs. The only issue remaining today is the accessibility, or inaccessibility, at PIL (Primary Inspection Line) of information regarding armed and dangerous (A&D) lookouts in the ICES (Integrated Customs Enforcement System) database. This database was accessed, at the time of the refusals to work in 2005, in the PIL booth through the PALS (Primary Automated Lookout System) terminal. This system i.e. PALS, is currently replaced by the new IPIL (Integrated Primary Inspection Line) system which is also accessed through a terminal in the PIL booth. Although PALS and IPIL may contain recent information about travelers, they are not considered databases.

[4] As we will see later, there are other databases available to BSOs in the main building where secondary examinations are conducted. The three main databases of interest in this case, which are accessed by secondary officers, are CPIC (Canadian Police Information Centre), its U.S. equivalent NCIC (National Crime Information Centre) and FOSS (Field Operational Support System) an Immigration database.

[5] Specifically, the HSO referred to Ms. Martin-Ivie's Statement of Refusal to Work which reads, in part, that:

> "…armed and dangerous lookouts are not being flagged locally and nationally…"

[6] The above Statement of Refusal to Work was also addressed by the health and safety committee (H&S Ctee) who could not agree on the presence or absence of danger. Their finding and subsequent request to have a HSO investigate and decide the matter was

[1] In addition to the appellant in this case i.e. Ms. Martin-Ivie, six other custom officers and **one Immigration officer** exercised the same refusal to work.

[2] Both terms i.e. CO and BSO, are used interchangeably in the text. The HSO mainly used CO, however the acronym BSO will be preferred in the following text.

reported by the HSO in his Investigation Report and Decision (the Report). The H&S Ctee observed that the fact that A&D lookouts were not being flagged[3] locally and nationally affected BSOs ability to tactically reposition i.e. leave the area and/or go behind a desk.

[7] According to his Report, under the heading 5. "**Facts established by the Health and Safety Officer"**, the HSO considered that:

> - The policy[4] of the Canada Border Services Agency (CBSA) is that "should a Custom Officer encounter an individual who is identified as being the subject of an armed and dangerous lookout, the Custom Officer should allow the individual to proceed and immediately notify the police and provide as much detail as possible to enable apprehension."

With respect to the issue in this case, he added:

> - "Item 2. Armed and dangerous lookouts are not being flagged locally and nationally.
>
> …management indicated that "armed and dangerous flags" should still be indicated on the system.
>
> "A "flag" does not necessarily mean that a person is going to come through a border crossing, it is used as a tool to assist Officers in accessing the appropriate level of intervention if said noted person does arrive at the crossing. The example given (exhibit 1) stated that the person had a "record of violence and weapons", the policy permits the Officer to assess the situation and let the person continue on their way and then notify local police authorities if they believe they did not want to deal with that person."

[8] On the basis of those facts, the HSO decided that danger did not exist to the group of refusing employees and notified their representative accordingly i.e. Ms. Martin-Ivie.

[9] The HSO testified that he intended to receive from the employer an AVC[5] to obtain clarification from both parties on the confusion with respect to the information available to officers through the ICES database. The AVC was not received since the HSO was satisfied with the explanation given to him subsequently.

Issues

[10] Issue 1: The issue to be decided in this case is whether Ms. Martin-Ivie is in danger, as defined in the Code, because she in not being provided at PIL[6] with the information available in secondary examination about A&D lookouts.

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[3] An A&D lookout is said to be flagged when it is entered into the PALS-IPIL/ICES system.
[4] See Exhibit 8 of the HSO Report: The National Policy in effect is dated March 2001
[5] AVC stands for Assurance of Voluntary Compliance. It is a written agreement, or promise, obtained by a HSO from the person in authority at the work place to have the situation under consideration corrected voluntarily.
[6] I note that Mr. Fader has confined the issue to PIL officers notwithstanding that one of the officers who refused to work is an immigration officer who, I understand, never works at PIL.

[11] Issue 2: If I conclude that a danger existed for Ms. Martin-Ivie, I must then consider whether the danger is a normal condition of employment.

Evidence

The Appellant: Ms. Eugenia Martin-Ivie

[12] Ms. Martin-Ivie is an unarmed BSO with 15 years experience. She is experienced in both traveler and commercial lines at the land base crossing of Coutts, Alberta.

[13] Ms. Martin-Ivie confirmed that the issue pertaining to this hearing is that A&D lookouts were not being properly inputted, locally and nationally, into the CBSA (Canada Border Service Agency) database ICES thus placing the BSOs in the primary booth in danger. She clarified that ICES is their internal database system and that it is linked to the primary inspection booth, which is where the officer conducts interviews and makes first contact with people entering Canada.

[14] The following examples of A&D lookouts that were not being flagged in ICES were given by Ms. Martin-Ivie:

- Nationally: the media has reported that known A&D individuals, including a terrorist involved in the World Trade Centre bombing, were not being flagged in the ICES system. The same applies to some Modern War Criminals or police agencies' Most Wanted lists.

- Locally: at the time (21h35) of the refusals to work on November 10, 2005, there was, in the primary inspection booth, on the screen of the system in place at that time i.e. PALS[7], a message[8] (hereafter referred to as the ALERT message) sent by the Saskatchewan CBSA at North Portal on November 9, 2005, which read very briefly:

  Current: Late 80'2[9] dodge omni silver, …[NAME REDACTED]… refer to Imm[10]. Record of violence and weapons. Mt Temp Plate[11].

  When Ms. Martin-Ivie queried the name of the subject in question in the ICES database, which is the lookout system for BSOs, there was no lookout for that individual. She also had a concern for the caution level

[7] PALS is the system predecessor to IPIL (Integrated Primary Inspection Line). A reference to the improved IPIL today is a reference to PALS in 2005.
[8] Ms. MacKinnon referred to the message as a paper (Fax) ALERT since the screen alert "was printed out and posted in the PIL booth on November 9, 2005".
[9] Read: Late eighties
[10] Read: Immigration
[11] Read: Montana Temporary Plate

indicated on the screen i.e. “Record of violence and weapons” which led her to believe that this individual should be assessed as A&D in the lookout system. Her concern was heightened at the time by the fact that there were no training provided to her[12], on how to deal with an A&D subject if encountered which is largely, according to Ms. Martin-Ivie, a Port of Entry (POE) responsibility.

That ALERT information was relayed by Ms. Martin-Ivie to CBSA management i.e. the traffic superintendent, to have the information entered into the ICES database as a lookout. She requested that CBSA provide an armed presence at the Coutts border during the lookout period to protect her since the individual in question had indicated his intention to enter Canada. When she checked up three days later upon her return i.e. November 12, 2005, she noted that management had still not taken action with respect to incorporating the A&D information into the ICES database.

The additional information that she received subsequently on this individual i.e. NAME REDACTED, was disturbing and, she opined, is an incident justifying her refusal to work. The individual in question was reported to be violent and having a history of weapons related convictions. The CBSA – Immigration at North Portal recommended:

> “USE EXTREME CAUTION if encountered”.

Ms. Martin-Ivie believes that the three day gap in intelligence, which is normally provided to reduce the risk to BSOs, in fact created a higher risk to her and to her colleagues who may not be aware of the ALERT information.

The message was subsequently entered into the system in place at that time i.e. PALS. The flag[13] for this individual only coded him for referral to Immigration. It included no reference to the individual being A&D. There was also no flag in the system indicating an ‘’officer safety’’ caution. The individual would therefore be referred by the PIL officer to secondary at other crossings with no information about the dangerousness of the subject in question. Only an Immigration officer in secondary with access and training in FOSS would be made aware of this information, assuming that the crossing has such an officer on staff at the time.

- Additional examples were also given about individuals that are likely A&D and who have a history of criminality. When queried, no lookout hits were obtained for these specific individuals in ICES. Information about these individuals is however found in FOSS (Field Operational Support System), an Immigration database linked to the ICES database. This information is

[12] Ms. Martin-Ivie was at the time, and still is, an unarmed officer.
[13] A flag is defined as being entered into the system which, at the time, was PALS/ICES.

not available to BSOs at the PIL[14] and is not accessible to them through ICES nor the current IPIL (see footnote above on PALS).

[15] Ms. Martin-Ivie explained the various reasons for conducting secondary inspections and commented about work alone situations.

[16] Ms. Martin-Ivie acknowledges that there are risks associated with her job and she accepts that. She added that she has made over 60 and possibly 100 arrests.

[17] Ms. Martin-Ivie was referred to the different types of lookouts. For example, there are lookouts for Commercial Fraud, Explosives, Immigration, Missing children, Proceeds of Crime, Smuggling, Terrorism, Wants & Warrants, Weapons, etc.

[18] PIL officers become informed of these lookouts, when working in the primary booth, when the license plate is read or a document, such as a passport, is scanned and a message is received on the IPIL screen that lets the officer know that this is a lookout. If there is some type of caution associated with the lookout, it will also come up on the IPIL screen, assuming, said Ms. Martin-Ivie that the originator of the lookout added that information to the lookout.

[19] There are a variety of "officer safety" cautions. They are identified in the CBSA LOOKOUT PROCEDURES, August 2008[15] as Armed & Dangerous, Known Drug User, Known to Carry Weapons, Known to Flee Authority, Known to Resist Arrest, May Pose a Health Risk, Mentally Unstable, and Violent.

[20] With respect to the specific officer safety caution "Armed & Dangerous", Ms. Martin-Ivie referred to the above noted CBSA policy indicating the type of indicators used to classify a caution as A&D[16] e.g.:

- The subject is fleeing the scene of a crime where a weapon was used;
- The subject is currently armed and very likely to use armed force if encountered;
- There is criminal history of violence with a weapon towards law enforcement;
- There is criminal/CBSA intelligence information, i.e. surveillance report, informant information, etc., that the subject is prone to violent acts using a weapon; etc.

[21] Once a positive response i.e. a hit is generated on the screen and a lookout appears, e.g. missing person lookout, an "officer safety" caution that would also appear indicates there is some element of safety attached to the lookout. The officer at PIL

[14] The information would be available to BSOs at secondary inspection inside the main building.
[15] Ms. Martin-Ivie confirmed that these officer safety cautions are essentially the same as in 2005.
[16] The list of indicators in question is a shortened version of the actual list of indicators used to classify a caution as A&D

would know if a lookout comes out with an "officer safety" caution "A&D" only if that information was entered into the ICES database.

[22] According to the CBSA policy, the response to disengage in A&D lookouts i.e. let the subject go and inform the police, is the accepted procedure if the officer cannot handle the situation with the tools provided. Currently, there are policies which clarify the procedure to follow if a PIL officer decides to deal with the situation. As an unarmed officer, Ms. Martin-Ivie feels that her response to these situations will be different than the response of an armed officer.

[23] When questioned about the ALERT message received from Saskatchewan, Ms. Martin-Ivie asserted that the A&D information would have been in the Immigration FOSS database. Any dealings with Immigration would be in their database. At the time of the refusals to work, the only officers having access to this information were the Immigration officers in secondary examination.

[24] Ms. Martin-Ivie stated that the only way she would know if an individual would represent a danger to her or to officers in secondary is if a specific lookout was issued. Otherwise, she said, anything entered into the Immigration FOSS database only shows up on PALS (now replaced by IPIL) as prior Immigration enforcement. She would know practically nothing about the individual in question.

[25] With respect to wants and warrants, Ms. Martin-Ivie clarified that if there was, for example, a domestic Canada-wide warrant that CBSA determined it was necessary to enter in ICES, the PIL officer would have access to it. She added that not every wants and warrant that are in the FBI list or in CPIC are entered into ICES. It is very specific in that only what is entered by CBSA is in ICES. That information, absent from ICES, is however available in other databases such as CPIC or its U.S. equivalent NCIC.

[26] According to Ms. Martin-Ivie, the whole point at primary is to decide whether the officer will permit that person to enter in Canada or make a referral to secondary for further examination. If the officer decides to search the person or refer him/her to Immigration at secondary, the decision is based on any indicators at hand e.g. the physical indicators, the vehicle itself or from other subjects in the vehicle.

[27] Ms. Martin-Ivie referred to the CBSA, Port of Coutts' policy with respect to high risk persons. They are defined as follows:

> A high risk person can fall into several categories that include, but are not limited to, the following: the person may have a history of violence, or assaulting a peace officer, is mentally unstable, is suspected of being armed, or is suspected of being armed and dangerous.

[28] Basically, this policy tells the unarmed PIL officer what to do if this person is encountered. The policy deals with the procedure to follow when either the arrival of the subject is expected or when the arrival is not expected at PIL.

[29] When asked why she considers that a lookout that is not flagged as A&D creates a higher risk to her, she explained there are procedures on how to proceed with people considered A&D. As a PIL officer, if she knows that someone is A&D and she is unarmed, and based on staffing that day or what is happening in operations, she knows that no one would be able to deal with the subject. Since she knows that the caution exists about the subject, she can rely on her ability to let the person go and inform the police accordingly. If all she receives is information about a lookout and she thinks it is a standard lookout, the subject can wait in line. Then, she said, different things can happen. She could send the subject to secondary which puts those people at risk because she cannot share that information with them, she could send the subject inside the building and put other persons at greater risk, and she puts herself at greater risk as a PIL officer because she might be asking too many questions on that subject letting the subject think she knows a lot about something that she knows nothing about.

[30] Ms. Martin-Ivie asserted that everything they do as an organization is trying to obtain information ahead of time on individuals that may pose a threat or risk to the officer. She added that that is the whole point of intelligence: to intercept individuals. It is to provide these lookouts which are the product of these intelligence officers so that these occurrences are minimized. The lookouts provide a situation that is less dangerous to the officers which is why they need to be complete and accurate. It is for example better for the PIL officer to know that a subject has a warrant out for them than to speak to the individual one on one for several minutes not knowing what the subject knows about themselves.

[31] Ms. Martin-Ivie reiterated that with regards to the policy respecting high risks persons i.e. A&D persons, she was not trained in applying these procedures, as an unarmed officer, in high risk intercepts at PIL and at various locations at the POE.

[32] Lookouts that are not flagged i.e. not entered into the ICES database as A&D, are treated as regular lookouts that could be referred to secondary for examination. Therefore, the vehicle would be referred with no advance notice of what to expect. With an A&D flag, Ms. Martin-Ivie knows that she can disengage. If in reading the indicators on the subject and the subject is suspicious about what the officer is doing and she knows this is an A&D lookout, she knows that, as an unarmed officer, it is best for her well being to let the subject go. However, not knowing whether this subject is considered A&D takes away her ability to disengage. In the end, this could be creating a fatal situation either for the PIL officer or the officer in secondary who does not know that the subject being referred is considered A&D.

[33] In cross-examination, Ms. Martin-Ivie testified, with respect to training that:

- She received extensive training and re-training on the use of force including OC Spray and baton;
- While she volunteered to be trained as an armed officer, she is on the waiting list and has been for the last two and a half (2 ½) years.
- She clarified that she did not receive formalized training,

- Although "officer safety" cautions can be entered into FOSS by BSOs, she is incapable of making such an entry since she has never received training to do so.

[34] With respect to conducting an examination in a pit inside the traveler examination building while the traveler is waiting in the traveler waiting room, Ms. Martin-Ivie commented that although there are other options to having the traveler so close, the BSO has a general referral and has not formed his/her own indicators to know what it is the BSO is examining. The travelers referred for examination are also the ones who bring the vehicle for examination in the building. The traveler waiting room in the building was designed for that purpose i.e. to have the subject wait there. She explained that as you are doing the examination, you may encounter other indicators i.e. things that would make you more suspicious such as documents, contraband, bullets etc., which may alter your opinion about the subject in question and lead you to conduct a more intense examination. That is the unknown, she said.

[35] The appellant explained the use of the retractable baton she carries. She indicated that she uses the baton according to the use of force model i.e. IMIM[17] (Incident Management Intervention Model). According to this model, which is widely used by the RCMP and other police agencies, the BSO should always have one step of force greater than the subjects you are dealing with. Hence, the BSO should know what their level of force is and have one step higher than that. If a subject is designated as A&D, the model would require the BSO to be able to combat them with greater force and thus have a gun. If there is an "officer safety" caution, then Ms. Martin-Ivies would not know how to respond to this flag given the large number of "officer safety" cautions types that exist.

[36] Tactical repositioning is on the outer layer of the model and that is what you want to maintain as an officer dealing with the subject. She explained the operation of the IMIM in situations of both cooperative and resistant or combative subjects, which is when intermediate devices would be used. In addition to the baton, she can use OC Spray, a radio, hand cuffs, a flash light, and gloves.

[37] She further explained that some lookouts on the system are not flagged as A&D but may only have an "officer safety" caution. She believes that the ICES system lacks in quantity and quality of information that is in it since there are many individuals that are A&D, that could be entering Canada and are not in the ICES system. The number of wants and warrants out there is a good indicator of this. As a BSO, she said, she does not have that information to make a safe decision.

[38] Ms. Martin-Ivie later clarified that in order to create time, space and distance as required under the IMIM, it is important for her own safety to know that there exists a want or warrant on the subject she is dealing with at PIL in order to be able to form an opinion or to disengage. Hence she must know who she is dealing with. As a PIL

[17] With IMIM, the officer continuously assesses risk and applies the necessary intervention to ensure public and police (or BSO) safety.

officer, this is crucial. It is also crucial for everyone in the building where she would be sending the subject.

Other witnesses[18]

For the employees

[39] Mr. Jason McMichael has ten years of experience in the air, marine and land travel modes. He has also operational experience with the RCMP and the OPP. He is currently the fourth Vice-President of the CIU (Customs and Immigration Union) and is responsible for occupational health and safety and Technological Change issues. Mr. McMichael testified about the discussions held with high level CBSA management with respect to the need to integrate the various databases to ensure the safety and health of BSOs. He related to the appeals officer past incidents and personal experiences with A&D individuals.

[40] Mr. Gary Clement has 35 years of experience in the field of law enforcement and was qualified before the Appeals Officer as an expert in this field. Mr. Clement addressed the importance of having real time information, such as direct access to CPIC intelligence, about A&D individuals and other similar dangerous individuals from law enforcement and officer and public safety perspective. He caution against referring an A&D person to secondary without advance intelligence to this effect.

For the Employer

[41] Mr. Gaby Duteau is Acting Manager, Regional Program Intelligence, Quebec Region. Mr. Duteau stated that that BSOs are dealing with travelers that have two choices: comply or run the border. By presenting themselves at secondary, it is Mr. Duteau's opinion that the travelers have chosen to comply. He further explained that the goal of a dangerous offender is not to create a situation in secondary where armed BSOs are present. He explained that observing travelers is of primary importance with the result that 90% of seizures are based on such observation. Also 90 % of referrals are based not on intelligence but on interaction with the traveler. Mr. Duteau explained that the CBSA works with many agencies, including Homeland Security and other agencies in other countries, with respect to determining whether their lookouts adhere to CBSA criteria. Mr. Duteau explained that the Auditor General indicated that the CBSA had to review and manage lookouts on a regular basis. As a result, the underlying theme is that lookouts have to be relevant to the CBSA's jurisdiction, accurate and timely. Data that is not validated is of no value to the BSO at PIL.

In cross-examination, Mr. Duteau testified that he was involved in supervising the drafting of CBSA's Lookout policy. He explained that the mandate of BSOs was expanded to include, in part, enforcement of the *Criminal Code*.

[42] Ms. Maureen Noble is the Superintendent of Traffic Operations at the Port of

[18] The detailed testimonies of the following witness are on record and will not be repeated here.

Coutts. Ms. Noble has 30 years of experience as a BSO. She stated that the PIL booth is not the place, nor is it productive, for the PIL officer to have unfiltered access to CPIC and FOSS databases since he/she must focus his attention on the traveler(s). The role of the BSO at PIL is to study the behaviour. She testified that once the PIL officer refers a traveler to secondary because of a caution, the BSO at secondary should be on higher alert than the officer at PIL. She added that the PIL officer has the option of releasing the traveler if they feel it is necessary to do so. She testified that timely information is important but indicated that it should be accurate and not stale dated. Ms. Noble confirmed that 32% of BSO are armed officers.

In cross-examination, Ms. Noble agreed that the more information the PIL officer has the better off the officer is. Ms. Noble acknowledges that under the High Risk Person policy i.e. the Standard Operating Procedure (SOP), an interception may take place at primary. She also addressed the time factor in processing the release of vehicles from the perspective of efficiency.

[43] Mr. Jason Bacon is the Director of Online In-service and POE training. Mr. Bacon testified that BSOs are trained not to ask questions related to criminality at PIL as to do so raises issues of privacy. These questions, he said, are better left for secondary where the traveler can be questioned out of ear shot from the other occupants of his/her vehicle.

In cross-examination, he agreed that if PIL officers had that information on the screen from, for example CPIC or FOSS, there would be no need to proceed with this line of questioning.

[44] Ms. Vickie McCamby is currently Acting Team Leader in the Use of Force and Enforcement Sector. Ms. McCamby addressed the significant training to become an armed officer. In addition to this, she testified that there is a yearly re-certification for firearms.

In cross-examination, Ms. McCamby testified that, in exercising use of force, it would be useful to have advance information about the subject against whom force is required.

[45] Mr. Greg Modler is currently Acting Manager in the Travelers Unit, Port of Entry. Mr. Modler explained that some information generated by FOSS is available at IPIL and some is not. He testified that FOSS is a repository of immigration documents and notes, that it contains millions of records and that while it is exclusive to CIC/CBSA it is still impossible to reformat. He testified that the CBSA wants to avoid false positives, a reference to the large number of stale dated A&D lookouts in FOSS, in order to(a) avoid subjecting the traveler to unwarranted high risk take down, and (b) avoid putting BSO in a high risk take down scenario when it is not called for. On the basis of his vast experience with FOSS, Mr. Modler asserted that it would take a minimum of 5-10 minutes to search the database for a complex file and a couple of minutes for an easy file, all of this without searching CPIC/NCIC. Mr. Modler also testified that if an individual was a Canadian citizen they would not be in FOSS. Any lookout/caution about that citizen would be in ICES.

In cross-examination, he added that a new system was being developed to replace FOSS.

[46] Ms. Karen Aggett is a specialist in IPIL Highway.

Ms. Aggett demonstrated to the Appeals Officer (AO) the working of the lookout system by using "screen shots" documents. She explained that the IPIL system has a response time of 3-10 seconds and the plate reader is 95% accurate. The efficiency of these systems allows the PIL officer to focus more time interviewing travelers and identifying those of high risk.

In cross-examination, Ms. Aggett explained that the use of the word “integrated” in IPIL meant that it is not a database but a process to integrate data from other databases.

[47] Mr. Dan Badour is the Director of Intelligence Development and Field Support. Mr. Badour supervises 60 Senior Intelligence Officers/Analysts. He provided a description of the elements of ICES and explained that lookouts are an intelligence product. He added that CBSA policy require that Intelligence manage and maintain the commodity and accuracy of the information. He explained that it would be impossible to monitor all of the information in CPIC and NCIC. Rather, what they do is work with their partners i.e. the RCMP, local police departments, Interpol and US authorities to identify those lookouts that are relevant to the CBSA mandate. Mr. Badour is responsible for the cleaning up of data in FOSS with emphasis on A&D lookouts. He added that CBSA is considering developing a new system to consolidate the information in FOSS and ICES. Mr. Badour explained the major difficulties and challenges that the A&D lookouts in FOSS represent to CBSA in order to meet the CBSA criteria for lookouts.

In cross-examination, Mr. Badour confirmed that the users of intelligence are the BSOs who can make better decisions if they know about the criminality of the subjects before them. That information is available in the various databases such as FOSS, ICES, CPIC and its U.S. equivalent, NCIC.

Submissions of the parties

Appellant’s submissions

[48] Ms. Mackinnon submitted that by failing to address gaps[19] in the information on A&D individuals in the ICES database including its IPIL/PALS terminals available to the PIL officer could reasonably be expected to cause injury to Ms. Martin-Ivie when she refused to work on November 11, 2005. In support of this proposition, Ms. Mackinnon used the example of NAME REDACTED as well as several others to explain the danger that these individuals represent to the PIL officer who does not have access to A&D lookouts about them.

[19] Ms. Mackinnon has described these gaps as including information on A&D lookouts that the CBSA either excluded from the ICES database or failed to input this information into the database in a timely fashion after receiving it.

[49] On the other hand, Ms. Mackinnon explained that having timely and relevant information on the A&D individuals is crucial in making the "best and safest decision possible" on how to deal with these high risk individuals. She added that Ms. Martin-Ivie testified that having advance knowledge of high risk individuals reduces the occurrence of dangerous situations and minimizes the risk of injury to officers. In support of this proposition, Ms. Mackinnon referred to the testimony of Mr. Clement, a law enforcement expert, who is in agreement with the testimony of Ms. Martin-Ivie.

[50] Ms. Mackinnon submits that the information necessary for the BSOs to perform their duties safely is available in FOSS, including information that an individual may be A&D but that the PIL officer is unable to access it as it is unavailable through ICES. Ms. Mackinnon referred to the testimony of Ms. Mackinnon who asserted that this creates a situation where the CBSA has information that an individual may potentially be A&D but it shows up at PIL as a generic "officer safety caution".

[51] The CBSA can easily achieve this reduction in injury given that the information needed is already in other databases available in secondary such as CPIC and NCIC. The same applies to wants and warrants which can be accessed through the CPIC/NCIC systems at secondary. Furthermore, Ms. Mackinnon submits that Ms. Martin-Ivie is an unarmed officer and is not trained to deal with A&D individuals. Only armed officers have received the training in question although all BSOs are expected to deal with A&D individuals.

[52] Ms. Mackinnon concludes that an abnormal danger exists to BSOs at PIL. She submits that "…the employer had the capacity to deliver information crucial to officer safety through the IPIL "hit" system to officers at primary without compromising the progress of legitimate traffic; but it failed to do so in 2005 and still fails to do so today."

Respondent's submissions

[53] Mr. Fader submits there are two points to be dealt with in this case. The first point deals with the scope of the hearing. The second point with the notion of danger as defined in the Code.

Scope of the hearing

[54] Mr. Fader submits that this case is a challenge, by the union, of CBSA's high level policy on the provision of information technology at the PIL at the Coutts border crossing. Mr. Fader is of the opinion that the Appellant considers that danger exists because she in not provided with "unfiltered access to the information on CPIC (NCIC) and FOSS". Mr. Fader has submitted that there are three issues pertaining to the scope of the hearing.

[55] Firstly, Mr. Fader submits that there is only one applicant in this appeal i.e. Ms. Martin-Ivie, since there is only one letter of appeal addressed to the Tribunal. Furthermore, subsection 129(7) of the Code does not provide for representational appeals even though it provides for representational investigations at the HSO level (ss. 129(2)).

[56] Secondly, Mr. Fader submits that a *de novo* hearing does not authorize the AO to consider new issues in this case. This is what would happen if the AO considered the applicant's concern with respect to "unfiltered access to the information on the CPIC, NCIC and FOSS databases", an issue that was not raised at the HSO's investigation. It should therefore not be allowed to be raised for the first time before the AO.

[57] Finally, it is also the position of Mr. Fader that the AO can only rule whether or not a danger exists, which is in accord with the Federal Court of Appeal decision in *Martin* v. *Canada (Attorney General)*[20]. According to Mr. Fader, the AO could not conclude that the employer is in violation of the Code and direct the employer to cease the specific contravention by issuing, for example, a direction under subsection 145(1) given the reading of the wording of subsection 146.1(1). Mr. Fader acknowledges that his position was not advanced before the Federal Court of Appeal and that, in his opinion, the Court did not consider this. Furthermore, the *Sachs* v. *Air Canada*[21] decision also prevents the applicant from appealing the absence of a direction. In conclusion, Mr. Fader submits that the AO is without jurisdiction to consider other violations of the Code outside of the question of "danger".

Notion of danger

[58] Mr. Fader analysed the facts of this case by applying the test for danger articulated by the Federal Court and confirmed by the Federal Court of Appeal (*Canada Post Corporation* v. *Pollard*)[22].

[59] Mr. Fader applied the evidence to the test and considered in detail whether the facts resulted in a reasonable possibility that the refusing employee would be injured. In the end, Mr. Fader concludes that the appellant in not in "danger" as a result of not having unfiltered access to CPIC (NCIC) and FOSS at PIL.

[60] In the alternative, Mr. Fader considered whether the risks associated with the job of a BSO are a normal condition of employment. He submitted that the job description of BSOs recognizes this. It provides:

> *Working Conditions – Conditions de travail*
>
> There is a potential for serious injury from assaults by suspect persons or persons being detained or arrested.

[61] It is the position of Mr. Fader that to run queries against CPIC, NCIC or FOSS would take up a significant amount of time and cause huge delays particularly if the BSO searches all three databases. In the end, the delays would effectively shut down the operations at the border and make the situation less safe for BSOs.

[62] Mr. Fader requests that the appeal be dismissed in its entirety.

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[20] (2005) FCA 156
[21] (2007) FCA 279
[22] (2007) FC 1362; affirmed 2008 FCA 305

Analysis

[63] Before determining whether danger, as defined at section 122 of the Code, exists to Ms. Martin-Ivie, it is necessary to address the three issues raised by Mr. Fader with regards to the scope of the hearing.

The first issue: Only one applicant

[64] The first issue raised by Mr. Fader is that there is only one applicant in this case i.e. Ms. Martin-Ivie. I agree with Mr. Fader on this point.

[65] Subsection 129(7) provides as follows:

> (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)

[66] As indicated by Mr. Fader, nobody, including the union, has been designated, for the purpose of the appeal, to represent all eight employees who refused to work in this case. When the HSO informed Ms. Martin-Ivie and the six BSOs and one Immigration officer represented by Ms. Martin-Ivie, by letter dated November 11, 2005, of his decision, he informed them of their right to appeal his decision. There is only one written notice on file indicating that Ms. Martin-Ivie was appealing the decision of absence of danger rendered by HSO Douglas A. Gould on November 11, 2005. It is also noteworthy that none of the other seven employees who refused to work were called by the union to testify nor were they represented at the hearing into this matter.

[67] Contrary to what Mr. Fader submits, the Code does provide for some form of representation in the appeal proceedings under subsection 129(7). It provides:

> "… or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days…"

[68] Consequently, Mr. Fader's assertion is not totally correct since all eight BSOs involved in the refusals to work could have designated the same person to represent them to appeal the HSO's decision. As to whether this person e.g. counsel or union representative, could actually represent those persons individually or as a group in the appeal proceedings is an issue that is not before me at this time.

[69] With respect to the issue of the single appeal that is before me, I note that Ms. Martin-Ivie's letter of appeal does not specify that she is appealing the HSO's decision as a person designated by each member of the group although she made a reference to the "*Group Refusal to Work on November 11, 2005 at Port of Coutts, AB*". The HSO was informed during his investigation into the group refusal to work that Ms. Martin-Ivie

> "Please accept this as my notice to appeal the decision…"
> (My underlining)

At the end of her letter, Ms. Martin-Ivie clarified once again that:

> "Please accept this information as my request to appeal…"
> (My underlining)

[70] A written notice of appeal indicating that she was appealing the said decision on behalf of each refusing employee is necessary since subsection 129(7) requires that it be sent, in writing, to an appeals officer ten days after receiving notice of the decision. Also, no officer from the group of refusing employees appealed the HSO decision and none of then sought union representation either individually or as a group although Ms. Martin-Ivie did so on her own behalf.

[71] It is therefore my decision that Ms. Martin-Ivie is the only appellant in this case.

The second issue: *de novo* appeal

[72] Mr. Fader submits that although the appeal of the HSO decision has been declared to be *de novo* by the Federal Court of Appeal in the *Martin* case, this does not authorize the appeals officer to consider new issues in this case. It is the submission of Mr. Fader that this is what would happen if the AO considered the applicant's concern for danger because she is not provided with ''unfiltered access to the information on the CPIC, NCIC and FOSS databases''.

[73] I am of the view that I am not considering new issues in the instant case since, in my opinion, both parties are addressing essentially the same issue. The parties may have formulated what constitute the alleged danger in a different manner however the issue that has been dealt with by the parties is, in my opinion, the same.

[74] I note that Ms. Martin-Ivie has identified the source of her concern in her Statement of Refusal to Work by referring to the fact that A&D lookouts were not being flagged in the CBSA database ICES. In my opinion, this is sufficient and reasonable since there is no magic formula to capture the essence of her concern. The investigation of the HSO should clarify this. As it turns out, the subject of her concern was understood by the employer, the health and safety committee, the HSO who investigated the refusals to work and by her representative, Ms. Mackinnon. On the other hand, Mr. Fader has

[23] on the possible remedy to Ms. Martin-Ivie's concern for danger by proposing that she alleges that danger exists to her because she is not provided with ''unfiltered access to the information on CPIC (NCIC) and FOSS". This formulation suggests that Ms. Martin-Ivie requires access to the databases that contain the information about A&D lookouts i.e. the subject of her concern for danger.

[75] Ms. Mackinnon has stated in her opening statement, in accord with the testimony of Mr. McMichael that, as a result of Ms. Martin-Ivie's concern for danger "The appellant is requesting that the employer provide full access and training to these databases in the primary booth." The statement may have misled Mr. Fader in believing that the appellant was raising a new issue in this case.

[76] Both formulations are however not incompatible and, in my opinion, address the same issue i.e. that Ms. Martin-Ivie alleges to be in danger by not being provided with the information about A&D lookouts that exists, as the evidence has shown, in databases available to officers in secondary examination.

[77] I am therefore dismissing Mr. Fader's objection with respect to this issue since I am addressing only the original issue raised by Ms. Martin-Ivie.

The third issue: No power to issue a direction

[78] The third issue raised by Mr. Fader is that as a result of the appeal formed under subsection 129(7) of the Code, the AO is restricted to ruling on the issue of danger only and is not authorized to conclude to a violation of the Code and issue a direction accordingly. Mr. Fader suggests that the Federal Court did not consider this possibility but finds support for his proposition in the limited powers of the AO under subsection 146.1(1) and the *Sachs* decision.

[79] I will answer this issue only if I conclude that a danger does not exist to Ms. Martin-Ivie but that a contravention exists and that a direction under subsection 145(1) of the Code is necessary.

[80] Before turning to the issue before me, I would like to note that in the course of her examination, Ms. Martin-Ivie mentioned that work on the midnight shift presented some particularities that seemed to preoccupy her.

[81] The parties did not provide me with any particular or specific submissions with respect to the night shift.

[82] The following danger analysis is based on the submissions and evidence presented to me as well as the information gathered during the site view at Coutts.

Issue 1: Does danger exists to Ms. Martin-Ivie?

[23] I note that Mr. Fader is aware that the Applicant's request for "unfiltered access to the information on CPIC (NCIC) and FOSS' is a request for corrective action to the issue stated by Ms. Martin-Ivie. RESPONDENT'S CLOSING STATEMENT, under the heading **Conclusion on danger**.

[83] Danger is defined at section 122 of the Code as follows:

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

[84] The principles in the *Martin* and *Verville* v. *Canada (Correctional Services)* [24] decisions established that in order to find danger:

> 1. There has to be a condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the condition or activity is altered.
>
> 2. The definition does not require that the "danger" cause an injury every time the condition or activity occurs. The French version, "susceptible de causer" indicates that it must be capable of causing injury at any time but not necessarily every time.
>
> 3. It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

[85] It is also relevant to the definition of danger to consider that, in the *Verville* decision, Madame Justice Gauthier noted that:

> “Reasonable expectation of injury cannot be based on hypothesis or conjecture, but if a hazard or condition is capable of coming into being or action, then it should be covered by the definition.
>
> There is more than one way to establish that one can reasonably expect a situation to cause injury. It is not necessary to have proof that someone else has been injured in exactly the same circumstances; a reasonable expectation could be based on expert opinions or even the opinion of ordinary witnesses having the necessary experience.
>
> A reasonable expectation of injury could even be established through an inference arising logically or reasonably from known facts.”

[24] (2004) FC 767

Danger to Ms. Martin-Ivie?

[86] I am of the opinion that Ms. Martin-Ivie was not in danger as defined in the Code when she refused to work on November 10[25], 2005 and is still not in danger today by not having "armed and dangerous lookouts being flagged locally and nationally".

[87] In addition to the definition of danger above, the relevant provisions to decide this case are 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 an 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.
>
> (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
> …
> (b) the danger referred to in subsection (1) is a normal condition of employment
>
> 129(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.
>
> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction , as the case may be, and the reasons for it and may
> (a) vary, rescind or confirm the decision or direction; and
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[88] In order to decide this matter, I would separate the case of NAME REDACTED from all other individuals identified by Ms. Mackinnon and for which she and Ms. Martin-Ivie believe an A&D lookout should have been but was not issued.

[89] It is necessary to do this because the right to refuse provisions in the Code is factually based. As noted by Mr. Fader who quotes the Federal Court of Appeal in *Fletcher* v. *Canada (Treasury Board)* [26]:

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[25] It would appear that the HSO may have referred to a different date i.e. November 11, 2005 in his Report. I consider this to be a typographical error without consequence to Ms. Martin-Ivie.
[26] (2002) FCA 424 at paragraph 38

> "The mechanism provided by the *Code* calls for a specific fact finding investigation to deal with a specific situation"

[90] The HSO's investigation considered the circumstances giving rise to the BSOs' refusals to work and decided on a factual basis that danger did not exists to Ms. Martin-Ivie. Under subsection 146.1(1) of the Code, my inquiry into the decision of absence of danger rendered by the HSO will also concentrate on the specific circumstances considered by the HSO as it applies to the appeal of his decision.

[91] There is no evidence that any of these individuals would eventually show up at PIL, at Coutts, and present a danger to the PIL officer Ms. Martin-Ivie by not having been flagged as A&D. The mere possibility that they may show up at PIL at some unknown time in the future and present a danger to Ms. Martin-Ivie as a result of not having been flagged as A&D is hypothetical; it has no basis in fact and therefore, no basis in law.

[92] Ms. Martin-Ivie and Ms. Mackinnon have never asserted that any one of these individuals would actually show up at Coutts and present a danger to the PIL officer. There is no evidence to assert this. In my opinion, Ms. Mackinnon was explaining to this AO that this type of individual could likely show up at PIL at some point in time and that, given the apparent flaws in the lookout system, this type of individual had the potential to injure the PIL officer before the hazard or condition can be corrected or the activity altered. In the end, Ms. Mackinnon is challenging the CBSA policy respecting access to A&D lookouts at PIL who decided to defer this responsibility to secondary.

[93] There is also an important distinction to be made between Ms. Mackinnon's submission with respect to the quality of the information that should be provided by ICES to the PIL officer i.e. timely and relevant information as opposed to the information actually found in ICES i.e. *accurate*, timely and relevant information. This is an important distinction because it goes to the heart of the problem i.e. the health and safety of the BSO who are looking at making, as submitted by Ms. Mackinnon, the best and safest decision possible in the circumstances.

[94] In order to fully understand the source of the apparent confusion, I would propose that we look at the process that takes place at PIL from the time a traveler arrives at the PIL booth to the moment where the traveler is referred to secondary for further examination which requires accessing the FOSS and CPIC/NCIC databases. This is a two step process.

Step 1: Traveler shows up at PIL

[95] When a traveler shows up at PIL, the traveler is subjected to a system of cameras, plate readers and document scanners. Once the plate is accurately read and confirmed and/or the documents are scanned or manually entered, the PIL officer may receive, in accordance with the various lookouts/cautions established by the CBSA, a specific message or "hit" from the ICES/IPIL system, about the vehicle or the traveler. If there is a hit, the traveler may be referred to secondary for further examination or be intercepted

[96] The hit may also result in a generic "officer safety caution" received from the FOSS Immigration database through the IPIL terminal. In such cases, it is standard practice to refer the subject to secondary for further examination. It should be noted that FOSS does not issue specific A&D flags.

[97] If no hit is received, the PIL officer will form his own opinion on the basis of the indicators gathered from focusing his/her attention on the behaviour of the driver or other passengers in the vehicle or from the physical evidence observed. On the basis of these indicators, the PIL officer may again decide to refer the traveler for further examination in secondary. If nothing appears to be out of order, the traveler may be released which is what happens for 92% of travelers.

[98] The CBSA database ICES is mostly a domestic database in that it contains information about Canadian citizens and it is under Canadian control i.e. the CBSA. Therefore, any lookout/caution about a Canadian citizen would not be in FOSS, it would be in ICES. For this reason, the information in the ICES database is subjected to specific and stringent criteria. The information must be accurate, relevant and timely. It is entered into the database by following a specific format. The CBSA must also review, manage and maintain the accuracy of the information. Also, the PIL officer is not to question the traveler at PIL on the issue of his/her criminality in front of other passengers as this raises issues of confidentiality. Having to meet all of the above criteria imposes a significant burden upon the CBSA. Nonetheless, given the above, the information issued i.e. lookouts/cautions from ICES/IPIL is, in my opinion, highly reliable and allows the BSO to make the best and safest decision possible.

Step 2: Referral process

[99] When a traveler is referred to secondary for further examination, the traveler may be subjected to questioning, physical examination, document verification and to computer searches of databases such as FOSS and CPIC/NCIC. Specific equipment may also be used such as contraband detection equipment, X-ray machines, etc.

[100] The FOSS database has an international content. Anybody, including foreign nationals of interest to Immigration, who has had prior dealings with Immigration and/or has had a prior Immigration enforcement action with Immigration, is in the FOSS database. A similar situation exists for CPIC/NCIC. It should be stated that CPIC, a national database used by the RCMP and other police agencies across Canada, is a database which has the capability of accessing its US equivalent NCIC database. The NCIC database is a huge database that contains all kinds of information about subjects of interest to the US including terrorists, gang members, organized crime etc. The information in those databases do not follow any specific format compatible with the CBSA database ICES.

[101] Also, FOSS contains well over four million documents. Much of the information

[102] In order to determine the status, for example, of criminality or dangerousness of a traveler who has been referred to secondary for examination, the BSO may have to search in detail the database to ascertain the quality of the information contained therein and make the best decision on the basis of the whole record. This is time consuming and requires specific training. For this reason, the analysis to be performed by a BSO following the referral process is conducted in a separate area, away from the PIL booth, where there is more time to do the analysis. Another reason for doing this is that it is important to keep the flow of commercial and public traffic moving as the CBSA is mandated to do under its enabling legislation.

[103] The same can be said of CPIC and NCIC. In fact the NCIC, which is accessed by CPIC, contains most enforcement actions by individual American States. Those actions are entered in the database by using different formats according to the State where the infraction or enforcement action took place. The individual States may also use different criteria to designate individuals and enter this information in the NCIC database. For this reason, one person may be identified in one State as A&D or be given a similar designation whereas in Canada, that person could have a completely different designation. The consequence for that person or for the officer involved could be significant for their personal health and safety.

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[104] Mr. Fader has produced in appendix "A" of the respondent's closing argument an analysis of each individual or group of individuals referenced by Ms. Mackinnon. I accept the explanations given therein by the employer's witnesses and particularly Mr. Badour as being reasonable in the circumstances. I recognize that the ICES/IPIL system is not a perfect system and that an odd case may turn out to be misleading or erroneous.

[105] The information in FOSS has been entered mostly in a narrative form. As indicated above, it has been front loaded i.e. entered by an officer who commits his/her observations in the database without following a specified format or criteria. It is raw information. Hence, the need to refer the traveler to secondary for further examination where the BSO has more time to search the databases, select, analyse, verify and confirm the *accuracy* of the information and decide on the course of events to follow.

[106] A similar argument applies to the large number of files in CPIC/NCIC about these individuals. This would require CBSA to enter into agreements with the RCMP and the US Homeland Security, the FBI and other individual State police agencies to access their

[107] The alleged gaps in the intelligence process identified by Ms. Mackinnon did not take into consideration several determinative aspects of the lookout/caution process pertinent to these persons such as:

- The ongoing consultation with other national and international police agencies and the US Homeland Security about the dangerousness of these individuals such as individuals on the FBI Most wanted and terrorist lists.

- The lack of evidence about the current status of some of these persons or other criminals such as whether the individual is considered rehabilitated, whether they meet the CBSA criteria to be on a lookout with a caution, etc.

- Insufficient evidence as to their current level of dangerousness given that many of them that were referenced by Ms. Mackinnon had been previously scrutinized by a BSO in secondary and that the BSO did not consider it necessary to issue a lookout/caution about these individuals.

- That Intelligence may decide, on the basis of the evidence before it, to issue or not issue a lookout with caution.

- That, on the basis of the evidence advanced, some cases were explained as not constituting a gap in intelligence.

- That one individual was still incarcerated and that Intelligence would review his case upon release and decide on the appropriateness of issuing a lookout/caution.

[108] It is clear that, strictly on the basis of timely and relevant information as suggested by Ms. Mackinnon, the PIL officer would not be in a position of making the best and safest decision. As we have seen above, in one case, the individual referenced by Ms. Mackinnon as being, according to her, a candidate for the A&D designation turned out to be rehabilitated. This information was only confirmed after a complete review of this individual's record. Mr. Fader explained that an A&D designation requires an interception with guns drawn and officers in a low position. That is the type of consequence that can be expected from receiving only timely and relevant information as opposed to *accurate*, relevant and timely information.

[109] As it stands today, with the systems in place, a thorough analysis of each referred traveler is the only way to ensure that the best and safest decision can be made. Accepting any "raw" information at PIL without verifying and confirming the quality of the information, as it is done in secondary, would likely cause unnecessary high risk actions. As Mr. Modler has testified:

> "…the CBSA wants to avoid false positives, a reference to the large number of stale dated A&D lookouts in FOSS, in order to(a) avoid subjecting the traveler to unwarranted high risk take down, and (b) avoid putting BSO in a high risk take down scenario when it is not called for."

[110] In addition to the above, and presuming that one individual was misevaluated by Intelligence, I would agree with Mr. Fader's proposition that once this person shows up at PIL as a traveler, that person's intent is to cross the border without causing any incident which would cause the traveler to be intercepted. As noted by Mr. Duteau, the traveler that shows up at PIL has two choices[27]:

- Run the border; or
- Comply with the officer's instructions.

[111] The mere possibility that the subject may decide to become violent at PIL as a result of the PIL officer persistence in questioning the subject for which there is no flag indicating that the subject is considered A&D or as a result of his/her unpredictability, is speculative and not supported by the facts. There has never been a violent attack at Coutts against a PIL officer and no officer has suffered serious injury as a result of an attack at PIL. There is also no evidence that to establish a link of cause to effect between the absence of an A&D lookout at PIL and injury to the PIL officer as a result of this.

[112] It is important to remember that lookouts/cautions are a part of a greater system. It is not the system. It therefore needs to be considered as an integral component to the whole system that takes place at PIL and in secondary.

[113] Furthermore, the mere possibility of a spontaneous attack against a PIL officer by a violent traveler is mitigated by the measures taken by the CBSA to reduce to a minimum the possibility of injury. I take into consideration that, should this possibility become reality, the BSOs, including Ms. Martin-Ivie, the PIL officer, are qualified to handle the situation as safely as reasonably possible. They have:

- Extensive knowledge, training and experience in dealing with this type of traveler.
- A vast range of protective equipment necessary to protect themselves including a protective vest, a baton, OC spray, handcuffs and in 32% of cases, a sidearm (although Ms. Martin-Ivie is still an unarmed officer).
- Assistance from other armed and unarmed officers on site

[27] Ms Mackinnon does not agree with Mr. Duteau's statement and indicated that given the unpredictability of violent individuals, a violent reaction could also take place.

or from the RCMP which is on call.

- A communication system such as portable radios.
- Training in control and defensive tactics (CDT).
- An ICES/IPIL system that will almost always give the PIL officer an "officer safety caution" that will alert the PIL officer of a potential problem.
- Policies, procedures and systems including a referral process, a disengagement option, separate secured inspection buildings, a confined PIL booth, plate readers, document scanners, cameras, etc.

[114] It has been shown that the role of the PIL officer is to focus his/her attention on the travelers i.e. driver and other passengers in the vehicle. The purpose of this is to gather indicators that will allow the officer to decide whether to release the traveler, refer him/her to secondary, allow the subject to leave or intercept the subject. To distract the officer by displacing his/her attention to searching the databases could place the PIL officer at greater risk by not allowing the officer to react in time. This is important because the PIL officer has the option of applying the CBSA policy to disengage at any time the officer feels, on the basis of the indicators gathered from focusing his attention on the travelers, that he/she cannot safely handle the situation before him/her. Hence the importance of remaining focused on the travelers.

[115] All of the specific individuals queried above represent a possibility, albeit a faint one, that one of them may show up at PIL, at Coutts, before Ms. Martin-Ivie, without prior Intelligence about them, with the intent to cross the border at any cost and without the PIL officer being able to react in time to protect himself/herself, etc. There are too many uncertainties and unknowns with respect to these individuals, or similar individuals, which are better dealt through the CBSA policies, procedures and safety measures put in place at Coutts.

[116] In the end, the CBSA has taken, in my opinion, all the measures currently available to deal with these unknowns in the safest manner possible.

The particular case of NAME REDACTED

[117] I am dismissing Ms. Mackinnon's reference to NAME REDACTED considered A&D by herself and by Ms. Martin-Ivie following her refusal to work to explain the danger to Ms. Martin-Ivie and to the other officers in secondary. NAME REDACTED was not the specific reason for Ms. Martin-Ivie's refusal to work nor was it for the other officers in secondary. In my opinion, the incident involving NAME REDACTED was used as an excuse to challenge the policy of the CBSA with respect to access at PIL to information about A&D individuals which information is available in secondary databases such as FOSS and CPIC/NCIC. It is Ms. Mackinnon's submission that "*It was the absence of this type of information that precipitated the work refusal by Ms. Martin-Ivie and her colleagues.*" Nonetheless, in my opinion, the case of NAME REDACTED needs to be addressed.

[118] The case of NAME REDACTED is somewhat different from the individuals identified above by Ms. Mackinnon because of the interpretation given to the concept of danger. If there is a reasonable possibility that NAME REDACTED would show up at PIL at Coutts and that, as it is alleged, it can reasonably be expected that the PIL officer would be injured as a result of this, then the definition of danger should capture this. Also, this is a case which is, to some extent given that the incident occurred at another POE, factually based.

[119] Details of the case involving NAME REDACTED were provided by Ms. Mackinnon and Ms. Martin-Ivie. The facts about this subject indicate that:

- he was intercepted at North Portal, Saskatchewan, which is within driving distance of Coutts, Alberta;
- he had previously been deported from Canada;
- he had indicated his intention to enter Canada;
- he had a long history of violent crime;
- the RCMP was called to assist with his refusal of entry
- the Alert/PALS screen indicated to use extreme caution if the subject is encountered;
- Ms. Martin-Ivie requested but was not provided with an armed presence to protect her from the possible approach of the subject.

[120] The response of Mr. Fader with respect to the above is twofold i.e. it is a response from the perspective of when the refusal to work occurred in 2005 and from today's perspective.

In 2005

- the subject was asked to remain in his car
- a BSO conducted CPIC and FOSS search in secondary
- information about the subject was on the PALS screen at PIL in Coutts
- the RCMP assisted with NAME REDACTED's refusal of entry

In 2011

- Improved connectivity between ports of entry
- Lookout is now required to be entered into ICES as opposed to an ALERT
- Officer safety caution on IPIL with specific caution

[121] From the perspective of Ms. Martin-Ivie, the issue of NAME REDACTED had been dealt with at another POE. Nevertheless, since she had information that the subject intended to enter Canada and that he was considered violent, she had reasons to be concerned. However, the information about this subject was known to Ms. Martin-Ivie

[122] Notwithstanding this, if the subject showed up at PIL at Coutts in 2005 to cross the border, given that it is within driving distance from North Portal and that he had indicated it was his intention to enter Canada, Ms. Martin-Ivie had the option, given the Alert on the PALS screen, of immediately disengaging in accordance with CBSA policy to this effect. It was shown that NAME REDACTED's intent was to enter Canada and by disengaging, the BSO would not be at risk of being injured.

[123] Also, if a specific lookout had been issued in ICES/IPIL prior to the North Portal incident, this is exactly what would have happen. While a PIL officer could investigate further the subject of a similar lookout, Ms. Martin-Ivie was made aware that NAME REDACTED was violent and there was a recommendation by North Portal BSOs to use extreme caution if the subject was encountered. In all likelihood, she would have disengaged since it would have been in her best interest to do so, that it would be in accordance with the CBSA policy to this effect and it would be in accordance with the training she received.

[124] On the other hand, if no lookout had been issued or no Alert received, the same scenario would repeat itself at Coutts as it did at North Portal given the referral policy. NAME REDACTED could have been referred to secondary and/or asked to remain in his car and the same events would likely have taken place with the RCMP assisting with his removal. As it turned out, all of this took place with no injuries to the officers involved. There is no reason to believe that anything different would have happen given all the mitigating measures put in place by the CBSA as noted above.

[125] In 2011, with the improved connectivity between POEs, a lookout would be entered in ICES/IPIL, as it is currently required under the new CBSA policy, with a specific officer safety caution rather than having only an ALERT issued. All POE would be immediately on alert. Armed BSOs would be prepared and the assistance of the RCMP could still be called upon. The BSOs can still apply the CBSA policy to disengage depending on the circumstances since a BSO is a peace officer, not a police officer. In the end, the same results would be obtained.

[126] Evidently, Ms. Martin-Ivie was not in danger in 2005 and she is not in danger today with respect to the likes of NAME REDACTED as a result of not being flagged with an A&D lookout, as Ms. Mackinnon believes it should be, about the nature of NAME REDACTED or of the likes of NAME REDACTED.

[127] Therefore, having decided that danger does not exist to Ms. Martin-Ivie, I need not consider the second issue in this case.

Decision

[128] For these reasons, I confirm the decision that a danger does not exist rendered by HSO Gould on November 11, 2005.

Serge Cadieux
Appeals Officer