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Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

GEORGE CZMOLA AND CHARLES RODIER

Applicants

and

TREASURY BOARD
(Solicitor General - Correctional Service Canada)

Employer

RE: Reference under subsection 129(5) of the Canada Labour Code

Before: P. Chodos, Vice-Chairperson

For the Applicants: Art Curtis, Philippe Trottier, Public Service Alliance of Canada

For the Employer: David Merner, Counsel

Heard at Winnipeg, Manitoba,
September 17 and 18, 1998.
Written arguments submitted on
October 9, 14, and 17,1998

DECISION

This matter came before the Board as a result of the referral of two safety officers' decisions pursuant to subsection 129(5) of Part II of the *Canada Labour Code*, which provides as follows:

> *129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.*

The Board's jurisdiction in respect of these matters is found at subsection 130(1) which states:

> *130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*
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> *(a) confirm the decision; or*
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> *(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).*

Both the applicants are employed as correctional officers at Stony Mountain Penitentiary, a medium security institution located a few miles north of Winnipeg. The inmates at the institution are housed in units containing a number of cells on two floors, each of which is referred to as a "range"; the ranges radiate from an open central area called the "dome" that is separated from the range by a locked door or barrier. In the unit is a staircase connecting the upper and lower ranges. Adjacent to the cells on each range is a corridor; the corridors emanate from the locked door to the end of the range, which has a type of punch clock called a "deister". There is another staircase immediately outside each unit also connecting the upper and lower ranges. Each range can be viewed from the outside of the barrier. When the cell doors are open, the inmates have free access to the corridor area adjacent to the cells; however, the inmates cannot leave the unit unless the barrier door is open. The

corridor area contains, among other things, tables and chairs as well as a refrigerator. The institution has a number of facilities, including a gymnasium, various workshops, as well as a kitchen, dining area and classrooms. There are alarm buttons contained in the classrooms, and a number of the other areas are surveyed by video cameras. It is common for staff and inmates to interact together in these areas.

On April 22, 1998, Mr. Chris Price, the Deputy Warden at Stony Mountain, sent a memorandum to all correctional staff advising them that "open range walks" would be introduced at the institution effective April 28, 1998. In essence, open range walks require the correctional officers to patrol the corridors of the range while the cell doors are open, thereby allowing the inmates access to the corridors. The memorandum also noted that: *"In preparation for this change in procedure, the lighting on all ranges has been upgraded to meet Labour Canada specifications."* In his testimony Mr. Price indicated that the walls of the ranges were also painted in order to provide better illumination. Mr. Rodier, who is one of the applicants, stated that he had been made aware of this directive on April 28. At approximately 9:30 a.m. that day he was instructed by his supervisor, Mr. Bill Robb, to conduct an open range walk on ranges A2 and A4. He refused to do so, invoking Part II of the *Canada Labour Code*. Mr. Rodier explained that since 1984, when a riot had occurred in the institution resulting in the death of two correctional officers, only closed range walks were conducted at Stony Mountain. He noted that this is reflected in a Standing Order issued on January 30, 1991 (Exhibit 13) concerning Range Patrols. Under that Standing Order and according to long-standing practice, five correctional officers participate in closed range walks (i.e., while the inmates are locked up in their cells). Under the new standing order, only three officers are involved in conducting open range walks; one officer stands outside the barrier looking in; two others walk down the range, one walks "wide", that is, he walks along the far wall of the corridor in order to get as broad a view as possible of the upper and lower tiers; they walk to the end of the range and punch the deister; they then walk back to approximately the middle of the range and walk up an open staircase to the second tier; as they are doing so, the officer at the lower barrier walks up the outside staircase to the upper range to maintain a line of sight with the officers inside the range.

Mr. Rodier noted that during the several seconds it takes the officer at the barrier to walk up a flight of stairs, the two officers inside the range are out of his or

her line of sight. Mr. Rodier described the ability of the officer at the barrier to observe their movements, as their "life line". He expressed the view that, during the approximately twenty seconds it takes for that officer to go up the outside staircase, their safety is in jeopardy. Mr. Rodier noted that subsequent to April 28, he was given the option of leaving the lower range and using the outside staircase to gain access to the upper range, thereby maintaining the line of sight between the two correctional officers walking the range and the correctional officer at the barrier. However, on April 28, he was not given that option, and was required to use the staircase inside the range to gain access to the upper floor.

Subsequent to April 28 Mr. Rodier performed several open range walks in the company of Mr. Chris Price, the Deputy Warden; on those occasions, he had taken the staircase outside the range to gain access to the upper tier. Mr. Price recalled that he had accompanied Mr. Rodier on open range walks on Unit 1 on two occasions. On one occasion, he went down the range, came back and proceeded to the second level by using the outside staircase. On the other, they began on the top floor and had gone down to the lower floor using the inside staircase. Mr. Price noted that he leaves it up to the correctional officers themselves to decide whether they wish to use the inside staircase. He also observed that on April 28 it had been suggested that there should be a dialogue with the bargaining agent concerning range walks; some of the staff indicated that there was a lack of clarification, and wanted to have some discretion as to how to conduct range walks. Mr. Price stated that initially management wanted it done a specific way, that is, by using the inside staircase, and Correctional Supervisors were so advised. Mr. Price referred to a memorandum he had written which states that (Exhibit 16):

> *... Currently, all shifts are conducting the range walks with 3 staff. However, there are differences in the methods - some are completing the entire bottom floor then moving to the top, others are completing both floors of the range before moving on. The post order is subject to interpretation as it doesn't clearly state which procedure should be used. For now, please allow staff to conduct them either way as long as they only use 3 staff.*

Mr. Price also noted that on the morning of April 28 at 9:30 a.m. he observed that the majority of cell doors were locked; the only inmates who were out on the range were

those who are permitted to use the phone or who work as cleaners; the cells were locked to give staff an opportunity to conduct a cell search.

Mr. Rodier expressed concern that the first memorandum issued from management which directed that there be open range walks, required that only the staircase inside the range be used by the correctional officers; he was concerned that, while the correctional officers currently appear to have the option to use the outside staircase, this option may change at any time (when taking a view of the Institution, the undersigned observed two correctional officers during a range walk using the inside staircase while the correctional officer at the barrier proceeded upstairs using the outside staircase).

Mr. Rodier also noted that he was not aware of any training being offered to the correctional officers respecting open range walks. He acknowledged that he had not filed any observation reports suggesting that the open range walks are more risky. He stated that it has always been the policy at Stony Mountain that correctional officers are not to carry radios or any other communications equipment while conducting range walks, because they could be taken away from them and used by the inmates to monitor information during a hostage incident. Accordingly, only the officer observing from the barrier has immediate access to a radio.

Mr. Rodier also stated that this summer he visited both the Prince Albert and Drumheller institutions; at both Prince Albert and Drumheller staff conducting range walks can take their radios with them; at Drumheller, officers are observed on video monitors.

Mr. Rodier noted that there were large numbers of gangs in the Institution, including several different biker gangs and a number of native Indian gangs as well as other ethnic groups; he estimated that out of a population of 400 inmates, there are about 125 members of organized gangs at Stony Mountain. In his view the existence of large numbers of gang members poses an additional threat to the safety of correctional officers. He also observed that it is a fairly common occurrence to find weapons in the possession of inmates as well as drugs and homemade “brew”; he has commonly encountered inmates who are under the influence of either alcohol or drugs. While there have been no hostage taking incidents while he has been there,

there have been a considerable number of assaults as well as some inmate murders, and a "mini" riot in January 1997 (Exhibits 1, 2, 3, 4).

Mr. Terrence McKay is a Safety Officer employed with the Labour Branch of Human Resources Development Canada. On April 28 at 10:40 hours he was contacted by Mr. Len Haryski, a correctional supervisor, at Stony Mountain Institution, who advised him that there was a refusal to work under Part II of the *Canada Labour Code* by an officer at the institution. Mr. McKay stated that it was common to have two officers conducting an investigation; accordingly, Mr. Ed Francis was assigned as secondary officer to accompany him in his investigation at the institution. He arrived at 12:35 hours where he was met by Mr. Gunnar Ivans, the Assistant Warden, Management Services who is also the Co-Chair of the Safety and Health Committee. He was subsequently informed that Mr. Rodier had refused to conduct an open range walk because he would be out of sight of the officer at the barrier. He met with Mr. Rodier at 13:06 hours along with Mr. Gilles Chiasson, a correctional officer who is a shop steward. Another shop steward, Mr. Lorne Jacobson, who is a representative on the Safety and Health Committee also joined them.

Mr. Rodier was asked to complete a Refusal to Work Registration Complaint form. Mr. McKay reviewed with Mr. Rodier the nature of his complaint. Mr. Rodier outlined the procedure used in conducting open range walks. Mr. Rodier had informed Mr. Robb that he was refusing to work because he felt he was in danger when the officer at the barrier moves from the first level to the second level and consequently cannot view the correctional officers on the range. Messrs. Rodier and Robb contacted the other members of the Safety and Health Committee and the employer conducted an investigation, following which the employer concluded that there was no danger. Mr. Rodier was informed of this decision, and continued to exercise his right to refuse to work under the *Labour Code*, resulting in Mr. McKay being contacted.

Mr. McKay sought further clarification about Mr. Rodier's safety concerns. Mr. Rodier explained that when the officer at the barrier walks up to the second tier, he would not be able to keep in sight the officers on the range. This raises the possibility of the officers being assaulted by one or more inmates while they are not being observed from outside the barrier.

At 14:15 hours all the interested parties continued the investigation at Unit 1, ranges A to A-4. Mr. McKay was advised that each of the tiers contains 19 cells; during the day these would hold 26 inmates; however, at the time of the refusal at 9:30 hours, there would be 10 or 11 inmates on the range. Mr. McKay stated that on that morning there was nothing unusual noted on the range, that is, there were no threatening gestures or perceived threatening activities. Mr. McKay inquired if there were any rumours of possible violence at the time (i.e. secret intelligence information known as "KITES") and was told that there was none. The Institution was operating at the time with a full complement of staff. Mr. McKay observed the ranges at the barriers; he saw nothing to indicate any violent behaviour. Mr. Rodier had told him that, as the two officers who conduct the range walk are not allowed to carry radios, pepper spray, or personal alarms, their ability to call for assistance, or to protect themselves, is restricted if an incident occurred while out of the line of sight of the officer at the barrier. Mr. Rodier also advised him that he had received no specific training on conducting open range walks.

Mr. McKay and Mr. Francis then reviewed the matter and examined the memorandum of April 22 concerning the range patrols. They were advised by Mr. Ivans that this memorandum was sent to all staff by internal mail on April 22nd. Mr. Rodier confirmed that he had received a copy. They were also advised by Mr. Ivans that this was a national policy, i.e. that open range walks were conducted at all medium security institutions, and that there had been ongoing discussions over the past year at labour-management committee meetings concerning this matter (ref. Exhibits 8, 9, 10). They were also told that approximately 10 correctional officers had been to other institutions to observe and become familiar with open range walks. Mr. McKay noted that it was common for other correctional staff such as teachers and shop instructors to work with inmates in open and unsecured areas such as classrooms and workshops; in addition, maintenance people often work alone with inmates. They also were given and reviewed a signed correctional officer position description (Exhibit 11).

At approximately 16:35 hours a meeting was again held in the Boardroom. Mr. McKay discussed the components of "inherent danger", reviewed the conditions on Unit 1 at the time of the investigation, and concluded that there was no danger present. He then informed the parties of the appeal process, and on May 4, 1998, he

hand delivered to Mr. Rodier a copy of the safety officer's decision. The following day he provided a copy of his decision to officials at the Institution. On May 6th he received Mr. Rodier's request for a reference to the Board.

Mr. McKay was asked to describe the configuration of the ranges. He noted that on the second floor there is a concrete walkway, with the cells located on the right side; on the left side are guard rails; approximately one half way along the range is a platform for a stairway leading down to the lower level. He estimated that the width of the walkway would be between 30 inches and three feet; the guard rails are approximately three to four feet high. He did not recall if the cells are indented (the undersigned observed that they are indented). It was his observation that the ranges were very quiet at the time. He recalled that the cell doors were open and he observed one inmate come out to the corridor, look around and go back into the cell. He believes that Mr. Rodier was with him throughout the investigation.

Mr. McKay stated that the term "inherent danger" is not defined in the *Code*; the Department has issued internal program guidelines (Exhibit 12) which address in general what is an inherent danger. Among other things, this document identifies some of the characteristics of inherent danger, e.g. *"it is a permanent attribute or quality of a job; it is an essential character or element of a job; it is likely or probable to cause injury unless special precautions are taken; it exists regardless of the method used to perform the work"*. Mr. McKay stated that he would determine if there are "special precautions" in place. In his opinion the possibility of assault is inherent in the job of a correctional officer.

The applicant, Mr. George Czmola, has been a correctional officer at Stony Mountain Institution for 21 years. Mr. Czmola was present at the institution in 1984 when a riot took place which resulted in the murder of two correctional officers. Mr. Czmola described in detail the events that he observed on that occasion, including seeing the bloodied body of a colleague, an officer named Wendl. Mr. Czmola was required to remain at the Institution at that time for thirty-five hours before he was allowed to leave. Mr. Czmola noted that there was another hostage taking in 1982, which he attributed to the policy of conducting open range walks in the maximum security wing. After 1984 the institution brought in a policy of having only closed range walks and there have been no hostage takings since then.

Mr. Czmola stated that there have been a lot of assaults at Stony Mountain and at least twenty inmate murders since he has been there. On a number of occasions he has participated in cell searches where correctional officers have discovered homemade knives, needles, bullets, drugs and homemade brew. It is not unusual to find inmates under the influence of drugs and alcohol. He observed that there has been a proliferation of gangs and in general inmates are more organized now. He also noted that an inmate named Myron, a gang enforcer, was killed in 1996. In January 1998 there was a riot by inmates (Exhibit 2) who were advocating among other things the introduction of open range walks.

Mr. Czmola began his shift on April 28th at 15:35 hours. He was directed to do his first open range walk at 7:00 p.m.; he told the Keeper that he was refusing to do it because of fear for his safety. As a consequence Mr. Francis went back to the institution (this time as the principal safety officer) with Mr. McKay at 9:20 p.m.; he met briefly with Mr. Ivans and was advised of Mr. Czmola's refusal to do the open range walk. Mr. Ivans also indicated that an investigation had been conducted in the presence of Mr. Ivans, Mr. Victor Sinclair who was Mr. Czmola's immediate supervisor, Richard Chartrand and Mr. Czmola. Mr. Czmola was asked to complete a Refusal to Work Registration Complaint form; Mr. Czmola, Mr. Chartrand, Mr. McKay and Mr. Francis proceeded to view the ranges in question (B-2 and B-4); Mr. Francis observed three inmates on the range at the time; one was on the phone; the other two were wandering the corridor; other inmates were in their cells. Mr. Francis and Mr. McKay then proceeded onto the range; the inmates were locked in their cells at this time. They went from one end of the range to the other and proceeded up the inside staircase. They took some measurements including the indentation of the cell doors which are recessed 15 inches from the wall. They noted that from the outer extremity of the indentation to the guard rail the width of the corridor is 36 inches; the distance from the cell door to the rail is 51 inches and the height of the rail is 33 ½ inches.

Mr. McKay and Mr. Francis had a short discussion concerning the events up to that point; they reviewed the additional information which they had received earlier in the context of Mr. Rodier's refusal to work that day, i.e. Mr. Price's memorandum, as well as the minutes of union-management meetings. They met with Messrs. Ivans, Sinclair, Chartrand, and Czmola where they sought clarification of the seven points

which Mr. Czmola had noted in his complaint form. Mr. Ivans had advised that one of the reasons for the open range walks was to have more interaction between the correctional officers and the inmates, thereby allowing more opportunity to observe anything unusual. Mr. Francis had asked whether there was anything out of the ordinary that evening which might suggest there was danger; he was advised by Mr. Chartrand that an inmate on Unit 4 had told a correctional officer "to come down and party"; he suggested that this may have been intended as a threat. Mr. Francis observed that this did not occur on the range in question and he therefore dismissed this information as not being relevant. Mr. Francis stated that, while he appreciated the seriousness of the issue of open versus closed range walks, he did not find anything out of the ordinary that evening. By 12:45 a.m. he had concluded that there was no danger and so advised Mr. Czmola, who was provided with a written report on May 4th. On May 6th Mr. Czmola requested Mr. Francis to refer this matter to the Board.

Mr. Francis acknowledged that he had conferred with Mr. McKay with respect to the Rodier decision. However, he maintained that he had no preconceptions about this matter and had no idea as to the reasons for the Czmola refusal prior to arriving at the Institution. He did inquire into past practice concerning range walks and was advised that prior to April 28 there were five correctional officers participating in closed range walks. Mr. Czmola had described to Mr. Francis how the direction to conduct the open range walk affected him; it was apparent that he was upset and concerned by this direction. With respect to the points raised by Mr. Czmola in his complaint including the presence of contraband, he did not inquire into the number of instances when contraband had been found, or stabbings or hostage takings had occurred. He agreed that there were various instruments for wood working at the institution and that tattooing needles do exist there; in his view, it is the responsibility of the correctional officers to deal with these matters.

Mr. Francis stated that the safety officer examines conditions that existed at the moment of the investigation. With respect to the characteristics of inherent danger as noted in Exhibit 12, he suggested that the reference to "special precautions" might include obtaining intelligence reports which suggests that there are special dangers present. He did inquire into the training for correctional officers and was told that ten officers were sent to other institutions to observe open range practices there.

Mr. Francis was asked about the reference in Exhibit 9 (the Labour/Management Meeting Minutes of December 1, 1997) which, under the subheading "Open Range Walks", referred to training being done during the month of December. Mr. Francis acknowledged that he did not inquire into this; it seemed to him that open range walks would not be a particularly complex part of the duties of a correctional officer.

Mr. Czmola testified that on the next day, that is April 29th, while he was doing an open range walk on ranges B2 and 4 with Mr. Chartrand, he heard inmates call out: *"Let's get them. Jump them. Jump them."* (Exhibit 21, Officer's Statement/Observation report dated April 29, 1998); they also heard someone say *"they're coming to cut him down."* Mr. Czmola stated that these comments had a serious impact on him; he immediately told his supervisor that he was too stressed out to continue to work and that he was going home. Mr. Czmola has not returned to the Institution since then; he has been on Workers' Compensation and has been advised by his doctor that he is suffering from post-traumatic stress disorder (Exhibits 14 and 5). Mr. Czmola stated that prior to this occasion he had been off work several times because of stress; his stress has been triggered by suicides at the Institution and Mr. Myron's murder, all of which reminded him of Mr. Wendl's death in 1984.

In response to questions by counsel for the employer, Mr. Czmola noted that the real issue for him is his belief that closed range walks involving five officers should be reinstated. If that practice had remained in place, he would not have refused to work. As a result of previous incidents, he had a sense that the situation in the units was potentially dangerous. Mr. Czmola stated that the unit management system "stinks", as it gives inmates too much leeway. He also observed that on April 28 the inmates knew that the correctional officers were going to be forced to do open walks, and "they would be ready" for them. Mr. Czmola also stated that their training generally "isn't worth anything".

Mr. Chartrand was with Mr. Czmola on April 29th when they were assigned to do an open range walk on ranges B2 and 4. It was his recollection that they were directed by the shift supervisor to follow the guidelines respecting open range walks, that is, one officer would be controlling the barrier, and two staff members would proceed down range while the cells were open; they were to walk the lower tier, come back and leave the range, then take the outside staircase to the upper tier. He recalled

that threats were directed at them from the inmates before they began their walk. He stated that he heard shouts of *"Get them.", "Don't let them off the range."* and *"They're going to find one hanging."* He had advised his supervisor, Mr. J.L. Meyer, that they had been threatened on the range. Mr. Czmola then refused to do the walk. Mr. Chartrand observed that Mr. Czmola was "very shook up" over the threats and told the supervisor that he was going home; the supervisor convinced him to stay on site.

Mr. Chartrand noted that when he began working at Stony Mountain in 1987 it was the practice to conduct closed range walks; both tiers would be walked at the same time. There would be three officers at the lower tier; two of the officers would walk the lower range while one would maintain control of the barrier. One officer would walk "wide", that is, he would maintain a perspective of the whole range; the other officer would walk directly beside the cells checking each cell; they would then turn around and come back. There would also be two other officers at the upper tier, one at the barrier and the other walking the upper range. They would be looking for suspicious activities, for example, the use of narcotics; they would also check to see if the inmates had any injuries.

Mr. Chartrand stated that he had "officially" toured the Bowden and Drumheller institutions on September 8th and 9th, 1998 regarding construction matters, and to examine locking mechanisms. He observed at that time that both institutions had open range walks; at Drumheller the cell blocks are monitored by video cameras located at subcontrol posts which provide surveillance of the lower ranges. He noted that at Drumheller they do not have the same gang problems that exists at Stony Mountain Institution. He stated that at Drumheller the officers have personal alarms which they carry with them when doing range walks. Similarly, in Bowden they carry radios wherever they go. He also observed that contraband, that is both weapons and drugs, are frequently found at Stony Mountain Institution. He referred to Mr. Myron's stabbing three years ago; he also noted that two months ago an inmate named Campbell was stabbed; he also made reference to "many riots" which occurred last year. Mr. Chartrand had prepared an Officer Statement/ Observation Report on April 29 concerning the threats which occurred at range B4 (Exhibit 21).

Mr. Chris Price has been the Deputy Warden at Stony Mountain Institution since April 1996. He has been employed with the Correctional Service since June 1984, and has held a variety of positions in several institutions. Mr. Price noted that Stony Mountain is divided into five separate units; four house general population inmates and one unit is used to house all inmates in Manitoba for an initial assessment period of eight weeks. During this period a determination is made as to the inmate's appropriate security classification, using a number of assessment factors. Depending on whether the inmate is considered a low, medium or high risk, he would be placed in a medium, maximum or minimum security institution. Mr. Price noted that in 1997, 65 inmates were transferred from Stony Mountain to a maximum security institution.

Mr. Price observed that the unit management philosophy was adopted in 1996; it provides for a decentralized approach to managing inmates; each institution is broken down into units and within each unit there is dynamic interaction between the staff and the offenders; all the staff, including the correctional supervisor, parole officer, and the correctional officers are held accountable for the operation of the units, and are allowed to act autonomously. Mr. Price noted that this interaction is essential to achieve the objectives of the unit management philosophy. He referred to the job description of the correctional officer (Exhibit 11) and observed that the duties of the officers are focussed on participating in case management activities. In order to achieve dynamic security objectives it is important that the correctional officers get to know the inmates, and anticipate when things are not right. He maintained that the open range walk policy is consistent with the mission of the unit management philosophy which is premised on constant interaction between the correctional officers and the inmates (Exhibit 17).

Mr. Price stated that when he arrived in 1996 there was not much interaction between the correctional officers and the inmates on the ranges. He maintained that it is essential for the correctional officers to go down range while the inmates are outside their cells in order to ensure that they are safe, to provide an opportunity for interaction on the range, and to convey to inmates that the correctional officers can go whenever and wherever they wish.

Mr. Price stated that prior to implementing the open range policy he discussed this issue with correctional officers and the bargaining agent; in general their reaction was very negative because of concerns about an unsafe environment. Concerns were also expressed about the inadequate lighting and the darkness of the walls. As a consequence, Labour Canada was contacted; at that time Mr. McKay had concluded that the lighting was inadequate. New lighting was therefore installed in all ranges and the walls were repainted. Mr. Price also noted that refresher training courses were offered in December 1997 (Exhibit 18).

Mr. Price stated that on April 28th he and Mr. Thompson conducted the first range walks; an officer remained at the barrier while they walked down the range, came back and then went down the inside staircase to the next level. He maintained that the officer at the barrier lost eye contact with them for only five to six seconds. He observed that everyone was apprehensive at that time; the inmates would let everyone know that they were coming down the range. However, he found that the inmates were polite and the mood seemed to have been very positive. Since the open range walks have been in place, there have been no incidents other than on April 29th (Exhibit 21) as referred to by Mr. Czmola and Mr. Chartrand.

Mr. Price stated that he has had several conversations with supervisors and inmate committees, as well as having done four range walks himself. He concluded that the inmates like the new policy as it gives them more freedom, and they feel safer with staff present on the unit. The walks are done randomly and the inmates do not know when the staff are coming and are therefore more inclined to behave properly. According to Mr. Price, this lowers the risk that they will assault another inmate, or inject needles.

In response to questions from the applicants' representative, Mr. Price acknowledged that there is only limited interaction between correctional officers and inmates during open range walks; when closed range walks were conducted the correctional officers were able to see whether inmates were safe and could talk to them through their cells. He agreed that a lot of time is spent by correctional officers on caseload issues, which do not involve much interaction between correctional officers and inmates. Mr. Price also agreed that Exhibit 18 concerning training makes

no reference to range walks, and that on April 28th management had directed that the correctional officers were to use the internal staircase on range walks.

The representatives of the parties requested permission to submit written arguments, which were filed with the Board on October 9, 14 and 17; their arguments are reproduced below:

Applicants' Arguments

> *These cases arose out of the initiation of two separate Canada Labour Code Part II Work Refusals at Stony Mountain Institution on April 28, 1998.*
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> *As the evidence clearly shows, in 1984, two (2) Correctional Officers were brutally slain by inmates who were high on "brew" (institution slang for home-made alcohol). Also, the evidence clearly shows that between 1982 and 1984, three (3) hostage-taking situations occurred at Stony Mountain involving Correctional Officers on the Ranges. One (1) of these hostage-takings occurred after the murders of the two (2) Correctional Officers and prior to the release of the findings of the Rankin Inquiry. This report was commissioned by the department to internally investigate the circumstances surrounding the murders which occurred in 1984 as well as looking into the over-all operation of the Institution.*
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> *As a result of the Inquiry, procedures throughout the institution were changed. The procedure for conducting range walks was one of these significant changes. Prior to the change in procedure, Correctional Officers conducted "Open Range Walks". This procedure was altered to provide for a lock down of prisoners prior to officers entering the range. Five (5) Correctional Officers participated in the walk on each range. Three (3) officers entered the range, two on the lower level and one on the upper level. The other two (2) officers observed these activities from outside the main range barriers, one officer on the lower level barrier and the other on the upper level barrier. This ensured that line of sight was maintained on officers in the range area at all times while on the range.*
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> *One (1) of the officers on the lower level patrolled "wide", that is to say they entered the cell block and once reaching the main area of the ground floor, moved as far away from the cells as was possible. From this position, located near the phones, they could observe whether all inmates were in their cells, or whether they were attempting to hide from general*

view outside of the cells. The cell bars and doors are inset some fifteen (15) inches from the pillars which are located between each cell within the range area. This first officer would check visually all of the cells on the first and second tier, prior to the other two (2) officers who were also in the range proceeded to inspect the cells and "swipe" the clock at the rear of the range. In this way, the first officer assured that no unexpected confrontations occurred between an officer and an inmate.

This procedure, which was first implemented following the findings of the Rankin Report, was re-enforced through re-issuance of subsequent "post orders", as is evidenced in Exhibit 13, the "post orders" issued January 30, 1991. It is important to note that in these "post orders", on the first page, under "Direction", at point 3., it states "The observing officer shall maintain visual contact at all times with at least one of the officers conducting the range patrol."

This procedure remained in effect until Officer Rodier came to work for the dayshift on April 28, 1998.

On the evidence, it is clear that Officers Rodier and Chartrand who commenced employment at Stony Mountain Institution in 1988 and 1987 respectively, had never known any other procedure than the one outlined above, during their whole careers as Correctional Officers. Further, on the evidence, it is clear that Officer Czmola, who witnessed the events in 1982 through 1984, namely the three (3) hostage takings and the two (2) murders, had worked under these procedures from the time they were implemented in 1984 until he came to work on the afternoon of April 28, 1998. As well, it is clear from the evidence, that Officer Czmola, even more so than officers who were hired after 1984, understood and realized the purpose in implementing these procedures, namely to prevent similar situations from occurring in the future, as well as providing him personally with security of person.

On April 28, 1998, during the day shift, the Complainant Rodier, was specifically ordered to conduct an "open range walk". The Complainant was ordered to conduct the walk with two (2) fellow officers, rather than with four (4) other officers, as had always been the past practice for his full term of employment at the institution. The Complainant, as the evidence shows, was given specific direction on how to conduct said "open range walk". Specifically, Officer Rodier was ordered to enter the range, walk accompanied by another officer to the far end of the range, "swipe" the clock, return to the middle stair case, which is inside the range area, and proceed to the second tier of cells. This was to be

conducted with the cell doors open and with the inmates who were on the range, having full access to the whole range area as well as the two officers present. While Officer Rodier and his fellow officer were proceeding to the second tier, the Observing Officer, who was observing at the lower barrier, was to leave this post and proceed outside the range area to the upper barrier, where he was again to observe Officer Rodier and his fellow officer on the second tier, continuing to conduct their "open range walk", until they reached the barrier and he unlocked the barrier and let them exit the range. It is interesting to note that during our taking of a view, when we observed the procedure, it took the Officer in question a full twenty (20) seconds to move from one barrier to the next, with minimal interruption to delay him further. This was twenty (20) seconds when the two officers on the range had no security back-up or support. Line of sight was lost for a full twenty (20) seconds. In the event of a delay or distraction to the observer, this period of time could be expanded considerably.

The three officers were then to proceed to the next range and repeat the same procedure.

Officer Rodier further raised the question of personal protective equipment (personal alarm, pepper spray, etc.) or communications equipment (radio) being provided, and was denied this by the supervisor.

Officer Rodier then instituted a work refusal under the Canada Labour Code Part II.

The employer conducted their own investigation and notified Officer Rodier that they did not agree that a "danger" existed.

Officer Rodier then notified them that he was instituting a "continued work refusal" under Part II of the Canada Labour Code, and Labour Programs - HRDC was notified. Safety Officers McKay and Francis attended at the institution and investigated the complaint. Safety Officer McKay orally confirmed his decision of "absence of danger" and then followed this up on May 4, 1998 with a written decision.

On May 6, 1998 Officer Rodier requested that Safety Officer McKay refer his decision to the PSSRB for review.

Officer Czmola attended work on April 28, 1998 on the afternoon shift. Officer Czmola received the same direction from his supervisor as Officer Rodier had received on the day shift. Officer Czmola informed his supervisor that he was initiating a work refusal under Part II of the Canada Labour Code. His supervisor informed him that a work refusal had

already taken place on the day shift, and that the Safety Officers had ruled that it was safe to conduct "open range walks". Officer Czmola insisted that an investigation take place, and the supervisor went to discuss the matter with management. Management returned and informed Officer Czmola that they did not agree with his position. Officer Czmola then invoked a "continued work refusal" under the Canada Labour Code Part II, and Labour Programs - HRDC were notified.

Safety Officers Francis and McKay attended at the institution. It is important to note that these two Safety Officers had already been in attendance at the Rodier investigation. Safety Officer McKay had been the lead investigator for the Rodier investigation, and Safety Officer Francis had accompanied him. For the Czmola investigation, Safety Officer Francis took the lead with McKay accompanying him.

As both Safety Officers were in attendance earlier that day during the Rodier investigation and a finding of "absence of danger", one must wonder how these same officers could conduct an impartial investigation? Could Safety Officer Francis disregard all the information that had been received and dealt with during the Rodier investigation earlier that day, and enter into this investigation with an "open mind", as he stated during his testimony? Although he may not have consciously used information from the previous work refusal, it is next to impossible to believe that none of what he had learned previously went into his conduct of this investigation and the conclusions he reached. Further, and more important, given his previous participation in the Rodier investigation, is there not reason for the Complainant Czmola to have an "apprehension of bias" in this matter?

Officer Czmola was in an agitated state during the investigation, and the employer was well aware of the fact, as stipulated by the parties at the beginning of the hearing, that he had previously suffered from severe stress and "Posttramatic Stress Disorder". These previous incidents of "Posttramatic Stress Disorder" had also been suffered as a result of occurrences that had taken place in the institution (murders, hostage-takings, suicides of inmates (some of whom were on his case load and with whom he had established a personal relationship), oral, written and illustrated threats, etc.).

In reviewing the Canada Labour Code - Part II, we find the definition for danger as follows:

"danger" "danger" means any hazard or condition that could reasonably be expected to cause injury or

> *illness to a person exposed thereto before the hazard or condition can be corrected; (emphasis added)*

Even if the Safety Officers were not informed of the situation with respect to Officer Czmola, the employer was well aware of it. "Posttramatic Stress Disorder" is an illness which is directly linked to the exposure to hazards at work. Correctional Officers are first and foremost human beings, not machines, and as such they are susceptible to the same illnesses as all other human beings. "Posttramatic Stress Disorder" is an illness recognized by the Workers' Compensation Board of Manitoba. Officer Czmola has been diagnosed by numerous medical professionals as having this condition. This illness is directly linked to a shock experienced in the workplace.

The Union contends that "Posttramatic Stress Disorder" is an illness which falls clearly within the definition of "danger" as found in the Canada Labour Code - Part II.

On April 29, 1998, the day following his work refusal, and being informed by Safety Officer Francis that there was an "absence of danger", Officer Czmola attended at work and commenced his duties on the afternoon shift. During the conduct of his first "open range walk", while following the procedures as directed by the Employer, threats were heard coming from a group of inmates within the open range. Officer Czmola was accompanied at this time by Officer Chartrand. Immediately upon leaving the range, both officers approached a supervisor and informed him of what had occurred. Exhibit 21 details what took place in that meeting, and also contains the two Observation Reports made out by Officers Czmola and Chartrand. It is important to note, in the covering report, the following: "Czmola further told me that he was very stressed and wanted to go home and that he would be submitting a Compensation form." The next day he attended at his doctor and as was stipulated by the parties at the commencement of the hearing, he has been off work ever since on an approved Worker's Compensation Claim for Posttramatic Stress Disorder. The situation above ,triggered a "flashback" to 1984, when he had seen and then carried the stretcher of one of his fellow officers who had been brutally murdered. He flashed back to "his head smashed in and blood everywhere".

Under the General Duties of Employer's as found in the Canada Labour Code - Part II, Section 124 states: "Every employer shall ensure that the safety and health at work of every person employed by the employer is protected." The employer was well aware of previous occurrences of

Posttramatic Stress Disorder and yet they created a dynamic within the workplace, namely the implementation of "open range walks". Further, the Employer at the same time, reduced the number of staff involved from five (5) officers to three (3). This reduction in staff was implemented when the potential for assault or worse is greatly increased. With respect to the reduction of staff, and whether or not this is a Labour Relations rather than a Safety issue, I would refer the Board to Justice Mahoney's decision in the Darrell Dragseth, et al. (copy attached) wherein Justice Mahoney on behalf of the Federal Court of Appeal wrote at page 250, last paragraph, first column:

> *"(It was suggested in argument that the Department of Labour has decided that staffing disputes are collective bargaining, not safety, questions. Surely, in an environment like a maximum security penitentiary, they may be both."*

Clearly, Stony Mountain Institute is an environment <u>like</u> a maximum security penitentiary.

At this time I would like to turn the Board's attention to the question of "inherent" danger. This question arises out of Section 128. (2) of the Act, wherein an employee may not refuse to work in a place where:

> *"(b) the danger referred to in subsection (1) is <u>inherent in</u> an employee's work or is a <u>normal condition of employment</u>." (emphasis added)*

First of all, let me state that the Union's position clearly is that whether or not a danger is inherent in the job, in no way obviates the Employer's responsibilities or duties as contained in Section 124 of the Act.

With respect to the question of "inherent" it is important to note that unlike "danger" the Act contains no definition. Bearing this in mind, I would refer the Board to other sources.

The Concise Oxford Dictionary describes "inherent" in part as:

> *"existing in or* in *something esp. as permanent or characteristic attribute;"*

Black's Law Dictionary defines "inherent" as:

> *"**Inherent** or **latent defect.** Fault or deficiency in a thing which is not easily discoverable and which is fixed in the object itself and not from without."*

Violence and the potential for violence in Stony Mountain is clearly known and the evidence provided demonstrates this without any doubt. It is "easily discoverable".

Further, Black's Law Dictionary defines "inherently dangerous" to be:

> *"Danger inhering in instrumentality or condition itself at all times, so as to require special precautions to prevent injury; not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances." (emphasis added)*

If we refer to Exhibit 12, which is the document which both Safety Officers referred to when dealing with the question of "inherent", we find under Section 4. CHARACTERISTICS - INHERENT DANGER, the following:

"While it is not easy to determine what dangers are inherent to a particular job, a danger is likely to be inherent when:

- it is a permanent attribute or quality of a job;

- it is an essential character or element of a job;

- it is likely or probable to cause injury unless special precautions are taken;

- it exists regardless of the method used to perform the work."

Of particular note are the last two points in this section. First there is recognition that special precautions be taken, and secondly that it exists regardless of the method used to perform the work. The procedure in place for lock down during range walks clearly indicates that for fourteen years it has effectively removed danger (assaults) from the performance of duties and further shows that a "special precaution" was put in place to ensure safety.

The Employer cannot have it both ways. Either the violence at Stony Mountain is "inherent" in the job and therefore the Employer must take "special precautions to prevent injury", or conversely, violence arises from "mere casual or collateral negligence of others with respect thereto under particular circumstances." If this be the case, then the danger is not inherent in the job nor is it a normal condition of employment and therefore the employer is clearly responsible for taking all reasonable steps required to ensure the protection of their employees.

In the circumstance before the Board, it is the Union's position that this requires a direction from the Board to return to the previous practice that was instituted in 1984 following the hostage takings and the two murders. In the past fourteen years, it has proven its effectiveness.

Stony Mountain Institution, as was evidenced by the documents and testimony, is a hostile environment to work in. In fact, it was clear that social conditions have worsened dramatically over the past several years. Although a medium security facilities, it has more aboriginal inmates and gang members than other medium security prisons. The fact that over one-quarter of the prison population has been identified as gang members, and the types of gangs that are present (Hell's Angels, Los Bravos, Manitoba Warrior's, Indian Posse, etc.) is a clear indication that Stony Mountain is unique among medium security institutes.

As the evidence clearly demonstrates, contraband is seized virtually daily. Drugs, alcohol, "brew" are quite common. Finding inmates under the influence of alcohol or drugs is not unusual. Seizures of weapons of all types, such as knives or stabbing instruments, commonly called "shivs", metal and wood objects for use as clubs, bullets, syringes and tattoo needles, drill bits, router bits, and other tools are a constant occurrence. The environment is very hostile and threatening.

Assaults on inmates are common, as are threats towards Corrections Officers. There have been inmate suicides in the past several years, due in part to fear of the gang elements.

Range walks are an area where the employer can provide a great deal of protection for their officers. Reinstituting the previous policy will take the special precautions necessary to protect these workers. This is the employer's duty under the Act.

During the taking of a view of the Institution, we attended at other areas such as the kitchen, workshops, classrooms, gym, etc., and it was identified that there were clear hazards in these areas as well. The Union agrees, however, in those other areas, you were dealing with individuals who had been screened and also, extra protection was provided in the form of fixed alarms, personal alarms, cameras, radios, etc. When in the open range, officers are not afforded any of these considerations, and are further dealing with large segments of the population, gathered together, without any program activities or regimented order, such as exists when in the classroom or working in the workshops. Clearly this is the most dangerous area in the Institution, and special

precautions need to be taken in order to protect these workers.

The Employer through their representative, Deputy Warden Price, stated the rationale for implementing "open range walks". He stated there were 3 main reasons:

1. *to make sure inmates were safe and alive.*

2. *to interact with inmates.*

3. *to show inmates that it was the employer's facility and that they could go where they wanted when they wanted.*

In cross examination, he admitted you could determine whether inmates were safe and alive, with the cells opened or locked. Further, he agreed that interaction could take place with inmates whether they were locked down or the cells were open. As well, if we consider what we observed during the taking of a view, interaction between officers and inmates was minimal and the walk through was completed in a minute or two.

With respect to the final reason stated, it appears rather inciting and challenging to inmates. Further, whether inmates are locked down or not officers can go anywhere the employer wishes them to go in the institution. In addition, situations can far better be controlled if the inmates are locked down rather than wandering the open range, should someone get out of hand or some contraband be discovered, especially if gang related or initiated.

Also placed into evidence were the Union Management Meeting Minutes for October and December. In reviewing the December minutes, it clearly states that Training will be provided prior to the implementation of this policy. The employer further presented Exhibit 18 as an indication that they had provided this training. First of all, as was stated by the Deputy Warden at the hearing, the briefing notes were read as presented. Nothing identified this training as anything more than refresher training. The 2 Complainants did not attend. The training was voluntary. The training was only four hours in duration and had a tentative agenda which included nine topics any one of which if dealt with in any depth would have taken more time than was allotted for the whole session. This shows how important this issue was to the employer.

In spite of the promises around training made at the Union Management Committee meetings in October and December,

the employer failed to clearly identify and present appropriate training for this serious change in policy.

With respect to the question as to what the Board should consider, I would refer to Section 130 (1) of the Act wherein it states:

130. (1) *Where a decision of a safety officer is referred to the Board pursuant to subsection 129 (5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

> *(a) confirm the decision; or*
> *(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145 (2). (emphasis added)*

Clearly the Act requires the Board to inquire into the circumstances of the decision, and this we would contend includes all information available related to the work refusal whether considered by the Safety Officers or not. Further, we would contend that to do otherwise would be to diminish the Board's ability to inquire into the circumstances of the situation and impede the Board's ability to act under 130 (1) (b). If a danger exists, and a Safety Officer fails to consider evidence which was available but not utilized, the Board must be able to deal with that evidence in reviewing the Safety Officer's decision. This is the Union's position on this matter, which my colleague disputed at several points during the proceedings before the Board, namely the question of the relevancy of evidence which the Safety Officers did not utilize in making their decisions.

Unlike my colleague's position as stated during his opening remarks, namely that this was an inappropriate use of ***Part II*** *of the Canada Labour Code, it is the Union's position that this is exactly what* ***Part II*** *was intended to address. An employee while at work has reasonable cause to believe that a condition exists in any place that constitutes a danger to the employee. Said employee then refuses to work in that place, and when the employer disagrees, continues to refuse until a Safety Officer conducts his investigation. The definition of what constitutes a danger under the code is "any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected." This definition, in the Union's opinion, removes the previous concept of "imminent" or "immediate" danger from the Act, and since 1986 has replaced this old concept with a "hazard or condition that*

could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected." This definition provides for the situation before the Board, namely the conducting of "Open Range Walks". An attack or assault does not have to be occurring in order for the employee to refuse to work. It does not have to be immediate, however, the potential has to be there for this injury and illness to occur before the condition is corrected. If we look at Section ***122.1*** *of the Act, it states:* ***"The purpose of this Part is to prevent injury to health arising out of, linked with or occurring in the course of employment to which this Part applies."*** *The change in procedures for open range walks sets up the dynamic of potential injury before it can be corrected. It is the Union's position that the Act is thus written to prevent illness and injury from occurring and to correct dangerous situations before someone is injured.*

It is the Union's position to the Board that this situation falls fully under the ***Canada Labour Code Part II****, and the Board has the authority under this Part to intervene in this matter and issue corrective action in the form of a direction under subsection 145(2).*

We request the Board to direct the employer to change their procedures with respect to the conduct of range walks to ensure that employees are protected from assault or worse. This would include a return to using five (5) staff rather than three (3) during the conduct of these walks.

Further, we request the Board to direct the employer to provide personal protective equipment such as personal alarms, pepper spray, radios, etc. to these employees while they are at work.

Finally, we request the Board to direct the employer to provide proper, adequate training to the employees which equipts these employees to deal effectively with the situations that can arise during range walks.

These directions clearly fall within the mandate given to the Board under ***Section 130 (1) (b)*** *and* ***Subsection 145 (2)*** *which states the following:*

> ***"130. (1) (b)*** *give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145 (2)."*

> ***"145 (2)*** *Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work;*
> *(a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the safety officer specifies*
> *(i) to take measures for guarding the source of danger, or*
> *(ii) to protect any person from the danger; and*
> *(b) the safety officer may, if the officer considers the danger cannot otherwise be guarded or protected against immediately, issue a direction in writing to the employer directing that the place, machine or thing in respect of which the direction is made shall not be used or operated until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction."*

We request that the Board exercise their powers under this Part of the Act, and issue appropriate direction to the employer to effectively protect these employees at work.

Thank you,

Art Curtis
Regional Rep.
PSAC
London, Ontario

Employer's Arguments

Introduction:

Messrs. Charles Rodier and George Czmola are correctional officers employed at Stony Mountain Institution. These employees claim that the open range walk policy implemented at the Institution on April 28, 1998 exposed them to danger that justified their refusal to work under the

Canada Labour Code (the Code). Two Safety Officers, Messrs. McKay and Francis, were asked to review the employees' respective work refusals on April 28, pursuant to ss. 129(5) of the Code. The Safety Officers determined that no danger existed to justify a work refusal. The question now before the Public Service Staff Relations Board (the Board) in this case is whether the Safety Officers were correct in deciding that no danger justifying a work refusal existed in these cases.

In order to succeed in this case, the employees must demonstrate they meet certain basic statutory requirements set out in the Code. In the employer's submission, the employees have failed to demonstrate that they meet these statutory requirements in two ways. First, they have failed to show a danger, as defined by the Code, existed at the time of their refusal to work. Second, they have failed to show that any of the alleged dangers they faced went beyond the inherent dangers associated with the normal performance of their jobs as prison guards.

The employer submits in these closing arguments that the Federal Court and the Board decisions relating to refusals to work by prison guards show that the employees' interpretation of the Code cannot be sustained. Further, the employer submits that evidence provided by the employees themselves, by the Safety Officers, and by Chris Price, the Deputy Warden at Stony Mountain Institution, demonstrates that the Safety Officers' respective decisions were correct.

Danger:

Paragraph 128(1)(b) of the Code provides:

> *128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that . . .*
> *(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place.*

The Code definition of "danger" is set out in section 122:

> *"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to an person exposed thereto before the hazard or condition can be corrected;*

In our submission, the employees needed to show the board that the danger they faced on April 28, 1998 was "actual and

real".[1] This is a crucial point, in light of the argument by Mr. Curtis to the effect that "potential injury" is a danger that is covered by the Code.[2] In our submission, this argument flies in the face of the Code's definition of danger cited above, as well as the decisions of the Federal Court and of the Board.

The employees' concerns, as expressed in their testimony to the Board and in their accounts to the Safety Officers, suggest that the issue in their minds was that they felt the new open range walk policy exposed them to greater potential danger in the future. The employees' testimony as to <u>potential</u> injury and the <u>possibility</u> of being attacked by inmates during an open range walk does not constitute a danger that meets definition of danger set out in the Code. Because the danger cited by the employees in this case are prospective rather than real and actual danger,[3] the employees' refusal to work was unfounded and the Safety Officers' decision to that effect was correct.

It is very significant that the evidence of both employees and both Safety Officers shows there was nothing out the ordinary on the ranges on the day in question. All four of these witnesses confirmed that there was no unusual behaviour on the part of inmates in the days or hours prior to the refusal to work.[4] This was critical evidence that the element of actual or real danger did not exist in this case.

It is also important to note that the employees in this case both testified to the fact that they refused to work even before they entered an open range. In the employer's submission, the employees were not in a position to say whether a real danger existed that would justify a refusal to work because neither employee conducted an open range

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[1] *This is the test set out in Stephenson and Treasury Board, PSSRB File No. 165-2-83 at page 2 (Kwavnick) and followed most recently in Procureur Générale du Canada et Mario Lavoie, Federal Court of Canada, Trial Division, File T-2420-97, unreported decision of Mr. Justice Marc Nadon, dated September 9, 1998. (Only the French version is currently available.) On the need to show "actual" danger to justify a refusal to work, see also Laflèche and Treasury Board, PSSRB File No. 165-2-61.*

[2] *See Mr. Curtis' closing argument, second paragraph, page 9.*

[3] *See Stephenson, footnote 1, at page 32.*

[4] *See Amell and Treasury Board, PSSRB File No. 165-2-56, (Chodos). The facts described are worth comparing to the facts in the Amell case. That case involved a nurse employed at the Kingston Penitentiary Psychiatric Treatment Centre who refused to work because of concerns about the application of an open range policy. On the day before her refusal to work certain inmates conducted a "sick-in" related to the issue of open and closed cells, while on the day of the refusal to work "the atmosphere remained tense" according to Ms. Amell. Notwithstanding this context, the Board upheld the Safety Officer's finding that Mr. Amell's refusal to work was not founded.*

walk on April 28 that would have enabled them to assess whether an actual and real danger existed. The facts in this case are somewhat similar to the facts in the Bidulka[5] and Stephenson[6] cases in that the employees in those cases claimed that a danger existed in the workplace without having been to the workplace.

Both employees did testify to the effect that nothing out of the ordinary was occurring on the ranges the day of the refusal to work. Given that testimony and the fact that the only thing out of the ordinary on that date was the first implementation of the new range walk policy, the employer submits that the Board should carefully assess the employees' motivation in refusing to work. The real issue in this refusal to work on April 28, in our submission, was that the employees disagreed with the open range walk policy. Mr. Rodier's testimony as to his discussions with colleagues of a refusal to work prior to invoking that right is also pertinent in that it suggests a degree of pre-meditation, rather than a response to an actual and real danger. The testimony of the Safety Officer as to the fact that Mr. Czmola and his union representative required an hour and a half to complete the form explaining the dangers Mr. Czmola felt he faced is revealing in this context, as it suggests an effort to develop a credible story, rather than an account of a actual and real danger.

Further, the nature of the evidence provided by the employees relating to their views of dynamic security generally and the open range walk policy in particular support the argument that the real motivation for this refusal to work was less a fear of real and actual danger than disagreement with the open range walk policy and fear of the <u>potential</u> danger that might arise. For example, when asked about his views of the unit management philosophy, Mr. Czmola stated that in his view "it stinks" and enables "inmates to run around and do what they want". In our submission, the Board will want to carefully assess whether "danger" was the real reason for the refusal to work, or whether a disagreement over the open range walk policy that permitted inmates to be on the range at the same time as correctional officers was the real reason for the refusal.

Finally, the evidence of Mr. Price as to the alleged danger arising from the open range walk policy indicated that no incident reports have been filed that suggest correctional

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[5] *(1987) 3 F.C. 630 at 642*

[6] *See footnote 1.*

officers have been exposed to greater danger because of the open range walk policy. When asked whether any such incident reports existed, Mr. Rodier agreed that none did, adding that in his experience "if you can get at me then it is more risky". In our submission, this evidence points to a basic flaw in the employees' case: the issue in their minds at the time of the refusal to work was the increased risk the open range walk policy presented to them and their colleagues. As noted above, increased risk or potential danger does not constitute danger justifying a refusal to work. Further, we will argue below that any increased risk of encountering a dangerous situation was inherent in the responsibilities of a corrections officer.

Inherent danger:

Paragraph 128(2)(b) of the Canada Labour Code provides:

> *(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where . . .*
> *(b) the danger referred to in subsection (2) is inherent in the employee's work or is a normal condition of employment.*

The Safety Officers found that the dangers the employees referred to in refusing to work on April 28 were dangers that were inherent in their work. In our submission, this finding was correct. Dangers arising from the possible actions of inmates are dangers that are inherent in the jobs of correctional officers -- these arise whenever correctional officers are in contact with inmates.[7]

The job descriptions of Messrs. Rodier and Czmola clearly indicate that dynamic security and interaction with inmates is an integral part of their functions. The testimony of Mr. Price as to the new "Unit Management" approach to correctional work indicated that correctional officers are required to interact with inmates through hands-on case management and the development of a good understanding of inmates. This is a critical aspect of correctional officers' objective of "helping offenders to become law abiding citizens", in Mr. Price's words.

The employer conceded that the work of a correctional officer is inherently dangerous work. However, no credible evidence was led to the effect that open range walks presented special dangers that go beyond the dangers inherent in other aspects

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[7] *See Mahoney and Treasury Board, PSSRB File 165-2-35.*

of the prison's operations. To the extent that evidence presented with respect to two murders committed in 1984 is relevant (and it will be argued below that such historical evidence is not relevant), it is worth noting that those murders occurred on closed ranges by prisoners who had hidden themselves in a shower near the range barrier before their cells were locked.[8] *Therefore, in our submission, there was no evidence before the Safety Officers or before the Board that demonstrated the dangers associated with open range walks were dangers that went beyond the inherent dangers facing all correctional officers who interact with inmates.*

Finally, it should be noted that the viewing clearly demonstrated that Stony Mountain Institution is a place where correctional officers are exposed to the dangers referred to by the two employees on April 28 on a daily basis and in many different parts of the Institution. These dangers are inherent to the work of correctional officers.

Irrelevant evidence before the Board:

While the employer respects the inquiry process and recognizes the desire for employees to express their concerns fully, much of the evidence presented to the Board was irrelevant as it did not relate to the real question at to whether the Safety Officers were correct in deciding that no actual or real danger existed to justify a refusal to work on April 28. In our submission two types of testimony heard by the Board was largely irrelevant, (1) the testimony as to potential dangers and (2) the "historical" evidence before the Board.

The testimony as to the potential dangers created by the open range walk policy was irrelevant to the question of whether an actual and real danger justifying a refusal to work existed on April 28. If the Board finds that the evidence relating to the potential dangers arising from the open range walk policy is relevant, then our position is that the open range walk policy reduces danger in Stony Mountain Institution. Mr. Price essentially testified to the effect that the open range walk policy results in safer ranges. He testified that greater interaction between inmates and correctional officers helps create "an element of trust", provides officers with "a good opportunity to anticipate when things aren't right", enables

[8] *See Exhibit 6, "Report of the Inspector General's Special Inquiry into the Murder of Two Officers" dated July 1984 at page 11 where reference is made to the lock up call being announced over the public address system, then correctional officers opening the barrier doors, then inmates attacking the officers.*

officers "to take proactive steps to defuse potential situations before they occur" and results in "numerous occasions when we get information from inmates in advance" in relation to security issues. Mr. Price also testified to the response that inmates provided to the open range walks which suggested that the new policy made inmates themselves feel more secure. This evidence supports our submission that the open range walk policy reduces danger on the range.

With respect to the "historical" evidence presented to the Board, the employer would submit such evidence should not be admitted as it is not relevant and it was not presented by the employees to the Safety Officers at the time of the Safety Officers' review. If the Board finds that the historical evidence relating to range walks at Stony Mountain Institution is relevant, then it is important to note certain aspects of the evidence before the Board. First, the implementation of the open range walk policy is the culmination of a series of initiatives that fall under the rubric of the "Unit Management" philosophy implemented at Stony Mountain Institution . This new approach involved steps to change the culture at the Institution, improve the morale of staff and inmates, and improve the physical environment. Mr. Price testified to new initiatives such as the more systematic security classification of inmates and more aggressive transfer of inmates who posed a high security risk. All these policies make Stony Mountain Institution a different type of institution from the Institution that existed even ten years ago, a place where social conditions have been improving and continue to improve.[9]

Second, the open range walk policy itself was implemented gradually, following extensive consultations between labour and management. Labour Canada safety officers were also consulted and those officers' recommendations with respect to painting the walls of the ranges a lighter colour and installing new lighting were implemented. Mr. Price also testified as to the voluntary, paid training offered to all correctional officers in anticipation of the implementation of open range walks and Mr. Francis noted that officers had been sent to observe open range walks at another institution. In our submission, the implementation of the open range walk policy was conducted in such a manner as to ensure any obligations under the Code to take precautions to avoid injury of employees were met in full by the employer.[10]

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[9] *See paragraph 1 on page 7 of Mr. Curtis' closing arguments on this point.*

[10] *See last two paragraphs of page 6 in Mr. Curtis' closing arguments on this point.*

Arguments relating to Mr. Rodier

The employer submits that the Board should reject Mr. Rodier's assertion that the open range walk policy posed a danger in that it required the two officers walking the range to be out of sight of the third "barrier" officer when the latter was moving from one level to another. First, the fact that the two officers on the range are out of the line of sight of the barrier officer does not present a danger unless some other event occurs, such as an inmate attacking one of the inside guards. Therefore, the danger that arises from being out of a line of sight is not an actual danger, but a potential danger that does not constitute grounds for refusing to work under the Code.

Second, we submit that the likelihood of this potential danger becoming a real danger is small. This submission is based on the testimony of Deputy Warden Chris Price to the effect that (a) no observation reports have been filed on any incidents arising from the open range walk policy since the walks began in April 28, 1998; and (b) the general practice of guards performing open range walks is for the guards to use the stairs inside the range, rather than returning to the barrier and using the outside stairs. The walks observed during the viewing supported this description of the general practice. If the dangers arising from using the inside stairs were actual or real, it is our submission that correctional officers would choose to use the outside stairs, as they are entitled to under the policy.[11]

Finally, we submit that the dangers posed by being out of the line of sight of the barrier guard are dangers that are inherent to the job of a correctional officer. The testimony of the employees, the testimony of Deputy Warden Price and the viewing all demonstrated the fact that correctional officers are frequently alone, out of the line of sight of fellow officers for extended periods, and in the company of inmates in various parts of this institution. This is a normal part of the daily work of a correctional officer and, as described above, constitutes an inherent danger. The clearest examples of this during our view were the situations of the correctional officers in the gym area and in the shop.

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[11] *It should be noted in passing that one of the employees' witnesses, Mr. Chartrand, squarely contradicted Mr. Rodier's assertion that the open range walk policy required the use of the inside stairs. He described the staff supervisors as requiring correctional officers to use the outside stairs and indicated that officers were* ***not*** *directed to use the inside stairs.*

Arguments relating to Mr. Czmola

In closing argument, Mr. Curtis raises the issue of Mr. Czmola suffering from "Post Traumatic Stress Disorder". In our submission, the issue of how Mr. Czmola reacts to contact with inmates is a matter that should properly be left for the Workers' Compensation Board. The issue before the Safety Officers and before the Board is whether conditions in the workplace justify a refusal to work was justified. not whether the condition of the person invoking the refusal justifies a refusal to work. Mr. Czmola has never established, before the safety officers or before the Board, that there is a causal relationship between the conditions in the workplace and the potential or actual harm which formed the basis of his refusal to work.[12]

Indeed, in our submission, it was only the day <u>after</u> his refusal to work that the issue of stress became an issue Mr. Czmola raised with management in the context open range walks. When the Safety Officers conducted their review no mention was made of Mr. Czmola's health condition. Specifically, Mr. Francis indicated in his testimony that he did not recall any statement being made with respect to the health of Mr. Czmola and that he did not recall Mr. Czmola using the word "panicked", the term suggested to him during questioning by Mr. Curtis. It is also worth noting that none of the reasons cited in the refusal to work documentation filed by Mr. Czmola on April 28 referred to his health situation. Therefore, it would not be appropriate for the Board to lend any weight to an argument about Mr. Czmola's health condition when that condition is not related to his original refusal to work.

With respect to the dangerous items listed by Mr. Czmola as commonly found on the ranges (such as hobby equipment, tattoo needles, etc.), it is worth noting that Mr. Francis indicated that he understood correctional officers were responsible "for eradication" of these items on ranges. The employer's position is that these items are found on ranges and that open range walks increase the likelihood that these items will be located. Mr. Price's testimony to the effect that one of the purposes of hourly unscheduled open range walks is to increase the security on the range and make the illicit use of such material more difficult supports this submission.

Impartial investigation by Safety Officers

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[12] *A case on point is Scott and Treasury Board, PSSRB File No. 165-2-71 (Chodos), see pages 10 and 11 where the Board's decision in Bliss and Treasury Board, PSSRB File No. 165-2-18 (Nisbet) is cited, as well as pages 12 to 13.*

The questions raised in Mr. Curtis' closing argument at pages 3 and 4 relating to the Safety Officers' impartiality were, in the employer's submission, convincingly answered by Mr. Francis before the Board. Mr. Francis testified that he and his colleague Mr. McKay approached their tasks with "open minds" and with no preconception.

The suggestion that the Mr. Francis' attendance at Mr. McKay's investigation may give rise to an apprehension of bias on the part of Mr. Czmola was not supported by any evidence put to the Board by Mr. Czmola. Indeed, just as the parties agreed that it was a sensible use of resources for the Board to hear both Mr. Rodier's and Mr. Czmola's refusal to work cases at the same time, it is our submission that the assignment of two Labour Canada officers to investigate these same cases was nothing more than as sensible use of resources.

Conclusion:

Turning the clock back to the days of locked ranges would, in our submission, be counterproductive in terms of the safety of both inmates and staff who live and work on the ranges of Stony Mountain Institution. The grounds for doing so have not been proven as the employees failed to meet the onus they face under the Code in this case. Specifically, they failed to show a danger, as defined by the Code, existed at the time of their refusal to work. They also failed to show that any of the alleged dangers they faced went beyond the inherent dangers associated with the normal performance of their jobs as prison guards.

Applicants' Rebuttal

In the employer's closing argument, Mr. Merner has argued that the situation at hand is not a danger that is covered by the Code. It is merely, and I quote " The employee's concerns, as expressed in their testimony to the Board and in their accounts to the Safety Officer's, suggest that the issue in their minds was that they felt the new open range walk policy exposed them to greater potential danger in the future." It is the union's argument that the definition of "danger" does in fact cover this situation, as it is a "hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected". Perhaps an illustration will help to demonstrate this. If a worker is exposed to excessive noise in the workplace, a situation which one could argue is "inherent" in

the job, and the excessive noise can be reasonably expected to cause ear damage (an injury) at some time in the future, it is ruled as a danger. As a result of this measures are taken to reduce the risk to this worker. For example, the cause of the noise may be isolated in a sound proof booth, or by a sound barrier, or the worker may be provided with personal protective equipment, such as ear protectors. Is this any different from the instant case, where it has been historically proven that assaults do take place from inmates, that the same measures can be taken, namely creating a barrier between the worker and the hazard (locked cells) or providing personal protective equipment and appropriate training for said worker. It is our position clearly, that there is no difference between these two scenarios, and that both fall within the definition of "danger" as contained in the code.

The employer's contention that the motivation for the work refusals was less a fear of real and actual danger and was a disagreement with the open range walk policy is not well founded. Nothing in the evidence takes away from the legitimate concerns based on real life experience that both corrections officers were aware of having occurred prior to the change in policy, nor does it take away from the concern that this situations could reoccur in the future as a result of this change. Yes it is true that the two complainants disagree with the change in policy, however, it was clear from the evidence that this concern was directly related to their reasonable concern that by doing so a "danger" was being created, as per the definition in the Code.

*With respect to the comments of Mr. Merner on page 3 of his brief with regard to the evidence of Mr. Price, he states that "**no** incident reports have been filed that suggest correctional officers have been exposed to greater danger because of the open range walk policy." There were two incident reports filed by Officers Czmola and Chartrand, which Mr. Price referred to and dealt with uttered threats. Further, cannot definitively say that because there have been no incidents to date, there won't be in the future. This is the nature of the hazard in this situation, it is unpredictable as to when it will occur, but again the union would argue that this is anticipated in the definition of "danger" as contained in the Code. I would suggest that the workers in this institution have been fortunate to date, not to have had a reason to file an incident report, but that that in no way substantiates the intimation that a "danger" is not present.*

With respect to the argument on the increased risk being inherent in the responsibilities of a corrections officer, I would refer the Board to my previous submission, wherein I dealt with this issue. I would also ask the Board to once again

consider the scenario which I presented earlier in this submission, with respect to a noise hazard being present in the workplace, and the measures that are taken by employers or directed by Safety Officers in order to rectify the situation. The damage in hearing loss does not occur evenly in all workers and takes several years to happen, therefore the danger is in no way immediate, and yet measures are taken to protect the workers. The same circumstances apply here. No worker should be expected to work without proper measures being taken to protect as far as possible their healt while at work, whether certain risks are apparent in the job or not. The employer still has an obligation to protect the health of employees while at work.

With respect to the relevency of the evidence, it is the union's position that all the evidence is relevent to the case at hand and was available to the safety officer's. It is important in that it establishes the context around which this case evolves. It explains why the policy which was in place for forteen years was established, and it helps address the concerns and deficencies in the current policy. To ignore this evidence, as the employer would have you do, lends credence to the old adage - Those who are ignorant of history are doomed to repeating it.

Conclusion:

The Union requests that the Board review the corrective actions contained in its earlier submission, and consider the appropriate actions to take to ensure the safety, health and security of person of these workers while at work. To accept the employer's request not to turn back the clock and to maintain the status quo of the new policy, is not the solution in our opinion. The danger is real, and can be reduced or controlled.

Reasons for Decision

The following provisions of Part II of the *Canada Labour Code* have particular relevance to the matters at issue:

122. (1) In this Part,

...

"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;

...

> *124. Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.*
>
> *...*
>
> *128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that*
>
> *(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*
>
> *(b) a condition exists in any place that constitutes a danger to the employee,*
>
> *the employee may refuse to use or operate the machine or thing or to work in that place.*
>
> *(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where*
>
> *(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 inherent in the employee's work or is a normal condition of employment.*

In essence, the safety officers in this case were required to determine whether the implementation of the "open range walks" policy constituted a "danger" as that term is defined above, to the applicants, and if so, whether that danger was subsumed under paragraph 128(2)(b). I have no doubt that, rightly or wrongly, the applicants had a *bone fide* belief that the implementation of the open range walks policy posed a real and immediate threat to their safety. I would also note that the concerns of the applicants are more than merely speculative. The prospect of violence in a medium security penitentiary - where gangs are prevalent, where home-made weapons are found from time to time, and where some inmates are on occasion under the influence of drugs and home-made alcohol - is an ever present reality which demands continuous vigilance, and requires that precautions are taken. However, I accept the evidence of Mr. Price that it is an important element of dynamic security within the institution that there be, and be seen to be, interaction and contact between correctional staff and the inmates, and that open range walks are an important aspect of the security process, and foster the mandate of the institution. I would note for

example that the correctional officer II position description (Exhibit 11) makes a number of references throughout that document to the requirement for correctional officers to interact and have direct contact with inmates. For example, paragraph 1(a) speaks of *"acting as first point of contact for inmates on his/her caseload;"* paragraph 3(a) refers to *"interacting frequently with, and actively relating to, inmates;"* paragraph 5 notes that correctional officers are to provide *"dynamic security through monitoring and supervision of inmate activities and programs within the unit/institution, by: (a) maintaining a dynamic presence in areas of inmate activity within and outside of the unit/institution;".*

Accordingly, I have concluded that the risks arising out of open range walks are inherent in the duties of correctional officers. That is, to put it colloquially, the risks associated with interaction and contact with inmates "go with the territory". This is hardly a new finding in respect of health and safety disputes within the Correctional Service; very similar conclusions were reached in, for example, the *Holigroski* decision (Board file 165-2-30) and in the *Stephenson et al.* decision (Board file 165-2-83).

It is important to note that a finding that the risks associated with an open range walks policy are inherent in the correctional officer's duties does not absolve the employer from its statutory obligation to *"ensure that the safety and health of any person employed by the employer is protected*" (section 124). The employer is still responsible for taking measures to ensure that the performance of these duties are free from unnecessary risks. In this regard, I share the concerns expressed by Mr. Rodier about the need for the correctional officer who is positioned at the barrier to the range to maintain constant observation of the officers who would be conducting the range walks. It is clear from the evidence that for a few seconds at least, when the correctional officer at the barrier uses the outside staircase to reach the upper or lower range, he or she loses sight of the officers who are using the interior staircase to gain access to the second tier. The raison d'être of having a third correctional officer at the barrier is to ensure that someone outside the range can continually view the officers conducting the range walk and can therefore react immediately in the event of trouble. This is particularly important, given that officers walking the range are prohibited from carrying radios, alarms, etc.

There is in fact no reason to break that visual contact, even for a few seconds. In my judgment, to do so exposes the correctional officers to danger as defined in Part II of the *Code*, a danger which is entirely unnecessary. Mr. Rodier's suggestion meets this concern; that is, to have the correctional officers who are walking the range take the outside staircase to the next tier in the company of the correctional officer at the barrier. Management has in effect acknowledged the feasibility of this modified procedure; Mr. Price testified that the correctional officers currently have the option to either use the inside or outside staircase when conducting the range walks. With all due respect, I would suggest that this is an abdication of the employer's responsibility for safety. Management provides detailed and firm direction for many aspects of the conduct of the duties of correctional officers, including those relating to safety. It should do so in this context as well. The safety of correctional staff is not a matter for discretion. Accordingly, by virtue of the Board's authority under paragraph 130(1)(b), I am directing that management advise correctional staff who conduct open range walks to use the staircase outside the barrier door in order to gain access to the upper or lower ranges.

I have given consideration to Mr. Curtis' submission that the employer should return to employing five correctional officers on range walks, rather than three, as is the current policy. However, it has not been demonstrated to me that this would enhance the safety and security of correctional officers during range walks. I am also not persuaded that it would be particularly helpful to direct the employer to provide for the training in respect of range walks.

I have considered as well the concerns expressed by the representative of the applicants respecting the carrying out of the two investigations by the same two safety officers. I have seen no evidence that this in any way imperilled the independence or fairness of either investigation. Indeed, common sense suggests that the more exposure the Safety Officers have to the environment that they are investigating, the greater the likelihood that their knowledge and expertise about that environment will be enhanced. The Safety Officers stated categorically that they conducted each investigation with an open mind, and I see no basis for questioning this assertion.

With respect to the circumstances surrounding Mr. Czmola's refusal to work, there is no dispute that Mr. Czmola is suffering from the psychological effects, characterized as post-traumatic stress disorder, as a result of the horrific experiences which he endured in 1984 involving the murder of two colleagues. However, the evidence does not support the conclusion that this illness is caused by the change of policy concerning range walks. In fact, Mr. Czmola acknowledged that he had to take sick leave as a result of work related stress on several occasions prior to April 28. The evidence falls short of establishing that the reversion to the old policy concerning closed range walks, with the participation of five, as opposed to three correctional officers conducting the walks, would meaningfully address Mr. Czmola's illness. I would also note that the threats directed at Mr. Czmola and Mr. Chartrand on April 29 occurred after the Safety Officers conducted their investigation and obviously could not be considered by them at that time.

Accordingly, as noted above, the employer is directed to require correctional officers who conduct range walks to use the staircase outside the barrier door when moving between the upper and lower ranges of a unit.

P. Chodos,
Vice-Chairperson.

OTTAWA, November 19, 1998.