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Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

ANDRÉ BOUSQUET

Applicant

and

TREASURY BOARD

Employer

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

Before: Evelyne Henry, Deputy Chairperson

For the Applicant: Michel Houle, Public Service Alliance of Canada

For the Employer: Stéphane Arcelin, Counsel



Heard at Montréal, Quebec,
March 23-24 and May 19, 2000.

DECISION

[1] This is a referral to the Public Service Staff Relations Board (Board) of a safety officer's decision under Part II of the *Canada Labour Code* (Code).

[2] André Bousquet, a CX-2 Correctional Officer at Leclerc Institution, Correctional Service of Canada, is requesting a review under subsection 129(5) of the Code of the decision issued by safety officer Pierre Morin on February 7, 2000, concerning his refusal to work on January 21, 2000.

[3] Mr. Morin's decision reads as follows:

[Translation]

HUMAN RESOURCES DEVELOPMENT CANADA
(LABOUR BRANCH)

REFUSAL TO WORK IF DANGER

CANADA LABOUR CODE - PART II

INVESTIGATION REPORT AND DECISION

1. IDENTIFICATION OF THE PARTIES

1. Employer: Correctional Service of Canada
Leclerc Institution
400 Montée St-François
Laval, Quebec
H7C 1S7
2. Employer representatives: Maurice Lapointe
Unit Manager
Telephone: (450) 664-1320 ext. 5531
Pager: (514) 440-0918
Fax: (450) 664-6724

Guy G. Gauthier
Acting Correctional Supervisor
Telephone: (450) 664-1320
3. Employee concerned: André Bousquet
Correctional Officer (CX-2)
Telephone: (450) 664-1320
4. Employee representatives: Richard Archambault
Union President
Member, Occupational Safety and
Health Committee

Pierre Blouin
Union Vice-President
Member, Occupational Safety and
Health Committee

5. Workplace involved: Control Room
Post-Suspension Unit 1
Leclerc Institution
400 Montée St-François
Laval, Quebec
H7C 1S7
6. Date and time of refusal
to work: January 21, 2000 at about 8:00 a.m.
7. Date and time HRDC
(Labour) notified: January 21, 2000 at about 9:45 a.m.
8. Notification received by: Pierre Morin
Canada Safety Officer
9. Date and time of safety
officer's investigation: January 21, 2000 at 10:12 a.m.
10. Name of investigating
safety officer: Pierre Morin, Safety Officer
HRDC, Labour Branch
Investigation Division
715 Peel Street, 4th Floor
Montréal, Quebec
H3C 3H6

II. SAFETY OFFICER'S INVESTIGATION

1. Reason for refusal to work: Refusal to work because my life and safety are being put in danger. The person working with me has neither the competence nor the knowledge to do the work of a correctional officer.
2. Employee's description of the facts: At 8:00 a.m., Mr. Bousquet was working in the post-suspension unit with an instructor, who did not have the competence to work there.
- In the post-suspension unit, a broader service is provided, which includes watching the institution's yard, issuing passes and registering the new inmates who arrive. More than a thousand

inmates pass through the unit each year.

The person at the control post must answer a lot of telephone calls and locate inmates, who may be in the shops, the infirmary or the visiting area.

The unit contains inmates who may be under the influence of drugs or who have suicidal tendencies.

The cells in this area are double-occupancy, and there are three types of inmate population there: segregation and protection, toxicology and regular post-suspension.

According to Mr. Blouin, the officers must ensure the smooth operation and security of this area of the institution.

The correctional officers who have to work in unit 1 must have taken and passed three levels of tests (A, B, C). The courses include a course on gas and the use of force and handcuffs. If an instructor uses excessive force, the CX (correctional officer) will be held responsible.

Mr. Blouin noted that a correctional officer who was a gardening instructor for four years could not go back to his CX position before qualifying again on the A, B and C tests as mentioned above.

He also said that the Correctional Service does not recognize as a correctional officer anyone who has not taken the A, B and C block of courses e.g. a trainee.

Mr. Archambault noted that the fact that an instructor is working as a supervisor means that the inmates who work in the instructor's shop are on forced, unpaid holiday. This increases the frustration and anger that inmates may feel toward the instructor, as does the fact that they are confined in their cells.

3. EMPLOYER'S DESCRIPTION OF THE FACTS:

According to the employer's representative, Mr. Lapointe, assigning instructors to supervision activities is a temporary measure designed to deal with budgetary constraints.

Mr. Lapointe referred to the decision made by Labour Canada in similar circumstances on July 15, 1996, in which it was found that there was no danger.

According to the employer, units with two levels of cells are operated by three correctional officers, and adding an instructor as an assistant only improves the correctional officers' working conditions and makes it possible to free up the case management officers, who must complete their files on inmate assessments.

The instructors must perform the following duties in their work: conducting visual surveillance of inmates, opening and closing range doors, answering the telephone, issuing passes and assisting the correctional officer.

Mr. Lapointe further noted that, according to their work descriptions, instructors must be in contact with inmates a minimum of 15 percent of the time. It is therefore not outside their work or competence to have to work in the presence of inmates and associate often with the same inmates who are in the cell blocks where the refusal to work occurred.

4. FACTS NOTED BY THE SAFETY OFFICER:

At the time of the investigation, there were 24 inmates out of a maximum of 38 in cell blocks AB and 45 inmates out of a maximum of 52 in CD.

The employer and employee representatives agreed to specify that, according to the matrix established for case management as provided for in the By-Pass policy, four officers must fill in when it comes to case management.

A copy of the report on the refusal to work on July 15, 1996, was given to me by the employer representative, Mr. Lapointe. In that report, a decision was made concerning a similar situation and it was concluded that there was no danger.

During the investigation, I met with two instructors, Mr. Plante and Mr. Demers, and heard what they had to say about the work they have to do in the post-suspension cell block.

I also consulted the "roll call" attendance book for the work period during which Mr. Bousquet exercised his right to refuse to work.

As part of the investigation, I contacted Claude Monette, an instructor at the staff college, to obtain the outline for the three-day course for new employees that Messrs. Plante and Demers acknowledged having taken.

I obtained a standard work description for an instructor, specifically a painting instructor.

A copy of the work description for a CX-2 correctional officer was given to me during the investigation.

III. SAFETY OFFICER'S DECISION

Whereas at the time of the investigation, the number of inmates in the cell blocks was not greater than the maximum number allowed for those cell blocks;

whereas the instructors have to do work they are competent to do, and whereas they are familiar with the prison system and the inherent occupational risk;

whereas the correctional officers have the freedom and opportunity to work in the cell blocks with the assistance of a correctional officer (CX), and whereas in that case the instructor merely has to go to take over from the CX who is lending assistance;

whereas no protective mechanism such as a "PPAS", fixed alarm or radio had any effect on increasing the occupational risk to which the correctional officers are exposed;

whereas the staff on duty at the time of the refusal to work included 28 correctional officers, whereas it would have been possible to turn to them had an emergency arisen, and whereas it is also possible to make use of the emergency response team at any time;

whereas the instructors have taken part in a three-day course covering emergency situations, security procedures and smuggling as well as inmate discipline;

whereas the instructors, who have to teach their workshops, are in the presence of inmates, whereas they have very good knowledge and control of their group of inmate workers and whereas the environment to which they are exposed in the cell blocks does not diminish their abilities and work experience, meaning that the occupational risk to which the correctional officers (CX) are exposed is not increased;

finally, taking account of the investigation report (GRW-196wO731) on the refusal to work on July 15, 1996 in similar circumstances and of its conclusion that there was no danger,

I conclude that there is no danger.

- [4] Mr. Morin testified that he is a safety officer with Human Resources Development Canada and has been involved with penitentiaries since 1985.
- [5] Mr. Morin took similar action on July 15, 1996, during which he made a decision confirming that there was no danger. The file in question is GRW-196WO731, and the decision was appended to his report of February 7, 2000. The 1996 refusal occurred in cell block 2KL, whereas the refusal of January 21, 2000 occurred in unit ABCD.
- [6] Mr. Morin described his investigation, the people he met with, the premises he visited and the documents he obtained. He met with Mr. Bousquet and his union representatives, unit manager Maurice Lapointe, acting supervisor Guy G. Gauthier and instructors Joël Plante and Sylvain Demers. Mr. Plante was the instructor assigned to work with Mr. Bousquet at the time of the refusal. Mr. Plante, a cabinet-making instructor, had five years of experience at the Correctional Service of Canada and had taken the training for new employees.
- [7] Mr. Morin obtained the outline for the training given to new employees. He assumed that Mr. Plante had taken the entire course. Mr. Morin did not make note of the length of the course given to correctional officers. He knew that it was a fairly long course. He also reviewed and compared the work descriptions of correctional officers and instructors.
- [8] The description of the work to be done by an instructor replacing a correctional officer had been submitted by Mr. Lapointe and confirmed by Mr. Plante. That description can be found in the fourth paragraph of item 3 of Mr. Morin's report (*supra*).
- [9] Mr. Morin concluded that a parallel could be drawn between the work in the shops and the work in the cell ranges. He took account of the fact that an instructor may be exposed to 35 or 40 residents and that, at the time of the refusal, there were fewer residents. According to Mr. Morin, there were 24 inmates out of a possible 38 in unit AB and 45 out of a possible 52 in unit CD. Mr. Morin stated that there were four correctional officers or instructors in unit AB and four in unit CD, resulting in a proportion of eight or nine inmates per correctional officer or instructor. Mr. Morin took account of the occupancy capacity and not the actual occupancy rate.

[10] Mr. Morin drew his conclusions about the conditions prevailing at the time of the refusal based on what he observed and heard and the documentary evidence he received during his investigation.

[11] In response to the employer's questions, Mr. Morin filed six photographs in evidence. Exhibit R1 is a photograph of the inside of the unit control room. Exhibit R2 is a photograph of the control room as seen from the outside. Exhibit R3 is a photograph of the alarm push-button inside the control room. Exhibit R4 is a photograph of the control room window overlooking one of the cell ranges. Exhibit R5 is a photograph of the administrative offices located behind the control room. Exhibit R6 is a photograph of a portable alarm (PAS).

[12] The applicant called four witnesses and also testified himself. His first witness, Mario Bernatchez, is a correctional officer in an acting CX-2 position. He held a CX-1 position from 1988 to 1995. From October 10, 1995 to November 22, 1999, he was a gardening instructor.

[13] As an instructor, Mr. Bernatchez had a team of three to six inmates working in his shop. He did not replace any correctional officers while he was an instructor except to take part in general searches of the institution. He searched the ventilation ducts, the outside and the cells. General searches are done in the absence of the inmates, who are taken to common rooms.

[14] In April 1999, Mr. Bernatchez applied to return to a correctional officer position. He had to take a training program and various exams and tests. He filed Exhibit A1, the *selection standards/statement of qualifications* for correctional officers I (CX-1). He had already received the training to be a correctional officer, but since more than two years had passed, he had to qualify again through interviews, shooting qualifications, the COPAT testing, first aid and cardiopulmonary resuscitation. He underwent a medical examination and had to take tests on the required knowledge, abilities and skills described in the statement of qualifications. He took three to four weeks of training spread out sporadically over April to November 1999. There were passing grades for the tests.

[15] As a correctional officer at the CX-1 level, Mr. Bernatchez has to perform a multitude of tasks. A schedule is established in advance for the correctional officers

assigned to predetermined posts, while the other correctional officers are assigned a post when they report for work.

[16] As a gardening instructor, Mr. Bernatchez often worked outside. The inmates in his shop were chosen by a selection board, the Work Board. Most inmates work on the basis of certain specific criteria. The preventive security officer has a say about the jobs to which inmates may be assigned. There are various security levels associated with the jobs. For example, the inmates assigned to the laundry are entitled to go to certain places and not others. Inmates in post-suspension may be assigned to various shops. Inmates in post-suspension are inmates whose parole has been suspended because they have either breached a condition or been arrested on new charges; they are brought back to the institution to await a decision.

[17] Michel Paiement is an upholstery instructor at Leclerc Institution. He supervises a team of 22 to 25 inmates. The security duties he performs involve ensuring that there is no fighting among inmates, that tools do not disappear and that the inmates do not go out into the yard or leave.

[18] When inmates fight, Mr. Paiement tries to calm them down and convince them to stop fighting. If they do not stop, he sounds the alarm. He is not trained to get involved in a fight as are the correctional officers. He presses the alarm push-button, and a large number of correctional officers arrive. The instructors are there to ease conflicts and press the button on the portable alarm they wear on their belts. They cannot take any other action with 22 inmates.

[19] Mr. Paiement has often had to replace correctional officers during general searches and when there were not enough correctional officers in the cell ranges. In the latter case, he has had to answer the telephone, write up passes, [translation] "look after the control room" and open the doors for inmates. The inmates are locked in the ranges; however, when they have passes, they are entitled to leave. The female correctional officer he sometimes used to assist had other things to do and sent Mr. Paiement to get the cart in range 2AB. Mr. Paiement did not feel safe in those circumstances. He did not know what to do when an inmate refused to go back to his range or was not accepted by the other inmates. The correctional officer had told him [translation] "I don't go in there" and had asked Mr. Paiement to go. When there were verbal altercations among inmates, Mr. Paiement was afraid because he did not know the inmates and did not know with whom he was dealing. He has not been trained to

deal with such situations. The situation is different in his shop, since he knows the inmates and they have an interest in the work he teaches. Mr. Paiement can dismiss an inmate who is causing him problems. When he replaces correctional officers, he feels like he is in a conflict of interest, since he sometimes has to supervise inmates who work in his shop. As a correctional officer, he may have to take unpopular action that could make an inmate want to take revenge when he goes back to the shop. In the shop, the inmates have access to a large assortment of scissors and knives that they can use to take their revenge.

[20] Mr. Paiement has been an instructor at Leclerc Institution for 13 years. He took the course for new employees two years after he started working there. That course lasts three to five days. He learned how the prison system works and how to fill out paperwork, make purchases and react if a hostage-taking occurs. If there is a hostage-taking, he must not do anything except sound the alarm. He received training on institutional searches to look for smuggled goods; these searches are carried out without the inmates present. He was given a morning of training on drugs, alcohol, etc. Mr. Paiement knows nothing about the use of force. If attacked, he would defend himself in his own way and might use excessive force. He has never had to hit an inmate.

[21] Mr. Paiement has gone back to work in the cell ranges since the incident with the female correctional officer. He informed the industrial leader that he no longer wanted to replace correctional officers. He even met with the warden of Leclerc Institution to tell him that that is not his place. The warden of Leclerc Institution and the union representatives told him that he was not entitled to refuse to work there and that he would be penalized if he did. Mr. Paiement does not think that the correctional officers have authority over him. When he assists a correctional officer, he does what the officer asks him to do.

[22] An incident occurred in Mr. Paiement's shop in which an inmate threatened him. He pushed the alarm button and the action team arrived within two or three minutes.

[23] On cross-examination, Mr. Paiement said that he does not know all the unit managers or case management officers, most of them being women. He knows them by sight but cannot name them or describe their roles. They are not at the control room. He rarely sees a correctional supervisor from the special multipurpose unit walking in the shops.

[24] Mr. Paiement has searched inmates in his shop to look for missing tools or equipment. Searches always involve instructors and security people. Mr. Paiement feels that his job is as an upholsterer, not a police officer. He is a peace officer within his area. His work as an instructor is always dangerous, but in his shop, he has a certain rapport with the inmates, who want to learn something. He makes sure that the disruptive ones are thrown out. In the post-suspension cell block, 30 or so inmates out of 50 do not have jobs and stroll up and down; Mr. Paiement generally does not know them. Although the inmates cannot leave their range, they are free inside it, and when he has to go get one of them, there are always two or three behind him, and there may be as many as 30.

[25] Mr. Paiement has three or four inmates in post-suspension in his shop. When he has to go [translation] "lock them up", it creates a conflict of interest.

[26] Mr. Paiement has to replace correctional officers 10 to 15 times a year when there is not enough staff.

[27] Robert Gagnon's testimony was more or less the same as Mr. Paiement's, aside from certain particulars.

[28] Mr. Gagnon has been a cabinet-making instructor at Leclerc Institution for 14 years. He explained that the instructors used to be able to replace the correctional officers. Mr. Gagnon never put his name on the list. Nowadays, the instructors may no longer put their names on the correctional officers' overtime list because they are not trained for that kind of work.

[29] Mr. Gagnon described how the office that places inmates in shops operates. An inmate fills out a form, which is sent to the instructor, who can choose to accept or refuse the inmate. The instructor must provide reasons for a refusal. An instructor is rarely pressured into taking an inmate.

[30] Mr. Gagnon has replaced correctional officers in the cell ranges several times. This has happened twice lately and about 20 times over the past 10 years. He does not volunteer to replace correctional officers.

[31] Mr. Gagnon said that he is not trained to do the work of a correctional officer and feels that he could be a danger to himself or others in a crisis situation. In his shop, he acts as a foreman. He always wears his portable alarm. He maintains the

production order and sounds the alarm if incidents occur, and the correctional officers intervene. The correctional officers have a method and protect the instructors.

[32] In the cell ranges, the correctional officers normally work in pairs. It sometimes happens that a correctional officer is alone. Mr. Gagnon believes that the instructors can be [translation] "double-crossed" by the inmates. The 20 or so times he replaced a correctional officer were in the afternoon; [translation] "they had taken a CX to go patrol". He has ended up alone in a range, which is why he does not like replacing correctional officers. He relies on the correctional officers for his protection; if an incident occurs, he presses the alarm push-button.

[33] Réjean Hamilton was a training officer at the Staff College of the Correctional Service of Canada until he retired two and a half years ago. From 1968 to 1997, he held various positions with the Correctional Service of Canada. He was responsible for training recruits at the Staff College from 1981 to 1997.

[34] Mr. Hamilton explained the Correctional Service of Canada's various training programs. The course taken by the instructors lasted three days and took a general approach since it was meant for a varied public: teachers, blue-collar workers, clerks, secretaries and chaplains. Mr. Hamilton explained and commented on the outline appended to the safety officer's report. A half-day is devoted to the Correctional Service of Canada's organization and mission. During the afternoon, an explanation is given of the prison subculture, inmates' different values, the effect of incarceration, attitude changes and the fact that things that are [translation] "minor" outside a penitentiary become privileges on the inside. Also explained are status issues, which inmates can move about and the inmate committee versus the true leaders.

[35] The second day deals with inmates' rights. Inmates have trouble distinguishing among rights, privileges and things that are tolerated. Privileges may be withdrawn. The staff learns which items are contraband, namely certain basic items, drugs, weapons and seized items; certain other items may be allowed in some places but not others. With respect to case management, the students learn the steps that inmates have to take before ending up at a halfway house.

[36] In the afternoon, the students are given explanations of the policy on offences, the disciplinary process, how to prepare a report, the information that must be included in a report and the difference between minor and serious offences.

[37] The security procedure covers movement control, forms, passes, control rooms, accounts, escorted and unescorted movements, stricter forms of detention and searches. Except in the case of general movement, an inmate must have a registered document describing where he has to go. The course has nothing to do with the use of force.

[38] The third day deals with the traps that inmates set for the staff. Traps having to do with interpersonal relations must be avoided. Inmates try to get the staff [translation] "mixed up" in the smuggling process through requests to take out a letter, take an item somewhere, give change to an inmate's girlfriend, mail a letter, etc. This session explains the traps that the staff may innocently fall into.

[39] The session on emergency situations focuses on hostage-taking and what may happen apart from hostage-taking. The Correctional Service of Canada's policies, the action team's role, crisis management, specialists in force situations and the role of negotiators are explained. Students learn how to react to a kidnapper: do not take action and, if they are merely witnesses, lie down on the ground and do not move. The course explains the help available to the person from the clinic, the Employee Assistance Program, etc. There are simulation exercises concerning traps and hostage-taking.

[40] Mr. Hamilton said that the basic content of the course is the same but that the emphasis may vary depending on who is giving the course and which staff members are taking it. The location of the course changes, and it may be given by two or three instructors.

[41] Mr. Bousquet is a correctional officer and has 25 years of experience with the Correctional Service of Canada. He has been working at Leclerc Institution since 1990. Initially, unit ABCD was made up of a general population of inmates serving sentences ranging from 15 years to life. Unit ABCD then became a post-suspension unit and a special unit. It is the unit for [translation] "sentence returnees", inmates with behavioural problems related to drugs and alcohol, etc. There are four cell ranges: range 1AB is the substance abuse wing, where there were 24 residents out of a possible 38. The residents there are undergoing medical treatment for drug, AIDS and hepatitis problems. Range 1CD is the wing for inmates who are back from the outside and are waiting to find out if they will be incarcerated or return to the community. They are there for breaching the terms of their release. Range 2AB is a protection wing. It

houses inmates who will be Crown witnesses or are members of the Rock Machine gang or its affiliated groups. Those inmates are not accepted elsewhere, except at Port-Cartier Institution, and are in conflict with the other inmates. Range 2CD is the regular post-suspension wing. The inmates residing there have had their parole revoked by the National Parole Board of Canada and are awaiting reincarceration or conditional release. This range is similar to range 1CD.

[42] In unit 1 (ranges 1AB and 1CD), the population is different because the inmates arrive from the outside in an advanced state of disorientation from drug or alcohol use, after assaulting [translation] "their wife" or because of fighting. They need a great deal of supervision and are nervous, depressive, suicidal, etc. Mr. Bousquet must meet with them to find out their medical record and ensure that [translation] "the fewest possible things" happen. He must also ensure that the inmates have the personal effects to which they are entitled and are placed with smokers or non-smokers, as the case may be. This may mean moving another inmate. Mr. Bousquet provides new inmates with the materials they need: forms to fill out, list of people to see and so on. The other units have general populations where the admission principles are different but consistent. In post-suspension, the inmates are coming from the provincial correctional service.

[43] Mr. Bousquet disputed Mr. Morin's statement that there were four correctional officers per floor in the post-suspension unit. There are two officers per floor, that is, two for ranges 1AB and 1CD and two for ranges 2AB and 2CD.

[44] Mr. Bousquet prepared a sketch of the first floor (Exhibit A2). It shows the glassed-in office and ranges 1AB and 1CD.

[45] Mr. Bousquet described the day of January 21, 2000 and filed a copy of the page from the officers' logbook (Exhibit A3). He explained that the correctional officers assigned to unit ABCD have at least 10 to 15 years of experience because there is a lot of tension among the inmates, who have often been rejected by other institutions and who require a great deal of staff intervention. Mr. Bousquet said that the inmates become more frustrated when an instructor replaces a correctional officer, since the shop is closed and they cannot go to work, which means that they lose their wages for the day. He said that, if the replacement can only answer the telephone, issue passes and open the doors, the correctional officer will be overworked, since he or she will constantly have to tell the replacement what to do.

[46] The parties agreed on the fact that, if Pierre Blouin had testified, his testimony would have been more or less the same as Mr. Bousquet's.

[47] The employer called Mr. Lapointe, the unit manager who has been responsible for the post-suspension unit, or unit ABCD, since April 1997. Mr. Lapointe has 24 years of experience at various institutions and various levels. He was unit manager at the Regional Reception Centre for two years before coming to Leclerc Institution.

[48] Mr. Lapointe explained that the post-suspension unit can hold 180 inmates but has taken in 142 since January 2000.

[49] Mr. Lapointe supervises one correctional supervisor at the CX-3 level, one clinical case management co-ordinator, 12 correctional officers at the CX-2 level, two clerks at the CR-3 level, five parole officers and a sixth parole officer in the substance abuse program.

[50] Mr. Lapointe said that the instructors work only during the day. Mr. Lapointe supervises 13 employees during the day.

[51] There are about 30 inmates in the ECHO program. CX-2 correctional officers are responsible for case management in that program, while parole officers handle case management for the other cell ranges.

[52] Mr. Lapointe explained that instructors who replace correctional officers do the same work as CX-1 correctional officers; they assist a CX-2 correctional officer in the same way. However, instructors are subject to restrictions as regards the use of gas, handcuffs and leg irons.

[53] Mr. Lapointe explained the practice of using instructors to fill in for correctional officers before resorting to overtime. He filed a memorandum on staff deployment dated March 7, 2000 (Exhibit R7) and Joelle Gagnon's e-mail of March 2, 2000 with a memorandum on staff deployment dated February 28, 2000 attached (Exhibit R8). Those documents refer to the criteria used for relief assignments in the absence of correctional officers. Instructors are seventh in line and are called only if the others are not available.

[54] Mr. Lapointe explained that the minimum operational requirements are three correctional officers out of four in each unit. In the post-suspension unit, there must

be at least four officers. Those minimum operational requirements date back to 1993 and 1994.

[55] Because of budgetary constraints, the employer has had to reduce overtime costs by introducing a policy of replacing correctional officers with other employees, including instructors. The minimum operational requirements have been changed to a minimum of two correctional officers and two other persons, for a minimum of four persons per unit. This policy takes account of the fact that CX-2 correctional officers are always supervised by a correctional supervisor and the unit manager.

[56] Mr. Lapointe explained that, in an emergency, the alarm rings at the main control centre. The Main Communications Control Room (MCCR) transmits the alarm to the correctional supervisor and the staff of the unit involved, and people arrive on the scene; they are all peace officers who work in the unit.

[57] On cross-examination, Mr. Lapointe confirmed that the staff deployment list was drawn up pursuant to an agreement with the bargaining agent's local representatives and was in force until March 31, 2000. Mr. Lapointe hopes that there will be more correctional officers or that, possibly, a new list will be drawn up. In the medium term, the Correctional Service of Canada is not considering giving instructors correctional officer training. According to Mr. Lapointe, instructors have the appropriate training to serve as replacements in the units.

[58] Mr. Lapointe explained that he does daily rounds of the unit for which he is responsible. He has never worked with an instructor, but he noted that he has not received any complaints from either correctional officers or instructors since the procedure was introduced. During his rounds, he has seen that an instructor was wearing a portable alarm and that the atmosphere seemed very relaxed. He argued that, if an instructor does not know what to do in a situation, he can ask the correctional officer or the manager. To his knowledge, he has never seen an instructor who did not know what he had to do while replacing a correctional officer.

Applicant's Arguments

[59] The applicant asked me to read section 124 and paragraphs 125(p) and (q) of the Code:

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

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

...

(p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place;

(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee;

...

He argued that paragraph 125(q) applies to instructors.

[60] The applicant submitted that the evidence shows that instructors are not qualified to replace correctional officers and do not meet the minimum requirements for such a position; in fact, they constitute a danger to themselves and others when they replace correctional officers.

[61] The applicant reviewed the evidence. He noted that Mr. Morin, in his testimony, assumed that there were eight correctional officers in unit ABCD, or four per floor, when there were actually two correctional officers per floor. Mr. Morin started from a premise involving twice the actual staff. This creates a problem when we examine the whereas clauses in his decision (*supra*). Mr. Morin hesitated in commenting on the photographs and ended up saying that there were eight correctional officers, or four per floor. On cross-examination, when the applicant's representative asked him whether he had checked the fourth paragraph of item 3 of his report, Mr. Morin answered that he had not checked what the employer meant by "assisting the correctional officer".

[62] Mr. Morin also gave evasive answers to the questions about the content of the training courses given to instructors. He assumed that what he had been given was sufficient. Mr. Bernatchez's testimony shows the contrary. Mr. Bernatchez had already been trained as a correctional officer, but he had to take a range of courses and undergo tests to move from an instructor position to a correctional officer position.

That training contrasts with the training given to instructors, which lasts three days and requires no tests. Mr. Bernatchez had to redo the correctional officer training because he had left such a position for more than two years, and this was true even though he had since been a gardening instructor at the Correctional Service of Canada.

[63] Mr. Paiement testified that he did not know what to do in some situations in the cell ranges. He does not feel safe and admitted that he does not know all the inmates, unlike what happens in his shop. His role in the shop is different from that of a correctional officer in a cell range. It is surprising that Mr. Bernatchez was asked to take courses again after two years working as an instructor and that this has not been asked of Mr. Paiement, who has only his training as an instructor after 11 years of experience.

[64] Mr. Paiement and Mr. Gagnon noted the differences between the dynamics in the shops, where the inmates are paid, and the dynamics in the cell ranges, where the inmates may be frustrated at not being able to work when shops are closed.

[65] The evidence showed that there used to be a practice allowing instructors to replace correctional officers for overtime. The employer put an end to that practice because the instructors were not trained for that work and were therefore not qualified. Instructors are now required to do that work for financial reasons. Mr. Gagnon added that he could be a danger to the correctional officers and himself because of his lack of training.

[66] Mr. Hamilton described the training given to correctional officers and that given to instructors. Correctional officers are assessed at all levels while instructors are not. The length and nature of the training are not the same in both cases.

[67] Finally, Mr. Bousquet described the work done by post-suspension correctional officers in detail. The unit requires staff with wide-ranging experience, since judgment and reliability are important criteria. Mr. Bousquet explained the reasons for his refusal. Mr. Lapointe did not contradict Mr. Bousquet's evidence on the work of the post-suspension unit.

[68] Mr. Lapointe confirmed that instructors have to replace correctional officers for budgetary reasons. He admitted that the employer had temporarily abolished the use

of instructors to replace correctional officers assigned to the supervision of inmates in post-suspension, as shown by Exhibits R7 and R8.

[69] The applicant argued that the definition of "danger" in subsection 122(1) of the former Code referred to imminent danger and that the word "imminent" was taken out. This must mean something. It must mean that the urgency or imminence of the danger no longer has to be proved.

[70] The reason it has been established that four correctional officers are needed to meet minimum operational requirements is that the presence of only three correctional officers presents a risk; this is the definition of danger in the prison system.

[71] The applicant argued that the investigator must determine whether there was a danger at the time of the refusal and not at the time of the investigation. In this regard, the applicant quoted a document published on Human Resources Development Canada's "Occupational Safety and Health" site:

...

Occupational safety and health in federal works, undertakings and businesses is governed by Part II of the Canada Labour Code (CLC). More specifically, the legislation is intended to prevent accidents and injury to health arising out, linked with or occurring in the course of employment. Three fundamental rights of workers underlie the legislation:

- *the right to know about known or foreseeable hazards in the workplace;*
- *the right to participate in identifying and resolving job-related safety and health problems; and*
- *the right to refuse dangerous work if the employee has reasonable cause to believe that a situation constitutes a danger to him/herself or to another employee.*

...

[72] Referring to *Czmola and Rodier* (Board files 165-2-201 and 202), the applicant noted that the Board may give any appropriate direction under paragraph 130(1)(b) of the Code. It may direct the employer to give instructors the necessary training so that they will be qualified to replace correctional officers and to set up a bank of qualified instructors. The employer is putting safety at risk over a question of money.

[73] Leclerc Institution is a medium security institution at level S5, or "high medium". It takes in inmates who do not function elsewhere. The applicant does not understand the dogged insistence that instructors rather than case managers perform correctional officers' duties, especially where there are only four correctional officers, contrary to what was stated by the investigator, who thought that there were eight. To make his decision, the investigator relied on the decision he had made in 1996; the situation has changed in four years. The investigation was too brief, and the investigator should have looked at the exact situation and given directions about instructor training to protect correctional officers and instructors in the medium term. It is not enough that nothing has happened: people are trained in case something does happen.

Employer's Arguments

[74] The employer submitted that the issue in this case is one of staff relations and not occupational safety under the Code. What is in dispute is a management decision involving the power to take steps to avoid overtime. According to the employer, the Code is used to try to resolve staff relations issues. The case law is consistent as regards the use of the Code for staff relations matters. That being said, the testimony must be assessed accordingly.

[75] What is involved is a refusal to work at a specific post doing specific work. The facts must be analysed in connection with that refusal. The evidence concerning danger indicates that it was more perceived than real. One merely has to look at what was stated by Mr. Bousquet to be convinced of this. His testimony is sufficient in itself for the complaint to be dismissed. The applicant's reasoning is that the instructors' lack of training creates a potential danger for them and the correctional officers.

[76] The employer asked me to carefully read subsection 129(5) of the Code and did not intend to explain my role further.

[77] The employer pointed out that an essential element of the instructors' work is to supervise inmates when they have access to dangerous objects such as scissors and tools. If there is a problem, the instructors press the alarm button. This is similar to when they assist a correctional officer, since they have to sound the alarm if there is a problem. An analysis of the instructors' normal work duties and their duties when assisting a correctional officer shows that they are similar and involve supervising

inmates, answering the telephone and filling out reports. It is clear that instructors have the skills to perform those duties.

[78] As for the above-mentioned alarm, the evidence shows that it is used once or twice a year. Does this therefore amount to danger within the meaning of the Code? There are a number of decisions dealing with the concept of danger, which must be real and immediate. The employer referred me to *Bidulka v. Canada (Treasury Board)*, [1987] 3 F.C. 630, and *Canada (Attorney General) v. Lavoie*, 153 F.T.R. 297, [1998] F.C.J. No. 1285 (QL), paragraph 24, especially the last sentence, and paragraph 27. The employer asked me to send a clear message that this is not the proper forum to deal with a staff relations issue. The employer then referred to *Evans* (Board file 165-2-32), pages 23-24. It also cited *Stephenson et al.* (Board file 165-2-83), pages 28-29.

[79] The employer pointed out that it based its decision on the work to be done, and it referred to *Holigroski* (Board file 165-2-30), pages 28-29 and paragraph 56. The employer noted that there are risks; whether employees have to work in the shops or the units, the risk is inherent in working at Leclerc Institution. The employer argued that the risk is lower in a unit than in a shop.

[80] The employer noted that there is no danger within the meaning of Part II and subsection 128(2) of the Code. Despite a few minor errors in the investigator's analysis and some minor confusion about the number of correctional officers, the report's various components are accurate. Training that makes it possible to do the work of the [translation] "operating position" is appropriate, since the instructors do not have to do all the correctional officers' work.

[81] As regards the documents submitted by the applicant, the employer argued that the Human Resources Development Canada document cannot take precedence over the law. That document merely states the perception of certain government employees; the law is what must rather be referred to.

[82] The employer submitted that, in *Czmola (supra)*, the Federal Court of Appeal dismissed the application for judicial review of the Board's decision (Federal Court of Appeal file No. 738-98, March 16, 2000). Although the Court did not confirm that the decision was correct, [translation] "that case does not change the situation".

[83] As regards Mr. Bernatchez's testimony, the employer submitted that, for an employee to perform all the duties of a correctional officer, the law requires the employee to take certain tests on firearm use and the performance of all the work. The law has changed, and it is important not to draw a parallel between the facts of this case and the work of temporarily replacing a correctional officer.

[84] The employer noted that Mr. Paiement testified that he has had to sound the alarm only once. This is a good indication of the risk.

[85] Mr. Gagnon's testimony that he was told of the instructors' lack of qualifications to be on the overtime list is hearsay. The employer stressed that what must instead be considered are the duties that had to be performed by the instructor in this case.

[86] The employer noted that the investigator's errors of fact may give rise to comments but are not detrimental to his analysis and do not invalidate his conclusion. The minimum operational requirements were met; that is what must be considered. The decision therefore remains the same; there is no danger within the meaning of the Code.

Applicant's Rebuttal

[87] In rebuttal, the applicant submitted that this case is not about overtime. Rather, it must be determined whether the use of instructors to replace correctional officers meets the minimum operational requirements. Instructors do not have the training to perform correctional officers' duties. They are qualified all of the time or not at all. The employer determined that they are not qualified to do overtime or, in Mr. Bernatchez's case, to become a correctional officer again. What was involved was a day shift, a time when there were a lot of activities and shops had to be closed, with all that this implies for the inmates.

[88] The applicant asked me, if I conclude that he was not justified in exercising his right of refusal, to give the directions that the investigator should have given had he done his work correctly.

Reasons for Decision

[89] Working in a penal institution is inherently dangerous. The safety officer had to determine whether replacing a correctional officer with an instructor constituted a danger within the meaning of the Code.

[90] The evidence shows that the minimum operational requirements were met by having four correctional officers in unit ABCD and that, when replacing a correctional officer, an instructor had to assist a correctional officer.

[91] Mr. Morin's testimony was confused as to the number of people on duty in unit ABCD at the time of the investigation. However, his report seems accurate as regards the minimum number required. Obviously, an instructor does not receive the same training as a correctional officer and their duties differ, even though they work in the same environment. Instructors also face dangers that are as great as those faced by correctional officers, if not greater.

[92] The testimony of Mr. Paiement and Mr. Gagnon clearly shows that they are unable to perform all the duties of a correctional officer. The evidence is not clear about the duties that had to be performed by an instructor temporarily replacing a correctional officer in a cell range. According to Mr. Lapointe, what was involved was assisting a correctional officer, conducting visual surveillance of inmates, opening and closing range doors, answering the telephone and issuing passes. According to Mr. Bousquet, the work involved all of this and more in view of unit ABCD's special role. According to the employer, the work given to the instructor is similar to the work of a CX-1 correctional officer, minus certain duties involving the use of gas, handcuffs and leg irons.

[93] The instructors who testified have no training in the use of force and feel vulnerable to the inmates. The only thing they can do if an incident occurs is to sound the alarm. No evidence was submitted to me about the post orders for the unit in question and how to perform the duties of a correctional officer assigned to supervise inmates in post-suspension. However, the evidence does show that there is a quick response when the alarm is sounded by an instructor. Mr. Bousquet did not clearly show me that a CX-1 correctional officer would act differently than an instructor serving as a replacement. Mr. Bousquet's evidence tended to show that an instructor is not competent to perform a large number of a CX-2 correctional officer's duties and that the officer must tell the instructor what to do. What Mr. Bousquet described is not so much a more dangerous situation as an inefficient situation. At what point does an inefficient situation become dangerous in a penal institution? The evidence did not show this. The instructor assigned to work with Mr. Bousquet did not testify. The instructors who did testify said that they do not know what to do when they replace

correctional officers. However, I have no evidence that Mr. Plante did not know what he had to do. The employer is obliged to provide "the information, instruction, training and supervision necessary to ensure the safety and health at work of [an] employee". It seems that the employer breached this requirement in some respects for the instructors who testified. However, the safety officer's investigation shows that he met with Mr. Plante and Mr. Demers and heard what they had to say about the work they have to do in the post-suspension cell block. I have no evidence that the safety officer erred in concluding that "the instructors have to do work they are competent to do, and . . . they are familiar with the prison system and the inherent occupational risk".

[94] The safety officer's mandate was not to assess whether instructors are competent to be appointed correctional officers but rather to determine whether asking them to replace a correctional officer constituted a danger. I have no evidence that the limited training given to instructors was inadequate or that the information given to Mr. Plante and Mr. Demers did not enable them to do the work without jeopardizing their safety or that of other correctional officers. Mr. Plante was under Mr. Bousquet's supervision, and a CX-3 correctional officer was available if needed. On the basis of the facts before me, I therefore cannot conclude that paragraph 125(p) of the Code was violated.

[95] As for the question of whether this case involves a staff relations issue or a safety and health issue, I take the same view as the Board in *Stephenson (supra)*, that such issues are often related in a penal institution. The Code was not enacted to handle safety in prisons. However, absent other more appropriate procedures, we cannot hold it against Mr. Bousquet for invoking it in good faith when he felt that he was in danger.

[96] For all these reasons, it is my view that the safety officer fulfilled his role and I do not have to intervene. The safety officer's decision is confirmed.

Evelynne Henry,
Deputy Chairperson

OTTAWA, September 18, 2000.

Certified true translation

Maryse Bernier

