File: 165-2-203

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

JOANNA GUALTIERI AND JOHN GUENETTE

Applicants

and

TREASURY BOARD
(Foreign Affairs and International Trade)

Employer

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

Before: P. Chodos, Vice-Chairperson

For the Applicants: Charles Gibson, Counsel

For the Employer: Judith Begley, Counsel

Heard at Ottawa, Ontario,
July 10 and August 18, 1998.

> *I was told in* (sic) *November 6, 1997 that if I did not return to the work place - A salary action would be taken against me.*
>
> *I returned Nov. 7, 1997 - I asked the Director if anything had changed - Would I be able to do my job - as prescribed by the oath and policies, regulations, acts Governing the work. I was told as long as current management remained that wasn't likely to happen.*
>
> *I requested work many times during this period was given a 2 week project between my return and my refusal to work.* ***5 ½ months*** *to sit without work - while colleagues are over-worked - is humiliating, demeaning and extremely abusive and in this case intentional infliction of emotional shock.*

On her form Ms. Gualtieri wrote:

> *Having been systematically, consciously, intentionally and concertedly harassed and abused by way of abuse of power and authority over the last 5-6 years, my health is in danger - with the risk of even more serious declining health and well-being, serious depression with low to non-existant cognitive functioning, gastrointestinal disease, nervous system problems, muscular deterioration, physical and emotional shock, debilatory stress, severe migraines, chronic sleep problems, insomnia, accompanied by necessity for prolonged periods of rest.*
>
> *The work environment at large constitutes the danger accompanied by the continuing refusal of the Dept. to comply with the rules and regulations governing the employer/employee relationship. The* ***objective*** *reality is a "dangerous" workplace for me.*

Mr. Strickland stated that following his examination of the applicants' Refusal To Work form and his discussions with them, he concluded that there was an absence of danger as defined in the *Code.* At that time Mr. Corrie Pyl, who is both the employee Co-Chair of the Health and Safety Committee and the Union Shop Steward, had joined them; Mr. Strickland asked Mr. Pyl if he had anything to add which might be relevant to his decision; Mr. Pyl replied in the negative. He then informed the applicants of their right to appeal within seven days. Ms. Gualtieri immediately wrote out a request for appeal. Mr. Strickland confirmed his decision in writing, dated June 19, 1998 (Exhibit 6).

In cross-examination, Mr. Strickland acknowledged that he had relatively little training in psychology; in particular, he had no training in respect of depression. He had been aware that there had been an earlier internal investigation concerning the matters at issue; he was familiar with that history from reading the previous reports which had come to his attention as a result of an earlier refusal to work, which his colleague Ms. Lalonde had investigated. Mr. Strickland was asked about Exhibit 1, the report of an investigation following a refusal to work by the applicants on April 20, 1998. At that time Ms. Lalonde concluded that "*the employer did not conduct an investigation into the refusal to work*" by the applicants. As a consequence, the applicants met with officials from the Department on May 15, 1998; the results of this meeting were outlined in detail in Exhibit 1. This document stated in part (at page 4) that:

> *In response to separate questions Ms. Gualtieri replied that they were not using the Department's harassment provisions because nowhere does it provide for a cessation of work. In response to a query as to whether she could work at the Pearson Building or Bisson rather than Vanier, she replied that it's the general environment of the workplace that creates the problem not the "place" of work.*

The report also concluded that:

> *The complaints of Gualtieri/Guenette are clearly, and stated to be, related to allegations of harassment and abuse of authority on the part of management. There is no evidence of any other generalized or alleged harassment elsewhere in their Section or Division. ...*

Mr. Strickland stated that he assumed that the report was truthful; he did not speak to the other employees referred to in that report in order to ascertain whether their views were accurately stated in the report. Mr. Strickland also acknowledged that he did not look at the numerous documents produced by the applicants; he stated that he asked the applicants what these documents dealt with; they replied that they concerned the harassment and stress which they had been subjected to. At that point he was already aware that the complaints concerned work-related stress allegedly arising from the actions of management. He declined to review this material when told what they were about, as he considered that documents were outside the scope of Part II of the *Code*. Mr. Strickland also stated that he viewed Exhibit 4, a memorandum from a colleague

of the applicants', Mr. Tim McCarthy, which referred to "*Senior Management's hidden agenda for this reorganization may include removing John and/or Joanna.*", as being irrelevant to his investigation; he took the same view of a memorandum from another colleague, Mr. Jacques Lecompte, dated December 6, 1996 (Exhibit 5) which made reference to the "bugging" of Ms. Gualtieri's e-mail (Mr. Lecompte 's comment states that "*I have taken the liberty of not including on the list Joanna's e-mail address in case it may be bugged by the Big Brother EyE (hahaha)*").

Mr. Strickland elaborated upon his understanding of the meaning of Part II of the *Code*, and in particular the definition of "danger" found in the *Code*. He considered whether there was a "hazard or condition" which required a response without delay in order to make the workplace safe. While he agreed that depression is an illness, he did not conclude there was "an emergency situation". Mr. Strickland observed that previous decisions have noted that the danger must be "imminent" in order to fall within the ambit of the *Code*. Mr. Strickland also stated that he concluded from his conversation with the applicants that the situation which caused their depression was peculiar to them, that is, it was not a condition which impaired other employees, and therefore was not a "collective danger". In his view the "danger" as defined in the *Code* must be visible and quantitative.

Mr. Strickland was also asked about his observation in his report (page 4 of Exhibit 6) that "*...there are no physical work place complaints related to physical injury or physical unhealthy environments due to their working conditions.*" Mr. Strickland said that this observation is in respect of sections 124 and 125 of the *Code* which speaks of the requirement that the workplace be a healthy environment. He stated that he may have erred in using the term "physical"; normally he would refer to "prescribed" work place complaints and "prescribed" unhealthy environments. Mr. Strickland stated that the term "prescribed" as he would use it, refers to matters set out in the *Canada Health Regulations*, which does not include mental health issues. He agreed that section 17.5 of the *Occupational Safety and Health Regulations* speaks of a threat, for example from a fellow employee. He also agreed that the reference in section 124 of the *Code* to "safety and health at work" could imply mental health.

Following Mr. Strickland's testimony the representatives of the parties agreed that the proceedings should be adjourned to allow them an opportunity to prepare

material and submissions which would address the threshold issue of whether stress-related illness resulting from harassment and abuse of authority constitutes a "danger" for purposes of Part II of the *Code*. The parties' representatives undertook to prepare a hypothetical fact situation based on the applicants' allegations, and to present submissions and argument on this issue. Accordingly, the parties requested that they be given until August 14, 1998 to prepare this material and to file it with the Board by that date. They also requested an opportunity to present oral arguments, which were scheduled to be heard on August 17th. The Board received the employer's submissions on the morning of August 17, 1998 and the applicants' submissions at the end of the day on the same date. As a consequence, oral submissions were made on August 18th, rather than on August 17th. The following is a summary of the written materials submitted by the parties as well as their oral representations.

> ***HYPOTHETICAL FACT SITUATION LEADING TO REFUSAL TO WORK***
>
> *The employer and complainants agree to rely on a hypothetical assertions for the purposes of the exercise, and only to that extent. The employer does not concede the truth of the allegations contained in that hypothetical scenario for any purpose, and reserved the right to contest the veracity of any and all such allegations in all other proceedings, and is this proceeding should this hearing reconvene to address the merits of the allegations.*
>
> *1. ORGANIZATION FRAMEWORK*
>
> *Joanna Gualtieri and John Guenette (also referred to as "the employees") are employed in the Bureau of Physical Resources, in the Department of Foreign Affairs and International Trade (also referred to as "the workplace") and as such are tasked, along with their colleagues, with managing and developing a vast global real estate portfolio for Canada's Foreign Service.*
>
> *Their employment is governed by numerous rules, regulations and policies that guarantee among other things: fundamental human rights and values; freedom from discrimination of any type; freedom from personal harassment and abuse of power/authority of any type; the right to work in a healthy, safe and productive work environment; job security; and, that place a high value on integrity, ethical conduct, public stewardship and accountability.*

Both the employees are well educated professionals and never had any less than fully satisfactory job evaluations in their time at the bureau.

2. RELEVANT FACTS RELATING TO THE EMPLOYEES WORKPLACE AND THE REFUSAL TO WORK

Over a period of six years, Gualtieri and Guenette have been systematically, deliberately, maliciously, and conspiratorially, harassed and abused by way of abuse of power by their senior management.

During the six years, the most senior members of the Department including the Minister, Deputy Ministers, and Assistant Deputy Ministers, were notified of the abuses and yet did nothing.

In addition, a Justice lawyer for the Department, on repeated occasions confirmed to Gualtieri (and to a lesser extent, Guenette) that management was abusing her by way of abuse of power and personal harassment.

Finally, Gualtieri and Guenette have repeatedly attempted over the course of the years to seek a dialogue with management and senior executives on the harassment and abuse of power; informed management and the senior executives of the damage being done to their health and persons; requested a cessation of the harassment and abuse of power; and, in good faith relied, to their own detriment, on management's and the Department's proclaimed commitment to provide a productive and healthy work environment.

3. OUTLINE OF THE HARASSMENT AND ABUSE OF POWER

i) <u>General Outline</u>

The workplace and the Department at large have adopted an ethos and decision-making modality that run contrary to the established principles and rules governing the duties of the employees. The Department in fact promotes loyalty to their Department for reasons including personal career advancement above all else, including the ultimate accountability to the Canadian tax payer.

When Gualtieri and Guenette attempted to properly exercise their mandate they were stopped from doing such by the employer. Despite the employer's continued attempts to impede Gualtieri and Guenette from properly executing their mandate, Gualtieri and Guenette continued to attempt to do their jobs. The employer adopted a systematic harassment of Gualtieri and Guenette in order to bring Gualtieri and

Guenette on board and have them adopt the culture of the Department which is the loyalty to the department above all else. This harassment included:

* *continual re-organization, with the final one having the covert intention of ridding the Department of the employees;*

* *deliberate marginalization of the employees in the workplace -- excluded from meetings, nor listened to when they did speak. The Director General routinely tapped his pen or read other materials while the employee spoke.*

* *deliberate and intentional exclusion from job functions otherwise mandated to the employees;*

* *belittling, threats, forced cooperation, intimidation, dismissive attitudes, withholding of information, arbitrary and illegal manoeuvres;*

* *failure of senior management to properly investigate and resolve breaches in the workplace that constituted an infringement of the employees rights;*

* *the appointment by the Department of a known harassor to a key senior management position in the Bureau while an investigative process (on harassment) was still being carried out, thereby making a mockery of the process and humiliating and causing severe emotional, and psychological distress to the employees as well as sending a message to their colleagues that there was no merit to the claims;*

* *unconscionable and discriminatory salary penalties;*

* *failure of the immediate and senior management to facilitate and ensure redress of harassment levelled against the employees by other members of the Department;*

* *wilful omissions and actions by the management and other senior Department members thereby rendering the employees unable or foreclosed from carrying out their duties;*

* *contributing to a perception and earmarking the employees as "loose cannons", incompetent, disgruntled, unstable, dispensable and undesired employees of the Department;*

* *failure by the management to provide acknowledgement of, and a hearing for, the employees contributions and relevant job findings;*

* *creating a widespread perception of incompetency of the employees by assigning their duties to others and/or assigning chaperons to them;*

* *arbitrary and unlawful withdrawing of the employees job title and duties and unilateral assignment to another undefined function against the explicit objection of the employee;*

* *failure by those who had a duty including the organizations own lawyers to take the necessary action to bring an end to the harassment of which they had thorough knowledge. Furthermore, the employees were coached and supported by at least one of the lawyers in their allegations of harassment and were subsequently misled into believing that corrective action was being taken. As a result of this representation, the employees suspended exercising their legal remedies, thereby suffering further damages and humiliation. This "detrimental reliance" was cultivated by parties who had an obligation to take corrective action and is yet a further example of betrayal and abdication of duty.*

This harassment and abuse of power and the reasons for which the employees were being harassed were communicated to senior management of both the Bureau and the Department. All levels of the department from the Minister down ignored these complaints. This work environment, which included the above mentioned harassment and abuse of power, and the general culture of the Department resulted in both the employees becoming clinically depressed. Both employees commenced complaints through the Public Service Commission. Guenette's complaint resulted in a finding of harassment. Gualtieri not proceed at that time because of ill health and then subsequently withdrew it because of the obvious futility of the procedure. The response of the Department was to promote some of the harassors, thereby condoning, by its action, the harassment. The harrassor was ordered to apologize to Mr. Guenette and never did such. Gualtieri's and Guenette's decision to stand-up to management and contest the abuses of power, ended their careers as public servants. As a result, they have suffered serious injury and illness to their mental and physical health. Both employees were off on extended medical leave because of serious physical and or emotional and or mental health problems. These problems are caused by the work environment and culture of the department.

During the time the employees were on medical leave, their health stabilized. Both employees wished to return to a productive work environment and in November and December of 1997 both returned to work. At this time the harassment intensified.

On or about April 20th, 1998 both Gualtieri and Guenette's health was seriously deteriorating. At this time they realized that if they continued to spend time at the work place, because they were not working but rather sitting in an office doing nothing because no work of consequence was assigned, they were seriously risking a breakdown, which would probably have resulted in serious and permanent damage to their physical and or mental and or emotional health. Gualtieri and Guenette therefore exercised their right to refuse to work pursuant to the Treasurer Board Directive.

ii *Examples of Statutory duties which Gualtieri and Guenette were attempting to execute and which caused harassment*

a) *attempting to ensure the Treasury Board guidelines with respect to staff quarters over-seas were respected;*

b) *attempting to rationalize and justify the economic costs of replacing existing buildings with new buildings or rental accommodations or visa versa in order to respect the Treasury Board guidelines and economize the tax payers dollars;*

c) *attempting to have Ambassadors act in a cost efficient way with respect to both their residents and their embassies;*

d) *attempting to save ten of millions of dollars annually because ambassadors refused to the give up their opulent life style which clearly violated both the guidelines and common sense;*

e) *refusal to allow efficient and cost effective sale or purchase of land and or land and buildings.*

. . .

5. RELATIONSHIP BETWEEN HARASSMENT AND ILLNESS

There is ample medical and social science authority that conclusively supports the relationship between personal harassment including abuse of power and mental and physical illness, injury and suffering.

6. The procedure pursuant to the Treasury Board Directive and the Canada Labour Code

a) As a result of the above Gualtieri and Guenette refused to work pursuant to the Treasury Board Directive re: refusal to work.

b) On April 22nd , 1998 the applicants met with the representative of the employer and of the safety committee. This was to constitute the investigation made pursuant to Section 19.3.2 of the Treasury Board Directive. It was determined that there was an absence of danger in work place.

c) On May 1st, 1998 an investigation was commenced pursuant to Section 129 of the Canada Labour Code. At this time, the safety officer found that no investigation had been performed by the Department and ordered the Department to do an investigation within four days of that date. The applicants broke down in discussing this matter and the meeting with initially terminated by the applicants. It is at this time that the safety officer found that there had been no investigation done by the employer.

d) The investigation was completed on June 9th, 1998. They determined there was an absence of danger in the work place.

e) The investigation by the safety officer pursuant to Section 129 of the Canada Labour Code took place on June 18th, 1998. The safety officer concluded that there was an absence of danger in the work place at the time of his investigation. The safety officer's report and testimony in full are to be deemed to be part of this hypothetical scenario.

[The above-noted submissions also included a section entitled "Personal Accounts of the Employees", which consists of a lengthy dissertation from both Ms. Gualtieri and Mr. Guenette elaborating upon their experiences at work and the impact that these experiences had on their personal lives. This part of the document has not been reproduced here (ref. Hypothetical Fact Situation, page 5 to page 10).]

On behalf of the applicants Mr. Gibson submitted the following written arguments:

Both the Treasury Board and Canada Labour Code define danger as follows:

Section 122(1):

> *" ... "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;"*

Section 124 of the Canada Labour Code states as follows:

> *"Every employer shall ensure that the safety and health at work of every person employed by the employer is protected."*
>
> *The applicants submit that the Treasury Board Directive and the Canada Labour Code have to be read in the global context.*

Section 19.4.1 of the Treasury Board Directive respectively states as follows:

> *"Where a department disputes a report made to it by an employee pursuant to 19.3.1 or where the department takes steps to make the machine or thing or the pale safe in respect of which such report was made, and the employee has reasonable cause to believe that:*
>
> *(a) the use or operation of the machine or thing continues to constitute a danger to the employee or another employee; or*
>
> *(b) a condition continues to exist in the place that constitutes a danger to the employee,*
>
> *the employee may continue to refuse to use or operate the machine or thing or to work in the place and the department and the employee shall notify a safety officer that there is a refusal under the Canada Labour Code.*

Section 19.5.1 of the Treasury Board Directive states as follows:

> *"an investigation by a safety officer, and the subsequent decision of the safety officer, will be pursuant to Section 129 of the Canada Labour Code and therefore not part of this directive and not grievable."*

Section 128(1):

> *"Subject to this section, where an employee while at work has reasonable cause to believe that*
>
> *c) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*
>
> *d) 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."*

Section 129(1) of the Canada Labour Code states as follows:

> *"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, enquire 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)."*

Section 122.1:

> *"The purpose of the Part (Part II of the* Canada Labour Code*) is to prevent accidents and injury to health arising out of, aligned with or occurring in the course of employment."*

The term "health" is not defined in the Canada Labour Code. *In the dictionary of Canadian Law, Second Edition, the term is defined as:*

> *"... not merely the absence of disease and infirmity, but a state of physical, mental and social well being. ..."*

The World Health Organization's definition of "health" reads:

> *"A state of full physical, psychological and social well being, which does not consist in the absence of illness or infirmity."*

Also, Section 3 of the Canada Health Act *states:*

> *"It is hereby declared that the primary objective of the* Canada Health Act *policy is to protect, promote and restore the physical and mental well being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."*

In order to decide if a condition exists in the workplace that constitutes a danger to the employee, we must first establish the organizational framework of the place of work. The Bureau's mandate is:

> *"To satisfy in a timely, economically justifiable and ethical manner the moveable and real property requirement of government departments operating at posts abroad - example diplomatic accommodations".*

The job description of the two applicants was:

> *"To support Canadian international objectives and programs through the effective stewardship and management of the government's real property investment portfolio abroad to provide cost effective office and residential accommodation and facilities which meet program requirements by reducing program costs and improving service quality."*

The workplace policy on harassment states:

> *"Everyone ... has a right to be treated with respect and a responsibility to treat others the same way, in an environment free of all forms of harassment. The Department's harassment policy builds on existing ... policy in the area."*

The objective of this policy is:

> *"To provide a work environment that supports productivity and the personal goals, dignity and self-esteem of every employee."*

The Applicants submit that the ultimate danger for the Applicants is they are seeking to carry out their functions as mandated in an ethical and competent fashion while being intentionally stopped by managers whether due to their fixation on careerism or other reasons. It is accepted in a hypothetical fact situation that the applicants have been systematically harassed. We are here to determine if this falls under the definition of danger in the Act.

To determine the definition of "danger", we must look at the purpose of the Act. At Section 124 of the Canada Labour

Code, *it states that every employer shall ensure that the safety and health at work of every person employed by the employer is protected.*

This Section is relevant because the Interpretation Act, *at Section 15.2 states the following:*

> *"Where an enactment contains an interpretation section or provision, it shall be read and construed:*
>
> *a) as being applicable only if contrary intention does not appear; and*
>
> *b) as being applicable to all other enactments relating to the same subject matter unless contrary intention appears."*

Also, Section 12 of the Interpretation Act *states:*

> *"Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as to best ensure the attainment of its object."*

Section 122(1) of the Canada Labour Code *defines "danger" as follows:*

> *"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."*

Black's Law Dictionary, (1979), 5th edition, defines illness:

> *"as meaning sickness, disease, or disorder of body or* ***mind****"*

In light of Sections 12 and 15 of the Interpretation Act, *the word condition used in the definition of danger cannot be construed to mean physical condition. As well, the definition of the word "illness or injury" includes a disease of the body or mind.*

Condition is not defined in the Canada Labour Code, *therefore, it must be given such fair, large and liberal construction and interpretation as to best ensure the attainment of its object. The object being to ensure that the safety and health at work of every person employed by the employer is protected and health means a state of physical, mental and social well being.*

The Respondents will surely argue that the Bliss case stands for the principle that the definition of danger does not include stress or conflict arising out of human relationships in the workplace because it does not relate to a machine, thing or physical condition of the workplace. We submit that the Bliss decision did not interpret the term condition properly as it included physical condition to the definition of danger when it is not included in the definition under the Canada Labour Code.

The applicants respectfully submit that the Bliss decision is not on point. In the final analysis, the conflict in this decision was simply an interpersonal difficulty between an individual manager and the employee. The applicants do not admit that the condition which constitutes the danger is simply an interpersonal difference between an individual and the applicants but rather an institutional problem caused by a culture deeply ingrained in the Department of Foreign Affaires which manifests itself by way of harassment when an employee challenges that culture or ethos.

In the alternative, if the Board were to accept the respondent's position with respect to Bliss, there has been finding in a more recent case Creamer and Treasury Board (1996) CPSSRB No. 80, where the Board decided against the complainant because they had not met the onus of proof. Nevertheless, they specifically stated that in dismissing the appeal, they were not endorsing the rationale of the safety officer which was that the definition of danger did not apply to a situation of harassment.

Very few cases have been decided on whether harassment constitutes a danger under the Act. We must therefore work by analogy. In the case of Lever and Treasury Board (Health and Welfare Canada) (1988) CPSSRB No. 350, the Board decided to overturn the safety officer's decision for the following reasons:

1. *The investigation conducted by the safety officer was not as complete as it should have been.*

2. *most employees involved complained of poor air quality and of experiencing various symptoms.*

In that case, the air quality in a workplace was poor. The evidence did not show a direct link between the symptoms experienced by the employees concerned and the air they breathed in their workplace, nor did it show that the various symptoms experienced by the applicants were related to causes other than the air circulation in the workplace. In that case, the Board nevertheless decided that the evidence was

sufficient because it showed, in a manner that was not contradicted, that the applicants did indeed experience various symptoms at least on the date of the refusal, that some of them consulted their physicians and took medication and they only experienced the symptoms in question after they began working in the premises involved. This constituted a danger according to the Canada Labour Code.

In our case, because of the safety officer's interpretation of the definition of danger, he also did not investigate as completely as he should have. The evidence shows that the complainants suffered symptoms which they experienced in the workplace. Because they have previously gone on sick leave, we know that when they are not at work the symptoms are alleviated. When they return to work, the symptoms re-occur.

On the date of the refusal to work, the applicants were not in good health. They were suffering symptoms and were likely to become more ill if they stayed in the workplace. If we follow the rationale in Lever and Treasury Board this constitutes a danger according to the definition found in the Canada Labour Code.

Another indication that harassment constitutes a danger in the workplace is a booklet published by Consulting and Audit Canada. At page 56, the following is stated:

> *"If productivity in your workplace is low and it is a stressful place to work, these may be indications that you are working in an unhealthy environment. I'm not speaking about the water you are drinking or the air you are breathing. I'm speaking about something just as dangerous. Your workplace could be infested with harassment. Even if it is not directed at you, this creature will worm its way around your work area until it eventually affects you. The unhappiness felt by one person can easily be passed on to others, resulting in lower productivity until the workplace is rife with low morale. Because harassment has a negative effect on morale and productivity, it poses a serious threat to the success of a workplace in these difficult times. A poisoned work environment leads to increased sick leave and employees simply not showing up for work."*

In a case before the Tribunal, it was clear from the safety officer's evidence that he adopted the position that the definition of danger did not include the situation before the tribunal and therefore did, at best a cursory investigation.

The applicants respectfully submit that the investigation was a sham and had a pre-determined conclusion, that being that there was no danger. The uncontradicted evidence before the tribunal in this matter demonstrates that the applicants suffered many problems which resulted in the applicant's being forced to leave the workplace for prolonged periods of time. It is also accepted in the hypothetical facts situation that if the applicants had continued working they could easily have had a total breakdown. This is the reason for which they refuse to work on that day.

If fact in the Lever decision, the Board accepted the definition of "health" which meant "mental well being".

Other indications that harassment is a danger in the workplace are Workers' Compensation Board decisions where benefits were awarded under the Workers' Compensation Act *on the grounds that workplace stresses were serious and a reasonable and stable individual would have been seriously affected by the stresses. The cases is decision No. 636/91, 21 W.C.A.T. Reporter, 277 dated January 28th, 1992.*

The complainants were being harassed in the workplace which caused them to be diagnosed with clinical depression. They went on sick leave. Their symptoms were alleviated. They came back to the workplace to find the same environment. Their symptoms returned. On the day of the refusal, the complainants recognised their symptoms as depression. They realized that if they did not leave the workplace, they could become seriously ill with depression which leads to other physical ailments. "Ailment" as defined in the Black's Law Dictionary is a "sickness, disease or disorder of body or mind." Depression is therefore an illness as stated in the definition of danger under the Act.

Because of the complexities of a condition of harassment in the workplace, it is an undeniable conclusion that the problem could not be corrected before the applicants would have become seriously ill with the symptoms of depression. Therefore, the applicants had reasonable cause to believe that the condition in their place of work constituted a danger to their health and that they had a right to refuse to work in that place under Section 128(1) of the Canada Labour Code.

"Illness" as defined in the Black's Law Dictionary is a "sickness, disease or disorder of the body or mind." Clinical depression is therefore an illness for which the employer should have ensured would not result from a condition of the workplace such as harassment.

Conclusion:

The applicants therefor submit that the evidence clearly establishes that there is a condition which continues to exist in the workplace that constitutes a danger to the employee and that that danger is imminent.

Reply:

The employers submission are all based on a fear that an acceptance in this case by the Board that the danger which is stated by the applicant constitutes a danger under the Canada Labour Code would open the flood gates of litigation. That each person who is having an interpersonal conflict with a superior would refuse to work. This is not a reason at law to refuse to consider this matter as a danger and permit the applicants to refuse to work. Their situation, it is respectfully submitted, is unique to the Department of Foreign Affairs that Gualtieri and Guenette's refusal to accept the ethos in culture of that Department. This ethos and culture is evidenced by the total disregard the Department of Foreign Affairs have shown with respect to travelling including the fraud of some years ago by all levels from ambassadors down were found to have defrauded the Department by exchanging first class tickets for economy and pocketing the difference. As well an internal audit of today's date which reports that Foreign service officers have used tax payers money for personal travel abroad. It is this type of life style that is being protected by the loyalty to the Department culture of ethos.

The Department's position is that the mechanism as settled by the Canada Labour Code and more particularly part II are not appropriate. They plead as follows:

Expedited and summary process:

a) *The term summary is a relative term as that if this were a complicated mechanical and or structural and or engineering problem, the process required would be one of prolonged investigation. This is clearly stated in the case of Lever supra. The Board found that the safety officer had not done a sufficient investigation and therefore persons were not to work until a sufficient investigation was completed.*

The Scope of the safety officer's duty and expertise:

b) *To state that a safety officer is not qualified for such an investigation does not mean that at law such an investigation is inappropriate. Please see reasons*

sited in heading a) above mentioned. This is an investigation into the systematic institutional problem at the Department of Foreign Affairs. It is incumbent on the employer to ensure the health of the employee and appoint the appropriate persons to investigate the different dangers. Clearly, every safety officer is not competent to look at all possible physical dangers and as such, from time to time, would have to receive technical expertise from else where.

Interpreting danger to include harassment that leads to a breach of procedural fairness:

c) This is once again an instance in which the employers is asking you to look at things from a contextual approach as opposed to what the law says. The Department would have full rights to participate in the investigation as that they are a party to the matter. As well, any individuals would have the right to testify if required at both the investigation stage or the hearing stage. This is clearly red herring.

Alternative avenues of addresses

d) The alternate avenues as addressed are not appropriate for this matter as that they have been instituted successfully against a manager and there was no result. This is evidence of the systemic use of power when an employee of the Department bucks the ethos and culture of the Department. It is clear in law that instituting a process in more than one forum is not an abuse process when the forums give different redress or have different criteria to deal with the subject matter of the complaint. In fact, an example of a parallel procedure could be found in section 132 of the Canada Labour Code which permits compensation under other laws.

Jurisdiction of the PSSRB

It is clear that the jurisdiction of the Board is that it ***shall*** *without delay in a summary way inquire into the circumstances of the decision as per section 129 (5). The applicants respectfully submit that a decision which precludes any persons from making a complaint under the refusal to work effective under the sections of the Canada Labour Code would be tantamount to a complete abducation of both the statute and moral authority vested in the Board to protect employees.*

> *Section 129.5 uses the imperative term shall and it is therefore incumbent on the Board to listen to the complaint. Re: Bliss, supra.*
>
> *In summary, the Canada Labour Code depicts clearly that it is the duty of the employer to ensure the safety and health at work of every person employed by the employer. It is also clear that health includes both mental and physical well being. It is also clear that a condition exists which if not dealt with will result in injury and illness of the employees and that this injury or illness is imminent. The fact that the employer would find it difficult to deal with this matter in no way restricts the Board's obligation to deal with this matter in a full and open hearing.*

Counsel for the applicants elaborated upon his written submissions in his oral argument. Mr. Gibson submitted that the issue to be addressed here is whether the Board can and should deal with the mental well-being and mental health of employees in the Public Service. He noted that the *Canada Labour Code* deals in part with the duty of the employer to ensure the health and safety of employees in the workplace. In the *Lever et al.* decision (Board file 165-2-58) it was accepted that the term "health" did include both mental and physical well-being. In the instant case, the two employees had been working in the area of real estate management for a number of years, and their competence had never been questioned; when they attempted to execute their functions in accordance with their statutory mandate, their efforts ran counter to the ethos and culture of the Department, which demands loyalty to the Department above the responsibility to the taxpayer. They were then subject to systematic abuse and harassment in order to bring them into line. When the situation was brought to the attention of senior management, they were ignored. As a result of these circumstances, both employees became emotionally depressed; Mr. Gibson noted that it is not disputed that depression is in fact a mental illness, nor is there any dispute that the applicants did attempt to use internal procedures to no avail. Their mental illnesses resulted in the applicants being unable to work for prolonged periods; when they attempted to return to work the harassment increased and intensified, as a result of which their depression returned. Thus, on April 20, 1998 they concluded that if they remained at work they risked the likelihood of a complete mental and emotional breakdown. Consequently at that time they exercised their right to refuse to work under the Treasury Board Directive. There was an investigation by a safety officer who at that time concluded that the employer had not

done an investigation as required under the *Code* and under the Treasury Board Directive. The resulting investigation report was prepared by Mr. Cliffe-Phillips, the Director of the Bureau, who was alleged to be one of the harassers.

Mr. Gibson maintained that the cause of the applicants' illness is not as a result of a clash of personalities as was the case in *Bliss* (supra), but rather a clash with the prevailing ethos in the Department. Counsel maintained that this constitutes a "condition" which is a broad term, which should not be limited to only "physical" characteristics, particularly in light of the *Interpretation Act*. That legislation directs that a broad and liberal meaning should be given in order to attain the objects of the Act. Mr. Gibson observed that section 124 of the *Code* is broadly written; there is nothing in Part II of the *Code* which in any way excludes the position taken by the applicants. The fact that a broad interpretation may cause problems for the employer is not a reason to restrict the ambit of the law.

With respect to the nature of any order under Part II in respect of this matter, Mr. Gibson argued that it can be in the same vein as in *Lever et al. (supra)*, that is, to make the work environment "safe and comfortable". Mr. Gibson acknowledged that this is a difficult case, but he insisted that the common law allows for an evolution in the interpretation of the law. In any event, the law is clear: there was a danger, and according to the *Code* the applicants had the right to refuse to work. He submitted that it would be "horrific" to hold that persons can be treated in the way the applicants had without being provided with a recourse.

Counsel for the employer also submitted written arguments which provided as follows:

> 3. *Under subsection 128(1) of Part II of the Code employees have a right to refuse to work under specified circumstances. Subsection 128(1) reads as follows:*
>
> > *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 [emphasis added].*

4. *"Danger" is defined in section 122 of the Code as "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".*

5. *The complainants allege that they are subject to harassment in the workplace which constitutes a "danger" to them in that it is a condition that could reasonably be expected to cause illness. For the following reasons, the Employer strongly disagrees.* ***First****, such an interpretation flies in the face of the what Parliament intended Part II of the Code to achieve, and necessarily and inevitably does violence to the investigation and review process set out in Part II. It is clear, when taken in the context of Part II as a whole, that Parliament intended to address the mischief caused by a defect in the workplace itself, be it structural, mechanical, electrical, related to air quality, etc. Part II is simply not intended to, or capable of being used to, remedy the mischief of harassment.* ***Second****, the right to refuse is designed and intended to be used in situations where employees are faced with imminent danger; it is not to be used as a means of bringing on-going disputes to a head.* ***Third****, the investigation process set out under the Code is intended to be an expedited and summary one, and is incompatible with the procedural safe-guards necessary in a harassment investigation.* ***Fourth****, Labour Canada Safety Officers are not required to have any expertise in the areas of harassment investigation or the medical consequences of harassment.* ***Fifth****, and of significant importance, an accused harasser would be denied fundamental procedural fairness in that s/he has no standing to defend him or herself in the Part II processes.* ***Sixth****, there already exist a multitude of avenues of redress available to those who feel they have been subjected to harassment and/or abuse of power.* ***Seventh****, to attempt to litigate in this forum allegations that may be subject to the harassment complaint procedure established under the Treasury Board Harassment Policy, and the governing grievance procedure, is an abuse of the Board's process and undermines the doctrine of judicial comity in that it opens the door to divergent tribunal decisions based on the same facts and allegations.*

As a result, it is the Employer's position that a safety officer has no authority to investigate harassment based allegations in the context of a work refusal investigation, and consequently the P.S.S.R.B. is without jurisdiction to entertain allegations of harassment and/or abuse of process in the context of a reference under subsection 129(5) of Part II of the Code.

1. *Parliament's intent as illustrated by the Code itself*

The Contextual Approach to Statutory Interpretation

6. *It is clear that in order for something to constitute a "danger" for the purposes of Part II of the Code, it must be something which Parliament intended should constitute a danger: Antonia Di Palma, 98 di 161 (C.L.R.B.), July 14, 1995, at 178. The question is how to ascertain Parliament's intent. When interpreting the wording of a statutory provision, one must not restrict oneself to examining the precise words in question. It is trite law that one must examine those words in the context not only of the specific provision, but of the statute as a whole:*

> *In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view.*
>
> > *A.G. v. Prince Ernest Augustus of Hanover, [1957] A.C. 436, at 465 per Lord Normand (H.L.); see also page 461 per Viscount Simonds.*

7. *This view has been adopted and affirmed by the Supreme Court of Canada in Prassad v. Canada (Minister of Employment & Immigration) (1989), 57 D.L.R. (4th) 663, at 679, and Thomson v. Canada (Minister of Agriculture), [1992] 1 S.C.R. 385, at 398, among others.*

8. *Ruth Sullivan addresses the issue in her book, Dreidger on the Construction of Statutes, 3rd ed., in which she states:*

> *Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by*

> *considering the rest of the Act, including both other provisions of the Act and its various structural components [emphasis added].*
>
> > *R. Sullivan, Dreidger on the Construction of Statutes, 3rd ed., (Toronto: Butterworths, 1994) at 245-246.*

9. *Accordingly, any interpretation adopted by this Board of subsection 128(1) and the definition of "danger" must be determined in the context of the purpose and scheme of the Code as a whole, and Part II in particular. It must achieve and reflect the goal intended by Parliament, and make sense in terms of the scheme set out by Parliament for achieving that goal. An interpretation that broadens the meaning of "danger" to encompass stress due to alleged harassment not only does not accord with that goal but would in fact do violence to the scheme and intent of the Code.*

10. *One flaw in the interpretation advanced by the Complainants is illustrated by subsection 145(3):*

> *145(3) Where a safety officer issues a direction under paragraph (2)(b), the officer shall affix to or near the place, machine or thing in respect of which the direction is made, a notice in such form and containing such information as the Minister may specify, and no person shall remove the notice unless authorised by a safety officer [emphasis added].*

It is clear from this subsection that the Safety Officer's direction is intended to be in respect of a place, not a person.

11. *The prevailing jurisprudence supports the Employer's interpretation that when a refusal to work is based on conditions of the workplace, it is the place itself that must pose the danger:*

> *The direction to be given must therefore be a direction concerning the workplace. Under s. 129(4), after the direction has been given by the safety officer or the board:*
>
> > *...an employee may continue to refuse to ... work in that place because of the dangers it presents and that the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers*

> *that employees were justified in not working there [emphasis added].*
>
> *Canada (Attorney General) v. Bonfa (1990), 73 D.L.R. (4th) 364 at 370 (F.C.A.).*

12. *It is crucial to note that while Parliament has expressly empowered safety officers and boards to give direction respecting the maintenance and use of places and equipment, and/or to preclude their use, they are not empowered to give any direction with respect to the conduct of people. In other words, they cannot direct that harassment cease, or that a harasser be removed or disciplined, or anything else that one would assume would attach were they intended to investigate and make findings based on harassment allegations. If Parliament had intended such allegations to fall within the ambit of Part II of the Code, it would have made some provision for how such conduct is to be dealt with and how the supposed danger is to be alleviated.*

13. *Of further interest in assessing the statutory context of the refusal to work provisions are the obligations expressly placed on employers, the primary elements of which are set out at length in section 125:*

> *Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,*
>
> *(a) ensure that all permanent and temporary buildings and structures meet the prescribed standards;*
>
> *(b) install guards, guard-rails, barricades and fences in accordance with prescribed standards;*
>
> *(c) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer;*
>
> *(d) post at a place accessible to every employee and at every place directed by a safety officer,*
>
> *(i) a copy of this Part,*
>
> *(ii) a statement of the employer's general policy concerning the safety and health at work of employees, and*

(iii) such other printed material related to safety and health as may be directed by a safety officer or as is prescribed;

(e) keep and maintain in prescribed form and manner prescribed safety and health records;

(f) provide such first-aid facilities and health services as are prescribed;

(g) provide prescribed sanitary and personal facilities;

(h) provide, in accordance with prescribed standards, potable water;

(i) ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed safety standards;

(j) provide every person granted access to the work place by the employer with such safety materials, equipment, devices and clothing as are prescribed;

(k) ensure that the use, operation and maintenance of

(i) every boiler and pressure vessel,

(ii) every escalator, elevator and other device for moving passengers or freight,

(iii) all equipment for the generation, distribution or use of electricity, and

(iv) all gas or oil burning equipment or other heat generating equipment is in accordance with prescribed standards;

(l) and (m) [Repealed, R.S., 1985, c. 24 (3rd Supp.), s. 4]

(n) ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;

(o) comply with such standards as are prescribed relating to fire safety and emergency measures;

(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;*
>
> *(r) maintain all installed guards, guard-rails, barricades and fences in accordance with prescribed standards;*
>
> *(s) ensure that each employee is made aware of every known or foreseeable safety or health hazard in the area where that employee works;*
>
> *(t) ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed safety standards and are safe under all conditions of their intended use;*
>
> *(u) adopt and implement prescribed safety codes and safety standards;*
>
> *(v) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing; and*
>
> *(w) comply with every oral or written direction given to the employer by a safety officer concerning the safety and health of employees [emphasis added].*

14. *It is clear from this lengthy and quite specific list that Parliament's focus and intent for Part II is on imposing obligations on the Employer relating to the fitness and safety of the physical elements of the workplace and the equipment in it, and on ensuring that employees working with hazardous materials would have access to safety gear as required. There is no mention of Employer obligations even remotely comparable to inter-personal conflict such as harassment and/or abuse of power, which further demonstrates that Parliament never intended such allegations to come within the ambit of this Part. That is the conclusion reached by the Deputy Chair of the Public Service Staff Relations Board in the Harold Bliss case:*

> *In my view the danger perceived by an employee under Part IV [now Part II] of the Code must relate to a machine, thing or to the physical condition of the work place of the employee. Such danger does not include stress or conflict arising out of human relationships.*

> *This interpretation of sections 85, 86 and 87 [now 128, 129 and 130] is confirmed by the provisions of section 82 [now 125] which prescribe the duties of employers. They must ensure the safety of every work place controlled by them by ensuring that buildings meet prescribed standards, that guard rails are installed, that diseases are recorded and reported, that first aid facilities and sanitary conditions are maintained, that hazardous substances are stored, handled and identified in the prescribed manner, and that standards relating to fire safety and emergency measures are complied with. In short, employers must ensure that safe physical conditions prevail at every work place controlled by them [emphasis added].*
>
> *Harold Bliss, (May 12, 1987), P.S.S.R.B. File No. 165-2-18 at page 30.*

15. *A further indication that only concrete, qualitatively and quantitatively measurable physical elements are intended to come within the ambit of Part II are the specific provisions relating to coal mines, and the recently added section 125.1 which sets out Employer obligations with respect to the use of hazardous substances. Clearly the focus of those provisions is the place of work and the concrete tangible substances that may be in it.*

16. *In conclusion, the statutory context of the provisions in question illustrates that Parliament's goal in enacting this legislation was to provide safeguards for employees with respect to their physical workplace. It was not to address situations of harassment, or any other form of inter-personal conflict.*

2. ***Imminent Danger***

17. *Parliament intended the right to refuse to work to be an extraordinary one to be invoked only to address an urgent situation of imminent danger. As a result, the jurisprudence is quite clear that a "danger", for the purposes of the Code, is immediate and real, not long-term and speculative:*

> *The right to refuse is an emergency measure to deal with dangerous situations that crop up unexpectedly and with those that require immediate attention and not as the primary vehicle for attaining the objectives of Part II of the Code or for settling long-standing disputes or differences. The safety provisions in the Code are intended to ensure that employers provide safe work places in terms of equipment and*

> *environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right there and then if the danger is not removed. It is not meant to be used to bring ongoing disputes to a head, and, where refusals coincide with other labour relations disputes, particular attention should be paid to the circumstances of the refusal [emphasis added].*
>
> *Stephen Brailsford, March 18, 1992, 87 di 98 (C.L.R.B.), at page 9.*

18. *This approach has not changed in light of the removal of the word "imminent" from the statute:*

> *For all intents and purposes, removing the word imminent from the definition of danger has not changed its meaning. The notion of immediacy is still implicit in the sense that the Code's definition of "danger" still contemplates "a situation where the injury might occur before the hazard could be removed".... Thus, in order to meet the Code's definition, the danger must be immediate and real: in other words, the risk to the employee must be serious to the point where the work must stop until the situation is rectified, i.e. the source or cause of danger removed... Further more, the danger must be one that Parliament intended to cover in Part II of the Code....*
>
> *That interpretation is also in keeping with the spirit and purpose of the refusal which is designed as "an emergency measure to deal with dangerous situations which crop up unexpectedly", ... not as a primary vehicle to attain the objectives of Part II of the Code or as a "last resort" to bring existing disputes to a head or to settle long-standing disputes... [italics in original, underlining added, citations omitted].*
>
> *Antonia Di Palma, supra, at 177-178.*

3. ***Expedited and Summary Process***

19. *Another basis for concluding that Part II is not intended to, or functionally capable of, encompassing harassment based work refusals is that the statute mandates that the processes for refusal and investigation are to be expedited and summary. This is no doubt because when the right to refuse is invoked, the refusing employee, and possibly all employees, cease to work. That is not a situation that Parliament intended to drag on. Rather the very structure of the investigative process is designed to*

allow an expeditious fact-finding investigation in order to minimize the interruption, and to have employees idle for only so long as is necessary to ensure that they can perform their duties safely:

> *128 (6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer...*
>
> *128(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report...*
>
> *129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.*
>
> *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... [emphasis added].*
>
> *See also J. Bidulka et al, (September 30, 1986), P.S.S.R.B. File Nos. 165-2-2 to 8, 1652-9 to 11, 165-2-12 and 13, at page 45.*

20. *In contrast to this statutorily mandated summary and expedited process, common sense dictates that the investigation and review of a harassment complaint is by necessity an in-depth and generally lengthy procedure. There is no other way in which to be fair to, and protect the interests of, both the accuser and the accused. Harassment allegations, particularly when coupled with the need to assess medical evidence as to the effect of that harassment, are simply not conducive to being dealt with in an expedited and summary process. It is not credible that Parliament intended the Part II process be used in such a fashion. Had that been the case, Parliament would have indicated so expressly.*

4. *The Scope of a Safety Officer's Duty, and Expertise*

21. *The scope of a Labour Canada safety officer's expertise does not extend to investigating harassment complaints. A safety officer is not a harassment investigator. However, in order to make the determination the complainants seek, namely that the harassment they allegedly suffer is a danger to them, a safety officer would first have to make a finding that such harassment existed. In order to make that finding, the officer would have to be trained in harassment investigation techniques and would have to engage in the lengthy process of conducting such an investigation. The safety officer would then have to make a finding, based most likely on medical evidence of some sort, as to whether or not there is a causal link between the harassment and the reported illness, and then as to whether or not the medical consequences are sufficiently dire to be deemed a "danger" under the Code. Safety officer's are simply not required or expected to posses the specialized knowledge or training necessary to engage in such an analysis. They are instead mandated to take quantitative and qualitative measurements in order to assess the safety of physical structures, chemical compounds, air quality and the like.*

22. *In addition, a safety officer's decision must be based on conditions as they exist at the time of the investigation, and not on past incidents: see Bonfa, supra at 369 and 370. With that in mind, it is clear that a harassment based work refusal would virtually never result in a finding of danger, as it is unlikely that harassing behaviour would take place in the safety officer's presence.*

23. *In sum, a harassment allegation is a far different creature from what safety officers are intended to, and trained to, investigate: it requires an analysis of past behaviour, not present circumstances; the potential danger to health is long-term and speculative, as opposed to immediate and real; and it requires far more medical expertise to evaluate than a safety officer is likely to possess. It is not functionally realistic to try to manipulate the refusal to work investigation process to accommodate what is in pith and substance a harassment complaint.*

5. ***Interpreting "danger" to include harassment leads to breach of procedural fairness***

24. *What is not said in a statute can often be as important to the contextual approach as what is said. It is of primary significance that there is nothing in Part II of the Code that addressed the rights of an alleged harasser. This in spite of the fact that this review process is clearly subject to the rules of procedural fairness:*

> *We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures, subject to the proviso that they comply with the rules of fairness [emphasis added].*
>
> *Prassad, supra at 679.*

25. *Harassment allegations are extremely serious charges. It is a fundamental precept of our legal system, and of procedural fairness, that anyone subject to such serious accusations has the right to defend him or herself. This right, a fortiori, requires at a minimum that s/he be made aware of the substance of the allegations, and be afforded the opportunity to respond to them. However, no provision is made in Part II of the Code for anyone other than the complainant, the safety officer and the employer to have standing in the investigation or review processes. As a result, it is entirely possible that the processes set out in Part II would proceed to a conclusion without the alleged harasser ever having the opportunity to respond to the allegations against him or her. That is clearly intolerable. The right to defend oneself against such serious allegations cannot be made subject to the whim of one's employer or anyone else, it must rest exclusively with the accused. Parliament cannot possibly have intended to allow the refusal to work process set out in the Code to be used to circumvent that right, thereby denying the accused the opportunity to defend him or herself.*

In order to adhere to the precepts of procedural fairness, a safety officer's investigation would necessarily have to expand in scope to allow the respondent a full and complete role in the investigation, as would the Board's review. Such a scenario is clearly at odds with the statutory scheme enacted by Parliament.

6. Alternate Avenues of Redress

26. There are many avenues of redress available to those who feel themselves to be at risk from harassment, avenues designed and structured specifically to address harassment complaints while respecting the rights of both the accused and the accuser. With respect to members of the Public Service, the Treasury Board Harassment Policy sets out a scheme for the lodging of a complaint, the investigation process, and the remedial process. Under the Policy, the Public Service Commission is tasked with investigating harassment complaints and deciding whether or not the harassment allegation is well-founded. The Public Service Staff Relations Act and the governing Public Service collective agreements set out a grievance process which is another avenue of redress available to Public Servants who feel they are being harassed in the workplace. These avenues are more appropriate forums to pursue, and their existence renders it unnecessary for the refusal to work provisions under Part II of the Code to be artificially expanded to encompass harassment based complaints.

7. Abuse of Process

27. To attempt to litigate before a review board established pursuant to the Code what is at its core a harassment complaint, instead of taking that complaint before one of the tribunals specifically charged with determining such complaints, amounts to an abuse of process. Those tribunals are mandated to address and resolve harassment complaints. This Board, in its review capacity under the Code, is not. In addition, the doctrine of judicial comity requires that the jurisdiction and authority of sister tribunals be respected, and the potential for divergent decisions based on the same facts and allegations be avoided.

The Jurisdiction of the P.S.S.R.B.

28. In a reference under subsection 129(5) the scope of the Board's inquiry is limited to an examination of whether or not the investigating safety officer was correct in his or her decision as to the existence or absence of danger in the workplace.

29. Given the above arguments, it is clear that Parliament intended the right to refuse to work to be a short term, last resort procedure to be invoked only in circumstances of imminent, real and acute danger stemming from the place of work itself, or the equipment and machinery in

it. Such danger must be caused by the conditions of the workplace itself, as they exist at the time of the safety officer's investigation, and it is not to be used to address the long-term inter-personal relationships of the individuals who happen to work in it. If the complainants' approach were to be sustained by this Board, the Board would find itself in the impossible position of having to render a ruling as to whether or not the complainants were harassed. It would somehow have to render this ruling in an expeditious and summary way and achieve fairness in spite of the fact that the alleged harassers are not parties to this action, and have no standing in their own right. To use the refusal to work provisions as the Complainants seek to do, is to do violence to the Code, and to ignore Parliament's clear intent.

Conclusion

30. *As the complainants do not allege that the workplace itself was a danger to them but rather base their refusals to work exclusively on allegations of harassment and abuse, and the long-term effects thereof - circumstances which, even if taken to be true, relate to the relationships between people in the workplace, and not to the state of the workplace itself - the safety officer's determination of an absence of danger must be upheld. The complainants' allegations of harassment and abuse of power are outside the scope of Part II of the Code, outside the jurisdiction of a safety officer to investigate, and outside the jurisdiction of this Board to review. It is therefore submitted that no evidence or submissions with respect to allegations of harassment and/or abuse of power may be entertained by this tribunal, as such evidence and submissions are wholly irrelevant to the issue to be determined.*

IV. Order Sought

31. *The Employer seeks a ruling that harassment and abuse of power cannot constitute a "danger" for the purposes of Part II of the Code. As a result, the Safety Officer's finding of an absence of danger must be upheld without the need of further evidence being led, as the sole basis for the work refusal in issue was allegations of harassment and abuse of power and there has been no allegation that the workplace itself constitutes a danger to the complainants.*

Ms. Begley also made the following oral submissions. She noted that the *Interpretation Act* provides that a provision is applicable only if a contrary intention does not appear; in this instance, there is a contrary intention expressed in the *Code.*

In her submission the object of the legislation is not consistent with the applicants' case; in this respect it is important not to look at the Act in a vacuum but in its overall context.

Counsel submitted that the employer had made provisions dealing with the problem of harassment; for example, there is a no harassment clause in the collective agreement governing the complainants; as well, there is the Treasury Board Directive on Harassment. Accordingly, this is not the correct forum to address harassment issues. With respect to the *Lever et al.* case (supra), it dealt with problems respecting air quality which is expressly addressed in the *Code*, at paragraph 125(1)(n). Counsel also submitted that the *Creamer* case (supra) does not in fact conflict with the *Bliss* decision (supra); she noted that the Board in *Creamer* (supra) specifically refused to make any decision as to whether Part II of the *Code* has any application to allegations of harassment.

Ms. Begley also submitted that the Board's jurisdiction is equated to that of a safety officer, which is set out in section 145. Under that provision a direction must be aimed at the place or equipment; the safety officer has no jurisdiction to issue a directive against persons or how they do business. Counsel again noted that the *Bliss* case (supra) held that danger "*does not include stress or conflict arising out of human relations*". Ms. Begley also reiterated that although the term *imminent* no longer specifically modifies the word "danger" in the *Code*, the jurisprudence has consistently found that the intent of immediacy is still there; that is, the danger contemplated in the *Code* cannot be long term or speculative.

Counsel for the employer also contended that the safety officer's authority to conduct investigations is limited to conditions which are analogous to those matters listed in the *Code*; the *Code* envisages danger which is real, imminent and acute, and which existed at the time of the investigation; it was not intended to deal with ongoing conditions which did not culminate in a final acute situation.

Accordingly, the employer is seeking a finding from the Board that harassment allegations of abuse of power cannot be the subject of a finding by the safety officer under Part II of the *Code*.

Counsel for the applicants replied that the real context pursuant to which this matter should be addressed is simply whether there is a danger to the applicants' health. Mr. Gibson maintained that the Board has to listen to the evidence to determine whether there is a danger, and only after hearing the evidence can the Board make that determination.

With respect to the issue of alternative remedy, Mr. Gibson submitted that the Treasury Board Directive is not adjudicable. He submitted that this case is distinguishable from the *Bonfa* judgment (supra) in that in this instance it has been accepted as part of the fact scenario that the danger was in fact present when the applicants refused to work. In *Bonfa* (supra) the Court concluded that the danger did not exist at the relevant time.

Mr. Gibson also maintained that reading the term "physical" into the definition changes the law as it is currently written. He also noted that no disciplinary action necessarily flows from any finding in this kind of proceeding. He submitted that this is in fact an urgent situation; he noted that the law does not provide that all other avenues have to be exhausted before invoking the *Code*.

Reasons for Decision

This decision addresses the important issue as to whether Part II of the *Code*, and in particular subsection 128(1) respecting the right to refuse to work, subsumes the allegations put forward by the applicants. In brief, their allegations are that they were subjected to harassment and abuse of authority while at their place of work, to the extent that it seriously affected their mental and emotional well-being, and ultimately their physical health as well; the applicants further allege that this abuse and harassment resulted from their efforts to enforce the government's rules and regulations concerning the Department of Foreign Affairs and International Trade's operations; according to the applicants, the enforcement of these rules and regulations ran counter to the ethos and culture of that department.

I have carefully considered the hypothetical facts scenario put forward by the applicants and the oral and written submissions of the parties; as well I have reviewed in detail the provisions of the *Code* and the relevant jurisprudence. In so doing, I

have arrived at the conclusion that Part II of the *Code* does not subsume the circumstances raised by the applicants.

One of the matters that is very much at issue in this case is whether a stressful work environment resulting from harassment and abuse of authority is the kind of condition which is contemplated by the *Code* as constituting a "danger" as defined in subsection 122.(1), and as that term is used in subsection 128.(1) of the *Code*. For ease of reference these provisions are reproduced here:

> *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;*
>
> ...
>
> *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.*

It is important to note that the term "*illness or injury*" in the definition is qualified by the phrase "*before the hazard or condition can be corrected*". This definition was introduced as part of the 1986 amendments to then Part IV of the *Code*; at the same time, the expression "imminent danger" was removed from the *Code*. In the *Pratt* decision [(1988), 73 d.i. 218; 1 CLRBR) 2 d) 310], one of the earliest cases following the 1986 amendments, the Canada Labour Relations Board (CLRB) made these observations concerning the meaning and intent of that provision:

> *If one recalls that Part IV of the Code referred to "imminent danger" prior to the adoption of the present definition of danger in 1984, it is readily apparent from the carefully chosen words in the definition that the legislators intended to retain an essence of immediacy in the concept of*

danger as it relates to an employee's right to refuse under ss. 85 and 86, and also to a safety officer's powers to issue a direction in dangerous situations under s. 102(2).

Let me be very clear on this - I am not suggesting for one minute that Parliament sought to curtail the rights of employees to refuse to work when faced with danger. Those rights are still as broad as ever and this Board has already said that the protection offered to employees under Part IV against discipline or other reprisals by employers for having exercised their right to refuse is no less than it was before: see Roland D. Sabourin, 1987, C.L.R.B. No. 618. What I am suggesting is that Parliament removed the word "imminent" from the concept of danger under Part IV, but replaced it with a definition that has virtually the same meaning. By using the definition it did, Parliament merely adopted the definition that Labour Canada and the Board had applied to "imminent danger" prior to the amendment:

> *Q. What is "imminent danger"?*
>
> *A. A threat of injury to your safety or health which is likely to happen at any moment without warning. This would usually refer to a situation where injury might occur before the hazard could be removed.*

(Labour Canada Brochure, The Right to Refuse to Work, p. 17 (emphasis added); see also Miller and Canadian National Railways, [1980] 2 Can LRBR 344 at p. 353, 80 CLLC 16,048 at pp. 754-755, 35 di 93 at p. 104 (C.L.R.B. No. 243))

In short, very little has changed as a result of the removal of the word "imminent". The role of safety officers and of the Board vis-à-vis the right to refuse remains the same for all intents and purposes, that is, to determine whether the risk of injury or illness to employees is so acute that the use of the particular machine, thing or place must cease until the situation is rectified.

...

It can be seen from the foregoing that the right to refuse is not the primary vehicle for attaining the objectives of Part IV of the Code. It is there to promote early recognition of hazards so that they are brought to the attention of those responsible for safety in the work place. The right to refuse is also an emergency measure to deal with dangerous situations which crop up unexpectedly. In that context, it becomes clear why danger is defined as it is. The purpose of the right to refuse is not to settle longstanding disputes or to bring to a head differences involving technology or production

> *practices. (See Gallivan and Cape Breton Development Corp. (1981), [1982] 1 Can LRBR 241, 45 di 180 (C.L.R.B. No. 332); and LaBarge v. Bell Canada (1981), 82 CLLC 16,151, 47 di 18 (C.L.R.B. no. 357).) The right to refuse is there to deal with situations which require immediate attention, hence the requirement for immediacy in the definition of danger. I should add that, because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a view to reducing the risk of injury or illness, or for instigating a study into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place.*

The views expressed in the *Pratt* case have been reiterated by this Board (ref. e.g. *Beauregard,* Board file 165-2-65, *Doiron and others,* Board files 165-2-114 to 132) and the CLRB on several occasions. For example, in the *Stephen Brailsford* decision (supra) the CLRB stated (at p. 9):

> *The right to refuse is an emergency measure to deal with dangerous situations that crop up unexpectedly and with those that require immediate attention and not as the primary vehicle for attaining the objectives of Part II of the Code or for settling long-standing disputes or differences. The safety provisions of the Code are intended to ensure that employers provide safe work places in terms of equipment and environment. The right to refuse is designed to be used in situations where employees are faced with immediate danger when injury is likely to occur right then and there if the danger is not removed. It is not meant to be used to bring ongoing disputes to a head and, where refusals coincide with other labour relations disputes, particular attention should be paid to the circumstances of the refusal.*

See as well the *Ameida* decision (supra); in that case the applicant maintained that "*... as a result of the long history of harassment... his health and personal life have been severely and adversely affected.*". Among other things the CLRB noted in this decision that "*... the Board has consistently confined the definition of danger to circumstances where the alleged danger has been of such an acute or immediate nature that the use of the particular machine, thing or place must cease until the situation is rectified. ...*" *(p. 15).* However, it is readily apparent from reading the materials filed by the applicants that what the safety officer was asked to address were in fact

"long-standing disputes or differences" rather than something that "arose unexpectedly" and required immediate and urgent attention. The applicants have made it very clear in their submissions that their mental and emotional problems were as a result of a prolonged state of affairs over a period of not merely days but in fact years. For example, in her REFUSAL TO WORK REGISTRATION form Ms. Gualtieri notes that she had been *"systematically, consciously intentionally and concertedly harassed and abused by way of abuse of power and authority over the last 5-6 years, my health is in danger - with the risk of even more serious declining health and well-being ..."* Moreover, there is no suggestion in any of the materials that there was something in the nature of a culminating incident or a critical event on or around June 18 that could be said to have constituted an immediate threat to the applicants at that time. Without wishing to minimize the effect that serious and sustained harassment and abuse can have on victims of such actions, I do not believe that this is the kind of immediate or urgent situation that is contemplated by Part II of the *Code.*

I am also in agreement with counsel for the employer that it is necessary to consider the meaning and intent of subsection 128.(1) in the overall context of Part II of the *Code*; upon doing so it becomes apparent that paragraph 128.(1)(b) is limited in its application to a physical condition at a specific identifiable location.

A number of provisions of Part II support this conclusion. For example, subsection 130.(3) provides that:

> *(3) Where the Board directs, pursuant to subsection (1), that a machine, thing or place not be used until its directions are complied with, the employer shall discontinue the use thereof, and no person shall use such machine, thing or place until the directions are complied with, ...*

Subsection 130.(3) indicates the kind of direction that the Board might make pursuant to its authority under section 130. It speaks, for example, of discontinuing the use of a place until the threat to health or safety is addressed. When one considers these modes of direction in the context of the instant case, it is apparent that Part II was not intended to address the kind of wrongs alleged by the applicants. That is, the applicants stated that there is no particular physical place which can be said to be the or even a cause of their ill health. In these circumstances, how could there be a direction as envisaged under subsection 130(3)? Even if there could be such direction,

how could it be adjudged that there has been compliance with it? Similarly, paragraph 128(1)(b) speaks of a *"condition (that) exists in any place ..."* (underlining added). If one were to accept the applicants' argument that the *Code* can address a situation or condition such as a "toxic" departmental ethos or culture, then presumably any and every location where the department operates should be shut down unless and until the culture changes. Surely, such an absurd result strongly suggests that the *Code* was intended to address a physical condition arising in a tangible, specifically identifiable location. Such a conclusion is not an example of the law being given an unduly restrictive interpretation; rather, it ensures that the true intent of the law is being respected, and that it is not being reduced to a state of absurdity.

A further illustration of the inappropriateness of the redress sought by the applicants is the order or direction which they are seeking from this Board. In response to a question from the Board, counsel for the applicants suggested that the Board issue an order directed at the department in terms similar to that found in the *Lever* case (supra), i.e., to the effect that the workplace be made "safe and comfortable". This Board is unable to conjure up the terms of an order that could in any meaningful way address the so-called dangerous condition which, according to the applicants, arises from the "culture and ethos" of the Department. What language could properly convey to departmental management the concrete steps that are required to be taken in order to remove this threat to the health and safety of its employees? What specific change of material circumstances could objectively satisfy a safety officer that this "dangerous situation" is no longer present? Merely to pose these questions is to illustrate the inherent difficulty in the interpretation which the applicants are urging this Board to accept.

I would note that there are other provisions in Part II, as outlined by counsel for the employer in her submissions, which also support this conclusion, and which do not require further elaboration here.

I would also note this Board's decision in the *Harold Bliss* case (supra), which was issued in 1987. In that case the applicant maintained that as a result of communication problems between himself and his supervisor "... *he suffered mounting stress and tension which brought on an angina attack perceived by him to*

have jeopardized his safety and health at work." (at page 1) In confirming the safety officer's decision the then Deputy Chairman of the Board, Mr. Walter Nisbet, Q.C., stated:

(at page 30)

> *In my view the danger perceived by an employee under Part IV of the Code must relate to a machine, thing or to the physical condition of the work place of the employee. Such danger does not include stress or conflict arising out of human relationships. This interpretation of sections 85, 86 and 87 is confirmed by the provisions of section 82 which prescribe the duties of employers. They must ensure the safety of every work place controlled by them by ensuring that buildings meet prescribed standards, that guard rails are installed, that diseases are recorded and reported, that first aid facilities and sanitary conditions are maintained, that hazardous substances are stored, handled and identified in the prescribed manner, and that standards relating to fire safety and emergency measures are complied with. In short, employers must ensure that safe physical conditions prevail at every work place controlled by them.*
>
> *For these reasons, I have concluded that the danger apprehended by the applicant, i.e., the stress arising out of his relationship with Mr. Merdjanian, is not a danger which comes within the purview of Part IV of the Canada Labour Code.*

Counsel for the applicants argues that the *Bliss* case is distinguishable from the instant circumstances in that Mr. Bliss was complaining only about a conflict of personality vis à vis his supervisor, whereas the applicants in this case are concerned about the culture and ethos of an entire department. I would suggest that, in the context of the applicability of Part II of the *Code*, this is a distinction without a difference. In both instances the complaints in essence concerned working relationships, rather than a condition in the workplace.

In considering this issue, I have also reviewed the jurisprudence from other jurisdictions. There have been two recent decisions from the Ontario Labour Relations Board which touch upon this matter. Both decisions arose out of allegations of sexual harassment, and the complaints were brought under subsection 50(1) of the *Occupational Health and Safety Act*, commonly known as the "reprisal" provision; this provision prohibits the employer from, among other things, dismissing or threatening

to dismiss a worker who has exercised his or her rights under the *Occupational Health and Safety Act* (hereinafter referred to as OHSA). In the first of these cases, *Lyndhurst Hospital* [1996] OLRB Rep. May/June 456, the employer submitted that under the *Occupational Health and Safety Act* the OLRB had no jurisdiction to deal with a sexual harassment complaint which, it argued, was outside the ambit of that legislation. A panel of the Board, chaired by Vice-Chair K.G. O'Neil, concluded that such a complaint may fall within the jurisdiction of the Board and consequently decided to hear the complaint on its merits. This decision was the subject of an application for judicial review (*Lyndhurst Hospital and Pauline Au et al* [1996] O.J. No. 3274) where the Court concluded that:

> *In our respectful view, the manner in which the OLRB has dealt with the preliminary motion made to it by the Applicant under its Rule 24 does not give rise to the remedy sought. This application for judicial review is dismissed as premature.*

In a subsequent decision by the OLRB concerning the complaints of reprisal, *Lyndhurst Hospital* [1997] OLRB Rep. July/August 616, the Board dismissed the complaint.

Subsequent to the issuance of the earlier *Lyndhurst Hospital* decision (supra) but prior to the later decision, the Chair of the Ontario Labour Relations Board, Mr. R.O. MacDowell, rendered *Musty* v. *Meridian Magnesium Products Limited* [1996] OLRB Rep. NOVEMBER/DECEMBER 964. In this case the applicant also alleged that her employment was terminated because she invoked the OHSA and complained about sexual harassment in the workplace. The applicant had also invoked a number of other remedies, including a claim with the Ontario Workers' Compensation Board, a complaint under the *Ontario Human Rights Code*, as well as a civil action for damages. In this case it was again argued by the employer that the Ontario Labour Relations Board did not have jurisdiction under the OHSA to address this matter; the applicant countered this argument by relying on the decision *Lyndhurst Hospital* (supra). Mr. MacDowell came to the following conclusions:

> *166. In the circumstances, it is my view that it is appropriate to defer to the procedures of the Code and the Commission, even if they are sometimes slow and there is some argument that the situation could be addressed under the OHSA. In my view, there are no compelling policy reasons for the Board to initiate an inquiry where, as here,*

> *the subject matter of the case is substantially (if not completely) covered by the Code, and those matters are central to the jurisdiction and expertise of the tribunal(s) established under the Code to deal with them. To reiterate: remedying gender discrimination and harassment (including reprisals) is the work of the Human Rights Commission and boards of inquiry under the Code - not the Ontario Labour Relations Board under the OHSA.*
>
> *167. For the foregoing reasons, I am satisfied that it is appropriate to exercise my discretion under section 50(3) of the OHSA not to inquire into this complaint.*

In the course of his detailed and lengthy decision, the Chair of the OLRB made a number of observations concerning the scheme of the OHSA and the intent of its provisions, particularly when considered in light of the *Ontario Human Rights Act.* Some of these findings are of particular interest to the instant case. For example, he makes the following comments, beginning at page 989:

> *127. .... At this point, I merely note that within the OHSA itself, the emphasis seems to be on physical threats to a worker's well-being, which may suggest that open-ended words like "health", "safety" or "hazard" should be construed in that light. For as the Court observed in Colquhoun v. Brooks (1889), 14 A.C. 493:*
>
> > *It is beyond dispute ... that we are entitled and indeed bound when constructing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.*
>
> *From this perspective, it might be said that general words like "hazard", "health", "danger", "precaution" should be interpreted in light of the way health and safety problems are considered elsewhere in the statute, and are limited to physical risks or hazards.*
>
> *128. The provisions of the OHSA focus primarily - if not exclusively - on physical hazards in the workplace: on machines, devices, things, equipment, protective devices, building structures, dangerous biological or physical agents, and so on. (See, for example, sections 8, 9, and 25, and the powers of an inspector under sections 54-60). Even the right to refuse unsafe work under section 43 focuses on the "equipment, machine, device or thing the worker is to use" or*

the "physical condition of the workplace". The physical element is either implicit in the hazard specifically identified, or has been added by the Legislature, as in section 43 which gives an employee the right to refuse to work when the situation is unsafe. If section 43 had been intended to cover any condition in the workplace, the word "physical" would not have been necessary.

129. Not only does the OHSA appear to be concerned with physical threats of one kind or another, but the provisions of the OHSA do not seem to focus at all on "dangerous people", except in relation to physical activities or the dangerous operation of equipment. Thus, section 28(2) of the OHSA provides:

> *28. (2) No worker shall,*
>
> ...
>
> *(b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or*
>
> *(c) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.*

Even Barmaid's Arms [1995] OLRB Rep. March 229, a case upon which the complainant relies, involved a physical threat to the employee in question.

130. This is not to say that the OHSA ignores employee behaviour that could pose a danger to other workers. If an employee engages in violent behaviour at work, "rough conduct" or some ill-intentioned "prank", such behaviour may be caught by OHSA section 28(2), even though it may be a manifestation of misogyny, racism, or other problems addressed in the Code. One must be careful not to unduly limit the scope of OHSA protections, or assume too readily that behaviour can be precisely characterized or confined to precise legal compartments. It is simply that "hazardous words", "dangerous pictures" and "injurious attitudes" - the allegations in this case - do not fit very well into the range of risks to which the OHSA is specifically addressed. Nor are these the sorts of things that appear to be contemplated by the kinds of remedial orders that an inspector may make under section 57. The provisions of the OHSA do not clearly speak to or easily encompass "dangers" to an employee's mental health - be they overt and unlawful harassment (sexual, racial or otherwise) as alleged in this case, or simply

> *conditions in the workplace which generate stress (technological change, impending layoffs, a new boss, friction with other employees, workload, etc.). Nor is it easy to accept that anything that causes "stress" is necessarily a "hazard" regulated by the OHSA.*

While the Ontario OHSA is clearly not identical to the provisions of Part II of the Canada Labour Code, I would suggest that the observations of the Chair cited above have considerable resonance for Part II, and for the instant case.

Whatever redress may be available to the applicants, in my view, for the reasons noted above, that redress does not lie with Part II of the *Code*. Accordingly, the safety officer's decision is confirmed.

P. Chodos,
Vice-Chairperson.

OTTAWA, September 25, 1998.