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Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

KEVIN F. KAVANAGH
JOHN HUGHES
EDWARD A. JARDINE

Applicants

and

TREASURY BOARD
Solicitor General Canada - Correctional Service

Employer

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

Before: Donald MacLean, Board Member

For the Applicant: Gary V. Bannister, Public Service Alliance of Canada

For the Employer: Stéphane Arcelin, counsel

Heard at Bathurst, NB,
June 24 and 25, 1999.

[1] Kevin F. Kavanagh is employed as a correctional officer (CX-1) with the Correctional Service of Canada at the Atlantic Institution in Renous, New Brunswick.

[2] On March 18, 1999, Mr. Kavanagh was working the day shift at the institution. His assignment for the day was on the post in the gallery that overlooks the kitchen, the dining room, workshops, the gym and other common areas in the institution. The gallery is located on a walkway above the main floor of the institution. From that vantage point armed officers can oversee and monitor inmate activity below them. Officers in the gallery divide their surveillance time from the advantage of glass-enclosed observation booths and doing rounds along the walkway. The glass in the observation booths is darkened. Persons on the main floor cannot easily see if a booth is occupied. The institution does not want the inmates to be aware where the officers are. The booths contain closed-circuit television monitors with which the officer can monitor movements below. He can sound the alarm if trouble starts to brew. Other monitors are located in the main central control room of the institution. Any of the cameras in the institution can be switched over to the monitors in central control.

[3] The gallery is ordinarily manned with two officers during the day shift and one or two officers during the evening shift. It is not manned during the night, nor between 6:30 a.m. and 7:30 a.m. A couple of the inmates are usually in the kitchen from the period when it first opens around 6:30 a.m. By 8:00 a.m., the number of inmates rises to five or six. They usually work in the kitchen for the rest of the morning.

[4] During the night of March 17, 1999, a work crew from an outside contractor painted the gallery floor. They had used an oil-based paint, with an epoxy hardener to reduce the drying time.

[5] When Mr. Kavanagh arrived at his gallery post on the following morning, he noticed that a very strong paint odour remained. The smell was sickening to him almost as soon as he arrived. Around 7:25 a.m., Mr. Kavanagh asked Dan Newton (an acting CX-3) if he knew what fumes were in the gallery. Although Mr. Newton did not know the answer, he said that he would ask management when they arrived.

[6] Around 8:00 a.m., Bob MacDonald relieved Mr. Kavanagh in the gallery. After he came down from the gallery, Mr. Kavanagh informed Mr. Newton that he would not return to the gallery until he knew what the fumes were. He then spoke with Richard Price, a fellow correctional officer, and Co-chair and representative of the bargaining

unit on the health and safety committee at the institution. Mr. Kavanagh explained to Mr. Price about the paint fumes in the gallery. Mr. Price replied that he would try to get a "material safety data sheet" (MSD sheet) on the paint. (A MSD sheet, under section 125.1 of the *Canada Labour Code*, would outline the characteristics and dangers of the paint fumes.)

[7] Mr. Kavanagh was scheduled to relieve Mr. MacDonald at 9:00 a.m. He did not do so. Around 9:30 a.m., his immediate supervisor (CX-3), Kevin Hare, ordered Mr. Kavanagh to return to work in the gallery. Mr. Kavanagh's response was to invoke his right to refuse to work under section 128, of the *Code*. Section 128 is 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.*
>
> *(2) an employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place*
>
> *(a) the refusal puts the life, health or safety of another person directly in danger; or*
>
> *(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment.*

[8] Mr. Hare informed Mr. Kavanagh that he could use the "Scott" air packs that were available for officers who were working in the gallery. Mr. Kavanagh's response noted that he had no training in the use of that self-contained breathing apparatus (S.C.B.A.). Mr. Hare did not press the issue further and reassigned Mr. Kavanagh.

[9] Later, Mr. Price informed Mr. Kavanagh that no MSD sheet was available for the oil paint that had been used. Later still, around 2:00 p.m., management obtained a MSD sheet for the paint. None could be secured for the epoxy hardener.

[10] John Hughes is also a correctional officer (CX-2) at the Atlantic Institution. He was working in the kitchen of the institution in the morning March 18, 1999. His role

in the kitchen is to act as security personnel to supervise the inmates as they assist the food service staff in preparing meals and in the clean up. The correctional officers are there to ensure that the inmates "don't get out of hand."

[11] The inmates who work in the kitchen, and in other areas of the institution, are screened and monitored by a selection committee which places the inmates in work locations that are compatible with the risks that they pose, plus an analysis based on the inmate's progress in the institution.

[12] In the kitchen, the employees are not armed. However, they do have a number of devices for their personal safety, in addition to the gallery officers and the closed circuit television cameras. For example, there are personal alarms, portable radios, and a couple of panic alarms that the officers can use to sound alarms.

[13] Around 10:10 a.m., Mr. Hughes telephoned the gallery post to verify who was still in the dining halls. He got no response on either of the gallery extensions. Mr. Hughes contacted aggregate control to determine why the gallery officers had not answered the telephone. He learned that the gallery officers had been removed from their posts because of the paint fumes. When he heard this news, Mr. Hughes called Mr. Hare and told him that without the gallery officers the working conditions in the kitchen were unsafe. He requested that he be relieved from his kitchen post.

[14] At 10:20 a.m., Mr. Hare arrived at the kitchen and gave Mr. Hughes a direct order to remain at his post. Mr. Hughes restated his concerns to Mr. Hare. Still, he complied with Mr. Hare's order. A few minutes after Mr. Hare left, Mr. Hughes took what he believed to be minimal security precautions. He collected all of the knives in the kitchen and secured them in the knife safe. At 10:40 a.m., the kitchen steward told Mr. Hughes that she needed the butcher knife. One inmate remained in the kitchen. Mr. Hughes had the inmate returned to his unit. After he ensured that the kitchen area was secure, he gave the knife to the kitchen steward.

[15] Around 10:45 a.m., John Harris, the unit manager, arrived in the kitchen. He gave Mr. Hughes a direct order to return all of the inmates to the kitchen. Mr. Hughes complied with that order. Because of the return of the inmates to the kitchen, Mr. Hughes invoked his right under (section 128) Part II of the *Code* and asked that he be removed from his post. He believed that he was being exposed to a risk that could

have been alleviated by other means. He then contacted Mr. Price for assistance in the matter.

[16] Mr. Hughes acknowledged that no inmate threatened him on the date, nor did he write up charges against an inmate. He believes that it was unsafe to work in the kitchen with inmates having access to knives, without someone in the gallery looking over him. He conceded also that there was no one in the gallery in the early part of the morning shift, at the same time as two to three inmates were assigned to do kitchen duties.

[17] At 11:45 a.m., Edward A. Jardine, a third correctional officer (CX-2), relieved Mr. Hughes from his kitchen post. Mr. Hughes briefed Mr. Jardine on the situation regarding the absence of officers from the gallery posts. Mr. Jardine also invoked his right of refusal under section 128 of the *Code*. Mr. Hare relieved him in the kitchen shortly afterwards. Mr. Hare told the inmates that they were to return to their cells.

[18] Mr. Jardine believes that it is very important to have officers in the gallery. Their presence was a safety net or backup when the officers in the kitchen need it.

[19] Luc Sarrazin, a safety officer with the office of Human Resources Development Canada, in Moncton, became involved in this case early on. Doug Robichaud telephoned him, and Simone Poirier, the acting deputy warden, confirmed by fax to Mr. Sarrazin that an employee refused to work (under section 128 of the *Code*). Mr. Sarrazin informed both of them on the procedure to follow in conducting their investigation. Mr. Sarrazin was again contacted at 11:30 a.m. by management because the employees were still refusing to work. He informed them that he would get to the institution as soon as possible and he advised the employer to secure MSD sheets on the paint.

[20] Mr. Sarrazin arrived at the institution around 1:30 p.m. He had asked Robert Reid, an industrial hygiene technologist, to assist him in the air quality assessment. On their arrival at the institution, they first met with all of the parties involved to get the information from them.

[21] Jacques Bossy, the supervisor of maintenance at the institution, described how a contractor had put five gallons of paint on the gallery floor overnight. The contractor had used an oil-based paint because a latex paint would not wear as well. In addition,

the contractor had added an epoxy hardener to the paint, to hasten its drying and curing process. The employer was able to secure a MSD sheet on the composition of the oil-based paint by 2:00 p.m. on March 18. However, no such data sheet was available for the epoxy compound that acted as the paint's hardener.

[22] Mr. Bossy related that he had tried to ventilate the gallery area by using fans, but his first attempt did not work well. Another method with open windows, was then used that enabled the air to vent out.

[23] The paint vapors were not very strong when Mr. Sarrazin and Mr. Reid visited the gallery around 4:00 p.m. He asked Mr. Kavanagh and Mr. MacDonald if the air was representative of when they refused to work, at 11:30 a.m. They said that it was not. It appeared that the air had dispersed, and the two employees agreed to go back to work in the gallery. Mr. Sarrazin did not have to make a decision on whether any danger was present at that time.

[24] The employer's version of events on the painting of the gallery, as recorded in Mr. Sarrazin's report, is as follows:

> *The employer agreed that the smell of fumes was present at the worksite, however it felt that the level contained in the air was not posing a risk to any employee, as the workplace had been vented.*

[25] Again, as noted in Mr. Sarrazin's report, regarding the manning of the gallery post, the employer had the following views:

> *The employer acknowledged that the gallery was not manned. He also acknowledged that kitchen staff was not notified of the removal of correctional officers for the gallery. It was management's position that the manning of these posts is not mandatory for the operation of the institution. It is with the warden's discretion to man these posts or not. However, the supervisor on site did not identify these posts as a priority. What is meant by that is; during the debriefing in the morning, no special attention was assigned for the kitchen post. In addition, the employees had not requested the gallery officers to remain at the kitchen post for any particular reason. It is within the normal duties of gallery officers to patrol various areas/posts within the gallery and they are not required to remain at any one post.*

[26] In his report, Mr. Sarrazin noted that the paint vapour had dissipated. Mr. Kavanagh had agreed to go back to work. He issued his decision under subsection 129(2) of the *Code*, which is as follows:

> *129. (2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not*
>
> *(a) the use or operation of the machine or thing in respect of which investigation was made constitutes a danger to any employee, or*
>
> *(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),*
>
> *and he shall forthwith notify the employer and the employee of his decision.*

[27] Regarding the refusal by Mr. Kavanagh, Mr. Sarrazin concluded that:

> *As the employees who were asked to work in the gallery post have agreed to return to their duties/post and the MSDS information was provided, we are not required to make a decision of danger or no danger.*

[28] On the refusal of Messrs. Hughes and Jardine to work in the kitchen, Mr. Sarrazin found, in part, the following:

> *Section 128 of the CLC Part II deals with the situation of danger. At the time of this refusal, the employee confirmed that at no time did any inmate threaten or present a danger to the employee.*
>
> *Here it is important to note that CX officers have been trained to handle inmates at close proximity and have been informed of resources available to them to report to the employer any conditions which might cause threat to safety or security. At the time of the refusal no such report was issued by any employee.*

[29] Messrs. Kavanagh, Jardine and Hughes each requested that Mr. Sarrazin, in his role as the safety officer, refer his decision to the Board for review pursuant to subsection 129(5) of the *Code* and subsection 11(1.1) of the *Financial Administration Act*. Subsection 129(5) is as follows:

> *129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not*

> *entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board*

[30] The following are other relevant provisions of the *Code*.

> *122. (1) In this Part,*
>
> *"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected*
>
> *124. Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.*
>
> *125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,*
>
> *…*
>
> *(p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place;*
>
> *(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee;*
>
> *…*
>
> *(s) ensure that each employee is made aware of every known or foreseeable safety or health hazard in the area where that employee works;*
>
> *…*
>
> *(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.*
>
> *125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to such exceptions as may be prescribed, every*

employer shall, in respect of every place controlled by the employer,

…

(e) subject to the Hazardous Materials Information Review Act, *make available, in the manner prescribed, to each of his employees a material safety data sheet, with respect to each controlled product in the work place, that discloses the following information, namely,*

(i) where the controlled product is a pure substance, the chemical identity of the controlled product and, where the controlled product is not a pure substance, the chemical identity of any ingredient thereof that is a controlled product and the concentration of that ingredient,

(ii) where the controlled product contains an ingredient that is included in the Ingredient Disclosure List and the ingredient is in a concentration that is equal to or greater than the concentration specified in the Ingredient Disclosure List for that ingredient, the chemical identity and concentration of that ingredient,

(iii) the chemical identity of any ingredient thereof that the employer believes on a reasonable grounds may be harmful to an employee and the concentration of that ingredient,

(iv) the chemical identity of an ingredient thereof the toxicological properties of which are not known to the employer and the concentration of that ingredient, and

(v) such other information with respect to the controlled product as may be prescribed.

128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

> *(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where*
>
> *(a) the refusal puts the life, health or safety of another person directly in danger; or*
>
> *(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment.*
>
> *130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*
>
> *(a) confirm the decision; or*
>
> *(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145 (2).*

Argument on behalf of the Applicants

[31] While the paint odour was not strong when Mr. Sarrazin and Mr. Reid walked through the gallery at 4:00 p.m., it was evident that the fumes had dispersed. Yet, according to the evidence of Mr. Kavanagh, the fumes were very strong when he arrived at work. The employer effectively concedes that indeed there were strong fumes. While there were self-contained breathing apparatus available, Mr. Kavanagh had had no training in their use.

[32] Besides, no MSD sheet was available for the paint when the right to refuse was first invoked. The employer's first response was that it did not have the MSD sheet available. The MSD sheet for the paint arrived after Mr. Kavanagh had refused to return to the gallery, but no such data sheet became available at all for the epoxy. Because the employer and employees did not know what the vapors were, the employees were within their rights to refuse to work. Under the *Code* any employee has a right to know the contents of the product. The employer failed in its duty under section 125.1 to have the MSD sheet available.

[33] The circumstances that led to the work refusals were real. It was not a staffing matter. Indeed, Mr. Kavanagh was exposed to unknown fumes. His supervisors verified that he was being exposed to strong oil paint with an epoxy.

[34] The events that led up to the removal of the gallery officers lead to concerns in the kitchen regarding "the eyes of their back up".

[35] The bargaining agent understands that the Board is reluctant to get into staffing issues. However, labour boards in general are having a new look at the whole situation.

[36] Correctional officers are trained to look out for one another. Mr. Hughes and Mr. Jardine were assuming unnecessary risks when they found that no officers were present in the gallery. To have officers posted in the kitchen with no officers in the gallery creates an unnecessary risk for the officers in the kitchen.

[37] The representative of the applicants referred to ***Czmola and Rodier*** and ***Thomsen*** (see below). When the employer removes one safeguard that the workers depend upon, it creates an unnecessary risk for the officers. There is no evidence that the employer has someone to constantly watch the monitors at the institution.

[38] Within the correctional setting there is some level of risk. At the Atlantic Institution, there are inmates in the kitchen between 6:30 a.m. and 7:30 a.m., without gallery officers at their post. However, in the early morning there is a minimal number of inmates in the kitchen as compared to the period after 8:00 a.m. when there are six or more inmates in the kitchen. It is the position of the applicants that the level of activity on the day and evening shifts increases with the number of inmates in the kitchen and other areas. The removal of the gallery officers compromised the health and safety of the officers in the kitchen and put them in an unsafe environment without their knowledge. Their health and safety should not take second place to fiscal concerns.

[39] The applicants assert that removing "the eyes of their backup" jeopardized their health and safety. They believe that with the presence of officers in the gallery someone is always watching over them.

[40] The representative of the applicants referred to ***Figures*** (see below). In ***Figures***, the institution's exercise yard had an increase in the number of inmates who used the

yard from ten to twenty. The officer supervising the inmates considered it unsafe for him to deal with so many inmates considering response times and the number of officers that were available.

[41] In the instant case, when he became aware that no officers were in the gallery, Mr. Hughes took steps to minimize the risk. He felt that he and other kitchen staff were at risk if no one was looking over them. He retrieved knives and placed inmates back in their cells. The employer countermanded his action and ordered the inmates back to the kitchen. There was no change in institutional activities, although no officers were in the gallery.

[42] In the case of Mr. Hughes and Mr. Jardine, once the officer in the gallery was removed, it was not a normal or an inherent condition of employment. In the workshops, which are also under the surveillance of the gallery officers, there is a different mindset and concern. The tools used in the other shops do not have the potential of knives. A knife is a much more dangerous instrument. Mr. Hughes and Mr. Jardine were just taking precautions.

[43] Under section 130 of the *Code,* the applicants ask that the Board issue a direction: (1) to have the gallery staffed with two officers during the day shift and two officers during the evening shift – this has been the usual practice at the institution –; (2) to order that staff be trained in S.C.B.A.; and, (3) in the event of exposure to paint (or other hazardous substances) MSD sheets be provided to all employees as required by section 125.1.

[44] Mr. Bannister referred to the following cases:

(1) ***Ontario Public Service Employees' Union Local 608 and Figures et al. and Ministry of the Solicitor General and Correctional Services***, [1997] O.O.H.S.A.D. No. 97 (Q.L.)

(2) ***Czmola and Rodier*** (Board files 165-2-201 and 202)

(3) ***Ontario Public Service Employees' Union and Thomsen and Ministry of Labour and Ministry of the Solicitor General and Correctional Services***, [1997] O.O.H.S.A.D. No. 2 (Q.L.)

Argument on Behalf of the Employer

[45] According to the issues raised by the bargaining agent, they are dealing with this case as a staffing issue. They want the gallery to be staffed by two correctional officers. However, that issue is not part of the Board's jurisdiction under Part II of the *Code*.

[46] Mr. Kavanagh does not agree with the decision of Mr. Sarrazin. He acknowledges that the odour was not there later in the day when Mr. Sarrazin was investigating. Any danger to him had ended by then. However, he decided to make a referral to the Board because he felt that the employer had violated the *Code.*

[47] Nevertheless, the real issue of the applicants in this case is that of staffing. Even the referral of Mr. Kavanagh is linked to the staffing of the gallery.

[48] At the Atlantic Institution, there are cameras in place to monitor activities. The camera monitors in the gallery can be switched to, and monitored by the central control office. In addition, the employees can use other devices. Moreover, there are always other employees on the main level who are available to intervene.

[49] The employer does acknowledge that not all procedures were followed with regard to the use of the oil paint. People may suffer problems because of the concentrations of fumes from the paint.

[50] With respect to the situation of Mr. Hughes and Mr. Jardine, counsel noted that the ***Czmola and Rodier*** case, supra, is in judicial review in the Federal Court on the Board's jurisdiction to address staffing issues under Part II of the *Code*. Staffing issues are not within the mandate of the Board under Part II of the *Code*. In ***Czmola and Rodier***, it was held that a correctional officer should be free from unnecessary risks. In the instant case, there were other elements available to help prevent risks.

[51] Furthermore, it is impossible to have constant surveillance of all employees in a correctional setting. In the ***Thomsen*** case, supra, it was acknowledged that is impossible to have somebody to watch from every angle. Cameras can be switched on and watched from other areas in the institution, but it was not the employer's role to bring evidence in that regard in this case.

[52] The major distinction in ***Thomsen*** is that there was a possibility to switch the camera monitoring from one place to another. In that case, there had been a study and extensive evidence regarding that situation. That did not occur in this instance.

[53] The ***Figures*** case, supra, was decided under the Ontario *Occupational Health and Safety Act*, which has different remedies than those in the *Code*. That case dealt with a staffing requirement.

[54] In this case, there is no staffing requirement for the posting of the gallery. The evidence demonstrates what is the "usual" staffing for the post. There is no minimal or mandatory staffing requirement at the institution. It is at the discretion of the warden.

[55] The applicants argue that the following remedies should be ordered: (1) minimal staffing in the gallery; (2) S.C.B.A. training; and (3) MSD sheets be provided to the employees. The applicants want an order for minimal staffing. Yet, it is not within the jurisdiction of the Board to make such an order. However, the employer would respect a decision pertaining to training in S.C.B.A. because not all procedures were followed.

[56] At the time that Mr. Sarrazin made his decision, the findings were valid. It was especially so when Mr. Kavanagh accepted to go back to work. Regarding the absence of a MSD sheet for the paint, the risk was for a limited period. The employer did what it could to limit problems in view of the security aspect of the problem.

[57] The Board is to place itself in the shoes of the safety officer at the time of the investigation. At the time of the investigation for Mr. Kavanagh, there was no danger. Mr. Kavanagh is the key element in this case.

[58] In ***Bonfa***, see below, it was held that the danger must be real and actual. The question for the safety officer is whether the danger existed at the time of his investigation (at page 371). (See also ***Bugden***, Board file 165-2-55.)

[59] Similarly, ***Stephenson***, see below, concluded that the danger must be imminent.

[60] Counsel argues that the danger, therefore, should be assessed not as possible danger, rather, it must be a probable danger.

[61] As to the issue of monitoring in the institution, counsel referred to a number of cases. In ***Mahoney*** (Board file 165-2-123, at pages 22 to 23), it was acknowledged that blind spots existed everywhere in the institution.

[62] Therefore, it is impossible to eliminate all risks in the institution. It is the employer's position that it has made all reasonable efforts to minimize the risk within the institution by using the technological apparatus.

[63] Paragraph 128(2)(b) of the *Code* creates an obligation not to refuse to work when the risk is an inherent part of the employee's position. In both ***Holigroski*** (Board file 165-2-30) and ***Evans*** (Board file 165-2-87) it was determined that there is an inherent risk associated with employment in penal institutions. That was also the determination in ***Stephenson***, see below, and in ***Mahoney***, supra. In ***Beggs*** (Board files 165-2-40 to 53), the Board found that many possible weapons can be created or obtained by inmates. This possibility, however, is part of the inherent assumption of risk of working in a penitentiary.

[64] The employer recognizes that it has a duty to protect the public and to rehabilitate the inmates. The screening process shows the employer has taken measures to limit risk for correctional officers as much as possible in the circumstances.

[65] With regard to staffing, the Board should not intervene with the employer's decision (see ***Evans***, supra, and ***Holigroski***, supra).

[66] With the camera technology in place, the employer has respected its duty under the *Code* to limit danger to the employees.

[67] Mr. Sarrazin clearly demonstrated that no danger to Mr. Kavanagh existed at the time of the investigation. Some procedures were not followed, but that is not an issue for the Board. According to Mr. Sarrazin, at the time of his investigation, the substances had dissipated and were no longer dangerous. Therefore, the Board should not interfere in that determination.

[68] In any event, what the applicants want here amounts to a staffing issue.

[69] Mr. Hughes may not feel safe in the kitchen. That does not make it a dangerous place. He was concerned with the knives.

[70] It is not possible to see the person in a booth on the gallery. This is confirmed by the fact that Mr. Hughes was not able to determine if a person was there or not until he telephoned.

[71] A question to be answered is whether the employer is obligated to staff every window in the gallery at all times. The employer says that there are the risks in the institution that are inherent to the institutional setting itself.

[72] The test applied by Mr. Sarrazin indicates that he would have felt some danger. However, he concluded that there was no danger for Mr. Jardine. The existence of danger is not the same as the perception of danger. At the time that Mr. Hughes refused to work there was a limited number of inmates in the kitchen.

[73] If the Board were to decide that Mr. Sarrazin's reasoning was wrong; the review now must be at the moment of Mr. Sarrazin's assessment. It is the employer's position that staffing should not be addressed to the Board as security issues.

[74] The Board must (1) respect the decision of Mr. Sarrazin; his analysis is a good, clear decision. (2) Staffing issues should not be addressed through security referrals before the Board.

[75] Counsel for the employer referred to the following cases:

(1) ***Attorney General of Canada and Bonfa et al.***, F.C.A. (1989), 73 D.L.R. (4th) 364

(2) ***Stephenson*** (Board file 165-2-83)

Rebuttal on behalf of the Applicants

[76] Monetary matters should not compromise the inherent risk of working as a correctional officer. In ***Bugden***, supra, "danger" was assessed in terms of being "real" and actual". That is a narrow interpretation. If a narrow interpretation is taken, we have to go back to imminent danger.

[77] It is the applicants' position that the interpretation of "danger" is wider - it is a reasonable cause in the mind of the individual. In this instance, a refusal by one employee increased the danger for other individuals in the kitchen.

Reply by the Employer

[78] Counsel for the employer argues that with "danger" assessed in the fashion that the applicants want, it would be impossible to manage the work place.

Conclusion and Reasons for the Decision

[79] On March 18, 1999, five employees of the Atlantic Institution invoked their right under Part II of the *Code* to refuse to work.

[80] Three of those employees requested that the Board review the decision of Mr. Sarrazin, in his role as the safety officer who investigated the incidents.

[81] I must determine whether in all of the circumstances, Mr. Sarrazin's finding that no danger existed is valid: ***Collard v. VIA Rail Canada Inc.*** (1993), 92 di 49 (C.L.R.B.). In deciding whether to confirm or reject a decision of Mr. Sarrazin, I must reach my conclusions by placing myself in the shoes of Mr. Sarrazin at the time that he conducted his investigation: ***Bugden***, supra. It is not for me to decide whether or not the employee was justified in refusing to work, but to investigate the problems that were identified by the employee and to assess whether the potential for danger, or the risk of injury, was so acute that corrective measures needed to be taken before the employee could safely perform his or her work duties: ***Montani v. Canadian National Railway Company*** (1994), 95 di 157 (C.L.R.B.).

[82] I will review the situation of each of the applicants to determine whether they had bona fide reasons for refusing to work. Mr. Kavanagh arrived at work for the day shift on the morning after the gallery had been painted. The odor was very strong. Mr. Kavanagh did not know what he was being exposed to in the gallery. He inquired, but no information was available. He refused to return to the gallery until such time that he was informed of the paint contents. At the outset no MSD sheet was available for the paint used on the gallery. Therefore, Mr. Kavanagh invoked his right under Part II of the *Code* and he refused to work. His supervisor told him that air packs were available for the employees working in the gallery. However, Mr. Kavanagh replied that he was not trained in the use of this apparatus. He did not return to the gallery.

[83] After the gallery officers refused to work, Mr. Hughes called the gallery post, but there was no response. Mr. Hughes inquired into the situation and he learned that no one was posted in the gallery. Because no one was manning the gallery, Mr. Hughes became concerned for his safety and the safety of the other employees in the kitchen.

He was ordered to remain at his post. He did so. However, he took what he believed to be necessary safety precautions. He locked the knives in the knife safe. When the food services officer requested a butcher knife, Mr. Hughes returned the last inmate to his cell. When his manager ordered the inmates back to the kitchen, Mr. Hughes invoked his right to refuse to work under Part II of the *Code*.

[84] When Mr. Jardine arrived later to relieve Mr. Hughes, Mr. Hughes briefed him on the situation. Mr. Jardine also believed that the absence of correctional officers in the gallery resulted in an unsafe environment for him. He also invoked his right of refusal under Part II of the *Code*.

[85] It is clear that a situation existed at the time of Mr. Kavanagh's arrival at the institution that resulted in his being unable to work. There was a strong smell from the paint that was used on the gallery. The area was not properly ventilated at this time. Furthermore, no MSD sheet was available to inform employees of the paint contents. There were self-contained air packs available for use of the gallery officers, but Mr. Kavanagh was not trained to use them. Given this evidence, it is clear that Mr. Kavanagh was justified in refusing to work in the gallery on March 18, 1999.

[86] However, it is not for me to judge whether Mr. Kavanagh was right in his refusal to work. My role is to determine whether or not at the time of Mr. Sarrazin's investigation a dangerous situation existed which had to be corrected before the employee could return to work (paragraphs 129(2) and 130(1) of the *Code*). In this case, by the time Mr. Sarrazin had the opportunity to investigate the conditions in the gallery the fumes had dissipated. Mr. Kavanagh agreed to return to work in the gallery at that time in the late afternoon. Mr. Sarrazin was, therefore, correct in his finding that no danger existed in the gallery at that time.

[87] However, it is clear that most of the problems of March 18, 1999, were the fault of the employer. They persisted even when Mr. Kavanagh went back to work. The gallery had been painted with a strong smelling oil-based paint, combined with an epoxy hardener. Apart from the fact that the area was not properly ventilated and Mr. Kavanagh was not trained in the use of the self-contained breathing apparatus, there still remained the issue that the employer had failed to make available a MSD sheet of what the employees were being exposed to. While the employer was able to produce the MSD sheet for the paint, no such sheet was yet available for the epoxy when Mr. Sarrazin came to his conclusion. It is not as if the painting of the gallery was

an unplanned occurrence. The employer knew well in advance what materials were going to be used. It had an obligation to secure the MSD sheets to make them available to the affected employees in anticipation of the event.

[88] For all of these reasons, the employer failed to act in accordance with its duty under sections 124 and 125.1.

[89] Therefore, I order that the employer ensure that "material safety data sheets" be available to employees for hazardous substances within the institution. In line with the concession of counsel for the employer, I also order that the employer engage in a systematic process to train the correctional officers in the use of the self-contained breathing apparatus. Under section 125(q) and 125(v) the employer has the obligation to provide training in such apparatus. It is almost axiomatic that it matters not what safety apparatus is available, if the employees have no training in its use, the apparatus would have no value at all.

[90] The cases of Mr. Hughes and Mr. Jardine demonstrate different security issues. While I can take judicial notice that most inmates are potentially dangerous, there is no evidence that the officers had reason to feel that the inmates in the kitchen on March 18 posed a greater threat to them than they did on previous occasions. Although these inmates were in the kitchen and had access to knives, that was a normal condition of employment for any person working in the kitchen.

[91] Mr. Hughes and Mr. Jardine say that the absence of the gallery officers increased the danger to which they were exposed. They were not being monitored from the gallery. They rely on the gallery officers to be their "extra eyes".

[92] Yet, numerous other areas of the institution rely on surveillance by the gallery officers. The officers are not in the gallery solely for the protection of employees in the kitchen. Therefore, the conditions as they existed on March 18, 1999, were normal conditions or risks inherent in the work of the officers.

[93] In ***Figures***, supra, the Adjudicator held that:

> *It is also clear that despite the requests of the refusing officers, no changes were made to the level of institutional activities to reflect the anticipated drop in staff when the medical escort went out. That being the case, I have no difficulty finding that working below the red line – be that red line seven, eight, or nine, with no alteration to the level of*

> *activities conducted within or by the institution to reflect the drop below the red line, is neither inherent in the work or correctional officers nor a normal condition of their employment.*

[94] The employer argued that the manning of the gallery posts is at the discretion of the warden. Mr. Sarrazin confirmed that (unlike ***Figures***, supra) the staffing in the gallery is not part of the minimum staffing requirements for the institution. Nevertheless, the gallery is ordinarily manned.

[95] The question becomes whether the manning of the gallery post is essential for the normal operation of the institution? Certainly, correctional officers assume the risks inherent in the institution as part of their profession. However, using the ***Czmola and Rodier*** case, supra, the union says that they should not be required to assume unnecessary risks. Perhaps not. However, the criteria to define even the concept unnecessary risks must be seen from the viewpoint of the reasonable person in the circumstances. It cannot become particularized to the individual employee. Rather, it has to be related to the standards of the institution.

[96] In ***Czmola and Rodier***, the particular circumstances of the officer in that case meant that he was out of sight of any other employee, and alone without alarms or radios to get assistance. In the case of Mr. Hughes and Mr. Jardine, other employees were present in the kitchen who could raise an alarm. The officers carry personal alarms, or they can trip the stationary alarms.

[97] Given these points, I cannot agree with the submission of Mr. Hughes and Mr. Jardine that the decision of Mr. Sarrazin was wrong. I hereby confirm the decision taken by Mr. Sarrazin on April 12, 1999, regarding Mr. Hughes and Mr. Jardine.

[98] I summarize my conclusions as follows:

(1) I order that the employer ensure that “material safety data sheets” be available to employees for hazardous substances within the institution.

(2) In line with the concession of counsel for the employer, I also order that the employer engage in a systematic process to train the correctional officers in the use of the self-contained breathing apparatus.

(3) I hereby confirm the decision taken by Mr. Sarrazin on April 12, 1999, regarding Mr. Hughes and Mr. Jardine that no danger existed at the time of their refusal to work.

Donald MacLean,
Board Member

MONCTON, January 21, 2000.