Date: 20000920

File: 165-2-209 to 216

Citation: 2000 PSSRB 86

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

Ken Fletcher, Claude J. Gallant, Fred W. Johnson, L.P. Leblanc, Philippe Leclerc, James A. MacLeod, Steven J. Richard and J.R. Hebert,

Applicants

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

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

Before: Anne E. Bertrand, Board Member

For the Applicants: Gary Bannister, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Moncton, New Brunswick
March 1st and 2nd, 2000

DECISION

INTRODUCTION

[1] A total of eight matters were referred to this Board following the reports by two safety officers in seven cases emanating from the Dorchester Maximum Security Penitentiary and in the one case which arose at the Atlantic Institution in Renous. The Safety Officers in all eight reports found an absence of danger at the time of the investigation. Safety officer Sarrazin was not present at the hearing for the matter in File No. 165-2-216, and a motion was granted to adjourn those proceedings sine die until he could be summoned to attend to adduce viva voce evidence on his report, and also pending the outcome of the Board's findings in the other matters.

[2] The matters heard by this Board were those investigated by safety officer Pierre St-Arnauld involving seven correctional officers at the Dorchester Penitentiary who individually attended work early on the morning of November 22, 1999 to find themselves working with only one other correctional officer on duty in their Unit, ie. only two officers per Unit. Reduction in staffing referred to as "minimum staffing" formed the basis of the complaint and refusal to work; however, none of the employees left their post on the day in question. The investigations by the safety officer were carried out over the next three days and by then, three officers staffed the units in question. At the hearing, the bargaining agent raised the issue of unsafe and dangerous work conditions brought about by minimum staffing policies which this Board has the power to direct be corrected.

[3] On the same day of the refusals to work, staff members who had been on training returned to the Institution in support of their colleagues to protest the dangerous situation brought on by minimum staffing. At the hearing, the employer argued that the invoked right to refuse to work, while not arguing with the right of invoking the provisions at the time, ought not to be used in this inquiry to promote on-going disputes between the bargaining agent and the employer regarding minimum staffing policies, which has been found in the jurisprudence to be an improper use of such provisions. Further, the employer submitted that the Board's power to act in these matters was strictly confined to the correctness of the safety officer's report.

FACTS

[4] At this hearing, the Board heard evidence from the safety officer, Pierre St-Arnauld, and from two of the applicants, Claude Gallant and Stephen Richard, correctional officers in Units 2 and 4 respectively, who were able to speak of their own situation and of their fellow workers given the similarities in all seven cases. Evidence was also led for the employer by Deputy Warden of the Dorchester Penitentiary, Vivian MacDonald.

[5] Safety officer St-Arnauld is an experienced investigating officer with nine years experience, which includes investigations in four Penitentiaries. The investigations he conducted in the present matters were launched on the same day his office received notification, ie. the next day on November 23, 1999. He arrived at the Dorchester Penitentiary at 1:30 pm, and met with the appropriate officials. As the applicants' shifts were ending, he opted to continue his investigations the next day.

[6] Essentially, the safety officer was apprised of the seven applicants' "technical" refusal to work based upon the same concern: that of minimum staffing. Minimum staffing, he learnt from the employer's representatives, is a reduction in staffing such that a Unit is only staffed with two correctional officers. This reduction in staffing occurs as a result of absence at work caused by sick leave, other leave, and mandatory training. The employer implements this practice from time to time as part of a "risk management plan". The safety officer was shown a copy of the roster for the staffing of the Units which he candidly admitted to having understood as being not too complicated. He did remark, however, on not having been shown the risk management plan, and on not having been told how often it is implemented.

[7] The visits to the different Units were conducted on November 24th and 25th. The safety officer obtained the necessary information by speaking with all of the applicants, and with the employer, and with other employees within these Units. When the visits were carried out, he noted that there were more than two people on staff in all of the four Units. The safety officer also noted the presence of support staff, such as clerical staff and parole officers.

[8] Given that the refusal to work was based on the staffing of only two correctional officers, however, and given that he was required to make a determination as of the time of the conduct of his investigation, he found no evidence of danger as there were more than two staff present at such time. The safety officer, however, noted that he had not found safe working procedures on what the staff ought to do when working as a team of two, three or four correctional officers, and this was of concern to him.

[9] He asked for a copy of such procedures and when none was submitted, the safety officer found this constituted a violation of paragraph 125(q) of the *Code*. The safety officer has the power to conduct a "parallel" investigation of the work place when called to assess a refusal to work. If such a parallel investigation reveals violations of the *Code*, the safety officer can issue an Assurance of Voluntary Compliance (AVC) to inform the employer of said violations, although it is not the task of the safety officer to tell the employer how to correct those violations.

[10] The officer testified that such AVCs are to be considered quite distinct from "directions" which can be issued by him under subsection 145(2) as a result of his investigation for a situation of danger under section 129. Violations of the *Code* do not automatically raise the presumption of danger, and violations do not come under the definition of "danger" under section 122.

[11] The safety officer also testified that he is aware of the nature of the work conducted by correctional officers and that work entails an inherent danger. He understands that these employees can be taken hostage, that they can be attacked. Some inmates are mentally unstable, which makes the situations quite difficult to deal with and so on. However, during his visits to the units he did not perceive any threat to himself, nor any danger, nor any direct danger to anyone around him including the correctional officers. There were no riots, no ongoing disputes or assaults or potential problems within the inmate cell area. Consequently, there was nothing which could cause immediate harm to anyone and therefore his report showed an absence of danger as the conclusion to his investigation of the matter.

[12] The safety officer made specific reference to the fact that he could not comment on whether or not there were only two correctional officers on staff on November 22, 1999 because that is not part of his job. According to him, he is required to look at the situation on the actual date on which the investigation is conducted, i.e. the time of his investigation is the critical time factor.

[13] Some of the violations which were revealed during the parallel investigation included an expired elevator inspection sticker, malfunctioning personal protection alarms, and so on, but the safety officer reiterated that these violations where not directly related to his investigation. When the question was put to him that, if there were areas in the institution where the radios and personal protection alarms were not working, would the effect of minimum manning create a dangerous situation, again the safety officer replied that his duty was to inform the employer of violations but not to tell how the violations ought to be corrected.

[14] The evidence led in these cases attests to the facts that there were no incidents on the day of the work refusal, on November 22, 1999, and none which pointed to an immediate danger. There were no cases of inmates' upheaval, nor of problems within the inmates' cells. There were no facts led either which would lead us to believe that a problem was brewing within the Units due to lingering arguments between inmates, for instance, nor a general discontentment within the prison population which could erupt, nor riots nor hostage taking.

[15] The applicants, however, asserted that having only two correctional officers on staff in the Units presented a situation where, if an event did arise, such as a problem within the inmates' cells requiring a correctional officer to respond immediately, one could reasonably believe the safety of the officer to be threatened, especially if such officer had to attend the cells alone. The normal procedure requires two officers to attend. Further, if both officers left the control post of the Unit to attend to the cells together, they would in effect leave the control area unmanned before help could be brought in to assist, which in itself would place the safety of those officers and any person at risk until the condition was corrected.

[16] When the applicant Claude Gallant invoked a refusal to work on November 22, 1999, he verily believed that the reduction in staff in his Unit 2 placed him at risk of harm by virtue of having only two correctional officers on the Unit. He explained that at any given time, any officer could be called to respond to a call regarding an incident within their range, such as in the case of an assault; to decide to respond to the call alone to deal with possibly a difficult inmate, leaving only one other officer on the range, is simply too dangerous to face. Even deciding not to go at all leaving others from other Units to respond to the incident would not be acceptable because of the time delay for others to respond. There were no directives to advise employees what to do in such instances.

[17] Mr. Gallant has been with the Dorchester Penitentiary for 15 years. In his Unit, a full roster is five correctional officers (the normal roster being three and there can be two substitutes in addition) and minimal manning can bring the number of staff to as low as two officers. There were 80 inmates in 75 cells in that Unit at that time. When he attended for his shift on November 22, 1999, he and only one other officer were present for work. Their employer believes that minimal manning for that Unit can be two officers, but Gallant believes that the minimum should be three officers, given the surroundings and composition of Unit 2, ie., the number of inmates, that the inmates are of multi-level security, and that there are two floors of cells blocks to cover in their range.

[18] As for the other Units 3 & 4, correctional officer Stephen Richard who works in Unit 4 testified to the same apprehensions for his safety. Units 3 & 4 are housed in a separate building away from the main building and there can be up to 128 inmates per Unit. Those Units are equipped differently in that all cells, locks, and doors are electronically controlled from a computer panel in the control office. According to Mr. Richard, one officer must be at the computer panel at all times for security reasons, though he admitted these were verbal instructions only. That officer is instructed not to leave his post. Further, there are two ranges with corridors and stairwell areas partly not visible on security cameras. On November 22, 1999, Mr. Richard showed up for work to find that he was working with only one other

officer. If either had to respond to a call and one could not leave the computer panel, one officer would have to respond to a call alone presenting a situation perceived to be too dangerous. A normal complement of staff in Unit 4 is four officers. Again, as in the other Units, there were no guidelines nor written instructions on what these officers should do in cases where there were only two or three officers.

[19] Messrs. Gallant, Richard, and their fellow officers had never invoked the work refusal provisions of the *Canada Labour Code* before and only learnt of the procedure after November 22, 1999. They felt strongly about the situation in their workplace as presenting a dangerous condition, a hazard to their work, knowing that there are inherent dangers in their work, but also believing that the reduction of staff to two officers on the range substantially increased the risk to their safety, an increase in risk which was not part of their normal work and which they felt to be dangerous. These officers never left their post on November 22, 1999 as they felt they could not leave the area unmanned for obvious reasons.

[20] The Deputy Warden, Vivian MacDonald, testified at the hearing that minimal staffing has been implemented for some time and has been proven to be safe. She has been with the Correctional Service for some 22 years, and at the Dorchester Penitentiary since 1992, and as one of four Deputy Wardens, she is in charge of the Operations Divisions - Security at the Penitentiary. Ms. MacDonald spoke of the medium security penitentiary as one focused on proper security, but where the movement within the perimeter of the institution is more relaxed given the classification of inmates at different levels. There are no armed posts within the interior of the perimeter, only on the perimeter itself. The general inmate population is between 360 -395 housed in four living Units. Units 1 & 2 are in the main building and Units 3 & 4 are in a separate building a few hundred feet away. Each Unit has three posts which require a correctional officer CXII per post; therefore three officers are required per Unit. Management had determined that the Units could be safely staffed with a minimum of two officers. Each Unit has a Unit Manager and a Unit Supervisor who are on the Unit 75 percent of the time. In addition, Ms. MacDonald indicated that each Unit has parole officers, some of whom have correctional officer

experience, and these officers are in the Units 95% of the time. Ms. MacDonald also stated that there is no requirement to have an officer at the control office for the computer panel at all times as it is located behind a barrier. The officers are never far away from the control office in any event.

[21] Ms. MacDonald spoke of the incidents reports; there have been only 17 in the last six months. Since 1992, she has had to respond to only five incidents. The correctional officers need no special training to respond other than that of correctional officer training and anyone can respond. Nurses who are at Dorchester on a 24 hour basis are trained to respond, and parole officers can respond like any other person who would come to the aid of another in trouble. Incidents are a normal occurrence and happen regularly, but usually are of the contraband, self-mutilation or disciplinary types, not of the riot type.

[22] On November 22, 1999, Ms. MacDonald reported that there were 17 staff on vacation, sick leave, training or other leave, and that is why minimal staffing occurred that day, not because management wished it so, but rather because there were no other staff to fill in the posts. Units 1, 3 & 4 had minimal staffing, and Unit 2 was not on minimal staffing. Minimal staffing had occurred before this date and has been used in other correctional institutions in the country.

[23] Ms. MacDonald reported that the shift commenced on that day at 7:00 a.m. as usual. There were no communications from the applicants. At around 9:30 am, seven officers who were on mandatory training reported to the Warden's office to "*lend support to their brothers and sisters who were in need*", but nothing had been said by the officer on duty in the Units that there was a problem. The seven officers were ordered to return to training and refused. It was only around 12:45 p.m. that Ms. MacDonald was made aware that the applicants were going to invoke the refusal to work provisions of the *Canada Labour Code*. She had no previous experience with this procedure. She immediately deployed four correctional officers supervisors to the Units to respond to the allegations of unsafe condition and until she could find out what was the matter. The refusal to work was formally invoked two days later.

[24] The Warden agreed not to minimally staff the Units until the matter could be resolved. The parties met through their joint health and safety committee but could not reach agreement. There were no incidents that day. When the Warden received the AVC from the safety officer, there were a lot of discussions with and input from the bargaining agent.

[25] Since this matter arose, management has determined that Units 3 & 4 will no longer have minimal staffing; therefore there always will be three officers posted. The reason for this was due to the configuration of those Units, the fact that they are in a building away from the main building, and that there are more inmates in those Units. Minimal staffing has continued to be applied to Units 1 and 2 for reasons that the configuration of those Units permit one officer to remain by the panel and oversee the officer doing cell counts and so on. Also, the response time for those Units is quicker given its location.

POSITION OF THE APPLICANTS

[26] Mr. Bannister alleged that the correctional officers are made to work in unsafe conditions due to minimum staffing which supposedly emanates from a "Risk Management Plan" which no one has seen, including the Warden. Without proper guidelines on the safety requirement of staffing in certain units within the Penitentiary, it is impossible for an investigating safety officer to make a determination that danger can exist if staffing is reduced to a certain minimum or below such number. In effect, Mr. Bannister argued that it remains impossible for an investigation to find the existence of "danger" by virtue of the fact that the date and time upon which the danger is believed to exist (thereby invoking a refusal to work) and the date and time upon which the safety officer conducts his/her investigation give the employer sufficient time to add extra staff thereby removing the element of danger.

[27] While Mr. Bannister recognized that the right to invoke a refusal to work must not be just to promote on-going disputes with the employer and that the Board has been reluctant to interfere in such matters, he cited cases in which tribunals found that they had the power to interfere and did so by reversing the safety officer's finding

of no danger only to proceed to order the development of safety protocols: **Re Ontario Public Service Employee's Union, Local 608 [1997] O.O.H.S.A.D.No. 97 (Ont. Ministry of Labour Adjudication); Re Ontario Public Service Employee's Union, Local 608 [1997] O.O.H.S.A.D.No. 2 (Ont. Ministry of Labour Adjudication).**

[28] Mr. Bannister found that the Ontario cases cited above raised similar issues under the provincial *Occupational Health and Safety Act* and that a reading of the relevant sections of that *Act* in matters of danger in the work place closely resemble those under Part II of the *Code* such as in the present case.

[29] To advance his argument further, Mr. Bannister referred to a recent decision of this Board in a case involving correctional officers' open range walks at the Stony Mountain Penitentiary, a medium security institution near Winnipeg in **Re Rodier and Czmola (1998, Board files 165-2-201 and 165-2-202).** The open range walks could present "dangerous" situations when the officers used the staircase inside the barrier where their movements were not captured by the security monitors. Vice-Chairperson Chodos found that this case was such that the Board ought to act, and by citing paragraph 130(1)(b) of the *Code* as the Board's authority to act, the Board directed that management advise the correctional staff to employ the staircase located outside the barrier when carrying out open range walks. An application by the employer for judicial review of this decision was dismissed by the Federal Court of Appeal (Court file A-738-98).

[30] Lastly, Mr. Bannister cited the case of **Montani v. the Canadian National Railway (1994) 95 di 197 (Can. L.R.B.),** in which the Canada Labour Relations Board (CLRB) assessed its role in matters of reviewing safety officers' decisions of danger to employees in the work place. The Board in that case decided that it too must assess whether there existed a danger to the employee at the time by reviewing whether the safety officer's role in the investigation and determination of whether danger existed for employee Montani were done properly. Having said so, the CLRB did go on to state that even in findings of no danger such as in the case of Mr. Montani, "valid concerns raised by employees ought not to be compromised" and "the parties have duties and

obligations to take all reasonable and necessary precautions to ensure the safety and health of the employees".

[31] Mr. Bannister urged the Board in the present case to find that the non existence of formal written procedures, apart from the Post Orders and the AVC, poses dangerous situations to these correctional officers and therefore, the Board can act by issuing an Order reversing the safety officer's findings, or alternatively, by confirming the safety officer's report and still issuing a directive to the employer to take measures to deal with the minimum staffing issue.

POSITION OF THE EMPLOYER

[32] Mr. Newman began his presentation by dealing with the issue of the Board's jurisdiction in matters of refusal to work based on perceived conditions which constitute danger in the work place. Section 128 of the *Code* provides for an employee to invoke a refusal to work where danger is believed to exist and, if the matter cannot be resolved at the work place, a safety officer is summoned to investigate the matter as per section 129 of the *Code.* Mr. Newman explained that under subsection 129(4), the safety officer has the power to order such direction as considered appropriate if he determines that danger exists, and the employee is entitled to continue to refuse until the direction is complied with.

[33] On the other hand, where the safety officer decides that there is no danger, the employee cannot continue to refuse to work but may require the safety officer to refer the matter to this Board, where the Board obtains its jurisdiction under section 130.

[34] It is the view of the representative of the employer therefore that the Board procures its jurisdiction only within the confines of section 130, which provides that either the Board confirms the decision of the safety officer - or - otherwise, that it give direction considered appropriate which the safety officer ought to have given under section 145. The latter provision stipulates that the safety officer can issue direction only in situations where the safety officer considers danger to exist for an employee. Consequently, Mr. Newman argued that, if the safety officer did not find the presence

of danger, and his findings are confirmed, this Board has no jurisdiction to issue a direction to the employer.

[35] In order to do so, Mr. Newman is of the view that the Board would have to find the existence of danger in the first instance and that is at the date and time when the safety officer conducted his investigation. The Board's role as per section 130 is to review the decision of the safety officer, not to substitute its opinion for that of the safety officer. Mr. Newman states that the *Code* has granted broad powers and duties to safety officers which ought not to be usurped by this Board. In his words, the Board is not a "surrogate safety officer".

[36] The purpose of the investigation was for the safety officer to determine whether it was safe for the employee to return to work not whether the refusal was proper.

[37] Mr. Newman went on to distinguish the Ontario occupational health and safety cases cited by the representative of the applicants in several ways: that those cases presented situations in which staffing was found to be below minimum staffing policies which was not so in the case before me; further, that the provincial legislation does not mirror the federal provisions of the *Canada Labour Code*; that those cases found the employees working below "red line" did not of itself constitute danger; and that the particular facts of those cases are not the same as the one before this Board.

[38] Even at the time of the employees' refusal to work, Mr. Newman reminded this Board that management had determined that it could operate effectively in such a fashion. This has changed today, but the issue of minimum staffing was not in question at the date of the investigation.

[39] In support of the employer's position, Mr. Newman made reference to cases in which Part II of the *Code* has been used in an attempt to deal with the issue of minimum staffing, and such attempts have failed for reasons that tribunals will not allow the legislation to resolve on-going disputes between labour and management. The **Montani** case referred to is a case on point, in that the CLRB wrote of the requirement that danger "in fact" must exist in order for there to be action taken.

Other cases found in the *Annotated Canada Labour Code* by R. Snyder reinforce this point, such as in **Bugden v. Treasury Board (August 31, 1998) Board file 165-2-55** wherein the Board reached its conclusions by placing itself in the shoes of the safety officer at the time of the investigation. The Board came to a similar conclusion in **Mahoney v. Treasury Board (May 4, 1998) Board file 165-2-35, Evans v. Treasury Board (July 29, 1991) Board file 165-2-87.**

[40] In the Stevenson et al v. Treasury Board (April 2, 1991) Board file 165-2-83 and Holigroski v. Treasury Board (February 12, 1988) Board file 165-2-30 cases, the issue of minimum staffing was explored and was found not always to represent a danger to employees mainly due to the fact that inherent danger is part of the work of correctional officers. In Kavanagh et al v. Treasury Board (January 21, 2000) Board files 165-2-205 to 207, a case involving the Atlantic Institution in Renous, New Brunswick, the Board held that there was no danger of fumes in the gallery at the time when the safety officer conducted his investigation.

ISSUE

[41] Ought the investigation reports of safety officer St-Arnauld signifying that there existed no danger in the work place for the applicants at the time of his investigation be confirmed by this Board ?

DECISION

[42] This Board recognizes the importance in establishing the boundaries of its jurisdiction before it can embark on a determination of the issues at hand. In order to do so, a review of the governing legislation and the state of the law in Canada on such legislation is undertaken.

[43] At this hearing, no one in this matter has questioned the applicant employees' rights in invoking the refusal to work provisions of section 128 of the *Code* on November 22, 1999. In fact, it was also recognized that they had not left their post notwithstanding their right to do so. Consequently, a "technical" refusal to work did

take place by these correctional officers, causing the Dorchester Penitentiary to conduct its investigation into the matter, which then led to the safety officer's investigation of the matter, in accordance with the provisions cited below:

> *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.*
>
> *128. (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.*
>
> ...
>
> *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.*
>
> *129. (2) A safety officer, 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 the investigation was made constitutes a danger to any employee, or*
>
> *(b) a condition exits 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.*
>
> ...

> *129. (4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing or to work in that place until the direction is complied with or until it is varied or rescinded under this Part.*
>
> *129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.*

[44] This Board's jurisdiction in hearing the referrals of these reports is borne out of section 130 of the *Code*:

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

[45] Particular attention is made of the words "*inquire into the circumstances of the decision and the reasons therefor*" for they impute onto the Board a role of an inquirer, an inquirer into the evidence and reasons with which the safety officer came to his or her decision. In effect, it is a review of the safety officer's decision, and thus, a

determination of whether the decision is supported by the evidence and whether the reasons for such decision are valid and reasonable in the circumstances of the case.

[46] To review the safety officer's decisions in these seven cases, we must first determine the scope of his investigation. Subsection 129(1) refers to the safety officer's investigation of *"the matter"* (in the French version, "*la question*"), and paragraph 129(2)(b)[1] requires the safety officer to make a decision on whether "*a condition exits in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1).* The key words are "condition" and "in respect of which the investigation was made", again directing the safety officer to focus his decision on a determination of "the matter".

[47] To further help us interpret this paragraph, we examine the French version which states as follows:

> *129. (2) Au terme de l'enquête, l'agent de sécurité décide s'il y a danger ou non, selon le cas:*
> *a) pour quelque employé d'utiliser ou de faire fonctionner la machine ou la chose en question;*
> *b) pour l'employé visé au paragraphe (1) de travailler dans le lieu en cause.*

[48] A literal translation of the French version reveals that the safety officer must decide if there is danger where the employee works, *au terme de l'enquête,* ie., according to the terms of the investigation. Again, the decision which must be reached is the answer to the question , the issue first put to the investigator, ie. the matter or "*la question*".

[49] In summary, we thus interpret these provisions to signify that a safety officer must first determine the matter to be investigated, and then, upon having obtained the necessary facts in respect of the matter, the safety officer must pose and then answer the question giving rise to the matter and give reasons. For instance, in a case where a worker refuses to work inside an airport hangar because of exhaust fumes due to poor ventilation, the matter is air quality in the airport hangar, and the question giving rise

to the matter becomes whether or not there exist exhaust fumes in the airport hangar such that such fumes constitute a danger to the employees or others.

[50] In each of the present seven cases, the matter was minimal staffing at the Dorchester Penitentiary, and the question to be answered by the safety officer was whether or not minimal staffing in each particular Unit (ie. the reduction in staff) within the Dorchester penitentiary constituted a danger to the correctional officer or others.

[51] Having said this, what is to be the temporal factor within which such question must be answered? Counsel for the employer submitted that the scope of the investigation must be restricted to the actual time the investigation is conducted, citing the existing jurisprudence in support of such contention, such as the decision in **Kavanagh**, supra. The legislative provisions under which the safety officer conducts his investigation is however silent on the temporal factor, except that it is clear the investigation must be conducted without delay (for obvious reasons in matters of danger).

[52] We therefore examine the decision in **Kavanagh et al v. Treasury Board**, supra. In that case, a correctional officer at the Atlantic Institution in Renous refused to work early in the morning due to the presence of fumes of unknown origin (later found out to be paint vapors) in the gallery where he worked. The Board stated that the safety officer was correct in his finding that no danger existed in the gallery "at that time", which time the Board referred to as the time at which the investigating officer arrived on the scene and visited the gallery. That time, however, was around 4:00 p.m. of that same day, when the fumes in the gallery had largely dissipated. The Board made it clear that its function was to determine whether the safety officer's decision was the correct one, and one which had to have been made "at the time of his investigation", citing various cases such as **Montani**, supra, and others. The Board confirmed the report of the investigating officer (yet still went on to order that the employer provide

[1] Paragraph 129(2)(a) not being applicable to the present case.

material safety data sheets for hazardous substances within the Institution and engage in a process to train their officers for use of breathing apparatus).

[53] Does the **Montani** case state that the temporal factor must be the time of the investigation as opposed to the time of the refusal to work? This Board has carefully read the decision in **Montani** in search of this query. In that case, Mr. Montani refused to work when he realized that he would be working as a locomotive engineer on a new line with a crew that was inexperienced and unfamiliar with that territory, which he believed posed a danger to himself and to others, including the public. Upon his investigation, the safety officer came to the conclusion that there existed no facts in support of Mr. Montani's alleged dangerous conditions, "*either at the time of the refusal or at the time of the Safety Officer's investigation*" (at page 6 of the decision, emphasis added).

[54] The Board in the **Montani** case went on to lay the framework of its decision, ie. the source and boundaries of its jurisdiction, to which we will refer later. Having reviewed the state of the law for investigations of dangerous situations in the work place, the Board then expressed the role played by the safety officer Armstrong in the following words at pages 10 and 11:

> *In arriving at his decision, Mr. Armstrong gave consideration to the immediacy of the alleged dangerous condition perceived by locomotive engineer Montani; to the fact that the danger must be actual and evident and that it must be present at the time the employee refused and at the time of the Safety Officer's investigation. The safety officer's role is not to determine the provisions of the collective agreement or the operating rules but to investigate and determine whether danger within the meaning of the Code existed.*
>
> (emphasis added)

[55] It is particularly important to note in the preceding passage, the Board's recognition and apparent approval of the safety officer having canvassed the entire situation, ie. not only of the fumes present at the time of his investigation but also the fumes which were present at the time that the employee had refused to work.

[56] Furthermore, there is no provision in the relevant sections of Part II of the *Code* which dictates that the safety officer must make his findings on the issue of danger at the time of his investigation, unlike the argument advanced by learned counsel. The definition of 'danger' in section 122 of the *Code* makes no mention of a time frame, and the pivotal section which speaks of danger, that of section 128, also makes no mention of a time frame. In fact, section 128 speaks of a condition that constitutes danger "which exists", but that reference is to the time at which the employee refuses to work.

[57] Besides, when the safety officer conducts his or her investigation, subsection 129(1) requires the safety officer to investigate "the matter" and subsection 129(2) requires the safety officer to decide whether or not a condition exists" that constitutes a danger to the employee. Again, no time frame, and the use of the words "the matter" seem to encompass the entire situation, ie. not just that presented to the safety officer upon his arrival but also the entire situation including that involving the reasons for which the employee refused to work in the first place, as argued above.

[58] I believe this interpretation gives proper meaning to the work of the investigating officer. Otherwise, the investigating officer could, as in the **Kavanagh** case, enter the workplace and find that because the fumes have dissipated, there is no danger at the time of the investigation, only for the whole process to begin once again if the fumes were present the next morning.

[59] Conversely, the **Bidulka v. Canada, [1987] 3 F.C. 630** of the Federal Court of Appeal is cited as authority that it is the time of the investigation which is the proper time to make this determination. In that case, the Court of Appeal was asked to review a decision of this Board confirming several decisions of safety officers having found no danger when meat inspectors were required to cross picket lines to enter the Gainers' Plant. Several refusals to work were invoked by the meat officers between June 6 and July 2, 1896. The peaceful strike picket line quickly degenerated into a very violent labour confrontation and the meat inspectors were afraid to cross the picket line for fear of being assaulted. At issue were the timing of the finding of "no danger", ie. at the time of the investigation, as well as the place of work, which was technically

outside the plant. The majority found that the task of the safety officer was clearly to determine whether at the time of the investigation, a condition exists that constitutes a danger to the employee. To explain, the Court then states:

> *The fact that there had been violence on the picket line a few days before the investigation was clearly not a condition that existed at the time of the investigation of the safety officers. It would, of course, have been relevant to the determination that they had to make if the situation had not changed since those eruptions of violence. But it was precisely because they judged that the situation prevailing at the time of their investigation was different from the one that had existed earlier that the safety officers decided as they did. Because of that change, one could not reasonably anticipate that the future would be a mere repetition of the past.*
>
> (at page 641)

[60] The Court's careful choice of words such as "the situation had changed" and the "situation prevailing at the time" envelops more than the time of the investigation in my view such as the entire circumstances of why there was an investigation in the first place. The choice of such words were probably intended to illustrate that there had been periods of times when the crossing of the picket lines were uneventful as opposed to times when it was not so. And, the several refusals to work were invoked over a period of time, between June 6 and July 2, times which included non violence. In fact, the evidence demonstrated that the violence directed at the meat inspectors from the picket line did not take place until June 17. Also, the fact that the refusal to work was outside the plant, and not in the "place of work" as the *Code* provides, weighed heavily into the decision to uphold the no danger decisions.

[61] The minority in the **Bidulka** case pointed this out carefully. The minority believed the Board ought to have reversed the safety officers' findings of no danger for refusals to work have taken place after June 17:

> *In the first week the meat inspectors were given safe conduct by the striking Union to cross the picket line. Thereafter the assurance of safe conduct was withdrawn, an event which triggered the first of the refusals by the meat inspectors to*

> *work at the Gainers plant. The safety officer, after an investigation and trial run, decided there was no danger to the meat inspectors. For a week thereafter, but for some taunting and name calling by picketers or strikers, there seems to have been no problem and no danger. But by June 17, when a violent incident occurred, arrangements had been made for the meat inspectors to assemble at a point some distance from the Gainers plant to be transported by van to the plant. The making of such arrangements indicates a recognition by their employer that it was hazardous for them to report on their own for work at the Gainers plant. The result of the arrangement, in my view, was to extend their place of work to include, as well as the Gainers plant, the assembly point and the route of the van from it to the Gainers plant. That involved the crossing of the picket line, an operation which, following the attack on the van on June 17, was accomplished with the aid of a police escort.*

[62] In the present case, the place of work is not in issue, but rather the time of the investigation. While the **Bidulka** case may be cited as authority for when the finding of danger or no danger must be made, this Board believes that it can be distinguished on its review as above. In fact, many decisions since **Bidulka** have been made recognizing that the time of the refusal is a crucial element to the safety officer's assessment. In the **Lavoie** case cited below, the Federal Court was of the view that both the time of the refusal and the time of the investigation were important. In addition, the **LeBlanc v. Via Rail Canada Inc. (1988), 75 di 156 (Can. L.R.B.)** case reported that the safety officer had to make a determination as to danger at the time of the work refusal.

[63] An appropriate investigation, in my view, would include an investigation into the cause for the perceived danger in first place, ie. the whole matter which necessarily includes the time at which the employee perceived the danger to be present. Such an interpretation is most likely what the legislator intended, and finds support in many other decisions: **Montani, supra; Atkinson v. VIA Rail Canada Inc. (1992), 89 di 76; Collard v. VIA Rail Canada Inc. (1993), 92 di 49; Lamoureux v. VIA Rail Canada Inc.(1993), 93 di 1** and **McSween v. British Columbia Maritime Employer's Assoc. (May 14, 1999), Decision No. 15 (C.I.R.B.).**

[64] Consequently, in each of the present seven cases, the question to be answered by the safety officer ought to have been whether or not minimal staffing in each particular Unit within the Dorchester penitentiary constituted a danger to the correctional officer or others at the time of the investigation and at the time of the refusal to work.

[65] Now, in order to review the correctness of the safety officer's decisions, we must ensure that such a review is conducted within the boundaries of its recognized jurisdiction, and again, we refer to the **Montani** decision for such analysis:

> *When the Board hears an application for review of a safety officer's decision under section 129(5), it is governed by section 130(1) of the Code which stipulates that the Board's jurisdiction is limited to reviewing the safety officer's report. There is no general power for the Board to go beyond this.*
>
> *When the Board receives a referral of a safety officer's decision, it must place itself in the shoes of the safety officer and enquire into the circumstances of the refusal and the safety officer's reasons for concluding that danger to the employee did not exist. As such, there is a requirement for the Board to analyze the safety issue which was the subject of the work refusal. The Board's role is not to determine whether the employee was right or wrong, but to investigate the problem that was 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 work duties. The Board must assess whether or not there existed a danger to Mr. Montani.*
>
> *The concept of danger is defined in section 122(1) of the Code as follows:*
>
> > *"122. "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 128(1) states:*

> *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."*

Section 128(2) states:

> *"(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."*

The Board has stated that Parliament did not intend to deal with danger in the broadest sense of the word. See David Pratt (1988) 73 di 218; and 1 CLRBR (2d) 310 (CLRB No. 86). Danger within the meaning of the Code must be perceived to be immediate and real. The risk to the employee(s) must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. Also, the danger must be one that Parliament intended to cover in Part II of the Code.

The right to refuse is an emergency measure. It is to be used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility of injury or potential for danger sufficient to invoke the work refusal provisions; there must in fact be danger. See Stephen Brailsford (1992), 87 di 98 (CLRB no. 921) and David Pratt, supra. Nor is the provision meant to be used to bring labour relations issues and disputes to a head. Where such refusals coincide with other

> *labour relations disputes, the Board will pay particular attention to the circumstances of the refusal. See Stephen Brailsford,supra), Ernest L. LaBarge, (1981), 47 di 18; and 82 CLLC 16, 151 (CLRB no. 357) and William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332).*

[66] As is evident from this quote, the **Montani** decision has recited the law in Canada at the time to illustrate the proper concept of danger to which alludes section 128. Danger must be "in fact danger", that it must exist as a probability, and that it cannot be a danger inherent to the work of the applicant.

[67] The concept of danger was further explored in the **Clavet v. VIA Rail** decision reported at **[1996] C.L.R.B.D. No. 7**, and in our opinion, it was expanded. In that case, Mr. Clavet, an electrician at VIA Rail refused to work with the shore power system at the Ottawa train station when he discovered that the system was not fail safe. The safety officer found that absence of danger as during his investigation, the shore power system's fuses had been corrected. The safety officer, however, noted that the ground fault protection mechanism of the electrical system was faulty and this was a problem. He issued a voluntary assurance of compliance which related directly to corrections of this problem. The Board found that the situation did constitute a danger for the purposes of the Code because a hidden defect affected a fundamental aspect of the ground fault protection mechanism of the electrical system, thereby rendering its use dangerous, which condition threatened the safety of the employee and exposed him to hazards not inherent to his work. Two factors seemed to have impressed the Board in that case: a) the fact that while the investigating officer made a finding of no-danger, he nevertheless recognized there existed a problem with the system which required correction; and b) the definition of "danger" in section 122 which referred to any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition could be corrected. By virtue of the nature of the hazard (the existence of a hidden defect) and that it could arise at any time, this condition could cause an accident before it could be corrected:

> *The existence of a hidden defect affecting a basic aspect of the system's protective mechanisms constituted, in our opinion, a "hazard or condition that could reasonably be expected to cause injury... to a person exposed thereto before the hazard or condition can be corrected," and hence, a danger within the meaning of the Code (section 122), because this hazard, given its nature, could arise at any time and this condition could cause an accident before it could be corrected. Employees required to work with this system could not anticipate the occurrence of such failures and could no longer rely on the protective mechanism to operate normally. In the circumstances, if it were acceptable to rely temporarily on the three red lights (the mechanism indicating that there was power), all persons affected having been informed of the danger and the need for strict observance once the existence of the hidden defect had been detected (as Mr. Auger had agreed to do on July 1, 1995 in order to complete the manoeuvre and shut down the system), such was not the case subsequently. In our opinion, as soon as the defect of the protective system for the 480 V power system had been detected, the electricians, carmen and anyone else should no longer have been exposed to it and hence required to continue using this system until the problem had been corrected.*
>
> *This dangerous situation existed at the time of the safety officer's second investigation on July 2, 1995; it is not contested that it was known at the time that a hidden defect was affecting the protective mechanism, making it unsuited to its intended purpose, i.e., to ensure the safe operation of the electrical system. The refusal to work was based on the fear that the protective system would not operate should a malfunction of the main system occur, and this fear was founded.*
>
> (At paragraphs 37 - 39)

[68] The Board in **Clavet** therefore went to state that while it was true that the situation involved a systems problem to the extent that the alleged danger stemmed from the employee's belief that he was not adequately protected while working on the shore power system, even if the rules governing use of the system were followed, there were serious reasons to believe that these rules would not necessarily protect the employees who had to use the system because it was not reliable since its internal protective mechanisms were defective. In those circumstances, the Board found that

Mr. Clavet's loss of confidence in the system was legitimate, and this condition presented a real and immediate danger.

[69] Therefore, as depicts the **Clavet** case, the meaning of "danger" as per Part II of the *Code* extends to a condition which can be reasonably believed to threaten the safety of an employee if such condition exposes that employee to hazards which are not inherent to the employee's work even in an industry known to have danger as part of its work. In other words, by virtue of the nature of the condition - the perceived danger - and that a hazard could arise at any time in that workplace which could cause an accident before the condition could be corrected, the condition can be reasonably believed to threaten the safety of the employee.

[70] As made obvious upon the reading of several decisions on refusal to work matters, the standard of judgment to be applied in rendering a decision on the assessment of whether there is danger is an objective one (as stated more definitely in **Brûlé et al. v. Canadian National Railway Company (February 18, 1999), Decision No. 2. (C.I.R.B.)).**

[71] To summarize then, this Board interprets the law as requiring a safety officer, in deciding whether an employee has correctly invoked section 128 of Part II of the *Canada Labour Code* for refusing to work in dangerous conditions to:

1. firstly, determine what is the matter to be investigated, and then, upon having obtained the necessary facts in respect of the matter, the safety officer must answer the question giving rise to the matter and give reasons;

2. secondly, in seeking to answer the question, the safety officer must make a positive finding of the following elements, on an objective standard, and at the time the refusal to work was invoked:

    a) the danger perceived must be immediate and real;

    b) the danger must be 'in fact danger', such that injury is likely to and probable that it will occur, not only a possibility that injury could occur,

    - or -

by virtue of the nature of the condition - the perceived danger - and that a hazard could arise at any time in that workplace which could cause an accident before the perceived danger could be corrected, the condition (perceived danger) can be reasonably believed to threaten the safety of the employee;

c) the risk to the employee must be serious to the point of need for measures of correction;

d) the danger cannot be a danger inherent in the work; and

e) the refusal to work must not coincide with other labour relations disputes.

[72] Consequently, in each of the present seven cases, the question giving rise to the matter to be answered by the safety officer was whether or not minimal staffing in the subject Units within the Dorchester penitentiary constituted a danger to the correctional officer or others. Moreover, in order to find that section 128 was properly invoked, the safety officer had to assess from an objective standard that a dangerous condition did exist in the particular Unit of the Dorchester Penitentiary on the particular date in question. Analysing this question through its elements, minimal staffing must have presented an immediate and real danger, a danger such that injury to the correctional officers was likely to and probably would occur, not only a possibility that injury could occur - or - that by virtue of the nature of the perceived danger, that minimal staffing within the Units where a situation within the Units could arise at any time which could cause an accident before the condition (minimal staffing) could be corrected, minimal staffing could be reasonably believed to threaten the safety of the correctional officers. Furthermore, that the risk to the correctional officers in question must have been serious to the point of need for measures of correction; and the danger complained of was not a danger inherent to the correctional officers' work. Finally, that the correctional officers' refusal to work did not coincide with other labour relations disputes. All of these elements which ought to be considered not only at the time of the investigation but also at the time of the refusal to work. When arriving at a decision, the safety officer should also give reasons.

[73] In the cases before this Board, the safety officer's reports suggested that no danger existed for the applicants at the work place. His reports indicate as follows:

Unit 1, Dorchester Penitentiary

F. W. Johnson, Complainant

- and -

Unit 2, Dorchester Penitentiary

James A. MacLeod and Claude J. Gallant, Complainants

> *When I visited Unit 2 on November 24, 1999, I noted that there was more that [sic] 2 persons on staff.*
>
> *I noted that inmates were for the majority either at work, attending workshop or busy doing other things away from the cell area (ranges).*
>
> *The inmates not attending programs were locked in their cell.*
>
> *I also noted that support staff were working in an area which is easily accessible to inmates.*
>
> *However, I did not find any safe working procedures whether the unit is staffed with 2, 3 or 4 persons.*

Unit 3, Dorchester Penitentiary

Ken Fletcher and Phillipe Leclerc, Complainants

- and -

Unit 4, Dorchester Penitentiary

Steven J. Richard, Complainant

> *"When I visited Unit 3 on November 25, 1999, I noted that there was more that* [sic] *2 persons on staff.*
>
> *I noted that inmates were for the majority either at work, attending workshop or busy doing other things away from the cell area (ranges).*
>
> *The inmates not attending programs were locked in their cell.*
>
> *I also noted that support staff were working in an area behind what appears to be a controlled access door.*

However, I did not find any safe working procedures whether the unit is staffed with 2, 3 or 4 persons."

Unit 4, Dorchester Penitentiary

L.P. LeBlanc, Complainant

"When I visited Unit 4 on November 25, 1999, I noted that there was more that [sic] *2 persons on staff.*

I noted that inmates were for the majority either at work, attending workshop or busy doing other things away from the cell area (ranges).

The inmates not attending programs were locked in their cell.

I also noted that support staff were working in an area which is easily accessible to inmates.

However, I did not find any safe working procedures whether the unit is staffed with 2, 3 or 4 persons."

[74] Under the heading "Decision" in his reports, the safety officer went on to state as follows:

I understand there are great deals of hazards working with inmates.
The fact is that when I investigated this refusal no one was directly in danger by a person(s) or a situation.
I consider that at the time of my investigation that there was absence of danger for the employee.

[75] As he reports, the safety officer noted that during his investigation there were more than two correctional officers on staff in all the Units, and as a result, there was absence of danger. As such, the safety officer did not find a element of danger given that the Units were staffed with more than two correctional officers. While the safety officer was aware that the matter entailed the issue of minimal staffing, his investigation did not encompass the question of whether the staffing of only two correctional officers in the Units would present a dangerous working condition for these employees such as the situation which took place on November 22, 1999.

[76] The investigation officer ought to have answered the question of whether or not minimal staffing in the particular Units within the Dorchester penitentiary constituted a danger to the correctional officer or others at the time of the investigation and at the time of the refusal to work on November 22, 1999. The investigation officer did answer the question in part, ie. that there was no danger at the time of the investigation, but then, there were more than two officers present at the time of the investigation two and three days after the refusal to work of November 22, 1999.

[77] As for the presence of danger at the time of the refusal to work, the safety officer did not make a direct finding on this question. He did, however, correctly note the absence of safe working procedures when the Units were staffed at a minimal level and he pursued this matter. He was told of the minimal staffing policy forming part of a 'risk management plan' but he was not presented a copy of this plan. He was also shown the staffing roster and how it was intended to staff the Units, but he admitted to not understanding how the complex roster worked. In any event, the safety officer's concerns on the lack of safe working procedures in all the Units remained unanswered.

[78] The safety officer testified that without such safe guidelines, the employees could not know what to do when the Units were staffed with two or three or four officers, ie. what precautions they ought to take when only two officers were present and so on. The safety officer had a problem with this situation and he led a parallel investigation for violations of the *Code* in this regard, as a result of which he issued an assurance of voluntary compliance to the employer.

[79] Had the safety officer directed himself to answer the question as to whether minimal staffing within the Units on the date of the work refusal constituted danger, what would he have reported? This Board has pondered this question and, as per its jurisdiction allowing it to do so, this Board makes the following determination, as the safety officer ought to have done in the circumstances. All of the five elements to the question which warrant consideration are dealt with separately below using an objective standard. Again we reiterate that these elements are necessary to satisfy the test of whether a dangerous condition existed at the time of the refusal to work to fulfill the requirements of section 128.

[80] First element - would minimal staffing in the Units have presented a danger perceived by the correctional officers to be immediate and real at the time of the refusal to work? This factor of having only two staff was certainly perceived as a danger and was quite real to the correctional officers involved. A reasonable person could view the situation of having only two officers present in a Unit where trouble might occur and where only one officer might have to attend to the inmates' cells alone as a real dangerous situation. The facts remain, however, that danger did not actually exist at the time of the refusal, it was not real nor immediate given the fact that no event occurred on the day in question. Moreover, the response time for Units 1 & 2 would have been appropriate for additional staff to attend those Units in the event of a call. This Board, however, is not disposed to think similarly for Units 3 & 4 which, by virtue of their location away from the main building, their interior configuration and the size of the inmate population, the presence of only two correctional officers could very well present a real and immediate dangerous condition.

[81] Second element - would minimal staffing in the Units have presented 'in fact danger', such that injury to the correctional officers was likely to and probably would occur, not only a possibility that injury could occur? - or - that by virtue of the nature of the workings within the prison Units, would a reduction in staff allow a situation to arise at any time which could cause an accident before more staff could be called in and that this condition could be reasonably believed to threaten the safety of the correctional officers? The evidence proves no incidents occurred on the day of the work refusal, and none which pointed to an immediate danger.

[82] This Board will agree with the applicants, however, that having only two correctional officers on staff could present a situation where if an event did arise, such as a problem within the inmates' cells requiring a correctional officer to attend immediately, one could reasonably believe the safety of the officer to be threatened, especially if such officer had to attend the cells alone in Units 3 & 4. The normal procedure requires two officers to attend. Further, if both officers left the control post of the Unit to attend to the cells together, they would in effect leave the control area

unmanned before help could be brought in to assist, which in itself would place the safety of those officers and any person at risk until the condition was corrected. There was also the matter of lack of directives advising employees on what to do in such instances. This Board recognizes that there would be other staff to respond to a call in the event of a problem, particularly for Units 1 & 2 located in the main building. Incidents requiring a response are a normal occurrence and happen regularly, and are thus inherent to the correctional officers' work, though admittedly, having only two officers on hand does make it that more problematic, but not necessarily dangerous.

[83] As for the perceived danger by the applicants, particular attention is given to the fact that minimal staffing had occurred without incident in the past, and while surely this practice was not sought out, it was sometimes inevitable due to lack of staff to fill the posts. When the applicants attended to their shift work in the early hours of November 22, 1999, they did not immediately invoke the refusal to work such as in the case of having been suddenly faced with a dangerous situation. Rather it is believed that these officers were of the honest belief that having only two officers on the range substantially increased the risk of their safety, and given that these employees had not been given guidelines nor written instructions on what they should do in cases where there were only two officers on staff, and probably given their level of frustration on wanting to have the issue of minimal staffing dealt with were the real reasons for their invoking the refusal to work.

[84] Moreover, the concerted attendance of seven officers at the Warden's office who were supposed to be on mandatory training to lend support to their fellow workers well before their colleagues invoked the refusal to work was suggestive of the furtherance of labour and management discussions of the issue of minimal staffing as opposed to a veridical invoking of the refusal to work provisions of the *Code.*

[85] Having said so, particular attention is drawn to the fact that after this affair took place, management determined that Units 3 & 4 would no longer have minimal staffing citing reasons such as the configuration of those Units, the fact that they are situated in a building away from the main building, and that there are more inmates in those Units. Minimal staffing has continued in Units 1 and 2. This evidence does give

credence to the arguments of the applicants that Units 3 & 4 did present a dangerous workplace when only two correctional officers filled the roster during the day shifts. That a reduction in staff in a correctional institute may present a dangerous working condition to employees is not new. Similar situations presented themselves in provincial cases in Ontario dealing with the reduction in staff for Sault Ste. Marie Jail, and in those cases, the tribunal found that due to the configuration of the circuit cameras, areas not visible for monitoring of staff, and delayed response time as of result of fewer staff increased the risk of incidents and thereby placed the health and safety of the employees to unnecessary risk, and consequently requiring management to implement changes in their staffing policies (see **Re Ontario Public Service Employee's Union, Local 608 [1997] O.O.H.S.A.D.No. 97 (Ont. Ministry of Labour Adjudication); Re Ontario Public Service Employee's Union, Local 608 [1997] O.O.H.S.A.D.No. 2 (Ont. Ministry of Labour Adjudication)**).

[86] Conversely, the Federal Court of Canada, Trial Division in the **Canada v. Lavoie (1998), 153 F.T.R. 297** case did not find that danger existed when one staff required to enter a cell alone. The Court reviewed the decision of a regional safety officer who had confirmed the finding of danger by a safety officer in an investigation at the Leclerc Correctional Institute in Laval Quebec. Due to discipline problems, two inmates were moved out of the general population cell blocks to the administrative segregation, but they were subsequently returned to the cell blocks due to lack of space in the administrative segregation. The correctional officer refused to serve them a meal in their open cell because he was alone, fearing that he would be placed in danger. The safety officer investigated the matter later in the day and found that there was "danger" if the correctional officer had to open the door of those two inmates without the presence of another co-worker without a sufficient assessment of those inmates' security profile and without adequate additional security provisions. The safety officer added that this danger was not inherent to the employee's work. The regional safety officer upheld the safety officer's decision that a danger existed at the time the worker refused to work. The Court recited the essence of the regional officer's decision at page 301 *et seq*:

"The facts that I find from the safety officer's investigation are:

- *that the administrative segregation cells in the regular cell block were different from those in detention since they were regular cells without windows for meal service, which required opening the doors to provide certain services to the two inmates and consequently being in physical contact with them;*

- *that inmates C and H were in 'deadlock' 23 hours out of 24, the same procedure as in detention, unlike the other inmates in the regular cell block who moved freely about the range;*

- *that a single correctional officer was to open the door to each of these two inmates, who were undergoing the same punitive regime as in detention, contrary to the security procedure in the detention area, under which the door of a detention cell should be opened only in the presence of two correctional officers;*

- *that although the security classification of the two inmates in question was maintained at medium, there was information missing from the files for these inmates that the case workers thought might affect their security classification and he [the safety officer] did not have this information in order to make an informed decision;*

- *that he thought the time spent by these two inmates in administrative segregation in the regular block was an extension of detention, which was not disputed by the employer, and that the same security rules should apply; and*

- *that the situation investigated by the safety officer was the same as during the refusal by Mr. Lavoie notwithstanding that the inmates were subsequently returned without incident to detention.*

"Based on the preceding, I [the regional officer] am of the opinion that the safety officer made the right decision in this matter given the circumstances. Accordingly, I am of the opinion that the directive was justified. The employer did not in fact adhere to its own detention procedures when inmates C and H were temporarily assigned to administrative segregation in a regular cell block. I am also

> *of the opinion that at the time of the investigation by the safety officer, there was no particular procedure for dealing with cases of detention in a regular cell block, and that this creates a situation that could result in injury to correctional officer Lavoie before it can be remedied, a danger that is not contemplated in my opinion by s. 128(2)(b) of the* ***Code.***
>
> *"Consequently, when inmates are temporarily placed in administrative segregation in the regular cell block, and until the Correctional Service of Canada has developed a special procedure for dealing with such cases, the detention procedure should still apply, bearing in mind any physical or other deficiencies that may exist. As the safety officer before me stated, if the doors of the two inmates were opened in the presence of two correctional officers, as should be done in detention, 'the refusal would not have been upheld'.*

[87] The regional officer's decision was submitted to judicial review on the basis that he had committed an error in law in his assessment of the true notion of "danger" under the *Canada Labour Code.* The Federal Court, after having referred to the **Canada v. Bonfa (1989), 113 N.R. 224 (Fed. C.A.)** decision in relation to the role of the safety officer, believed that the officers' single function was to focus on the existence of danger and not any particular procedures within the different cell blocks. The Court formulated the issue as such at paragraph 13 of its decision:

> *Consequently, the real issue in dispute is whether, on April 24, 1997, when the respondent was to serve the meals of inmates C and H, there existed such a danger that the respondent was justified in refusing to work.*

N.B. We note for reference in the present decision, that both the Federal Court and the safety officers determined whether danger existed at the time of the refusal as well as at the time of the investigation.

[88] The Federal Court in **Lavoie** perceived the matter to involve administrative policies on inmates' segregation, matter outside the realm of duties of a safety officer under Part II of the *Code.* The Court referred to two other cases involving penitentiaries: the **Stephenson** case (**Board File 165-2-83, April 2, 1991**) and the **Evans** case (**Board File 165-2-87, July 29, 1991**). After having reviewed the

Stephensen and the **Evans** cases, the Federal Court in **Lavoie** concluded in finding that the regional officer had simply "presumed" the existence of a danger given the employer's failure to apply procedure for inmates in administrative segregation, and had not looked at all of the evidence as to whether the danger was "actual and real". The matter was sent back to the safety officer for reconsideration.

[89] The **Stephensen** involved a correctional institute where, interestingly enough, the issue of minimal manning was addressed as a possible dangerous conditions for employees. This is how the Board in that case confirmed, tough with reservation, that there was no danger:

> *(...) There is no evidence before me to show that the number of correctional officers on duty, even though below minimum manning standards, was a condition that constituted a danger to the employees. From which it follows that the report of the safety officer is sustained.*
>
> *The problem here is of a different order. Let us begin with a hard fact. Since June 1987, this Board has heard a total of 27 applications under the health and safety provision of the **Canada Labour Code**. Of those 27 applications, 14 originated with employees of correctional institutions. There is a problem here and it is not being addressed.*
>
> *Mr. Benda has suggested that the **Code** was being abused for the purpose of pursuing labour relations objectives. Mr. Lawson denied this allegation and reiterated that health and safety concerns were foremost in the minds of the applicants when they exercised their rights under s. 128.*
>
> *Both Mr. Benda and Mr. Lawson are right. Given the nature of a correctional institution, there cannot realistically be a separation between questions of health and safety, on the one hand, and certain aspects of labour relations, on the other.*
>
> *The bottom line in this matter is that the **Canada Labour Code**, as it now stands, is an inappropriate means of dealing with health and safety concerns in correctional institutions.*
>
> *The root of the problem is that the danger, under the law, must be actual and real whereas, the realtiy in a correctional*

institution is that the source of the danger, the inmate, has intelligence and free will.

The law provides that an employee may not refuse to work until the danger has crystallized and is present in the work place. The reality is that until the moment that the inmate acts in a manner which endangers a correctional officer, there is not danger. The reality is, as well, that once an inmate has ceased to act in a manner which endangers a correctional officer, there is no longer a danger and, therefore, no right to refuse to work. This is true even if all of the conditions which led the inmate to act as he did continue unchanged.

Indeed, under the law as it now stands, a correctional officer who is endangered by the malicious conduct of an inmate could refuse to work only while the inmate is engaging in such conduct. Whether the inmate would, under such circumstances, be willing to recognize a correctional officer's right to withdraw is another matter.

Another matter, as well, is the question of whether services could be withdrawn even under the conditions described above. Faced with rampaging inmates, it might well be the case that a correctional officer would find his right to invoke s. 128(1) of the ***Code*** *barred by the provisions of s. 128(2)(a): 'the refusal puts the life, health or safety of another person directly in danger'.*

The reality is that under the law as it now stands, correctional officers are, except in the most unusual cases, effectively barred from exercising the right to refuse to work under s. 128 of the ***Code*** *where the source of the danger lies in misconduct on the part of inmates. Mr. Benda would argue that this is as it should be, that the* ***Code*** *was never intended to cover such risks and that threats arising from the conduct of inmates are a labour relations matter rather than a health and safety problem.*

It would appear that Mr. Benda has the law on his side. However, that does not alter the fact that there is a problem, that the problem is real enough to those who must live with it and that the law provides no remedy.

Under the circumstances, it is not surprising that what ought to be matters of health and safety end up being dealt with in a labour relations context.

> *Indeed, health and safety matters, as they relate to malicious conduct by inmates, have become so intertwined with labour relations matters that the two cannot be kept entirely apart even by the employer.*
>
> (As cited in the Court's decision at pp.312- 314)

[90] As directly alluded to by the tribunal in the quotation above, a particular difficulty in cases dealing with a reduction in staff in correctional institutes is the meshing of genuine safety concerns with equally genuine labour problems. It is recognized that Part II of the *Code* is not to be used to further labour matters, but it must for situations which present danger. As far as the safety officers were concerned in the **Stephensen** case, danger did exist.

[91] In the **Evans** case, this Board was asked to revisit the decision of a safety officer who found that danger did not exist on the date of the refusal nor on the date of the investigation by reason of having only two correctional officers on duty in the Kingston Penitentiary. These correctional officers had invoked the refusal to work and the Unit whithin which they worked was immediately placed under a "lockdown" resulting in all of the inmates being confined to their cells. This lockdown resulted in a finding of no danger by the safety officer; however, the safety officer nevertheless asked the employer to bring clarification to this problem through the Safety and Health Committee. Of particular importance to the case at bar, this Board in the Evans went on to state that the perception of minimal staffing creating potentially dangerous conditions for correctional officers was valid:

> *What is clearly demonstrated from the testimony of Mr. Tittley and Mr. Evans is that whether safety problems, if any, may be said to have existed in the Lower 'H' Block of Kingston Penitentiary on June 9, 1991, the remedy is not likely to be found in Part II of the* ***Code****. In Mr. Evans' view, the problem is related to the employer's minimum staffing policy. His testimony, quoted earlier in this decision, bears ample proof of his opinion that management created a safety problem by reducing the number of correctional officers assigned to the shift in question. Counsel for the employer has argued that this is related to the employer's staffing policies and is not a safety issue.*

> *It is a perplexing problem the solution to which, I suggest, does not lie in refusals to work or in referrals of decisions of safety officers to this Board. I agree with Board Member Kwavnick's comment in* ***Stephenson*** *cited above.*
>
> *Perhaps, Part II of the* ***Code*** *needs to be amended to exclude correctional institutions or to provide for some other process better suited to deal with the particular circumstances of such institutions. That is not a matter for this Board to decide."*
>
> (As cited from the Court's decision at pp. 316- 317)

[92] Clearly, in the **Evans** case, the safety officer directed himself to the time of the investigation only, ie. during the lockdown, to find that there was no danger, which finding the Board upheld. The same message, however, is made clear: both the safety officer and the Board were nevertheless concerned that minimal staffing could present potentially dangerous conditions.

[93] Having reviewed all of the foregoing, this Board is therefore of the view that Units 1 & 2 did not present a dangerous working conditions for those correctional officers when their Units were staffed with two correctional officers on November 22, 1999. I find, however, that such a dangerous condition did exist in Units 3 & 4 on November 22, 1999.

[94] Third element - would the risk to the correctional officers in question have been serious to the point of need for measures of correction? This question had been already answered in the above elements. While there was no finding of imminent danger by the safety officer and no officer left his post, the evidence is still that minimal staffing did not take place after the date of November 22, 1999 in any of the Units. All Units were staffed with more than two officers, especially during the investigation. The safety officer's noting of the lack of safe working procedures for staffing of Units when only two officers are present and his issuance of the AVC for deficiencies requiring the Warden to establish safe working procedures while unit posts are reduced in staff and so on can be viewed as corrective measures. This element was therefore present.

[95] Fourth element - would the danger complained of not be a danger inherent to the correctional officer's work? While this Board is certainly cognizant of the nature of a correctional officer's work and how it entails working in situations on a daily basis which can become dangerous, the matter of minimal staffing Units in a penitentiary with only two correctional officers at a time in Units 3 & 4 for reasons explained above cannot be considered a condition inherent to their work given that such condition presents a possibility that danger and thus injury could occur ought, particularly in light of the fact that employees were not apprized of safe working procedures in such instances. This element was present in Units 3 & 4 only.

[96] Finally, did the correctional officers' refusal to work coincide with other labour relations disputes at the time of their refusal to work? As in the **Brailsford, LaBarge** and **Lalonde** cases referred to in the **Montani** decision, the Board will pay particular attention to this factor in ensuring that the work refusal provisions are not used to resolve labour relation matters. As stated earlier, the applicants' refusal to work did coincide with an appearance by personnel at the offices of the Warden. These employees had left their training session to lend support to the plight of their colleagues, and the issue of minimum staffing could thus be said to be an on-going matter for discussion between the parties at the time of the work refusal. In addition, the wording of the work refusal form completed by the applicants recite the singular issue of minimum staffing as the cause of the alleged danger in their workplace. While this Board does not pass judgment on the invoking of the work refusal by the correctional officers in this case, the Board does note that the refusal was used in part to further discussions between the officers and their employer on the issue of minimum staffing within the Units. This element was present and as a consequence, it lessens the serious-mindedness of the applicants' stand in invoking the refusal to work for the perceived danger.

[97] Considering all of these elements together, this Board is of the view that while the safety officer's reports did not fully canvas the matter to be investigated, he nevertheless came to the correct conclusion that there was no danger in Units 1 & 2,

and his reports for those Units are confirmed with all of the comments in this decision.

[98] As for the safety officer's reports regarding the situation in Units 3 & 4, the Board of is of view that a dangerous condition did exist as a result of having only 2 correctional officers on staff on the shift of November 22, 1999, and the safety officer's reports relevant to those Units are rescinded and replaced with this Board's decision.

[99] Having found that a dangerous condition did exist in Units 3 & 4 on November 22, 1999, the Board's task pursuant to paragraph 130(1)(b) is now to give any direction considered appropriate as would have done a safety officer under subsection 145(2). Despite his findings of no-danger, safety officer St. Arnauld did request the employer to correct certain deficiencies as a result of his investigation by issuing an assurance of voluntary compliance on December 3, 1999. The employer has responded to this AVC and undertook to modify its minimal staffing policy for Units 3 & 4. The condition which existed at the time in Units 3 & 4 due to minimal staffing is no longer a problem given that management has made a decision to staff those Units with no fewer than three correctional officers from now on. The employer acted responsibly in the circumstances and the dangerous condition therefore is no longer.

[100] Given the entirety of the circumstances and the concerns of the applicants, the Board finds that the directions to be given in the present case correspond well to safety officer St-Arnauld's assurance of voluntary compliance of December 3, 1999 and the employer's responses and undertakings in that regard. The Board endorses the terms and conditions found in that assurance of voluntary compliance.

[101] On the basis of the foregoing, the Board confirms the reports of the safety officer that there was absence of danger on November 22, 1999 in the case of Fred Johnson in Unit 1, in the case of Claude Gallant in Unit 2, and in the case of James MacLeod in Unit 2. The Board rescinds the report of the investigation officer and finds that a dangerous condition did exist on November 22, 1999 in the case of Ken

Fletcher in Unit 3, in the case of Phillipe Leclerc in Unit 3, in the case of L.P. LeBlanc in Unit 4, and in the case of Stephen Richard in Unit 4.

ISSUED at Fredericton, New Brunswick, this 20th day of September, 2000.

ANNE E. BERTRAND
Board Member