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Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

WALT HOVEY AND JEFF GAYGER

Applicants

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

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

Before: Evelyne Henry, Deputy Chairperson

For the Applicants: Tina-Marie Bradford, Counsel

For the Employer: Richard Fader, Counsel

Heard at Vancouver, British Columbia,
January 29 to February 1, 2002.

[1] This is a request for the review of a Safety Officer's decision finding that pursuant to subsection 129(5) of the *Canada Labour Code* no danger existed.

[2] On February 25, 2000 Walt Hovey and Jeff Gayger invoked their right of refusal to work under subsection 128(1) of the *Canada Labour Code.* On March 3, 2000, Mr. Hovey requested a Board review of the decision of the Safety Officer on the following grounds:

> ...
>
> *At this time I am unable to specify reasons. I have been told three different versions of the decision and have received no written document at this time. I am informed that I should receive a written document by Tuesday the 7th of March.*
>
> *The basis for review at this time includes but is not limited to the following matters.*
> *1 - The originally stated reasons for invoking a Part II being the danger in taking the escort with two staff, restraints and gas.*
> *2 - Statements by Mr. Smith respecting firearms before the hearing started including the assumption that it was the original concern.*
> *3 - Discrepancies in three verbal versions of the decision.*
> *4 - All information was not completely reviewed with respect to the inmate involved.*

[3] On March 7, 2000 the Safety Officer issued the report which was forwarded to the Public Service Staff Relations Board on April 6, 2000. The report reads:

> *Report on Refusal to Work*
>
> *Section 128(1) of the Canada Labour Code*
>
> *Kent Prison, February 25, 2000*
>
> <u>Background</u>
>
> *On Friday, February 25, 2000 this office received notice that a refusal to work had occurred at the maximum security prison located at Kent, BC. It is this officers understanding that a similar situation had occurred 1 or 2 days earlier. I attended the workplace and arrived at 09:45.*

Details

Two guards, Msrs. Gayger and Hovey were requested to escort inmate B to Chilliwack General Hospital for an 11:30 appointment. They refused to do this task unless one guard was armed and stated the following 2 reasons to support their refusal.

1. The prior history of this inmate:
The two guards stated they felt an immediate risk was posed by this inmate due to his past history. Mr. B had escaped on 2 prior occasions (1987 and 1992). He further was on "suicide watch" for periods of time while incarcerated in the Kamloops Correctional Centre.

2. The size of Mr. B
Mr. B is a large man and has great physical strength.

These officers refused the work assigned believing in good faith that their safety would be in question to a greater extent than is normally present in their work.

Process

A meeting was convened in the boardroom with the following present:
J. Gayger
W. Hovey
M. O'Dell
F. Paolini
M. Hale
V.G. (Vince) Smith - HRDC Labour Program - Canada Safety Officer

Materials presented were reviewed and concerns of all were expressed.

Decision (*)

*After reviewing the information presented and the concerns expressed by the guards, Msrs. Gayger and Hovey, it was the decision of this safety officer that a **condition does not exist that constitutes a danger to these employees**. This is based on the following:*

1. Mr. B had been escorted off of prison property in the immediate past without incident.

2. Mr. B would be handcuffed and secured with leg irons. I can not see an incident in the hospital that would prevent him from being cuffed or in leg irons.

3. Although Mr. B had attempted to escape in the past, this was many years ago.

4. One of the guards had 18 years experience as a police officer and a guard.

This decision was given verbally on February 25, 2000 to all present and I informed them it would be at least a week before they would receive my report confirming my verbal decision.

** When I issued my decision, I also addressed the "threat risk assessment" for Mr. B and addressed the recommendation of a third guard being assigned. Upon my return to the office, I contacted the Warden and the Union representative and informed them both by way of telephone I erred in addressing the item of the number of guards assigned as this refusal concerned the arming of a guard, not the number of guards assigned.*

Conclusion

At the conclusion of my decision I informed all present that as per Section 128(5) of the Canada Labour Code, that either party had seven (7) days to request a review of my decision and such request must be in writing.

[4] This matter was scheduled for hearing and postponed several times for a variety of reasons including the unavailability of key witnesses, of counsel and changes in counsel and in the bargaining agent.

[5] At the onset of the hearing there was a request from the employer that the privacy of the inmate be protected in keeping with the *Corrections and Conditional Release Act* (CCRA) as well as the *Privacy Act.* The request was unopposed by counsel for the applicants who insisted that the documents be part of the record. The request was granted and the inmate will be identified as Inmate B in the decision.

[6] A book of nineteen documents was submitted, with consent, by the applicants as Exhibit A1. This book contains the following documents:

Tab 1	*November 1, 1992*	*Correctional Service Canada, Commissioner's Directive, Number 545, re Escorts*
Tab 2	*February 20, 1996*	*Correctional Service Canada, Commissioners Directive, Number 605, re Use of Force*

Tab 3	*undated*	*Correctional Service Canada, Commissioners Directive, Number 003, re Peace Officer Designations*
Tab 4	*undated*	*Excerpt from Security Manual, Part I re Security Escort*
Tab 5	*undated*	*Memo to Correctional Supervisors - Kent Institution from D. Knopf, Deputy Warden re Deployment of Firearms on Security Escorts*
Tab 6	*June 10, 1996*	*Standard Order 545-Escorts signed by Warden R.T. Lusk*
Tab 7	*undated*	*Document outlining "Action to be taken by the officers I/C escort of an inmate(s) escape or attempts to escape during an escort"*
Tab 8	*November 20, 1998*	*VIP Offender Profile of B*
Tab 9	*February 24, 2000*	*Escort Briefing - Security Escort Report signed by DS Dick re B*
Tab 10	*various dates*	*Description of Institutional Incidents re B*
Tab 11	*undated*	*Penitentiary Report re B*
Tab 12	*August 1999*	*Correctional Treatment Plan re B*
Tab 13	*undated*	*Security Classification Report re B*
Tab 14	*December 13, 1999*	*Security level evaluation re B*
Tab 15	*February 24, 2000*	*Memorandum from J. Farrel to Warden P. Urmson re Threat risk assessment for B*
Tab 16	*February 23, 2000*	*Kent Maximum Security Institution Escort Sheet*
Tab 17	*February 24, 2000*	*Report of Frank Paolini on invoking of Section 128(2) of Canada Labour Code Refusal to Work - Unarmed Escort on February 24, 2000*
Tab 18	*February 25, 2000*	*Report of Canada Safety Officer V.G. Smith on Refusal to Work, Section 128(1) of the Canada Labour Code, Kent Prison*
Tab 19	*March 3, 2000*	*Letter to the Labour Program, HRCC-*

Surrey from Walt Hovey re Reference: Part II sec 128 Canada Labour Code Kent Institution & staff W. Hovey and J. Gayger

[7] Mr. Vincent George Smith, the Safety Officer, was the first witness. Mr. Smith read and commented on his report. Mr. Smith confirmed that he had the documents in tabs 6-7-8-9-15-17 and parts of tab 12 of Exhibit A1. He had not seen tabs 2-3-4 and 14 and he was uncertain about tab 10 although he was provided with the same information but in a different format.

[8] Mr. Smith also introduced two documents which were also provided to him during his investigation. One of these documents entitled "Elements to be Considered During Assessment" became Exhibit E-1. It describes the criteria to be considered by those in authority when assessing whether a firearm should be carried during a security escort. Exhibit E-2 is the definition of the elements found in Exhibit E-1.

[9] Mr. Smith indicated that it was not defined to him whether the escort of February 25, 2000 was a security escort. He knew that the two correctional officers had to escort the inmate outside the Institution. He believed Mr. Hovey had the authority to carry firearms; Mr. Smith also knew that all guards were trained in the use of weapons and that they are considered an armed force within correctional institutions.

[10] Mr. Smith met with Mike O'Dell, Frank Paolini, Jeff Gayger, Walt Hovey and the Assistant Warden, Mr. Mike Dale in the morning of February 25, 2000. Mr. Smith was requested by the management representative to meet with the Warden if he wanted to hear the Warden's reasons for his decision. He did not. Mr. Smith later telephoned the Warden and apologized for an error in his report. Mr. Smith believes he had not "set sight" on the Warden. No one else other than those listed in his report was interviewed.

[11] Mr. Smith stated that the investigative process is used when a continued refusal to work exists. The Safety Officer is not involved in the preliminary steps taken by the employer. He comes in when the parties cannot agree. The process to be followed by a Safety Officer in conducting an investigation into a work refusal, depending on the location, is to look at the evidence presented, review the material and then issue an

oral decision. Mr. Smith told the parties that a written decision would follow in at least a week.

[12] Mr. Smith admitted discussing the addition of a third correctional officer. In tab 15 of Exhibit A1 there was a recommendation by the Correctional Supervisor that a third correctional officer be deployed. Mr. Smith did suggest that a decision could be made to add a "third guard".

[13] Mr. Smith is surprised that the issue of the third correctional officer is still alive because in his opinion the refusal was about arming the officers, not about a third officer.

[14] Mr. Smith stated that the only decision he gave was that he did not uphold the work refusal. He does not remember saying the employer should appoint the third correctional officer. That would have meant he upheld the refusal. All that he addressed was the arming of the guards.

[15] Mr. Smith may have said that, when someone in a management position is recommending a third correctional officer, why not follow it. Mr. Smith does not know who has the power to override such a recommendation.

[16] Mr. Smith had the report of Mr. Paolini (Exhibit A1, tab 17) regarding a similar work refusal the day before involving the applicants; Mr. Smith did not speak to the Chief of Health Care, nor to Unit Manager Romain, nor to CO II Sylvester.

[17] Mr. Paolini and Mr. Hovey agreed that a firearm should have been issued to the escorting officers. Mr. Smith does not recall Mr. O'Dell's opinion.

[18] In cross-examination Mr. Smith indicated that the investigation started at about 10:15 on February 25, 2000 and was completed probably prior to noon. He faxed his two-page report on March 7th at 15:47.

[19] Mr. Smith communicated his decision prior to leaving the meeting and the Institution. Mr. Smith believes that the escort in question did go on, carried out by two supervisory personnel, while he was in the meeting.

[20] Mr. Smith indicated that the basis for the work refusal was that the two correctional officers felt an immediate risk at escorting Inmate B because he had two

prior escapes, because of his history as well as the size of the man and his physical strength. Their concern was in relation to that escort of the 25th of February 2000.

[21] Mr. Smith at some point became concerned that the escort had taken place; he wanted to ensure that it wasn't by two other correctional officers. He learned that it was two supervisory personnel and he commented that the work refusal was over. Basically, when there is a continued refusal to work, the refusal ceases when either correction is made or alternate means of resolving the problem are taken. The condition no longer existed in the later part of the investigation when the inmate was taken to the hospital by others. This would not prohibit these employees from refusing to work again should this situation arise again. Issuing a report finalizes that situation but does not prohibit a future work refusal.

[22] Having found no danger, Mr. Smith saw no need to issue a directive under subsection 145(2) of the Code. Mr. Smith did not issue an Assurance of Voluntary Compliance (AVC).

[23] To the best of Mr. Smith's knowledge, Inmate B had gone on a previous escort one or two days before, escorted by two management representatives without incident.

[24] At this point in the hearing, counsel for the employer made a motion for dismissal stating that once the escort had gone out there was nothing left to decide. Counsel for the applicants objected. She wanted to lead evidence that the situation could arise at any time since Inmate B was still at Kent Institution and the applicants might be asked again to escort him to the hospital. I took the motion under advisement and indicated that the parties should address the question thoroughly in their arguments.

[25] Walt Hovey is a CO-II currently acting as a Correctional Supervisor, CO-III. He has worked at Kent Institution for 7 ½ years and 3 years at the B.C. Penitentiary from 1972 to 1974. He held the position of bylaw enforcement officer in various areas and worked for the Royal Canadian Mounted Police from 1966 to 1972.

[26] Kent Institution is a maximum security federal penitentiary with approximately 270 inmates.

[27] In February 2000 his duties of CO-II consisted of operating the D living unit with a partner and carrying a caseload of five or six inmates. In addition he was responsible

for the movement of the inmates and ensuring they received what they needed. His work involved direct contact with inmates. He could be called upon to escort inmates outside the Institution. Mr. Hovey has done so approximately a dozen times and he was in charge half the time. Mr. Hovey believes he has also performed escorts three times while formerly working at the B.C. Penitentiary.

[28] Mr. Hovey received training on escort duties on the job and at the Staff College. The responsibilities of the escorting officer are to retain possession of the inmate, prevent escapes, and protect the inmate and the public. These responsibilities flow primarily from the *Criminal Code of Canada* which requires him by law to keep the inmate safe and secure and to protect the public. There are also provisions for criminal liability; if he does not do his job well enough, he could be fined or jailed.

[29] Mr. Hovey referred to the *Corrections and Conditional Release Act*, the Commissioner's Directives and other policy documents that cover the responsibilities of correctional officers with regard to escort and the custody of inmates. Mr. Hovey reviewed tabs 1 to 6 of Exhibit A1 in this regard.

[30] When he first came in to work on February 24, 2000, Mr. Hovey was asked to take Inmate B to the Chilliwack Hospital for a doctor's appointment. He was not aware of the specifics of Inmate B's medical condition.

[31] Mr. Hovey had specific security concerns about this escort because of the general public being around the inmate and the possibility of being required to remove one or the other restraints on him. Because of this particular inmate's history, namely that he is known to react negatively to instructions, particularly to the word no, Mr. Hovey was worried he would not be able to control the inmate should he start acting out. The presence of material and tools normally present in a hospital made the situation even more dangerous. At Kent Institution there are 20 staff members available for assistance. On an escort with only two officers and the tools approved i.e. handcuffs, leg irons and pepper spray, Mr. Hovey did not feel he could make the escort without a firearm.

[32] Mr. Hovey indicated that there is a provision in the Security Manual for the issue of firearms in particular high risk escorts.

[33] Mr. Hovey indicated that prior to an escort there is a package of information provided to escorting officers concerning the inmate, including specific instructions, the number of security measures to be taken, and a risk assessment. On February 24, 2000 there was a risk assessment completed by Correctional Supervisor Yoland Todd.

[34] Tabs 8, 9 and 10 provide the detailed data and history pertaining to Inmate B. It shows that Inmate B was on a second sentence, that he has two escapes on his record and that he is a maximum security inmate. Mr. Hovey described Inmate B as a person of 240 to 250 pounds who can press a sizeable amount of weight. Inmate B is one of the three or four strongest inmates at Kent Institution. Inmate B is also unpredictable and prone to acting out.

[35] When Mr. Hovey was called in on February 24, 2000, he read the risk assessment, Inmate B's profile and asked if a weapon would be provided. When he was told it was not authorized, Mr. Hovey refused to take the escort and invoked the *Canada Labour Code*. An investigation was conducted by the Institution Safety Committee and a report was issued by Mr. Paolini, tab 17 of Exhibit A1.

[36] Mr. Hovey knew when he left on February 24, 2000 that the escort was rescheduled for the 25th. A second risk assessment was done by A/Correctional Officer J. Farrell and is found at tab 15 of Exhibit A1. The last paragraph read: "The use of a firearm in this case with the information available to this writer is not warranted. However due to the inmates' past behaviour and size it is this writers' view a third officer should be deployed at this escort."

[37] Mr. Hovey did not have a problem if a third staff member was provided depending on who the third member was. He would have considered it. On February 25, 2000, Inmate B would have known he was going out and this would have given him time to plan something if he communicated with the outside.

[38] After reading the paperwork, Mr. Hovey refused to do the escort on February 25th and invoked the *Canada Labour Code*. According to Mr. Hovey, the risk factors had not changed and the inmate had had time to contact others outside the institution and the inmate would be aware of a concern even if not necessarily aware of the steps taken on the 25th to address the concerns.

[39] Mr. Hovey had never refused escorts before and never invoked the *Canada Labour Code* before February 24, 2000. After his refusal, Human Resources Development Canada (HRDC) was contacted and a Safety Officer called a meeting with union and management safety personnel in a boardroom at Kent Institution. He spoke with Mr. Smith for half an hour or 45 minutes while they were waiting for Mr. Hale. Mr. Paolini, Mr. O'Dell, and Mr. Gayger were also there. Mr. Hovey believes the investigation started around 10:20 or 10:30 a.m., he cannot remember precisely.

[40] Basically, the material on the inmate was presented and an explanation of why the employees were concerned. Information on the inmate was reviewed but not quite as in depth as at this hearing. Mr. Hovey was asked specific questions about the history and his concerns. Mr. Gayger presented his views and support for these concerns.

[41] Mr. Hovey gathered that Mr. Smith felt he had enough information to make his decision. After he went through it, Mr. Smith gave a "verbal" decision that he supported the applicants' position and felt the recommendation of the supervisor for a third staff member should be followed.

[42] Mr. Hovey is not sure how, but there was a comment that the inmate should be back; that drew a comment from Mr. Smith who was upset that the inmate had gone out and back and Mr. Smith wasn't aware of it. Mr. Smith related he would complete the process. Mr. Hovey is not sure when this occurred; it was in the later part of the process somewhere around noon when the verbal decision was made. Mr. Smith told them they would receive the decision and indicated they had seven days to review it. Mr. Hovey was unsure whether it was seven days from the oral or written decision.

[43] Mr. Hovey indicated that the Safety Officer mentioned he was only dealing with the February 25th, 2000 work refusal.

[44] Regarding Mr. Smith's report that the refusal only dealt with the provision of a firearm, Mr. Hovey stated that his appeal was made on March 3rd, 2000; at that time he had not been provided with the written report. Mr. Hovey's refusal was based on the fact he could get neither the third officer nor the firearm.

[45] When Mr. Smith phoned about the issue of the three staff, Mr. Hovey's understanding was Mr. Smith would have been enlightened on it. It took a number of

communications to get the written decision and to know what they were dealing with. It was mentioned that, because the escort had gone out, the risk was over.

[46] Mr. Hovey believed that the risk situation involving the escort of Inmate B was an ongoing issue. The risk was over on that day but if they had to take him out again, the same situation would prevail. It was Mr. Hovey's belief that the Safety Officer was going to continue the investigation, that he did recognize that as an issue.

[47] In cross-examination, Mr. Hovey elaborated on the training he received and the security procedure followed before and during an escort. Mr. Hovey conceded that, if an inmate put a gun in his face, he would let him go and that the presence of a gun could escalate to the point that he could be shot. Mr. Hovey agreed that the decision to take a firearm is one made on a case by case basis. Mr. Hovey did not question the need for Inmate B to go to the hospital.

[48] Mr. Hovey was not aware Inmate B had gone out on February 24; he was aware the appointment had been rescheduled. Mr. Hovey stated that, as in the Institution, Inmate B did not always act out.

[49] Mr. Hovey did not discuss the possibility of doing a work refusal to challenge "the firearm policy". His only concern was that particular escort, not something else going on in the Institution.

[50] In February 2000, Jeff Gayger had been a CO-I for approximately three years. The duties of a CO-I are related to the static security of an institution. Static posts are control posts, doors, walks, gun walks, mobile patrol and at certain times in the living units force. Carrying a firearm is a usual part of the duties in gun walks, mobile patrols and some control posts.

[51] Mr. Gayger has received training in the use of firearms at the Staff College during his initial training and must requalify every year on the four weapons used by CSC.

[52] On February 24, 2000, Mr. Gayger was called from his assigned post to the Correctional Supervisor's office. There were several people there who were asked by the Correctional Supervisor if they wanted to go on escort. After looking at the security escort briefing sheet, tab 9, Exhibit A1, Mr. Gayger asked what equipment was provided and who was going. The Correctional Supervisor said two officers without

firearm, with the regular escort restraint: handcuffs and leg irons and pepper spray. Believing a third person or a firearm was required for a safe escort, Mr. Gayger refused to go on escort and invoked the *Canada Labour Code.*

[53] Mr. Gayger knew Inmate B because he had worked with him on some occasions. He saw the long list of disciplinary problems and the problems with the staff. Inmate B was around the two-year mark in a five-year sentence. Mr. Gayger had concerns regarding using pepper spray inside a hospital where it could be picked up by the air system and reach patients with breathing problems. Also pepper spray is used for a pain control and, depending on pain tolerance, some can work through it. Furthermore, it doesn't work on people with psychiatric problems or who are under the influence of drugs or alcohol.

[54] Mr. Gayger described Inmate B as being of similar height to him but unusually strong with most of his muscles in the upper body. Inmate B spends a lot of time at the gym lifting weights and doing work outs on the punching bag. He would be very proficient if he wanted to assault someone. Inmate B is one of the strongest inmates at Kent Institution.

[55] While at the Staff College, Mr. Gayger was shown a pair of handcuffs smashed by an inmate so he could get out of them. They were the same model as those provided for the escort, which were displayed at the hearing. Mr. Gayger was told by his teachers that he had to assume that an inmate will take his handcuffs off if his eyes were off of him. Mr. Gayger believed that Inmate B had the physical strength to break handcuffs if motivated to stand the pain on his wrists to remove them.

[56] Mr. Gayger indicated that Inmate B usually gets his wishes or ideas carried out in the inmate population by the use of force. His behaviour is volatile and the smallest thing can set him off against staff, anything from loud yelling at staff to physically threatening to intimidate. This is coupled with his diabetes; when he goes into insulin shock, Inmate B becomes physically dangerous, arms flailing and he becomes aggressive until inmates bring him juice to get his blood sugar level on track.

[57] Inmate B was not good at managing his diabetes. He liked to use insulin injections to help him in the gym lifting up more weights to help his muscles grow. A diabetic since age 13, Inmate B used his medical condition to get officers' attention and to ask for access to nurses and medical attention.

[58] Mr. Gayger was told that Inmate B's appointment at the hospital had been rescheduled for February 25, 2000 and that he would be escorting him. When he came in he asked if there were changes made from the conditions of the previous day. When he was told there were no changes, he refused to do the escort and invoked the *Canada Labour Code* again.

[59] Mr. Gayger had never refused to do an escort or invoked the *Canada Labour Code* before being asked to escort Inmate B on February 24 and 25, 2000. Mr. Gayger believed that Inmate B will have to be escorted to the hospital at future dates and that he might be assigned to any such escort if he is still working at Kent. Once the escort of February 25, 2000 had gone out, the danger of that escort was taken away but he could be asked to do the same thing the next day.

[60] Mr. Gayger was present during the Safety Officer's investigation. The Safety Officer said he supported their refusal under Part II; he did not uphold the request for a firearm but he indicated that a third officer should have been included in the escort.

[61] When asked about the decision at tab 18 and the first of the four conclusions, Mr. Gayger stated that the escort was lucky; it could be just that Inmate B had nothing to gain from escaping or causing a disturbance just that one time.

[62] In cross-examination Mr. Gayger indicated that on February 24, 2000 he did not know whether his colleagues had refused the escort before Mr. Gayger made his refusal. Mr. Gayger knew of at least one escape attempt at Kent during an escort. An inmate had subverted his restraints while the officers were not looking. When the door to the vehicle was open, the inmate charged past them and started running. That is why the seats in the van had changed; they were rotated. Mr. Gayger identified a photograph of the van used for escorts (Exhibit E-3). Escorting officers do a strip search of the inmate and scan him for metal before he is taken out.

[63] Mr. Gayger had no reason to question the purpose of Inmate B going to the hospital. On February 25, 2000 the danger was gone when he was involved in the investigation but he could be asked to do the escort on February 26. He did not know then that the escort had gone. When asked if he knew he would have had the right to refuse again, Mr. Gayger stated that he believes so now but at the time, pending the outcome of the investigation, the action could have resumed.

[64] Mr. Andrew David Silvester was a CO-II in February 2000. He has been a correctional officer for 14 years at the provincial and federal levels. He has been at Kent Institution since 1991 or 1992. During that period, Mr. Silvester has been assigned to the recreational area. As Recreational Officer assigned to the gym, Mr. Silvester was carrying a caseload of inmates and overseeing an inmate work crew of approximately five or six inmates employed to clean the gym and do maintenance duties. Inmate B was on that team and was a part of his caseload.

[65] It was Mr. Silvester's duty to supervise inmates using the gym. He had daily contact with Inmate B ranging from four to five hours a day. Inmate B was an extremely large and intimidating inmate; he had a shaved head and numerous tattoos. He was powerful and had a strong presence as an inmate. Inmate B weighed approximately 245 pounds and liked to mention his weight daily. The weight of 204 pounds in tab 8 of Exhibit A1 would be his weight at the same date as his picture was taken on admission. The personal information on an inmate may be updated but not always. That weight is likely that on intake into the federal system. In all likelihood the picture may have been updated but not the weight data. That weight was low but when on the street Inmate B was a heroin user.

[66] Inmate B was obsessed with weight training, not for physical fitness but in order to be as large and powerful as he could be. He spent a great deal of time practicing boxing with a punching bag. His strength was well out of ordinary range. Inmate B was probably the strongest inmate in the Institution. In general terms, he was incredibly stronger than the average person.

[67] Inmate B's behaviour was very erratic, unpredictable, almost child-like, like a big kid. He was aggressive, often non-compliant and liked to use his size to intimidate. Through his actions one would assume he did not think of consequences; he would still act out. Inmate B did not like the word "no"; he may appear to be easy-going and compliant until he hears the word "no". This raises the issue of handcuff removal. At the hospital, in at least half of the escorts, requests from medical staff to remove handcuffs were made and not always because of the medical procedure. If that occurred with Inmate B, the escorting officers would not remove the handcuffs and would have to terminate the escort as per instructions. Mr. Silvester said that the outcome would not have been good; Inmate B would have acted out, whether verbally or physically.

[68] Mr. Silvester indicated he could not predict how but knowing the inmate as he did and his abilities, if he had acted out, he would seriously hurt the two officers whether he removed the handcuffs or not. It is the combination of Inmate B's characteristics that made him dangerous. He is compulsive and aggressive, as well as physically large and powerful.

[69] Mr. Silvester saw a documented incident where Inmate B threw a table or barrier at a control post. Inmate B has fluctuating and aggressive moods.

[70] Mr. Silvester was interviewed by a JOSH (Joint Occupational Safety and Health) officer on February 24, 2000 to give information on Inmate B. He believed Walt Hovey, Frank Paolini, Mike O'Dell and Mike Hale were present for the interview. Mr. Silvester believes two officers escorting Inmate B without a firearm would be in danger.

[71] Mr. Silvester has been involved in many escorts. Prior to February 24, 2000, it was common procedure for the escort to be armed. Mr. Silvester stated that Inmate B would see a weapon as power and, as he respected power, he would respect officers being armed and refrain from acting out.

[72] Mr. Silvester believed Messrs. Hovey and Gayger when they said they cannot handle Inmate B if he acts out. Mr. Silvester would not go on escort of Inmate B with less than three officers and he would like to pick officers big enough to control the inmate if it became necessary to control him.

[73] In cross-examination Mr. Silvester stated he was not aware of an incident of staff assault by Inmate B. Kent Institution being a maximum security institution, if an inmate would assault staff at Kent, it is possible he would be shot; this is something for an inmate to think about.

[74] Had Inmate B been involved in any assault or broken out of custody, it would show in his record. Mr. Silvester had no knowledge that Inmate B had.

[75] Susan Ann Nolan has been employed four and a half years at CSC as a nurse. She is currently Chief of Health Care at Kent Institution. Ms. Nolan has a Bachelor degree in Science of Nursing and a Masters degree in Adult Education. She has worked as a staff nurse and taught nursing at the University of New Brunswick and at a Community College prior to working at the Atlantic Institution in Renous.

[76] The Health Care Unit at Kent Institution is a 16-hour operation from 7:00 a.m. to 11:00 p.m. It is an emergency service for inmates and staff. There is a nursing clinic in the evening. Three mornings a week, a doctor comes in. The doctor has a private practice but also works with the Regional Health Centre. There is no physician on duty. The nurses' responsibility in an emergency is to stabilize the patient till the ambulance arrives and he is sent to the local hospital. In cases where there is no emergency, there is a nursing assessment to determine if a patient needs to be seen by the physician who is then called.

[77] Nurse Nolan is familiar with Inmate B. Inmate B is someone very manipulative. He uses his illness to manipulate and control others. He is basically a baby in a large body. Nurse Nolan is not afraid to work with him.

[78] Nurse Nolan introduced the nurses' notes from Inmate B's file as Exhibit E-4. These notes show that Inmate B suffered abdominal and chest pain on February 21, 2000 and was transferred to Matsqui so he could be assessed. He was added to the clinic list of February 23, 2000 and Doctor Hogan ordered blood work and an ultra sound for the gallbladder. Inmate B was sent out to the Chilliwack Hospital for tests and was not allowed to drink or eat after midnight. Because of the inmate's diabetic condition both the unit manager and the correctional supervisor were notified that he would require food as soon as he returned.

[79] Nurse Nolan met with Inmate B on February 24th at one o'clock to explain he would go back to the hospital the next day. Inmate B was in a very good mood; no acting out has been noted on his file.

[80] Nurse Nolan introduced as Exhibit E-5 a memo she wrote for Inmate B's file concerning a call she received from Warden Paul Urmson asking if failure to transport him could lead to possible debilitation of his condition. Health Care Staff had confirmed that this may happen.

[81] Nurse Nolan indicated that the ultra sound test could occur with handcuffs and leg irons on without problems. She also indicated that when she saw Inmate B at 12:30 on February 25, 2000 everything looked normal.

[82] In cross-examination, Nurse Nolan indicated that Inmate B would refuse treatment if he was not getting his way or they were not treating him as he wanted. In

the Correctional Service there are refusal of treatment forms that are used as records when inmates refuse treatment; it also states why treatment was refused.

[83] Paul Urmson has worked for the Correctional Service for 17 years. He is the current Warden of Kent Institution.

[84] Mr. Urmson worked at Warkworth Institution for two and a half years as Chief of Industry, Operations Manager, Unit Manager and Assistant Warden for Programs. He worked two years at Stony Mountain Institution as Assistant Warden Correctional Programs, then three years at Regional Headquarters (RHQ) for the Prairies Region in regional administration for Institutional and Community Operations. While at RHQ he participated in the National Task Force on Segregation. After that, he went to the Regional Psychiatric Centre in the Prairies for over a year, prior to coming to Kent Institution.

[85] Mr. Urmson has been the Warden of Kent Institution since January 9, 2000. His responsibilities are the safety and security of the inmates and the staff within Kent Institution. He is also responsible for the safety of the surrounding community and of the general public when inmates leave Kent Institution, this includes warrant expiry, release on parole etc. Mr. Urmson is accountable to bring his institution on budget and to achieve a series of objectives determined by the Regional and National Headquarters.

[86] Mr. Urmson reports to the Deputy Commissioner for the Pacific Region. He supervises indirectly 306 staff and directly four Deputy Wardens, one responsible for security, another for management services, one for all operational non-inmate related and one for operations (CorCan). There are 270 to 300 inmates at Kent Institution.

[87] Mr. Urmson introduced as Exhibit E-6 the minutes of the Offsite Labour Management Committee meeting of October 26, 1999 where the issue of Security Bulletin 99-12 dated October 1, 1999 was raised and the quote "under ordinary circumstances, firearms shall not be carried by CSC officers during an ETA. However, the Warden may approve the use of weapons, based on an individual risk assessment". It was obvious that CSC was not following its policies. This raised issues of accountability. Some Wardens were avoiding their responsibility. The policy task force reviewed the policies finding that Wardens were not fully aware. A policy was written

to ensure that people making decisions were aware at what level decisions should be made and the kind of accountabilities followed.

[88] Changes from the *Penitentiary Act* to the *CCRA* occurred approximately six or seven years earlier. Correctional officers were only peace officers during working hours. This had an impact on the carrying of firearms and a number of issues. The purpose of the bulletin regarding paragraph 22 of the Security Manual was that there was a change because the Institution's Head cannot delegate his responsibility. A number of people were authorizing weapons and this was a concern. If the Warden authorized that a weapon be taken, he did so because he authorized that officers may use lethal force. Warden Urmson cannot authorize the use of lethal force simply for a psychological advantage; there is no half way to authorizing a weapon.

[89] Warden Urmson introduced as Exhibit E-7 the minutes of the Labour Management Committee meeting of February 14, 2000 where the issue of armed escorts was discussed. Warden Urmson believed it was fairly traumatic to officers at Kent Institution who had always taken a gun out as a security blanket. They saw the policy as an assault on their professionalism, as a lack of trust creating a greater risk. The Warden explained his accountability of assessing the risk and that he could not delegate the decision and was not prepared to delegate. He assesses on a case by case basis. In tab 5 of Exhibit A1 the procedure is clearly described.

[90] Warden Urmson introduced the Kent Post Order for the Officer in Charge of Escorts as Exhibit E-8 and that for Escort Driver as Exhibit E-9.

[91] On February 23, 2000, Warden Urmson had a call from the Correctional Supervisor indicating that Inmate B needed a transport to hospital. The Warden talked to the Unit Manager, John Romain and the case manager. The Warden had had a number of dealings with Inmate B. Inmate B would act out on a regular basis, go into a diabetic coma, and collapse in front of the nursing station. Was it real or play act? The Warden was informed the belief of the nursing staff was that most of those if not all were fakes. There was also information from the Institution Preventive Security Officer (IPSO) that Inmate B was an enforcer utilized by inmates who ran drugs; he was utilized to beat people up or assault them.

[92] Warden Urmson went to talk to the officers; he believed Inmate B was ill but told them to be cautious and not to remove the handcuffs. After the first visit to the

hospital, the Warden learned there were no issues, Inmate B was compliant; he appeared to be in pain. The Warden was told that the inmate would have to go out again the next day for an appointment at 11 o'clock.

[93] On February 25, 2000 officers Hovey and Gayger refused the escort unless provided with a weapon. Warden Urmson contacted the JOSH Committee, Mike Hale, A/W Services and Mike O'Dell for USGE and they started an investigation. The Warden contacted the Health Care Unit and was told Inmate B had to go at 11 o'clock; he then arranged for two managers to accompany him. Warden Urmson phoned Labour Canada and talked to the supervisor; he requested that they come out; he needed to get a decision. The parties do not agree; they need to have the matter resolved.

[94] On February 24, 2000, Warden Urmson was told the escort came back after going to the hospital because they had not arrived in time; people were staring at the inmate who got hungry and asked to get back to the Institution.

[95] Warden Urmson had instructed the Correctional Supervisor to request the same two officers. He also asked Correctional Supervisor, Jim Farrell to do "Threats Risk". At that point in time there was no formal process for "Threats Risk" which involves looking at Offender Management System, talking to the CO II and the IPSO. The correctional officers on the floor only have part of the information. Jim Farrell did more than the "Threats Risk"; he made recommendations. Warden Urmson did not see any reason to change his instructions.

[96] Warden Urmson had a couple of managers ready to do the escort and he felt that, as long as the Safety Officer arrived and did the investigation, there would be a decision. Warden Urmson is of the same opinion as Mr. Hovey as to the oral decision of the Safety Officer.

[97] According to the log book extract, Exhibit E-10, Inmate B left for the hospital at 10h15 and returned at 11h50. Exhibit E-11 is the Post Temporary Absence /Work Release Evaluation Report for Inmate B's visit to the hospital on February 23, 2000. This report indicates that the escort proceeded without incident. Exhibit E-12 is the Post Temporary Absence/Work Release Evaluation Report for February 24, 2000 which indicates that Inmate B was co-operative at all times with the escorting officers. Exhibit E-13 is the Post Temporary Absence/Work Release Evaluation Report of the

February 25, 2000 visit to the hospital by Inmate B. It states that the offender was co-operative throughout the escort.

[98] Warden Urmson stated that the Safety Officer did not request to speak with management. He left the Institution without advising the Warden of his decision. Warden Urmson had asked to attend the meeting and the Safety Officer had said he would let him know. From what Warden Urmson heard, after the decision had been made, the Safety Officer had said there should be three officers but no gun. Warden Urmson was told of this decision by Mike Hale: "three escorts and no gun".

[99] Warden Urmson then phoned HRDC to ask how the Safety Officer could make the decision without hearing his rationale to arrive at his instructions. The next day Warden Urmson received a phone call back from the Safety Officer who said he had erred or made a mistake; he should not have ruled on the number of officers because the complaint was the lack of a weapon.

[100] According to Warden Urmson the issue was the gun. The national policy on escorts is that for each inmate there are two officers escorting. The Warden believed that the third officer was a compromise, an attempt to solve problems. Warden Urmson was a little apprehensive when Inmate B went out the first time; was he feigning again? The second and third time with the directions that the cuffs not come off for any reason and the "OC spray", Warden Urmson felt he made the right decision.

[101] Warden Urmson has never heard of handcuffs having been torn apart but he has known them to be destroyed and inmates having broken free using concealed keys.

[102] Warden Urmson introduced a report of the Interview Meeting with him on February 24, 2000 as Exhibit E-14. This interview meeting was provided to the joint chairs of the JOSH Committee. The first part is the information provided by the Warden to the Committee and the second part was how he planned to deal with the issue.

[103] Warden Urmson then introduced the work description for Correctional Officer I (Exhibit E-15) and that for Correctional Officer II (Exhibit E-16). Escorting inmates is a normal duty in the work description of CO Is and IIs. They receive training on it and medical escorts are necessary.

[104] In cross-examination Warden Urmson indicated that he had met Inmate B two or three times in the five weeks he had been at Kent Institution before the work refusal took place. This is Paul Urmson's first posting as a Warden.

[105] Warden Urmson confirmed that the security bulletin at Exhibit E-6 was distributed to all staff. The security bulletin on the Deployment of Firearms on Security Escorts did not change the policy; it emphasized that the Warden had the responsibility to authorize firearms on escorts. Previously there were no formal process being followed. Warden Urmson was not aware a risk assessment was done for February 24, 2000.

[106] Warden Urmson had discussions with Labour Canada on February 24, 2000; they refused to come out. The bargaining agent felt they were right and the Warden felt he was right; both sides wanted to get it resolved. It was the Warden's understanding that the decision of the Safety Officer was that the refusal was upheld until a third man is sent along. He phoned and complained; then the written decision came. The oral decision was a third man and no gun. After the Warden called to ask the Safety Officer to come back and listen to his evidence, the Safety Officer changed his decision.

Argument for the Applicants

[107] Counsel for the applicants made two arguments concerning the jurisdictional issue. She asked me to find that, even though the escort had gone out while the investigation was going on, the danger had not passed for the two correctional officers as the "danger" that existed was not just that particular escort scheduled for that day but rather the danger was escorting Inmate B in general. That being the general danger of escorting him without proper security measures. The nature of the "condition" was escorting Inmate B with minimum security measures; the issue was not that escort in particular.

[108] In this argument it does not matter when the Safety Officer made his decision, either before or after the escort went out that day, as the danger was one that would appear at any moment.

[109] The applicants rely on the *Davis* decision [2000] CIRB No. 26, tab 9 book of authorities for the proposition that if a danger is ongoing and the event will occur

again then the Safety Officer has the jurisdiction to investigate a complaint. They also rely on *Fletcher* 2000 PSSRB 86 (165-2-209 to 216) in paragraphs 75 to 77.

[110] The applicants ask that the Safety Officer's report finding that there was no condition constituting a danger to these employees present, not be upheld. Instead, they ask that the Board provide direction to the parties, that in the circumstances, additional security measures should have been provided for this escort, such as the issuing of a firearm for the escort.

[111] If the Board finds that the danger was over for the two correctional officers as soon as the escort went out during the investigation and therefore will have to dismiss the appeal for the two officers then the applicants ask the Board to exercise its power under subsection 145(2) of the *Code* and find that there did exist a danger during the time of the investigation and that danger was for the two managers who were doing the escort at the time of the investigation: Todd Yolland and David Dick. The Board has the power to do this under paragraph 130(1)(b).

[112] This argument hinges on whether or not the Board finds that the Safety Officer gave his decision before the escort was back from the hospital and therefore the risk was still ongoing for officers Yolland and Dick. On this, the evidence received was at best murky. The Safety Officer said that he was out of Kent Institution by noon. One of the correctional officers said that the Safety Officer had given his decision around the time the dining hall closed. Exhibit E-3 says they were back at 11:57 and Exhibit E-10 says 11:50. Based on the delay in starting the meeting and thereby the delay of the decision by Mike Hale who was acting as an agent for the Warden, any benefit of the doubt should be given on the side of the employees.

[113] The applicants ask that the Safety Officer's report finding that there was no condition constituting a danger, not be upheld. They instead ask that the Board provide direction to the parties, that in the circumstances, additional security measures should have been provided for this escort for officers Yolland and Dick and for that matter on the previous two escorts that went out on February 23 or 24, such as the issuing of a firearm for the escort.

[114] If the Board dismisses this matter completely under section 129 then the applicants ask that the Board make a finding that the employer failed to act in accordance with its duties under section 124 by sending this particular inmate out

three times with only the most minimal security measures. The Board also has the power to find that the employer was in violation of section 124, the general duty of the employer to keep its employees safe, and order the employer to rectify the violation.

[115] The applicants rely on the *Kavanagh v. Treasury Board* decision (2000) PSSRB 4 (165-2-205 to 207), tab 10 for the proposition that if a danger is found not to be present at the time of the investigation then nonetheless the Board may still find that the employer breached its section 124 duty to ensure the safety of its employees. The applicants refer to paragraphs 86-89.

[116] The applicants request that the Board keeps in mind the various applicable sections and the principles found therein of Part II of the *Code*.

[117] In order to appreciate the proper interpretation of "danger" under Part II of the *Code*, one must understand where the right to refuse to work fits into the overall scheme of Part II of the *Code*. Subsection 122.1 reads:

> *The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this part applies.*

[118] Flowing as part of this purpose is the duty placed on employers:

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

There is also the right of an employee to refuse to work if placed in a dangerous situation.

> ***Refusal to work if danger***
>
> ***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.*

[119] Danger is defined in the *Code* in subsection 122(1) as follows:

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

[120] The right to refuse is limited in some respects in that an employee may not refuse to work if the danger is inherent in or a normal condition of his or her work

> ***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.*

[121] The various provisions of the *Code* may not be interpreted in isolation, but work together as a unit under the guiding purpose of the *Code*. While employees may not refuse to perform their work if there are dangers in their work that cannot be avoided, an employer has a responsibility to safeguard employees from those very dangers. The ironworker who is afraid of heights cannot refuse to work high above the ground as working at great heights is a condition of his or her work. This does not mean that an employer may refuse to provide proper safety equipment to reduce the risk of falling. The duty placed on the employer by the *Code* is to ensure that the employee is protected from the risk.

[122] It is the policy at Kent Institution, the minimum safety requirements when an inmate is escorted outside of Kent Institution, that a minimum of two staff for the first inmate is required (tab 4, paragraph 6). It is the policy that all escorted prisoners shall wear handcuffs, and leg irons during the escort (tab 4, page 6 and 17 and tab 6, page 2). If a dangerous inmate must be escorted outside of the institution, it is the policy of Kent Institution that a firearm shall be carried by a correctional officer on the escort (tab 4, page 7, paragraph 17 and tab 6, page 2).

[123] In Deputy Warden Knoph's memo on the deployment of firearms on security escorts, written a week before the scheduled Inmate B escort, procedures were clarified for obtaining permission for deploying firearms on a security escort; the following four

issues were ordered to be taken into account when considering deploying firearms on an escort:

1. the potential escape risk posed by the inmate,

2. the security classification of each inmate,

3. the presence of external factors which pose a threat to Correctional Service staff or the public during a security escort; and

4. availability of alternatives for diffusing the risk such as deploying a third officer.

[124] It is clear from the employer's own policy documents that not only are correctional officers permitted to carry firearms during an escort, but that it is mandatory that they do so should they be escorting a dangerous inmate.

[125] The evidence shows that typically senior correctional officers perform risk assessments on inmates who are to be escorted out of Kent. They make recommendations based on their review of each inmate's file, discussions with other correctional officers and their own experience as to the level of risk each escort has, and what types of security measures are required.

[126] The risk assessment considers such things as, has this inmate ever tried to escape before, does this inmate have a reputation for violence in the community or against correctional officers, the inmate's institutional behaviour and even the inmate's frame of mind at the time of the escort. There is no definite list of risk factors, and correctional officers have to predict based on their past experiences with the inmate, and the records of the inmate, as to what the inmate could be capable of once they are removed from the secured setting. Officer Hovey testified there was a process in place for risk assessment of an escort. Warden Urmson testified that there was not a set policy.

[127] The minimum requirements of security measures for an escort are that there be two officers present for each first inmate, and that the inmate be handcuffed and in leg irons.

[128] The evidence from Correctional Officer Hovey is that a written risk assessment similar to tab 15 was done for the escort scheduled for February 24. The risk assessment found that this was not a typical escort, and recommended that one of the officers on the escort be issued a firearm in addition to handcuffs and leg irons. Warden Urmson reviewed the recommendation and denied it. Warden Urmson ordered that only the minimum-security measures be permitted, that being handcuffs, leg irons and OC Spray (tab 15). Warden Urmson testified that the assessment recommended that two officers and a firearm be issued for this escort. Warden Urmson testified if there was one done for that day he doesn't remember it.

[129] Correctional Officers Hovey and Gayger reviewed the escort material on February 24 and again on the 25th considered Warden Urmson's decision, and decided that to perform the escort without a firearm would put them at risk beyond what is part of their regular duties. Neither officer has refused to perform an escort before. Correctional Officer Hovey is an experienced officer. For these two individuals to invoke section 128 of the *Canada Labour Code*, and refuse to perform this work because they thought that they were being put in unreasonable danger is significant. It is also significant that other senior officers, and those who actually knew Inmate B, agreed that for this particular inmate a firearm should be issued.

[130] It is anticipated that counsel for the employer will be arguing that these two correctional officers were not put in danger by escorting this inmate off secured premises or, alternatively, that if they were in danger, it is inherent in their line of work.

[131] Inmate B was a dangerous inmate. It is the applicants' submission that under *Fletcher* (supra) Inmate B as an individual created the danger to correctional officers by his very presence. His very nature created a danger for those around him.

[132] While the *Code* does not refer precisely to a person, it may be concluded that a person, by his physical condition or personal characteristics, by his very presence makes a place or activity dangerous. It is counsel for the applicants' submission that the hazard or condition that results from work with inmates, who are by their incarceration and placement in a maximum security institution, supports the notion of danger. To disregard an inmate's personal characteristics and behaviour, which have placed him in a maximum security institution, would amount to excluding correctional officers from the *Code*. It is the applicants' submission that the *Code* allows for the

prospect that actions taken by one person or likely to be taken by one person, can constitute a danger to another person. This is the situation that exists in the institutional setting, and in particular on escorts outside of a secured institution. Correctional officers are entitled to the full protection provided by the *Code.*

[133] The applicants' request that in assessing the dangers of the situation faced by Correctional Officers Hovey and Gayger it is vital that Inmate B be the main focus of the inquiry.

[134] The applicants submit that two things should be examined:

(i) the nature of Inmate B; and

(ii) his past behaviour for both violence and escape.

[135] It is necessary to examine the nature of Inmate B, his nature being his propensity for impulsive behaviour and his extreme unpredictability. If one can't predict someone's behaviour then one goes to the next step of looking at past behaviour so that one can extrapolate what sort of behaviour the individual is capable of. If a person is impulsive and therefore unpredictable in his behaviour, and has in the past exhibited behaviours that would fall within the definition of danger, then it is submitted that the combination of these two factors presents a situation where Inmate B himself presented an imminent danger.

[136] Counsel for the applicants submitted that the position that the correctional officers were placed in when faced with an unarmed escort went beyond just a possibility of injury, or a potential for danger. It moved beyond a hypothetical danger when the recommended safety measures were denied to them.

[137] This is not a situation such as in *Ferraro* [2000] CIRB No. 4, and *Mahoney* (Board file 165-2-35), where employees were unable to point to past injuries or incidents with respect to their complaints. Here there are numerous documented incidents concerning Inmate B.

[138] It is important to emphasize here that whether Inmate B was going to try to escape on the escort is hardly the only issue here. The issue is whether there was a hazard that could cause injury to the applicants. An attempt to escape was not the

only way that Inmate B could cause injury. The evidence is that Inmate B was easily agitated.

[139] The correctional officers have been candid in their evidence. They have not tried to exaggerate the risk or overstate it.

[140] There is uncontradicted evidence that Inmate B was capable of great violence; he had little respect for staff; he was highly impulsive, highly unpredictable; he manipulated staff regularly and he acted out regularly. Numerous witnesses stated that he was on many levels one of the worst inmates at Kent Institution. And the fact that he was at Kent, a maximum security institution, speaks volumes in itself. He was one of the worst of the worst. Inmate B's background documents and the testimony given by the correctional officers and Nurse Nolan have left little doubt as to the nature of Inmate B.

[141] The applicants rely on the *Johnston* decision, tab 8 [1999] CIRB No. 41 for the proposition that the Safety Officer does not have to consider the state of the equipment (or in this case the behaviour of Inmate B) as it presents itself at the time the Safety Officer arrives on site, see paragraphs 75 to 88.

[142] The applicants rely on the Board's detailed review of the jurisprudence (in *Fletcher* (supra)) in respect of the issues currently before this Board. The *Fletcher* case involved a reduction in staffing referred to as "minimum staffing"; it formed the basis of complaints made by seven correctional officers who attended work on the morning of November 22, 1999 to find themselves working with only one other correctional officer on duty in their unit (i.e. only two officers per unit). In finding that in two of the units the staff reduction did create a dangerous condition, the Board produced an extensive review of the governing legislation and the state of the law in Canada, beginning on page 12 of the decision, culminating in the Board's summary of the applicable law on page 26.

[143] On pages 12 through 23, the Board reviews *Kavanagh et al v. Treasury Board* (January 21, 2000, Board File No. 165-2-205); *Montani*, C.L.R.B. No. 1089 (1994); *Bidulka v. Canada* [1987] 3 F.C. 630 (F.C.A.); *LeBlanc v. VIA Rail Canada Inc.* (1988), 75 di 156 (Can. L.R.B.R.); and *Clavet v. VIA Rail*, [1996] C.L.R.B.D. No. 7. The applicants leave the Board to peruse this detailed review of the law but wish to explore in detail paragraphs 66 to 69 and 71 of the decision in *Fletcher*.

Paragraphs 66 and 67 of the decision state:

> *...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.*
>
> *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.*

[144] The applicants rely on principle in that the nature of the hazard, Inmate B's impulsive and unpredictable behaviour accompanied with his history of violent behaviour, creates a hazard that could arise at any time causing injury before it could be corrected. Paragraph 67 continues quoting from *Clavet* at paragraphs 37 to 39 of that decision:

> *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.*

The Board in *Fletcher* went on to state at paragraphs 68, 69 and 71:

> *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.*
>
> *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 employees.*
>
> ...
>
> *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 the 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.*

[145] Based on the summary above, the applicants submit that the following elements should be considered together by the Board:

(a) The hospital escort of Inmate B presented an immediate and real danger to officers Hovey and Gayger;

(b) There was a danger that injury to the correctional officers was likely to or probably would occur, not only a possibility that the injury could occur;

-or-

By virtue of the nature of the perceived danger, the hospital escort of Inmate B where a situation instigated by Inmate B could arise at any time, could cause an accident before the condition (the escort) could be corrected;

[146] It should be noted that in *Clavet* [1996] C.L.R.B.D. No. 7, tab 5, the Board considered that the danger in that case "was immediate and real because the condition could arise at any time and without warning. In fact, it was established that there was no way of telling when the fuse in the control transformer would blow again." ...(Paragraph 46)

(c) The hospital escort of Inmate B could be reasonably believed to threaten the safety of the correctional officers;

(d) The risk to the correctional officers was serious to the point of need for measures of correction;

(e) The danger complained of was not a danger inherent to the correctional officers' work that could not otherwise be prevented with adequate safety measures;

[147] The correctional officers' refusal to work did not coincide with other labour relations disputes.

[148] The applicants submit that the situation in which Officers Hovey and Gayger found themselves on February 24 and 25, 2000 did constitute a danger beyond the level of acceptable, inherent danger found within the duties of a correctional officer.

[149] An employee may not refuse to perform work that is an inherent part of his employment. This poses the question, what is an inherent danger, and how does it affect the employer's responsibility. Section 124 of the *Code* places a duty on an employer to ensure the safety of, and the health of every person employed by the employer. The term inherent is not defined by the *Code*, but is defined in the standard

dictionary Le Petit Robert 1, 1991 Edition, which states that inherent means "existing as a basic quality of a being or thing, as an inseparable part thereof. CF. Essential, imminent, inseparable, intrinsic".

[150] There are certain dangers inherent in a correctional officer's duties that is danger intrinsic to the work, and therefore cannot be eliminated. There are inherent dangers in performing work at a correctional institution. These hazards cannot be eliminated. An employee working in a correctional institution will almost certainly be injured unless the employer takes measures provided for by the *Code*, such as the necessary equipment, training and other safeguards to protect the employees. While an inherent danger may be present in the work place of a correctional officer, this does not relieve an employer of its obligation to ensure that safeguards are in place to protect the safety and health of their employees. When safeguards such as the issuing of firearms to correctional officers are available and found within the employer's policies and directives, they should be implemented unless a reason exists that would override the employer's responsibilities to ensure the safety of its employees.

[151] Paragraph 128(2)(b) uses the phrase "danger inherent in the employees' work". This phrase implies that the danger inherent in an employee's work must be an ongoing danger that is intrinsic to an employee's specific work, and something that cannot be eliminated at its source. The hazard or danger is only eliminated from the right to refuse to perform work when the employer has provided its employees with the equipment, training, policy and procedures and any other measure needed to protect the employee. A danger that persists, despite measures taken by the employer to protect an employee is danger inherent in the work. When an employer has not fulfilled its responsibility under the *Code*, it is dangerous for the employee to perform work under those conditions and paragraph 128(2)(b) of the *Code* does not apply to such a danger.

[152] Correctional officers may refuse to work with an inmate if the measures taken by their employer to protect them are inadequate or insufficient. The correctional officers accept the risk inherent in their job, provided that they are given proper equipment or assistance in performing their job. If Warden Urmson had approved that the proper measures be taken to protect employees from the inherent danger by providing them with a firearm, then there would have been no refusal to work.

[153] There are certain tasks in the correctional setting that involve a particularly increased level of risk. Such tasks include escorting an inmate outside of the secured institution. Additionally, the higher the inmate's security classification, the higher the risk associated with that particular inmate, and further protective measures have to be implemented for protecting officers. As you move up into the higher levels of security, the employer has a higher obligation to provide protective measures to its employees. A correctional officer may not refuse to work simply because he is working with a maximum security inmate, as opposed to a medium security inmate, but he may refuse to work if the employer has not given him the appropriate tools, training or other security measures to deal with the increased risk associated with maximum security prisoners. There are reasons why correctional officers working in minimum security institutions do not carry weapons on a regular basis, but yet those working in maximum security institutions do. That reason is, of course, that an inmate with a maximun security classification is considered a greater risk to a correctional officer than one with a minimum security classification; therefore, additional security measures are provided to the officer working in the maximum security setting. The protective measures taken by an employer must be commensurate with the level of risk that correctional officers are exposed to.

[154] All escorts carry some risk for correctional officers. Correctional Officers Hovey and Gayger do not claim that they should not have to do escorts. They do not claim they should not have to escort Inmate B. We all know that correctional officers are subject to certain risks simply by walking into their place of work everyday.

[155] Correctional Officers Hovey and Gayger did not make an unreasonable request in requesting that a firearm be permitted on the escort. They are simply asking that the risk assessment recommendation be approved. It is counsel for the applicants' submission that an employer should not be permitted to place its employees in dangerous situations when there is an easily available remedy. They were not asking for policy to be ignored; on the contrary, Correctional Service policy both at the Commissioner level and internally to Kent Institution provided for the carrying of firearms in such situations. Both of these correctional officers have carried a weapon through much of their working careers.

[156] These two correctional officers were not asking for an unrealistic expenditure of resources to be made. These correctional officers were requesting that further security

measures be put in place to protect both themselves and the general public. Pepper spray was no disincentive, as it could not be used in a hospital setting. We heard evidence two correctional officers could not restrain Inmate B if he did not want to be; therefore two correctional officers were not a disincentive. Having a firearm present could have provided a disincentive for the inmate. Further, in the worst case scenario, the firearm could have been used should the inmate attempt to escape or otherwise act out against the correctional officers or members of the public. It is important to remember that this inmate was being escorted to a hospital where he would have come into contact with hospital personnel. The escort as approved by Warden Urmson would have placed Correctional Officers Hovey and Gayger into a situation where they were not only trying to protect themselves, but to possibly prevent, or protect, members of the public who would be in close contact with this particular inmate.

[157] The particular characteristics of Inmate B, specifically his impulsivity, and unpredictability took this escort outside of normal escorts. In order not to put Correctional Officers Hovey and Gayger into a dangerous situation beyond what was typical, a firearm should have been issued for the escort. While employees may have to just live with dangers inherent in their work this does not give their employer unlimited freedom to increase the risk by refusing to provide basic safeguards from the inherent risks.

[158] There was evidence that a third correctional officer would not have been much help; at least the third correctional officer would have been closer to what security measure was required for this escort. Neither Correctional Officer Hovey nor Gayger was convinced that a third correctional officer would help prevent injury to them but Correctional Officer Silvester did not support that conclusion. All three correctional officers did give evidence that they felt that the presence of a firearm would likely have a deterrent effect on this inmate and thereby prevent injury to correctional officers.

[159] The applicants rely on *Czmola and Treasury Board*, (Board file 165-2-201 and 202) decision, tab 4. In this decision, the employer issued a standing order for open range walks which required correctional officers to patrol the corridors of the range while cell doors were open, thereby allowing the inmates access to the corridors. Under the old standing order, correctional officers had been required to conduct closed range walks, that is, with the inmates locked in their cells. The new standing

order also reduced the number of correctional officers conducting these walks, from five to three, with two officers in the range, and one outside. If the correctional officers in the range used the inside staircase to get from one level to the next, they were momentarily out of the line of sight of the correctional officer on the outside. The purpose of this change was to increase interaction between the correctional officers and the inmates.

[160] When requested to participate in the open range walk, correctional officers refused to do so on the ground that it constituted a danger to them within the meaning of the *Code*. The Board accepted the employer's position that it was an important element of security within the institution that there be interaction between correctional staff and inmates, and that open range walks were an important aspect of the security process. It was found that risks associated with an open range walks policy were inherent in the duties of a correctional officer. However, the employer was still responsible for taking measures to insure that the performance of these duties was free from unnecessary risk.

[161] Allowing correctional officers within the range to use the inside stairs, resulting in a momentary loss of eye contact with the officer outside the range, constituted an unnecessary risk, and the employer was directed to require correctional officers conducting open range walks to use the outside staircase to ensure the officers' safety. In his reasons for decision, Vice Chairperson Chodos, while finding that the danger associated with open range walks was inherent to the correctional officers' work, noted that the danger to the correctional officers was *"more than merely speculative"* (paragraph 38).

He continued in paragraph 40:

> *... it is important to note that a finding that the risk associated with an open range walks policy are inherent in the correctional officer's duties does not absolve the employer from its statutory obligation to 'ensure that the safety and health of any person employed by the employer is protected' (section 124). The employer is still responsible for taking measures to ensure that the performance of these duties are free from unnecessary risk...*

Further, in paragraph 41 he stated:

> ...

> *There is in fact no reason to break that visual contact, even for a few seconds. In my judgement, to do so exposes the correctional officers to danger as defined in Part II of the* Code, *a danger which is entirely unnecessary... With all due respect, I would suggest that this is an abdication of the employer's responsibility for safety. Management provides detailed and firm direction for many aspects of the conduct of the duties of correctional officers, including those relating to safety. It should do so in this context as well. The safety of correctional staff is not a matter for discretion. Accordingly, by virtue of the Board's authority under paragraph 130(1)(b), I am directing that management advise correctional staff who conduct open range walks to use the staircase outside the barrier door in order to gain access to the upper or lower ranges.*

[162] The applicants also rely on the Board decision of *Danberg and Treasury Board (Solicitor General Canada)* (Board file 165-2-57). In this case, a correctional officer refused to escort prisoners from the Prince Albert Airport to the regional psychiatric centre in Saskatoon with only one additional officer assigned to the escort. The correctional officer reviewed the prison histories of the inmates to be escorted and concluded the assignment had a high element of risk, and he therefore requested a handgun or mace be issued for the escort. The employer rejected his request and the correctional officer refused to do the escort. Deputy Chairperson Chodos found that correctional officers assigned to escort duties are subject to additional dangers which exceed those found within the institution itself. In such circumstances, the employer should have erred on the side of caution, and assigned an additional officer to the escort.

[163] He stated on page 8 that:

> *I accept the evidence of Mr. Danberg that had an additional officer been assigned to the escort duty, he would not have refused to work. It is also my conclusion that correctional officers assigned to escort duty are subject to additional dangers which exceed those found within the confines of the institution itself. In my view, in all the circumstances of this case management should have erred on the side of caution and assigned an additional correctional officer to the escort duty. By not doing so they were exposing the applicant to risks which were beyond those inherent in the applicants work.*

[164] Deputy Chairperson Chodos did not believe that it would be appropriate, desirable in the circumstances, to issue direction, as each escort must be looked at

individually, and in the number of other circumstances in which escorts may have to be carried out. Deputy Chairperson Chodos did not address whether a firearm should be issued or not. It is important to point out that the particular characteristics of the inmate in question in *Danberg* were minor in comparison to the characteristics of Inmate B.

[165] The dominant theme to Warden Urmson's evidence was accountability, his accountability, that he was going to answer for anything that happened because he had approved a weapon. In contrast to how often his accountability was mentioned, little was mentioned about the correctional officer's accountability.

[166] Also, in contrast to how many times the Warden stated that he was accountable and would have the "ultimate responsibility if guns go off" was the lack of apparent interest he had in what his correctional officers thought about the situation. After all the evidence and documents one is hard pressed to find a person who agreed with the Warden. There was no direct evidence placed before this Board that any correctional officer agreed with the Warden's decision to send this inmate out without a firearm being present. For only two individuals do we have evidence and one only partially agreed with the Warden that one being the Safety Officer who admitted quite freely "I admit I'm not aware of the prison environment. Even when I read what that senior officer said: assign a 3rd officer and I see a manager recommending a 3rd officer, I say why not follow it." Correctional Supervisor Farrell recommended a third officer (tab 15).

[167] This is in comparison to the opinion of Correctional Officers Hovey, Gayger, Silvester, and Paolini (tab 17).

[168] While it is commendable that the Warden has such high confidence in the abilities of his correctional officers, it was striking how little regard he appears to have for their opinions. There is rarely even a precise way of predicting how a person will act. In corrections so many things come down to opinions based on what factors are known. Warden Urmson acknowledged he asked one of his managers Supervisor Officer Farrell to do a risk assessment of the inmate. "I had to ask myself did I make the right decision. Have I missed something? Is there something my officers know about that I didn't?" But when Correctional Officer Farrell's opinion did not match his own it was ignored. The opinions of Correctional Officers Hovey, Gayger, Silvester, and

Paolini were also ignored. Three of whom actually knew Inmate B and some who knew him well.

[169] There was some reference in evidence that this refusal may have involved "ongoing labour relations disputes". It is important to point out that the only evidence was that by Warden Urmson in relation to the policy of issuing firearms for escorts at Kent Institution. There is no evidence that this might or might not be a national issue. There is no evidence that Correctional Officers Hovey and Gayger were motivated by anything other than their personal safety. There was no evidence that this was anything other than a new Warden trying to exert his influence on a new institution. Ongoing labour relations disputes constitute something more than announcing to a management committee that procedure is going to change and then a week later an incident arises involving that procedure. The applicants submit that in this situation this does not even come close to what the Board tries to prevent when it refuses to deal with refusals to work as a way of bringing the matter to a head.

[170] The Board raised a concern with Warden Urmson that "you believe they could handle problems and they said they couldn't". Warden Urmson's response was "luckily those things didn't occur". The applicants submit that luck should not play into the decision making process when it comes to protecting correctional officers from danger. When there are policy approved security measures available to protect correctional officers from one of the worst inmates in British Columbia "luck" should not be a factor.

[171] The applicants request that the Safety Officer's decision not be upheld by the Board, and that the Board provide direction to the parties that in the circumstances, additional security measures should have been provided for this escort, such as the issuing of a firearm for the escort.

<u>Arguments for the Employer</u>

[172] This is an appeal under subsection 129(5) of the *Code* as it stood prior to October 1, 2000. The decision applies to a clear and specific event on February 25, 2000. It was the requirement to take Inmate B on escort on February 25, 2000 that formed the basis of the investigation and the decision and the corollary appeal. That same inmate was escorted successfully on February 23, 24 and 25, 2000. It is the position of the employer that there was no danger at the time of the investigation and

any risks associated with the escort were inherent to the position of correctional officer.

[173] The first issue is one of jurisdiction given the fact that the escort went out. The second issue is that the Board does not have jurisdiction to go under sections 124 and 125 to find a violation of the *Code*. The third issue is that, in the alternative on the merits, in fact there was no danger as defined under the old *Code*. The fourth is a further alternative, any risks associated with the escort are inherent to the correctional officers' job at Kent Institution and not proper grounds under section 128.

[174] Once that escort went out on February 25, 2000, the condition for the work refusal no longer existed. The *Code* provides at paragraph 128(8)b:

> ***128(8)*** *Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employer has reasonable cause to believe that*
>
> *... (b) a condition continues to exist in the place that constitutes a danger to the employee,*
>
> *the employee may continue to refuse to use or operate the machine or thing or to work in that place.*

[175] This section deals with a continued refusal to work which gives rise to subsections 129 (4) and (5) which read:

> ***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.*
>
> *(4) 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.*

[176] There is a narrow specific window of when the refusal is made. Parliament did not grant the Safety Officer the power to opine on employer policy. It is a very specific question that the Safety Officer must deal with. At the time the Safety Officer shows up, is there a condition that can justify correctional officers to refuse to work.

[177] The employer refers to the decision of the Federal Court of Appeal in *Bidulka v. Canada (Treasury Board)* 3 F.C. 630. The decision deals with the issue the Safety Officer must determine: is it now safe to return to work. The employer refers to page 641:

> *... The task of a safety officer under paragraph 86(2)(b) is clearly to determine whether, at the time of the investigation, a "condition exists... that constitutes a danger to the employee". The fact that there had been violence on the picket lines 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. In my view, the Board was therefore right in deciding that the safety officers had approached their investigation in the correct way.*

[178] Paragraph 86(2)(b) in *Bidulka* (supra) is identical to the present section 129 of the *Code.*

[179] The Federal Court of Appeal decision in *Bidulka* (supra) has been respected in all cases before the Board except in *Fletcher* (supra) which is subject to judicial review: Court file A-653-00.

[180] The present case is on all fours with the decision of the Federal Court of Appeal *Canada (Attorney General) v. Bonfa* [1989] F.C.J. No. 1062. Once the escort goes out the condition no longer exists for the work refusal. The employer referred to pages 4 and 5 of the *Bonfa* (supra) decision:

> ...

> *If an employee persists in his refusal to work, reference is made under s. 129 to a safety officer, who must investigate forthwith and decide "whether or not . . . a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee". The function of the safety officer is not to decide whether the employee was right in refusing to work in his workplace but whether, at the time the officer did his investigation, a condition existed in the workplace that constituted a danger to the employee. If the officer concludes that there was a danger, he must give the direction he considers appropriate under s. 145(2). If the officer considers that no danger exists, his decision may be appealed to Canada Labour Relations Board.*

[181] Parliament did not give the Safety Officer the right to comment; the condition no longer existed. It is trite law that the parties cannot by consent enlarge the jurisdiction of a tribunal. The officers were faced with clear conditions, that of the escort on February 25, 2000. Once the escort had gone out, the conditions no longer existed.

[182] The *Fletcher* decision (supra) is under judicial review and the Board is not bound by it, nor should it be influenced by it. The pronouncement made in *Bidulka* (*supra*) has been followed by the Board in all cases except in *Fletcher*. The employer does not understand *Fletcher* and how the Board gets around *Bidulka*. The law is clear and it is clear in every other decision of the Board.

[183] In the present case the facts are clear; the escort had gone out; the condition no longer existed; the appeal should be dismissed.

[184] The issue of *Czmola (supra)* that instead of looking at section 128, you can look at sections 124 and 125 and start finding specific violation of the *Code*, is coming up for the first time. A big part of sections 124 and 125 is regulations and guidelines made in a tripartite way with Human Resources Development Canada, the employers and the unions. The small part is work refusal. If the Board goes into the law, it does not have jurisdiction.

[185] This was never suggested to the Safety Officer; it never came up to the employer, it is coming up for the first time in arguments. Subsection 145(2) of the *Code* is incumbent on the finding of danger. The employer did not call evidence on section 124. Section 124 is not a plea to the jury clause; if a party cannot make a case under section 128, it will hang its hat on section 124. A violation of the *Code* is a very

serious matter; it is ground for prosecution. *Czmola* (*supra*) does not apply here. This Board does not have the jurisdiction to do here what Vice Chairperson Chodos did in *Czmola* (*supra*) and the Board in *Kavanagh* (Board files 165-2-205 to 207). Section 130 of the *Code* is where the Board gets its authority and paragraph 130(1)(b) reads:

> *130 (1) Where*
>
> > *(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).*

[186] The only direction under subsection 145(2) is one flowing from a decision of danger but the Board has no jurisdiction to make a finding of danger. Had Parliament intended for the Board to go into inquiry, it would have provided authority to issue directions under subsection 145(1) but it did not do so. In *Canada (Correctional Service v. Union of Solicitor General Employees, Local 10170*, [1997] C.L.C. R.S.O.D. No. 19, decision No. 97.017 at page 5, paragraphs 16 and 17 it is stated:

> *16 When a safety officer believes that the employer is not ensuring the health and safety of its employees, either because the work procedure is inadequate or insufficient to protect its employees, he must notify the employer that it is contravening section 124 of the* Code, *or any other pertinent provision, and order him through directions, preferably in writing, to take measures to correct the contravention.*
>
> *17 As far as I myself am concerned, I cannot issue a direction to the employer under paragraph 145(1) of the Code to correct the Escort procedure, should such a correction be necessary, since paragraph 146(3) of the Code does not provide for a regional safety officer to issue such a direction. Paragraph 146(3) states:*
>
> > *(3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken.*

[187] As there is no jurisdiction for the regional Safety Officer under subsection 146(3), there is none for the Board. The same principles are found in *Pratt v. Grey Coach Lines Limited* (1988) C.L.R.B. Decision 686, 73 di 218, more specifically in the second paragraph of page 13. The point is there is no jurisdiction.

[188] The Federal Court did not comment when it dismissed the appeal of *Czmola* (*supra*) it merely issued a one line decision.

[189] In *Bonfa* (*supra*) at page 5 the Federal Court of Appeal stated:

> *... The fact that before the safety officer did his investigation the respondent may have had legitimate grounds for refusing to do the work assigned to him cannot affect the answer to be given to this question; and the fact that under s. 145(1) the safety officer could have found that the employer was in breach of Part II and directed it to terminate this breach was also not germane to the issue, since the safety officer never found such a breach to exist and never gave a direction to the employer under s. 145(1). ... If the regional officer had asked himself the question he should have asked, he could only have given it one answer, namely that at the time the safety officer did his investigation the respondent's workplace presented no danger. He should therefore simply have rescinded the direction given by the safety officer.*

[190] The problem with going off into inquiry at this stage of the game is that in the applicants' closing statement the Board is asked to make a finding that the employer has violated section 124. It is new to the employer which has not led evidence against such a serious allegation. It is like a *Burchill v. Attorney General of Canada* [1981] 1 F.C. 109 situation, the issue being raised for the first time. The Board does not have jurisdiction under the legislation and it is not fair to raise it at this point. Parliament has not anticipated this Board to respond to this issue because either a positive or negative finding on a violation of sections 124 or 125 is appealed to the regional Safety Officer. The Board is limited by section 130 to review findings of no danger which clearly circumscribe directions to subsection 145(2) and not to the general authority to issue specific violation of the *Code* under sections 124 and 125.

[191] The third argument is, in the alternative, should the Board dismiss the jurisdictional one. It is that in fact there is no danger. There are nine points of fact that are relevant. First the inmate was under four-point restraint at all time. Second, the officers were required to keep him in sight and sound at all time. Third, two officers were assigned to one inmate. Fourth, OC spray was provided. Fifth, the inmate was strip-searched and metal scanned by the escorting officers. Sixth, the inmate went out on two escorts within the previous 48 hours, and no incident happened in the two escorts. Seventh, the inmate was going out for legitimate reasons.

Eighth, no specific concerns were brought forward and ninth, nothing out of the ordinary was happening at the time.

[192] The definition of danger under the old *Code* where most of the jurisprudence is found, has changed. The word "imminent" has been removed. What the Canada Labour Relations Board and the Public Service Staff Relations Board have said is that the right to refuse is an emergency measure. There is the definition of danger in the *Clavet (supra)* line of cases relied on in *Fletcher (supra)* and in the *David Pratt* line of cases.

[193] The definition in subsection 122(1) of the *Code* reads:

> *"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;*

[194] In the *Clavet (supra)* case, a railway case, there was a defect in the braking system and it could reasonably be expected that a failure could happen. In *Stephenson et al v. Treasury Board (Solicitor General)* (Board file 165-2-83), which was affirmed in *Canada (Attorney General) v. Lavoie* [1998] F.C.J. No. 1285 (T.D.) the decision of the Board was that the danger had to be real and probable.

[195] The *Pratt* case (1988), CLRB decision No. 686, 73 di 218 is a transport case. At page 8 it is stated:

> *... Parliament removed the word "imminent" from the concept of danger under Part IV but replaced it with a definition that has virtually the same meaning. By using the definition it did, Parliament merely adopted the definition that Labour Canada and the Board had applied to "imminent danger" prior to the amendment:*
>
> ...
>
> *In short, very little has changed as a result of the removal of the word imminent.*
>
> ...

[196] The employer submits that the *Pratt* line of cases appropriately defined danger in the *Code*. This line was followed in:

Guénette v. CN Rail et al. (1988), CLRB Decision No. 696, 74 di 93

Koski et al. V. Canadian Pacific Limited (1993), CLRB Decision No. 1030, 92 di 195

Montani v. CN North America (1994), CLRB Decision No. 1089, 95 di 157

Brailsford v. Worldways Canada Ltd. (1992), CLRB Decision No. 921, 87 di 98

[197] There are two more applicable escort cases. They are:

Blindés Loomis Ltée v. Guilbault, [1992] C.L.C.R.S.O.D. No. 10

Canada (Correctional Service) v. Union of Solicitor General Employees, Local 10170, [1997] C.L.C.R.S.O.D. No. 19

[198] The *Code* now provides for JOSH a new mechanism to deal with danger.

[199] In *Doiron v. Treasury Board (Solicitor General Canada - Correctional Service)*, (Board files 165-2-114 to 132) and *Ferraro v. Canadian National Railway Corporation* (2000), CIRB Decision No. 50, [2000] CIRB No. 4 the same definition of danger is found. It is clear that the danger has to be imminent. The employer submits that there is no actual and real danger, even if the employees acted in good faith.

[200] The fourth argument is that any risks associated with escorts are inherent to the duties of the position. Under paragraph 128(2)(b), no refusal is permitted when "the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment". One can have concerns but this is not the forum where these concerns can be addressed.

[201] In *Montani* (*supra*) at page 14 the Canada Labour Relations Board deals with such concerns:

> *Although there was a finding of no danger in this instance, the concerns raised by Mr. Montani are very valid concerns. Safety and health should not and must not be compromised by either employers or employees. The Board reiterates what it said in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):*
>
> > ***"...because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with***

> ***a view to reducing the risk** of injury or illness ... into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."*

> *The Board reminds the parties that under Part II of the Code, both **employees** (section 126(1)) **and employers** (section 124, 125 and 126(2)) **have duties and obligations to take all reasonable and necessary precautions to ensure the safety and health** of the employee, other employees and any person likely to be affected by the employee's acts or omissions.*

Applicants' Reply

[202] Counsel for the applicants apologized for advising the employer the night before the hearing that it would rely on the *Czmola* (*supra*) decision but maintained its point. The Board has the ability to make a decision under subsection 145(2) that there was a danger and provide directions that way.

[203] The issue of the investigation was Inmate B and the escorting of Inmate B and both parties have had the opportunity to submit evidence on that topic. The employer defined the work condition as that particular escort on February 25, 2000. The applicants define the condition existing that consists of three things: one Inmate B, two, not being provided with adequate measures of protection and three, the implementation by the Warden of existing policy. The applicants' submission is that the condition that exists is a general issue as opposed to a specific one.

[204] The facts in the *Bonfa* (*supra*) case are quite different from the facts of this case. The key point is not that the individual was already taken to the hospital; the point was that the contracting of the disease was no longer there. The situation dealt with by the Safety Officer is going to arise again. It is different from the line of cases of *Bonfa* (*supra*). It is not different from the *Fletcher* (*supra*) and *Clavet* (*supra*) line.

[205] The applicants disagree that *Fletcher* (*supra*) ignores or tries to get around *Bonfa* (*supra*). What it did was that this particular fact pattern does not fit nice and neatly under *Bonfa* (*supra*) and the same with *Clavet* (*supra*). The facts of the present case do not fit either because the same officers were assigned two days in a row for the escort and both could be assigned to escort Inmate B in the future.

[206] The employer referred to *Bidulka* (*supra*) and the section directed to the Board stated that where it can be reasonably anticipated, there would be a repetition of the facts existing during the investigation. The applicants maintained that the condition still existed regardless of who is doing the escort; Inmate B is not going to change. The limitation the Federal Court placed is dealing with a different set of issues.

[207] The two lines of cases cited can co-exist. It is not a matter of choosing one or the other. It is a matter of fitting the facts into one of them.

[208] The applicants submit that there are two requirements in defining danger. There is a summary or checklist in *Fletcher* (*supra*) and the Board should move through the checklist in order to find danger that meets the two parts of the definition of danger.

[209] With regard to the reference to *Lavoie* (*supra*) the applicants submitted that the evidence has gone beyond the level of hypothetical or potential for this inmate to be considered a danger. They rely on his nature and his past behaviour to meet the requirement that the danger be actual and real.

Reasons for Decision

[210] The sections of the *Canada Labour Code* applicable to this case are subsections 128(1) and (8) and 129(5):

> ***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.*
>
> . . .
>
> *(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that*

> *(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or*
>
> *(b) a condition continues to exist in the place that constitutes a danger to the employee,*
>
> *the employee may continue to refuse to use or operate the machine or thing or to work in that place.*
>
> . . .
>
> ***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.*

[211] The Safety Officer created confusion by failing to meet with the Warden and issue a clear oral decision. Both parties understood him to have upheld the refusal and to have directed the use of a third correctional officer. After the Warden's input by telephone, the Safety Officer seemed to have had a change of heart which is reflected in his written decision.

[212] The Safety Officer found that: "a condition does not exist that constitutes a danger to these employees", and the evidence reveals that at the time of the investigation the escort had already gone out. I therefore have no ground to overturn the Safety Officer's decision. Escorting Inmate B was the condition which the applicants alleged created a danger for them. At the time of the investigation by the Safety Officer that danger no longer existed.

[213] This case does not fall into the *Fletcher* (*supra*) line of cases. The escort of inmates differs from the issue of minimum staffing of units in a penitentiary.

[214] While the characteristics of Inmate B, his impulsive and unpredictable personality, his unusual strength and his history of violent behaviour were the hazard to be assessed on February 25, 2000, I cannot accept the statement that this was an ongoing danger similar to a fuse in a control which would blow again as in *Clavet*

(*supra*). I subscribe to the Board's statement in *Stephenson et al* (*supra*) that: "the source of the danger, the inmate, has intelligence and free will". Inmate B may yield to the rehabilitative measures taken by the Correctional Service to alter his behaviour or he may have a spiritual awakening and change to become a model inmate.

[215] The reality of escorts is that each must be assessed at the time they are to take place. I subscribe to the Board's finding in *Danberg* (*supra*):

> *... However, there are considerable variations in both the personal histories of the inmates at the Centre, and in the number of other circumstances in which escorts may have to be carried out. Consequently there continues to be a requirement for the exercise of discretion and judgement on the part of management in respect of each escort situation. In light of this, in my view it would be futile and not very helpful to attempt to set down rules or criteria governing safety measures for escort duties.*

[216] I realize that this finding may be disappointing to the parties who wished to have someone make a final disposition on the use of firearms in escorts of inmates such as Inmate B. My opinion on this issue would be obiter and not binding on anyone.

[217] In view of the evidence submitted that Inmate B could act out regardless of the consequences, I cannot find any fault with Warden Urmson's decision not to authorize the issuance of firearms which could present greater danger. Having done so Warden Urmson should have asked himself the next question: how can the escorting officers be protected should Inmate B choose to act out?

[218] It would appear that both the Warden and the bargaining agent focussed on the use of the firearm as the only solution to dealing with the particular challenge presented by Inmate B.

[219] The evidence revealed that the handcuffs provided and the leg irons might be inadequate in the case of Inmate B. I am amazed that the parties have not considered restraints other than those shown to me. Surely there must be means of attaching handcuffs to the leg restraints or other parts of the body to nullify attempts at using handcuffs as a weapon. Had the parties focussed on the real problem: Inmate B's extraordinary strength and his volatile temper, they could have come up with solutions other than the firearm and something more appropriate than just the usual restraints,

gas and two officers. I sympathize with the Warden's view that it is inappropriate to authorize the use of lethal force simply as a deterrent, but I am assuming that his lack of imagination in dealing with the applicants' concerns was due to the fact that he was new at his job and that he failed to ask the right questions. The applicants and their bargaining agent were not any more creative when they saw the firearm as the only answer to the danger presented by Inmate B. While Messrs. Hovey's and Gayger's concerns about safety were genuine, their view as to the solution was limited and probably coloured by their bargaining agent's position regarding Security Bulletin 99-12.

[220] What is the role of a safety officer when confronted with the fact situation of February 25, 2000? It is to assess the actual work situation confronting the employees refusing to work. Obviously when the Warden decided to use managers to do the escorting of Inmate B, the Warden removed the danger facing Messrs. Hovey and Gayger. It was therefore no longer required of the Safety Officer to make a finding of danger.

[221] Having said that, I do sympathize with the parties and their ongoing problem of having such diametrically opposed opinions on the use of firearms during escorts. The fact that Inmate B did not act out in February 2000 does not mean he never will. When he acts out, he does so without regard to consequences. The Warden's decision on the use of firearms was sensible in the circumstances; however, his failure to address the potential for harm to the employees assigned to escort Inmate B and to provide appropriate protection was not; it left too much to luck. My only advice is that the parties need to use the JOSH Committee and possibly other brain storming groups of interested and knowledgeable personnel to thoroughly canvas the issue of escorting inmates such as Inmate B. When firearms are not approved, what safety measures could protect escorting officers from powerful inmates who act out? These are questions best answered by people familiar with various equipment and techniques of inmate control rather than by the Board.

[222] In conclusion, I hereby confirm the Safety Officer's decision in the February 25, 2000 work refusal of Messrs. Hovey and Gayger.

Evelyne Henry,
Deputy Chairperson.

OTTAWA, June 5, 2002.