

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code. Part II  
of a direction issued by a safety officer

Applicant: Environment Canada  
Represented by: Agnès Lévesque, Counsel to the Treasury Board of  
Canada Secretariat from the Department of Justice Canada

Respondent: Charlotte Hutchinson  
Environment Canada  
Represented by: Wayne Maddick, the Public Service Alliance of  
Canada

Mis en Cause: Ron Thibault  
Safety Officer  
Human Resources Development Canada

Before: Douglas Malanka  
Regional Safety Officer  
Human Resources Development Canada

An oral hearing was held in Dartmouth, Nova Scotia on February 13 and 14, 1997

**1. Background:**

On October 1, 1996, Ms. Charlotte Hutchinson, an employee of Environment Canada (EC), at the Queen's Square Building, Dartmouth, Nova Scotia, exercised her right to refuse work pursuant to paragraph 128.(1)(b) of the Canada Labour Code (Code). She told her employer that she was refusing to work due to the environmental conditions in her workplace. She left the workplace shortly thereafter.

Subsection 128.(1)(b) of the Code reads:

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

*(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.*

Mr. Michel de la Ronde, Safety Coordinator for EC, then notified safety officer Bob Muzzerall of the refusal. Safety officer Ron Thibault subsequently investigated the refusal and was assisted by Bob Reid, a safety officer and industrial hygiene technologist at Human Resources Development Canada (HRDC).

On November 12, 1996, safety officer Thibault wrote to Mr. G. Hamilton, Regional Director, Environment Canada (EC), concerning his decision. He said that he was of the view that a condition in the workplace constitutes a danger for Ms. Hutchinson while at work. He directed Mr. Hamilton, pursuant to paragraph 145.(2)(a) of the Code, to take measures to protect her from the danger immediately. A copy of the direction is attached in Appendix.

Following his direction, and within the 14 day limit for appeal, the employer disputed the decision of danger and requested that the Regional Safety Officer review the direction.

## **2. Summary of Evidence:**

### **2.1 Safety Officer Ron Thibault:**

Safety officer Ron Thibault provided a written chronology of the events that led to his decision of danger. The summary is included in the file of documents related to the case and will not be reproduced here. He testified that he assisted Bob Reid in a survey of the indoor air quality at the Queen's Square building over a period of 4 days. He confirmed that Dr. Kirkbride's<sup>1</sup> letter satisfied him that a danger existed and that there was no need for further tests to determine the danger.

### **2.2 Safety Officer Bob Reid:**

Bob Reid, an industrial hygiene technologist and safety officer at HRDC - Labour, testified that he conducted a broad spectrum indoor air quality survey at Queen's Square on October 4, 7, 8, and 29, 1996. His report is filed with the documents. From the results of his survey, there were no concentrations of formaldehyde and carbon monoxide above the detectable limits of the instruments, and the concentration of carbon dioxide did not exceed prescribed levels. There was no evidence of a significant presence of microbial fungi in the building, including the air conditioners, and there was no sign of pooling water around the building. He noted that each floor had its own air conditioner. While the concentration of total volatile organic compounds (TVOCs) in Ms. Hutchinson's office was found to be 52 times higher than that found in an office on the 14th floor, neither of the levels exceeded accepted levels of between 0.3 mg/m<sup>3</sup> and 3mg/m<sup>3</sup>.

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<sup>1</sup> Dr. Kirkbride, M.B., Msc. FRCPC, Senior Medical Consultant to HRDC - Labour

### 2.3 Witnesses:

Ms. Lévesque called two witness from EC. They discussed what was done at Queen's Square to accommodate Ms. Hutchinson's medical condition, and what measures were taken concerning the renovation of Queen's Square. Ms. Hutchinson's supervisor, John Clarke, confirmed his understanding that Ms. Hutchinson suffers from multiple chemical sensitivity and is sensitive to virtually anything that smells. She is also sensitive to dusts and moulds. Mr. Clarke confirmed that he has tried to accommodate Ms. Hutchinson's medical condition in many ways, including the purchase of an air purifier and respirator for use at her workplace. EC also promoted a scent free work environment.

Walter Williams was responsible for supervising the renovations to the 4th floor at Queen's Square. He indicated that they used the latest available technology in environmentally friendly materials for refurbishing the workplace. Carpets used at Queen's Square were outgassed prior to use and furniture was refurbished instead of buying new furniture. The glue used to lay carpets and refurbish the furniture was said to be environmentally friendly. Paints selected for use did not contain mercury or other toxic metals.

Mr. Clarke said that, after the trial office at the DVA building failed, the Department felt it had exhausted all options. On July 31, 1996, he wrote to Ms. Hutchinson and informed her that she would have to report to her office at Queen's Square, take sick leave or disability leave, exercise her right to refuse work, or telework at home. On the same day, she replied that she was exercising her right to refuse. The next day she clarified that she was refusing to work at her office on the fourth floor, at the Burnside warehouse and at the EC laboratory area.

### 3. Argument of the Employer:

The employer submitted written reasons for the appeal of the direction by the safety officer prior to the hearing. A copy of this is on file. Ms. Lévesque tabled further documents at the hearing which also form part of the written record.

Ms. Lévesque argued that I need to consider section 122., paragraph 128.(1)(b), and paragraph 128.(2)(b) of the Code, for arriving at my decision.

Counsel referred me to cases<sup>2</sup> previously decided by the Public Service Staff Relations Board (PSSRB), the Canada Labour Relations Board (CLRB) and the Federal Court that establish specific criteria for the Code to apply to a danger. Of these, she stated that there must be a medical or scientific link pointing to a causal link between the environment and the imminent

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<sup>2</sup> Bonfa case (Federal Court of Appeal, August 31, 1990)  
Howard Cross and Wayne Pike case (PSSRB - File No., 165-2-82, January 15, 1991)  
J. A. Normand Beauregard case (PSSRB - File No., 165-2-62, April 28, 1989)  
Barbara Webber et Al. Case (PSSRB - File No., 165-2-92)  
John Walton case (PSSRB - File No., 165-2-21, July 9, 1987)  
Nella Spadafora and Canadian Airlines International Ltd. (CLRB - Decision No., 981)  
Stephen Brailsford case (CLRB - Decision No., 921, March 18, 1992)  
Bidulka versus Canada (Treasury Board), Federal Court of Appeal, 1987  
C. M. Hutchinson=s case at the PSSRB (PSSRB - File No., 165-2-13, September 23, 1996)

danger, and the direction issued must be one concerning and connected to the workplace. In addition, the right to refuse can not be used to resolve a job action.

Ms. Lévesque pointed out that Ms. Hutchinson is suffering from environmental illness, and her allergies are not limited to the workplace. She distributed a report by Dr. K. MacDonald entitled, "Sick Building Syndrome", that indicates that the symptoms suffered by a person suffering from environmental illnesses are subjective symptoms and there is no real known cause for them. She said that it also states that organizational stress is a factor of environmental illness.

Ms. Lévesque argued that stress can only be controlled by the person suffering from the stress.

Ms. Lévesque reminded me that safety officer Thibault had testified that the survey indicated that nothing in the building's environment would normally be expected to constitute a danger to the employees at Queen's Square and, without Dr. Kirkbride's letter, he would have decided that there was no condition of danger. She contended, however, that Dr. Kirkbride's letter only confirms that Ms. Hutchinson is unable to work at Queen's Square because of her own medical condition, and that he does not recommend further tests or modification to her workplace. She reiterated that Ms. Hutchinson's personnel medical condition is not a danger governed by the Code.

#### **4. Argument of the Employee:**

Ms. Hutchinson submitted information concerning her refusal to work prior to the hearing. In addition, further documents were tabled at the hearing by Mr. Maddick. A copy of these are on file. However, I took the following points from the evidence submitted at the hearing by Mr. Maddick and his summation arguments.

Mr. Maddick agreed that the danger here relates to subsection 145.(2) and not to a contravention under subsection 145.(1) of the Code. In this regard, he reminded me that safety officer Reid's report confirms that the concentration of TVOCs in Ms. Hutchinson office was 52 times higher than that found in another part of the building. He also referred me to the part of safety officer Reid's Report where it states that the level at which reactions to TVOCs could be triggered is unique to each person with hypersensitivity to volatile organic compounds. Therefore, he argued that Dr. Kirkbride's letter to safety officer Thibault shows that there was a danger and that it is related to the workplace.

Mr. Maddick noted that the employer is required, pursuant to paragraph 125(s) of the Code, to ensure that every employee is made aware of every known or foreseeable safety or health hazard in the area where that employee works. He added that the employer is also required, pursuant to section 124 of the Code, to ensure that the safety and health at work of every person employed by the employer is protected. Given these requirements, he maintained that the Code applies even if other employees are not affected by the danger.

Concerning the previous review cases cited by Ms. Lévesque, Mr. Maddick disagreed that the Beaugard and Spadafora cases apply here. He argued that those cases dealt with inherent danger and safety officer Thibault confirmed that inherent danger does not apply in this case. He said that neither the Cross and Pike case nor the Webber case apply here because they dealt with an infraction under subsection 145.(1) of the Code.

## **5. Decision:**

When called to investigate Ms. Hutchinson's work refusal, safety officer Thibault was confronted with compelling arguments on both sides of the issue. On the one hand, the survey conducted by safety officer Reid confirmed that there was nothing in the building's environment that would normally be expected to constitute a danger to employees. The survey also confirmed the results of the previous survey that safety officer Reid carried out at Queen's Square two months earlier.

On the other hand, safety officer Thibault had medical reports from doctors who had examined Ms. Hutchinson in the past confirming that scents in the workplace were a problem for her. He also had Dr. Kirkbride's letters stating that exposure to Queen's Square workplace aggravates Ms. Hutchinson's medical condition and, on that basis, it is reasonable for her to refuse to work there until her medical condition improves. Safety officer Thibault said, in the end, that he relied on Dr. Kirkbride's advice when he decided that danger exists for Ms. Hutchinson, and that the danger is the total workplace environment. The question I must decide is whether or not a condition of danger regulated under the Code existed at the time of the safety officer's investigation of the refusal to work.

To answer this, I looked at section 122. and subsection 128.(1)(b) of the Code, and took into account the Bonfa, Webber, Walton and Bidulka case precedents cited by Ms. Lévesque. Taken together, they clearly establish that for a safety officer to decide that a danger exists the safety officer must verify that a danger exists in the workplace at the time of his investigation, and that there is a medical or scientific link pointing to a causal link between the environment and the possibility of imminent danger to the health of employee. In this case, safety officer Thibault had to establish that a condition of danger concerning and connected to the workplace existed for Ms. Hutchinson, and that there was a causal link between the condition and the workplace. To interpret the Code otherwise places the employer in the untenable position of being in technical violation of the law without anyone having confirmed that a dangerous condition exists in the workplace.

On the question of whether a condition exists concerning and connected with Ms. Hutchinson's workplace, we have safety officer Reid's survey results concerning the indoor air quality at Queen's Square, and Dr. K. MacDonald's report on "Sick Building Syndrome (SBS)" that provides general information on environmental illnesses.

On the subject of the indoor air quality survey at Queen's Square, safety officer Reid reported that he did not find anything in the building's environment that would normally be expected to constitute a danger to employees. He confirmed that, while the level of TVOCs in Ms. Hutchinson's office was 52 times higher than that measured in a room on the 14th floor of the building, both were within accepted levels.

Moreover, safety officer Reid referenced a Health Canada guideline entitled, “Indoor Air Quality In Office Buildings - A Technical Guide” in his report. Safety officer Reid noted in his report that the guideline suggests that the TVOC concentrations found in Ms. Hutchinson’s office are levels at which discomfort can be expected in conjunction with thermal stressors. No mention is made of injury or illness in this regard.

This general lack of findings by safety officer Reid’s survey is somewhat supported in the publication by Dr. K. MacDonald entitled “Sick Building Syndrome (SBS),” Dr. MacDonald observes in her Report that: the symptoms of SBS are real but the cause is not clear; that it is unlikely there is one single cause of SBS; and that one of the factors may be organizational stress. She also observes that the cause of SBS is not always known, and cases are reported where the investigation of the building reveals nothing.

On the question of whether the facts of the case establish that there is a link between Ms. Hutchinson’s medical condition and the workplace, evidence was presented concerning the nature of Ms. Hutchinson’s medical condition, efforts by EC to accommodate Ms. Hutchinson, and recommendations from Dr. Kirkbride, medical advisor to HRDC.

The evidence concerning Ms. Hutchinson’s medical condition shows that she suffers from environmental illness and multiple chemical sensitivity, and that she is sensitive/allergic to virtually anything that smells at almost every location. This includes scents at other building offices, at hotels and at her home. Evidence was also presented concerning the measures that the employer has taken to address the situation. It shows that, while these measures may have alleviated Ms. Hutchinson’s symptoms, nothing the employer has done appears to have resolved the problem or provided any information on how the workplace specifically aggravates her medical condition.

Mr. Maddick is of the view that Dr Kirkbride’s letters to safety officer Thibault confirm that a dangerous condition exists at Queen’s Square for Ms. Hutchinson and that there is a link between the danger and the workplace. It appears that safety officer Thibault inferred a similar interpretation when he decided that a condition of danger existed for Ms. Hutchinson at Queen’s Square.

However, when I look closely at Dr. Kirkbride’s letters, he clearly qualifies that his opinion is based on medical information he received about Ms. Hutchinson from copies of medical reports from her family physician, and from a certified medical specialist. He does not maintain that his recommendation is based on evidence concerning the environment at Queen’s Square. In fact, he specifically clarifies that he is not suggesting that Queen’s Square workplace is responsible for initiating her illness, that he does not feel that Queen’s Square is in any way unsatisfactory or unsafe for other employees, and that he has no recommendations to make regarding further environmental investigation or regarding modifications to Ms. Hutchinson’s workplace or to Queen’s Square. Therefore, I do not conclude that Dr. Kirkbride letters confirm that a dangerous condition exists at Queen’s Square for Ms. Hutchinson or that there is a causal link between the danger and the workplace.

Instead, what I find from the evidence presented is that the employee has a medical condition, that her symptoms are increasing over time and that they are experienced in other workplaces and in her home. The tests conducted in the Queen's Square workplace do not establish anything abnormal in the workplace or that there is a contravention of the Code and regulations. None of the medical doctors consulted, nor the safety officer, can pinpoint for the employer the specific cause of the aggravation, or the link between the aggravation Ms. Hutchinson experiences and the workplace. The only medical certainty, as indicated in Dr. MacDonald's report, is that the medical condition is real and not imaginary, that the causes are unknown and that stress can be a factor. None of the efforts by Environment Canada have resolved the situation or given any clue as to what at Queen's Square aggravates Ms. Hutchinson's medical condition. Dr. Kirkbride suggests addressing the situation by permitting Ms. Hutchinson to work at home.

As a result, I find that the facts in this case do not confirm that a dangerous condition exists in the workplace for Ms. Hutchinson because they do not meet the requirements of section 122. (definition of danger) and paragraph 128.(1)(b), in the Code. For clarity, I am not saying that Ms. Hutchinson's medical condition is not real. However, until it can be established that an actual condition of danger exists in the workplace at the time of the safety officer's investigation and that there is a medical or scientific link pointing to a causal link between the environment and the possibility of imminent danger to the health of Ms. Hutchinson, I find the danger alleged is not one regulated under the Canada Labour Code. In my opinion, Safety officer Thibault did not fully take this into consideration when he decided that a danger exists for Ms. Hutchinson because she has a medical condition that causes the workplace at Queen's Square to be unsafe for her.

Having found that there is no evidence that a danger regulated under the Code exists, I will not address myself to the other arguments raised by the parties concerning the right to refuse provisions in the Code. Specifically, I will not comment on arguments related to whether or not the alleged danger was real, immediate, present at the time of the safety officer's investigation, or inherent to the work of the employee.

## **6. Decision:**

For these reasons, **I HEREBY RESCIND** the direction of safety officer Thibault issued on November 12, 1996, to Environment Canada at the Queen's Square Building located in the Province of Nova Scotia.

Decision rendered on April 14, 1997.

D. Malanka  
Regional Safety Officer

## **Comment:**

I feel compelled to comment that, during the hearing, both parties demonstrated a great deal of good-will and determination in dealing with this situation. Mr. Clarke stated that he recognized that Ms. Hutchinson's medical condition has, for the moment, no cure, but that it could be managed.

I commend both parties for their efforts in the past to find a way to manage the situation, and encourage them to continue working together to find an arrangement that meets the needs of both parties. Such efforts could possibly lead some day to an understanding of the cause of her condition. If, in the discovery of cause of Ms. Hutchinson's medical condition, someone establishes that there is a causal link between that hazard or condition and the workplace, Environment Canada will know that it acted in a manner consistent with the Code regardless of the inability at this time to confirm a causal link. But more importantly it will have acted within the spirit and intent of the Code.



**APPENDIX**

**IN THE MATTER OF THE CANADA LABOUR CODE  
PART II - OCCUPATIONAL SAFETY AND HEALTH**

**DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)**

On October 4, 7, 8 and October 29, 1996, the undersigned safety officer conducted an inquiry following the refusal to work made by CHARLOTTE HUTCHINSON in the work place operated by ENVIRONMENT CANADA, being an employer subject to the Canada Labour Code, Part II, at 45 ALDERNEY DRIVE, DARTMOUTH, NS, the said work place being sometimes known as Quees Square.

The said safety officer considers that a condition in the workplace constitutes a danger to Charlotte Hutchinson while at work:

Charlotte Hutchinson suffers from a medical condition that causes the workplace to be unsafe for her.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to protect Charlotte Hutchinson from danger immediately.

Issued at DARTMOUTH, N.S., this 12th day of November 1996.

R. THIBAUT  
Safety Officer  
1819

To: ENVIRONMENT CANADA  
45 ALDERNEY DRIVE  
DARTMOUTH, NS  
B2Y 2N6

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Environment Canada  
Represented by: Agnès Lévesque, Counsel to the Treasury Board of  
Canada Secretariat from the Department of Justice Canada

Respondent: Charlotte Hutchinson  
Environment Canada  
Represented by: Wayne Maddick, the Public Service Alliance of  
Canada

**KEYWORDS:**

Work refusal, environmental illness, multiple chemical sensitivity, sick building syndrome, environmental conditions, indoor air quality, occupational stress, problem buildings.

**PROVISIONS:**

Code: 122., 124., 125.(s), 128.(1)(b), 128.(2)(b), 145.(1), and 145.(2)

COSH Regulations: 10.19

**SUMMARY:**

On November 12, 1996, a safety officer decided that the environment in a workplace constituted a danger for an Environment Canada (EC) employee because she has an environmental illness that causes the workplace to be unsafe for her. He subsequently directed the employer, pursuant to paragraph 145.(2)(a) of the Canada Labour Code, to take measures to protect the employee from danger immediately. The safety officer said that he was unable to identify any specific environmental condition that would constitute a danger to the employee in the workplace. However, based on advice he received from the Senior Medical Consultant to HRDC at Health Canada, he decided that a danger exists for the employee and that there is no further tests to determine the danger.

Upon review, the Regional Safety Officer concluded that there was no danger because the evidence in this case fails to establish that an actual condition of danger existed in the workplace at the time of the safety officer's investigation and that there is a medical or scientific link pointing to a causal link between the environment and the possibility of imminent danger to the health of the employee. The Regional Safety Officer **RESCINDED** the direction of the safety officer on April 14, 1997, because the alleged danger is not regulated under Part II of the Canada Labour Code.