

Canada Labour Code
Part II
Occupational Health and Safety

D. Willan and J. Klein
applicant

and

Human Resources Development Canada
(M. Janosik)
Respondent

Decision No.: 05-021
May 11, 2005

This inquiry involves an appeal made pursuant to subsection 129(7) of the *Canada Labour Code* (*Code* or Part II). Appealed was a decision of a health and safety officer that a danger did not exist for two employees who had refused to work over concerns about the quality of air in their work place. Hearings were held in Windsor, Ontario, on April 7, 2003, September 17 and 18, 2003 and on September 29 and 30, 2004.

Appearances

For the applicant

Donna Willan, Service Delivery Advisor (SDA), Human Resources Development Canada (HRDC);

Jan Liberty, Representative, National Health and Welfare Union

Denise Blackburn, Occupational Health and Safety Representative, National Health and Welfare Union

Barry Lam, Occupational Hygienist, Occupational Health Clinics for Ontario Workers

Tom Laporte, Property Facility Manager, Public Works and Government Services Canada (PWGSC)

Scott Mertz, Technician, Dual Electric and Refrigeration Services

Peter Sammit, Environmental Health Officer (EHO) Work Place Occupational Health and Safety Program, Health Canada (HC)

Stewart Teasell, Inspector, Environment Protection Branch, Environment Canada

Elliot Welch, Health, Safety and Environment Consultant, Social Development Canada

For the respondent

Hélène Brunelle, Counsel, HRDC

Michele Janosik, Service Delivery Manager, HRDC

Amy Desjardins, Manager, Corporate Services, HRDC

Larry Hurajt, Building Technician, Brookfield, Lepage Johnson Controls (BLJC)

Burt Doobay, EHO, HC

Health and Safety Officer (HSO)

Paul Danton, Health and Safety Officer, Human Resources Development Canada

- [1] On Friday, October 26, 2001, Ms. Donna Willan, a Service Delivery Agent (SDA) in the Income Security Programs (ISP) section of Human Resources Development Canada refused to work. She complained that she felt ill as a result of exposure to Freon gas or other indoor air quality (IAQ) hazards at her work place located in Windsor, Ontario.
- [2] At approximately the same time, Mr. John Klein, a co-employee of Ms. Willan, also refused to work. He too complained that he felt ill as a result of exposure to freon gas or other indoor air hazard in the work place. Following the employer's investigation of the refusals to work, both employees were sent home and a health and safety officer at HRDC was contacted to investigate the refusals to work.
- [3] On Monday, October 29, 2001, health and safety officer Paul Danton arrived at the work place with labour affairs (LAO) officer Marjorie Roelofsen to investigate into the refusals to work of Ms. Willan and Mr. Klein. Additionally, he was there to address a meeting of the Base Building Committee¹ (BBC) that had been prearranged on October 19, 2001. The purpose of the BBC meeting was to deal with on going employee concerns regarding indoor air quality in the building. These were the same concerns that Ms. Willan and Mr. Klein cited in their refusals to work.
- [4] HSO Danton then conducted an extensive investigation into the indoor air quality issues that were raised at the October 19, 2001 BBC meeting. On January 22, 2002, some three months later, he wrote and informed Ms. Willan and Mr. Klein of his decision that a danger did not exist for either of them.
- [5] On January 29, 2002, Ms. Willan and Mr. Klein appealed the decision of HSO Danton pursuant to subsection 129(7) of the *Code*. Hearings were held in Windsor, Ontario, on April 7, 2003, September 17 and 18, 2003 and on September 29 and 30, 2004. Mr. Klein was unable to attend the hearings due to health reasons and he indicated that Ms. Liberty and Ms. Willan would represent his interest.

¹ The Building Base Committee consisted of all tenants of the building in Windsor, Ontario. The first floor was occupied by HRDC, City of Windsor and St. Clair College staff. The second floor was occupied by Veterans Affairs, Canada Customs and Revenue, Correctional Service Canada, Health Canada and Brookfield Lepage Johnson Controls.

- [6] HSO Danton submitted a copy of his investigation report to the Appeals Officer prior to the hearing and testified at the hearing. I retain the following from his report and testimony.
- [7] HSO Danton and LAORoelofsen met first with Ms. Janosik, Manager, Service Delivery, on October 29, 2001, regarding the refusals to work. Ms. Janosik advised HSO Danton that Ms. Willan and Mr. Klein were actually present in the work place that morning despite their refusals to work the previous Friday.
- [8] HSO Danton met separately with Ms. Willan and Mr. Klein and advised them that they could not remain in the building to attend the BBC meeting if a danger existed for either of them. Ms. Willan insisted that her participation at the BBC meeting was essential because she had been involved in the health and safety issues both as a representative of the National Health and Welfare Union (NHWU) and as a member of the work place joint occupational health and safety committee (JOHSC). When Ms. Willan and Mr. Klein asked what it would take for them to remain in the building and participate in the BBC meeting, HSO Danton suggested that they could withdraw their refusals to work. HSO Danton opined that it would be unsafe to do otherwise.
- [9] Ms. Willan and Mr. Klein withdrew their refusals to work and HSO Danton had them confirm their withdrawals in writing. The BBC meeting then proceeded with the participation of Ms. Willan and Mr. Klein. HSO Danton chaired the meeting.
- [10] HSO Danton testified that he continued to investigate the refusals to work of Ms. Willan and Mr. Klein despite their withdrawals because he was obliged to do so by departmental policy. He did this in parallel with his investigation of the ongoing employee indoor air quality concerns discussed at the BBC meeting on October 29, 2001. HSO Danton stated that the principal issues related to both refusals to work were:
- Freon leaks from the air conditioning (A/C) system at the work place;
 - concerns regarding indoor air quality; and,
 - gnats falling from the ventilation ducts onto work place stations.
- [11] With regard to the first issue, HSO Danton considered the following facts for deciding that a danger did not exist for Ms. Willan or Mr. Klein.
- [12] During the weekend of April 26 to 28, 1999, an electrical contractor carried out electrical work near an outside A/C cooling tower located in the parking lot behind the building. During his work, he accidentally damaged a valve on the A/C tower which permitted the Freon to escape. The damage was not discovered until the following Monday when it was estimated that approximately seventy-seven (77) kilograms of Freon ₁₂ had escaped from the cooling tower.

- [13] Instead of simply repairing the air cooling tower, PWGSC and BLJC decided to have the A/C system converted to operate with Genetron 134A Freon (Freon_{134A}) refrigerant instead of Freon₁₂. The converted A/C system included two Freon compressors located in the mechanical room and a water cooled condenser located on the roof of the building.
- [14] On September 2000, approximately 2.3 kilograms of Freon₂₂ leaked from a separate and unconnected A/C unit located on the south east corner roof of the building. As the A/C unit was not located near the air intake pipe to the building, BLJC expected that it was unlikely that anyone was exposed to the Freon which escaped into the atmosphere. The BBC was informed of the occurrence two months later and told that the system was repaired
- [15] On September 19, 2001, Mr. Scott Mertz, a technician with Dual Electric and Refrigeration Company (Dual Refrigeration) conducted a routine annual inspection of the A/C unit in the mechanical room. While he observed that the unit was starved of Freon_{134A}, he could not find any leaks. He tightened some of the nuts on the Freon line to the expansion unit and re-charged the A/C unit with approximately forty-one (41) kilograms of Freon_{134A}.
- [16] In connection with this, PWGSC and BLJC notified HRDC of the loss of Freon_{134A} and confirmed that the A/C unit had been re-pressurized with approximately forty-one (41) kilograms of Freon_{134A} on September 19, 2001. PWGSC further informed HRDC that:
- Freon_{134A} posed a low risk to health and safety;
 - it was likely that the leak of Freon_{134A} had occurred over a period of time because a sudden leak would have caused the air conditioning unit to fail immediately which was not the case. Thus any concentration of Freon_{134A} in the room would have been low;
 - there was a one and a half inch gap under the door which permitted the Freon_{134A} to escape from the room;
 - both stairwells outside of the mechanical room led from the basement to the exit doors to the outside of the building;
 - the doors to the outside of the building were opened frequently by the public; and
 - the room was ventilated via an open basement window.
- [17] Mr. Mertz returned on September 26, 2001 and found a leak in the capillary line of the A/C unit which he opined was due to vibration. He left without adding any Freon_{134A}.
- [18] On October 2, 2001, Mr. Mertz returned to the mechanical room and capped the Freon line that was leaking. He then re-charged the A/C system with approximately forty-one (41) kilograms of Freon_{134A} for winter operations.
- [19] HSO Danton was satisfied from the facts that none of these incidents had caused Ms. Willan or Mr. Klein to be exposed to a dangerous level of Freon in their work place.

[20] With regard to the other IAQ issues cited by Ms. Willan and Mr. Klein when they refused to work, I retain the following from HSO Danton's investigation report and testimony at the hearing.

[21] Ms. Willan's principal IAQ concern was that the damper door on the intake pipe of the heating, ventilating and air conditioning (HVAC) system were fully closed. As a result, she alleged that the amount of outdoor fresh air being drawn into the building was less than what was required according to the American Society for Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) standard. The ASHRAE standard is referenced in the *Canada Occupational Health and Safety Regulations* (COHSRs). She held that the deficiency of fresh air exacerbated her continuous exposure to Freon in the building.

[22] In this regard, Environmental Health Officer Sammit testified that:

- in 2000, he conducted an indoor air quality test in the building and the concentration was measured at the breathing zone of the person and so represented what people were breathing;
- the concentration of carbon dioxide in a building is generally considered to be a surrogate indicator for air flow rates of outdoor fresh air and of air flow distribution. Five hundred parts per million (ppm) concentration of carbon dioxide was considered normal and, as the concentration climbed to one thousand (1000) ppm, one would expect increased complaints regarding tiredness and scratchy dry skin;
- he found that the concentration of carbon dioxide in the building in question was four hundred and fifty (450) ppm, so he considered the indoor air quality to be good; and
- he would have expected a higher than normal concentration of carbon dioxide if the air flow had been insufficient or the air flow had not been adequately balanced.

[23] The third issue of concern for Ms. Willan and Mr. Klein was the presence of gnats in the ventilation ducts. However, Mr. Pierre Léger, Health Canada, reported to HSO Danton on March 8, 2002 that the gnats found in the ventilation system had been sent to Agriculture Canada for identification. Agriculture Canada determined that the insects were a nuisance but did not pose a health threat.

[24] Finally, HSO Danton testified that:

- there were approximately 70 persons on the floor at the time of the refusals to work;
- only Ms. Willan and Mr. Klein reported feeling any symptoms at the time; and
- the employee who had been taken to emergency services earlier that morning confirmed that the symptoms he suffered were not connected with those reported by Ms. Willan and Mr. Klein.

[25] Mr. Mertz testified at the hearing regarding the leak tests he conducted and the Freon that he added to the A/C system in the mechanical room located in the basement of the building. I retain the following from his testimony.

- in April 1999, Mr. Mertz completed the conversion of the A/C unit in the mechanical room from Freon 12 to Freon 134A. After re-charging the A/C system with Freon 134A, he left the empty Freon 134A cylinders to show BLJC that the system had been re-charged;
- these were the Freon cylinders that Ms. Willan observed during her inspection of the mechanical room in May 2000. Mr. Mertz testified that he never stored charged cylinders of Freon 134A in the mechanical room;
- on September 19, 2001, during his annual inspection of the A/C unit in the mechanical room, he discovered that the A/C unit was starved for Freon. He did not wear a respirator when he entered the mechanical room because he did not feel any health symptoms that would indicate the presence of a high concentration of Freon 134A. In addition, the below grade window in the mechanical room was opened;
- he was unable to find any leaks, but tightened some nuts on the system and re-charged the system with approximately forty-one (41) kilograms of Freon 134A;
- Mr. Mertz returned on September 26, 2001 and found a leak. He did not add any Freon 134A on that day; and
- Mr. Mertz returned on October 2, 2001, capped the leak and added approximately forty-one (41) kilograms of Freon 134A.

[26] Mr. Sammit testified that HSO Danton had discussed the refusals to work with him on the day of the refusals. The purpose of their discussion was to decide if it was necessary to evacuate other employees and members of the public present in the building. He agreed with HSO Danton that this was unnecessary for the following reasons:

- no-one other than Ms. Willan and Mr. Klein had reported feeling ill out of the approximately seventy (70) persons present on the floor at the time;
- the mechanical room was ventilated by a below grade window;
- the mechanical room was a restricted area that was locked and inaccessible to the public or employees;
- employees from BLJC and PWGSC accessed the room on a daily basis and did not report suffering any symptoms from exposure to Freon; and
- Mr. Mertz, the Dual Refrigeration technician, had not complained of symptoms connected to exposure to a high concentration of Freon when he was in the mechanical room.

[27] Mr. Sammit also recalled in testimony that the below grade window was open when he visited the room in 1998.

[28] Mr. Burt Doobay, EHO, HC, testified that he conducted indoor air quality tests on November 13 to 16, 2001 following the refusals to work by Ms. Willan and Mr. Klein. I retain the following from his testimony.

- [29] For designing the indoor air quality tests for the building, he consulted with Ms. Desjardins, Manager, Corporate Services, HRDC, Mr. Hurajt, Building Technician, BLJC, Ms. Janosik and Ms. Willan. Mr. Doobay stated that he was not concerned with the air flow measurements, the air balance findings, or the exact number of occupants in the building, because indoor air quality test conditions are satisfied as long as the building is seventy-five (75) percent occupied. This was the case during his testing.
- [30] The indoor air quality testing was conducted on the main floor, including the board room. The measurements were taken at the representative breathing zone for the work place and the work.
- [31] Mr. Doobay reiterated the following findings that he made in his IAQ report dated January 2, 2002:
- carbon dioxide concentrations were within the levels specified by the Treasury Board Guidelines and the ASHRAE Standard;
 - levels for temperature, relative humidity, carbon monoxide and air flow were satisfactory;
 - the airborne microbial activity measured did not indicate any abnormal activity and was acceptable; and
 - the visual inspection of all HVAC systems indicated that the systems were satisfactory.
- [32] Mr. Teasell, Inspector, Environmental Protection Branch, testified at the hearing that he wrote to Mr. Campbell, Property Manager, BLJC, on January 13, 2003, to report his findings following his investigation into BLJC's Freon records. He confirmed for Ms. Willan that, according to his investigation on November 4, 2002, BLJC was in compliance with the *Federal Halocarbon Regulations* relative to leaks that had occurred at the building. He noted that there had been some documentation inconsistencies but that these were regarded as minor.
- [33] Ms. Willan submitted documents and testified at the hearing on September 30, 2004. Many of the documents submitted have already been addressed. However, I retain the following additional facts from her documents and testimony.
- [34] On the subject of Freon leaks, Ms. Willan testified that she was convinced that some Freon₁₂ gas had escaped from the compressor located in the basement mechanical room and infiltrated to the first floor where she worked during the April 1999 Freon incident.
- [35] Ms. Willan further held that she was exposed to Freon_{134A} when she entered the mechanical room in May, 2000 in connection with the annual inspection done by the work place JOHSC. She observed that there were two cylinders labeled Freon_{134A} and a container labeled "Emkarate 22 Solvent Freon." According to Ms. Willan, this is when the work place JOHSC began to question the leaks and to conduct its own research into Freon_{134A}. While conducting its research, the committee learned for the first time of the Freon₁₂ leak in April of 1999.

- [36] Ms. Willan maintained that the fact that the A/C unit was found to be starving for Freon _{134A} on September 19, 2001 was proof that the A/C unit had not been repaired in April 1999 and that Freon had leaked continuously from the unit. She further maintained that any Freon _{134A} that leaked into the mechanical room immediately entered the air supply to the building. Therefore, she and other employees on the first floor were continuously exposed to the Freon _{134A} during this period of time *via* a ventilation duct that connected the mechanical room to the first floor.
- [37] Ms. Willan alleged that Mr. Mertz re-charged the A/C system in the mechanical room on September 26, 2001 with an additional charge of forty one (41) kilograms of Freon _{134A} not recorded in the Freon log. Thus she and other employees on the first floor were exposed to approximately eighty-two (82) kilograms of Freon _{134A} between September 19, 2001 and October 2, 2001.
- [38] At the BBC meeting on September 28, 2001, Ms. Willan learned about the Freon _{134A} leaks that had been discovered on September 19, 2001 and dealt with on September 19 and September 26, 2001. Following the meeting, Ms. Willan met with her co-workers. She showed them the A/C logs that documented when the various A/C units at the work place were serviced and the dates when Freon escaped from or was added to an A/C system.
- [39] The group consisting of Ms. Willan and Mr. Klein and four other employees then met with their immediate supervisor, Ms. Wendy Truant, Manager, Service Delivery, on October 11, 2001. During the meeting, they submitted a group hazard occurrence report. The employees alleged in the report that PWGSC had not properly maintained the A/C equipment in good order and that Freon had leaked from the A/C system. The employees further claimed that they were exposed to high levels of yeast, bacteria and mould through the contaminated ductwork system and that the building did not meet the ASHRAE standards for fresh air.
- [40] Each of the employees provided Ms. Truant with an outline of the symptoms that they had experienced. Common in their complaints was that they had experienced all or some of the following symptoms over the last few months. Their symptoms included;
- light headedness;
 - dizziness; and
 - headaches.
- [41] Ms. Willan and Mr. Klein submitted that they had experienced more serious health symptoms during this period. They also indicated that they had experienced the same symptoms in 1997.

[42] With regard to her complaint concerning the air flow in the building, or, more precisely, the lack of adequate outdoor fresh air being added to the HVAC system, Ms. Willan maintained that:

- Lorenzen Mechanical Engineering had erred in their determination of air replacement requirements for the building because they had been provided with lower occupancy numbers than what normally occurred in the building. Therefore, the amount of fresh air replacement in the building was below ASHRAE standard requirements;
- Caltab Air Balance Inc. (Caltab) was not hired to balance the air in the building until March of 2001. Therefore, HRDC had knowingly continued to operate the ventilation system in violation of the ASHRAE standard for months; and
- the work completed by Caltab was flawed because Mr. Hurajt had instructed them to leave all outdoor air dampers on all rooftop units in the fully closed position.

[43] On the subject of the gnats, Ms. Willan maintained that their presence constituted a health hazard.

[44] With regard to her refusal to work on October 26, 2001, Ms. Willan reiterated that:

- she felt headachy and fatigued which were symptoms of exposure to Freon;
- she was concerned that she had not been given satisfactory proof that the A/C unit in the basement had been repaired such that there were no Freon leaks;
- she did not believe the Freon leak repair tickets provided to her in response to her demands because they contradicted everything she had previously seen and heard; and
- she was not reassured by the indoor air quality tests conducted by Mr. Doobay because her principal concern was the lack of outdoor fresh air in the building and Freon leaks in the building.

[45] Ms. Willan stated that she visited the work place nurse following her refusal to work and later met with Ms. Desjardins at approximately 13:05 hours. Ms. Desjardins told her to go home at that time, but she did not leave the work place until approximately 13:50 hours because she was concerned for her co-workers. After leaving the work place, she went to a clinic and saw a medical doctor.

[46] Ms. Willan submitted as evidence of injury due to exposure to Freon a letter that Dr. Deborah Heller, Clinical Physician of the Occupational Health Clinics for Ontario Workers Inc., had written on June 17, 2003 to her physician, Dr. Bev. Beattie. Among other things, the letter summarized the medical history that had been provided to Dr. Heller and included Dr. Heller's assessment regarding Ms. Willan. Dr. Heller's report is not reproduced here to protect Ms. Willan's privacy.

[47] In the portion of the letter that dealt with the background medical history, Dr. Heller wrote that Ms. Willan had reported that:

- she was well until 1997 when she developed symptoms;
- she discovered in 2001 that there had been Freon leaks of the compressor inside the building from 1999 on, and that cylinders of Freon were stored nearby;
- her concern was that her symptoms were associated with the constant exposure to Freon in her work place from 1999 on;
- she reported that she was off work for a period of eight weeks and her symptoms normalized;
- a clinic that she consulted tested and confirmed the existence of her illness; and
- the Lorenzen Report dated August 17, 2000 indicated that there was an insufficient supply of outdoor air and extreme amount of dirt and debris in some heat transfer coils and duct work consistent with and resulting in poor indoor air quality.

[48] Reporting on her assessment of Ms. Willan's illness, Dr. Heller wrote that "*during overexposure to fluorocarbons the heart becomes more sensitive to adrenaline and can result in palpitations.*" She also commented that:

- her review of medical literature documented that chronic exposure to Freon in the workplace would have been associated with the development of the type of illness suffered by Ms. Willan as well as non-specific symptoms such as fatigue. The medical literature indicated that the exposures to Freon in a sensitized worker would result in symptoms even though the specific concentrations were not measured.

[49] Ms. Willan cited in her testimony an excerpt from a report by Mr. Dan Burlac, a Mechanical Maintenance Management Specialist with PWGSC. The June 17, 2003 report, entitled "*Mechanical Room Requirements*" commented on the requirements for the mechanical room located at the work place to comply with the *Code* and COSHRs for housing an A/C system. In that excerpt, Mr. Burlac stated that it was theoretically possible for the entire charge of Freon ^{134A} to empty into the mechanical room, and that, if this occurred, the concentration of Freon in the mechanical room would exceed the maximum permitted level of exposure to Freon for a person.

[50] On the subject of the letters that she and Mr. Klein signed on October 29, 2001 to withdraw their respective refusals to work, Ms. Willan testified that:

- she had assumed when she met with HSO Danton on October 29, 2001, that he had already established that indoor air quality testing had been done;
- during her meeting with HSO Danton, she tried to explain her chronic Freon problems, however, HSO Danton talked to her in an intimidating manner; and
- she felt totally coerced as HSO Danton insisted that she could not stay in the work place and attend the upcoming meeting on indoor air quality concerns unless she withdrew her refusal to work.

[51] On August 18, 2003, Mr. Klein submitted an affidavit to the Appeals Officer. I retain the following excerpt:

...

As the state of my health precludes my attendance at the appeal hearing to be held in Windsor on Aug.21st and 22nd 2003. I wish to make the following notarized statement concerning the events surrounding the October 29, 2001 work refusal meeting and subsequent events, as described by Mr. Paul Danton in his decision.

On October 29th 2001, I initially met with Mr. Paul Danton and Health and Safety Officer M. Rofelson, however shortly after the meeting started Officer Rofelson left and the meeting continued with Mr. Danton alone, concerning my work refusal, and the anticipated investigation process.

At that time Mr. Danton advised me that if I did not withdraw my work refusal for Friday October 26th 2001, that there would be no investigative meeting concerning the health and safety issues surrounding the work refusal, nor would there be, any resolution of that situation.

Mr. Danton did not, at that time, nor at any time thereafter, ever advise me that I was entitled to a Union or any other representative, nor, did he ever advise me that, whether or not I withdrew my work refusal the investigation process was required by law to be completed.

Mr. Danton did however inform me that Ms. Willan who had also filed a work refusal, had withdrawn her refusal in order that the investigative meeting could proceed, and resolution of the problem could be undertaken.

I felt that Mr. Danton was coercing me into withdrawing my work refusal, and intimidating me by indicating that Ms. Willan (a knowledgeable health and safety representative) had withdrawn her refusal in order to proceed with the investigative process.

...

[52] Ms. Janosik submitted documents to the Appeals Officer prior to the hearing regarding the chronology of events before and after the refusals to work by Ms. Willan and Mr. Klein. I retain the following information.

[53] On October 5, 2001, Ms. Willan wrote to Mr. Lancop, Corporate Services Consultant, HRDC, and employer chair person of the work place JOHSC. In her letter, she disputed BLJC's claim that the outdoor dampers leaked twenty 20% fresh air into the ventilation system even when they are completely closed.

- [54] On October 10, 2001, Ms. Willan wrote to Ms. Janosik and stated that a work refusal could be imminent if the information she requested was not provided in the next 24 hours. The information that Ms. Willan demanded included:
- whether or not the person who re-charged the A/C system in the mechanical room with Freon _{134A} was an official air conditioning technician;
 - who was the company who added the Freon _{134A};
 - was the basement A/C unit tested for leaks; and
 - what was management doing to immediately comply with the ASHRAE standards for outside air into the building.
- [55] Later that day, Ms. Willan wrote to Mr. Sammit as “official note” of the work place JOHSC. She confirmed that she was not requesting an indoor air quality test. She stated that the Lorenzen and Caltab reports already confirmed that the office space did not meet ASHRAE requirements for the intake of fresh outdoor air. She stated that the lack of fresh outdoor air combined with the Freon leaks was causing her health problems. She stated that management needed to take action to correct the contravention of the ASHRAE requirements.
- [56] On October 11, 2001, Ms. Willan and other employees met with their supervisor, Ms. Truant, and filed a joint hazardous occurrence incident report.
- [57] On October 12, 2001, Ms. Janosik informed Ms. Willan and other employees that HRDC Labour Program had been asked to conduct a formal investigation.
- [58] On October 19, 2001, HSO Danton agreed to meet with the BBC to deal with employee concerns regarding Freon leaks, fresh air intake, gnats and any other indoor air quality issue.
- [59] On October 23, 2001, Mr. John Campbell wrote to St. Lawrence Chemicals who manufactured Genetron 134A (Freon _{134A}), regarding their MDSA on the product. In describing the circumstances of his request, he confirmed that the basement mechanical room was not connected to the main air supply of the main occupant space.
- [60] On October 25, 2001, Ms. Willan complained to Ms. Janosik that the work place JOHSC was not provided with the information given to HRDC in preparation for the meeting of the BBC on October 29, 2001.
- [61] On October 26, 2001 at approximately 09:30 hours, Ms. Willan wrote to HSO Danton to inform him that ISP employees had met with Ms. Truant on October 11, 2001 to file hazardous occurrence reports regarding the Freon leaks. She complained that management had not acted on the hazardous occurrence reports to date. She also informed him that an ISP employee was taken to emergency services earlier that morning with dizziness and cardiac symptoms, which were symptoms of freon exposure. As management had not provided her with any documentation to prove that the leaking

equipment had been repaired, she stated that a refusal to work would be forthcoming unless she received the documentation by 10:00 hours so that employees could be reassured that the work place was safe.

- [62] At approximately 10:50 hours, Ms. Helene Okeefe, employee co-chair of the work place JOHSC, recorded that she had provided Ms. Willan with confirmation that the Freon leaks in the basement were repaired. Mr. Lancop and Ms. Okeefe recommended to Ms. Willan that employees participate in a telephone conference call with Health Canada and Labour Canada to decide the next step. Ms. Willan did not agree and Ms. Willan and Mr. Klein refused to work at approximately 13:00 hours on October 26, 2001.
- [63] On October 30, 2001, several days following the refusals to work by Ms. Willan and Mr. Klein, Mr. Mertz went to the mechanical room and confirmed that the A/C system was leak free.
- [64] On April 17, 2002, Ms. Heather Hayne, P. Eng, M. Eng, advised Ms. Leigh Campbell, Asset Manager, PWGSC, that the "Emkarate" that Ms. Willan observed during the work place JOHSC inspection in May 2000 was not a health hazard.
- [65] Mr. Hurajt, Building Technician for BLJC testified at the hearing. I retain the following from his testimony.
- [66] Based on his experience, Freons were generally not harmful unless in close proximity to a rapid release. In such cases, one could get burned by the liquid Freon. The Enkarate observed in the mechanical room by Ms. Willan in May of 2000 was a non toxic type of refrigerant oil.
- [67] Mr. Hurajt stated that if the A/C unit in the mechanical room was suddenly to suffer a huge leak, not all of the Freon ^{134A} in the system would leak into the mechanical room. This is because the mechanical room compressors only hold a portion of the total Freon ^{134A} in the system and the other portion remains in the cooling tower on the roof of the building. On cool days most of the Freon ^{134A} would be located in the cooling tower; on hot days most would be found in the compressors.
- [68] He further testified that the A/C system in the mechanical room had operated for 30 years without incidence before the damage in April of 1999.
- [69] Mr. Hurajt held that the Freon leak that Mr. Mertz detected in the mechanical room A/C unit on September 19, 2001 was slow because he had difficulty finding any leaks and because there had not been a sudden loss of cooling in the building. He explained that Mr. Mertz added enough Freon ^{134A} to the system on September 19, 2001, to enable it to operate and added another charge of Freon ^{134A} on October 2, 2001. The total charge on the two occasions was approximately eighty-two (82) kilograms of Freon ^{134A}. He confirmed that Mr. Mertz had not added Freon ^{134A} on September 26, 2001 and Mr. Tom Laporte's comment to the BBC on September 28, 2001 to this effect was a misunderstanding.

[70] Mr. Hurajt confirmed that a ventilation duct connected the mechanical room housing the A/C unit to storage rooms located on the first floor of the building. He held, however, that before the Freon gas in the mechanical room could reach the first floor, it would escape from the mechanical room *via* the below grade window and the door to the room.

[71] Mr. Hurajt confirmed that the cooling tower on the roof of the building was replaced by air condenser during late March and early April of 2002, following the refusals to work. Replacing the tower involved recovering approximately forty-five (45) kilograms of Freon from the system on March 11, 2002 and another approximate twenty (20) kilograms of Freon _{134A} on April 2, 2002. Once the replacement tower was connected and sealed, the system was re-charged with the recovered Freon _{134A} plus an additional approximately sixty (60) kilograms of Freon _{134A}. The approximate fifty-nine (59) kilograms of Freon _{134A} that was not recovered would have remained in the old condenser or escaped to the atmosphere. He could not estimate how much Freon _{134A} may have been lost to the atmosphere.

[72] Mr. Hurajt also confirmed that a negligible amount of Freon _{134A} was released in connection with repairs to an A/C unit on November 11, 2002 and April 3, 2003.

[73] In her summation, Ms. Liberty held that I should rescind the decision of HSO Danton that a danger did not exist for Ms. Willan and Mr. Klein and find that a danger existed for the two employees for the following reasons:

- Ms. Willan and Mr. Klein were constantly exposed to Freon as there were repeated Freon gas leaks in the mechanical room from 1999 to 2002 and possibly beyond;
- Ms. Willan had entered the mechanical room housing the A/C unit on two occasions as part of the annual work place inspection conducted by the work place JOHSC. The inspection in May of 2000 followed the accidental discharge of Freon ₁₂ in April of 1999. The second inspection occurred on September 25, 2001 which followed the time when Mr. Mertz added approximately forty-one (41) kilograms of Freon _{134A} to the A/C unit on September 19, 2001 and preceded the time on October 2, 2001 when he added another approximately forty-one (41) kilograms of Freon _{134A} to the A/C unit.
- the mechanical room that housed the A/C unit had no separate ventilation and was ducted solely to the first floor where the appellants worked. Any escaping Freon would have had to exit the mechanical room *via* the first floor;
- the memorandum from Mr. Dan Burlac to Ms. Leigh Campbell and Mr. Steve Morris (titles not indicated) on June 17, 2003, confirmed that a real danger existed because the space available in the mechanical room could not handle a rapid and complete release of all the Freon _{134A} from the A/C unit should such a thing occur;
- insufficient fresh air was being supplied to the building because the HVAC system dampers were fully closed;
- both Ms. Willan and Mr. Klein were suffering from serious illness which were consistent with constant exposure to Freon. In the case of Ms. Willan, she was subjected to a battery of medical testing to rule out any other etiology; and
- four out of the five co-workers of Ms. Willan had complained on October 11, 2001 of having experienced various health symptoms.

- [74] With regard to the fact that Ms. Willan and Mr. Klein withdrew their refusals to work on October 29, 2001, Ms. Liberty held that their withdrawals were coerced by HSO Danton. She maintained that HSO Danton had a duty under section 129 of the *Code* to investigate the refusals to work and determine if a danger existed at the time of his investigation and not at the time of the refusals to work. She maintained that, since HSO Danton had not made this determination, it was inappropriate for him to have deliberately misled Ms. Willan and Mr. Klein that they could only remain in the building and attend the BBC meeting if they withdrew their refusals to work. According to Ms. Liberty, Ms. Willan and Mr. Klein had a right under the *Code* to participate in HSO Danton's investigation of their refusals to work.
- [75] Finally, Ms. Liberty argued that the true extent of exposure to Freon by Ms. Willan and Mr. Klein will never be known as no tests were ever conducted for Freon gas in the mechanical room or residual Freon gas in the building. However, medical doctors consulted by Ms. Willan confirmed that the symptoms suffered by Ms. Willan and Mr. Klein were consistent with exposure to Freon gas and that no other etiology was established. Ms. Liberty held that this fact alone would indicate that chronic or acute exposure to Freon was life threatening for Ms. Willan.
- [76] In her summation, Ms. Brunelle argued that the evidence suggested that Ms. Willan would not be coerced by HSO Danton because:
- Ms. Willan was heavily involved in the union representing employees at the work place and represented employees in their appeals;
 - Ms. Willan had been a representative on the work place JOHSC for several years and co-chaired meetings; and
 - Ms. Willan was, by her own admission, someone who was tenacious.
- [77] Ms. Brunelle held, instead, that Ms. Willan had refused to work because of her frustration with not being able to obtain information satisfactory to her regarding the Freon leaks in the building and the amount of fresh air being brought into the building. The reason that she withdrew her refusal to work was to attend the meeting where HSO Danton would be discussing her indoor air quality concerns.
- [78] Ms. Brunelle maintained that HSO Danton had a duty to warn Ms. Willan and Mr. Klein that it might be unsafe to remain in the building as he had not yet determined if a danger existed. Therefore his purpose was to inform Ms. Willan and Mr. Klein and not to coerce them to withdraw their refusals to work.
- [79] Finally, Ms. Brunelle argued that the right of appeal available to Ms. Willan and Mr. Klein under subsection 129(7) of the *Code* was extinguished once they withdrew their refusals to work, whether or not I decide that HSO Danton had a duty under the *Code* to continue his investigation of their refusals to work despite their withdrawals. On that basis, she asked that I dismiss their appeals. In this regard, she referred me to paragraph 7 of the decision

of Appeals Officer Michèle Beauchamp in the case of Laroche and the Canadian Auto Workers, Decision No. 04-004, dated February 12, 2004. Appeals Officer Beauchamp stated the following in paragraph 7:

[7] Only two provisions of the *Canada Labour Code* Part II authorize the appeals officer to hear an appeal, these being subsections 129(7) and 146(1). These provisions address two entirely different situations.

[80] In the alternative, Ms. Brunelle argued that the facts failed to establish that a danger existed for either Ms. Willan or Mr. Klein and that the decision of HSO Danton should be confirmed.

[81] In this regard, she referred to the following jurisprudence which she maintained confirmed the standard of proof that is required for a determination of danger. The particular citations cited will not be repeated here but suffice to say that they were considered in my decision. The jurisprudence cited by Ms. Brunelle included:

1. *Boucher v. Canada (Correctional Services)*, [2002] C.L.C.A.D.D. No. 20
2. *Byfield v. Canada (Correctional Services)*, [2003] C.L.C.A.D.D. No.7
3. *Canada (Attorney General) v. Fletcher (CA.)*, [2003] 2 F.C. 475
4. *Canada (Correctional Services) v. Schellenberg*, [2002] C.L.C.A.D.D. No.6
5. *Chapman v. Canada (Customs and Revenue Agency)*, [2003] C.L.C.A.D.D. No. 17
6. *Employees and Amalgamated Transit Union v. Laidlaw Transit Ltd. - Para Transpo Division*, [2001] C.L.C.A.D.D. No. 19
7. *Laroche v. Canadian Auto Workers*, [2004] C.L.C.A.D.D. No.3
8. *Martin v. Canada (Attorney General) (FC)*, [2004] 1 F.C.R 625
9. *Stone v. Canada (Correctional Services)*, [2002] C.L.C.A.D.D. No. 27
10. *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940
11. *Welbourne v. Canadian Pacific Railway Co.*, [2001] C.L.C.A.D.D. No.9

[82] With regard to the facts in the case, Ms. Brunelle held that HSO Danton's decision regarding the absence of danger was reasonable and correct as he had relied on the numerous professional documents previously referred to at the hearing.

[83] Ms. Brunelle pointed out that the evidence showed that:

- the Freon ^{134A} leak discovered on September 19, 2001 constituted a slow leak, as opposed to a rapid release, that was ultimately repaired on September 26, 2001;
- the A/C unit in the mechanical room and on the roof was leak tested on October 30, 2001, and found to be intact;
- Ms. Willan and Mr. Klein refused to work on October 26, 2001 and the facts in the case established that no Freon ^{134A} had leaked after October 2, 2001 when the A/C system was last re-charged;
- there was no evidence that Freon ^{134A} could make its way to the first floor *via* the HVAC ducts in the building; and

- the possibility of this occurring was insignificant because the mechanical room was vented to the outside *via* a below grade window which was always open and Freon is heavier than air and could escape through the gap between the floor and the door.

[84] In response to Ms. Willan's allegation that she was exposed to Freon on two occasions in connection with the annual inspection of the work place by the work place JOHSC, Ms. Brunelle argued that this should not be considered as it was not part of her right to refuse complaint on October 26, 2001.

[85] Ms. Brunelle noted that Mr. Dan Burlac had also written in his report dated June 17, 2003, that, even if the entire charge of Freon ^{134A} was to empty directly into the first floor of the building, the concentration would not exceed the permitted Threshold Limit Value for Freon ^{134A} of one thousand (1000) parts per million specified in the *Mechanical Refrigeration Code*, CSA, given the volume of the room.

[86] Ms. Brunelle addressed the letter by Dr. Heller that Ms. Willan had submitted as evidence of injury due to exposure to Freon. She held that the letter did not constitute direct evidence and did not establish a link between exposures and illness in respect of Ms. Willan.

[87] There are two issues to be decided in this case. The first issue is whether or not I have jurisdiction to review the decision of HSO Danton that a danger did not exist for Ms. Willan or Mr. Klein. This is because both employees withdrew their refusals to work on October 29, 2001 and confirmed their withdrawals in writing that day.

[88] If I decide that I have jurisdiction to review the decision of HSO Danton, then I must decide whether or not he erred when he decided that a danger did not exist at the time of his investigation for either Ms. Willan or Mr. Klein.

[89] With regard to the first issue, I find for the following reasons that the withdrawals by Ms. Willan and Mr. Klein of their refusals to work on October 29, 2001 were coerced by HSO Danton and have no validity.

[90] First, there was no evidence that HSO Danton had determined if Freon was present on the first floor of the building the morning of October 29, 2001, before he met with Ms. Willan and Mr. Klein. Nor was there any evidence that Ms. Willan or Mr. Klein believed that Freon continued to be present in their work place when he interviewed them. To the contrary, Ms. Willan assumed that HSO Danton had already established that air testing had been completed. Since he had yet to conduct his investigation of their refusals to work, HSO Danton's insistence that their remaining in the work place was inconsistent with their refusals to work was, at the time, premature.

[91] Second, HSO Danton knew that Ms. Willan and Mr. Klein were eager to attend the meeting of the BBC on October 29, 2001. This was because he would be addressing the very health and safety concerns regarding Freon and indoor air quality in the building that

led to their refusals to work. So, even it were done unintentionally, HSO Danton's suggested link, that they might attend the BBC meeting if they were to withdraw their refusals to work, was coercive in nature.

[92] Third, in the case of Mr. Klein, he alleged that HSO Danton further coerced him by informing him that Ms. Willan had withdrawn her refusal to work. While Mr. Klein did not attend the hearing to testify, I was not persuaded by the evidence that this did not occur.

[93] Finally, I note that there is no reference in section 129 of the *Code* to the withdrawal of a refusal to work by an employee, or that such withdrawal is a basis for terminating the mandated investigation. To the contrary, it is my view that HSO Danton's investigation of the refusal to work by Ms. Willan and Mr. Klein continued, not by virtue of departmental policy, but by virtue of subsections 129(1) to (4) which read as follows:

129(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128 (13), the health and safety officer shall **without delay** investigate or cause another health and safety officer to investigate the matter **in the presence of the employer, the employee** and one other person who is

- (a) an employee member of the work place committee;
- (b) the health and safety representative; or
- (c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

(2) If the investigation involves more than one employee, those employees may designate one employee from among themselves to be present at the investigation.

(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present.

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

[My underline and bold.]

[94] I accept from HSO Danton's testimony that he had not set out to coerce Ms. Willan or Mr. Klein into withdrawing their respective refusals to work, and acted only to protect their health and safety. However, his suggestion that they could attend the meeting if they were to withdraw their refusals to work was inappropriate in the circumstances, and, in my opinion, sufficiently coercive in nature that the withdrawals should be considered as void.

[95] Following this determination, I will review the second issue, which was HSO Danton's decision that a danger did not exist for Ms. Willan or Mr. Klein at the time of his investigation.

[96] For deciding if a danger existed for Ms. Willan or Mr. Klein, it is necessary to consider the relevant legislation, applicable jurisprudence and the specific facts in the case.

[97] In this regard, the term "danger" is defined in section 122.1 of the *Code* as follows:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

[98] To find that a danger existed, I must first ascertain the circumstances in which the existing or potential hazard or condition in the work place could reasonably be expected to cause injury or illness to Ms. Willan or Mr. Klein before the hazard or condition could be corrected. Then, I must determine if the circumstances existed at the time of HSO Danton's investigation or if they would occur in the future as a reasonable possibility.

[99] In the present case, the alleged hazards or conditions were:

- exposure to Freon gas used in the A/C system in the building; and
- exposure to gnats.

[100] The alleged circumstances regarding the Freon gas was that it leaked constantly from the the building A/C systems and infiltrated their work place on the first floor *via* the air supply ducts. This, according to Ms. Willan, was evidenced by the five Freon leaks that had occurred in the past, and the fact that she and her co-employees reported to the supervisor feeling ill over the months prior to her refusal to work.

[101] It was further claimed by Ms. Willan and Mr. Klein that their exposure to Freon gas was exacerbated by the alleged deficiency of outdoor air being added to the indoor air. Ms. Willan, pleaded that she was additionally exposed to Freon gas on the two occasions that she inspected the mechanical room in the course of the annual inspection of the work place by the JOHSC. Finally, Ms. Willan held that the medical doctors that she consulted confirmed that her illness was consistent with exposure to Freon and that they had not established any other cause.

[102] With regard to their allegation that Freon leaked constantly, it is necessary to consider the five events in evidence.

[103] The first Freon event occurred in April of 1999, when an estimated seventy-seven (77) kilograms of Freon₁₂ escaped from a condenser located in the parking lot behind the building. In my opinion, it is more believable from the facts that the Freon dissipated directly into the atmosphere and did not enter the building. Beyond their simple allegation to the contrary, the applicants provided no evidence that any of this Freon₁₂ made its way into the basement of the building and infiltrated the first floor such that they were exposed to the Freon on the following Monday. During this event, the loss of Freon occurred as a result of accidental damage and not due to a system failure. Therefore the event did not give rise to an expectation that this A/C unit would leak Freon in the future.

[104] The uncontested evidence regarding the Freon leak that occurred in September 2000 was that it occurred from a different and separate A/C system. This A/C system was located on the roof of the building, remote from the offices of Ms. Willan and Mr. Klein and remote from the fresh air intake pipe for the building. This made it highly unlikely that any of the Freon which escaped entered the building and exposed Ms. Willan or Mr. Klein. In addition, this event did not give rise to the expectation that the A/C unit in the mechanical room would leak Freon in the future.

[105] The third event related to the fact that Mr. Mertz re-charged the A/C unit in the mechanical room on September 19, 2001 with approximately forty-one (41) kilograms of Freon_{134A}. The following evidence in the case convinced me that the Freon_{134A} leaked slowly from the A/C unit in the mechanical room between September 2000, when the A/C unit in the mechanical room was previously inspected, and September 19, 2001, when the A/C unit was re-charged with approximately forty-one (41) kilograms of Freon_{134A} :

- BLJC only suspected a leak when the condenser on the A/C began to ice up. There was no evidence that the A/C unit in the mechanical room suddenly failed to cool the building;
- Mr. Mertz had difficulty detecting the Freon leak in the system when he inspected the A/C unit on September 19, 2001. In fact, it wasn't until he re-charged the system with approximately forty-one (41) kilograms of Freon_{134A} that he discovered the leak in the capillary tube on September 26, 2001. Mr. Mertz testified that it appeared that the leak was caused by vibration over time; and
- Mr. Mertz testified that he did not become ill on any date when he worked in the mechanical room, which suggested to him that the concentration of Freon_{134A} in the mechanical room did not exceed permitted levels of exposure.

[106] The fourth Freon event related to the fact that Mr. Mertz again added approximately forty-one (41) kilograms of Freon_{134A} to the system on October 2, 2001. This means that up to approximately forty-one (41) kilograms of Freon_{134A} must have leaked into the mechanical room between September 19, 2001 and October 2, 2001.

[107] The fifth event was the replacement of a cooling tower on the roof of the building during March and April of 2002. This event occurred after the refusals to work by Ms. Willan and Mr. Klein and could not have constituted an existing hazard for them. Given that the

escape of Freon was in connection with planned maintenance, the event does not give rise to an expectation that the system located in the basement mechanical room constituted a potential hazard and would leak in the future.

[108] Of the five Freon events, only the third and fourth events involved a Freon leak into the mechanical room. And while I have distinguished between the two events, it is my view that they two releases essentially relate to a singular leak in the system. Mr. Hurajt's testimony was that the A/C system had operated without incident for nearly thirty years before it was damaged in April of 1999. In my opinion, Ms. Willan and Mr. Klein failed to establish that Freon leaked constantly in the building or that the possibility of a future Freon leak in the mechanical room existed as a reasonable possibility, as opposed to the mere possibility that was the case here. Moreover, there was no evidence to confirm Ms. Willan's allegation that BLJC's record keeping relative to recording Freon leaks was unreliable.

[109] Ms. Willan and Mr. Klein held that any Freon in the mechanical room could infiltrate the first floor because the main air supply to the building was connected to the mechanical room and because a ventilation duct connected the mechanical room to the first floor. However, the more reliable evidence from Mr. Campbell was that the mechanical room was not connected to the air supply to the building.

[110] Ms. Willan testified that she and her co-employees filed hazardous occurrence reports with Ms. Truant on October 11, 2001 and complained of symptoms associated with exposure to Freon. This was the singular evidence that gave weight to the contention by Ms. Willan and Mr. Klein that at least some of the Freon ^{134A} that leaked into the mechanical room over the summer and fall of 2001 reached the first floor. However, I was reluctant to rely heavily on the hazardous occurrence reports of employees because:

- the employees were not specific regarding the time frames when they felt ill;
- two employees (Ms. Willan and Mr. Klein) reported experiencing symptoms in 1997, long before Freon leaks occurred in the building;
- one reported experiencing symptoms in 1999, before leaks occurred in the building; and
- one reported experiencing symptoms while away from work.

[111] Regardless, for the following three reasons, the hazardous occurrence report filed by employees is not particularly relevant to my decision as to whether or not a danger existed for Ms. Willan or Mr. Klein at the time of HSO Danton's investigation. First, the hazardous occurrence report related to a period of time before the leaks were repaired. Second, I have already concluded that Freon leakage during the period referred to in the hazardous occurrence report did not give rise to an expectation that the A/C unit in the mechanical room would leak Freon in the future as a reasonable possibility. Third, no one other than Ms. Willan and Mr. Klein complained of feeling ill consistent with exposure to Freon gas on the day of their refusals to work.

- [112] Ms. Liberty held in her summation that Ms. Willan was overexposed to Freon ^{134A} when she inspected the mechanical room in May 2000 and September 26, 2001. This was in connection with the annual inspections of the work place by the work place JOHSC.
- [113] With regard to the May of 2000 inspection, the evidence was that the A/C unit had been inspected in September of 2000 and found to be leak free. Thus, there was no basis to conclude that Freon was present in the mechanical room when Ms. Willan inspected the mechanical room in May of 2000.
- [114] With regard to the September 25, 2001 inspection, this corresponds to the period of time when it appears that approximately forty-one (41) kilograms of Freon ^{134A} leaked from the A/C unit in that room over a period of approximately twelve to thirteen days. However, what stands out relative to this event is that there was no evidence that Ms. Willan complained immediately to fellow health and safety committee members of ill health effects or later to her employer.
- [115] This would appear to support Mr. Hurajt's contention that any Freon that leaked from the A/C unit in the mechanical room would rapidly escape to the outside before the concentration in the building would cause injury or illness to employees. If this was not the case, then it was inconsistent with Ms. Willan's contention that she was particularly sensitive to Freon.
- [116] In her summation, Ms. Liberty argued that the letter by Dr. Heller confirmed that Ms. Willan suffered from a serious illness consistent with constant exposure to Freon. However, I had several problems with this conclusion for the following reasons.
- [117] First, Dr. Heller noted in the medical history part of her letter that Ms. Willan reported that her illness began in 1997. This was well before the above noted Freon incidents.
- [118] Second, nowhere in her report did Dr. Heller conclude that Ms. Willan's illness was due to exposure to Freon in the work place. This is not surprising because there is no indication in Dr. Heller's report that she or anybody else had independently verified that Ms. Willan's illness was caused by exposure to Freon and that the source of the Freon was her work place. The report appears to rely on Ms. Willan's allegation that she was constantly exposed to Freon in her work place and that she felt better after being absent from the work place for eight weeks. The only independent evidence was that a clinic attended by Ms. Willan confirmed the existence of her illness.
- [119] Finally, I have to agree with Ms. Brunelle that Dr. Heller's evidence did not constitute direct evidence and there was no way for Ms. Brunelle to question her findings.
- [120] With regard to the report by Mr. Burlac dated June 17, 2003, Ms. Liberty was correct that Mr. Burlac had indicated that a sudden and immediate loss of Freon in the mechanical room was theoretically possible. He further opined that, if this occurred, the volume of Freon gas released would exceed the volume of the mechanical room. However, Mr. Burlac also reported that, if all the Freon suddenly leaked onto the first floor, the

concentration of Freon in the room would not exceed the permitted Threshold Limit Value for Freon _{134A} of 1000 parts per million specified in the *CSA Mechanical Refrigeration Code*, given the volume of the room. I note that this opinion was disputed by Ms. Willan, who alleged that the volume of space calculated by Mr. Burlac for the first floor was based on incomplete or incorrect data. However, I reiterate my belief that the possibility of a total leakage constituted a mere possibility as opposed to a reasonable one.

- [121] Ms. Willan and Mr. Klein alleged that their constant exposure to Freon was exacerbated by the fact that the amount of outdoor air being added to the existing indoor air did not meet the minimum requirements specified in the ASHRAE standards. In this regard, the evidenced is mixed.
- [122] For her part, Ms. Willan relied on the fact that Caltab had reported to PWGSC that the dampers in the intake ducts were closed when they conducted their investigation regarding her allegation that there was insufficient fresh air being drawn into the indoor air. She also held that PWGSC had underestimated the number of persons who could be present in the building when they calculated the amount of fresh outdoor air needed to meet the ASHRAE standards.
- [123] The opposing evidence from Mr. Hurajt was that at least 20% of fresh air enters the HVAC system even when the dampers are in the closed position. This was essentially confirmed by Messrs. Sammit and Doobay who conducted indoor air quality tests respectively in April of 2000 and on November 12, 2001. They both found that the concentration levels of carbon dioxide confirmed that sufficient outdoor air was being added to the air in the building and that the flow rates in the HVAC system were adequate.
- [124] The question that I must address in this review is not whether or not the amount of outdoor air being added to the indoor air met the ASHRAE standard, rather it is whether the quality of the indoor air in their work constituted an existing or potential hazard or condition that could reasonably be expected to cause illness or injury to either Ms. Willan or Mr. Klein before the hazard or condition could be corrected. This points out that a contravention to the *Code* and COSHRs does not necessary confirm that a danger exists.
- [125] Based on the evidence of Messrs. Hurajt, Sammit and Doobay, I am satisfied that sufficient outdoor air was being added to the indoor air flow in the work place occupied by Ms. Willan and Mr. Klein. Therefore, I find that the quality of the indoor air did not constitute an existing or potential hazard or condition for either of them, and did not exacerbate any minor exposure to Freon that Ms. Willan or Mr. Klein may have experienced.
- [126] Looking at the final issue relative to the refusals to work by Ms. Willan and Mr. Klein, I find that a danger did not exist in connection with the presence of gnats in the HVAC ducts. I make this conclusion essentially based on the evidence that Mr. Léger reported to HSO Danton on March 8, 2002 that the gnats found in the ventilation system were a

nuisance but did not pose a health threat. There was no evidence from Ms. Willan or Mr. Klein that these gnats posed a unique hazard for them, or that the gnats constituted a potential hazard or condition.

- [127] In conclusion, I find that Freon did not constitute an existing or potential hazard for Ms. Willan or Mr. Klein that could, in the circumstances, be reasonable expected to cause injury or illness to either of them before the hazard could be corrected. The fact is that there was no evidence of a Freon leak in the mechanical room on the day of the refusals to work and, as I have indicated, there was no expectation, beyond a mere possibility, that a Freon leak would occur in the mechanical room in the future. Moreover, the indoor air quality was determined to be safe and the gnats were characterized as a nuisance, as opposed to a health hazard.
- [128] I, therefore, agree with HSO Danton's decision that a danger did not exist for Ms. Willan and Mr. Klein at the time of his investigation and confirm his decision to this effect.

Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-021

Applicant: D. Willan and J. Klein

Respondent: HRDC (M. Janosik)

Key Words: Freon gas, Emkarate, air conditioning unit, headed, dizzy, headache, illness, indoor air quality, out door fresh air, carbon dioxide, air flow, air balance, ASHRAE standard, gnats, mould, bacteria, danger.

Provisions: Code 128, 129, 146.1
Regulation

Summary:

Two service delivery employees refused to work claiming that they felt ill due to exposure to Freon gas and that Freon leaked constantly from the air conditioning unit located in the basement of their building. They further held that their exposure to Freon was exacerbated because insufficient out door fresh air was being vented into the building. Additionally, they complained of gnats that fell from the air ducts.

A health and safety officer investigated into their refusals to work and decided that a danger did not exist for either employee. With regard to their complaint regarding Freon, the officer determined in his investigation that there was no evidence of a Freon leak, and there was no expectation, beyond a mere possibility, that a Freon leak would occur in the mechanical room in the future. The officer further determined that the indoor air quality was determined to safe and the gnats constituted a nuisance as opposed to a health hazard.

Following his review, the Appeals Officer agreed with the conclusion of the health and safety officer that a danger did not exist at the time of his investigation for either employee. The Appeals Officer confirmed the decision of the health and safety officer.