Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-11-07
Case No.: 2017-31

Between:

Laurent Vaillancourt, appellant (respondent to motion)

and

Correctional Service of Canada, respondent (applicant to motion)

Indexed as: *Vaillancourt v. Correctional Service of Canada*

Matter:	Motion to dismiss the appeal filed under subsection 129(7) of the *Canada Labour Code* on the grounds of mootness.
Decision:	The appeal is moot, but the case will be heard on the merits.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	French
For the appellant:	Mr. Olivier Rousseau, Union Adviser, UCCO-SACC-CSN
For the respondent:	Ms. Cristina St-Amand-Roy, Treasury Board Legal Services, Department of Justice
Citation:	2018 OHSTC 13

REASONS

[1] This decision concerns a motion brought by Correctional Service Canada (CSC) to dismiss the appeal filed by the appellant under subsection 129(7) of the *Canada Labour Code,* RSC (1985), c. L-2 (the *Code*) on the grounds of mootness.

[2] The appellant appealed the decision of no danger rendered on September 12, 2017 by the official delegated by the Minister of Labour, Régis Tremblay (ministerial delegate) regarding the appellant's refusal to work on September 6, 2017. At the time of the refusal, the appellant Vaillancourt was performing his duties as a correctional officer II (CO II) as part of a team of three correctional officers assigned to cellblock E of the Regional Reception Centre (RRC) in Ste-Anne-des-Plaines, Quebec, and was also the president of the local union CRR/USD. Although this is not a decision on the merits of the appeal, since it precedes the actual appeal hearing, it is still important to understand the context in which Mr. Vaillancourt refused to work in order to analyze and assess the admissibility of the mootness motion submitted by CSC.

Background

[3] According to the the ministerial delegate's investigation report, it appears that the appellant refused work at the Ste-Anne-des-Plaines RRC on September 6, 2017, due to the presence of inmate Acyl Koua Amir (the inmate), who had been in segregation since his emergency night transfer from the Donnacona maximum security penitentiary on August 29, 2017, after having assaulted a correctional officer (punched in the face) on August 28, 2017, while the officer was verbally directing him toward his cell. It seems that the inmate had lost his turn to make a telephone call and had become aggressive. More precisely, it appears that the work refusal occurred when the correctional officers of cellblock E received an order to release the inmate from segregation, where he had spent the previous five days after transferring to the RRC. The officers were to assign the inmate to the institution's regular prison environment for an unspecified period of time pending his transfer to another maximum security penitentiary, Collins Bay Institution in Ontario. The investigation report stated that the reason for the inmate's transfer was that "the risk that the inmate poses can no longer be managed at the Donnacona Institution," which, as mentioned above, is a maximum security institution with control posts and armed guard towers, which is not the case at the RRC in Ste-Anne-des-Plaines. In his investigation report, the ministerial delegate notes the reasons the appellant gave for his work refusal, partially quoting him:

> - The inmate was subject to an emergency night transfer to the RRC for having assaulted an officer, because he could no longer be managed by the Donnacona Institution, a maximum security institution with everything that entails. He cannot be managed in an institution such as ours.
>
> - The appellant does not understand how the inmate could be too dangerous for the Donnacona Institution (maximum security) but not for cellblock E at the RRC (multi-level), a cellblock that has neither armed control posts nor walkways like at Donnacona.

- The inmate had a history of problems in detention, such as aggressiveness and weapons creation.

- The inmate was placed in a regular cellblock at the RRC, where security is weaker than at Donnacona in terms of infrastructure and the number of officers.

[4] As for the justification the respondent gave for its conclusion that the reported situation did not merit work refusal by Mr. Vaillancourt, the ministerial delegate's report states the following:

> Based on the decision of the Institutional Segregation Review Board (ISRB) issued on September 5, 2017, the employer considers the risk posed by the inmate to be manageable in the cellblock. The employer admits that some risk does remain due to the nature of the job of a correctional officer, but finds no reason to believe that there was imminent or higher-than-usual risk in the situation.

[5] According to the ministerial delegate's investigation report, the security level differences between the two institutions are recognized by all parties involved, as is the fact that there is nothing exceptional about the circumstances surrounding the inmate's transfer to the RRC; the RRC was partially intended for that purpose. However, it does appear that the inmate had a maximum security rating and belonged to a street gang when he committed the offences that led to his imprisonment. He had several behavioural issues in prison and came with a long list of disciplinary offences, including several events involving bladed weapons and altercations with other inmates. The investigation report also lists some events where the inmate made threats to correctional officers and tried to bribe them.

[6] The ministerial delegate acknowledged that there is a real and likely chance of inmates making threats in the prison environment, and that this is a known possibility in the field. However, with respect to the potential threat to the appellant, the ministerial delegate came to the conclusion that there was a serious threat, and described such a threat as being of high importance and reasonably possible.

[7] The ministerial delegate was of the opinion that there was not necessarily a possibility of re-offence in the short term, stating, however, that the inmate's action had been to "punch [the correctional officer] in the face," giving him a swollen cheek and a cut lip. The circumstances led the ministerial delegate to believe that was not a premeditated act, but one committed out of frustration, and the inmate had become aggressive and reacted swiftly; however, the attack was not a stabbing or an attempted murder. As for the need for "high severity" consequences that a threat/risk must entail in order to fall within the definition of "danger" as a "serious threat," the ministerial delegate doubted that there would have been high-severity consequences in this case, but expressed his opinion that there could be high-severity consequences "if a prisoner's act is premeditated and if he plans to use a weapon." He added that, as he understood it, "makeshift weapons are used against fellow prisoners." The ministerial delegate nevertheless concluded that "the inmate is dangerous and the facts show that the risk is real. There may be a higher probability that the inmate would proceed with the act, given his heavy track record of offences."

[8] However, the ministerial delegate still came to the conclusion that there was no danger to the appellant's health and safety, noting that an "inmate usually targets other inmates for various

reasons and can cause them serious harm," and stated his opinion that an inmate would not commit a serious offence against a correctional officer, as that could lead to serious consequences for his detention conditions and sentence severity. According to the ministerial delegate, that is more dissuasive than firearms being available at the control posts.

[9] With regard to the institution's decision to end the inmate's segregation and place him in the open population, the ministerial delegate relied on the competence of the ISRB and the Warden, stating that "the professionals of Correctional Service Canada (CSC) are competent to make recommendations in this type of situation. I believe that the decision was made in everyone's best interest and that we must trust these people and the system that is in place."

[10] As noted at the beginning of this decision, the ministerial delegate concluded that, based on the facts, there was no danger, hence this appeal. However, the ministerial delegate did make certain statements in the conclusion of his report that I feel it is important to record at this point, both for the consideration of the appeal itself if the motion to declare the matter moot is rejected, and for the relevant caselaw criteria to be applied in the consideration of the motion itself. The representative stated:

> In closing, I must say that there is a very fine line when it comes to deciding whether a work condition is normal or that an investigation should be conducted to determine if there is danger. There is always room for error in situations where a person is considered to be dangerous. As in my previous investigation, I reiterate the fact that I trust the system in place and the professionals who assess cases and make decisions. There is still room for error. We—the official delegated by the Ministry of Labour—are involved in cases such as these that are difficult to assess, and I think that a deeper analysis for this type of refusal [when an inmate presents a danger] is needed.

Issue

[11] As mentioned in the introduction, the decision that follows concerns only the motion to declare moot the appellant's appeal against the ministerial delegate's decision of absence of danger rendered on September 12, 2017. The background above describes *in extenso* the circumstantial elements of the situation that ultimately gave rise to the appeal, and those facts are not contested by the parties to the motion. In support of its motion, the respondent argues that the circumstances have changed since the appellant exercised his right to refuse to work in that the source of danger no longer exists, so the precise circumstances in which the appellant exercised his right of refusal to work no longer exist. As part of the said change, the respondent explains that when the inmate's administrative segregation at the Ste-Anne-des-Plaines RRC is no longer required, the said inmate will "probably" be transferred to Collins Bay Institution, and he will remain in detention until August 2020. As for the appellant, he no longer works at the RRC, as he has been employed at La Macaza Institution in La Macaza, Quebec since January 29, 2018 and will stay there for an undetermined amount of time. The issue raised by this motion is, therefore, whether the change of circumstances in this case has rendered the appeal moot.

Submissions of the parties

A) CSC's submissions

[12] CSC bases its motion on the fact that the particular circumstances leading to the appellant's refusal to work due to danger - namely the presence of a difficult, if not dangerous inmate at the RRC who was transferred from a maximum security institution for assault - no longer exist, and therefore the reason for the refusal has been eliminated, so the appeal is no longer founded and has become moot. The specifics on what led to the inmate's detention at the RRC are set out above, so it is not necessary to repeat them here. For the purpose of precision, it should be noted that when he arrived at the RRC on August 29, 2017, the inmate was placed in administrative segregation in the special handling unit (SHU) pending his eventual transfer to the maximum security institution in Collins Bay. At this time I do not know if the inmate in question is still at the RRC or if the scheduled transfer has taken place. It is also important to note that the appellant is no longer in contact with the inmate, since he now works at the La Macaza Institution, where he has been since January 29, 2018, and will remain for an undetermined amount of time; that means that the inmate is no longer under the appellant's surveillance, or even in the same institution.

[13] CSC bases its motion on the principle that a tribunal may decline to render a decision on a case which raises a merely hypothetical or abstract question. This principle applies when a decision will not have the effect of resolving a controversy affecting or potentially affecting the rights of the parties; the tribunal can decline to decide on a case which would have no practical effects on the rights of the parties. CSC bases that argument on the judgment in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 (*Borowski*), in which the Supreme Court established a two-step analysis for mootness allegations: (1) determine whether the requisite tangible and concrete dispute has disappeared, rendering the issue academic; if so, it is then necessary for the tribunal to decide (2) if it should exercise its discretion to hear the case, notwithstanding its affirmative answer to question (1). CSC also asserts that, on the basis of the judgment in *Borowski*, the practical effects on the rights of the parties are essential to deciding whether a dispute is moot or not, and those effects must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. Accordingly, CSC argues that a case will be considered moot if events occur after the initiation of the action or proceeding which affect the relationship between the parties such that no present live controversy exists affecting the rights of the parties.

[14] CSC argues that the Tribunal has found controversies to be moot in many circumstances. Such was the case, for example, with the retirement of an employee, meaning that there was no longer a dangerous situation in the work place as defined in the *Code*, because the right to refuse to perform dangerous activities is restricted to employees of an employer subject to the *Code* (*Maureen Harper v. Canadian Food Inspection Agency*, 2011 OHSTC 19), or when there is no longer an employment relationship between the employee and Correctional Service Canada (*Tanya Thiel v. Correctional Service Canada*, 2012 OHSTC 39), when the employer's practice leading to the refusal has ceased (*Robert J. Wellon v. Canada Border Services Agency*, 2011 OHSTC 28), when the penitentiary has closed down (*Correctional Service Canada v. Mike Deslauriers*, 2013 OHSTC 41), or when the inmate with regard to whom the refusal to work was based is no longer in the same institution as the officer who made the refusal (*Manderville v. Correctional Service Canada*, 2015 OHSTC 3).

[15] In light of the above, CSC argues that the appeal should be dismissed on the ground that the concrete and tangible dispute involving the appellant has disappeared, rendering the issue academic. Although it invoked the *Borowski* decision by the Supreme Court of Canada to support this point, CSC produced no argument as to the second part of the analysis formed in the said decision, namely whether the Tribunal, having concluded that the dispute is academic, should exercise its discretion on the basis of the criteria set out by the Court and nevertheless hear the case. Nor has CSC replied to the appellant's arguments set out below.

B) Appellant's submissions

[16] Wishing to pursue his appeal, although aware of his own circumstances and acknowledging that a work refusal is an individual right, the appellant nevertheless asserts that he exercised his right to refuse to work while he was president of the local union and that he had discussed the refusal with a number of correctional officers who largely shared his position on the issue. The appellant argues that his work refusal is, at its core, an issue of inmate management by security level, and that Tribunal clarifications are needed, as similar situations arise on a regular basis. The appellant notes that, although the ministerial delegate concluded that there was no danger in this case, CSC did transfer the inmate to the special handling unit, which the appellant describes as the most secure penitentiary space in Canada.

[17] The appellant argues that, without a Tribunal decision on the issue of inmate management raised by the refusal, CSC could decide to transfer the inmate elsewhere, and correctional officers would be reluctant to exercise the rights afforded to them by the *Code*. Conversely, the Tribunal's analysis of this situation would provide important guidelines on exercising the recourse set out in the *Code*. The appellant argues that any analysis of the notion of "danger" should be based on the criteria developed by the Tribunal's decision in *Correctional Service Canada v. Ketcheson,* 2016 OHSTC 19, requiring answers to the following questions:

> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[18] More specifically, the appellant reiterates that the situation in this case involved the management of a "maximum" rated inmate who had just assaulted a correctional officer in a maximum security institution, and who was then transferred to a penitentiary that is not operated the same way as a maximum security institution. The appellant states that an analysis of the

criteria mentioned above by the Tribunal would not be moot because CSC has not indicated that it is committed to ensuring the situation does not recur.

[19] The appellant contests the relevance of the precedents invoked by the CSC to support its argument that the appeal is moot for the reasons listed below. The Appeal Officer's decision in the *Harper* case declared the dispute moot because the appellant no longer worked for the Canadian Food Inspection Agency; however, the appellant in the case before us claims that the work refusal in question had an impact on other correctional officers, who did not have to manage the inmate in the open population of the prison as a result of the work refusal. Mr. Vaillancourt's refusal therefore provided a solution for all employees. A failure to render a decision due to the appellant's transfer to another institution will not solve the issue for the other employees. In the *Thiel* case, the employee in question was no longer employed by the Correctional Service of Canada and had lost standing in his own appeal. The situation is different in this case. In *Wellon*, the Canada Border Services Agency subsequently changed the practice that led to the refusal despite the conclusion of absence of danger by the ministerial delegate (at the time called a Health and Safety Officer); nothing in the current case, however, indicates that CSC intends to change its practice of managing inmates with maximum security ratings in the open population at the RRC.

[20] The appellant also distinguishes the current case from the situation in *Correctional Service Canada v. Mike Deslauriers*, where the Kingston Penitentiary had closed down before the appeal on the penitentiary's air quality could be heard. In *Gordon v. Correctional Service Canada*, 2017 OHSTC 8, the decision of mootness indicated that the work refusal was based solely on an inmate and a particular situation (funeral), and not the general activities of the correctional officer. Furthermore, the correctional officer was transferred to another institution, which is not the case before us because here we are assessing the situation and duties in relation to the risk, should it occur again. Lastly, the appellant distinguishes the present case from *Manderville*, where the appeals officer concluded that the appeal had become moot because the case involved an individual situation with an inmate who had been transferred elsewhere, and the correctional officer had not been involved and had declared that her work refusal was a matter of principle for other correctional officers, which differs from this case in that the appellant himself was given the order to open the door to in order to take the inmate to the open population.

[21] In light of the above, the appellant argues that the dispute in relation to this case and to CSC practices in such cases remains concrete and tangible and, as a result, the Tribunal should not determine the appeal to be moot. Furthermore, the appellant submits that even if the Tribunal concludes that this dispute is not sufficiently concrete and tangible, it would still have reason to exercise discretionary power to render a decision pursuant to the Supreme Court decision in *Borowski*, since this case involves managing inmates based on their security levels, a key part of the Correctional Service of Canada's operations.

Analysis

[22] After considering all of the parties' arguments, it is apparent that a number of factors must be clarified, as they are important to the decision I must make. It must be mentioned that this decision will not determine whether the appellant faced danger at the time of the refusal,

which should be decided by the undersigned if the merits of the appeal are eventually heard. Rather, this decision aims to establish whether the situation of danger alleged by the appellant at the time of refusal still exists, in order to determine whether the appellant's recourse has become moot. That being said, the parties must still perceive the dispute or the situation itself in the same way, which I will address below. The first factor that arises from all of the parties' submissions is their agreement on the analytical approach that I should take to decide on the motion. The Supreme Court of Canada outlined that approach in the *Borowski* decision as follows:

> The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.
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> The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)
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> […]
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> The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of their discretion by considering the underlying rationale of the mootness doctrine.
>
> The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

[23] The second factor on which the parties agree is the fact that the right to refuse to work or perform an activity is an individual right relating to a risk, situation or specific activity in a particular work environment. This right was exercised by the appellant pursuant to section 128 of the *Code*, which states that an employee can refuse to use a machine or thing, to work or to

perform an activity. The investigation report of the ministerial delegate does not include the Refusal to Work Registration document and does not specify under which sub-section of section 128 of the *Code* the refusal was made. Nevertheless, if I rely on the content of the report as well as the wording of the parties' arguments, it seems evident to me that the said refusal relates to the terms set out in subsection 128(1)(c) of the *Code* with regard to the performance of an activity that constitutes a danger to the employee or to another employee or other employees. One only need read the investigation report and CSC's arguments that it was "after the formal order the Correctional Manager *gave to officers of cellblock E to open the inmate's cell"* [emphasis added] to support this conclusion.

[24] As I have already mentioned, before it is determined whether the appellant's recourse is moot, both parties must clearly understand the nature of the situation or dispute on which the motion is based. In his investigation report, the ministerial delegate clearly establishes the premise that it was "the mere presence of inmate Acyl Koua Amir [that] motivated the complainant [Vaillancourt] to refuse to perform the work." He goes on to say that there "was no threat made at that time nor any knowledge of a threat," which reduced the danger - or more specifically the source of danger - to the inmate himself and his history, termed a "heavy track record of offences," which increased the likelihood that he would "proceed with the act," i.e. assault a correctional officer.

[25] Nevertheless, we cannot ignore the fact that the ministerial delegate, after concluding that there was no danger, further to the somewhat tortuous reasoning which led him to conclude that there was a serious threat, a likelihood of threat from inmates, that this inmate is dangerous and that the particular risk is real, also commented that "the fact that they transferred the inmate to the RRC under these circumstances is in no way exceptional […] the parties acknowledge this [and] the RRC was partially intended for this purpose." He then concluded "that a deeper analysis for this type of refusal [when an inmate presents a danger] is needed."

[26] CSC's arguments supporting the motion did not go beyond describing Mr. Vaillancourt's refusal as being "motivated solely by the presence of the inmate" mentioned in this case, and the activity as being to open the inmate's cell "after the formal order the Correctional Manager gave to the officers of cellblock E."

[27] As for the appellant, while acknowledging that the right to refusal is an individual right, his representative characterizes or defines the situation more broadly. First, having acknowledged the right to refuse work as an individual right, the appellant's representative argues that Mr. Vaillancourt exercised that right while he was president of the local union, that the action had been discussed with several correctional officers and that it was a position largely shared among employees. Noting that the situation in question relates to the management of an inmate with a "maximum" rating who had just assaulted a correctional officer in a maximum security institution, and that the inmate was to be managed in a penitentiary not operated at a maximum security level, the appellant maintains that the real issue with regard to the work refusal relates to managing inmates by security level, and that it is important to have some clarifications from the Tribunal, since similar situations do arise from time to time, and that "the Tribunal's analysis of this situation would provide important guidelines on exercising the recourse set out in the *Code*." It must be said that the argument made on behalf of the appellant -

with full acknowledgement that the right to refuse is clearly an individual right, which requires that a clear and direct link be established between the refusing employee and the activity refused - leads me to believe that greater attention must be paid to the second part of the process set out in the *Borowski* decision.

[28] Taking the above into account, I believe it necessary, before going any further, to give the following explanation. As I previously stated, having been unable to hear this case even partially on the merits due to CSC's somewhat hasty use, in my opinion, of this motion for a declaration of mootness, the only proven source of information that can in principle assist the undersigned in this case is Ministerial Delegate Tremblay's investigation report, a report and conclusion that the undersigned would be required to review and validate or invalidate in a *de novo* study as part of the appeal.

[29] That being said, certain statements have of course been made and facts advanced by both parties in their arguments on this motion that were not supported by any evidence, which the undersigned could at least have obtained at a partial hearing. The most striking example is that, despite what both parties have stated, it is not clear whether the inmate named in this case is still detained at the RRC or has been transferred to another institution. I would also add, with regard to the above, independent of any knowledge we may have of the facts leading to the refusal - in particular the named inmate who was held at the RRC, as argued by CSC, or the presence of a maximum-rated inmate at the RRC entailing a sub-issue as to how inmates are managed at the RRC, as argued by the appellant - the only commonality between those two approaches with respect to the appellant is the inmate's presence at the RRC; therefore the activity assigned to the appellant is the alleged source of danger in and of itself.

[30] With that in mind, has the appeal become moot? One thing is clear. Although the appellant refused to perform an activity due to the inmate's presence at the RRC on the refusal date, this appellant is no longer be working for the RRC at the time this decision is being made, because he has been transferred to another penitentiary for an indeterminate amount of time. As a result, the specific situation surrounding the work refusal, whether defined in terms of contact with the specific maximum rated inmate Acyl Koua Amir, or in terms of contact with any maximum rated inmate, both occurring in a penitentiary described as not operating at a maximum security level, is not likely to continue to affect the employee who initiated the refusal when the time comes for the undersigned to render a decision.

[31] As previously mentioned, any decision on the issue raised in this motion must take into account the principle that the right to refuse work is an individual right associated with a specific situation and with facts that have a practical effect on the parties involved in the work refusal; those facts must be present both at the time the right is exercised and when the Tribunal has to render a decision. The CSC argues that "the circumstances have changed from the time of the refusal, such that the source of danger no longer exists." I agree with the first part of that statement, since a key factor has indeed disappeared. The inmate is no longer under the appellant's surveillance, nor is he still in the same institution, since the appellant has been transferred to another institution. Clearly, the circumstances have changed since the time of the work refusal. For the reasons previously mentioned, I still find it difficult to conclude that the source of danger, in a broader sense that is not directly related to the appellant, has disappeared,

whatever the dichotomy used to define the source of danger. Nevertheless, given the factual situation involving the appellant, it is clear that a decision by the undersigned on Mr. Vaillancourt's refusal will not have any practical effect on him when it is made. As a result, that key factor is missing and I have no alternative but to conclude that, as for the first part of the analysis set out in *Borowski*, the appellant's appeal has become moot.

[32] I must now determine whether, in light of the factors above, I should exercise my discretionary power to decide the merits of this case, further to my conclusion that the appeal has become moot. The Supreme Court specified in *Borowski* that three factors must be taken into account, while also considering whether the public interest would require me to decide the merits of the case. Those factors relate to the presence of an adversarial context, the economy of judicial resources and the need for the Tribunal to be sensitive to its role as the adjudicative branch. It should also be noted again that CSC has not provided any comments as to the undersigned's exercise of discretion to hear to appeal on the merits, regardless of its conclusion as to mootness.

[33] The requirement of an adversarial context is a fundamental tenet of our legal system, guaranteeing that the issues are well and fully argued by parties who have a stake in the outcome. The Supreme Court clearly stated that, despite the cessation of a live controversy, that requirement can still be met if the adversarial context is ongoing. In the case before us, while I recognize that the initial dispute involving Mr. Vaillancourt has become moot, it must be concluded that there is still an adversarial position in one form or another with regard to the management of maximum rated inmates in a prison institution that is not maximum security, or at least is not described as such. Limiting this question to the mere presence of the named inmate, which was without a doubt the factor triggering the appellant's refusal, would mean, as the undersigned sees it, overlooking the actual substance of the issue, which could not be heard on the merits by way of an adversarial debate because CSC filed the motion before any evidence had been presented to the Tribunal.

[34] Setting aside the statements made by the appellant's representative that the position on which the appellant relied was largely shared by other employees, that other such situations have occurred at the RRC and that CSC has not indicated any intention of refraining from creating similar situations again - all unverified statements, as the case was not heard on the merits before this motion was filed - we cannot ignore the ministerial delegate's statements in the investigation report to the effect that nothing was exceptional about the transfer of an inmate to the RRC in this situation since the RRC was partially intended for this purpose, and that a deeper analysis of this type of refusal, when an inmate poses a threat, is necessary.

[35] As for judicial economy and the Tribunal's role as the adjudicative branch, I cannot ignore the fact that the Tribunal's resources are scarce and that is has an obligation under the *Code* to "in a summary way and without delay, inquire into the circumstances" of appeals brought before it. Due to recurring challenges usually beyond its control, it is often difficult for the Tribunal to schedule its hearings within a time frame that meets the requirements set out in the *Code*, resulting in repeated motions such as the one before us in this case.

[36] Nevertheless, the Supreme Court's statements in the *Borowski* case are clear: "The concern for judicial economy as a factor in the decision not to hear moot cases will be answered

if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it." Also: "The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action." However, aside from the comments by the appellant's representative to the effect that "the Tribunal's analysis of this situation would provide important guidelines on exercising the recourse set out in the *Code*," these statements reflect the appellant's view as to the real issue at hand - the management of inmates by security level. The ministerial delegate's investigation report clearly illustrates the difficulties involved in handling such situations when he concludes that the inmate referred to in this case is dangerous and poses a real risk. He also states that he trusts the system in place and the professionals assessing the case, that there is still room for error, and that this type of case is difficult to assess, concluding that "a deeper analysis for this type of refusal [when an inmate presents a danger] is needed."

[37] The role that an appeals officer must play under the *Code*, like that of the ministerial delegate conducting a first-instance investigation the findings of which are likely to be submitted to the appeals officer for consideration, must be exercised with a view to satisfying the general purpose of the law: preventing employment-related accidents and illnesses. An analysis of the merits of this case by the Tribunal, despite the fact that it has become moot, has the potential to improve the handling of such cases that are bound to recur, and possibly prevent similar appeals in the future. In that sense it justifies the use of the Tribunal's scarce resources and satisfies its role as the adjudicative branch.

Decision

[38] Based on the above, notwithstanding my conclusion that the appeal has become moot, my decision is to exercise my discretion to hear this case on the merits.

Jean-Pierre Aubre
Appeals Officer