Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Canada

Date: 2021-05-13
Case Nos.: 2018-13 and 2018-14

Between:

Jean-François Bergeron et al., Appellants

and

Correctional Service Canada, Respondent

Indexed as: *Bergeron v. Correctional Service Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by an official delegated by the Minister of Labour.
Decision:	The decision of absence of danger is confirmed.
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	French
For the appellant:	Mr. François Ouellette, Attorney and Union Advisor, CSN
For the respondent:	Ms. Kétia Calix, Attorney, Department of Justice
Citation:	2021 OHSTC 01

REASONS

[1] This decision concerns an appeal filed on May 14, 2018, by Mr. Jean-François Bergeron et al., of a no danger decision rendered May 5, 2018 by Ms. Vicky Mathieu, the official delegated by the Minister (ministerial delegate), under subsection 129(7) of the *Canada Labour Code* (the Code).

[2] The employer, Correctional Service Canada (CSC), submits that the ministerial delegate's decision finding that a danger did not exist should be upheld because the evidence did not show an imminent or serious threat.

[3] Following the pre-hearing teleconference that took place on August 14, 2019, cases 2018-13 (Jean-François Bergeron et al. and Correctional Service of Canada) and 2018-14 (Daniel Vaillancourt et al. and Correctional Service of Canada) were consolidated.

Background

[4] The facts established by the ministerial delegate, as related in the investigation report, describe the general context. The appellants are correctional officers (COs) in a maximum security institution. The appellants exercised a collective refusal to work the morning of May 3, 2018, arising from the fact that the employer had changed the emergency procedures and removed the fire brigade (FB). This refusal to work included 85 Correctional Service Canada employees at the Donnacona and Port-Cartier penitentiaries. Before it was disbanded, the FB consisted of 15 members at Donnacona and 12 at Port-Cartier.

[5] At the time of the refusal, the employees were performing their daily duties in their capacity as COs. The only thing that had changed at the time of the refusal was the removal of the FB.

[6] They said that, if a fire were to occur, they would be at risk of becoming trapped or unable to get out, and the fire department could refuse to respond if the inmate population was not controlled. The danger conveyed to the Minister of Labour was stated as follows:

> [TRANSLATION]
>
> After the termination of the penitentiary fire brigade that was made up of correctional firefighting officers, the new procedure and work method established (FSM 2016) for the search and rescue of myself and others in my workplace, while inmates are present, if I am trapped or unable to get out of an area where my life is in danger (because of fire, heat, hazardous materials, smoke or other hazards) represents a threat to life (serious personal injury or death), because the City's fire department does not control inmates and may decide not to enter the institution if the inmate population is not under control or may leave at any time if there is a threat from an inmate or unrest endangering the employees in charge of firefighting or rescue operations.

[7] On May 4, 2018, the ministerial delegate conducted an investigation on the CSC employees' refusal to work at the workplace in Donnacona, Quebec.

[8] In her initial investigation report, she first noted that it is well established that the possibility that a CO will encounter inmate violence, weapons and/or assaults are all normal conditions of employment within the meaning of the Code.

[9] She added that these conditions are related to the unpredictability of human behaviour and the particular context of the correctional environment and that they are clearly stated in the CO job description.

[10] As for the employer's changes to the procedures concerning FBs, it was a policy decision under the exclusive responsibility of the employer.

[11] In 2009, according to the fire safety procedures manual (2009 manual), the decision to put an FB in place was at the discretion of the wardens. In Canada, only five penitentiaries had an FB.

[12] The role of the FBs was to help control fires that could not be put out with hand-held extinguishers and fire hose stations while waiting for the municipal fire firefighters to arrive. In general, FBs were only called on to respond when the risk of sustaining injuries or being surrounded by flames was low.

[13] The 2009 manual states that FBs have to receive proper training, although it does not provide a definition of "proper training."

[14] The 2016 edition of the manual (2016 manual) was prepared by the employer and its aim was to define consistent procedures and practices that would make it possible to maintain high performance standards for fire safety, thus minimizing the risk of death and loss of property.

[15] The 2016 manual stipulates that, when a fire is considered controllable, employees can extinguish it on their own. In other cases, the manual stipulates that employees must immediately initiate the fire safety procedures in the institution. The municipal fire department must be notified.

[16] This change in emergency procedures for evacuation and search and rescue apparently led to an increased danger that is attributable to the employer as a result of disbanding the industrial FB and handing over the responsibility to the municipality.

[17] Following the investigation at the Donnacona penitentiary on May 4, 2018 into the appellants' refusal to work, the ministerial delegate rendered the following decision in accordance with subsection 129(4) of the Code:

> [TRANSLATION]
>
> **Absence of danger**
>
> Therefore, note that under subsection 129(7) of Part II of the *Canada Labour Code*, the aforementioned employees are not authorized pursuant to section 128 to continue to refuse to carry out their correctional officer duties in their workplace because the new procedure and work method established (FSM 2016) for the search and rescue of them or others in the workplace when inmates are present, if an officer is trapped

> or unable to evacuate on his own from an area where there is a risk to the officer's life (due to fire, heat, hazardous materials, smoke and/or other hazards) represents a danger to life, because the City's fire department does not control inmates and may decide not to enter the institution if the inmate population is not under control or cannot get out at any time if there is a threat from an inmate or unrest endangering the employees in charge of firefighting or rescue operations.

[18] This is the decision that is being appealed here.

[19] During Mr. Davidson's testimony on October 23, 2019, counsel for the respondent requested that Exhibits P-5, P-6, P-7, P-8, P-9, P-10 and P-11 be sealed. I allowed the respondent's request by order during the hearing and the exhibits were sealed.

Testimonial evidence

[20] The parties' witnesses were heard over the course of the hearing, which took place on October 22, 23, 24 and 25, 2019, and during the follow-up to the hearing on March 9, 10 and 11, 2020. The ministerial delegate did not appear as a witness and only one expert witness was heard.

[21] The appellants called five people as witnesses, including an expert witness:

a. Jean Girard, Fire Chief, Cap-Santé
b. Jean-François Bergeron, Correctional Officer, Donnacona Institution
c. Jean-François Davidson, Correctional Officer, Donnacona Institution
d. Nicolas Proulx, Assistant Director, Emergency Preparedness, Shannon MRC and City of Shannon
e. Jean-Philippe Trottier, Correctional Officer, Donnacona Institution

[22] The respondent also called five witnesses:

a. David Lamarre, Fire Chief, Port-Cartier
b. Karl Léveillé, Assistant Warden, Operations, Donnacona Institution
c. Éric Amyot, Fire Chief, Donnacona Institution
d. Michael Kruszelnicki, Fire Protection Engineer
e. François Hamel, Regional Fire Safety Officer, Correctional Service Canada

[23] The Tribunal weighed all of the testimonial evidence adduced at the hearing. To help organize the testimonies, the Tribunal divided them into three topics and summarized the key elements as follows.

1- Description, importance and disbandment of the FBs

[24] As an expert witness and Fire Chief at Cap-Santé and former Chief of Donnacona Institution's FB, Mr. Jean Girard testified that, in his opinion, a correctional institution should have an FB. According to him, FBs provide operational support to the firefighters and reduce response time.

[25] In the second part of his report, Mr. Girard addressed the issue of the FB's role and whether it contributes to mitigating the risks to the health and safety of employees.

[26] He notes that the industrial sector in Quebec, and elsewhere in Canada, is not required to maintain an FB. However, this type of brigade can be found in various industrial sectors and their purpose is usually to protect facilities and employees.

[27] Maximum security institutions have self-protective mechanisms such as fire detection systems, storage tanks with several thousand gallons of water and fire pumps that can pump several gallons a minute, fire hydrant systems, sprinklers and hose cabinets. However, the expert notes that this does not in any way prevent the possibility of vandalism, tampering or the shutting off of certain elements or components of the detection systems by inmates.

[28] Mr. Girard is of the opinion that the FBs help to mitigate risks and hazards associated with the particular dynamics of a maximum security institution. This conclusion is based on the following:

- FB members regularly take preventive action and write observation reports. Threats are therefore dealt with as soon as they are discovered. Members of the brigade have regular contact with inmates and are able to detect changes in behaviour that often lead to the discovery of potential incidents.

- The COs' presence throughout the institution is key to awareness of the environment. This real-life experience in the institution is not something that is taught to municipal firefighters, and it cannot be conveyed in a few minutes.

- Therefore, knowledge of the correctional environment is the best way a correctional facility has to prevent fires and incidents.

- Officers specialized in fire safety, who have firefighting protective garments and specialized equipment and undergo annual training, can respond appropriately to the hazards involved in this particular setting.

- These officers are already trained to respond with firearms and inflammatory agents to control an individual, as well as to put on handcuffs. They are also trained to deal with a suicidal person.

- They can administer first aid and use a defibrillator if necessary. Their specialized training allows any member of the FB to replace an officer affected by smoke at the control point and provide the support needed in the emergency operation underway.

[29] The expert clearly concluded that having an FB can prevent, reduce and avoid certain health and safety risks and save the lives of occupants and employees.

2- Risks as a result of the disbandment of FBs and the rule of visibility

[30] In his report, Mr. Girard noted the health and safety risks for employees in relation to fires at maximum security institutions. The following key elements were noted in the report:

- Smoke and contaminants from a fire are the main health and safety risks for employees and all occupants of a maximum security institution.

- Smoke poses two risks: poisoning from carbon monoxide or other gases that may lead to death.

- At the same time, smoke affects overall safety as it hinders the ability to see at all times. If full visibility changes to reduced and then zero visibility, the safety of the institution will be jeopardized. Smoke considerably increases the risk of a workplace accident involving primary workers.

- Employees on the floors must attempt to evacuate or rescue inmates and staff. Smoke can cause visibility to drop from reduced to zero during manual door opening procedures. The doors must be opened manually if the mechanism being remotely controlled by an officer at an armed control point breaks or malfunctions. The officer, whose visibility is in turn reduced, may not be able to protect primary workers.

[31] Mr. Jean-François Davidson, who has been a first-level CO at Donnacona for approximately 20 years and a member of the local occupational health and safety committee, testified as to the specific types of fire hazards at a maximum security institution, as well as to the concern and disappointment about toxic gases following the disbandment of their FB.

[32] As a regional public safety manager (emergency procedures), CO at Donnacona and also a former chief of the FB at Donnacona Institution, Mr. Nicolas Proulx talked about the repercussions of the FB being removed from the institution. He too is of the opinion that having an FB at a maximum security institution technically improves the safety of the premises when there is a fire because the brigade can get started on the ventilation (expulsion of smoke) well before the firefighters arrive.

[33] Mr. David Lamarre, Fire Chief at Port-Cartier, also testified on the hazards that resulted from the disbandment of the FBs.

[34] Mr. Lamarre has been a Port-Cartier firefighter since 2005 and fire chief for approximately the last year and a half. He talked about his experience (four or five incidents) in responding to fires at the Port-Cartier Institution in the past 14 years (kitchen fire, fire started by an inmate in his cell, etc.).

[35] He confirmed that his fire station is approximately two kilometres from the institution. He confirmed that the response time is around two to three minutes (time it takes to get to the front gate of the penitentiary), plus 10 to 15 minutes to take the various steps involved (get access to the site, take information from the institution’s authorized representative, identify the

risks and develop a specific plan of attack). Therefore, the response time at this type of facility is longer than usual.

[36] He also confirmed that, as part of a memorandum of understanding, an Emergency Response Assistance Plan (ERAP) was established between his department and Port-Cartier Institution. This is due to a number of factors, including the complexity and the particular time frames for accessing the premises, given that it is a maximum security institution. This type of ERAP provides for inmates to be controlled (evacuated from the premises and moved to another location in the institution) by the employees before the firefighters take action, so as to avoid contact with them.

[37] As Assistant Warden, Operations, at Donnacona Institution for the last two years, Mr. Karl Léveillé testified on the occupational health and safety directives and procedures he oversees as part of his work at Donnacona Institution, including response to fire emergencies.

[38] He confirmed that in incidents where smoke is generated, COs are not authorized to carry out search and rescue operations for inmates if smoke causes visibility to be less than 10 feet. Indeed, COs are neither equipped nor trained in that kind of response. Their job is rather to put on self-contained breathing apparatus (SCBA) and evacuate the inmates to a safe location.

[39] In addition, the witness confirmed that, when there is an immediate danger to the life of an inmate and the COs cannot respond because of the preceding criterion, the firefighters are responsible for rescue operations.

[40] As Fire Chief at Donnacona and a firefighter for approximately 20 years, Mr. Éric Amyot testified as to the role and duties of firefighters in the context of an emergency response at Donnacona Institution and on the ERAP currently in place at the institution.

[41] Mr. Michael Kruszelnicki is an engineer specialized in fire prevention and works for the CSC. He explained that fire hazards in prisons are limited by virtue of the construction and design standards for this type of facility, for example, the fact that they are built of concrete and that specific requirements are applied to the ventilation systems. The standards referred to by engineer Kruszelnicki are mainly from the *National Building Code of Canada* (NBC) and the *National Fire Code of Canada* (NFCC).

[42] Lastly, on this point, the Tribunal heard from Mr. François Hamel, Regional Fire Safety Officer, CSC.

[43] As the CSC's Regional Fire Safety Officer for Quebec, Mr. Hamel testified on the contents of the Fire Safety Manual (FSM) used in Canada's maximum security institutions. The manual confirms that a CO's duties do not include the search and rescue of inmates in the event of a fire. Mr. Hamel also confirmed that, if there is a problem with controlling the inmate population during a fire, both the firefighters and COs can, at any time, withdraw their participation if there is a risk to their lives.

3- Incident of September 26, 2019

[44] At the hearing, witnesses Jean-François Bergeron, Jean-François Davidson and Jean-Philippe Trottier testified with regard to the incident on September 26, 2019 in wing J of the penitentiary.

[45] The incident arose as the result of an intervention with an inmate barricaded in his cell. During the intervention, a specialized CO team, the Emergency Response Team (ERT), apparently tried to get the inmate out of his cell by using hydraulic grippers to force the cell door open. In the end, they allegedly used a stun grenade, which was thrown into the cell. After using the stun grenade, smoke reportedly began to fill the cell. Once the inmate was removed, smoke allegedly continued to generate and gradually spread to the corridor (row) of wing J.

[46] The municipal firefighters were reportedly alerted afterwards. Meanwhile, COs wearing SCBA and, in some cases, their firefighter uniforms from the former FB, allegedly came to the scene to remove the equipment left by the ERT and try to neutralize the source of the smoke coming from the cell (using water and extinguishers), among other things. The COs apparently removed the grippers, fire hose, extinguishers and other equipment from the site, and the inmates in the row were allegedly told to leave their cells and the row, which they apparently did gradually on their own, individually or in small groups. At the time, there was a significant amount of smoke in the row.

[47] COs dressed in their firefighter uniforms from the former FB apparently used a fan that was part of the equipment of the former FB to extract the smoke filling the row by placing the fan in the opening of the emergency exit at the end of the row. Some video images of the events were also viewed during the hearing. In the videos, the municipal firefighters can be seen arriving at the row when the smoke had already been substantially evacuated from the site.

[48] Mr. Trottier is a second-level CO at Donnacona with eight years of experience in the institution. He testified on the incident that occurred on September 26, 2019 in the institution's wing J and the FB's subsequent response, followed by that of the firefighters. He was one of the employees on site and noted in particular that the 10-foot visibility rule was apparently not followed by the COs during the incident, especially in the area at the end of the row where the cell in which the smoke originated was located.

Submissions of the parties

A) Arguments of the appellants

[49] According to the appellants, the concept of danger is central to this dispute and the definition in section 122(1) of the Code has been the subject of considerable jurisprudence that was summarized in *Ketcheson.*[1]

[50] In order to respond to the issues described in this case, the appellants submitted that it is essential to analyze not only the facts at the time of the refusal to work, but also the events

[1] 2016 OHSTC 19

preceding and following the refusal to work in order to determine the risk of the danger materializing.

[51] Given the respondent's argument that it is unlikely that the risk contemplated by the appellants will materialize, the appellants recalled the principles laid down by the Federal Court of Appeal in *Martin*.[2] In that matter, the Court stated that when a potential or prospective hazard is taken into consideration, administrative tribunals must "weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future."

[52] The appellants maintain that the disbandment of the FBs constitutes a hazard under the Code and the jurisprudence relating to the three-criteria analytical framework developed in *Ketcheson*.

I. The alleged hazard

[53] The appellants argue that the disbandment of the FBs constitutes a significant deterioration in the health and the safety of employees at Donnacona Institution. It appears to be similar to the situation in *Ketcheson* because it is not the policy decision to remove the brigades that constitutes the hazard, but "the result of the policy can be a direct cause."

[54] The appellants summarized the consequences of the disbandment of the FBs as follows:

> [TRANSLATION]
>
> - There is no longer anyone who can do search and rescue in the presence of inmates.
> - There is no longer anyone who can respond when visibility in the institution is less than 10 feet because firefighters must be accompanied at all times by correctional officers; yet, COs absolutely cannot be in an area where visibility is less than 10 feet.
> - There are no longer any correctional officers who are trained and equipped to accompany the emergency team during a response.
> - Employees generally have less training and practice in responding to fire hazards in a correctional environment, especially when it comes to smoke and contaminants from the fire.
> - Correctional managers are now the ones who take the lead during fires and they have no specific training in that area, whereas it used to be done by members of the fire brigade, who were much more qualified.

[55] The appellants are of the view that this condition poses various risks. In particular, the lack of proper training leads to a higher risk that employees will be exposed to smoke or contaminants from the fire. The risk becomes exponential because staff and municipal firefighters are unable to respond quickly and effectively at the site of the fire.

[2] 2005 FCA 156

[56] They add that, if a fire that is not brought under control quickly, the inmates must be evacuated from the building, which in itself constitutes a hazard that could be avoided by a rapid, effective response by the brigade.

[57] It is alleged that the risk of fires worsening is greater with no brigade, which increases the likelihood that the lives and safety of the building occupants will be at risk.

[58] According to the appellants, the employees are more prone to making mistakes that would put their safety at risk given the lack of proper training.

[59] To conclude on the first criterion, the appellants stated that, based on the current procedure, if a person is trapped by smoke, neither the municipal firefighters nor the staff are able to carry out search and rescue operations if visibility is less than 10 feet. In such a situation, a person who is trapped might perish.

II. Imminent or serious threat to life or health

[60] The appellants argue that the disbandment of the FBs constitutes a serious threat based on the definition of "danger." According to *Ketcheson*, two elements are required in reaching this conclusion: (1) the threat must be likely to cause serious injury or illness and (2) there must be a reasonable expectation that the threat will occur.

[61] With respect to the first point, it is submitted that the evidence categorically indicates that smoke exposure can result in breathing problems, injury or even death. Smoke is even more dangerous in a correctional environment given the type of building, which traps the smoke, and the fact that inmates set fires intentionally. Thus, the threat posed by inmates is exacerbated by fires. In *Verville*,[3] the Federal Court established that the unpredictable behaviour of inmates in itself meets the definition of danger.

[62] On the second point, the appellants argue that, on the basis of *Keith Hall*,[4] there must be a reasonable possibility that the alleged threat could materialize for a danger to exist.

[63] An imminent threat would mean a hazard, condition or activity that will cause injury or illness soon (in a matter of minutes or hours).

[64] A serious threat would mean a hazard, condition or activity that will cause severe injury or illness at some time in the future (days, weeks, months, in some cases years).

[65] In order to determine the reasonable possibility of the threat materializing in the future, the appellants cited *Nolan*,[5] in which the Tribunal sets the test to be applied. According to the appellants, there must be sufficient proof to establish that the disbandment of the brigades could reasonably result in a severe injury to them at some time in the future.

[3] 2004 FC 767
[4] 2017 OHSTC 1
[5] 2017 OHSTC 11

[66] The appellants claim that the fire brigade's history shows that its disbandment in 2018 created a condition or hazard that poses an imminent and serious threat to the lives or health of the employees.

[67] In support of this argument, the appellants referred to an incident that could reasonably have been expected to rapidly be confined by the fire brigade. However, in light of the FB's disbandment, the incident escalated and some employees had to be hospitalized.

[68] The appellants submit that the hazards identified in the expert report and the role of the FB are not hypothetical because they were observed many times during actual events.

[69] In addition, there should be no further doubt as to the probability of the threat materializing because the incident feared by the appellants materialized on September 26, 2019, a few months after the ministerial delegate's decision.

[70] The appellants therefore claim that the ministerial delegate's decision is not reasonable. In response to the issue in *Nolan*, they conclude that not only is it likely that an event or incident causing severe injury to an employee will occur based on past events, it is a certainty given that, in reality, injury had already materialized subsequent to the filing of the complaint.

[71] They also submit that the evidence shows that the various means put in place to address the absence of a brigade and to mitigate fire-related hazards are ineffective. Even though the employer implemented means, the incident of September 26, 2019 resulted in a situation that had never occurred in the nearly 30 years of the brigade's history.

[72] The appellants cite the decision by the Federal Court in *Union of Canadian Correctional Officers v. Canada (Attorney General)*,[6] in which it states that the success of measures to eliminate the risk must be taken into consideration by the appeals officer.

III. Existence of a threat once the condition is corrected, whether the activity is changed or the hazard eliminated

[73] The appellants emphasize that, since the disbandment of the FBs, the employer has not dealt with the dangerous condition and that it confirms having no plans to restore the brigade.

[74] According to the appellants, the resulting dangerous condition has not been rectified. To the contrary, it has been exacerbated by the respondent's lack of effort to address this breach of workplace safety. The respondent has not put any transition plans in place. The appellants add that there is not just a threat to life and health, because it actually materialized on September 26, 2019, before the condition was corrected.

[75] In the present case, zero risk is impossible to achieve, although it is possible to reduce or minimize the risk. On this point, the appellants submit that the other controls in place in the correctional institution are not sufficient to reduce the risk of danger.

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[6] 2008 FC 542

[76] Indeed, the double danger posed simultaneously by inmates and fire requires a human response by properly trained and qualified employees. They suggest that the employer's measures are otherwise ineffective in ensuring the fast ventilation of smoke and rapid response to medium to large fires and the search and rescue of occupants.

[77] The appellants also note that the risks were substantially minimized by the FBs, which was confirmed by expert witness Mr. Girard. In addition, they state that the brigade's value was demonstrated by the work it had done.

[78] In conclusion, the appellants submit that the employer did not take all the measures needed to reduce the risk; rather, it eliminated one of the essential firefighting measures without establishing a viable alternative.

[79] For these reasons, the appellants request that the Tribunal: (1) allow the appeal; (2) set aside the direction issued by the ministerial delegate on May 14, 2018; (3) declare that a danger exists within the meaning of the Code; and (4) order that the disbandment of FBs in federal maximum security institutions be cancelled.

B) Arguments of the respondent

I. The appellants were not exposed to a danger within the meaning of the Code

[80] According to the employer, the decision of no danger is well founded and there is insufficient evidence to show that the appellants were exposed to a "danger" within the meaning of the Code when they exercised their refusal to work.

[81] The risks include very significant risks that constitute a "danger" and may be the subject of a refusal to work. Conversely, there are lower risks that do not constitute a "danger" and are dealt with by means other than the refusal to work.

II. The alleged condition

[82] According to the employer, the appellants are referring to two conditions alleged in support of their refusal to work.

[83] In the appellants' written submissions, the alleged condition was the removal of the FB in the Donnacona and Port-Cartier penitentiaries. However, during the refusal to work under section 128 of the Code, the reasons for the work refusal were as follows:

> [TRANSLATION]
>
> After the termination of the penitentiary fire brigade that was made up of correctional firefighting officers, the new procedure and work methods established in the fire safety manual (FSM 2016) for the search and rescue of employees or others in the workplace, while inmates are present, if the employees are trapped or unable to evacuate on their own from an area where their lives are in danger (because of fire, heat, hazardous materials, smoke or other hazards), represent a threat to life because the City's fire department does not control inmates and may decide not to enter the

> institution if the inmate population is not under control or may leave at any time if there is a threat from an inmate or unrest endangering the employees in charge of fire or rescue.

[84] The respondent submits that the reasons for the refusal to work engaged the process stipulated in the Code, which also led to the investigation and the ministerial delegate's decision. That is why the alleged condition should be the grounds for refusing to work stated by the appellants when they exercised their refusal to work.

[85] The respondent claims that the decision to dismantle the FBs and not to refer to them in the 2016 Manual was a policy decision. Not all of the maximum security institutions had an FB. The decision to dismantle the FBs constitutes a root cause and this decision cannot constitute a danger within the meaning of section 128 of the Code.

[86] The respondent submits that the reasons given by the appellants when they exercised their refusal to work are the ones needing to be reviewed in this appeal.

III. No imminent or serious threat

[87] In the employer's view, some limits apply to the concept of "danger." The legal test does not make it possible to characterize hypothetical or generic scenarios as "danger" when it would be better to review such issues using other mechanisms established in the Code.

[88] The respondent agrees with the appellants that there is no imminent threat.

[89] The respondent notes that a serious threat means that there is a reasonable expectation that the hazard will cause severe injury or illness at some point in the future. The concept of "danger" is based on reasonable expectations. Therefore, the respondent submits that the mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat.

[90] Indeed, the respondent maintains that there must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the hazard. In the case at bar, there is insufficient evidence to establish a reasonable possibility of the alleged condition arising.

[91] At the outset, the respondent submitted that the testimonial evidence indicates that there was no situation where a fire broke out, the inmate population was uncontrolled and one or more employees were trapped and unable to get out.

[92] The respondent notes that the appeal file contains no observation or investigation reports or other documents stating the fact that the alleged situation occurred or that a situation where employees got trapped in a fire occurred.

[93] What the evidence does establish is that, with the exception of a major fire at Donnacona Institution several years ago, fires are typically small. The evidence shows that the Donnacona fire department has only responded once to Donnacona Institution since 2008, namely on September 26, 2019, which was after the refusal to work by the appellants. In that case, the fire

was put out by the COs before the firefighters arrived on the scene. The respondent claims that the incident of September 26 is not relevant to the determination of the issue because the alleged condition in support of the refusal to work did not occur during that incident.

[94] The respondent notes that, based on the testimonial evidence, the firefighters' response in the past 14 years at Port-Cartier Institution has mostly been limited to ventilating and looking for trouble spots. In addition, the incomplete statistics filed in evidence show that the fires that occurred in maximum and multi-level security institutions from 2013 to 2019 were for the most part small and put out by COs.

[95] The respondent also argues that, although some COs work for a fire department as firefighters, they were not hired as firefighters by the employer, but rather as COs. The duties of this job include supervising and monitoring inmate activities and movement, ensuring safety and maintaining peace in the institution, and trying to correct the inappropriate behaviour of inmates. It is the responsibility of the fire department to extinguish fires that are identified as out of control.

[96] According to the respondent, the evidence demonstrates that, if there is a fire at Donnacona Institution, the Donnacona fire department will respond. The following types of response are available:

- Evacuating smoke;
- Extinguishing fires (depending on the call);
- Searching buildings;
- Evacuating people;
- Saving or protecting various areas.

[97] The Donnacona fire department will not put the lives of firefighters in danger to save lives where there is a risk of flashover. However, the respondent notes that Mr. Amyot testified that there is always something that can be done by the firefighters.

[98] The respondent argues that little weight should be given to Mr. Girard's expert report, considering it makes no reference to the methodology used to establish the findings and the facts on which the opinions are based.

IV. Approaches adopted by the employer to reduce the risk of fire

[99] The respondent notes the approaches adopted to significantly reduce the risks:

- All of the employer's medium and maximum security units are constructed of concrete;
- All products and finishes meet the minimum requirements of the *National Building Code of Canada*;
- There are certain restrictions on furniture to limit the spread of fire;
- There are strict limits on mattresses and all bedding items in the facilities;
- The respondent installed smoke detectors, automatic sprinklers, heat detectors, fire alarm boxes and dual path signalling alarm systems;

- The institutions are equipped with extinguishers and hose cabinets;
- The institutions are divided into rows to limit the potential extent of fires;
- All means of evacuation and exits are in compliance with the *National Fire Code of Canada;*
- The employer conducts daily, monthly and semi-annual inspections aimed at identifying and eliminating fire hazards;
- There are measures in place to ensure strict monitoring throughout native sweat ceremonies and religious practices involving purification with smoke or incense;
- There are control measures in place for the location, storage and pouring of flammable liquids, control measures for heating and cooking, barbecues, heating units, scrap and waste disposal, electrical equipment and appliances, laundry, rules for decorations and lights (celebrations), storage of records and files, general storage, contents of cells, as well as safety measures to prevent fires during construction and renovation projects;
- Equipment is maintained in accordance with the *National Fire Code of Canada*.

[100] The respondent points out that risk cannot be eliminated, but it can be mitigated. The risk of a fire spreading can be substantially limited through technical and operational means. Moreover, if members of a fire department are unable to extinguish a fire directly from inside the building, they do have other ways of putting it out, depending on the situation.

[101] The respondent does not agree with the appellants' interpretation of *Verville* that the unpredictable behaviour of inmates is in itself the definition of danger. That is not what the decision established, according to the respondent. In *Verville*, the applicant conceded that his job description involves a risk of possible hostage taking, injury or danger when dealing with violent and hostile offenders.

[102] Lastly, the respondent submits that the facts and evidence do not show any imminent or serious threat. The ministerial delegate's decision was therefore well founded.

[103] For these reasons, the respondent asks the Tribunal to dismiss this appeal and to confirm the decision rendered by the ministerial delegate on May 4, 2018.

C) Reply

[104] In reply, the appellants submitted that the respondent's representations present three arguments. They supplemented their main representations by addressing the three arguments as well as other specific points made in the respondent's representations concerning the evidence.

I. The danger identified by the appellants is speculative

[105] The appellants repeated that the danger posed by the removal of the FBs is not only very real, but already materialized in the events of September 26, 2019. They are of the opinion that the weight of the evidence shows that the disbandment of the brigades will likely lead to injury or even death of occupants of the correctional institution.

[106] They note that the purpose of the refusal to work was precisely to address the danger before it materialized and, in support of their position, they again referred to *Martin*.

II. The various fire safety measures in place are sufficient and brigades are obsolete, and therefore unnecessary

[107] The appellants submit that the measures are commendable but that the weight of the evidence shows that they are insufficient in practical terms and cannot replace FBs. They note a sharp dichotomy between what the procedures are meant to achieve in theory and their true effectiveness in practice.

[108] Several examples are illustrated in the reply and a few of them are listed below:

> [TRANSLATION]
>
> - In theory, the items in cells are nonflammable. In practice, during the events of September 26, these items caught fire within seconds. Inmates could also have highly combustible items in their cells, such as large paper files.
>
> - In theory, the extinguishers in cells activate at the appropriate time. In practice, the inmates tamper with them or they simply fail to activate, which was the case on September 26, 2019.
>
> - In theory, municipal firefighters are supposed to make up for the disbandment of brigades. In practice, they are not properly trained to respond in a correctional environment, and they cannot intervene with inmates or respond as quickly as FBs.

[109] The appellants argue that the Tribunal should favour the testimony of witnesses who have experience in responding to fires at Donnacona. They agree with the claim that an FB is invaluable in mitigating fire-related hazards in a correctional environment.

[110] The appellants are opposed to the respondent's position that FBs are outdated. This position was behind the respondent's move to disband them. The respondent claims that they were inconsistent from one penitentiary to the next, that their role and training needs were unclear, that training was inadequate and the FB equipment was in poor condition. The appellants suggest that the testimonial evidence given by Messrs. Proulx and Girard contradicts witness Hamel on this point.

[111] The appellants note that it is up to the employer to properly train and equip its employees. The observation of the outdatedness of brigades is not an inevitability according to the appellants, because it is at the discretion of the employer to address the shortcomings observed and the employer is solely to blame for not having done so in a timely manner.

III. The reason underlying the refusal to work was not the disbandment of the FBs per se, but a specific condition alleged in the refusal to work

[112] In reply, the appellants maintain that the Tribunal must render its decision based on the evidence submitted at the hearing because the appeal is *de novo*.

[113] The appellants are of the opinion that this means the evidence adduced at the hearing prevails over how the initial refusal to work was formulated. In support of this argument, they refer to *Zimmerman*.[7]

[114] They add that Mr. Bergeron's testimony was clear that the reason underlying his work stoppage was the disbandment of the FBs. Mr. Davidson testified to the same effect. Further, no evidence was submitted suggesting that the respondent failed to understand the danger as expressed by two witnesses at the beginning of the hearing.

[115] The respondent's interpretation of the wording of the refusal to work at this late stage of the proceedings should not prevail over the intention clearly formulated by the appellants and their representative to the effect that they believe the disbandment of the FBs was what constituted a danger.

[116] Hence, the appellants ask the Tribunal to decide the issue in light of the evidence submitted at the hearing, and not limit itself to the formulation of the initial refusal to work.

IV. Other specific points made by the respondent regarding the evidence

[117] In reply, the appellants submit that, contrary to the respondent's claims, the incident of September 26, 2019 is relevant and should be considered.

[118] They recall that this is a *de novo* appeal and that the appeals officer is not bound by the findings of the ministerial delegate. They add that the appeals officer must rely on the evidence submitted at the hearing, including evidence that was not made available to the ministerial delegate or that she did not take into account.

Issue

[119] Does the disbandment of FBs by the respondent constitute a danger as defined in section 122(1) of the Code?

Analysis

[120] I have before me an appeal under subsection 129(7) of the Code in relation to a no danger decision issued by the ministerial delegate.

[121] Subsection 146.1(1) of the Code defines the power of an appeals officer who is considering the appeal of a decision that a danger does not exist:

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> **146.1(1)** If an appeal is brought under subsection 129(7) or section 146, the Board shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> **(a)** vary, rescind or confirm the decision or direction;

[122] The appellants exercised a refusal to work under paragraph 128(1)(a) of the Code:

> **128(1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> **(a)** the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

[123] The appellants are of the opinion that the disbandment of the FBs constitutes a danger to them and the employees at Donnacona Institution. Subsection 122(1) of the Code defines "danger" as follows:

> **122**(1) In this Part,
>
> **danger** means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;

[124] In order to decide whether to confirm or rescind the decision of no danger by the ministerial delegate, I will apply the legal test described in *Ketcheson* to the facts of this case in order to ascertain whether the appellants were exposed to a danger within the meaning of the Code.

[125] The test is described as follows:

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 **serious 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?

[126] I will therefore assess the test in this legal context.

1) What is the alleged hazard, condition or activity?

[127] The evidence described above shows that the appellants exercised a collective refusal to work on the morning of May 3, 2018, arising from the fact that the employer had changed the emergency procedures and removed the FB. The collective work refusal included 85 CSC employees at the Donnacona and Port-Cartier penitentiaries.

[128] On the morning of May 3, 2018, the only change in the COs' work duties was the removal of the FB following the respondent's decision.

[129] As a direct result of the removal of the FB, the appellants claim that in the event of a fire they could be trapped and unable to evacuate. In addition, they argue that the fire department could refuse to respond if the inmate population is not under control.

[130] The evidence shows that the danger signalled to the Minister of Labour was worded as follows:

> [TRANSLATION]
>
> After the termination of the penitentiary fire brigade that was made up of correctional firefighting officers, the new procedure and work method established (FSM 2016) for the search and rescue of myself and others in my workplace, while inmates are present, if I am trapped or unable to get out of an area where my life is in danger (because of fire, heat, hazardous materials, smoke or other hazards) represents a threat to life (serious personal injury or death), because the City's fire department does not control inmates and may decide not to enter the institution if the inmate population is not under control or may leave at any time if there is a threat from an inmate or unrest endangering the employees in charge of firefighting or rescue operations.

[131] In addition, the danger reported to the Minister of Labour is what initiated the process set out in the Code, which also led to the investigation and decision of no danger by the ministerial delegate.

[132] The report and testimony of the expert witness confirm that the alleged hazard is described in the notice presented to the Minister of Labour. Mr. Girard was introduced to, and recognized by, the undersigned as an expert witness in the area of fire safety in maximum security institutions. Despite the lack of detail on the scientific approach used by the expert to reach his conclusions, I note that his testimony is credible, reliable and consistent with the report submitted in evidence.

[133] The Tribunal recognizes the respondent's argument that the expert's evidence does not mention the methodology used and, for that reason, should be given little weight. A number of factors must be considered in determining the admissibility and value of an expert witness's testimony, including:

- Whether the expert's testimony would help to resolve the matter under review;
- Whether the testimony falls within the expert's area of expertise;
- How the expertise was acquired, that is, through education, experience or both;
- The fact that the expert formed an opinion while knowing all of the relevant facts;

- The facts and assumptions relied on by the expert;
- Whether the facts relied on by the expert were established;
- The reliability of the methods used by the expert to form an opinion.

[134] The methodology issue is only one of many factors to consider in assessing the probative value of the expertise. In the case at hand, and after having weighed all of the relevant factors, I am of the opinion that the respondent's argument is not sufficient to affect the probative value of the expertise as it suggested.

[135] The other factors I considered lead me to give high probative value to Mr. Girard's expertise. Specifically, the evidence submitted was within his area of expertise as the municipality of Cap-Santé's fire chief, his testimony was needed to help resolve the issue in dispute, and his expertise was acquired over many years of experience as demonstrated in his testimony.

[136] For these reasons, I find that the hazard is as described and submitted to the Minister of Labour.

2) Could this hazard pose an imminent or serious threat?

A. Imminent threat

[137] As set out in *Ketcheson*, an imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[138] I note that the parties agree that the alleged condition does not constitute an imminent threat to the lives or health of the appellants.

[139] Accordingly, and after having considered the evidence on record, I agree with them that the facts of this case and the alleged hazard do not constitute an imminent threat to the lives or health of the appellants.

B. Serious threat

[140] After finding that there is no "imminent threat," I must determine whether the condition alleged by the appellants could reasonably be expected to be a "serious threat" to the lives or health of the appellants.

[141] As stipulated in *Ketcheson*, a serious threat is a reasonable expectation that the alleged hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). An event or something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor;

it is severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[142] After taking into consideration all of the evidence submitted to me, I find, for the following reasons, that the appellants were not exposed to a serious threat to their lives or health.

[143] In order to come to the conclusion that the appellants were exposed to a serious threat to their lives or health, the evidence must show that there was a reasonable expectation that the appellants would be faced in the days, weeks or months ahead with a situation that could cause them serious harm as a result of the disbandment of the local fire brigade.

[144] In other words, we know from *Ketcheson* that two elements are required to conclude that the alleged hazard constitutes a serious threat: (1) the threat must be likely to cause serious injury or illness and (2) there must be a reasonable expectation that the threat will occur.

[145] The Tribunal notes that the parties agree on the legal test that applies to the concept of "serious threat."

[146] With respect to the first element of analysis, the appellants submit that the evidence is clear that smoke exposure can result in breathing problems, injury or, in extreme cases, even death. They note that smoke is even more dangerous in a correctional environment given the type of building, which traps smoke, and the fact that inmates set fires intentionally.

[147] On the other hand, the respondent emphasizes that some limits apply to the concept of "hazard" and that the test does not make it possible to characterize hypothetical or generic scenarios as hazards.

[148] As regards the first element and considering the weight given to Mr. Girard's expertise, the Tribunal agrees with the appellants that the evidence shows the alleged hazard or the threat could potentially lead to serious injury or illness.

[149] In his report, the expert witness notes the health and safety risks for employees in relation to fires at maximum security institutions:

> [TRANSLATION]
>
> - Smoke and contaminants from a fire are the main health and safety risks for employees and all occupants of a maximum security institution.
>
> - Smoke poses two risks: poisoning from carbon monoxide or other gases that may lead to death.
>
> - At the same time, smoke affects overall safety as it hinders the ability to see at all times. If full visibility changes to reduced and then zero visibility, the safety of the institution

will be jeopardized. Smoke considerably increases the risk of a workplace accident involving primary workers.

[150] Indeed, there is no question that hazards and threats like those described by the expert witness demonstrate that they are potentially serious. At the same time, this is not in itself sufficient to conclude that the *Ketcheson* test has been met. A reasonable expectation that the threat will materialize must also be borne out by the evidence.

[151] Apart from its argument on the weight of the expertise, the respondent did not make any representations on the potential health and safety risks as demonstrated by the expert's evidence. The respondent's arguments have more to do with the second part of the *Ketcheson* test, namely a reasonable expectation that the threat will occur. This is the issue here and I will therefore deal with this aspect in the next part of the analysis.

[152] On this topic, the appellants cite *Nolan* and maintain that the evidence must be sufficient to find that the disbandment of the brigades could reasonably be expected to result in an accident causing severe injury to those employees at some time in the future. The hazards identified in the expert report and the role of the FBs are not hypothetical because they were observed many times during actual events.

[153] In their view, there should be no further doubt as to the probability of the hazard materializing because the incident feared by the appellants materialized on September 26, 2019, a few months after the decision that is the subject of this appeal. With respect to the test in *Nolan*, they conclude that not only is it likely that an event or incident causing severe injury to an employee will occur based on past events, it is a certainty given that, in reality, injury had already materialized subsequent to the filing of the complaint.

[154] They also submit that the evidence shows that the various means put in place to address the absence of a brigade and to mitigate fire-related risks are ineffective. Despite the employer's implementation of means to mitigate fire-related risks, the incident of September 26, 2019 resulted in a situation that had never occurred in the nearly 30 years of the brigade's history.

[155] On the other hand, the respondent submits that the testimonial evidence indicates that there was no situation where a fire broke out, the inmate population was uncontrolled and one or more employees were trapped and unable to get out. It adds that the appeal file contains no observation or investigation reports or other documents stating that the alleged situation or a situation where employees got trapped in a fire occurred.

[156] The respondent also claims that the incident of September 26 is not relevant to the determination of the issue because the alleged condition in support of the refusal to work did not occur during the September 26 incident.

[157] It adds that, although some COs work for a fire department as firefighters, they were not hired as firefighters by the employer, but rather as COs. The duties of this job include supervising and monitoring inmate activities and movement, ensuring safety and maintaining peace in the institution, and trying to correct the inappropriate behaviour of inmates. It is the

responsibility of the fire department to extinguish fires that are identified as out of control. However, this precludes the reasonable expectation that the risk or threat will materialize.

[158] Before considering the reasonable possibility of the threat materializing, I must first address the respondent's argument that the incident of September 26, 2019 would not be relevant to our analysis. On this point, I agree with the appellants. This is a *de novo* appeal, meaning that new evidence that was not available when the initial refusal to work was filed may be considered by the Tribunal. I am always mindful of the fact that the Tribunal is entitled to hear only relevant and significant evidence in a *de novo* hearing.

[159] In my opinion, failing to accept the evidence from the incident of September 26, 2019 simply because it occurred after the incident is inconsistent with the *de novo* nature of the hearing and the wide latitude given to courts to fulfil their fact-finding mandate. I also note that the evidence presented in relation to the September 26 incident is directly linked to the issue I must resolve, hence it is relevant.

[160] That said, in *Nolan*, the appeals officer addressed the reasonable possibility test and identified the issue that needed to be resolved by assessing this test in the following terms:

> [61] Given that the Code's definition of danger is based on the concept of reasonable expectations, the mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat. There must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the alleged hazard, condition or activity.
>
> [62] The determination of whether the materialization of the threat is a reasonable possibility as opposed to a remote or hypothetical one, is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is examined. It involves a question of appreciation of facts and passing judgment on the likelihood of occurrence of a future event. In my view, **an acceptable way to make this determination is to ask the following question: would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is likely to occur?**
>
> (Emphasis added)

[161] In addition, the Federal Court, in *Laycock*,[8] recently stated that despite the legislative amendments to the definition of danger, the decision in *Verville* still offers a useful framework when attempting to ascertain whether a condition could reasonably be expected to be a serious threat. In *Verville*, the Federal Court made the following statement:

> [36] (…) I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[8] 2018 FC 750

[162] The Tribunal's jurisprudence has established that a finding of danger under the Code cannot be based on speculation or hypothesis. A serious threat is established when the evidence shows there is a reasonable possibility of serious injury or illness at some point in the future.

[163] After reviewing all of the evidence on record, I find that it would be inconsistent with the applicable jurisprudence to conclude that there was a danger within the meaning of the Code simply based on a single incident, namely, the incident of September 26, 2019.

[164] Firstly, the Tribunal is satisfied that the evidence shows that the Donnacona fire department will respond to fires at Donnacona Institution. Moreover, I note that the appeal file contains no observation or investigation reports or other documents stating that the alleged situation or a situation where employees got trapped in a fire occurred.

[165] According to the Tribunal, the evidence establishes that, with the exception of a major fire at Donnacona Institution several years ago, fires are typically small. The evidence shows that the Donnacona fire department has only responded once to Donnacona Institution since 2008, namely on September 26, 2019. In that case, the fire had already been extinguished by the COs at the time of the incident.

[166] The Tribunal notes that the testimonial evidence has shown that the firefighters' response at Port-Cartier Institution in the past 14 years has been mostly limited to ventilating and looking for trouble spots. In addition, the incomplete statistics filed in evidence show that the fires that occurred in maximum and multi-level security institutions from 2013 to 2019 were for the most part small and put out by COs.

[167] In my view, the situation alleged by the appellants reveals, at most, a remote possibility that the threat will materialize. This would mean the lowest probability possible.

[168] To determine whether a threat is a real possibility or a remote or hypothetical possibility, the statistical information, although not the only determining factor, proves to be conclusive. The appeals officer in *Brinks Canada Limited*[9] wrote the following:

> [143] The determination of whether a threat is a real possibility as opposed to a remote or hypothetical possibility is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is executed. Statistical information is relevant to make an informed factual finding on that question, although in the final analysis, it involves a question of appreciation of facts and judgement on the likelihood of occurrence of a future event, in the present case an event that is linked to unpredictable human behaviour.

[169] In my opinion, the statistical evidence submitted supports the finding that this case concerns a hypothetical or remote possibility rather than a real possibility.

[170] This finding is also supported by the evidence of all the measures implemented by the respondent to reduce the reasonable possibility. The fire safety cover plan and Mr. Kruszelnicki's report point to the following measures:

[9] 2017 OHSTC 9

- All of the respondent's medium and maximum security units are constructed of concrete;
- The respondent takes steps to ensure that all products and finishes (paint, flooring, wall finishes, etc.) conform with the minimum requirements of the *National Building Code of Canada* in order to limit the spread of fire and reduce the release of smoke;
- The respondent puts certain restrictions on furniture to limit the spread of fire;
- The respondent put strict limits on mattresses and all bedding items in its facilities;
- To reduce the fuel load in cells and bedrooms, there are restrictions on combustible wall decorations, accumulation of clothing and personal belongings, the number of plugged-in electrical devices, bookshelves, cupboards, tables, benches, chairs, etc.;
- The respondent installed smoke detectors, automatic sprinklers, heat detectors, fire alarm boxes and dual path signalling alarm systems;
- Daily, monthly and semi-annual inspections aimed primarily at identifying and eliminating fire hazards are conducted.

[171] Based on all of the testimony heard, there are no technical aspects that would allow me to confirm that the safety of the employees at maximum security institutions was put directly in danger by the disbandment of the local fire brigades. The procedures in place, including the use of SCBA by employees and ERAPs that were jointly established by municipal fire departments and the correctional institutions, appear sufficient and appropriate to ensure the safety of employees, including COs.

[172] The evidence on record is insufficient to establish that a reasonable person, properly informed and viewing the circumstances objectively and practically, would conclude that an event or incident causing serious harm to an employee is likely to occur following the disbandment of the FBs. Considering all of the measures implemented by the employer, it is my opinion that this is the only possible conclusion.

[173] The Tribunal is therefore not satisfied that the threat is likely to materialize given the measures implemented by the respondent. The second element required to establish the existence of a serious threat was not demonstrated during the proceedings.

[174] Given all of the above, I find that the evidence gathered at the hearing does not show a reasonable possibility that the COs working at the Donnacona penitentiary may be exposed to the risk stated in their refusal to work.

[175] In the specific case of the incident of September 26, 2019, all indications are that COs equipped with SCBA could have removed the ERT's specialized equipment and that the inmates could have then been evacuated from the row without the need for a response by the former FB members. The municipal firefighters would have later been able to clear the smoke from the row and neutralize the source of the smoke coming from one of the cells. There is no evidence to suggest that in the absence of an FB (in this specific case, the former FB and its equipment) in the institution, the employees would have been in danger during that incident.

[176] Given the finding that there was no serious threat in the circumstances of this case, there is no need to turn to the third part of the test developed in *Ketcheson*, namely whether the threat to life or health existed before the hazard or condition could be corrected or the activity altered.

Decision

[177] For these reasons, I confirm the decision of absence of danger rendered on May 5, 2018 by Ms. Vicky Mathieu, official delegated by the Minister of Labour, pursuant to subsection 129(7) of the *Canada Labour Code*.

Olivier Bellavigna-Ladoux
Appeals Officer