Federal Court  Cour fédérale

Date: 20221116

Docket: T-948-21

Citation: 2022 FC 1567

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 16, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JEAN-FRANÇOIS BERGERON, DANIEL VAILLANCOURT, DAVID MORIN, SIMON VOYER, VINCENT TREMBLAY, DANIEL TURCOTTE, CATHIE PAQUET, FÉLIX LAURIN, PASCALE BERNIER, SYLVAIN TURCOTTE, CAROLINE MALOUIN, JOHANNE FERGUSON, NELLY THIBEAULT, DAVID DINUCCI, SIMON LANDRY, MARC LAPLANTE, ALEX-SANDRA BRASSARD, PIERRE BLAIS, JULIE POIRIER, YANICK ARSENAULT, NADINE CAUVIER, JACQUES PETITPAS, ANNIE GAUTHIER, ANGELO TREMBLAY, OLIVIER BACON, LOUIS-PHILIPPE MESSIER, OLIVIER PAGEAU, GUILLAUME LAMY, GUY FRIGON, RÉJEAN BEZEAU, PASCAL GIRARD, ANOUARD EL BADAOUI, SABRINA FORTIN, MARILYN LEBLOND, GILLES TREMBLAY, MARIPIER COURCHESNE, FRÉDÉRIC LABBÉ, MARTIN BACON, STEEVE GAGNON, BASTIEN PÉLOQUIN, LUC THERRIAULT, STÉPHANE GAGNON, HUGO LEMIEUX, TONY THIBEAULT, CARL BOUCHARD, MICHEL COUTURE, GABRIELLE RICARD, MYLÈNE BENOÎT-BOUSQUET, MARIE-PIER CHEVRIER, STÉPHANE-ÉRIC MÉTHOT, LISON VALLÉE, SAMUEL HOULE, NICOLAS COULOMBE, JOHANNE MÉNARD, NANCY CÔTÉ, STEVE MORNEAU, STÉPHANE POIRIER, BRUNO-PIERRE PARADIS, SYLVAIN LESSARD, PASCALE LÉVESQUE, MARTIN DESCHÊNES, BIANCA LALIBERTÉ VIRGINIA ROY DUVAL, ANDRÉ-FRÉDÉRICK DUPLAIN, GUILLAUME MORIN, JONATHAN MATTE, JEAN-PHILIPPE ROY, FRANÇOIS GIRARD, ANTHONY BOUCHARD, ROCH ROY, LINDSAY BELLAMY, RAYMOND ROUSSY, DENIS LANGLAIS, CLÉMENT AUGER, LOUIS NADEAU, SERGE LANGLOIS, GUILLAUME FISET, GABRIEL SÉGUIN, STÉPHANE BRIAND, SÉBASTIEN HÉBERT, PIERRE-OLIVIER DESCHÊNES, PIERRE LUC CORBIN, HUGUES GENOIS, STEVE WALSH, MATHIEU LACHANCE, SOPHIE BEAULIEU

Applicants

and

CORRECTIONAL SERVICE OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review pertains to a decision of the Occupational Health and Safety Tribunal (the Tribunal) dated May 13, 2021. A decision dated May 14, 2018, by an official delegated by the Minister of Labour, determining that danger justifying a collective refusal to work on May 3, 2018, did not exist, was affirmed by the Tribunal after an investigation.

[2] The 87 applicants work as correctional officers (COs) at two maximum security penitentiaries located in Donnacona and Port-Cartier, Quebec, respectively. Their application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] The reviewable decision is, of course, the Tribunal's decision. To facilitate understanding, it would be helpful to review the factual background leading up to the collective refusal to work, briefly describe the decision of the official delegated by the Minister and summarize the decision under judicial review.

I. Facts

[4] The facts forming the basis of this matter are not in dispute.

[5] Correctional officers from the above two institutions claimed to have invoked section 128 of the *Canada Labour Code*, RSC 1985, c L-2 [Code] on May 3, 2018. This provision enables employees to refuse to work if there is danger. Subsections 128(1) and (2) form the legal basis for the refusal:

Refusal to work if danger	**Refus de travailler en cas de danger**
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	**128 (1)** Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :
(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;	a) l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in the place that constitutes a danger to the employee; or	b) il est dangereux pour lui de travailler dans le lieu;
(c) the performance of the activity constitutes a danger to the employee or to another employee.	c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

No refusal permitted in certain dangerous circumstances	**Exception**
(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if	**(2)** L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :
(a) the refusal puts the life, health or safety of another person directly in danger; or	a) son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;
(b) the danger referred to in subsection (1) is a normal condition of employment.	b) le danger visé au paragraphe (1) constitue une condition normale de son emploi.

[6] The concept of "danger", which is at the heart of the regime, is defined in subsection 122(1) of the Code:

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; (danger)	***danger*** Situation, tâche ou risque qui pourrait vraisemblablement présenter une menace imminente ou sérieuse pour la vie ou pour la santé de la personne qui y est exposée avant que, selon le cas, la situation soit corrigée, la tâche modifiée ou le risque écarté. (danger)

[7] The above-cited provisions are found in Part II of the Code, which was briefly described in *Canada Post Corp v Canadian Union of Postal Workers* 2019 SCC 67, [2019] 4 SCR 900 [*Canada Post Corp*] as relating to occupational health and safety. I hasten to note that this Part

was amended after the events giving rise to this dispute. For example, the scope of this Part was broadened from “to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment” to “to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses arising out of, linked with or occurring in the course of employment”. In the same vein, the role of the appeals officer, who rendered the decision under judicial review, was repealed. Appeals are now heard by another body. It goes without saying that these amendments have no effect on the matter at hand, which is governed by the provisions of the Code in force at the time of the refusal to work.

[8] With respect to the factual background itself, it is not very complex. It appears that, on May 3, 2018, some correctional officers working for the Correctional Service of Canada (CSC) at the penitentiaries in Donnacona and Port-Cartier, Quebec, refused to work.

[9] The officers stated the reason for the refusal as follows:

> [TRANSLATION]
> Following the dissolution of the institutional fire brigade, which was made up of firefighter correctional officers, the new procedure and work method put in place (FSM 2016) for the search and rescue of myself and other occupants of my workplace, when inmates are present, if I am trapped or unable to evacuate on my own from an area that puts my life at risk (from fire, heat, hazardous substances, smoke and/or other risks) represents a danger to life (serious bodily injury or death) since the City Fire Department does not control inmates and may choose not to enter into the Institution if the inmate population is not under control, or may leave at any time if inmate threat or unrest endangers the fire or rescue personnel.

[10] The evidence filed with the Tribunal shows that, in 2009, the CSC’s Fire Safety Manual contained a section regarding “fire crews”. Paragraph 20 of the Manual conferred on the

Institutional Head the discretion to use “a Fire Crew or Brigade, composed of staff personnel” who had to be trained and equipped. The crew’s role was described as enabling “limited fire suppression and control in those circumstances where a fire is beyond the control of hand extinguishers and fire hose stations and the resources of the local Municipal or other Fire Department are required, have been summoned, but have not yet arrived”. This role is clearly an auxiliary one. In addition, the 2009 Manual does not define the tasks of the fire crews in a more specific manner. Paragraph 21 of the Manual specifies that crew members (at least six per crew) must receive “sufficient” training that would enable them to “provide assistance to the responding Fire Department as required”. In fact, the auxiliary nature of the crews’ role is underscored in paragraph 21 where it is stated that “[n]ormally, crews would only engage in fire operations when the risk of injury or entrapment is minimal”.

[11] The 2009 Manual stipulated the circumstances in which using fire crews (which were referred to as [TRANSLATION] “Fire Brigades” or “FBs” at the hearing) may be appropriate:

> In conformance with Treasury Board Standards, the use of on-site Fire Crews may be considered when:
>
> a) The Institution is remote from an organized Municipal or other Fire Department; or
>
> b) The Municipal or other Fire Department is for any other reason considered inadequate for the protection of the Institution, as determined by the Institutional Head, in consultation with Human Resources Skills Development Canada or the Chief Operational Fire Safety at NHQ. These may include special security concerns.

[12] According to the evidence, the Donnacona and Port-Cartier Institutions were among those that had FBs, but only 5 of the 53 institutions had them. The FBs at Donnacona and Port-Cartier penitentiaries consisted of 15 and 12 people respectively.

[13] It seems to me that the applicants somewhat overstated the roles of their FBs. They stated in their written submissions before this Court and at the hearing that the two brigades in question here took part in evacuating the premises, performed search and rescue, worked on prevention and conducted routine checks (Applicants' Memorandum of Fact and Law at para 11). It appears that the FBs' role has evolved somewhat since they were created at the start of the 1990s.

[14] The Fire Safety Manual is relevant for our purposes as regards the FBs' search-and-rescue role. This is the document that the applicants are using to justify their refusal to work. The Manual came out in 2016. It has a detailed section dealing with fire safety planning. The Manual no longer provides for discretion to use FBs, and it is not in dispute that they have been dissolved. It should be expressly noted that the Manual sets out the role of staff and that it deals with evacuating people on site, using self contained breathing apparatus (SCBA) and performing search and rescue, which is no longer the sole responsibility of COs. I will reproduce below paragraphs 1 and 7 to 13 of section 5.3.1 (Response to Fire Alarms at Institutions):

> 1) In impeded egress buildings and living units, fire department assistance shall be initiated by the MCCP within 2 minutes of the receipt of the first notification of a fire alarm initiating device unless the Officer in Charge is notified that the alarm is the result of a nuisance fire or false alarm and that there is no need for fire department response.
>
> …
>
> 7) Investigating Staff will conduct an immediate and ongoing Threat and Risk Assessment (TRA) of the alarm and report to the

Correctional Manager (Officer in Charge) and MCCP (or other alarm receiving location);

8) The results of the assessment of the alarm will determine what action will be necessary as follows:

a) False Alarm - notify MCCP and Correctional Manager (Officer in Charge); log the alarm and contact authorized Staff to reset fire alarm system;

b) Manageable Fire - if Staff determine that the fire can be quickly extinguished within their capabilities without placing themselves at risk they will proceed to do so;

c) Working Fire - if the investigating Staff determines that the fire is beyond their capabilities, they will immediately commence the Institutional Fire Emergency Procedures which should include MCCP or designated individual calling the local Fire Department. Operating the pull station at the unit control panel will initiate the 2nd stage fire alarm and sound the alarm signal throughout the unit. This alarm signal is intended to initiate offender readying procedures in the event that an evacuation becomes necessary.

9) If a working fire should occur, a phased evacuation shall be the preferred option such that offenders located closest to the fire are evacuated/relocated first, followed by the next closest.

10) When a smoke-filled unit undergoes an evacuation due to fire, staff shall employ SCBA in order to assist with evacuation. SCBA shall be used only in a lightly smoke-filled environment. If visibility is reduced to approximately 10 feet or the area becomes too hot to remain present,

officers shall not proceed but shall immediately begin to release all cell doors, giving verbal orders to offenders and retreat and await the assistance of the responding Fire Department.

11) In a contained use living unit, the usual response to a dryer fire shall be deemed a working fire and require the use of SCBA and shall anticipate the need for evacuation of the range or area.

12) When using SCBA for evacuation purposes, a minimum of 4 staff shall respond as follows:

> a) an initial team of two (2) SCBA-qualified and equipped persons entering the hazardous or smoke-contaminated zone;
>
> b) a third SCBA-qualified and equipped person standing by in visual contact, situated at the unit Control Post; and
>
> c) a fourth person acting as a monitor in a safe location in the immediate vicinity but in communication with the others and the Correctional Manager (Officer in Charge), ready to call for additional resources as required.
>
> 13) SCBA is intended to serve as Personal Protective Equipment for officers. It shall not be used to conduct search and rescue operations but rather is to be used to assist in the evacuation of offenders or to occupy a smoke-contaminated essential security post during evacuation.

[15] As these excerpts show, the role of the staff is well defined in the Manual. Since February 15, 2018, and April 1, 2018, there have also been Memoranda of Understanding between His Majesty the King in Right of Canada and the cities of Port-Cartier and Donnacona under which agreements were concluded regarding fire protection services to be provided in both penitentiaries and rescue to be carried out. The memoranda stipulate that the services to be provided are subject to an annual grant-in-lieu of taxes paid by the federal government to the cities.

II. Decision under judicial review

A. *Ministerial delegate*

[16] This was the factual background to the refusal to work on May 3, 2018. As was required at the time, the official delegated by the Minister of Labour immediately launched an investigation. A decision on the continued refusal to work was emailed out in the evening of

May 4, 2018. The next day (May 5), a formal letter confirming that the continued refusal to work was not permitted was sent out. The relevant parts of the letter are reproduced below:

> [TRANSLATION]
> On May 4, 2018, I investigated the refusal to work by employees listed in the attached document (whom you are representing) in the workplace located at 1537 Route 138, Donnacona, Quebec, G3M 1C9.
>
> I have rendered the following decision pursuant to subsection 129(4) of Part II of the *Canada Labour Code*:
>
> **Danger does not exist.**
>
> Accordingly, please note that, pursuant to subsection 129(7) of Part II of the *Canada Labour Code*, the above-mentioned employees are not permitted, under section 128, to continue to refuse to perform their duties as correctional officers in their workplace since the new procedure and work method put in place (FSM 2016) for the search and rescue of themselves and other occupants of the workplace, when inmates are present, if the officers are trapped or unable to evacuate on their own from an area that puts their lives at risk (from fire, heat, hazardous substances, smoke and/or other risks) represents a danger to life since the City Fire Department does not control inmates and may choose not to enter into the Institution if the inmate population is not under control, or may leave at any time if inmate threat or unrest endangers the fire or rescue personnel.
>
> The employees or designated representative may appeal the decision in writing before an appeals officer at the Occupational Health and Safety Tribunal Canada (OHSTC) within 10 days of receiving this decision, as stipulated in subsection 129(7) of the *Canada Labour Code*. For more information on the procedure to follow, visit the OHSTC website: ohstc-tsstc.gc.ca.
>
> Please note that an investigation report will be sent as soon as possible to the employer and to the representative of the employees who exercised their right of refusal.

[17] An investigation report was produced by the ministerial delegate on May 14, 2018. The investigation report brings together the various elements raised by the employees and the

employer. Essentially, the refusal to work was based on the dissolution of FBs, which supported or helped firefighters. Inmates' unpredictable behaviour and the fact that firefighters will not intervene if inmates are not under control were noted. The employer for its part submitted that the role of FBs was not to control inmates. It was understood that it was still the COs' role to do so. That role does not include search and rescue operations, which are carried out by the firefighters: the COs' role is to apply emergency measures and to evacuate the premises. SCBA equipment is provided solely to facilitate evacuation, not to carry out search and rescue operations. Technical aids were also put in place, such as fire-detection systems, sprinklers, fire extinguishers, ventilation systems, non-flammable bedding and textiles and limited combustible materials.

[18] The Ministerial delegate considered the danger in the present case. She summarized the case as follows:

> [TRANSLATION]
> The danger invoked on May 3, 2018, is as follows: the new procedure and work method put in place (FSM 2016) for the search and rescue of employees and other occupants of the workplace, when inmates are present, if employees are trapped or unable to evacuate on their own from an area that puts their lives at risk (from fire, heat, hazardous substances, smoke and/or other risks) represents a danger to life since the City Fire Department does not control inmates and may choose not to enter into the Institution if the inmate population is not under control, or may leave at any time if inmate threat or unrest endangers the fire or rescue personnel.

[19] The real question is whether there was an imminent or serious threat as stated in the definition of "danger". It was agreed that there was no imminent threat; everyone agreed with this even upon judicial review. It is therefore the reasonable expectation that there was a serious

threat that should be assessed. The ministerial delegate had no doubt that COs would likely face a fire in the future. However, the ministerial delegate did not conclude that a serious threat of danger within the meaning of the Code's definition was likely.

> [TRANSLATION]
> If a fire breaks out, it is reasonable to think that the correctional officers would take measures to either put out the fire or apply the evacuation procedures. The risk of the fire spreading is limited by technical and operational means. It is reasonable to think that inmates would be moved to another area. The Fire Department can then fight the fire. It may also be possible to extinguish the fire from outside, depending on the situation.
>
> As previously mentioned, the employer has also put in place several measures to prevent fires.
>
> In short, it is possible that a correctional officer would be faced with a fire. It is possible that a correctional officer would come in contact with an inmate. It is possible that a correctional officer would apply evacuation procedures. However, the likelihood that an employee would become trapped in the flames and/or the smoke with inmates where the smoke is such that no one can intervene and/or evacuate and that the inmates refuse to evacuate putting their own lives in danger is very low. Therefore, it is not reasonably expected that all of these situations would arise at the same time and result in serious injuries.

[20] As stated in the letter dated May 5, the ministerial delegate's decision could be appealed. The applicants appealed the decision to an appeals officer with the Occupational Health and Safety Tribunal. This is the decision for which judicial review is sought.

B. *Occupational Health and Safety Tribunal*

[21] This decision is of course based on the facts as stated in the ministerial delegate's report. The appeals officer highlighted the following:

- Human behaviour is unpredictable and the correctional setting has a specific context, which is described in correctional officers' job descriptions.
- Using FBs is discretionary and disbanding them was a policy decision made by the employer.
- FBs' role was limited to controlling the fire if it could not be put out through the use of fire extinguishers or hose stations while waiting for municipal firefighters to arrive. In general, FBs were expected to intervene only when the risk of injury or of being engulfed by the flames was low.
- With the 2016 Manual, employees can put out the fire using their own means when it is "manageable". Otherwise, "fire safety" procedures must be followed and the fire department called.

[22] The appeal was heard over eight days, and ten witnesses testified.

[23] The Tribunal reviewed the testimony heard. It set out in detail the arguments presented by the parties.

(1) The parties' arguments

[24] Basically, the applicants argue that disbanding the FBs constitutes a danger within the meaning of the Code, "a significant deterioration in the health and the safety of employees at Donnacona Institution" (OHSTC decision, para 53). Thus, the absence of FBs raises the risk of fires worsening. They also cited the lack of proper training raising the risk of exposure to smoke or other contaminants. Inmates' unpredictable behaviour is raised as an important factor in the danger.

[25] For the applicants, it sufficed that the evidence was sufficient to establish that disbanding the FBs could reasonably be expected to lead to an incident causing serious harm to an employee.

[26] In fact, the applicants claimed before the OHSTC that the danger materialized on September 26, 2019. Not only could it be reasonably expected that disbanding the FBs would cause serious harm, but it has already happened. An inmate apparently barricaded himself in his cell, and an emergency response team had to use a stun grenade to get him out. Smoke allegedly filled the cell and then the row. Based on the account available, COs wearing SCBA tried to neutralize the source of the smoke and removed the equipment left in the row by the response team. A fan was used. Inmates were told to evacuate their cells and the row, which they did. According to the decision, there were some video images of the incident, where firefighters could be seen arriving when the smoke, which was dense according to a witness, had already largely dissipated. The applicants chose not to provide the video images to the Court, as did the respondent. It seems that some employees went to hospital but were able to return to work very quickly.

[27] In the end, the Tribunal summed up the applicants' argument as follows: the presence of inmates, whose behaviour is unpredictable, and the risk of fire, which must be responded to by properly trained and qualified employees, mean that not only is the decision to disband the FBs ill-advised, it also exacerbates the danger within the meaning of the Code.

[28] The respondent argued that COs are not exposed to a danger within the meaning of the Code. Removing the FBs from the Donnacona and Port-Cartier Institutions does not constitute a danger.

[29] It is important for the risk of serious injury or illness to be reasonably expected. A mere possibility will not suffice. In this case, a reasonable expectation, that is, more than a mere possibility, was not established. The evidence did establish, rather, that fires have been minor (except the one in 2008). As for the incident on September 26, 2019, it is completely irrelevant given that the incident was under the COs' control before the Donnacona Fire Department even arrived. The September 26 incident is completely unrelated to the allegation in the complaint.

[30] The respondent stressed the specific measures put in place to find and eliminate the danger within the meaning of the Code. The measures lead to the conclusion that the danger as defined in the Code does not constitute a reasonably expected risk. They are cited at paragraph 99 of the decision and reproduced below:

> • 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*.

The respondent therefore concluded that the appeal from the ministerial delegate's decision must be dismissed.

(2) The Tribunal's decision

[31] The Tribunal's decision centres on the concept of "danger" within the meaning of the Code. The Tribunal noted that, on May 3, 2018, the only reason for the collective refusal to work was the change in emergency procedures and the removal of FBs. It was alleged that, because the FBs were removed, employees could be trapped or unable to evacuate if a fire broke out. It was also noted that the fire department could refuse to intervene (which is stipulated in two agreements) if the inmate population was not under control.

[32] Since it was agreed that the imminent threat part of the definition of "danger" was not at stake here, it had to be decided whether a serious threat gave rise to the refusal to work. There

had to be “a reasonable expectation that the alleged hazard, condition or activity will cause serious injury or illness at some time in the future” (OHSTC decision, para 140). Here, being exposed to a serious threat is the result of a reasonable expectation of facing a situation that may cause them serious harm stemming from the removal of the FBs. Thus, on the basis of *Canada (Correctional Service) v Ketcheson*, 2016 OHSTC 19 [*Ketcheson*], the Tribunal established that two factors were to be considered: the threat must be likely to cause serious injury or illness, and there must be a reasonable expectation that the threat will occur.

[33] The Tribunal accepted the testimony of an “expert witness” presented by the applicants, who concluded that smoke exposure can result in serious breathing problems that may even lead to death. The Tribunal was therefore satisfied with respect to the first component: the threat is likely to cause serious injury or illness.

[34] The Tribunal was not satisfied, however, with the evidence that there was a reasonable expectation that the threat would occur. The respondent’s attempt to characterize the September 26, 2019, incident as irrelevant was rejected. Since the appeal was a *de novo* proceeding, evidence that was not available to the ministerial delegate could be admitted before the Tribunal (the September 26, 2019, incident occurred almost 18 months after the refusal to work).

[35] In the end, the Tribunal had to conclude at paragraph 175 that the evidence regarding that incident was of little benefit to the applicants because “all indications [were] that COs equipped with SCBA could have removed the ERT’s [emergency response team’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. … There [was] 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." Thus, the evidence regarding the September 26, 2019, incident was admitted, but it did not strengthen the applicants' case because it did not support the reasonable expectation that the risk would materialize.

[36] Fundamentally, the crux of the matter is that there must be at least a reasonable probability, not a mere possibility, that an event or incident would cause serious harm. For the Tribunal, the available evidence showed, at most, a remote possibility that the threat would materialize (para 167). The September 26, 2019, incident in itself did not make it possible to conclude that there was a danger within the meaning of the Code. The Tribunal was satisfied that the fire department would intervene. In addition, no evidence was provided of a situation where employees remained trapped during a fire. The Tribunal wrote the following:

> [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.

[37] The statistical data provided by the respondent were helpful but not determinative. Quoting from *Brink's Canada Limited v Dendura*, 2017 OHSTC 9 [*Brink's*], the Tribunal could make an informed factual finding on the basis of statistical evidence, even though the final analysis involved a question of appreciation of facts and judgement on the likelihood of occurrence of a future event. The except quoted from *Brink's* (at para 143) discusses the inherent difficulty of determining "the likelihood of occurrence of a future event, in the present case an event that is linked to unpredictable human behaviour." In the Tribunal's opinion, the statistical evidence suggested that there was not a real possibility in this case.

[38] The Tribunal also noted the evidence regarding the measures in place to further reduce the possibility of danger. Therefore, the risk was not reasonably likely to materialize, but measures were also taken to minimize the spread of a fire. Those measures are stated at paragraph 30 of these reasons.

[39] It was the lack of evidence on the part of the applicants that led the Tribunal to dismiss the appeal.

> [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.

III. Arguments and analysis

[40] Since this is an application for judicial review, the first issue to resolve is the applicable standard of review. In this case, the parties agree that the reasonableness standard applies here. It is sufficient to refer to *Canada Post Corp*, above, a matter concerning occupational health and safety, where the Supreme Court saw no reason to depart from the presumption that the reasonableness standard of review applied. The Court stated that the "Appeals Officer's decision is reviewable on a standard of reasonableness" (at para 27). This is also clearly the case here.

[41] As everyone knows, the reasonableness standard of review has notable consequences. The decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] provides the analytical framework. The burden is on the party challenging the administrative decision to show that it is unreasonable (*Vavilov* at para 100). The reviewing court must follow the principle of judicial restraint (at para 13) and adopt a posture of respect regarding the administrative decision (at para 14). The reviewing court is invited to develop an understanding of the reasoning that led to the administrative decision. If the decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision-maker, the reviewing court will show deference (at para 85). In other words, the reviewing court does not decide on the merits: that is the prerogative of the

administrative decision-maker. In addition, an unreasonable decision is usually remitted back for reconsideration (at para 139). A decision has to have serious shortcomings for an application for judicial review to be successful; “a line-by-line treasure hunt for error” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458 at para 54) would not be very helpful (*Vavilov* at para 103). “Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100).

[42] The administrative decision is being challenged on the ground that it is not intelligible because it does not respect the evidence filed and makes assumptions unsupported by the evidence. The applicants also submit that the Tribunal erred [TRANSLATION] “in disregarding the concept of danger materializing, in not taking into account the concept of inmates’ unpredictable behaviour and the severity of the threat” (Memorandum of Fact and Law at para 20). In my view, none of these arguments has merit.

[43] Expressing disagreement with various elements of a decision is insufficient. The decision must also be unreasonable. This involves showing that the hallmarks of reasonableness, namely, justification, intelligibility and transparency, and the decision’s justification in light of factual and legal constraints, are seriously deficient. That said, with respect, this was not demonstrated in this case.

[44] First, the applicants submit that the decision omitted [TRANSLATION] “the concept of danger materializing”. It did not take into account the unpredictability of inmates’ behaviour and

the severity of the threat. One can simply refer back to *Ketcheson*, above, where the appeals officer dissected the definition of "danger" from the Code. The following excerpt, often cited in the Tribunal's decisions, is at paragraph 199 of *Ketcheson*:

> [199] To simplify matters, the questions to be asked whether there is a "danger" are 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 a 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?

[45] It can easily be seen that *Ketcheson* does not create a "test"; it simply presents the definition of "danger" more accessibly. In this case, there were two issues: is there a serious threat to life and health, and could the hazard, situation or activity reasonably be expected to be a serious threat to life or health. As stated earlier, everyone agrees that the threat is not imminent, and that this part of the definition of "danger" is not helpful for deciding the judicial review.

[46] The applicants allege that the Tribunal did not take the threat into account (Memorandum of Fact and Law at paras 37 and 38). This is not true. The senior officer specifically accepted the expert testimony presented by the applicants. It would be difficult to be any more explicit than the impugned decision was at paragraph 150. On the basis of the expert testimony provided by the applicants, the administrative decision-maker stated that the risks and threats to life and

health are potentially serious. The decision under judicial review rather deals with the reasonable expectation that the threat would occur.

[47] In this regard, the applicants raise the materializing of the danger. It is understood that the argument is that the threat did materialize: according to the applicants, the incident of September 26, 2019, constituted the "materializing" of the danger, which establishes the reasonable expectation required by law. They refer to paragraph 163 of the decision, which reads as follows: "[a]fter 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." This excerpt on its own may be taken to imply that a single incident is not sufficient. But there is more. The Tribunal's reasons regarding the risk materializing on September 26, 2019, go much further. Indeed, the decision states that the September 26, 2019, incident did not constitute the risk "materializing". The Tribunal concluded at paragraph 175 that the September 26, 2019, incident could have been brought under control without an FB's intervention. The administrative decision-maker applied the evidence in accordance with its mandate. The nature of the incident was not such that it would put employees in danger in the absence of an FB. I reproduced paragraph 175 almost in full at paragraph 35 of these reasons. I find no fault with this conclusion by the Tribunal. The Tribunal concluded that the danger did not materialize on September 26, 2019, and this conclusion was not specifically disputed as being unreasonable. At best, the applicants are of the opinion that the "threat materialized" (Memorandum of Fact and Law at para 29), but that opinion is not shared by the administrative decision-maker. The burden was to show that this conclusion was unreasonable. This was not even attempted.

[48] The applicants also stated that inmate unpredictability was not discussed. To them, this seems to negate the right to be heard. This is an overstatement. The unpredictability of the prison population is mentioned several times in the decision (paras 8, 27–28, 61–76, 146). That concern was clearly noted. Therefore, the Tribunal rejected the claim that the danger materialized on September 26, 2019, and acknowledged the unpredictability of the prison population. The threat is clearly serious. But that is not the issue. What is missing, according to the Tribunal, is the reasonable expectation that the serious threat will occur.

[49] The Tribunal found in the statistical evidence provided that there was no reasonable expectation that the serious threat would occur. The Tribunal admitted two paragraphs from *Nolan et al v Western Stevedoring*, 2017 OHSTC 11 [*Nolan*], which state the following:

> [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.]

Therefore, more than a mere possibility is needed to conclude that there was a reasonable expectation as per the definition of “danger”. In this context, the appeals officer cited *Brink’s*, where it is noted that statistical data is useful for determining such a reasonable expectation, such as the occurrence of an event related to unpredictability. I will reproduce paragraph 143 of *Brink’s*, which is similar to paragraph 62 of *Nolan*:

> [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.

I find nothing amiss in these descriptions of what constitutes a reasonable expectation that a serious risk will materialize.

[50] The applicants also allege that the evidence was assessed unreasonably. This concerns the use of statistics that demonstrated the minor nature of the incidents involving fires. The applicants allege that the expert report they presented shows many cases where the FB intervened. According to the applicants, this evidence tends to show that the FB intervened regularly to control fires. Not only is this evidence short on details of the incidents, nor does it provide the dates when they occurred, it also cannot cast doubt on the statistics filed in evidence. The fact alone that an FB intervened in the past does not establish that the situation was serious or that those situations required intervention from anyone other than COs. In other words, the fact that an FB intervened in the past does not establish the seriousness of the incidents.

[51] It is far from clear that the Tribunal made an error. The information provided by the expert does not establish that the FB was necessary. Rather, it suggests that it made itself useful in certain circumstances. However, this does not contradict the fact that, according to the evidence, the fires that occurred between 2008 and 2018 were minor. As noted by the respondent, no one has cast doubt on the fact that fires have occurred in penitentiaries, which means there will be more. But that is not the issue. The issue before the Tribunal was regarding the reasonable expectation of a serious threat. It was open to the Tribunal to admit the statistical evidence, to assess its probative value and to draw inferences from it. I cannot see how the incidents raised by the expert could change anything.

[52] The proverbial line-by-line treasure hunt for error was carried out when the applicants fell back on an observation report dated October 14, 2017, to argue that the statistics were incomplete and that, in any case, the Tribunal did not take that report into account. Yet, the report was unsigned by its presumed author and had no reviewer's signature either. It appears that the observation report was never received by the person who compiled the statistics. In Karim Bahou's affidavit, it is stated that the Tribunal indicated that the statistics are incomplete because that incident was not included with the statistics filed in evidence with the Tribunal. The respondent is correct in noting that the observation report is irrelevant to the situation that gave rise to the refusal to work since it does not deal with the reasonable expectation. At best, it may deal with the quality of the statistical evidence, which is therefore incomplete. I have read the observation report. It concerned an inmate who lit a fire in his cell in the evening. The fire was put out with a fire extinguisher. The inmate in the next cell was overcome by smoke, but it was stated that other inmates were not because the ventilation was functioning properly. It seems

clear to me that, at best, this piece of information raises superficial or peripheral flaws or shortcomings in the statistical evidence and does not affect the merits of the decision (*Vavilov* at para 100).

[53] Continuing in the same vein, the applicants claim that, although the statistics were incomplete (because the observation report dated October 14, 2017, was not included in the statistics), the Tribunal still found them to be determinative. However, the decision states that "the statistical evidence submitted supports the finding that this case concerns a hypothetical or remote possibility rather than a real possibility" (at para 169). This means that the statistics were not declared determinative, but rather that they support the Tribunal's conclusion. It simply was not shown why the Tribunal could not see in those statistics evidence that could lead it to conclude that the fires were minor. Indeed, the observation report, which was not received by the person who compiled the statistics, also described a minor incident.

[54] Ultimately, the applicants failed to discharge their burden of establishing that the decision lacks the hallmarks of reasonableness. The Court must find that those hallmarks— justification, transparency and intelligibility—are indeed present and that the decision is justified in light of the relevant factual and legal constraints.

[55] In this case, the impugned decision deals first and foremost with the reasonable expectation that a serious threat to life or health may materialize in the absence of fire brigades at the Donnacona and Port-Cartier penitentiaries. The applicants tried to establish this with the incident of September 26, 2019. That evidence was admitted, but the Tribunal decided that the

former FB members' intervention was simply not necessary to deal with the incident. The statistical evidence tended to confirm the minor nature of past incidents. The Tribunal reviewed the evidence and concluded, in accordance with its mandate, that the reasonable expectation of the risk was not established. The applicants' burden was not discharged.

IV. Conclusion

[56] In *Canada Post Corp*, the majority of the Supreme Court judges described the decision of the Occupational Health and Safety Tribunal's appeals officer as exemplary (at para 30). The Supreme Court reiterated, however, that the reviewing court must not seek perfection. It must seek instead to find out whether the reasons adequately explain the bases of the decision. In my view, although not exemplary, the Tribunal's reasons in this case are more than adequate.

[57] It seems to me that the decision-maker's reasoning can be easily followed. The Court found no shortcomings or flaws that were sufficiently central or significant to render the decision unreasonable. Contrary to the applicants' claims, the decision is intelligible and respects the factual and legal constraints. It was not shown that this decision lacks the hallmarks of reasonableness.

[58] Several of the complaints about the Tribunal's reasons concern the assessment of the evidence. As it is often said, "deference to a decision maker includes deferring to their findings and assessment of the evidence. Reviewing courts should refrain from 'reweighing and reassessing the evidence considered by the decision maker'" (citations omitted, *Canada Post*

Corp at para 61) Here, the Tribunal took the evidence before it into account and responded to the arguments presented. It is not the role of this Court to try to reweigh this evidence.

[59] The application for judicial review must therefore be dismissed with costs. The parties have agreed that costs in the amount of $3,000, including disbursements and taxes, would be appropriate. I see no reason to disagree. Costs of $3,000 are therefore awarded to the respondent. This includes disbursements and taxes.

JUDGMENT in T-948-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs of $3,000, including disbursements and taxes, are awarded to the respondent.

"Yvan Roy"
Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-948-21
STYLE OF CAUSE:	JEAN-FRANÇOIS BERGERON ET AL v CORRECTIONAL SERVICE OF CANADA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 5, 2022
JUDGMENT AND REASONS:	ROY J.
DATED:	NOVEMBER 16, 2022

APPEARANCES:

Yanick Vézina	FOR THE APPLICANTS
Kétia Calix	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laroche Martin CSN Legal Services Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT