

Tribunal de santé et  
sécurité au travail Canada



Occupational Health  
and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

**Date:** 2014-05-30  
**Case No.:** 2012-38

**Between:**

Canada Post Corporation, Appellant

and

Wendy Vivian and Wayne Beeton, Respondents

and

Canadian Union of Postal Workers, Intervenor

**Indexed as:** *Canada Post Corporation v. Vivian and Beeton*

**Matter:** Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer

**Decision:** The direction is varied

**Decision rendered by:** Mr. Pierre Hamel, Appeals Officer

**Language of decision:** English

**For the Appellant:** Ms. Caroline Richard, Counsel, Bird, Richard

**For the Respondents:** Ms. Vickie Stephen

**For the Intervenor:** Mr. David Bloom, Counsel, Cavalluzo, Shilton, McIntyre, Cornish LLP

**Citation:** 2014 OHSTC 6

Canada

## REASONS

[1] This decision concerns an appeal brought by the Canada Post Corporation (“the employer” or “Canada Post”) under subsection 146(1) of the *Canada Labour Code* (“the Code”) against a direction issued by Health and Safety Officer (HSO) Bob Tomlin on May 23, 2012. The direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBPARAGRAPH 145(2)(a)(i)

On 15 May 2012, the undersigned health and safety officer conducted an investigation following a refusal to work made by **Wendy Vivian and Wayne Beeton** in the work place operated by CANADA POST CORPORATION, being an employer subject to the *Canada Labour Code*, Part II, at 41 TEMPERANCE ST, Bowmanville, Ontario, L1C 3A0, the said work place being sometimes known as the Bowmanville Post Office.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

**The number of deliveries being made to rural mail boxes on routes #SS402 and #SS403 exceeds the recommended number of deliveries to a rural mail box per hour as determined by an independent qualified contractor to Canada Post Corporation in a report dated 15 December 2006 and therefore presents a potential danger of injury due to ergonomic hazards associated with performing this work.**

**Further to the above, there are numerous rural mail boxes on routes that require the RSMC to make the delivery while a significant portion of the car is parked on the roadway and therefore in a position of increased risk of being struck from behind by another vehicle. The RSMC is required to remove their seat belt to make the delivery and that places them at risk of more serious injury without having the benefit of the safety belt.**

Therefore, you are HEREBY DIRECTED, pursuant to subparagraph 145(2)(a)(i) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.

Issued at Bowmanville, this 23<sup>rd</sup> day of May, 2012.

(signed)  
BOB TOMLIN  
Health and Safety Officer

[2] The appeal is directed at only a portion of the said direction, namely its second paragraph, which deals with what I will refer to throughout this decision as the “road traffic safety” issue. In its statement of appeal, the appellant states the grounds of the appeal as follows:

Canada Post has not contravened Part II of the *Canada Labour Code* and appeals for the following reasons:

1. the rural mailboxes in issue have been assessed through the specialized TSAT tool and found to be safe based on detailed road safety criteria;
2. TSAT contemplates that delivery will be effected while not wearing a seatbelt; and
3. the delivery of mail to rural mailboxes through the passenger-side window is a normal condition of employment.

[3] I was informed in the course of the proceedings that the employer has complied with the first part of the direction, which is not under appeal, and which deals with the “ergonomic safety issues” for employees related to the delivery of mail to Rural Mail Boxes (RMBs). Given the focus of the present appeal, it is not necessary to describe in detail the nature of the ergonomic issues related to the delivery of mail to RMBs. Suffice it to say that the employer has ultimately granted the employees’ request to be provided with an ergonomic assistant, the removal of whom had caused the employees to exercise their right to refuse to perform work that they considered to present a danger to their health, in circumstances that will be briefly outlined further in these reasons.

[4] On July 6, 2012, counsel representing the Canadian Union of Postal Workers (CUPW) informed the Occupational Health and Safety Tribunal Canada (“the Tribunal”) that the CUPW would not participate in this appeal as a respondent and advised the Tribunal that it would be applying for intervenor status, which it did on March 18, 2013. The appellant did not object to the application and was in fact supportive of it, without prejudice to the position it may take in other proceedings. The respondents did not present any submissions regarding the request, after having been invited by the Tribunal to do so. In a letter-decision dated May 8, 2013, I allowed the request and granted intervenor status to the CUPW.

[5] The respondents were represented by Ms. Vickie Stephen, who is a local health and safety representative for the Bowmanville Post Office, in their communications with the Tribunal. I held a pre-hearing teleconference on February 6, 2014, at which Ms. Stephen participated, along with the appellant’s and the intervenor’s counsel. During the teleconference, counsel for the appellant reiterated that only the “traffic safety” aspect of the direction was under appeal and confirmed that the provision of an ergonomic assistant would not be affected by the outcome of the appeal. Ms. Stephen indicated that in light of this information, she considered not participating in the proceedings and would inform the Tribunal of her decision in due course. Ms. Stephen informed the Tribunal on March 4, 2014 that the respondents would not attend the hearing in this matter. The appeal was heard on March 11, 2014, in Toronto, Ontario.

## **Background**

[6] The direction arises out of a work place investigation conducted by HSO Tomlin on May 15, 2012, further to a refusal to work by two employees of Canada Post, Ms. Wendy Vivian and Mr. Wayne Beeton. They are both employed as Rural Service Mail Carriers (RSMC) at the Bowmanville Post Office and, at the material time, were assigned to effect mail delivery to

RMBs on their regular routes on Rural Roads (RR) # 002 and # 003 respectively. Their work refusal complaint, as registered, states as follows:

We were scheduled to work as RSMCs without having an ergonomic helper. We believe this presents ergonomic hazards that could potentially cause an injury.

[7] The following description of the events leading up to the work refusal is taken from HSO Tomlin's report, and is not contested. Up until the day of the refusal, both employees had been working with an ergonomic helper on their routes. The ergonomic helper sits in the passenger seat of the vehicle and, from what I can infer from the report since no evidence was adduced on that point, assists the RSMC by effectively placing the mail in, and retrieving the mail from, the RMB. There was apparently a change in the number of deliveries on both routes and the employees were required to re-apply to have an ergonomic helper assigned to them, pursuant to a procedure that appears well understood by the parties. Both applications were denied and on arrival to work on May 15, 2012, the respondents were informed they would not have an ergonomic helper to assist them in their delivery functions. The removal of the ergonomic helper meant that the RSMCs had to place and retrieve the mail by themselves. This required that they remove their seatbelt, twist behind and pick up the mail to be delivered from the floor of their vehicle behind the front seat, twist back and slide over to the passenger seat, to deliver the mail through the passenger window. If mail is being picked up, the movements are repeated in reverse.

[8] HSO Tomlin mentions in his description of the events that the employees also expressed concern that under the safety procedure for delivering mail to a rural mail box they are required to remove their safety belt. He notes that many of the RMBs they deliver to are close to the roadway, preventing the RSMCs from getting their vehicle completely off the road. When this happens, they believe that they are at higher risk of being struck from behind by another vehicle at a time they may not have a seatbelt on, causing the potential risk and severity of injury to increase.

[9] HSO Tomlin first concluded, on the ergonomic issues, that the number of RMBs to be delivered on each of the routes exceeded the maximum number of RMB/per hour that can safely be delivered by RSMCs when making the repetitive movements described above, and thereby constituted a danger to the employees within the meaning of the Code. I understand that the numbers in question are arrived at by the application of a fairly complex set of formulas designed to assess the ergonomic implications of those movements, and the potential for injury to the RSMC. There is no need to elaborate further on that aspect of HSO Tomlin's conclusions in light of the employer's decision to comply with the first paragraph of the direction and reinstate the ergonomic helper to work with the respondents.

[10] I point out however that HSO Tomlin's report and analysis, as well as the documentation that he considered in reaching his decision of danger, is primarily - if not exclusively - concerned with the issue of "ergonomic safety". His references to the "traffic safety issue" are few, and are found at pages 4 and 5 of his report:

[...]

The applications for both RSMCs were completed at the first level by a Supervisor and at the second level by the A/Local Area Manager. It is my understanding that no one involved in the application process at the Bowmanville Post Office have been trained in completing an ergonomic evaluation or using the TSAT tool. [...]

[...]

I travelled both rural routes in this investigation with the A/Local Area Manager. I observed there are many RMBs on both routes where it is not possible to park the car completely off the roadway. Vehicle traffic was light on both routes at our time of travel of about 9:15 - 10:15 am on May 16, 2012.

#### **Decision by the Health and safety Officer**

[...] I also believe that removing the seatbelt to make a delivery to an RMB, especially when the vehicle must partially obstruct the roadway to vehicles travelling in the same direction, increases the risk of being struck from behind and subsequently the potential for increased severity rate of injury. Therefore I determine that a danger as defined in the Canada Labour Code, Part II does exist.

[Underlining added]

[11] At the hearing, the appellant called one witness, Mr. Jeff Enright. Mr. Enright holds the position of Coordinator, Delivery Safety Team, with Canada Post. He first referred to a document introduced in evidence, and titled “*RMB Traffic Safety Assessment Tool – TSAT Guidance Document*”. He explained that all routes servicing RMBs must be assessed using this Guide. The assessment consists in determining whether the location of each RMB satisfies the various criteria/standards set out in the Traffic Safety Assessment Tool (TSAT) for RSMCs to safely do their work. Mr. Enright testified that a TSAT assessment is conducted by persons who have been trained to conduct such assessments and who have received a formal accreditation from Canada Post in that regard. He indicated that a proactive assessment of the RMBs on routes RR # 002 and # 003 had been conducted on May 29, 2009 and June 6, 2009, respectively, as reflected in the Traffic Assessment Worksheets for RR # 002 and RR # 003”, entered as Tabs 2 and 4 of Exhibit E-1, respectively. The persons who carried out the assessment of these routes were duly accredited TSAT assessors.

[12] The TSAT standards essentially relate to required distances between the parked RSMC vehicle and traffic approaching from the rear and from the front, in the opposite lane. In the document titled “*Rationale behind the Rural Mailbox (RMB) Traffic Safety Assessment Tool Version 3.0 (May 2008)*” and introduced in evidence as Tab 8 of Exhibit E-1, the following description aptly summarizes the risk of accident that the TSAT is designed to address:

The Panel considered the driving tasks requirements that arise due to an RSMC decelerating to stopping at a rural mailbox and merging back into traffic. These can result in collisions risk for the RSMC, as well as for the other drivers who encounter stopped or merging RSMCs.

The specific requirements considered are:

- For the RSMC, the time required to merge back into traffic from a stopped position, whether on roof the roadway. The associated crash risk can be a sideswipe (as two drivers attempt to occupy the same lane) collision or run-off-road (due to avoidance manoeuvre) collision as the RSMC merges into traffic.
- For drivers encountering a stopped RSMC vehicle, the times required to detect the stopped RSMC vehicle on the roadway and for other drivers to respond appropriately by stopping, or changing lanes and overtaking the stopped vehicle, potentially in the face of oncoming traffic. There are two sources of associated crash risk, the first source of risk can be rear-end or run-off-road collision because the approaching driver realized too late that there is an RSMC vehicle obstructing a portion of the lane and the approaching driver has insufficient time to sop or move into the opposing lane. The second source of risk can be head-on collision or run-off-road collision because the approaching driver moves into the opposing lane and an oncoming vehicle appears suddenly in the opposing lane.

[13] I note that this document is critical to an informed understanding of the TSAT. For the purpose of the present appeal, it is sufficient to summarize the key elements aimed at minimizing the risk described above, and that are reflected in the rationale developed by the group of experts that has authored the document. For the location of an RMB to pass the TSAT assessment, it must be placed in such a way as to allow the RSMC sufficient time to re-enter traffic after stopping, whether on the road or a shoulder lane, and to allow other drivers sufficient time and distance to see the parked RSMC's vehicle and react appropriately, by either stopping or changing lanes and overtaking it on the left, potentially with vehicles coming from the opposite direction. These passing times also take into account the potential number and speed of other vehicles on the road; whether there are trucks, curbs, a cul-de-sac, stoplights or stop signs, pedestrians or bicycles on the road; the distance of the overtaking and visibility; and whether the road is a low-speed, low-traffic rural road, a through road, a secondary road or a dead-end road. All of the evaluation criteria set out in the TSAT must be respected in order for an RMB to be deemed safe. If an RMB does not meet one of the criteria, it must be moved to safer place or be eliminated.

[14] The appellant also entered in evidence an Expert Opinion Report from Ms. Geni Bahar, P.Eng., P.E., dated May 2012, marked as Tab 9 of Exhibit E-1. Ms. Bahar directed the development of the TSAT by forming a panel of experts and a multi-disciplinary team of professionals supporting the project, as well as by providing her own traffic safety engineering expertise. That project led to the development of the *Rationale behind the Rural Mailbox (RMB) Traffic Safety Assessment Tool Version 3.0*, to which I referred earlier. Ms. Bahar has previously been accepted as an expert witness before other appeals officers of the Tribunal, as will be explained in greater detail later in these reasons. I have no hesitation in declaring Ms. Bahar to be an expert witness in light of her uncontested qualifications and credentials, as well as her specific expertise regarding the subject matter discussed in the present appeal. Accordingly, I accept her opinion evidence regarding the scope and foundation of the TSAT and on its particular application to the circumstances of the present case.

[15] Ms. Bahar explains the scientific basis upon which the TSAT is founded and states, at page 4 of her report:

The RSMC driving tasks as well as the driving tasks of other drivers approaching a stopped or merging RSMC vehicle were assessed for the development of the TSAT. These tasks were analyzed considering the knowledge obtained from past empirically-based, scientific studies about how long and over what distance drivers typically complete driving tasks, such as merging into traffic or overtaking another vehicle (*References 1 and 2*). The analysis indicated that these scientific studies provided information about similar conditions to the driving conditions of the RSMCs, and could be used to define adequate time and distance to stopped RSMC vehicles during the delivery at RMBs, and merging back into traffic.

The TSAT is based on the following driver requirements:

- i) RSMC time requirements for merging back into traffic from a stopped position
- ii) Other driver time requirements for responding to a stopped RSMC vehicle
- iii) Other driver time requirements to overtake a stopped RSMC vehicle
- iv) Time gaps for turning vehicles at intersections

[16] She then goes on and presents a more detailed explanation regarding the scientific analysis that was applied to arrive at the time requirement standards set out in the TSAT.

[17] Mr. Enright took me through the Traffic Safety Assessment Worksheets for RR # 002 and RR # 003, which reflect the assessment of each RMB on those routes against the criteria/standards set out in the TSAT. As a result of the assessment, a number of RMBs were identified as not meeting the prescribed standard and had to be relocated so as to be compliant with the standard or, where it was not possible to do so, converted to an alternate mode of delivery. Some of the RMBs passed the TSAT test but are nevertheless at locations where the RSMCs cannot get the four wheels of their vehicle off the road.

[18] Once the assessment and required adjustments are completed, Mr. Enright explained that the RSMCs who are working on the routes in question are met in order to review the final outcome of the assessment. Further to the proactive assessment of RR # 002 and RR # 003, Ms. Vivian and Mr. Beeton attended a Rural Safety Review Meeting on July 9, 2009 and both agreed with the results of the assessment. That agreement is reflected in the Minutes of the meetings, entered in evidence and marked as Tabs 3 and 5 of Exhibit E-1, respectively.

[19] Ms. Bahar's expert opinion is that TSAT specifically assesses traffic safety criteria to determine whether there are traffic safety risks when the RSMC vehicle is not parked four wheels off the road at an RMB. Ms. Bahar specifically addressed HSO Tomlin's concern in her report as follows, at page 4:

The TSAT takes into account the fact that the RSMC vehicle may be parked on the travelled part of the road, obstructing partially or fully the travel lane.

[...]

In conclusion, when a RSMC vehicle is on the road (i.e. blocking partially or fully the travel lane) the time gap required behind the RSMC at an RMB is 11 seconds (based on the decision sight distance, as per the standards for road design, for a driver not expecting a stopped vehicle on the lane) and 14 seconds in front for overtaking the stopped RSMC and return to the lane; and the traffic volumes are 40 vehicles/15 minutes and 80 vehicles/15 minutes for 2-lane and 4-lane conditions respectively. The “on the road” condition was met with greater time gap behind and a defined time gap in front, and much lower traffic volumes than adequate when the RSMC is off the road.

[20] Ms. Bahar’s opinion also deals with the impact of not wearing a seatbelt on the results of the TSAT assessment. She expresses the opinion that not wearing a seatbelt when delivering mail to an RMB does not invalidate the results of the TSAT assessment, in the following terms, at page 6 and 7:

2. [Q] Was the fact that a RSMC removes his/her seatbelt in order to deliver to a RMB taken in consideration when the Traffic Safety Assessment Tool (“TSAT”) was developed?

[A] The “RSMC Safe Work Procedures” were reviewed during the development of the TSAT. The procedures stated that RSMCs should park their vehicle close to the RMB, turn the four-way emergency flashers on remove seatbelt, prepare the mail to deliver, move to the passenger seat, undertake the mail delivery, move back to the driver seat, reattach the seatbelt, signal and proceed. When establishing driver requirements for TSAT, as described in subsection 2.1 above, time gaps that are conservative in nature, and low exposure to traffic, were adopted.

3. [Q] Is there a relationship between seatbelt use and the risk of a collision, and why?

[A] No, there is no relationship between the use of seatbelt and the risk of a collision. Seat belts are secondary safety device; they do not prevent a collision from occurring.

4. [Q] Does the fact that an RSMC is not wearing a seatbelt while stopped at an RMB impact on the validity of the TSAT results?

[A] The validity of the TSAT results is not impacted by the fact that a RSMC is not wearing a seatbelt while stopped at an RMB. The TSAT was developed based on driver requirements with specific consideration of the RSMCs delivering mail at RMB, as described in the Rationale Report. While a RSMC is delivering mail at an RMB (based on HFN measurements, time spent at an RMB varies between 12.7 to 20 seconds / RMB when considering 3.5 second / movement of buckling and unbuckling the seatbelt; and adding the time to move seat to passenger and back to drivers’ seat and deliver mail) (Reference 3), that meets the



TSAT requirements, time gaps and traffic volumes provide decision sight distances (11 seconds time gaps behind), overtaking sight distances (14 seconds time gaps in front of the stopped RSMC vehicle), and delay of 25 seconds or less to get a gap of sufficient time.

[21] The documentation referred to above was entered in evidence by counsel for the appellant, with no objection from counsel for the intervenor.

### **The issue**

[22] The issue raised by the present appeal is whether the respondents were, at the time of their refusal to work on May 15, 2012, exposed to a danger related to traffic safety and whether the part of the direction issued by HSO Tomlin that deals with such issue as a result of his finding of danger, is well-founded.

### **Submissions of the Parties**

[23] The parties presented oral submissions at the hearing, with the understanding that they would also present written submissions, at my request, in accordance with the Tribunal's practice. The appellant's written submissions were received on March 26, 2014, and those of the intervenor on April 9, 2014.

### **Appellant's submissions**

[24] Counsel for the appellant submits that it is clear that the direction under appeal must be varied by the deletion of its second paragraph. The uncontested evidence shows that the two routes in question were proactively assessed using the TSAT. Any RMB that did not pass the TSAT test were moved to locations where the box passes the TSAT, or were converted to alternate mode of delivery. Further to the proactive assessments, Ms. Vivian and Mr. Beeton attended a Rural Safety meeting and both agreed with the results of the assessment. HSO Tomlin was not aware, or did not take any steps to become aware, of these facts and makes no reference to them in his report. He nevertheless concluded that the RSMCs were exposed to a danger due to the risk of collision because of the fact that their vehicle was parked on the roadway while they were making their mail delivery, placing them at risk of more serious injury due to the fact that their seatbelt was unbuckled.

[25] Counsel for the appellant argues that HSO Tomlin's conclusion is not supported by any evidence or analysis, and is contrary to the evidence presented at the hearing that the TSAT is a valid and reliable tool to assess whether mail delivery to RMBs may present a danger to the RSMCs effecting the delivery. She referred to the expert report authored by Ms. Geni Bahar and to the *Rationale behind the Rural Mailbox (RMB) Traffic Safety Assessment Tool Version 3.0 (May 2008)* ("the *Rationale*") that conclude that the TSAT addresses all risks related to delivery to RMB. Counsel draws my attention to several specific excerpts of the *Rationale* explaining its methodology and scientific basis. Counsel submits that the methodology was chosen as it ensures an adequate level of safety. The expert panel unanimously agreed that the TSAT was adequate and recommended it to Canada Post for the assessment of individual RMBs. The method used in the development of the TSAT is based on scientific research and principles that

are widely accepted in practice. She also points out that the methodology and resulting criteria/standards are based on a conservative approach, which create greater protection for RSMCs. Counsel for the appellant points out more specifically that the TSAT does take into account the fact that the RSMC's vehicle may be parked on the roadway, partially or fully obstructing the travel lane. She also refers to Ms. Bahar's expert opinion that not wearing a seatbelt does not invalidate the TSAT assessment results.

[26] Counsel submits further that the Tribunal has unanimously endorsed the TSAT on many occasions and quotes several excerpts of decisions rendered by appeals officers of the Tribunal who have accepted the TSAT in their analysis of whether mail delivery to RMBs presented a danger to employees. None of these decisions challenge nor raise doubt about the scientific foundation and reliability of the TSAT: see *Morrison et al. v. Canada Post Corporation*, OHSTC-09-032; *Townsend et al. v. Canada Post Corporation*, 2010 OHSTC 7. Those decisions ought to be followed.

[27] Counsel for the appellant also cited decisions of appeals officers dealing with situations that were virtually identical to the present case, where the danger was alleged to be based on a combination of the RSMC vehicle being partially parked on the roadway and the RSMC having unbuckled the seat belt to make the delivery: see *Canada Post Corporation*, 2012 OHSTC 34; *Canada Post Corporation and Diana Baird and Canadian Union of Postal Workers*, 2013 OHSTC 31. In both these cases the appeals officers found that the proper application of the TSAT had ensured an appropriate level of safety for RSMCs in carrying out their duties. The same conclusion should be reached in the present case.

[28] Counsel for the appellant concludes by requesting that HSO Tomlin's direction be varied by deleting the second paragraph in its entirety.

### **Intervenor's submissions**

[29] Counsel for the intervenor essentially agrees with the appellant's position in the present appeal. Counsel submits that HSO Tomlin's Decision and Direction(s) were issued without proper consideration of the facts and the existing jurisprudence. There was no basis for that portion of the direction pertaining to the risk of delivery while the delivery vehicle was parked on the roadway and the removal of the seatbelt during delivery to RMBs, and no plausible basis on which the direction can remain unvaried by the appeals officer.

[30] Counsel for the intervenor points out that the routes had been assessed by TSAT assessors using the TSAT tool. The assessment was accurate and the results were not challenged by the respondents. Counsel accepts the thorough review of the case law presented by counsel for the appellant, relating to the subject matter of the present appeal, and he agrees that evidence would be required to support any departure from the Tribunal's previous conclusions that have accepted the principle that where a proper TSAT assessment has been conducted, it is not open to the Tribunal to conclude that delivery to RMBs pose a danger within the meaning of the Code. In that light, HSO Tomlin's investigation was seriously deficient, as he appears to have been unaware of the TSAT assessments, unfamiliar with the TSAT assessment process and

ignorant of the Tribunal jurisprudence where the TSAT has been accepted as a valid assessment of traffic safety risk.

[31] Counsel further submits that the evidence adduced in the present case is unchallenged and establishes that TSAT is a valid reliable scientifically based risk assessment tool. Similar evidence has been previously accepted by the Tribunal in other cases. There is simply no basis on which I could reasonably refuse to find this evidence to be persuasive in this proceeding.

[32] Counsel concluded by echoing the appellant's request that the direction be varied in the manner sought by the appellant.

### **Analysis**

[33] On May 15, 2012, the respondents have exercised the right provided in subsection 128(1) of the Code to refuse to perform their duties on the ground that the performance of those duties presented a danger to them. Subsection 128(1) reads as follows:

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;
- (b) a condition exists in the place that constitutes a danger to the employee; or
- (c) the performance of the activity constitutes a danger to the employee or to another employee.

[34] "Danger" is defined in section 122 of the Code as follows:

122. (1) In this Part,

[...]

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

[35] The question before me in the present appeal is to determine whether, in the circumstances that prevailed on May 15, 2012 and that were established in the evidence presented in this case, the respondents were exposed to a danger attributable to road traffic safety and the risk of accident while effecting their mail delivery. More specifically, I must determine whether the risk of collision flowing from the fact that the RSMC's vehicle is parked – partially or totally – on the roadway while delivering the mail to RMBs, and while the RSMC does not wear a seatbelt, constitutes a danger within the meaning of the Code.

[36] The analysis to be conducted in order to answer that question has been reiterated many times by appeals officers and the Federal Court. That analysis is predicated on the objective of prevention of Part II of the Code, which is set out in section 122.1, and articulated around the measures enunciated in section 122.2, which reads as follows:

**122.2** Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[37] The applicable test to determine whether a danger exists is aptly summarized in *Robitaille and Via Rail Ltd.*, Appeals Officer Decision No. 05-55 (December 20, 2005). Relying on the Federal Court judgments in *Martin v. Attorney General of Canada*, 2003 FC 1158 and *Verville v. Correctional Service of Canada*, 2004 FC 767, the appeals officer states as follows:

[67] Taking the above noted Code provisions and the findings of Justices Tremblay Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:

- eliminate a hazard, condition, or activity;
- control a hazard, condition or activity within safe limits; or
- ensure employees are personally protected from the hazard, condition or activity; and

one determines that:

- the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and
- the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[38] This overview of the applicable statutory framework brings me to the question at issue in the present case. The respondents invoked the ground that the performance of their regular duties presented a danger to them, in that the ergonomic hazards resulting from the loss of their ergonomic helper, could potentially cause an injury. As it is reflected in HSO Tomlin's report, the respondents also raised the traffic safety issue, resulting from the combination of two factors: the risk of collision created by their parked car obstructing the roadway when effecting the delivery, and their greater vulnerability to injury as a result of having to unbuckle their seatbelt to place and retrieve the mail, having lost their ergonomic helper.

[39] The appellant has not appealed the "ergonomic safety" aspect of the direction and has reinstated the ergonomic helper. While that corrective measure could be seen as having removed the practical significance of present appeal, now that the RSMCs no longer need to unbuckle

their seatbelt to reach RMBs through the passenger side window, I agree with counsel for the appellant in her oral submissions that the matter at hand is not moot and that I should proceed to make a determination on the question of danger raised in this appeal. First I must look at the factual circumstances as they existed at the time of the refusal and second, this case raises, as will be seen further, an important question of consistency with which the Code has been applied in the past in similar instances, and should be applied to future situations of this nature between the parties.

[40] Regarding the traffic safety issue, the appellant submits that it has put in place measures, namely the TSAT, to control the risk associated with delivery to RMBs and related to road traffic within safe limits. As I have related earlier when describing the facts, the evidence establishes that the routes to which the respondents were assigned on May 15, 2012, were proactively assessed in 2009 using the TSAT. They were assessed by certified TSAT assessors. The RMBs that did not meet the TSAT standards were either placed to a location which made them “TSAT-compliant”, or changed to an alternate mode of delivery. Mr. Enright’s evidence is that all criteria of the TSAT assessment have accordingly been met with respect to each RMB located on RR # 002 and RR # 003 in Bowmanville. The final results were presented to the respondents and they both agreed with those results. None of these facts appear to have been brought to the attention of HSO Tomlin in the course of his investigation. It is well known that an appeals officer’s review under subsection 146.1 of the Code is conducted *de novo*, which means that I am not restricted to the information collected by the health and safety officer and can properly take into consideration all relevant evidence related to the issue under appeal.

[41] Clearly, the TSAT is central to the determination of the issue in this case. Both counsel have pointed out that the TSAT has been accepted by appeals officers in all decisions dealing with RSMC traffic safety issues. The validity and reliability of this instrument, designed to minimize the risk associated with possible road safety hazards linked with the activity of delivering mail to RMBs, has been recognized and endorsed by appeals officers. The TSAT has been developed and implemented in 2006, and was analyzed in detail by the appeals officer in the *Morrison* and *Townsend* decisions. I consider that it serves no useful purpose for me to conduct an exhaustive and independent analysis of the TSAT in the circumstances of this case. I have already set out briefly in the “Background” section of the present decision, the basis upon which that assessment tool is founded. I will simply quote with approval, the following description of the tool as set out in the *Morrison* decision, the first of a series of decisions which have accepted the TSAT methodology as an appropriate measure to minimize the risk arising from road traffic safety while making mail delivery to RMBs, at paragraph 314 to 319:

[314] As indicated at the beginning of this decision, the *de novo* nature of the process allows the Tribunal to receive and take into consideration all the evidence that the parties can present to the Tribunal, whether or not it was considered or available to the HSO at the time of his or her investigation. Consequently, in deciding whether the RSMCs were exposed to a danger, I give considerable weight to the TSAT document. This is particularly the case here since the appellants put forth no argument against the TSAT, other than the fact that the tool in question does not take into consideration seasonal changes. This will be taken into consideration later on in this decision.

[315] Taking all of the above into consideration, this knowledge can now be applied to answering the original question, which was:

Do the circumstances described by the RSMCs present an existing or potential hazard or condition that could reasonably be expected to cause injury before the hazard or condition is corrected?

[316] I retain from the TSAT document that for a location to pass the assessment, there had to be acceptable time requirements for a vehicle driver to react to the other vehicles' position and/or action. This is required because, based on driver behaviour, there needs to be adequate time for a person to react when faced with another vehicle that is merging back into traffic or, when coming up suddenly on a stopped vehicle that is partially blocking the roadway. This time is required for the driver to decide if he is going to stop, or avoid the vehicle by passing it on the left. This decision needs to be taken while accounting for the stopped or merging vehicle, oncoming traffic, speed of travel, speed of other vehicles and number of vehicles on the road.

[317] As well, the RSMC sitting in his vehicle needs to have an adequate time gap to decide to merge back into traffic, and it was found that there are limits as to how long a person will wait for an adequate time "space" to merge back. Passed that time, the person takes shorter and shorter intervals to make a move to merge back into traffic.

[318] Based on my reading of the TSAT document, I find it logical to need a time gap to react to any conditions. I believe that some people may react more quickly than others, but I find that ITrans selected time gaps based on the average reactions of multiple drivers.

[319] At the present time, the evidence shows that the time gaps established by ITrans, as well as the other criteria used to assess a location, are reasonable, in my opinion, to assess the locations of RMBs and make sure that the risk of collision is mitigated to a minimum. When a location passes the assessment, the risk of collision under the above described circumstances is consequently reduced to an acceptable level. I understand however, that the risk of collision is not totally eliminated.

[Underlining added]

[42] In *Canada Post Corporation and Canadian Union of Postal Workers*, 2012 OHSTC 16, the appeals officer also accepted the TSAT as a valid tool, as stated at paragraphs 17 and 23:

[17] At the outset I want to make it clear that I accept the validity of the TSAT as an appropriate and accepted mechanism for determining the safety of RMB delivery with respect to criteria such as traffic volumes and speeds, road configuration and characteristics, and appropriate sight lines. Paragraph 22 of the parties' joint submission is eloquent on the confidence that they both have in the way the TSAT was developed and in the effectiveness of its application. It is also evident from the Abbotsford – Maple Ridge and Newmarket decisions that the TSAT has been found to offer a valid method for determining and mitigating traffic related hazards that may be encountered by RSMCs when delivering mail to RMBs. [...]

[...]

[23] In the light of the development of the TSAT and emerging jurisprudence, I find that the directions under appeal no longer have practical application to rural mail boxes that have passed a properly administered assessment using the traffic safety assessment tool (TSAT) and I will vary the wording of the directions accordingly.

[Underlining added]

[43] It is quite clear that the question of the vehicle not having all four wheels off the road is a situation that is specifically dealt with in the TSAT. I have already quoted an excerpt of Ms. Bahar's report of May 2012, which clearly stresses that point. The TSAT considers that the placement of an RMB could require an RSMC to park on the roadway. In spite of the fact that the four wheels of the vehicle are not on the shoulder of the road, the RMB can still be safe if it respects all TSAT criteria, which the evidence presented in this case establishes without question. In *Canada Post Corporation v. Canadian Union of Postal Workers* (cited previously), the appeals officer quotes with approval paragraph 167 of the *Morrison* decision:

[17] [...] With specific reference to the "wheels on, wheels off" issue, I find paragraphs 166 and 167 of the Newmarket decision particularly instructive and also illustrative of the application of the TSAT. I quote them here.

[166] On the issue of not having all four wheels off the road, I found in TSAT 18 that under certain conditions, TSAT accepts this and allows for the vehicle to be stopped in the travel portion of the road. I found two conditions in TSAT where not having all four wheels off the travelled portion of the road is accepted.

1) 2 lanes roadway:

- no double solid line in centre
- a count of less than 40 vehicles in 15 minutes
- no hill or curve within the 11 seconds time gap behind the vehicle, and
- no hill or curve within the 14 seconds time gap in front of the vehicle,

2) 4 lanes roadway:

- a count of less than 80 vehicles in 15 minutes
- no hill or curve within 11 seconds time gap behind the vehicle.

[167] Consequently, for those locations where the RSMCs vehicles may have stopped on the travel portion of the road, if, when assessed, all the criteria set by TSAT are met, I find that this is as acceptable as with any of the other situations assessed. Therefore, I find that it is not always necessary to have four wheels off the road to be in a situation where, along with the other circumstances discussed above, the "danger" is a normal condition of employment.

[Underlining added]

[44] Similarly, the appeals officer in *Canada Post Corporation and Diana Baird and Canadian Union of Postal Workers*, 2013 OHSTC 31 reaches the following conclusion:

[50] On the matter of wheels on or off the roadway, the question arose in relation to the seat belt use issue as to whether the TSAT considered or rather took into account the situation where the RSMC might not be able to park his or her vehicle entirely off the travelled part of the roadway while delivering mail at a given RMB. Both counsel have argued that indeed, in setting varying time gaps, sight lines and threshold traffic volumes, the TSAT did take into account whether a vehicle would be parked on or off the road. The Bahar Expert Opinion also confirmed that the “TSAT takes into account the fact that the RSMC vehicle may be parked on the travelled part of the road, obstructing partially or fully the travel lane”. Confirmation of this can also be repeatedly found in the ITrans document previously mentioned. For example, under title “Establishing Driving Task Requirements for Drivers at a RMB”, the document states that the specific requirements considered were:

-For the RSMC, the time required to merge back into traffic from a stopped position, whether on or off the roadway. [...] For other drivers encountering a stopped RSMC vehicle, the times required to detect the stopped RSMC vehicle on the roadway [...].

-If the RSMC is stopped off the road, and the 9-second gap with no more than a 25 second wait is met, then there is no further issue to consider for the approaching driver from behind. On the other hand, if the RSMC vehicle is stopped so that it is partially or fully obstructing the lane, the safety of the situation depends in part on the sight distance and time the approaching driver from behind has before reaching the stopped RSMC vehicle. [...] In order to increase the safety of stopped RSMCs who are partially blocking a traffic lane as well as the safety of the approaching drivers from behind, an 11-second time gap requirement was concluded to be a reasonable time gap.

There is therefore no doubt that the assessments conducted under TSAT can and do take into account that it is allowable for RSMC vehicles to be stopped on the travelled part of the roadway without invalidating the results of the assessments.

[Underlining added]

[45] The other aspect of the alleged danger in the present case is related to the fact that the removal of the ergonomic helper would require RSMCs to unbuckle their seatbelt in order to reach the RMB through the passenger window, while their car is parked on the road. That aspect is also dealt with in the evidence presented before me. I have already quoted from Ms. Bahar’s expert report, in which she addresses that aspect of the issue, in the same way that she addressed that very same point in *Canada Post Corporation and Diana Baird and Canadian Union of Postal Workers*, as reflected at paragraph 49 of that decision:

[48] The question of whether the TSAT takes into account the wheels on or off the roadway situation and the question of whether the wearing, or rather the non-wearing of the seat belt affects the validity of a TSAT assessment are central to the determination of this case. The position taken by both parties is clearly expressed above, and both have



based it on the evidence obtained through the expert opinion report that they jointly presented to the undersigned as determinative as well as the ITrans report titled “Rationale behind the Rural Mailbox (RMB) Traffic Safety Assessment Tool Version 3.0”. I have reviewed both documents.

[49] In the case of the seat belt issue, the ITrans document makes no mention of the use of a seat belt which gives credence, in my opinion, and given the scientific base of the TSAT, to the conclusion expressed by expert G. Bahar to the effect that the validity of the TSAT results is not affected by the fact that a RSMC is not wearing a seat belt while stopped at an RMB given that there is no relationship between the use of seat belt and the risk of collision, seat belts being a secondary device that does not prevent the occurrence of a collision.

[Underlining added]

[46] In *Canada Post Corp.(Re)*, 2012 OHSTC 34, the appeals officer describes the traffic safety issues as follows:

[13] Furthermore, Mr. Daniel had to stop his vehicle for longer periods at each RMB, as well as remove his seatbelt, which, in the opinion of HSO Rioux, increased his risk of collision with another vehicle, as well as his risk of injury in the event of such an incident. In the opinion of HSO Rioux, these risks were even greater in poor weather conditions, since the visibility of other drivers or the width of the road could be reduced, particularly in the winter during snowstorms and with the buildup of snowbanks along the street.

[Underlining added]

[47] The appeals officer explains further that the Tribunal’s jurisprudence, namely the *Morrison* case, establishes the principle that a danger becomes a normal condition of employment within the meaning of paragraph 128(2)(b) of the Code after the RMBs in question have been subject to a TSAT assessment and those that do not meet TSAT requirements have been relocated, and concludes as follows:

[66] Upon reading the above-mentioned document and the testimony given by Ms. Bahar, I also understand that these periods of time established for the TSAT by the group of ITrans experts, as well as the other criteria used to determine whether the location of an RMB is safe, help to minimize the RSMC’s risk of collision with another vehicle during the performance of his or her work.

[67] In addition, upon reading the same document, I understand that, for an RMB to be declared safe, all TSAT criteria must be met. In fact, if one of the criteria is not met, the RMB must be either moved to a location that meets TSAT requirements, or eliminated from the delivery route.

[68] The evidence also shows that, after a TSAT assessment, every RMB that does not meet TSAT requirements must undergo another assessment to be relocated to a safe area on the delivery route, converted to community mailboxes, or moved to the local post office.

[69] With regard to potentially inclement weather conditions (build-up of snowbanks, snow-covered mailboxes, snowstorms or thunderstorms) that may increase the risk of collision during mail delivery on the street in question, both the testimony given and the document submitted by Mr. Desruisseaux show that work procedures were put in place by the Canada Post Corporation before August 2, 2010, stipulating that RSMCs should not deliver mail if such conditions are present.

[70] I am of the opinion that the implementation of these measures ensures that the potential hazard identified above is reduced to a minimum.

[48] Not wearing a seatbelt in a parked car does not inherently create a source of danger. It is rather the risk of collision which is the source of the danger and it is that risk which the TSAT is designed to counter. Once that risk is minimized by having conducted a TSAT assessment of all RMBs on the routes to which the respondents were assigned on May 15, 2012, I find it reasonable to conclude, on the basis of Ms. Bahar's expert opinion and as submitted by both counsel in argument, that this is the end of the matter. The fact that an RSMC does not wear a seatbelt while delivering mail to an RMB does not render the TSAT results invalid. There has been no evidence presented at the hearing to contradict such a conclusion. Consequently, not wearing a seatbelt while parked partially or completely on the roadway does not, in my opinion, constitute a danger within the meaning of the Code.

[49] I have purposely quoted several excerpts from the decisions referred above to illustrate that I am dealing with the very same documentation and expert evidence that the appeals officers had before them in those other appeals. I see no reason why I should not endorse their conclusions regarding the TSAT assessment being an appropriate measure to reduce, to the extent practicable, any risk of injury associated with road traffic, and by the same token, remove or at least minimize a danger to which the employees could be exposed. No contrary evidence has been adduced which could lead me to doubt the validity of the results in the circumstances of this case. I was not presented with extraordinary factors or evidence of changes to the traffic safety conditions that could potentially affect the validity of the results of the TSAT assessment. I agree with counsel for the intervenor that evidence would be required to support any departure from the Tribunal's previous conclusions regarding the TSAT assessment process.

[50] At paragraph 43 of his decision in *Canada Post Corporation and Dian Baird and Canadian Union of Postal Worker*, the appeals officer states as follows:

[43] That all parties agree that the TSAT and the rationale and methodology underlying it make it the best tool, or at least the most appropriate tool, when applied, to ensure safety of RMB delivery, which is effectuated by motor vehicle using public roads, while somewhat compelling, does not in and of itself bind the undersigned to the same conclusion, be it generally or relative to a particular rural delivery route as in the present case. However, to disagree, I would need supporting evidence to arrive at such differing conclusion, particularly in the face of precedents from this Tribunal where the TSAT has been recognized as ensuring the level of safety required by the Code, with remaining

conditions after a completed and satisfactory TSAT assessment being seen or accepted as normal conditions of employment.

[Underlining added]

[51] I was given no evidence that would lead me to reach differing conclusions. HSO Tomlin's report offers no analysis to support his conclusion reflected in the second paragraph of his direction. He makes no comment from which I could infer that he even considered the TSAT in making his findings, nor does he make reference to the fact that a TSAT assessment was actually conducted for the routes in question. He does not appear to have considered the appeal decisions dealing with the issue of traffic safety involving Canada Post's RSMCs. He simply states that no one in Bowmanville has "been trained in using the TSAT tool" and that he observed that "there are many RMBs on both routes where it is not possible to park the car completely off the roadway", which is a situation fully dealt with by the TSAT and decided upon in the precedents referred to earlier. Finally, he concludes that "removing the seatbelt [...] especially when the vehicle must partially obstruct the roadway [...] increases the risk of being struck from behind [...]", a statement which makes little sense and which is also contradicted by previous decisions of the Tribunal. Consequently, there was no basis for the part of the direction pertaining to the traffic safety risks and I find that, having considered all the evidence, there is no basis on which the direction can remain unvaried further to the present appeal.

[52] This takes me to make a final observation. Appeals officers are not bound by each other's decisions, since the review conducted pursuant to section 146.1 of the Code, and the decision which results from that review, must be based on an analysis of the circumstances of each case. However, the present case highlights the value of precedents and the importance of consistency in the application of the Code in the presence of recurring circumstances with the same parties. As I have observed, the facts in the present case are virtually identical to those in several previous cases, and the question at issue already decided by appeals officers of the Tribunal on the very same evidentiary basis. The parties are entitled to expect that the provisions of the Code will be applied with consistency by those who administer them, in cognizance of and with due consideration to the precedents established by appeals officers and the Courts, thereby perhaps avoiding unnecessary appeals and the related costs to the parties and the Tribunal.

[53] Considering all of the above, I find that there was no foundation for the part of the direction that is the subject of this appeal. On the basis of a properly applied TSAT assessment, I am led to the conclusion that any residual traffic-related danger to RSMCs in the performance of their duties constitutes a normal condition of employment under paragraph 128(2)(b) of the Code, therefore precluding the employees from exercising their right to refuse to work. I have no difficulty in concluding that the part of HSO Tomlin's direction that is under appeal is, as a result, not founded and must be deleted.

**Decision**

[54] For all the above reasons, the appeal is allowed and I hereby vary HSO Tomlin's direction by deleting its second paragraph in its entirety. The varied direction is appended as a Schedule to the present decision.

Pierre Hamel  
Appeals Officer

Tribunal de santé et  
sécurité au travail Canada



Occupational Health  
and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

## SCHEDULE

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

#### DIRECTION TO THE EMPLOYER UNDER SUBPARAGRAPH 145(2)(a)(i) AS VARIED BY APPEALS OFFICER PIERRE HAMEL

On 15 May, 2012, the undersigned health and safety officer conducted an investigation following a refusal to work made by **Wendy Vivian and Wayne Beeton** in the work place operated by CANADA POST CORPORATION, being an employer subjected to the *Canada Labour Code*, Part II, at 41 TEMPERANCE ST., Bowmanville, Ontario, L1C 3A0, the said work place being sometimes known as the Bowmanville Post Office.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

**The number of deliveries being made to rural mail boxes on routes #SS402 and #SS403 exceeds the recommended number of deliveries to a rural mail box per hour as determined by an independent qualified contractor to Canada Post Corporation in a report dated 15 December 2006 and therefore presents a potential danger of injury due to ergonomic hazards associated with performing this work.**

Therefore, you are HEREBY DIRECTED, pursuant to subparagraph 145(2)(a)(i) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.

Issued at Bowmanville, this 23<sup>rd</sup> day of May, 2012.

(signed)  
BOB TOMLIN  
Health and Safety Officer  
Certificate Number: ON0243

To: CANADA POST CORPORATION  
41 TEMPERANCE ST.  
Bowmanville, Ontario  
L1C 3A0

Canada