



# Occupational Health and Safety Tribunal Canada

**Date:** 2015-06-25  
**Case Nos.:** 2012-40  
2012-43  
2012-44

**Between:**

Canada Post Corporation, Appellant

and

Pierre Gatien et al., Respondents

and

Canadian Union of Postal Workers, Intervenor

**Indexed as:** *Canada Post Corporation v. Gatien et al.*

**Matter:** Appeals brought under subsection 146(1) of the *Canada Labour Code* of three directions issued by two health and safety officers.

**Decision:** The directions are rescinded.

**Decision rendered by:** Mr. Olivier Bellavigna-Ladoux, Appeals Officer

**Language of decision:** French and English

**For the appellant:** Ms. Caroline Richard, Legal Counsel, Bird Richard

**For the respondents:** Mr. Pierre Gatien (For himself)

**For the intervenor:** Mr. David Bloom, Legal Counsel, Cavalluzzo Shilton McIntyre & Cornish LLP

**Citation:** 2015 OHSTC 11

## REASONS

[1] This decision concerns three appeals filed by the Canada Post Corporation (Canada Post) (the first on June 12, 2012 and the others on July 3, 2012) against three danger directions issued on June 8, 2012, June 29, 2012, and July 10, 2012, by health and safety officers (HSOs) Jessica Tran and Marie-France Carrier, under subsection 146(1) of the *Canada Labour Code* (the Code).

### Background

[2] This matter began with a refusal to work by seven Rural and Suburban Mail Carriers (RSMCs) in the St-Lazare and Vaudreuil-Dorion areas in June and July 2012. Mr. Gérald Desgroseilliers, Mr. Léonard Smith, Ms. Katherine Riley, Ms. Bélinda Hubert, Mr. Pierre Gatien, Ms. Guylaine Bissonnette and Ms. Lise-St-Marseille invoked their right to refuse to work, in this case, to deliver mail to certain rural mail boxes (RMBs) on the basis of the following concerns:

- a. The presence of a single continuous line prohibiting passing according to the Québec Highway Safety Code, R.S.Q., c. C-24.2 (HSC);
- b. The location of RMBs at a distance of less than 5.25 metres from the shoulder;
- c. A prohibition on stopping in a 70 km/h zone according to the HSC;
- d. Weather conditions;
- e. The presence of trucks, automobiles, cyclists, and pedestrians close to the RMBs.

[3] According to the report by HSOs Jessica Tran and Marie-France Carrier, the RSMCs cited as the reason for refusing to perform their tasks the fact that they had to deliver mail to RMBs while their vehicles were partially parked on the road, forcing other drivers travelling in the same direction to swerve around them. Other drivers pass the RSMCs despite the presence of a solid centre line that prohibits passing.

[4] The two HSOs conducted an investigation at the three work sites in question and came to the same conclusion. They conclude on the existence of a danger due to the employer failing to fulfil all of its obligations in terms of controlling and eliminating the risk of collision. According to the officers, certain RMBs could be moved to another location to allow the RSMCs to park their vehicles off the road. In cases where it is impossible to move the RMBs, the delivery method must be changed. Moreover, the HSOs conclude that the exception stipulated in paragraph 128(2)(b) does not apply because the danger does not constitute a normal condition of employment.

[5] Therefore, they issued three similar directions to the employer pursuant to paragraph 145(2)(a). The June 29, 2012 direction reads as follows:

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

INSTRUCTION TO THE EMPLOYER PURSUANT TO  
PARAGRAPH 145(2)(a)

[...]

[Traduction]

The said health and safety officer considers that delivery of mail to the rural mail boxes on two-way roads (2 lanes) on which traffic flows at 50 km/h or faster, which have a solid single centre line and where the shoulder (or absence of a shoulder) is insufficiently wide to allow a mail truck to move completely off the road, constitutes a danger for an employee at work, that is:

Stopping the mail delivery vehicle on the roadway to obstruct (block) the traffic going in the same direction increases the risk of accidents for motorists who must go around the mail delivery vehicle by crossing the solid centre line. During another investigation conducted on May 25, 2012, a standard type of vehicle was stopped, thereby blocking the roadway on the St. Louis route to make deliveries. A Ford F-150 type pick-up truck passed the mail delivery vehicle while a Hydro-Québec vehicle was coming from the opposite direction. The Hydro-Québec vehicle braked suddenly, squealing its tires before finally driving onto the shoulder to avoid the Ford F-150 type pick-up truck passing the Canada Post vehicle. Furthermore, a similar incident occurred on May 17 2012, on route St. Féréol during the employer's investigation. The fact that motorists must cross the solid centre line to go around the stopped Canada Post vehicle, which is partially blocking the roadway, constitutes an increased the danger of collision for automobile traffic and the Canada Post vehicle, potentially leading to serious injuries to the employee. This situation is particularly problematic on the Chemin St-Grégoire and Chemin St-Antoine routes. The same situation was found on May 18 and 25, 2012, on the St-Louis, Chemin du Fleuve, St-Féréol, Lotbinière, and Chevrier routes, with a direction being subsequently issued by HSO Jessica Tran on June 8, 2012.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(2)(a) of Part II of the *Canada Labour Code*, to immediately protect all persons from this danger.

[...]

[6] In the file regarding the refusal to work of Ms. Bélinda Hubert, Mr. Gérald Desgroseilliers, Ms. Katherine Riley, and Mr. Léonard Smith, the appellant has filed an application for a stay of the direction. This application for a stay was dismissed by the appeals officer in the decision *Canada Post Corporation v. Gérald Desgroseilliers and others and Canadian Union of Postal Workers*, 2012 OHSTC 23.

[7] Prior to the hearing, Mr. David Bloom, on behalf of the Canadian Union of Postal Workers (CUPW), filed an application to obtain the status of intervenor. The appellant

supported the application by the CUPW, and the respondents elected not to provide submissions concerning the application. During the pre-hearing conference, I granted the application by the CUPW.

[8] Considering the factual similarity of the three files, they were joined for the hearing held in Montreal on July 15-19, 2013, February 11-14, 2014, and May 15, 2014.

[9] Following receipt of the appeals, the registrar of the Occupational Health and Safety Tribunal Canada (Tribunal) contacted the employees who had invoked their right to refuse to work to inform them of the appeals filed by the employer. Initially, four employees indicated wanting to attend the hearing and were present at the first series of hearing dates in July 2013. Just before the continuation of the hearing in February 2014, three of the four employees informed the Tribunal of their desire to abandon the appeals process. Mr. Gatien, an RSMC in Vaudreuil-Dorion, is the only one of the seven employees who elected to submit a short written submission.

[10] At the request of the appeals officer, the two HSOs, Ms. Jessica Tran and Ms. Marie-France Carrier, testified at the hearing. During their testimony, they explained the circumstances surrounding their investigations and the reasons underlying their decisions to issue the directions under appeal.

### **Issue**

[11] The issue in this case involves determining whether the three directions issued to the employer by HSOs Tran and Carrier indicating the existence of a road safety danger were founded.

### **Submissions of the parties**

#### **A) Appellant's submissions**

[12] During the hearing, the appellant asked the following people to testify: Ms. Geni Bahar, president of Navigats Inc. (formerly ITrans Consulting), expert in road safety who supervised the development of the Traffic Safety Assessment Tool (TSAT), Mr. Yves Bédard, National director of RSMC operations at Canada Post, Mr. Alexandru Gonta, Rural delivery service officer at Canada Post and accredited assessor for application of the TSAT (assessment of RMBs) on mail delivery routes, as well as Mr. Carl Paquet, Delivery planning officer at Canada Post.

[13] The appellant argues that deliveries to RMBs do not constitute a danger as defined in the Code, because the employer has developed and implemented the TSAT and other joint measures to maintain the risks associated with deliveries to RMBs within safe limits. In support of this argument, the appellant cites *Robitaille and Via Rail Ltd.*, 2005 CLCAOD no. 55, *Martin v. Canada (Attorney General)*, 2003 FC 1158, and *Verville v. Canada (Service Correctionnel)*, 2004 FC 767.

[14] The TSAT is a tool that was developed for the purpose of assessing the safety of RMB delivery with respect to criteria such as traffic volumes and speeds, road configuration and characteristics, and appropriate sight lines. The TSAT measures the risks associated with RMB delivery, including the time gap required for an RSMC to merge back into traffic after being stopped on the shoulder, the possibility of collisions, as well as the types of collisions that can occur between another driver and an RSMC vehicle stopped on the shoulder with its wheels partially on the road.

[15] The appellant explains the unique and innovative nature of the TSAT and reiterates Ms. Bahar's testimony that the TSAT, a tool based on motorists' behaviour, is the best method of assessing relative and acceptable risk. The appellant argues that all RMBs in Canada have been assessed using the TSAT.

[16] The appellant also argues that the TSAT was unanimously approved by the Tribunal as a tool for minimizing the risks associated with RMB delivery. According to the appellant, the Tribunal never questioned the scientific foundation or reliability of the TSAT. In support of this claim, the appellant cites the decision of appeals officer Richard Lafrance in *D. Morrison et al.*, *C. McDonnell et al.* and *Canada Post Corporation*, Decision No.: OHSTC-09-032; and *Pamela Townsend and Grant Leblanc v. Canada Post Corporation*, 2010 OHSTC 7. Moreover, in support of its claim that the TSAT minimizes the risks associated with RMB delivery and, in particular, the possibility that a collision will occur, the appellant cites the decisions *Canada Post Corporation v. Canadian Union of Postal Workers*, 2012 OHSTC 16; *Canada Post Corporation*, 2012 OHSTC 34; *Canada Post Corporation and Diana Baird and Canadian Union of Postal Workers*, 2013 OHSTC 31.

[17] According to the appellant, since the Tribunal unanimously concluded in several other decisions that the TSAT minimizes the risk of a collision, the appeals officer cannot cite the HSC nor the Ministère des Transports du Québec (Transport Québec) standards in formulating an opposing conclusion.

#### *The investigation and conclusions of the HSOs*

[18] The appellant points out that HSOs Tran and Carrier visited only a few RMBs located on the seven delivery routes and that they took no measurements to determine whether the sight lines were sufficient to allow a motorist to safely pass an RSMC vehicle parked partially or completely on the shoulder.

[19] Moreover, the appellant submits that the HSOs based their danger decision on an interpretation of the HSC, according to which motorists encountering an RSMC vehicle parked partially or completely on the shoulder are not allowed to pass the vehicle on a road with a solid centre line. During their testimony at the hearing, the HSOs also confirmed that, apart from at 1256 St-Féréol, there is no danger for RSMCs when an RMB is located on a section of road with a single broken dividing line, since motorists are allowed to pass the RSMC vehicle. Consequently, according to both HSOs, the only difference between RMBs that are deemed safe and those that are deemed dangerous is the presence or absence of a solid single centre line.

[20] The appellant considers that the two HSOs concluded on the existence of a danger based solely on an incident that occurred during their investigation on the St-Louis route in St-Lazare (hereinafter called "the incident"), despite the fact that there was no collision. According to the appellant, the HSOs extrapolated this isolated incident to all RMBs on the seven RSMCs' routes without having observed the RMBs in question.

[21] The appellant cites the testimony of Mr. Gonta to the effect that, during the incident, the vehicle passed him in a normal manner and he did not feel that he was in danger. The appellant claims that this testimony is more credible than that of the HSOs because it is neither emotional nor subjective. The appellant specifies that Mr. Gonta has been assessing RMBs for several years and therefore has specific experience with traffic on rural routes. According to the appellant, Mr. Gonta has an in-depth understanding of the TSAT, which was designed to ensure a safe perimeter that allows for the type of passing that took place on the St-Louis route in St-Lazare.

[22] The appellant submits that because this passing incident took place on a road with a solid centre line, the HSOs incorrectly concluded that the risk of collision was increased in areas where passing is prohibited. On the contrary, the appellant submits that the empirical and scientific evidence shows that most collisions are the result of driver inattention, speed, or sudden moves.

[23] The appellant submits that the application of the TSAT prevents the risks associated with the behaviour of other drivers, since it takes into account all collision risks noted by the RSMCs and by HSOs Tran and Carrier.

#### Speed limits and sight lines

[24] Contrary to the HSOs' allegations according to which the TSAT does not take into account motorists who do not respect the speed limit, the appellant submits that the TSAT is based on the expectation that motorists encountering RSMCs parked on the shoulder are travelling at 90–95 km/h, i.e. 40 km/h higher than the 50 km/h limit, and 20 km/h higher than the limit on St-Féréol, which is 70 km/h. The appellant submits that, given that it is unlikely that motorists travel at 90–95 km/h on roads with a 50 km/h speed limit, the sight lines established by the TSAT are greater and the risk of collision is consequently minimized.

[25] Moreover, the appellant argues that the TSAT ensures that, when motorists decide to pass an RSMC vehicle parked on the shoulder, they will have sufficient time to do so without colliding with another vehicle.

[26] The appellant submits that the TSAT is based on sight lines that are stricter than the Ministère des Transports du Québec and HSC standards and that the HSOs should not have relied on these provincial standards. The appellant claims that the opinions of Ms. Nancy Leduc of the Sûreté du Québec and of Mr. Pascal Lacasse, civil servant with the Ministère des Transports, should not be retained because the latter have no expertise in road safety.

[27] The appellant cites the testimony of Ms. Bahar, who explained that the delays used for road marking by the TSAT are more conservative than those used by the Ministère. According to Ms. Bahar, the TSAT uses the same formula as the Ministère. This formula is recognized by the Transportation Association of Canada and is applied across Canada to establish sight lines. Ms. Bahar also explains that the TSAT modifies the Ministère's formula to ensure greater sight lines and a longer reaction time for motorists who encounter RSMCs parked on the shoulder.

[28] Ms. Bahar also indicates that the time that RSMCs are required to wait before merging into traffic is more conservative than the Ministère's standards, i.e. less than 30 seconds (25 seconds).

[29] Moreover, the appellant submits that the conservative nature of the TSAT compared to Ministère standards is demonstrated by the fact that, when the TSAT is applied to RMBs on a specific route, even on sections of the road with a broken dividing line, the RMBs must be moved since the sight lines are insufficient according to the TSAT criteria. The appellant thus argues that the TSAT is the only tool that minimizes the risk associated with mail deliveries to RMBs.

[30] According to the appellant, the HSOs incorrectly concluded that, because the HSC prohibits passing in Québec in the presence of a single or double solid centre line, the TSAT should treat these two types of markings in the same way and also require RMBs located on roads with a solid single centre line to be automatically moved. However, the appellant submits that, according to Ministère marking standards, a single line is used in sections where the lane is less than 6m wide, whereas a double solid line is a Canada-wide standard applied by road designers when the sight lines are insufficient to permit passing. Accordingly, the appellant refers to page 96 of the Report on the foundations of the TSAT, exhibit E-8, which explains as follows [translation]:

In the scenario in which the RSMC's vehicle is stopped on a two-lane road, we take into account the presence (or absence) of a double solid yellow centre line before assessing the threshold volume due to the limited sight lines for passing at the location in question, i.e. a driver encountering the parked RSMC vehicle might not have a sufficient sight line to pass that vehicle.

[31] The appellant submits that, contrary to the conclusion of the HSOs, the TSAT evaluators are not obliged to apply the provincial standards. Rather, the appellant argues that the TSAT applies universally across Canada since it ensures sufficient sight lines to allow any vehicle to pass an RSMC vehicle parked on the shoulder with a low risk of collision, even when the road markings prohibit passing.

[32] The appellant submits that, according to the TSAT, if all of the following criteria are met, the location of an RMB could be deemed safe despite the fact that the RSMCs must park partially on the road:

- a perception delay of 11 seconds behind the RSMC vehicle;
- a perception delay of 14 seconds in front of the RSMC vehicle (corresponding to the passing time);
- the maximum number of vehicles within a 15-minute delay must be fewer than or equal to 40.

[33] When an RMB does not meet one of these criteria, its location is deemed unsafe and must be changed. In such a case, the RMB is either moved to a safer location on the road or is completely removed. The appellant refers to the testimony of Mr. Gonta and Mr. Paquet, who confirmed the changes to the RMBs on the routes of the seven RSMCs who had refused to work.

[34] Regarding the HSOs' conclusion that the appellant failed to comply with the requirements of sections 384 and 418 of the HSC, the appellant cites the testimony of Mr. Bédard to the effect that Québec is the only province with regulations prohibiting stopping on roads with a speed limit of less than 80 km/h. Therefore, prior to May 2008, if an RMB was located on a road with speed limit of 70 km/h or higher, it was automatically moved. However, during development of the TSAT, Mr. Bédard contacted the Ministère to request an exemption to this regulation applicable solely to RSMCs during mail deliveries. In response to this request, the Ministère confirmed that police “do not give tickets to postal workers who stop their vehicle on the shoulder, given their impossibility defense.”

[35] The appellant submits that, while the HSOs discounted this confirmation on the basis that it did not constitute a legal opinion, the latter had been issued to avoid having to modify the text of the HSC. Moreover, the appellant argues that because the RSMCs stop on the shoulder only to make deliveries, this exemption is logical and reasonable.

#### Weather conditions

[36] As for risks related to weather conditions, the appellant cites paragraph 126(1)(c) of the Code, which stipulates that an employee at work shall take all reasonable and necessary precautions to ensure his own health and safety. Moreover, the appellant cites paragraph 126(1)(g), which specifies that the employee shall report to his employer any thing or circumstance in a work place that is likely to be hazardous to his health or safety, or that of the other employees. The appellant submits that it is reasonable to expect an RSMC who observes such a hazard to report it to his employer, including when RMBs are poorly maintained or a snowbank is obstructing visibility for other drivers. It adds that when such a hazard is reported to the supervisor, it is the employer's responsibility to rectify it.

[37] The appellant cites the testimony of Ms. Bahar, who affirms that the TSAT is based on wet road conditions and that, consequently, winter conditions do not invalidate the results of the TSAT.

[38] Mr. Bédard, Mr. Gonta, and Mr. Paquet explained that the winter situation can be resolved by applying Corporation policy 1202.05 entitled [translation] “Hazards and Obstructions to Delivery”, according to which RSMCs must not deliver mail to RMBs if



they deem that the weather conditions make doing so impossible, especially in the case of snowbanks that obstruct sight lines. Mr. Bédard confirmed that this policy was explained to the RSMCs during training sessions.

[39] Moreover, the appellant points out that, according to Mr. Gonta, the RMBs are assessed according to the TSAT on request by any RSMC, member of the management team, or other Corporation employee. If it is not possible to assess the RMBs due to weather conditions, delivery is halted until the RMBs can be assessed. In such a case, the mail is temporarily forwarded to an individual post office box, or as per the customer's instructions. The appellant also argues that it has procedures in place to ensure that RSMCs are not endangered by adverse weather conditions. The appellant refers to the decision *Canada Post Corporation*, 2012 OHSTC 34, in which the appeals officer recognized that the implementation of measures to control weather conditions ensures that the potential hazard is reduced to a minimum.

#### Ditches and presence of vehicles and pedestrians on the road

[40] In response to the RSMCs' claim that there are ditches along their route and that, consequently, they are forced to stop their vehicle in traffic to make their deliveries because there is no shoulder, the appellant cites the *Morrison* decision, in which the appeals officer decided that this did not constitute a danger since control of the vehicle remains with the RSMC, who can decide how close he wants to approach the ditch with his vehicle.

[41] In response to the RSMCs' claim that they must share the road with tractor-trailers in St-Lazare, the appellant argues that the TSAT takes into account the presence of trucks and heavy vehicles on the roads. The appellant argues that this concern was also addressed in the *Morrison* decision, in which the appeals officer concluded that the employer has no control over such a situation.

[42] In conclusion, the appellant asks the Tribunal to rescind the danger directions and to adhere to previous decisions on the same circumstances by concluding that the risk of collision is minimized and that any residual risk constitutes a normal condition of employment pursuant to section 128(2).

#### **B) Respondent's submissions**

[43] Mr. Gatien recognizes the quality of the TSAT and admits that, following the assessment of the RMBs, a significant proportion of RMBs were moved or eliminated on his mail delivery route. However, Mr. Gatien argues that the TSAT has its limits and does not take into account excess speed, poor passing decisions by motorists, and the aggressive driving habits of certain motorists. According to him, the risk not controlled by the tool is the most threatening.

[44] As an example, Mr. Gatien cites the incident that occurred in St-Lazare involving a Hydro-Québec truck, which he says was caused by a poor passing decision by a motorist

who was in a hurry. He adds that the fact that the RSMC vehicle was partially parked on the road left more space for passing than if the vehicle had been completely blocking the road.

[45] Mr. Gatien concludes by saying that the risk of collision must be assessed as carefully as possible to eliminate the residual risk not taken into account by the TSAT.

### **C) Intervenor's submissions**

[46] The intervenor argues that the Tribunal has, in several other similar cases, acknowledged the TSAT as an effective and reliable tool for assessing the safety of deliveries to RMBs. To this effect, it cites the decisions *Morrison* and *Townsend, Canada Post Corporation v. Canadian Union of Postal Workers*, 2012 OHSTC 16 and *Baird* (cited previously). Moreover, the intervenor argues that the Tribunal also agreed that stopping a vehicle on the shoulder to make a delivery to an RMB does not constitute a danger under section 122 of the Code.

[47] The intervenor argues that the evidence submitted establishes that all roads on which the employees refused to work were assessed using the TSAT. According to the intervenor, no evidence was submitted that would call into question the accuracy of the assessment by the TSAT, and the Tribunal has no valid reason to reject the validity and reliability of the TSAT.

[48] In addition, the intervenor argues that the evidence in these cases supports the conclusion that the HSOs are largely or completely unfamiliar with the TSAT as well as the Tribunal's jurisprudence on the subject, which explains why they incorrectly concluded on the presence of danger. Moreover, he stresses that the HSOs did not submit scientific evidence to contradict the validity of the tool. According to the intervenor, despite their misunderstanding of the TSAT, they concluded on the existence of a danger when a delivery vehicle is required to park on a road with a solid centre line in order to deliver mail to an RMB. This conclusion is largely based on the incident that occurred on the St-Louis route, in St-Lazare, as well as on the Québec Highway Safety Code, which prohibits passing on roads with a solid centre line.

[49] The union, intervenor, argues that the HSOs did not investigate this incident and, consequently, the details about what really happened are unknown. The intervenor explains that no evidence was presented regarding the speed that vehicles were travelling on St-Louis route, nor indicating that drivers were driving dangerously during the incident. According to the union, no evidence has been submitted to show that an accident has ever occurred on this route or on any other route in the area. Consequently, the appeals officer cannot reasonably rely on this incident to conclude on the existence of a danger.

[50] The intervenor argues that the opinions of Ms. Leduc of the Sûreté du Québec on the HSC and of Mr. Lacasse, civil servant with the Ministère des Transports, which were extensively cited by the two HSOs, are hearsay since neither of them testified at the hearing. Moreover, the intervenor argues that Ms. Leduc is not qualified to interpret the HSC, and, therefore, her opinion should not be considered as that of an expert. The intervenor also

argues that the HSOs wrongly ignored the opinions of Ann Baril, Ministère des Transports employee, to the effect that deliveries to RMBs requiring stopping RSMC vehicles on the road do not violate the HSC.

[51] Finally, the intervenor argues that the conclusions of HSOs Tran and Carrier are incorrect and based on an incomplete investigation. The appeals officer received no evidence of the concerns of the employees who refused to work since the latter did not testify at the hearing. Therefore, the intervenor argues that the appeals must be upheld and the directions from HSOs Tran and Carrier rescinded since the HSOs did not consider all of the relevant circumstances in rendering their decisions on the presence of danger.

#### **D) Reply**

[52] In its reply, the appellant argues that the CUPW and Mr. Gatien acknowledged the validity and quality of the TSAT. According to the appellant, Mr. Gatien is the only party alleging that the TSAT has its limits - a statement that is not supported by evidence.

[53] The appellant reiterates that the passing incident that occurred in St-Lazare is not sufficient grounds on which to conclude the presence of danger. The appellant argues that, on the contrary, this situation shows that when an RMB meets the TSAT criteria, the sight lines are sufficient to allow for passing without causing an accident.

[54] Moreover, the appellant argues that Mr. Gatien did not submit any evidence to show that drivers who pass RSMCs are unable to judge the passing distance. On the contrary, according to the appellant, Ms. Bahar's evidence shows that drivers adapt their driving to compensate for obstacles on the road and that the TSAT was designed to provide for a safe passing zone.

[55] The appellant argues that, as indicated by Mr. Gatien in his written submissions, the risk associated with delivering mail to RMBs located on routes marked with a solid single line and on which the RSMC vehicle is partially or completely parked on the road is residual and low. This led the Tribunal to repeatedly conclude that delivering mail to RMBs that meet the TSAT criteria constitutes a normal condition of employment.

[56] Lastly, the appellant argues that since the Tribunal unanimously ruled that the TSAT minimizes the risk of a collision, the appeal should be upheld and the three directions rescinded.

#### **Analysis**

[57] The question before me in the present appeal is to determine whether the directions of danger issued by the two HSOs are well founded. As previously mentioned, the three directions are almost identical and identify as danger the fact of stopping the mail delivery vehicle on the road in a manner that blocks traffic for vehicles driving in the same direction. Therefore, I must determine whether the resulting risk of collision constitutes a danger under the Code.

[58] This question has been the subject of several other decisions on similar files by several of my colleagues. In *Canada Post Corporation v. Vivian and Beeton*, 2014 OHSTC 6, Appeals Officer Pierre Hamel made the following remark:

[52] [...] 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 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 the 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.

[59] I am in agreement with my colleague and consider that it is essential to ensure uniformity in the application of the Code. The appellant's position in this file is the same as that which it took in similar files regarding road safety to the effect that it implemented measures, such as development of the TSAT, to control the risk associated with mail deliveries to RMBs. The evidence showed that the TSAT is a tool used to assess whether mail deliveries to RMBs are safe with respect to the risk of a collision. Ms. Bahar, a qualified TSAT expert, confirmed that the TSAT measures all risks associated with deliveries to RMBs, including the time gap required by an RSMC to merge back into traffic after being stopped, and the possibilities of a collision.

[60] As submitted by the appellant and the intervenor, the validity and reliability of the TSAT in minimizing the risks associated with mail deliveries by RSMCs have been acknowledged by several appeals officers in similar files. In the first decision on this matter (*Morrison*), the appeals officer stated:

[316] I retain from the TSAT document that for a location [of an RMB] 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 "space" in which to merge back. Past 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.

[61] This line of reasoning was carried through in a series of decisions made by Tribunal appeals officers on the same matter, in which the same documentary evidence and expert evidence were produced. My colleagues all agree that the TSAT is an appropriate tool for minimizing the risk of collisions during deliveries by RSMCs. As mentioned by the appellant, I note that no evidence was submitted that calls into question the validity of the tool. I consider that such evidence would have been necessary in order for me to have come to a different conclusion. In the *Baird* decision (cited previously), the appeals officer shared this opinion when he stated:

[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.

[62] During their testimony at the hearing, the two HSOs admitted to not having taken into account the TSAT or Tribunal jurisprudence confirming its validity and efficacy in determining the danger involved for RSMCs in delivering mail to RMBs. Instead, as it appears in the text of their directions, they largely based their conclusions of the presence of danger on the incident that occurred in St-Lazare involving a near collision between a Hydro-Québec vehicle and an RSMC vehicle. Moreover, they largely relied on the Québec provincial regulation that prohibits passing on roads marked with a solid single centre line. According to them, the locations of certain RMBs are in violation of provincial laws and

regulations. Therefore, in their opinion, the fact of violating the provincial regulation increases the risk of a collision between motorists' vehicles and RSMCs' vehicles.

[63] In my opinion, it is clearly established that the TSAT provides for uniform standards that are applicable nationwide. Moreover, the evidence shows that the TSAT criteria are, in most cases, stricter than Québec provincial standards. As such, I cannot retain the two HSOs' arguments to the effect that a danger exists on routes with a solid single centre line. The evidence submitted showed that the risk of collision in passing situations is minimal and that, moreover, the TSAT ensures sight lines that take into account the speed limit and allow a motorist to pass an RSMC vehicle with minimal risk of collision.

[64] Regarding the passing incident that appears to have greatly influenced the two HSOs' decision, I note first of all that the evidence submitted shows that the TSAT takes into account the fact that all four wheels of the RSMC vehicle may not be on the shoulder. In fact, the location of an RMB may still be deemed safe if it meets all of the TSAT criteria. In paragraph 166-167 of the *Townsend* decision, the appeals officer addresses this point in the following manner:

[166] On the issue of not having all four wheels off the road, I found in TSAT that, under certain conditions, TSAT accepts this and allows for the vehicle to be stopped on 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 yellow 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 the 11 seconds time gap behind the vehicle.

[167] Consequently, for those locations where the RSMCs' vehicles may have to be stopped on the travel portion of the road, if, when assessed, all the criteria set by the 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 all 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.

[65] As for the RSMCs' concerns about the weather conditions adding additional risks, in particular the accumulation of snow, which can block sight lines, the evidence shows that the employer implemented work policies to compensate for these risks. In fact, according to the

employer's work policies, an RSMC must not deliver mail if he deems that the delivery is not possible because of the weather conditions.

[66] As Mr. Gatien argues, it is true that the TSAT does not completely eliminate the risk of collision. There are certainly other factors to consider when talking about road safety. Nevertheless, when it comes to assessing the risk associated with the delivery of mail by RSMCs, the evidence submitted allows me to conclude, as my colleagues did, that the TSAT reduces the risk to a minimum.

[67] In the above-mentioned *Morrison* case, the appeals officer cites the principle according to which the danger related to road safety when delivering mail to RMBs becomes a normal condition of employment under paragraph 128(2)(b) of the Code, after the RMBs in question had undergone a TSAT assessment and the locations of the RMBs that did not meet the TSAT criteria had been changed. In paragraph 343, the appeals officer explains as follows:

[343] In view of this, I can only conclude that the employer has, at the present time, met its obligations and identified the potential danger locations, corrected those locations accordingly and reduced the danger to a minimum.

[344] Since the employer has now, to the extent reasonably practicable, implemented measures to minimize the danger, any residual danger that may remain, as explained above, becomes a normal condition of employment.

[68] In this case, it was demonstrated that all the RMBs on the routes of the seven RSMCs were the subject of a TSAT assessment, and that all the RMBs that did not meet the set criteria were either moved to a safer location on the route or completely eliminated.

[69] For all these reasons, I conclude that Canada Post implemented the TSAT to compensate for the risk of collision that exists when RSMCs deliver mail to RMBs. The efficacy of the TSAT in minimizing the hazards has been demonstrated, mainly through the expert testimony of Ms. Bahar. As such, given the fact that all RMBs on the RSMCs' delivery routes were assessed using the TSAT, I conclude that the residual traffic-related risk for RSMCs constitutes a normal condition of employment pursuant to paragraph 128(2)(b) of the Code, thus preventing the employees from invoking their right to refuse to work.

## **Decision**

[70] For these reasons, the appeals are upheld and the three directions issued by HSOs Jessica Tran and Marie-France Carrier on June 8, 2012, June 29, 2012, and July 10, 2012, are rescinded.

Olivier Bellavigna-Ladoux  
Appeals Officer