Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2019-01-18
Case No.: 2017-06

Between:

Troy Robitaille, Appellant

and

Air Canada, Respondent

Indexed as: *Robitaille v. Air Canada*

Matters:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by an official delegated by the Minister of Labour Appeal under subsection 146(1) of a direction issued by an official delegated by the Minister of Labour
Decision:	The decision is confirmed. The appeal of the direction is dismissed.
Decision rendered by:	Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Ken Russell, General Chairperson, IAMAW, Atlantic Canada
For the respondent:	Mr. Stephen Bird, Counsel, Bird Richard
Citation:	2019 OHSTC 1

REASONS

[1] These reasons concern an appeal brought under subsection 129(7) of the *Canada Labour Code*, LRC (1985), c L-2 (*Code*) by Mr. Troy Robitaille (the appellant), the lead station attendant at Halifax International Airport (YHZ), against a decision that a danger does not exist rendered on December 9, 2016, by Ms. Alice Clark in her capacity as an official delegated by the Minister of Labour (ministerial delegate).

Background

Decision of absence of danger rendered under subsection 129(7) of the *Code*

[2] On November 13, 2016, Simon Allen, the station manager at YHZ and Anne-Marie Dubois, the respondent's safety programs manager, were conducting seatbelt auditing at YHZ. During the course of the auditing, the appellant was seen driving an open tractor without wearing a seatbelt. Ms. Dubois told the appellant to buckle up, but he disregarded the instruction and kept on driving without wearing a seatbelt. When asked to buckle up for a second time, the appellant said he would not comply with Ms. Dubois' instruction as he believed that wearing a seatbelt while driving an open tractor was unsafe. Ms. Dubois reminded the appellant of the risk assessment conducted by the respondent in which it was determined that seatbelts were mandatory to reduce potential injury in case of an accident. The appellant proceeded to exercise his right to refuse to work, stating the following:

> In my opinion, wearing a seatbelt will pose more danger and risk of injury and or death as there is no roll bar to prevent the tractor rolling onto a person. Not wearing a safety belt I have a 50/50 chance of being ejected or pushing myself away from the vehicle.

[3] I must point out at this stage that it became clear during these proceedings that the appellant's work refusal was prompted by the issuance of a national scope direction issued to the respondent following an accident that took place in April 2016, at Toronto Pearson International Airport (YYZ), during which a ramp agent was ejected from his vehicle and died. The direction issued following the April 2016 incident instructed the respondent to equip all of its Motorized Material Handling Equipment (MMHE) with seatbelts, and to ensure that all of its employees use a seatbelt while operating MMHE. MMHE includes open air baggage tractors such as the one driven by the appellant as part of his ramp attendant duties. An open air tractor refers to a type of MMHE with no roof structure or no roll cage protection.

[4] On September 30, 2016, the respondent issued a bulletin to highlight the corporate requirement regarding the use of seat belts while operating MMHE: "All Air Canada personnel, including passengers, must wear seat belts, where installed, while operating a company owned vehicle. This requirement applies to all stations across the country." The bulletin also informed employees that the respondent had been fitting seat belts on vehicles that previously did not have any, and that, while most vehicles had already been fitted, all vehicles will have been fitted by November 15, 2016.

[5] In a subsequent bulletin issued on October 5, 2016, the respondent advised its managers on how to initiate the right to refuse to work process if an employee does not want to wear a seatbelt because he/she believes that wearing a seat belt is dangerous and wishes to exercise the right to refuse dangerous work.

[6] Following the appellant's work refusal, the respondent investigated the matter and concluded that there was no danger in the situation identified by the appellant. The appellant did not consider the matter resolved, which prompted the respondent's health and safety committee (committee) to perform a joint employer-employee investigation. The committee expressed concerns about the specific nature of the work refusal, but the members could not come to a consensus as to whether the refusal was justified or not. The committee concluded that a danger did not exist.

[7] Following the joint investigation, the appellant maintained his work refusal. The Labour Program was contacted and assigned the ministerial delegate to investigate the case. On November 14, 2016, the day after the work refusal, the ministerial delegate went to the scene and met with the appellant, Ms. Dubois, Mr. Matthew Payne - a representative of Halifax International Airport Authority (HIAA) - and Mr. Paul Martin Benoit, a health and safety representative. Together, they visited the work site around the apron of the airport to try and witness examples of the concerns raised by the appellant. The pictures taken in the course of the ministerial delegate's site visit are included in her report. During the visit, the appellant told the ministerial delegate that, in his opinion, seatbelts create a danger to employees because of the following circumstances:

- Lack of roll over protection;
- Inclement weather (built-up of snow and ice);
- Possibility of being t-boned;
- Reckless driving of others;
- Inappropriate storage of equipment on the apron and footprint of the aircraft by third parties who are using the equipment; and
- Chocks and pylons left on the apron.

[8] Throughout her investigation, the ministerial delegate requested documents such as maintenance records for MMHE at YHZ, training records for the appellant, manufacturers' operation manuals and specifications, records regarding the installation and replacement of seatbelts on the equipment, a list of the makes and models of equipment used by the service attendants, records regarding the use of the tractors, a copy of the risk assessment done previously, incident reports regarding vehicles and incident reports regarding equipment properly stored. Both parties were actively involved in the investigation process and provided all the documentation required by the ministerial delegate. The ministerial delegate also analyzed scientific literature on the use of seatbelts that I will review further in these reasons.

[9] The appellant told the ministerial delegate that he believes that enclosed tractors are safer than open type tractors since they are equipped with a cage to protect the driver. When asked by the ministerial delegate if he believed that side impact was a danger in the case of a collision, as there is no protection for the driver besides a seatbelt, the appellant stated that it was not an issue and that his main concern was the rolling over of the tractor.

[10] After her investigation, the ministerial delegate identified elements that the respondent should consider in order to assess potential hazards or activities that could lead to a dangerous situation. During her testimony, the ministerial delegate mentioned that the respondent had since complied with those elements. I will nonetheless review some of these elements as they prove to be relevant to this appeal.

[11] First, the ministerial delegate had concerns about the training available to the drivers for the operation of MMHE. In particular, she wanted clarification with respect to the ramp attendant manual training on vehicles and to the obstacle course training. After reviewing all material provided to new staff members as well as the appellant's training record, the ministerial delegate concluded that the training dispensed by the respondent was adequate, particularly considering the extensive number of courses included in the respondent's Safe Driving Program.

[12] During the work site visit, the ministerial delegate noted, as pointed out by the appellant, that third parties were leaving chocks, tow bars and pylons on the apron, which is in contravention of the HIAA policy. It was brought to the attention of the ministerial delegate that between January 2015 and November 2016, there were 19 incidents resulting in equipment being damaged at YHZ. This number was provided by HIAA and includes incidents that did not lead to injury. Of those 19 incidents, 8 involved MMHE driving over unattended tow bars and hoses. None of these incidents involved chocks, which are more imposing in size and could be more damaging in case of a collision. HIAA also indicated that 67 traffic directive infractions had occurred in 2015. The respondent demonstrated that steps had been taken in order to resolve the issues related to equipment being left on the tarmac and that complaints had been filed with HIAA and another carrier. The respondent explained that communication was ongoing with HIAA and the other carrier in order to resolve the issue. Ms. Dubois provided correspondence with HIAA and the other carrier regarding equipment left on the tarmac. The ministerial delegate was satisfied with the actions undertaken by the respondent in order to correct this issue.

[13] The ministerial delegate found that there were 6 reported rollover accidents in North America over the past 28 years. These accidents were either reported to the Labour Program or the Occupation Safety and Health Administration (USA) or by the press. One of the six documented rollover accidents involved a rollover that occurred because of chocks left on the tarmac. This event was reported in Tennessee, USA. The reported rollovers also include the April 2016 incident at Toronto International Airport that I mentioned above.

[14] Concerning the type of MMHE driven by the appellant, the ministerial delegate noted that the manufacturer recommends that this type of vehicle should not be driven on rough service road or over a grade in excess of 15%. During her visit, the ministerial delegate did not notice any type of rough terrain or any grade over the one recommended by the manufacturer. HIAA traffic directives indicate that speed should not exceed 30 km/h on the apron, but the ministerial delegate noticed that some drivers were travelling at speeds in excess of that limit. The ministerial delegate noticed that some of the ramp attendants who drive enclosed MMHE were also not concerned about wearing a seatbelt despite the respondent having made it a requirement.

[15] The last element that the ministerial delegate raised during her investigation that I will address concerns the seatbelt retractor mechanism. The ministerial delegate saw that it was possible to step off the tractor while still wearing the seatbelt. After investigating this issue, the

ministerial delegate determined that the seatbelt mechanism was not defective, since seatbelts are designed to expend when the person wearing it leans forward. The ministerial delegate also noted that the respondent replaced seatbelts with restraint mechanism issues with high visibility orange seatbelts, to help ensure compliance with the direction issued in September 2016.

[16] On December 9, 2016, the ministerial delegate concluded that a danger does not exist. The appellant filed an appeal of that decision on December 14, 2016.

Direction issued under subsection 145(1) of the *Code*

[17] In addition to her decision of absence of danger rendered under subsection 129(7) of the *Code*, the ministerial delegate identified two contraventions under paragraph 125(1)(z.04) of the *Code*. She came to the conclusion that the respondent needed to complete an assessment of the conditions which contribute to a rollover of each of the MMHE used at YHZ. Her direction reads as follow:

> IN THE MATTER OF THE CANADA LABOUR CODE PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On November 14, 2016, the undersigned Official Delegated by the Minister of Labour conducted an investigation in the work place operated by AIR CANADA, being an employer subject to the *Canada Labour Code*, Part II, at 1 Bell Boulevard, Comp 1650, Halifax International, Enfield, Nova Scotia, B2T 1K2, the said work place being sometimes known as Air Canada – Ground Operations, Halifax (YHZ).
>
> The said Official Delegated by the Minister of Labour is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:
>
> No. / No : 1
>
> Paragraph 125.(1)(z.04) - *Canada Labour Code*, Part II, Section 19.4 – Canada Occupational Health & Safety Regulations
> Air Canada, located at the Halifax Stanfield International Airport has not completed an assessment of the conditions which contribute to a rollover of each of the motorized material handling equipment used at that location and the requirement for roll over protection under 14.6 of the Canada Occupational Health & Safety Regulations. The assessment shall be completed by a qualified person, in consultation with the workplace committee. The assessment shall include, but not be limited to; the piece of equipment, how it is used and the environment in which it is used.
>
> No. / No : 2
>
> Paragraph 125.1(1)(z.04) - *Canada Labour Code*, Part II, Section 19.4 – Canada Occupational Health & Safety Regulations
> Air Canada, located at the Halifax Stanfield International Airport has not completed an assessment of the conditions which contribute to a rollover of each of the motorized material handling equipment used at that location which are not covered by CSA Standard B352-1980

> referenced in section 14.6 of the Canada Occupational Health & Safety Regulations. The assessment shall be completed by a qualified person, in consultation with the workplace committee. The assessment shall include, but not limited to; the piece of equipment, how it is used and the environment in which it is used.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than January6, 2017.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the Official Delegated by the Minister of Labour, to take steps to ensure that the contraventions do not continue or reoccur.
>
> Issued at Dartmouth, Nova Scotia, this 9th day of December, 2016.

[18] As I mentioned previously, the respondent's requirement for all MMHE drivers to wear a seatbelt stems from a risk assessment conducted by the respondent following the April 2016 fatal incident at YYZ, where a ramp attendant driving an enclosed tractor rolled over. In that risk assessment, it was determined that seatbelts provide a high degree of protection to drivers of MMHE, including open air tractors such as the one driven by the appellant. Noticing that the risk assessment done by the respondent did not cover rollover protection systems, the ministerial delegate issued the direction of above.

[19] On December 14, 2016, in addition to his appeal of the decision of absence of danger, the appellant filed an appeal to dispute the scope of the direction issued to the respondent. The respondent also filed an appeal of the direction on January 6, 2017, but subsequently complied with the direction and withdrew its appeal on August 23, 2017.

[20] A hearing into this matter took place in Halifax on April 23 and 24, 2018.

Issues

[21] The issues in the present appeal may be described as follow:

1. Was the appellant exposed to a danger as defined under the *Code* in the circumstances that prevailed at the time of his work refusal?

2. Does the appellant have standing to challenge the scope of the direction issued on December 9, 2016?

Submission of the Parties

Appellant's Submissions

[22] On June 4, 2018, the appellant provided the Tribunal with very brief final submissions. On June 5, 2018, the respondent contacted the Tribunal to point out that the appellant had not dealt with the definition of danger or with the Tribunal's jurisprudence. In the same

correspondence, the respondent suggested that I offer a one-week extension period to the appellant to file additional submissions. On June 12, 2018, the Tribunal's registrar conveyed my instructions to Messrs. Russell and Bird, the parties' representants. These instructions read as follows:

> 1. Mr. Russell will be granted the opportunity to file additional submissions addressing the definition of danger (set out in subsection 122(1) of the Canada Labour Code), and the Tribunal's jurisprudence in this regard, on behalf of Mr. Robitaille. Should he [choose] to avail himself of this opportunity, he will have until June 19, 2018 at the latest to do so;
>
> 2. Consequently, the deadline for the filing of Mr. Bird's reply submissions on behalf of Air Canada is hereby extended to June 26, 2018;
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> 3. The parties are reminded the legal test to interpret the definition of danger is summarized at paragraph 199 of the enclosed decision – Correctional Service of Canada v. Ketcheson (2016 OHSTC 19). The parties are expected to address this test in their submissions.

[23] Further to those instructions, the appellant completed his final submissions on June 19, 2018. The appellant submits that it would be safer for the respondent's ramp attendants not to wear a seatbelt while operating MMHE. The appellant believes that the witnesses he called to testify, namely Mr. Curtis Hull, Mr. Wayne Collicutt and Mr. Stu Towers, all of whom, like himself, work as ramp attendants at YHZ, would feel much safer not wearing a seatbelt while driving MMHE because they could more easily jump off the MMHE in the event of a rollover. The appellant explains that ramp attendants drive in all imaginable weather conditions (snow, rain storms, freezing rain, wind, darkness and black ice), and in confined spaces where obstacles are often left on the ramp. The appellant explains that there are no roll bars for protection on open air tractors and points out that the witnesses expressed that they would not want to be tied down to one of these tractors in the event of a rollover. The witnesses also spoke to the fact that some areas of the service roads have ditches, grassy areas, culverts and no barriers, which could increase the possibility of a rollover. The appellant drew a comparison between driving an MMHE in those areas and driving all-terrain vehicles (ATV).

[24] As instructed, the appellant addressed the legal test developed in *Ketcheson*. In that regard, the appellant submits that other ground handling companies and airlines that use the same gates and materials as the respondent may on occasion leave behind thick and heavy wheel chocks or other objects that could easily be run over by MMHE. According to the appellant, those obstacles could possibly throw the driver off the vehicle. The appellant argues that the hazard described, combined with adverse weather conditions, could reasonably be expected to be a serious threat to the life or health of a person exposed to it.

[25] The appellant made no submissions in regard to the contraventions identified in the direction issued on December 9, 2016.

Respondent's Submissions

Decision of absence of danger rendered under subsection 129(7) of the *Code*

[26] The respondent submits that none of the factors outlined in the work refusal pose a danger to its employees, and that there is no evidence that the appellant was in danger as a result of wearing a seatbelt while operating MMHE on the day of the work refusal. The respondent refers to the definition of danger under the *Code* and to paragraph 199 of the decision in *Ketcheson* where the test to assess whether there is a danger was established. Paragraph 199 reads as follows:

> [199] To simplify matters, the questions to be asked whether there is a "danger" are as follows:
>
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

What is the alleged hazard, condition or activity?

[27] The respondent suggests that the alleged dangerous activity in this appeal is the wearing of a seatbelt in the event of a rollover of MMHE caused in one of the following circumstances:

- Lack of roll cage;
- Inclement weather or buildup of ice and snow on service roads and aprons;
- Possibility of being t-boned;
- Effect of reckless driving by others;
- Failure of third parties to properly store equipment after use; and
- Chocks and pylons left on the apron.

[28] The respondent is of the view that the circumstances raised by the appellant are based on hypothetical events which were not present at the time of the work refusal.

Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?

[29] Going through the first step of the second part of the test, the respondent suggests that there must be a reasonable possibility for the appellant to be injured within a matter of minutes or hours from the time the work refusal is exercised, as pointed out in *Pogue v. Brinks Canada Ltd.*, 2017 OHSTC 27. The respondent submits that there is simply no evidence to support that wearing a seatbelt causes an imminent risk of injury, especially in the case of a rollover, as none of the circumstances identified by the appellant were present at the time of the work refusal.

These circumstances are remote, unlikely to materialize and purely speculative, and the respondent states that a reasonable expectation of injury cannot be based on hypothesis or conjecture (*Wade Unger v. Canada (Correctional Service)*, 2011 OHSTC 8).

Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?

[30] Moving on to the second step of the second part of the test, the respondent establishes that the employee was never exposed to a serious threat. The respondent states that the hazard identified needs to meet a minimum threshold in order to be called a threat. The respondent mentions that there must be a reasonable possibility that the alleged threat could materialize in a timeline that can be identified.

[31] The respondent argues that the appellant's statement that wearing a seatbelt poses a danger to employees goes against scientific literature and contradicts the expert evidence that seatbelts save lives in cases of collisions and rollovers. As for the risk of a rollover at YHZ, the respondent alleges that the risk assessment provided to the ministerial delegate and prepared by the committee established that the possibility of a rollover is remote, which is the lowest risk level in the assessment tool.

Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[32] Concerning the final part of the test, which asks whether the hazard identified can be corrected before the threat to life or health materializes, the respondent stresses the fact that there was no evidence introduced that any of the MMHE used by the respondent at YHZ could, without some external event, become subject to rollover. If the external causative events described in the refusal could be corrected or eliminated, the potential for a rollover can be eliminated. The respondent submits there has been no MMHE rollover at YHZ, and that the respondent has taken proper precautions with HIAA to ensure that chocks and tow bars be kept out of the service area. The respondent writes that works and repairs have been made to service roads (HIAA has widened the shoulders of service roads, repaved portions and installed guard rails in other locations).

Direction issued under subsection 145(1) of the *Code*

[33] In regard to the direction issued on December 9, 2016, the respondent argues that the appellant does not have the standing authority to ask that the risk assessment required under the ministerial delegate's direction be conducted on a national level, since the appellant does not work for any other carrier or airline than the respondent, at the YHZ location. The respondent points out that no other airlines came forward to dispute the ministerial delegate's direction and, therefore, there is no need to expand its scope to them or to a national level.

[34] In addition, the respondent argues that in order to have standing, the appellant should be *aggrieved* by the direction as opposed to simply being dissatisfied with the scope. The respondent suggests that an expansive interpretation of "aggrieved" would open the door to challenges of every direction issued by a ministerial delegate by employees who may not be directly affected by the direction issued.

Appellant's Reply

[35] In its reply submissions, the appellant submits that ramp attendants are exposed to an imminent danger every time they drive down the ramp while wearing a seatbelt on MMHE not equipped with roll bars. The appellant also submits that the ramp attendants who testified are experts and that driving MMHE without roll bars makes them "uneasy".

[36] The appellant did not submit a reply concerning the respondent's submissions in regard to the contraventions identified in the direction.

Analysis

Decision of absence of danger rendered under subsection 129(7) of the *Code*

[37] The appellant engaged in a work refusal pursuant to subsection 128(1)(a) of the *Code*:

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

[38] The concept of danger under the meaning of the *Code* is defined at subsection 122(1):

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

[39] Since the coming into force of the most recent definition of danger in October 2014, appeals officers have been consistent in applying the interpretation of the concept of danger developed in *Ketcheson*. The appeals officer in *Ketcheson* undertook an extensive comparison between the previous definition of danger and the new one in order to assess the nuances intended by the legislator. The relevant parts of the appeals officer's comparison in *Ketcheson* read as follows:

> [186] In summary, the legislative evolution of the definition of "danger" suggests that, in spite of some similarities in terminology, the 2014 definition is different in nature from its predecessors – both of them. It is neither a reversion to a pre-2014 "imminent danger", nor is it merely a simplification of the 2000-2014 definition. There are two types of "danger". They are both high risk, but for different reasons. The new definition adds a time frame for assessing probability. It adds the concept of severity of harm. In the context of the rest of the Code, a "danger" is a direct cause of harm rather than a root cause.
>
> […]

> [193] The caselaw during the period 2000-2014 contained many expressions for probability: "more likely than not"; "likely"; "reasonable possibility"; and "mere possibility". What was often left unstated was the time period in which the probability was to be assessed: the day of the work refusal; the foreseeable future on the day of the work refusal; a year from the refusal? Is something likely? It may be almost certain to occur in the next five years, reasonably foreseeable to occur in the next year, but merely possible in the next five minutes. It is meaningless to talk about probability without specifying the time period. Unlike the 2000-2014 definition of "danger", the 2014 definition, by distinguishing between "imminent threat" and "serious threat", is adding a time frame for probability.
>
> […]
>
> [198] In the *New Shorter Oxford English Dictionary* (1993) the word "threat" is defined as: "a person or thing regarded as a likely cause of harm". Thus, it can be said that based on that definition, a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.
>
> [my underlining]

[40] As pointed out in *Ketcheson*, a threat entails a probability factor. The decision in *Keith Hall & Sons Transport v. Wilkins*, 2017 OHSTC 1 (*Keith Hall & Sons Transport*) underscores that for a threat to be considered a danger, there must be a reasonable possibility that this alleged threat could materialize:

> [40] It also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former definition required consideration of the circumstances under which the hazard, condition, or activity could be reasonably expected to cause injury or illness, the new definition requires consideration of whether the hazard, condition, or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the Code, to cause injury or illness to employees.
>
> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that

> can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.
>
> [my underlining]

[41] I adhere to my colleagues' interpretation of the concept of danger in *Ketcheson* and *Keith Halls & Sons Transport*. I believe that for a hazard to be considered a threat, the probability of the hazard materializing and the severity of the harm that this hazard may cause must both reach a minimum threshold. I also believe that for a threat to meet the definition of danger, it must be established that the threat could *reasonably be expected* to be imminent or serious. As submitted by the respondent, the legal test developed in *Ketcheson* is set out as follows:

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

2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?

Or

b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?

3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

What is the alleged hazard, condition or activity?

[42] The respondent claims that the hazard identified is that wearing a seatbelt would cause injury to a driver of MMHE *in the event of a rollover* precipitated by the lack of a roll cage, inclement weather, the possibility of being t-boned or the reckless driving of others. While I do understand that the main concern of the appellant is the alleged danger posed by a seatbelt while driving MMHE, because wearing a seatbelt would not allow him to jump off the moving vehicle in the case of a rollover, one can hardly dissociate the use of a seatbelt in the event of a rollover from the use of a seatbelt during the day-to-day duties involving the driving of MMHE. A rollover is unpredictable whether one wears a seatbelt, or does not. If an employee does not wear a seatbelt in the case of a rollover, he also does not wear a seatbelt during his day-to-day duties involving the driving of MMHE, in the event of a vehicle ejection or during a collision. I find that the alleged hazard in the present case is simply the use of a seatbelt while operating MMHE.

Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?

[43] The second part of the test consists of assessing whether the alleged dangerous activity could reasonably be expected to be an imminent *or* a serious threat to the life or health of the appellant. The first step of the second part of the *Ketcheson* analysis, when applied to this case, consists in determining whether the use of a seatbelt while driving MMHE could reasonably be

expected to be an *imminent* threat to the life or health of the appellant. In *Ketcheson,* the concept of imminence was interpreted as follows:

> [205] An imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.
>
> [my underlining]

[44] The appellant claims in his reply submissions that driving MMHE with no roll bars while wearing a seatbelt puts the driver in an imminent danger, but did not bring forward any evidence to support his claim. On the other hand, the respondent submitted that there was no occurrence that could have caused a rollover on the day of the work refusal. Since there is no evidence before me to support that there is a reasonable expectation that the use of a seatbelt while operating MMHE could have caused injury to the appellant within minutes or hours of his work refusal, the appellant's claim remains purely speculative, and I cannot conclude that the use of a seatbelt was an *imminent* threat to the appellant's life or health on the day of his work refusal.

Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?

[45] The second step of the second part of the test is to determine whether or not, at the time of his work refusal, the appellant was facing a *serious* threat to his life or health. The appeals officer in *Ketcheson* wrote the following concerning the seriousness of a threat:

> [210] A serious threat is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). Something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.
>
> [my underlining]

[46] Based on the meaning of *serious* as interpreted above and on the evidence before me, I cannot conclude that the use of a seatbelt while driving MMHE could have reasonably been expected to cause severe or substantial injury to the appellant in the days, weeks or months ahead of his work refusal. As the respondent submitted, the evidence included in the ministerial delegate's report is undeniable: in the event of a collision, ejection or accident, wearing a seatbelt will *reduce* the potential risk of injuries as well as the extent of these injuries. The appellant does not dispute the research study used by the ministerial delegate to reach her conclusion of absence of danger (*Comparison of risk factors for cervical spine, head, serious, and fatal injury in rollover crashes,* Accident Analysis and Prevention 45 (2012) 67-74). The study does not address open

structure MMHE such as the one used by the appellant as part of his duties, but it confirms that ejection from a vehicle is the source of serious and fatal injuries. I have analyzed the research methods used in the conduct of this epidemiological study and I am of the opinion that the study is reliable and pertinent to this case. The study focuses on the type of injury caused in rollover crashes, links fatality in the event of a rollover to the ejection of the occupant from the vehicle, and finds that the use of a seatbelt virtually eliminates complete ejection from the vehicle.

[47] Contrary to what the appellant suggests, the evidence before me leads me to conclude that there are more advantages to the use of a seatbelt than there are disadvantages. The seatbelt is a protective device used by the respondent in order to protect the health and safety of its employees, as opposed to threatening it. There can be no doubt about the effectiveness of wearing a seatbelt. Hence, I am of the opinion that the use of a seatbelt does the opposite of creating a serious threat to the life or health of a person exposed to it. Rather, as the evidence shows, the use of a seatbelt helps prevent such serious threat by protecting the driver, particularly in case of a collision, an ejection or a rollover.

[48] Since the submissions of the parties were mainly about whether or not the use a seatbelt could pose a danger to the appellant *in the case of a rollover*, I will address the concept of reasonable expectation, despite having already concluded that the use of a seatbelt does not consist of a serious threat to the life or health of the appellant. The concept of danger, as defined under the *Code,* requires that the hazard, condition or activity identified, *reasonably be expected* to be a serious threat to the life or health of the person exposed to it. Accordingly, if the hazard identified should only materialize in the case of a rollover, there must be a reasonable possibility that a rollover could happen and cause serious harm to the life or health of the appellant.

[49] As the Federal court recently confirmed in *Attorney General of Canada v. Laycock*, 2018 FC 750, the decision in *Verville v. Canada (Service correctionnel)*, 2004 FC 767 (*Verville*), even if rendered prior to the 2014 amendments to the current definition of danger, continues to offer useful guidance for the application of the concept of reasonable expectation. In *Verville*, Gauthier, J. stated that the risk of a serious threat must be real and reasonable as opposed to hypothetical and speculative:

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

[50] In the present case, the risk assessment conducted by the committee reveals that the possibility of a rollover is “remote” at best. “Remote” is, in fact, the lowest risk level the committee could award in terms of probability when conducting the risk assessment.

[51] In order to determine if a threat is a real possibility as opposed to a remote or hypothetical possibility, statistical information, even if not determinative, often proves to be relevant. To that effect, the appeals officer in *Brinks Canada Ltd. v. Dendura,* 2017 OHSTC 9 wrote as follows:

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

[52] The uncontested statistical evidence before me demonstrates that there were only 6 documented rollovers in North America in the past 28 years. Based on this information, I cannot infer that a rollover is a real possibility as opposed to a remote or a hypothetical one.

[53] Messrs. Towers, Hull and Collicutt and the appellant himself testified to the effect that they would feel safer on an open air baggage tractor without wearing a seatbelt, because not wearing a seatbelt would allow them to jump off the MMHE in the event of a rollover. Even though I cannot consider the appellant's witnesses as expert witnesses, I am mindful of their views when evaluating the reasonable expectation of the hazard identified at the first part of the test. As the court wrote in *Verville* at para. 51: "A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion."

[54] The appellant's witnesses made remarks concerning the state of the service roads at YHZ. The evidence gathered at the hearing showed that the HIAA enforces a speed limit and that no rollover accident has been reported at YHZ to this date. Concerning the comparison the appellant made with ATVs, the appellant's witnesses agreed during their testimonies that the service road at YHZ is not as turbulent and uneven as the trails on which ATVs are usually driven on. Moreover, the ministerial delegate did not notice any type of rough terrain or any grade over the one recommended by the manufacturer. I therefore give very little weight to this comparison.

[55] As for the circumstances raised by the appellant in which a rollover is more likely to happen, namely inclement weather, the possibility of being t-boned and the reckless driving of others, they remain purely hypothetical. I am convinced, based on the evidence included in the ministerial delegate's report, that the respondent dispenses appropriate training in order for the ramp attendants to drive safely in the circumstances surrounding the driving of MMHE on YHZ's tarmac. The appellant does not dispute the adequacy of the training given by the respondent.

[56] I do not minimize the views of Messrs. Towers, Hull, Collicutt and Robitaille based on their personal knowledge and life experiences, but I must give the appropriate probative value to their testimonies and balance them with the documentary evidence concerning the use of seatbelts included in the ministerial delegate's report. Even if the witnesses are unanimous, they only focus on the possibility of a rollover, without taking into account the incidents that are more likely to

occur, such as collisions and ejections. The evidence has shown that the risk of being ejected from MMHE is greater than the risk of the equipment rolling over, and that the best way to reduce the severity of the injuries caused by an ejection is the use of a seatbelt.

[57] Accordingly, based on the preponderance of the evidence, I find that the documentary evidence related to the use of seatbelts analyzed above outweighs the opinion evidence given by the lay witnesses who testified before me. There is no tangible evidence before me to support the appellant's claim that a serious risk of rollover could reasonably have been expected at the time of his work refusal.

Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[58] Given my conclusion on the second part of the *Ketcheson* analysis, I will not proceed to the third part of the test on whether or not the threat is likely to occur before the potential hazard can be corrected or altered.

[59] Based on the above, I find that the appellant was not exposed to a danger within the meaning of the *Code* when he exercised his right to refuse to work on November 13, 2016.

Direction issued under subsection 145(1) of the *Code*

[60] In her direction to the respondent issued on December 9, 2016, the ministerial delegate identified two contraventions to the *Code*, both enjoining the respondent to complete an assessment of the conditions which contribute to a rollover of each the MMHE used at YHZ. The appellant and the respondent both filed an appeal of the direction, but the respondent withdrew its appeal on August 23, 2017. The appeal before me is the one filed by the appellant, an employee.

[61] In order for an employee to appeal a direction issued by a ministerial delegate, the employee must feel *aggrieved* by the direction. The relevant provision of the *Code* reads as follow:

> **Appeal of direction**
>
> **146 (1)** An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction in writing to an appeals officer within 30 days after the date of the direction being issued or confirmed in writing.
>
> [my underlining]

[62] During his cross-examination, the appellant stated that he was not challenging the ministerial delegate's direction to the respondent to conduct a risk assessment, but that the goal of his appeal was to broaden the scope of the direction to include other airports and to reach other carriers. It is clear to me, based on his testimony, that the appellant does not feel *aggrieved* by the direction in the ordinary usage of the word "aggrieved". I agree with the respondent that giving a broad interpretation to "feels aggrieved" would lead to appeals of directions by employers, employees and trade unions that are not directly affected by the directions appealed.

[63] Based on what precedes, I find that there is no legal or factual basis to vary the direction issued by the ministerial delegate on December 9, 2016.

Decision

[64] For these reasons, the decision rendered by the ministerial delegate on December 9, 2016, is confirmed, and I dismiss the appeal of the direction issued on the same date.

Olivier Bellavigna-Ladoux
Appeals Officer