CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

C. Brazeau, B. Martin, B. Thoms,
B. Woods, A. Ozga and P. Gour
represented by Catherine Gilbert,
Associate Counsel, CAW-Canada

applicants

and

CAW-Canada, represented by
Catherine, Gilbert, Associate Counsel,
CAW-Canada

and

Securicor Canada Limited, represented
by Carl Peterson, Counsel

respondent

Decision No. 04-049
December 16, 2004

Appearances:

Applicant: B. Martin, B. Thoms, A. Ozga, S. Matthews, employees Securicor Canada Ltd.;
E. Torre, National Representative, CAW-Canada;
R. Charron, Local President, CAW-Canada; and,
C. Gilbert, Counsel

Respondent: T. White, General Manager, Securicor Canada Ltd.;
R. Potvin, Securicor Canada Ltd.,
S. Hénault, Securicor Canada Ltd.;
S. Avery, Securicor Canada Ltd.
C. W. Peterson, Counsel

Preamble

On September 30, 2002, C. Brazeau and B. Martin, employees of Securicor Canada Limited (Securicor), refused to work and get out of their vehicle to carry out their first stop of their night shift. They complained that a danger existed for them because Securicor had reduced their crew size from 3 persons to 2, such that there was no driver to remain with their new high technology S-Series vehicle while they conducted the stop. Without a driver to maintain surveillance at the site, they feared that they would be vulnerable to attack as they emerged from the building. They added that there was no driver to remove the vehicle or otherwise assist them in the event of a robbery and that the communication devices and training provided to them by Securicor were deficient. Health and safety officer Serge Marion investigated into their refusals to work and decided that a danger did not exist for either employee. The employees appealed the decision of health and safety officer Marion to an appeals officer pursuant to section 146.1 of the *Canada Labour Code*, Part II (Code).

On January 15, 2003, B. Thoms and B. Woods, employees of Securicor, refused to work and get out of their vehicle to carry out their first stop of their day shift. They complained that a danger existed for them because Securicor had reduced their crew size from 3 persons to 2, such that there was no driver to remain with their new high technology S-Series vehicle while they conducted the stop. Without a driver to prevent someone from blocking their vehicle and to maintain surveillance at the site, they feared that they would be vulnerable to attack as they emerged from the building. They also held that there was no driver to remove the vehicle or otherwise assist them in the event of suspicious circumstances or a robbery, and that the communication devices and training provided to them by Securicor were deficient. Health and safety officer Gilles Hubert investigated into their refusals to work and decided that a danger did not exist for either employee. The employees appealed the decision of health and safety officer Hubert to an appeals officer pursuant to section 146.1 of the Code.

On March 04, 2003, A. Ozga and P. Gour, employees of Securicor, refused to work and leave the bank which they had just serviced as their first stop during their night shift. They complained that a danger existed for them because Securicor had reduced their crew size from 3 persons to 2, such that there was no driver to remain with their new high technology S-Series vehicle while they conducted the stop. Without a driver to maintain surveillance at the site, they feared that they would be vulnerable to attack as they emerged from the building. They also held that there was no driver to remove the vehicle or otherwise assist them in the event of suspicious circumstances or a robbery, and that the communication devices and training provided to them by Securicor were deficient. Health and safety officer Serge Marion investigated into their refusals to work and decided that a danger did not exist for either employee. The employees appealed the decision of health and safety officer Marion to an appeals officer pursuant to section 146.1 of the Code.

With the agreement of parties, concurrent hearings were held in Gatineau, Quebec, on July 11,2003, November 12, 13, 14, 18, 19, 2003, and December 8 and 12, 2003.

[1] The employees who appealed the decisions of health and safety officers (HSOs) Marion and Hubert pursuant to subsection 129(7) agreed that I would conduct a concurrent review of their appeals under subsection 146.1(1) because the general circumstances surrounding their refusals to work were common. While the three appeals were heard during the same series of hearings and the decision applies generally, each appeal was considered and decided on its own merits.

[2] To assure a fulsome review, Securicor provided the tribunal with confidential documents regarding internal security procedures and equipment. To protect the confidentiality of the security information, and ultimately the health and safety of crews, as little of that confidential information as possible has been repeated in this decision. Nonetheless, parties are assured that all the material was considered.

Refusals to Work by C. Brazeau and B. Martin

Investigation Report/Testimony by Health and Safety Officer Serge Marion

[3] HSO S. Marion submitted a copy of his report regarding his investigation of the refusals to work by C. Brazeau and B. Martin, both employees of Securicor. I retain the following from his report dated October 8, 2002, and testimony at the hearings.

[4] On September 30, 2002, C. Brazeau and B. Martin arrived at work at approximately 7:30 p.m. to commence their night shift. Their supervisor, R. Potvin, informed them that they would operate as a 2-person-off[1] crew during their shift instead of the normal 3-person crew and that they would use one of Securicor's new S-Series armoured vehicles for the shift. R. Potvin told them that they were the first night shift crew in Ottawa to operate as a 2-person-off crew using an S-Series vehicle. R. Potvin reviewed the 2-person-off crew procedures on the new S-Series vehicle in Securicor's Operations Procedures with them. He further told them that their first stop would be another bank instead of their usual first stop.

[1] During the hearing, parties referred to 3-person crews, to 2-person crews, and to the new 2-person-off crews. In the case of a 3-person crew at Securicor, the driver remained with the vehicle during the stops. In the case of a 2-person crew, normally operated during the day, the driver remained with the vehicle during the stops and the custodian accompanied by a client employee completed the stop. In the 2-person-off crew scenario, the crew used an S-Series vehicle and both the guard and the custodian left the vehicle to carry out the stop. The new S-Series vehicle is equipped with specialized high technical security devices for protecting the liability and was left unattended during the stop.

[5] Shortly after arriving at the first stop at approximately 8:40 p.m., they called to supervisor Potvin and refused to work and complete the stop. Supervisor Potvin instructed them not to move the truck and immediately proceeded to investigate their refusals to work.

[6] Supervisor Potvin arrived at the bank and observed that the area was well lit, that there was a cleaner in the bank and that the vehicle was parked approximately ten feet from the front door of the bank. Supervisor Potvin surveyed the location and the truck and then walked to the side of the vehicle and told C. Brazeau and B. Martin that there was nothing suspicious at the stop. Nonetheless, the two employees continued to refuse to work. Supervisor Potvin then contacted S. Matthews, employee health and safety committee representative at Securicor for the Ottawa region, concerning the refusals to work.

[7] S. Matthews arrived shortly thereafter and conducted a separate investigation, as supervisor Potvin had left. Following this investigation, S. Matthews agreed with C. Brazeau and B. Martin that a danger existed and later prepared a written report concerning the investigation and conclusions. S. Matthews subsequently provided a copy of the report to HSO Marion. The following are excerpts from the written report of S. Matthews were copied as presented, except that gender pronouns were replaced by initial and surname:

> …The lights to the branch were on. This in itself was unusual to the crew who also witnessed one or more persons moving around inside the branch. All this was compounded by the fact that this location is situated in a dangerous part of town. B. Martin and C. Brazeau stated that in these situations they would normally become more alert, but would continue to do the stop because they would depend on their driver[2] to watch for possible dangerous situations to arise. The driver would then, from the security of the armoured vehicle, be able to warn the crew over the radio and contact emergency agencies i.e. police, ambulance etc. protecting the lives of the crew and the public until help arrives. Without a driver present C. Brazeau and B. Martin had no one to be their eyes to the outside of the bank to help prevent a possible robbery or to call for help should they be injured in an unavoidable confrontation.
>
> B. Martin and C. Brazeau also expressed a serious concern that in the event of a robbery taking place they would have to "convince" a robber that there is no possible access to the vehicle and hope that the robber wouldn't take retribution on them because he thought they were lying. A driver could flee with the truck eliminating liability[3] and possibility of a hostage situation.
>
> C. Brazeau expressed a concern that the tamper alarm would not go off (on the S-Series vehicle) if someone tampered with the lock on the entry door by jamming, for example, a toothpick or other device in the door key lock.

[2] In a 3-person crew scenario.
[3] Liability is defined in *Merriam Webster's Dictionary*, 10th Edition, 1998, as something for which someone is responsible. In the case of the armoured vehicle industry this would broadly mean any pecuniary valuable that they were hired to handle.

> C. Brazeau explained that a driver would detect anyone tampering with a lock.
>
> B. Martin and C. Brazeau also stated that there are many "dead zones" in the city and they don't feel safe relying on a cell phone as the single communication device with which to reach police, fire, and ambulance services. Also if they get were injured in an attempted robbery there would be no one to call for help… .
>
> B. Martin and C. Brazeau went on to explain their training sessions for the new trucks systems. The training length was scheduled as four hours but the actual training time was two and one half hours, with the class split up into three groups of trainees. Because of space restrictions of the interior of the truck only one group could be taught the truck systems at a time. B. Martin and C. Brazeau estimated the time that each training group actually spent in the truck was only 20-30 mins. No drills were conducted on how to properly guard the custodian in and out of the vehicle. A driver, whose job it was to cover the front of the truck, had now been eliminated but no new training drills had occurred. The written procedures were handed out for approximately five mins. for the class to read but trainees were not given a copy to take home and study.
>
> B. Martin and C. Brazeau brought up a concern that there is only one door key and if the person with the key was incapacitated the other crew member would be left in the dangerous position of having no access to the safety of the truck.
>
> Location Inspection
> …The location has many escapes including the Queensway and is situated in a dangerous neighborhood (there have been previous instances of robberies at this bank). There are low branches around the premises that, in the past, have provided shelter for drunks. These bushes provide potential coverage for criminals waiting to ambush the truck and crew. On the south side of the building there was a dark unlit stairway leading to an entrance underground. This is another possible hiding spot for criminals intending to rob the crew. In this stairway a green/black backpack was spotted at the bottom of the stairs next to the door. The suspicious package was left untouched and police were dispatched to the scene.

[8] HSOs Serge Marion and Gilles Hubert arrived to investigate the refusals by C. Brazeau and B. Martin. The two HSOs observed that access to the bank was lighted and the armoured vehicle was parked approximately ten feet from the sidewalk. Numerous clients used the automated bank machine (ABM) at the site while they conducted their investigation.

[9] The two officers then interviewed C. Brazeau and B. Martin and had each of them complete a refusal to work registration form. The following is paraphrased and extracted from the refusal to work registration form signed by C. Brazeau:

> At the bank there were 5 or 6 individuals in the Bank using and waiting to use the Automatic Teller Machines (ABMs), 2 suspicious men outside of the Bank near the doors, a parked vehicle with driver in the parking lot across from

> their vehicle. We both agreed that our lives were in danger and called Supervisor Potvin and a person inside the closed Bank. There were many escape routes at the site and low bushes that could hide someone.
>
> With a 2-person off crew, there is no driver to stay with the vehicle for protection through surveillance while they are in the branch, and for communication between driver and crew (from inside the branch to the public). Without a driver, there is no fast entry point to the truck from any danger, being held gun point, and the driver cannot leave due to fact that there isn't any. We had a cell phone which dies 2 hours later. Also there were no procedures on how the truck runs completely… .

[10] The following is paraphrased and extracted from the refusal to work registration form signed by B. Martin:

> I refused to work due to the unsafe working conditions. My crew was reduced from a 3-person crew including a driver, custodian and guard to just a custodian and a guard. When we arrived on site, there were two individuals standing at the door to the bank and another person in a car parked to my left. Three or four people were also using the bank machine. With the new trucks in use, both the custodian and the guard must exit the vehicle leaving no way of knowing what is happening outside and what is waiting for us. I told my partner that I didn't feel safe because there was also someone inside the bank.
>
> We have been taught that if we get held up, the driver is to leave with vehicle. This can't happen under the new trucks and procedures. It makes me feel very unsafe – we have no communication with the driver that we rely heavily on during time of trouble.

[11] Employees later provided health and safety officer Marion with three documents that supported their position that the driver (who stayed with the vehicle in a 3-person-crew) was responsible for surveillance, early warning and for removing the vehicle during a robbery.

[12] The first document was a letter signed by C. Healey who wrote of being attacked by two armed robbers on June 6, 1994 while acting as custodian. According to C. Healey, the driver saw what was transpiring and let the custodian enter the truck before the armed robbers got close. The guard was left outside the truck, but before the assailants could use the guard as hostage, the driver had left the scene with the liability. He held that, without the quick thinking of the driver, they could have been seriously injured or killed.

[13] The second document was a Loomis Armoured Car Procedure inter-office memorandum dated October 4, 1996, signed by S. Hénault, Senior Supervisor, now with Securicor. The memorandum advised Securicor employees that a recent incident had confirmed that removing the vehicle from the scene during a robbery prevented injuries to crews because it eliminated the motivation for robbers to take hostages to gain access to the vehicle.

[14] The third document dated September 2000 appeared to be an employee advisory (company not identified) that reminded crews, among other things, that special attention had to be given to the parking of trucks when making pick-ups and deliveries. Crews were advised to ensure that drivers kept the custodian in full view to the maximum extent possible.

[15] HSO Marion also investigated into allegations by C. Brazeau and B. Martin that they had not been properly trained in respect of the S-Series vehicle and Securicor Operations Procedures that applied to its use. He attended part of a training session on the S-Series vehicle similar to the one that Securicor had provided to C. Brazeau and B. Martin and decided that the training was adequate. In this regard, he referred to a letter dated October 1, 2002 that T. White, General Manager, Ottawa-Kingston, Securicor had sent confirming the training points covered in the Securicor course. These training points included:

- all of the functions on the vehicle through a general familiarization;
- steps required to perform a route;
- a simulation as how the S-Series vehicle would be used on the street; and,
- guarding procedures and Securicor Operations Procedures for the 2-person-off crew.

[16] HSO Marion further noted that S. Staff, Director of Security, Securicor, prepared and sent a memorandum[4] to Branch Managers on August 1, 2002. The memorandum outlined 2-person-off crew operation procedures using the S-Series vehicle. The document described the revised procedures and held that the use of new technologies combined with strict crew procedures ensured that there was minimal impact to the level of protection for the liability and employees.

[17] Securicor advised HSO Marion that the security features connected with the new S-Series vehicles protected the liability in the truck and removed the necessity for the driver. He noted that Securicor had already operated 2-person-crews during the day, but the night shift 2-person-off crew operated by C. Brazeau and B. Martin on September 30, 2002 was different. During the day shift, the driver in a 2-person-crew remained with the vehicle and the custodian was escorted into the client's location by a client employee. The driver who remained with the vehicle was responsible for surveillance at the stop to assess any suspicious circumstances that could result in an unsafe condition for the custodian. However, in the case of C. Brazeau and B. Martin, the 2-person-off crew night shift procedures required both employees to leave the vehicle and to conduct the stop together as there was no client employee to escort the

[4] The memorandum included a document dated September 21, 2002, entitled "CS1 CT Training Course, All Off."

custodian and ensure dual custody of the liability. As a result, there was no driver to stay with the vehicle.

[18] HSO Marion stated that his task was to determine if the circumstances surrounding their refusals to work met the definition of danger in Part II. In this regard, he noted that the armoured vehicle industry has a normal condition of employment having a high risk. He opined that the danger is likely to be a normal condition of employment when:

- it is a permanent attribute or quality of a job;
- It is an essential characteristic or element of a job;
- It is likely or probable to cause injury unless special precautions are taken;
- it exists regardless of the method used to perform the work.

[19] Following his investigation HSO Marion concluded that a danger did not exist for C. Brazeau or B. Martin because:

- the guards had received training from Securicor which he deemed to be adequate on two-person-off crew procedures and on the S-Series vehicle;
- Securicor had provided him with a review of violent incidents in Ontario over the past ten years. The document showed that the relative number of incidents was low. He noted that C. Brazeau and B. Martin could only recall 2 or 3 robberies within the last six years and that, of those, only one resulted in an injury to an employee;
- Securicor had provided him with a report of a risk assessment they had conducted that demonstrated that the work performed by guards has a higher risk factor when performed during the day than when performed at night;
- despite the fact that crews relied on the driver to advise them of a robbery, the presence of a driver would not prevent a robbery. If a robbery occurred, the employees were trained to fully cooperate with the robbers [to mitigate the risk of injury];
- the S-Series vehicle has security features that would prohibit a thief from driving the vehicle away or from accessing the load;
- the Securicor procedures in place minimized the risk of an incident and thereby minimized the risk of injury. The remaining risk was inherent to the work.

[20] At the hearing, HSO Marion confirmed for Ms. Gilbert that he did not regard the fact that Securicor had changed the first stop for C. Brazeau and B. Martin, or that Securicor had altered the crew size such that there was no driver to stay in the vehicle, as relevant to his decision. He testified that he only considered the observable circumstances that existed at the time of his investigation.

[21] The HSO disagreed with her that the role of a driver was to provide surveillance, but agreed that, when there was a driver, the driver was available to advise crews of suspicious situations or individuals and to leave the location. He also agreed that a driver could use the vehicle as a weapon or as a shield to assist the guard and custodian. He noted, however, that employees could only remember two situations where this had occurred.

[22] HSO Marion agreed with Ms. Gilbert that it would be difficult for employees to completely co-operate with robbers because the S-Series vehicle was equipped with security features that prevented crews from giving anyone access to the vehicle or to the liability. He also confirmed that he was aware that Securicor had not conducted a hazard analysis of the bank that was to be serviced by C. Brazeau and B. Martin and that C. Brazeau and B. Martin were each provided with a cell phone and a two-way radio.

[23] HSO Marion confirmed for C. Peterson being aware that the driver in a 3-person crew could not leave the vehicle in the event of a robbery, even to assist the custodian and guard, and there was a point in which the driver could no longer see the guard and custodian as they entered the location.

[24] He further agreed with C. Peterson that:

- a 2-person-off crew could survey a location before the guard left the vehicle by driving around the location and by using the vehicle windows and cameras;
- there was no driver in a 2-person-off crew to be coerced by robbers to gain entry into the vehicle thereby eliminating the risk of a custodian or guard being taken hostage for this;
- the normal work of a crew in the armoured vehicle industry was to service areas where clients of the company came and went;
- the normal work of a crew in the armoured vehicle industry was to enter areas that were essentially blind to the guard and custodian;
- C. Brazeau and B. Martin had exchanged cell phones with their replacement crew so the cell phone that they reported going dead after two hours was not the one with which they started;
- crews could return to their branch for new batteries at any time; and
- the S-Series vehicles were equipped with detectors to detect any tampering with the vehicle and an on-board pager for alerting guards and custodians, and the Securicor dispatcher that tampering had occurred.

Written Submissions - Appellants[5]

[25] In written submissions submitted to the appeals officer prior to the hearing in respect of each of the three cases, the appellants requested that the decisions by HSOs Marion and Hubert that a danger did not exist for the 6 employees who refused to work be reversed. It was held that the officers had not considered all relevant information available to them, but had considered evidence which was immaterial and/or inaccurate with respect to the refusals to work. The submissions also disagreed with the interpretation and application of the Code by HSO Marion and Hubert in respect of the refusals to work.

[26] Specifically, the appellants' submissions alleged that the HSOs had not considered that Securicor's prevention program was deficient in the following four areas:

- importance of the driver;
- communications;
- training; and
- risk assessment and robbery statistics.

[27] According to the submissions, the driver in an armoured car crew was essential to the health and safety of the guard and custodian because the safety and security of every crew member had to be guarded at a stop. The employees who refused to work maintained that there was an industry culture to this effect whereby the driver guarded the guard, the guard guarded the custodian, and the health and safety of the driver was guarded or protected by the vehicle, the only safe location at a stop.

[28] Specifically, the driver guarded the guard, and coincidently the custodian, by providing surveillance of the area behind and to the left of the vehicle while the guard exited the vehicle to secure the route between the vehicle and the building where the client was located. When the area was secured, the custodian exited the vehicle and entered the building. When it came time for the guard to exit the client's location to secure the area between the location and the armoured vehicle for the custodian, the driver provided the guard with early warning of any suspicious person or circumstance outside of the location, and then surveyed the area behind and to the left of the vehicle while the guard exited the building and took up position. It was pointed out that some stops took up to and sometimes over forty-five minutes to complete.

[5] Appellants submitted a separate submission for each of the 3 refusal to work situations. While they included certain aspects unique to each refusal to work situation, the majority of the submissions were similar. Differences were noted in their individual testimonies..

[29] The appellants' submissions held that, once the guard and custodian were in the building and no longer visible to the driver, the driver maintained constant surveillance of the location. In the event of a suspicious person or circumstance, the driver forewarned the guard and custodian to remain in the location, used the vehicle to investigate the matter and/or called for police backup using the cell phone in the vehicle. To support their claim, the employees referred to Securicor's Operations Procedures that required drivers to remain vigilant at all times, and they also referred to an internal Securicor advisory that reminded drivers to remain vigilant. All employees who refused to work reported that they had been forewarned by their driver in this manner on numerous occasions.

[30] According to the appellants' submissions, drivers were essential also because they maintained 2-way radio communications with the crew while the guard and custodian were in the client's location. In that way, the guard and custodian were able to report anything suspicious to the driver, and to go to "open-mike" if they became apprehensive. In the "open-mike" mode, the guard and custodian switched their 2-way radios to transmit so that the driver could hear their conversations and events continuously. If the driver overheard something threatening, the driver called for the police or an ambulance. The employees who refused to work confirmed that they relied on the driver and their 2-way radios in the past for this and maintained that it would be extremely difficult to call for help using a cell phone as the cell phone would be difficult to access and operate during a robbery. They further held that the cell phones did not replace the driver because they were unreliable. They stated that cell phone communication dead zones existed throughout the city of Ottawa and on out-of-town runs, and cell phone batteries often failed during their shifts.

[31] Moreover, the appellants maintained that the crew initiated alarm (CIA), a device that Securicor provided to its crews following the C. Brazeau and B. Martin refusals to work, did not replace the driver. The devices that could be used to remotely trigger the audible alarm in the truck or the silent alarm to the Securicor dispatcher required line of sight view with the vehicle to operate.

[32] Employees further claimed that the driver knew the estimated time for each stop and checked with the guard and custodian if they were delayed. This provided early response if the guard and custodian were under attack or injured by assailants.

[33] According to the evidence, Securicor permitted its drivers to advise the dispatcher in the event of a robbery and to get authority to drive away from the site to protect the liability in the vehicle. However, without a driver in a 2-person-off crew, the guard and custodian would have to convince the assailant(s) that they were unable to disable the security features on the

vehicle that separated the assailant(s) from the liability in the truck. The employees who refused to work all complained that they had not received any instruction or training from Securicor on how to convince an assailant of this.

[34] The applicants further argued that the driver was essential to their safety and health because the driver could use the vehicle as a shield or a weapon in the event of a robbery.

[35] The submission of the applicants went on to complain that a driver who stayed with the vehicle was critical to their health and safety because they were only permitted to park their vehicle close to a building entrance if a driver remained with the vehicle. The driver was necessary to occasionally move the vehicle to accommodate normal vehicular traffic activity at the stop. Without a driver to stay with the vehicle, crews were obliged to park farther away and sometimes remotely from the client's access entrance. This additional distance and difficulties related to securing the route prior to leaving the vehicle exposed the guard and custodian to greater risk. The additional risk was further exacerbated by the line of sight requirement for the CIA devices.

[36] The appellants' submissions additionally held that the change from a 3-person crew to a 2-person-off crew created an unacceptable level of danger because the Cash In Transit (CIT) Vehicle Training provided by Securicor failed to address how the safety of the guard was to be protected without a driver and how crews were to handle hostage situations. The employees who refused to work were firm that the training Securicor provided was rushed, and, unlike the training program audited by HSO Marion, employees only had a brief opportunity during their training to see the Securicor's Operations Procedures entitled "Security Directive #S 03/02 – Reduced Crewing Procedures – CIT S-Series Armoured Vehicle Crewing". The submission reiterated that employees who refused to work were provided with insufficient time to understand the instruction and training and to assimilate the information.

[37] Finally, the written submission held that the risk assessment and violent incident statistics that Securicor provided to HSO Marion were flawed, misleading and incomplete.

[38] The applicants held that the risk assessments were flawed because:

- the assessments did not address the communication dead zones which excluded the use of the cell phone, or the fact that the batteries in the 2-way radios routinely failed;
- the assessments did not address the fact that emergency calls had gone unanswered, or circumstances where cameras mounted on the S-Series vehicle malfunctioned frequently during winter stops;

- it did not make sense for Securicor to have assigned significantly different risk levels to CIT commercial and CIT ABM day runs to the same location, or to have assigned a lower risk value to a CIT ABM night run compared to the same run during the day, especially given the fact that the number of night runs have increased significantly; and
- the risk assessments did not take into account that stops can take up to forty-five minutes or more.

[39] The applicants maintained that the robbery and injury statistics quoted by Securicor regarding violence were incorrect because they did not include data for Ottawa or other cities where there have been numerous robberies and attempted robberies with assault over the last ten years. In this regard, they proffered evidence from the Canadian Centre of Justice Statistics (CCJS)[6] that reported the following national statistics for robberies or attempted robberies which included:

- 2001 - 3;
- 2000 - 6;
- 1999 - 3; and
- 1998 - 8.

[40] With specific reference to the refusals to work by C. Brazeau and B. Martin, the applicants' document noted that Securicor had instructed the crew to alter their first stop. It was alleged that this was significant because the parking lot normally used for the first stop could have been full, and, without a driver to stay with the vehicle, the guard and custodian could have been forced to park their vehicle a block or two from the entrance of the stop and walk the distance with the liability. It was also known that the cell phone could not be used at that location because it constituted a cell phone dead zone.

[41] In conclusion, the applicants asked that I rescind the decisions of HSOs Marion and Hubert and find that a danger existed and issue a direction requiring Securicor to:

- ensure that a driver shall remain with the armoured vehicle at all times;
- improve the communication equipment provided to crews including a sufficient number of portable radios and cell phones and charged batteries to supply each employee;
- revise its training program in consultation with the union to ensure that all employees receive complete, detailed training on the S-Series vehicle including a significant training component on guarding in the context of the new truck; and

[6] The CCJS reported that their statistics were not necessarily comprehensive as the data only came from 154 police departments representing 59% of the national volume of crime data.

- such further order as the appellants may seek and/or the appeals officer may deem appropriate.

Written Submission - Securicor[7]

[42] Securicor submitted a written submission to the appeals officer prior to the hearing in response to the applicants' submission. I retain the following from its document.

[43] Securicor held that they had proactively researched the design of the S-Series vehicle in consultation with a vehicle design committee comprising of Securicor management, union and employees. The objective of the consultation was to increase safety for employees and security for the vehicle and liability. According to Securicor, the S-Series vehicle finally selected was equipped with advanced security technology to protect the liability such that the vehicle and its liability could be left unattended (i.e., no driver). For example, in the event that the vehicle was tampered with in any way, the advanced security technology would signal the Securicor dispatcher and the crew via a pager that the vehicle was under attack and possibly being moved. The dispatcher would then alert the police. Securicor added that the crew could also use their CIA device[8] to initiate the advanced security technology alarm from their position in the event of a robbery or suspicious circumstances and summon help through the Securicor dispatcher.

[44] In addition to this, crews had a cell telephone for alerting the dispatcher that they were under attack.

[45] According to Securicor, the principal role of the driver who stayed with the vehicle was to protect the liability and not to provide surveillance. Securicor added that drivers had to move the vehicle sometimes to accommodate normal vehicular traffic at a stop and could not be expected to maintain constant surveillance. In support of the position that drivers were not there for surveillance, Securicor noted that it had observed drivers being less than attentive and recalled one situation where a driver was unaware that a robbery was in progress.

[46] Securicor confirmed that crews were to ensure that there was always an escape route for the vehicle. However, Securicor held that the guard and custodian in a 2-person-off crew could always go to another stop if they felt that their vehicle would be blocked.

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[7] Securicor submitted a separate submission for each of the 3 refusal to work situations. While the submissions included certain aspects unique to each refusal to work situation, the majority of the submissions were similar.

[8] C. Brazeau and B. Martin were not provided with a CIA device as they were not issued to crews until after their refusals to work.

[47] Securicor pointed out that pedestrian and vehicular traffic were a common occurrence at a stop and the guard and custodian had to accept this. It clarified that a route sheet normally predetermines the route followed by a crew, but the custodian could alter the run if the crew decided that something was unsatisfactory at a stop. They only had to inform management with reason that they were proceeding to another location and return at a later time.

[48] With regard to communications, Securicor held that the cell phone was standard equipment for all crews and was the principal means of communication for crews whether or not there was a driver to stay with the vehicle. In addition to the cell phone, Securicor reiterated that the company provided its crews with 2-way radios, a pager and a CIA device to enhance safety. Securicor claimed that these devices were the best performing devices on the market and this ensured their performance and reliability.

[49] Securicor stated every S-Series vehicle was equipped with a battery charger to ensure that the cell phones could be recharged during a shift. However, crews could return to their workplace for a replacement cell phone or new batteries if they experienced any problems with the cell phones. In addition, the guard and custodian could always use a land telephone located at the site if their cell phone failed.

[50] Securicor maintained that they had never experienced a situation where a crew was unable to reach Securicor in an emergency. Moreover, past incidents had shown that 9-1-1 calls were made by all members of crews and usually after the robbery.

[51] The Securicor submission further stated that there had not been any incidents in the past where crew members were taken hostage by assailants to gain access to the vehicle whether the driver departed the scene or decided to stay at the scene. Securicor opined that the absence of a driver in a 2-person-off crew increased safety for the guard and custodian because there was no driver to coerce in a hostage situation.

[52] Securicor was unaware of a situation where an armoured vehicle was used to attack assailants, but conceded that the vehicle could be used as a shield for the guard and custodian.

[53] Securicor reiterated that the training provided to employees included the operation of the S-Series vehicle, the high technology security devices on the vehicle and Securicor's revised Operations Procedures. Securicor further held that its Operations Procedures that applied to 2-person-off crews were essentially the same as the previous procedures for 3-person crews. Securicor maintained that it was the role of the guard

in either crew configurations to ensure that the area outside the vehicle was safe for the custodian. Securicor argued that, not having a driver to stay with the vehicle just forced the guard to be more vigilant when securing the area for the custodian. Securicor reiterated that crew members were instructed to comply with assailants and give them the liability.

[54] Securicor disagreed with employees that they had only received twenty to thirty minutes of training and that the instruction and training was too short and insufficient. Securicor countered B. Martin had signed a training record document that confirmed having attended four hours of training and that it was satisfactory. Securicor reiterated that HSO Marion had confirmed that their instruction and training was adequate. Securicor added that section managers reviewed the security and operational functions of the S-Series vehicle with crews who refused to work just before they departed for their run to ensure that they were familiar with the equipment.

[55] Securicor stated that the 2002 risk assessment was conducted by the chairs of the Securicor's national health and safety policy committee. However, it conceded that the risk assessment was a generic assessment of the types of locations served, the equipment used and the usual environment. It further conceded that the assessment did not cover the type of vehicles used to perform the work, the time at a stop, or the communications "dead zones" related to the cell phones.

[56] Securicor held that the statistics they presented to HSO Marion confirmed that the robbery attempts had occurred during the CIT day commercial runs, as opposed to the ABM night runs, and noted that Securicor, Ottawa, had only experienced six attempted robberies. Of these, two occurred in 1993; two in 1994; and two in 1996. However, Securicor held that Ottawa has not had any robberies in the last eight years. Securicor noted that the rest of Canada has also experienced a similar decrease in robberies. Finally, Securicor maintained that 2-person crews had been used at Securicor for eight years without incident to supply emergency cash to ABMs in Toronto, Montreal, Vancouver and Halifax.

[57] Securicor held that statistics on armoured car robberies demonstrated that the majority of attacks occurred between the customer location and the armoured vehicle, and that attacks rarely occurred inside the customer's location. They held that industry statistics further proved that the crews had no opportunity to make contact with a land telephone, cell phone, 2-way radio or other communication device until after the assailants had left the scene. Securicor claimed that it only had one attack in over 64 000 stops in Ottawa and concluded from this that the chance of a robbery and of severe injury was rare.

[58] Finally, Securicor held robberies were an inherent risk associated with the armoured vehicle industry and a normal condition of employment. Employees fully understood that at some time in their career it could happen to them. Securicor argued that proof of increased risk of robbery must come from verifiable information such as police reports. Otherwise there is no way of predicting human behaviour.

[59] Securicor explained that in the case of C. Brazeau and B. Martin it had changed the route as it anticipated the refusals to work. The first stop ordered by Securicor ensured a quick response time with minimal impact to Securicor's operations and customers. B. Thoms also testified that the hotel where they refused to work was not their usual first stop and only went there first because Securicor had instructed them to do so.

Testimony by B. Martin

[60] B. Martin had been employed by Securicor for approximately two and a half years and had been previously employed by Pickerton for approximately seven and a half years. Experience at Securicor included time as a guard, custodian and driver on the various shifts and runs.

[61] B. Martin testified to having continued to refuse to work the evening of September 30, 2002, after the suspicious persons were no longer present, because there was no driver to stay with the vehicle during the stop. B. Martin repeated the reasons given in the written submission as to why a driver is essential to the health and safety of the guard and custodian.

[62] In addition, B. Martin testified being dissatisfied with the training provided by Securicor on the S-Series vehicle and the two-person-off crew procedures. According to B. Martin, T. White's letter to HSO Marion on October 2, 2002 concerning the teaching points was incorrect in that item 3 (use of S-Series vehicle) was only covered partially and item 4 (Guarding procedures and Securicor Operations Procedures for the 2-person-off crew) was not covered at all.

[63] According to C. Brazeau's written statement, the class size was too large and there were too few vehicles available. As a result, the actual training on the vehicle lasted only for approximately thirty minutes. Moreover, the thirty minutes only provided each participant with approximately ten to fifteen minutes of actual training and participants only had five minutes to read the handout explaining security features on the S-Series vehicle.

[64] When the truck was loaded, supervisor Potvin had to remind them how to get on and off the truck and how to transfer the truck to CIT mode.

[65] B. Martin confirmed having been equipped with a two-way radio and a cell phone at the time of the refusals to work.

[66] In response to C. Peterson, B. Martin agreed that guards and custodians were normally required to enter or to be exposed to numerous blind spots in banks, malls and buildings while accessing ABMs. B. Martin confirmed having worked the previous night before on a 3-person crew in an S-Series vehicle and had not refused to work for having to enter or be exposed to blind spots.

Refusals to Work by B. Woods and B. Thoms

Investigation Report/Testimony by HSO Hubert

[67] HSO Hubert submitted a copy of his report on the refusals to work by B. Thoms and B. Woods and testified at the hearings. I retain the following from his report dated February 27, 2003, and testimony.

[68] On January 15, 2003, B. Thoms and B. Woods working the day shift were assigned to service an ABM at a hotel located in Ottawa, Ontario. This was not unusual for them, except that on this day, they were informed that they would complete the shift as a 2-person-off crew using an S-Series vehicle. Securicor provided them with a pager which alarmed if the vehicle was disturbed while they were away, and with a CIA device which they could use to activate the audible alarm in the vehicle and a silent alarm that connected to the police through a GPS telephone. The previous instruction provided to them on the 2-person-off crew and the S-Series vehicle only lasted for approximately 25-30 minutes.

[69] They told HSO Hubert that they had been unable to use the normal parking location at the hotel when they arrived that day. To use the normal parking spot, it was necessary for a driver to remain with the vehicle because it was necessary to move the vehicle to accommodate the arrival of tour buses transporting hotel guests to and from the hotel. Management at the hotel had suggested that they park on another street to the side of the hotel, but this was unsatisfactory for B. Thoms and B. Woods. It was unsatisfactory to them because they could not assess whether or not the course from the vehicle to the entrance of the hotel was secure prior to leaving the vehicle, and they would have had to walk a distance with the liability in hand. The hotel then suggested that they park in the front court of the hotel, which they did. This, however, proved unacceptable because other vehicles could park behind their vehicle and effectively block their escape route in the case of a robbery. In fact, their vehicle was blocked by another vehicle twice during the stop.

[70] But the employees told HSO Hubert that they were mostly concerned about being assaulted while outside the armoured vehicle because there was no driver to drive away in the event of a robbery. As a consequence, they would have had to convince the assailant(s) that they were unable to defeat the security systems on the S-Series vehicle which protected the vehicle and the liability. B. Thoms and B. Woods further complained that:

- they had never been trained by Securicor on proper 2-person-off crew procedures;
- the cell phones did not work half the time;
- bullet proof vests were not immediately available to them; and
- engine exhaust fumes entered the armoured vehicle when the vehicle was left idling.

[71] The two employees were succinct in their respective refusal to work registration forms which stated:

> Refusal to work due to unsafe working conditions.

[72] Securicor management told HSO Hubert that B. Thoms and B. Woods had agreed with their supervisor that they understood and were satisfied with the training provided to them at the start of their shift on the use of the pager and CIA device. HSO Hubert was also told that the pager and CIA device were thoroughly tested the previous day.

[73] With regard to the parking situation at the hotel, Securicor maintained that B. Thoms and B. Woods were veteran armoured vehicle employees and knew that Securicor policy permits crews to reschedule a stop if they perceived a danger.

[74] Securicor reiterated to HSO Hubert that there was a cell phone charger in the truck, and that the use of bullet proof vests was at the discretion of employees.

[75] HSO Hubert observed that the vehicle was parked at the hotel in a location where it was impossible to escape with the S-Series vehicle when another vehicle was parked behind it. He further observed that:

- the hotel was not very busy;
- the entrance to the hotel was clear;
- the area was well lighted by natural sunlight;
- the lobby was large; and
- it was possible to see the area immediately outside of the hotel as the front entrance and walls were mostly windows.

[76] However, HSO Hubert confirmed that it was difficult to see the lobby of the hotel from the armoured vehicle parked in the new parking space.

[77] HSO Hubert said that B. Thoms and B. Woods had told him that they had accidentally triggered their CIA device and Securicor had no record that a silent alarm had been sent. HSO Hubert also testified that he was not convinced that the absence of a driver to stay with the vehicle at a stop increased the risk to the guard and custodian. He held that any danger there was inherent to the work.

[78] After completing his investigation, HSO Hubert decided that a danger did not exist for B. Woods or B. Thoms beyond the inherent danger that is associated with this type of activity because there were no abnormal or unusual circumstances in the workplace.

Testimony by B. Thoms

[79] B. Thoms had been employed at Securicor for 8 years and had worked at Loomis Security prior to joining Securicor. While at Securicor, B. Thoms had worked 6 different night runs as driver, guard or custodian and worked 2 different day runs, as driver, guard or custodian. It was noted that B. Woods, who accompanied B. Thoms at the time of the refusal, was no longer with Securicor and would not testify.

[80] B. Thoms reiterated the security culture throughout the armoured vehicle industry was that everyone was to be protected by someone or something. Specifically, the custodian was protected by the guard, the guard by the driver and the driver by the truck.

[81] B. Thoms stated further that the driver could take preemptive measures in the event of suspicious circumstances or a robbery, such as:

- calling the police;
- evacuating the site;
- using the vehicle to shield the guard and custodian; and/or
- using the vehicle as a weapon.

[82] In connection with this, B. Thoms testified that it was a widely held view in the industry that the vehicle should be removed in the event of a robbery to remove the motivation for a robbery or hostage taking to continue.

[83] According to B. Thoms, the S-Series vehicle was made available to Securicor crews in November of 2002 and the two of them wanted to try out the new S-Series vehicle and its new security features. They were not concerned that they had only received a half day of training on the vehicle because they operated the vehicle as a 3-person crew on replenishment

runs where there were no fixed routes or timeframes. He noted that open mikes had been phased out before with the use of S-Series vehicles.

[84] During their use of the S-Series vehicle in a 3-person crew configuration, the emergency alarm failed to sound once when the vehicle was disturbed, and the device limiting access to the truck failed to operate properly.

[85] When B. Thoms and B. Woods used the S-Series vehicle as a 3-person crew, their average stop time to replenish an ABM was fifteen minutes. They had a two-way radio to communicate with the driver who remained in the vehicle and the driver had a cell phone in which he or she could communicate with dispatch or with the police. With this arrangement, B. Thoms postulated that the driver would know within 3 minutes that it was necessary to check on the status of the guard and custodian.

[86] According to B. Thoms, they arrived for work on January 15, 2003 expecting that to be part of a regular 3-person crew on a replenishment run. Instead, supervisor Potvin called them to the Boardroom and informed them that they would carry out the run as a 2-person-off crew. He then instructed them on the pager and CIA device that would be used for the first time at Securicor. The training session lasted fifteen to twenty minutes and they signed a Securicor training form confirming that they had received the instruction.

[87] On the way to the hotel, they discussed what they would do in the event of a robbery without a driver. B. Thoms responded that he would give everything away, but wondered how he would be able to convince a robber that the security devices on the vehicle prevented unauthorized entry to the vehicle. In this regard, B. Thoms confirmed that Securicor had not provided them with any directives or instructions. B. Thoms held that the security technology in the truck only protected the money. He reiterated that the remote warning device required a direct line of sight to work.

[88] B. Thoms further testified that, when he left the Securicor branch for the first stop the day of the refusal to work, the CIA device was chained to the gun belt. After accidentally sitting on the device the alarm sounded. However, there was no response from Securicor dispatch regarding the alarm.

[89] Just before arriving at the first stop, B. Thoms and B. Woods contacted the hotel to find out if they could still use the parking spot in front. Hotel management recommended that they park beside the hotel on another street as the usual parking spot at the front of the hotel was also used by tour buses for picking up and delivering hotel clients.

[90] B. Thoms testified that parking to the side of the hotel was unacceptable to them because they would be unable to survey and assess the security of the entrance to the hotel before exiting the vehicle or on returning. B. Thoms noted that the normal parking position in front of the hotel permitted the driver in a 3-person crew to see into the hotel lobby and to leave in the event of a robbery.

[91] B. Thoms and Woods then called their supervisor and refused to work stating that this constituted an unsafe working condition.

[92] R. Potvin and T. White arrived at the hotel and arranged for the armoured vehicle to use a parking spot in the front court of the hotel that faced the front wall of the hotel. However, this was unacceptable to B. Thoms and B. Woods. They held that their departure from the hotel could be blocked if vehicle parked behind the armoured truck, and that the mirrored windows in the lounge facing the vehicle were tinted preventing them from seeing into the lobby of the hotel. B. Thoms and B. Woods continued to refuse to work and cited the loss of a level of security provided by the driver. B. Thoms noted that the truck was blocked by taxis on two or three occasions as they waited for the HSO from HRDC to arrive. When HSO Hubert arrived, he also parked behind the armoured vehicle.

[93] Following health and safety officer Hubert's decision that a danger did not exist, B. Thoms and B. Woods carried out the delivery at the hotel. However, when they were about to leave, the vehicle alarm activated making it impossible for them to operate the cash door on the armoured vehicle. T. White entered a code into the system which corrected the situation and subsequently provided the code number to B. Thoms and B. Woods. Dispatch called them about the alarm about five minutes later.

[94] B. Thoms agreed with C. Peterson that the driver in a 3-person-crew could not always see the guard and custodian, but countered that 3-person crews used to work with their 2-way radio on transmit or "open mike" which permitted the driver to monitor their circumstances at all times. The mike would be turned off when the guard and custodian were about to leave the location so that the driver could advise them regarding the status outside. B. Thoms conceded that when the mikes were opened, the driver was unable to communicate with the guard or custodian to warn them.

[95] B. Thoms further agreed with C. Peterson that the driver could not have monitored the circumstances at the hotel when occupied with moving the armoured vehicle to make way for a tour bus, when a taxi accessed the front door of the hotel, or when people moved to and from tour buses. He further agreed that drivers could not see everything at stops where the custodian and guard entered a shopping mall out of sight of the driver.

[96] B. Thoms agreed that he was not able to point out anyone or any thing to HSO Hubert that could cause him harm. B. Thoms confirmed not ever being robbed while at Securicor.

Refusals to Work by A. Ozga and P. Gour

Investigation Report/Testimony by HSO Marion

[97] HSO Marion submitted a copy of his report dated March 20, 2003, on the refusals to work by A. Ozga and P. Gour and testified at the hearings. I retain the following from his report and testimony.

[98] According to HSO Marion, A. Ozga and P Gour were servicing their first stop as a two-person-off crew at approximately 10:00 p.m. They both left their vehicle and entered the bank. When it was time to return to their vehicle, they refused to go back outside to their vehicle because they had been in the building for approximately one hour and there was no driver in the vehicle and they had no way of knowing if someone was waiting outside to rob them.

[99] They then advised their supervisor, C. K. Bradford, that they were refusing the work. He arranged for a joint employer-employee investigation of the refusals to work. K. Bradford and D. Marinier, employee member of the health and safety committee, arrived to assess the location. K. Bradford reported that the stop was well lit and there was no through traffic or parked cars in the lot. He assured A. Ozga and P. Gour that the area was secure, but the two continued to refuse to work. At this point, a HSO was summoned.

[100] When HSO Marion arrived, A. Ozga and P. Gour complained that the outside conditions were unsafe as there was no driver. They held that a driver would be an extra pair of eyes to advise them of suspicious characters entering the lobby to access the ABM and to call police and ambulance if they were injured in a robbery. In his refusal to work registration form, A. Ozga complained:

> I believe that not having my driver outside of the Bank to tell me what or who is out there causes a danger to myself and my partner, as we have no idea as to what is there. There is no communication with the outside

[101] In his refusal to work registration form, P. Gour complained:

> Refused to leave premises without having an or word from someone outside the building meaning the driver, reason is not to be surprised by someone out there and even if my guard is out there I also want someone to be in a secure place to call for help if needed.

[102] During his investigation, HSO Marion determined that the ABMs at the bank were located inside the lobby of the building. The access to the bank was through a large transparent glass sliding door measuring approximately 8 feet high by 6 feet wide. Since this provided A. Ozga and P. Gour with good visibility of the ABMs in the lobby, and there was adequate lighting, he held that A. Ozga and P. Gour could have retreated back inside of the bank and waited until the individual had left. Then the guard only had to follow Securicor procedures and go outside and verify that the environment was clear. HSO Marion concluded that there was no apparent danger at the site at the time of his investigation.

[103] HSO Marion further testified that A. Ozga and P. Gour stated that they had been trained on 2-person-off procedures but that they only received approximately 20 minutes of training. K. Bradford spent about ten minutes with them to explain the operation of the pager and the CIA device.

[104] HSO Marion agreed with Ms. Gilbert that the money carried by the guards created the risk of robbery and injury and that there was always a risk of robbery. He further agreed that the risk of injury due to robbery was an inherent part of the work of a guard.

[105] HSO Marion decided that a danger did not exist for either A. Ozga or P. Gour beyond the inherent danger that is associated with this type of activity because there were no abnormal or unusual circumstances in the workplace. He maintained that the driver was a safety measure but that Securicor had procedures in place to address this.

[106] During questioning by C. Peterson, HSO Marion agreed:

- a driver who stayed with the vehicle during a stop could loose sight of the guard and custodian often;
- he was not aware of any refusal to work because the driver, who stayed with the vehicle, lost sight of the guard or custodian;
- a driver who stayed with the vehicle during a stop was prohibited from leaving the vehicle to assist the guard or custodian. The driver could, however, remove the vehicle from the site to defuse a hostage taking situation;
- neither A. Ozga or P. Gour were able to cite for him any situation where they were robbed;
- when a crew saw someone at a stop who they regarded as suspicious, they could by-pass the stop and return later, or wait in the truck until the suspicious person left;
- that the guard in a 2-person-off crew could use the CIA device to put the vehicle into alarm or activate the silent alarm which would be communicated to dispatch at Securicor;

- the guard was trained and responsible for protecting the custodian whether working as part of a 2-person or 3-person crew;
- A. Ozga or P. Gour had access to a land phone inside the bank branch with which to call for help in the event of suspicious circumstances;
- robbery statistics referred to by A. Ozga or P. Gour showed that there had not been any injuries resulting from robberies since 1994;
- the lack of a driver to stay with the vehicle was a problem for the guards and custodian because there was no one to warn the guard or custodian or call police as they moved between the vehicle and the bank;
- driver and custodian were instructed by Securicor to cooperate fully with robbery;
- Securicor statistics provided to him during his investigation suggested that the number of robberies was low;
- by March 4, 2003, Securicor had provided its crews with a pager to alert guards that someone had tampered with the truck, and a CIA device that was capable of setting the vehicle into alarm or activating a silent alarm to the Securicor dispatcher; and
- the CIA device required a line of sight with the vehicle to operate.

[107] During further questioning by Ms. Gilbert, HSO Marion agreed that:

- a driver who stays with the vehicle during a stop could leave with the truck during a robbery and eliminate the possibility of a hostage situation; and
- a driver who stays with the vehicle during a stop could use the vehicle as a weapon or a shield to protect the driver and custodian outside of the vehicle in the event of a robbery.

Testimony by A. Ozga

[108] On June 26, 2003, P. Gour wrote to the Canada Appeals Office on Occupational Health and Safety and withdrew the appeal of the decision of HSO Marion as he was no longer employed by Securicor. His withdrawal of appeal was accepted.

[109] A. Ozga had been employed by Securicor for four years following employment at Pinkerton Security. A. Ozga testified having worked at Securicor in the past as driver and custodian and being familiar with all assignments. A. Ozga explained that Securicor assigned the stops for a given shift, but it is for the crew to determine the order of stops which would facilitate their completing the run before the shift is over.

[110] A. Ozga explained the term “Cash in Transit” (CIT) and explained what the work entails during the day and night shifts. A. Ozga explained that on replenishment runs at nights there were no set runs or routes and ABMs

were serviced as calls arrived. Prior to the night of the refusals to work, they had participated in the same run for several months as a 3-person crew using an S-Series vehicle.

[111] When they arrived for their shift on March 4, 2003, supervisor Bradford informed them that they would complete their run as a two-person-off crew with an S-Series vehicle. A. Ozga complained of not having been instructed on Securicor procedures for two-person-off crews using the S-Series, or on the use of the pager. Supervisor Bradford instructed A. Ozga and P. Gour on the use of the pager and had them sign a form confirming having been instructed. A. Ozga and P. Gour responded that operating without a driver to stay with the vehicle increased risk for them because the driver was needed to remain vigilant at the stop, to inform them of anything or anyone suspicious, and to check on them if they were delayed. Despite their stated reservations, they proceeded with the shift.

[112] At their first stop, A. Ozga and P. Gour entered the bank, went to the ABM room, and completed the stop after approximately one hour. When they started to leave, they got as far as the sliding glass doors that entered into the lobby and realized that they had no way of knowing what danger awaited them outside. They retreated back to the ABM room and used the telephone there to advise supervisor Bradford that they were refusing to work.

[113] When supervisor Bradford went to the branch with D. Marinier to investigate the refusals to work, supervisor Bradford looked around and advised A. Ozga and P. Gour that it was safe to come out. Nonetheless, the two employees continued to refuse to work. Supervisor Bradford then called to a HSO to come and resolve the matter.

[114] HSO Marion arrived a few hours later and investigated the refusals to work. Following his investigation, HSO Marion decided that a danger did not exist. According to A. Ozga, HSO Marion stated that danger related to the unknown was normal to the work of an employee employed to handle money in the armoured vehicle industry. Employees would have to be in the process of being robbed for a danger to exist.

[115] A. Ozga insisted that the unknown constitutes a danger and opined that the blind spots inside a bank or institution were safer than blind spots connected with traveling between the vehicle and the building and back. A. Ozga stated that the driver acts as guard and is in a position to investigate into suspicious circumstances, to call police, to warn the guard by radio to stay in the building and to take measures with the vehicle to avoid hostage situations.

[116] According to A. Ozga, the pager and the CIA device did not replace the driver as they only operated so long as the guard was physically able to activate them. In the event of being wounded during a robbery before activating the alarm, no-one would know that assistance was needed on an urgent basis.

[117] A. Ozga agreed with C. Peterson that the CIA devices provided by Securicor could be used for activating the audible alarm on the vehicle or for notifying dispatch of a robbery via a silent alarm. But A. Ozga countered that any attempt to activate a hand held style CIA device which he carried connected to his belt could provoke a personal attack. Even if able to activate the CIA device, it could take ten to fifteen minutes to get a response from Securicor dispatch.

[118] A. Ozga agreed with C. Peterson that there were numerous blind spots when leaving the vehicle, going into the lobby, going into the ABM room and returning, and that these when with the job. A. Ozga countered that the absence of driver to stay with the vehicle and monitor the situation created a blind spot when the guard exited the building or the vehicle to secure the area between the building and the vehicle that was significantly more hazardous than any of the other blind spots.

Testimony by S. Matthews

[119] S. Matthews testified at the hearing. I retain the following from this testimony.

[120] S. Matthews joined Securicor in 1995 and worked for the company for approximately 8 years. During that time, S. Matthews had performed the duties of guard, custodian and driver in CIT, Service Crew and replenishment on both day and night shifts. S. Matthews testified as the local health and safety committee representative at Securicor, Ottawa.

[121] S. Matthews testified that Securicor had not consulted the local health and safety committee regarding the reduction of crew size from 3-person crew to 2 person-off crews. S. Matthews further testified that Securicor had not consulted the health and safety committee regarding the implementation of policy and procedures relative to a 2-person-off crew operating the S-Series vehicle. S. Matthews could not say if Securicor had consulted the CAW union prior to September 30, 2002.

[122] According to S. Matthews, during the meeting with health and safety officers that occurred after the refusals to work, the CAW took the position that one of the employees on a 2-person-off crew should stay with the vehicle at all times and the other employee should transport the liabilities alone. The driver could then remain vigilant while the custodian was away

from the vehicle. Securicor did not agree with this proposal because it regarded the method to be less safe and contrary to company directives requiring dual custody of liabilities at all times.

[123] S. Matthews stated never having personally received training from Securicor regarding the use of the S-Series vehicle, but was familiar with the security features on the S-Series vehicle. S. Matthews opined that the security features on the vehicle protected the liability on the truck, but did not mitigate the additional hazards related to operating without a driver to remain with the vehicle.

[124] S. Matthews echoed the sentiments of the other employees who had previously testified stating the driver protects the guard, the guard protects the custodian and the vehicle protects the driver. S. Matthews could not recall any incident where a vehicle was used as a weapon to protect the guard and custodian, but recalled an incident where a robbery had been thwarted when the driver left the site with the truck.

Testimony by R. Potvin

[125] R. Potvin, CIT and Bay Manager, Securicor, testified at the hearing. I retain the following from his testimony.

[126] R. Potvin testified that he had been employed by Securicor for approximately 8 years and had been employed by Brinks previously. During his eleven years in the armoured vehicle industry he had performed all aspects of the work including guard, custodian and driver on all types of runs and during day and night shifts.

[127] On the night of the refusal to work by B. Martin and C. Brazeau, he was the CIT night manager and supervisor of the two employees. He had been CIT manager for approximately 2 years. Prior to being appointed as manager, he occupied a position in the bargaining unit and had held various union positions including union vice-president and employee representative on the health and safety committee.

[128] In 2002, he attended four days of training for the trainer on the S-Series vehicle. The training included:

- functions of the security features on the S-Series vehicle;
- deliver modes available on the S-Series vehicle, including 2-person-off modes;
- trouble shooting the S-Series vehicle; and
- training others on the S-Series vehicle.

[129] Following his own training he organized a session to train employees on the use of the S-Series vehicle. During the session, the sixteen employees present were separated into four groups. Each group received training on the security features on the S-Series vehicles and on Securicor's Operations Procedures that applied to the use of the S-Series vehicle. The employees were also taken on board an S-Series vehicle and shown how the features operated.

[130] R. Potvin confirmed that the training did not include defusing a hostage situation or how to cooperate with robbers without being able to defeat the security features of the vehicle. The training provided was voluntary on the part of employees, but the employees who participated were paid for four hours of work. He agreed that participants had to share the copy of the Securicor Operations Procedures and, while they could not keep a permanent copy of the directives, they could read the copy during the training for as long as they wanted. He also confirmed that the training on board the S-Series vehicle lasted for approximately 20 minutes per group and the training on 2-person-off crews lasted about a half hour.

[131] On September 30, 2002 he advised B. Martin and C. Brazeau that they would be the first 2-person-off crew and provided them with a copy of applicable Securicor directive. After 20 minutes of review, he asked them if they had any questions and they answered "no". He confirmed, however, that he had not provided B. Martin and C. Brazeau with any training instruction on the vehicle that evening.

[132] At approximately 8:40 p.m. B. Martin and C. Brazeau called him and refused to work and he proceeded to the bank to investigate their refusals to work.

[133] He testified that he considered the risk of robbery to be low. He stated that he had personally worked on a 2-person crew where both the driver and custodian left the vehicle before the introduction of the S-Series vehicle and had never experienced a robbery. Moreover, he could not recall that Ottawa had ever experienced a robbery in the last 8 years. He added that he could not recall any situation where the driver prevented a robbery in the Ottawa area.

[134] R. Potvin confirmed that he had also participated in the investigation of the refusals to work by B. Thoms and B. Woods and that neither B. Thoms nor B. Woods had pointed to a specific danger. He held that they just wanted a driver.

[135] R. Potvin held that the security features on the S-Series vehicle protected the crews, in addition to the liability, and made the driver unnecessary.

He agreed that Securicor Operations Procedures state that the driver was to:

- stay in the vehicle;
- watch the crew;
- guard the guard; and
- advise crew of anything suspicious.

[136] He also agreed that Securicor policy is that the driver can drive away from a robbery or suspicious circumstance. However, he disagreed that this was useful for thwarting a robbery.

[137] R. Potvin stated that when he was a crew member, and was acting as guard, he did not rely on the driver's observations because he preferred to check things out on his own.

Summation by Ms. Gilbert

[138] Ms. Gilbert argued that the Canada Industrial Relations Board (CIRB), formerly the Canada Labour Relations Board (CLRB), the Canada Appeals Office on Occupational Health and Safety (CAO-OHS), formerly the Regional Safety Officer (RSO) Office and the Federal Court have long recognized that the risk of armoured robbery and injury was a danger which constituted a normal condition of employment in the armoured vehicle industry. She agreed that this "normal" danger could not justify a refusal to work, but held that any hazard or condition that increased the level of danger and that could be mitigated through the employer's prevention program, and not done, constituted a danger beyond the "normal" danger.

[139] Ms. Gilbert held that a danger beyond the "normal" danger associated with the armoured vehicle industry existed for the Securicor employees who refused to work because Securicor had reduced their crew sizes from the normal 3-person crew to a 2-person-off crew. The reduction of crew size eliminated a driver who stayed in the vehicle during the stop and this increased the risk of injury because the guard and custodian relied upon the driver for providing a level of protection by:

- guarding the guard when the guard and custodian were outside of the vehicle;
- guarding the front and left of the vehicle when the guard and custodian exited from the vehicle or the building at the stop;
- surveying the area for suspicious persons or circumstances while crew was inside the stop;
- investigating into suspicious persons or calling police to investigate suspicious persons or circumstances;

- contacting the guard and custodian if they took longer at a stop than anticipated;
- monitoring the 2-way radios used by the guard and custodian where the guard and custodian were apprehensive and left radios on "open mike" so that the driver could monitor events;
- summoning the police or ambulance for immediate backup when required;
- forewarning the guard and custodian to delay coming out of the stop if something was suspicious;
- driving away with the vehicle to thwart a robbery and defuse a possible hostage situation;
- using the vehicle as a weapon or as a shield to protect the guard or custodian; and
- opening the door to the vehicle to facilitate rapid escape of the guard and custodian in a hold-up.

[140] Ms. Gilbert noted that Securicor's revised Operations Procedures did not claim that the advanced security devices installed on the S-Series vehicle replaced the level of safety protection provided by the driver. She argued, to the contrary, that the inability of employees to over-ride the advanced security devices to give robbers access to the vehicle and the liability elevated the risk of injury for crew members since it was impossible for crews to cooperate with the assailant(s). She maintained that the risk of injury was further increased because Securicor had not trained its crews on how to handle this eventuality.

[141] If this was not sufficient to establish that a danger existed, Ms. Gilbert maintained that the increased level of risk associated with the crew reduction was exacerbated by the deficiencies cited by the employees relative to the:

- communication equipment;
- alarms;
- training; and
- Securicor Operations Procedures.

[142] She held that all of these risks increased the level of danger beyond the "normal" danger associated with the work and constituted a "pending" danger referred to by Justice Tremblay-Lamer in *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*, 2003 FC 1158, October 6, 2003 (*Martin*), since a robbery with attendant injury could occur at any time.

[143] Ms. Gilbert referred to my decision in *Michael Chapman and Canada Customs and Revenue Agency*, Decision No. 03-019, October 31, 2003 (*Chapman*), in which I summarized the jurisprudence to date concerning

the interpretation and application of the revised definition of danger in the year 2000 amendments to the *Canada Labour Code*, Part II. She held that the jurisprudence confirmed that the danger can be speculative and need no longer pose an immediate danger to a person.

[144] She also cited the Canada Labour Relations Board decision in *Stephen Elnicki and Loomis Armoured Car Service Ltd*, Decision No. 1105, Board File 950-259, January 31, 1995 (*Elnicki*), which was rendered by the Board prior to the 2000 Part II amendments. She held that the CLRB confirmed in that decision that duties of employees employed in the armoured vehicle industry involve a somewhat high level of inherent danger particular to the nature of the business. She also stated that the Board decided that reducing the crew size from 3 persons to 2 persons in that case by removing the armed guard who escorted the custodian constituted a danger beyond the high inherent danger associated with the work. She noted that the Board enumerated guidelines for deciding whether the work place conditions create a danger for a two-person crew. The criteria included:

- condition of the location;
- amount of time the custodian and guard loose visual contact;
- distance covered by custodian from the vehicle to the location and total duration of the run;
- safety measures in place to protect the custodian;
- number of exits and entrances in the location;
- isolated areas on the premise;
- time of day;
- relative importance of the service points; and
- any other factor likely to have a significant level of risk.

[145] Ms. Gilbert also referred to Regional Safety Officer G. R. McKnight's decision in *Loomis Armoured Car Service Ltd. and Canadian Brotherhood of Railway, Transport and General Workers*, Decision No. 93-008, June 23, 1993 (*Loomis*). In that decision, RSO G.R. McKnight confirmed that armoured vehicle employees were exposed to risk on a daily basis and that a danger existed unless the employer ensured that the employees were adequately informed, trained and supervised. The other factors cited included:

- kind of client;
- valuables being transported;
- distance from the vehicle;
- configuration of the work place;
- security available from the client; and
- constant communication.

[146] She maintained that the issue in each refusal to work was not whether or not there was a robber hiding ready to attack, but whether or not the removal of the driver in the circumstances of deficient communication equipment and alarms, deficient training, deficient operations procedures elevated the danger to a level that exceeded the “normal” danger associated with the work. According to Ms. Gilbert, the HSOs looked for evidence to determine if it was reasonable to expect that a robbery would occur at the time of the refusals to work, and failed to consider relevant facts beyond this.

[147] Following the hearing, Ms. Gilbert was invited to comment on the decision of Justice Gauthier in *Juan Verville and Service Correctionnel du Canada*, 2004 FC 767, May 6, 2004 (*Verville*). A. Dale, Associate Counsel, CAW-Canada responded on her behalf. A. Dale held that the Federal Court in *Verville, supra*, had clarified the interpretation of the definition of danger that was first provided by the Federal Court in *Martin, supra*. In particular, he opined that paragraphs 35 and 36 of *Verville, supra*, made it clear that:

- the presence of danger is established even it can not be said that an injury would result every time a condition or activity occurred;
- the condition or activity must merely be capable of causing injury at some or anytime, but not necessarily every time; and
- the definition of danger requires an assessment whether circumstances could be expected to cause injury and an assessment whether such circumstances might reasonably (as opposed to possibly) occur in the future.

[148] He further held that Justice Gauthier’s observations *in obiter* in paragraphs 55 and 56 were particularly apt. Paragraphs 55 and 56 read:

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?
>
> [56] Obviously, these reasons should not be construed as giving any indication or opinion as to whether or not in this particular case, the circumstances fall within paragraph 128(2)(*b*).

Summation by C. Peterson

[149] C. Peterson argued that the employees wish me to focus on the role of the driver and Securicor's training and communications and ignore the fact that nothing was occurring or about to occur that threatened the health and safety of the employees who refused to work.

[150] He held that, for a finding of danger, the applicants had to show that the lack of a driver created an existing or potential hazard or condition, that one of the employees would have been exposed to the hazard or condition; that the person exposed would have been injured by the exposure; and that the injury would occur before the hazard or condition could be corrected. In this regard, he referred me to paragraph 80 of my decision in *Chapman, supra*. Paragraph 80 reads:

> [80] Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the HSO must form the opinion, on the basis of the facts gathered during his or her investigation, that:
>
> - the potential hazard or condition or future activity in question will likely present itself;
> - an employee will likely be exposed to the hazard, condition or activity when it presents itself;
> - the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,
> - the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.

[151] C. Peterson further held that it was necessary to refer to Appeals Officer Serge Cadieux's decision in *Parks Canada Agency and Doug Martin*, Decision No. 02-009, May 23, 2002 (*Parks Canada*), for interpreting and applying the definition of danger in the work place. He maintained that paragraph 145 of *Parks Canada*, *supra*, confirmed that a finding of danger must be based on facts having regard for the four objective criteria listed in the previous paragraph (paragraph 144) of the decision. Paragraphs 144 and 145 read:

> [144] The Code allows for a future activity to be taken into consideration in order to declare that "danger" as defined in the Code exists. However, this is not an open-ended expression. In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, <u>on the basis of the facts gathered during his investigation</u>, that:
>
> - the future activity in question will take place[9];
> - an employee will be exposed to the activity when it occurs; and

[9] This first condition is redundant in cases where the health and safety officer had established that the activity is taking place at the time of his investigation.

- there is a reasonable expectation that:

  the activity will cause injury or illness to the employee exposed thereto; and,

  the injury or illness will occur immediately upon exposure to the activity.

  Note: The latency aspect of the injury or illness will not be addressed in this decision since this was not raised as an issue in the instant case. However, I would refer the reader to paragraph #21 of the Welbourne decision for clarification.

[145] Given that the health and safety officer must investigate a situation in a factual manner and having regard to the four objective criteria listed above, hypothetical and speculative situations will continue to be excluded from the definition of danger. After all, both hypothetical and speculative situations have no firm factual basis, a direct contradiction with the concept of "danger" as defined in the Code. It is important to note at this point that although "danger" as defined in the Code may be found not to exist, a contravention may still exist.

[152] He pointed out that paragraph 150 of *Parks Canada, supra*, confirmed that danger is a restrictive concept requiring a high standard of proof.

[150] In the instant case, the health and safety officer opted to address the park warden safety issue under subsection 145(2) of the Code, a provision that is highly specific in that it deals with a restrictive concept that has been set at a very high standard, and in my opinion, rightly so. The concept of "danger" as defined in the Code is unique in that it only applies in exceptional circumstances. It is a concept that is strictly based on facts. Clearly then, Mr. Raven's earlier suggestion that it would "…not be helpful to address this case from a very specific fact situation involving a particular work environment and a particular complaint" is both self-serving and contrary to the concept of "danger" as defined in the Code.

[153] Mr. Peterson noted that appeals officer Cadieux had stated in paragraph 153 of the decision that one was dealing with a hypothetical situation where the witnesses were unable to reliably establish if, when, and under what circumstances the danger would happen. An extract of paragraph 153 reads:

[153] … The witnesses that appeared before the tribunal made it clear: an assault could take place at any point in time when carrying out law enforcement duties. However, they simply cannot reliably establish if, when or under what conditions this will happen. Evidently, the witnesses were referring to hypothetical situations that have no application within the concept of "danger" as defined in the Code.

[154] He further noted that appeals officer Cadieux stated in paragraph 155 of the decision that the, who, what, when and where are important to decide the likelihood of injury. An extract of paragraph 155 reads:

> [155] It is clear from the above that one cannot ascertain with any degree of reliability whether a law enforcement situation resulting in injury will occur. In cases of this nature, the "who", the "what", the "where", the "when" and the "under what circumstances" are important criteria necessary to establish objectively the likelihood of injury and therefore of danger. …

[155] He held that paragraph 162 of the decision confirmed that the tribunal cannot rule on danger solely on the basis of past occurrences. Paragraph 162 reads:

> [162] The tribunal cannot rule positively on the existence of "danger" as defined in the Code solely on the basis of past occurrences. The notion of "danger" as defined in the Code, which includes the concept of "future activity", does not authorize a health and safety officer to look into the past to declare that a "danger" as defined in the Code exists. "Danger" as defined in the Code is either immediate or prospective, as explained above. A "danger" as defined in the Code cannot exist retrospectively.

[156] Mr. Peterson then referred me to the decision of Justice Tremblay-Lamer in *Martin*, *supra*. He referred to paragraph 42 of the decision where Justice Tremblay-Lamer commented that her review constituted a significant search and testing of the *Parks Canada* decision, *supra*, by appeals officer Cadieux. In support of his argument, he referred me to paragraphs 57 and 59 of her decision which read as follows and are, in my view, self explanatory:

> [57] I agree with the appeals officer that in the absence of specific evidence indicating when grievous bodily harm or death could reasonably occur to a park warden performing law enforcement activity, a safety officer would have to conclude on the absence of danger since he would be faced strictly with a hypothetical or speculative situation.
>
> [59] Nevertheless, in my opinion, the new definition still requires an impending element because the injury or illness has to occur "before the hazard or condition can be corrected or before the activity is altered".

[157] Mr. Peterson then referred me to the decision of the Canada Industrial Relations Board in *Brulé et al and Canadian National Railway Company*, Decision No. 2, Board Files 19168 20013, February 18, 1999. He argued that this decision confirms that the right to refuse work was not to be used to challenge the employer's policies, procedures and training. Paragraph 16 of the decisions reads:

[16] … Refusing to work is not the way to challenge the employer's policies and procedures, to have railway industry rules applied or to criticize a training program.

[158] He further referred me to the decision of Appeals Officer Serge Cadieux in *Jack Stone and Correctional Service Canada*, Decision No. 02-019, December 6, 2002. He pointed out that appeals officer Cadieux stated the following in paragraphs 40, 41, 42 and 45:

[40] Applying the facts of this case to the definition of danger, it is clear that Mr. Stone was not faced with any immediate or future situation i.e. a hazard, condition or activity, involving the fashioning of a weapon from undetected contraband that would jeopardize his health and safety and result in injury to him in any foreseeable future. Also, the fact that inmates could fabricate a weapon in one of the shops that would be undetected because of the absence of a control post at a specific location in the Institution is not helpful in this case to establish objectively that this will result in an assault on Mr. Stone or on any other officer. Working in a medium security penitentiary is by the very nature of that environment a higher risk environment than most work places. Mr. Stone's job description emphasizes that exposure to violence is a normal condition of his employment. Specifically, Mr. Stone's job description states, under the section of Working Conditions, Part 15 Work Environment, that:

> There is frequent exposure to inmates who may be agitated, unpredictable, attempt to intimidate or resort to violence. The incumbent may be required to intervene in various threatening or violent situations involving inmates, staff or visitors, including emergencies (ie: riots), instances where other resources are not available for immediate aid and those where lethal force may be necessary. There is potential for inmates to verbally or physically assault the incumbent, to which all attempts at self-defence, including lethal force are authorized for use (inmate assaults may have deadly intent)…

[41] On the basis of the evidence submitted in this case, it is clear that Mr. Stone did not refuse to work because he had specific knowledge of something happening or about to happen in the Institution that would jeopardize his health and safety at some specific time. There existed no actual hazard or condition at the time of Mr. Stone's refusal to work that would support a finding that danger existed. The mood of the Institution at the time of Mr. Stone's refusal to work was indicative that nothing out of the ordinary was happening or about to happen. Mr. Stone had no information, and manifestly no evidence, that an inmate working in one of the shops had in fact fabricated a weapon and intended to use it against him, or any other officer for that matter. In the Parks Canada decision, *supra*, I dealt with this issue, at paragraph # 162 …

[42] … An incident that occurred in the past cannot be used to establish objectively the existence of danger. …

[45] Also, Mr. Stone has no evidence that any weapon that might have been fabricated in any of the shops, or elsewhere in the Institution, would be

> used against him. It was acknowledged that a weapon is probably present in the Institution at any given moment. This is a reasonable assumption to make given the nature of the population incarcerated at Springhill…

[159] Mr. Peterson maintained that none of the employees who had refused to work had been able to point to a specific person or circumstance that posed a threat to their health and safety at the time of their refusals to work. Nor did they submit any facts to show that a driver prevents accidents or injury connected in the event of a robbery.

[160] He held that the objective evidence in these cases did not establish that a driver prevented robberies or prevented injury to drivers and custodian during a robbery. Moreover, he pointed out that the driver who stays with the vehicle frequently lost sight of the guard and custodian when they entered a bank or other place of business to conduct deliveries and pickups, and that the driver was not permitted by Securicor procedures to leave the vehicle to aid the guard and custodian during a robbery. While he conceded that the safety of the guard and custodian may be enhanced by the presence of a driver, he countered that the driver's presence was not critical to the safety and health of the driver and custodian and so removal of the driver did not constitute a danger.

[161] He reiterated the testimony of the guards that their work routinely required them to go into blind spots in buildings, that the driver routinely lost sight of the guard and custodian when they entered buildings, and that the driver could not be completely relied on for ensuring that the area outside of the building was secure when they emerge from the vehicle or a building. He also reiterated that the employees who testified could not cite a situation where the driver used the vehicle as a shield or defused a potential hostage situation by leaving the site with the vehicle. He reiterated that the driver's sole duty was to protect the liability and taking the driver away did not increase the risk of robbery or of injury.

[162] He held that the primary responsibility of the driver was to protect the money and, even though they might survey the immediate surroundings while the guard and custodian were away carrying out the work, this was primarily done to protect the money. He concluded that the driver was not necessary in S-Series vehicles because the money was protected by the security features on the vehicle.

[163] Mr. Peterson disagreed with Ms Gilbert's supposition that the risk of robbery and injury, considered "normal" in the armoured vehicle industry, constituted a "pending" hazard, such that anything which elevated that "normal" danger constituted a pending danger that exceeded the danger which was a normal condition of the work. He added that, if I found that a "normal" danger established that a hazard was pending, employees in

every industry where there was an inherent danger associated with the work would be able to refuse to work. He said that this would be contrary to section 128 of the Code.

[164] He asked that I confirm the respective decisions of health and safety officers Marion and Hubert.

[165] Following the hearing, C. Peterson was also asked to comment on the *Verville* case, *supra*. In his response, Mr. Peterson noted that Justice Gauthier did not take issue with the analysis of Justice Tremblay-Lamer in *Martin, supra*, which he had essentially relied on in his previous submissions. He further noted that in paragraphs 36 and 37 confirmed that Justice Gauthier had agreed with Justice Tremblay-Lamer's overall interpretation and analysis of the definition of danger. He concluded from this that both Justice Gauthier and Justice Tremblay-Lamer agreed that:

- the definition of danger still encompasses the concept of reasonable expectation, i.e., objective analysis based on facts rather than a speculative opinion based on belief; and
- the concept of danger can be speculative but the doctrine of reasonable expectation still excludes hypothetical or speculative situations.

[166] Mr. Peterson stated that the Court in paragraphs 44 through 51 had not criticized or questioned the appeals officer's interpretation that a reasonable expectation of injury cannot be based on hypothesis or conjecture, but rather found in that case that there was evidence in the transcript which established on previous occasions, correctional officers were injured because they did not have ready access to handcuffs. In other words, there was a reasonable expectation of danger because there was objective evidence that a longer struggle created an increased risk of injury. In contrast, there was absolutely no evidence in this case that anyone had been injured while working on a 2-person-off crew in circumstances similar to the instant appeals.

[167] Finally, he disagreed that the Court's *obiter* comments at paragraph 55 were applicable to these appeals because:

- the question is *obiter* in the form of a rhetorical question meant to provoke further questions and discussion about the concept of "normal"; and
- the comments do not relate to the facts of the instant case in that the Court did not refer to a 2-person-off crew.

****

DECISION

[168] The issue in respect of each refusal to work was whether or not in the circumstances the absence of a driver to stay with the vehicle in a 2-person-off crew constituted a danger for the employees who refused to work. If I find in the affirmative, I then must decide whether or not the danger constituted a normal condition of work for the employees.

[169] In this regard, I had to consider the instruction, training and equipment that Securicor provided to its employees in connection with the crew size reduction. It was also necessary to consider the 2002 Risk Assessment Report and robbery statistics completed by Securicor.

[170] With regard to the legislation, the term “danger” is defined in section 122.1 of the Code as follows:

> "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;

[171] As pointed out by Mr. Peterson, the Honourable Madam Justice Tremblay-Lamer conducted in *Martin, supra,* a significant searching and testing of the decision of appeals officer Cadieux in *Parks Canada, supra.* In her decision, Justice Tremblay-Lamer essentially confirmed appeals officer Cadieux’s interpretation and application of the definition of danger in the case. However, she disagreed with his finding that the injury must occur immediately after exposure for a finding of danger.

[172] The following two column table summarizes what Justice Tremblay-Lamer wrote following her significant searching and testing of the *Parks Canada* decision, *supra*, and what I retained of general application regarding the interpretation and application of the definition of danger:

Quotation – Honourable Justice Tremblay-Lamer	What I Retain
[55] I agree with the above analysis made by Mr. Cadieux in *Welbourne, supra*. To paraphrase, the new definition of danger in the Code makes it clear that any potential hazard or condition or future activity can constitute a danger. This means that a safety officer can look beyond the immediate circumstances that exist at the time of his investigation to determine whether "danger" exists as defined in the Code.	• Any potential hazard or condition or future activity can constitute a danger. • A health and safety officer can look beyond the immediate circumstances that exist at the time of his investigation to determine whether “danger” exists.
[56] Furthermore, it is evident to me that the amended definition still encompasses the concept of reasonable expectation which excludes speculative situations: the provision specifically provides that "the future activity could reasonably be expected to cause injury or illness to the person exposed". This requires evidence and obliges the safety officer to perform an objective analysis of a particular situation.	• The amended definition still encompasses the concept of reasonable expectation which excludes speculative situations.
[57] I agree with the appeals officer that in the absence of specific evidence indicating when grievous bodily harm or death could reasonably occur to a park warden performing law enforcement activity, a safety officer would have to conclude on the absence of danger since he would be faced strictly with a hypothetical or speculative situation.	• The absence of specific evidence indicating when grievous bodily harm or death could reasonably occur would be faced strictly with a hypothetical speculative situation.
[58] However, the new definition also clearly states that a hazard, condition or activity could constitute a danger "whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity". As such, contrary to what was indicated by the appeals officer, I am of the view that it is not necessary that there be a reasonable expectation that the injury or illness will occur immediately upon exposure to the activity in order to constitute danger within the meaning in the Code.	• It is not necessary that there be a reasonably expectation that the injury or illness will occur immediately upon exposure to the activity in order to constitute a danger.
[59] Nevertheless, in my opinion, the new definition still requires an impending element because the injury or illness has to occur "before the hazard or condition can be corrected or before the activity is altered".	• The new definition still requires an impending element because the injury or illness has to occur “before the hazard or condition can be corrected or before the activity is altered.

[173] More recently, the Honourable Madam Justice Gauthier also conducted a significant searching and testing of the decision that appeals officer Cadieux made in *Juan Verville & Fifteen Other Correctional Officers and Correctional Service Canada*, Decision No. 02-013, June 28, 2002. The following two column table summarizes what Justice Gauthier wrote following her significant searching and testing in her *Verville* decision, *supra*, and what I retained of general application regarding the interpretation and application of the definition of danger:

Quotation – Honourable Justice Gauthier	What I Retain
[31] As was recently explained by the Federal Court of Appeal in *Canada (Attorney General) v. Fletcher*, 2002 FCA 424, [2003] 2 F.C. No. 475 (C.A.), the pre-amendment Code was intended to insure that immediate work would not expose an employee to a dangerous situation. "It is the short-term well-being of an employee which is at stake" (paragraph 18 of *Fletcher, supra)*. [32] With the addition of words such as "potential" or "éventuel" and future activity, the Code is no longer limited to specific factual situations existing at the time the employee refuses to work. [33] In his decision, the appeal officer states that he relies on his decision in *Parks Canada Agency, supra*, where he found that: "In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of the facts gathered during his investigation that: - the future activity in question ***will*** take place [See Note 2 below]; - an employee ***will*** be exposed to the activity when it occurs; and - there is a reasonable expectation that: - the activity ***will cause*** injury or illness to the employee exposed thereto; and, - the injury or illness will occur ***immediately*** upon exposure to the activity. Note 2: This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.	• With the addition of the words such as “potential” or “éventuel” and future activity, the Code is no longer limited to specific factual situations existing at the time the employee refuses to work.

Quotation – Honourable Justice Gauthier	What I Retain
[34] The above statement is not entirely accurate. As mentioned in *Martin, supra*, the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided. [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time. [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. [41] … the customary meaning of "potential"[4] or "éventuel"[5] hazard or condition does not exclude a hazard or condition, which may or may not happen based on unpredictable human behaviour. If a hazard or condition is capable of coming into being or action, it should be covered by the definition. As I said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear that in this case, spontaneous assaults are indeed capable of coming into being or action.	• The injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition, or activity is altered. • The definition does not require that the hazard, condition or activity could be reasonably expected to cause injury every time it occurs. • It must be capable of causing injury at any time but not necessarily every time. • It is not necessary to establish precisely the time when the potential hazard or condition or the future activity will occur. • The definition only requires that one ascertains in what circumstances the potential hazard, condition or future activity 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 possibility. • The customary meaning of “potential” or “eventuel” hazard or condition does not exclude a hazard or condition, which may or may not happen based on unpredictable human behaviour

Quotation – Honourable Justice Gauthier	What I Retain
[51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. 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. It could even be established through an inference arising logically or reasonably from known facts. [52] … the applicant concedes that his job description involves a risk of possible hostage taking, injury or danger when dealing with violent and hostile offenders. But he argues that the order given to him on September 24, was a variation of his normal conditions of employment and constitutes an increase of the risk or danger described above. The applicant relies on the Public Service Staff Relations Board's decision in *Fletcher v. Treasury Board (Solicitor General Canada - Correctional Service)*, [2000] C.P.S.S.R.B. No. 58; *Danberg and Treasury Board (Solicitor General Canada),* [1988] C.P.S.S.R.B. No. 327 and *Elnicki v. Loomis Armored Car Service Ltd,* 96 di 149, CLRB Decision No. 1105, in which the Board acknowledged, in the context of refusals to work by correctional officers and security guards, that even though risk of injury or death was a normal condition of employment for these employees, an increased danger resulting for example from a change in the employer's policy (such as minimum staffing), was not automatically excluded under paragraph 128(2)(*b*) [7].	• It is not necessary to have proof that an injury occurred in the past in exactly the same circumstances. • A reasonable expectation could be based on expert opinion 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. • It could even be established through an inference arising logically or reasonably from the facts.

Quotation – Honourable Justice Gauthier	What I Retain
[54] There appears to be little jurisprudence from this Court on this issue. In *Canada (Attorney General) v. Lavoie*, [1998] F.C.J. No. 1285 (T.D.) (QL), cited by the appeal officer, the argument with respect to an increased risk over and above the normal conditions of employment was not raised, nor did the Court consider the decisions of the Board referred to by the applicant, two of which were issued after the decision in *Lavoie, supra* (see paragraph 52 above).	• There appears to be little jurisprudence from this Court on the question of increased risk and danger that is a normal condition of work which is automatically excluded under paragraph 128(2)(*b*).
[55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?	• The customary meaning of the word “normal” in paragraph 128.(2)(*b*) refers to something regular, to a typical state or level of affairs, to something that is not out of the ordinary. • This would exclude a level of risk that is not an essential characteristic, but which depends on the method used to perform a job or activity.

[174] For interpreting and applying the definition of danger in the Code in respect of these appeal cases, which requires me to consider the concept of danger that is a normal condition of employment, I am particularly inclined toward what Justice Gauthier stated in paragraphs 36 and 55:

> [36] …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 underline]

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. … [my underline]

[175] In accordance with paragraphs 36 and 55, it is my view that a danger exists if the facts establish that a potential hazard could reasonably be expected in the circumstances to cause injury or illness and that both will occur in the future as a reasonable possibility, as opposed to a certainty or likelihood. The danger remains in effect, or pending, until remedial and preventive measures are taken to alter the circumstances such that risk of injury due to the potential hazard is eliminated or reduced to the extent that is reasonable. If measures are taken to alter the potential hazard and circumstances, such that risk of injury is eliminated or reduced to the extent that is reasonable, and a danger continues to exist, that danger may constitute a permanent attribute of the work and be considered to be a normal condition of employment.

[176] On the basis of the above, **if I find** in these cases that the absence of a driver to stay with the vehicle during stops to:

- guard the guard when the guard was outside the vehicle securing the area between the building and the vehicle for the custodian;
- monitor the area outside the building while the guard and custodian were in the building servicing the client;
- forewarn the guard and custodian of a robbery or suspicious person or circumstance;
- summon the assistance of police or ambulance in the event of a robbery or suspicious person or circumstance;
- check on the guard and custodian if they were unreasonably delayed at the stop; and
- leave the stop in the event of a robbery or, in the alternative, use the vehicle as a weapon or shield,

constituted a significant potential hazard for the guard and custodian when:

- the guard exited the vehicle or the building to secure the area between the vehicle and the building housing the client; and
- the guard and custodian were in the building housing the client,

in circumstances where it could be established that:

- the security devices on S-Series vehicle did not replace the "guard" role of a driver who stayed with the vehicle during stops;

- the communication and alarm devices that Securicor provided to the employees who refused to work were deficient for summoning help from the dispatcher, police or ambulance in the event of a robbery;
- the training that Securicor provided to the employees who refused to work was deficient with regard to the communication and alarm devices and Operations Procedures for 2-person-off crews using the S-Series vehicle, including what to do in the event of a hostage situation;
- the risk assessment conducted by Securicor was deficient;
- Securicor had not consulted with the local health and safety committee regarding employee concerns relative to the implementation the 2-person-off crew using the S-Series vehicle and had not taken any other prevention measures sufficient to eliminate or reduce to a reasonable extent the risk of injury that may have arisen as a result of the absence of a driver in a 2-person-off crew assignment,

and I find that:

- the absence of the driver to stay with the vehicle in the circumstances could reasonably be expected to cause injury to the employees before the hazard could be corrected; and
- armed robbery was a reasonable possibility in the future;

then **I must conclude that it falls within the definition of "danger"** in the Code.

[177] **If I decide in the affirmative**, then, as I said in paragraph 168, I must determine whether or not that danger was a normal condition of employment which precluded the employees from refusing to work.

[178] While the refusal to work is an individual right, each of the employees in these cases refused to work for essentially the same reasons and in the same circumstances. They all held that the absence of the driver constituted a danger because the driver was crucial to their occupational health and safety. They all held that there were deficiencies related to Securicor's communication and alarm equipment, Operations Procedures and training program.

[179] With regard to the first aspect of the question, which was whether or not the absence of a driver to stay with the vehicle constituted a significant potential hazard for the guards and custodians who refused to work when the guard exited the vehicle or the building to secure the area between the vehicle and the building, I find in the affirmative for the following reasons.

[180] During the hearing, both employees and Securicor agreed that it was critical for crews to assess the area at a client's location before stopping at the location. If there was anything suspicious, crews were authorized by Securicor to leave and return later. This policy was understandable given the statistics that the majority of robberies occurred outside between the vehicle and the client's location. In addition, it was not uncommon for pedestrians to be present during a stop making the situation variable and dynamic. Given the high importance parties assigned to assessing a site before stopping, I found it reasonable to conclude that continued monitoring and assessment while the guard and custodian were away was also necessary.

[181] Securicor argued that the 2-person-off crews were still able to make this same assessment on arrival with the aid of the security features on the S-Series vehicle and, therefore, the level of risk was not increased by the fact that there was no driver to stay with the vehicle. The employees countered that a driver who remained with the vehicle guarded the guard when the guard was about to exit the vehicle to secure the location between the vehicle and the building by surveying to the left of the vehicle and behind it. They maintained that this level of protection provided by the driver was not replaced by the vehicle.

[182] While I appreciated the position of the employees that the absence of a driver to guard the guard when exiting the vehicle to secure the area between the vehicle and the building increased the risk to the guard, I was persuaded by the evidence that the 2-person-off crew members were still able to thoroughly assess the location upon arrival before the guard exited the vehicle. Thus, I was not convinced that the increased risk to the guard at this point constituted a significant hazard. This of course only applies where the guard and custodian were able to park close to the entrance of the building.

[183] However, it was a different matter when the guard and custodian completed their work in the building housing the client and prepared to exit the customer's location after being there for up to forty-five minutes or more. Without a driver, I agree with employees that they had no way of knowing what awaited them on the outside as the guard exited the building and so were more vulnerable to attack. It must be recalled that without a driver in the vehicle, potential assailants were unencumbered in their efforts to formulate and implement their plan while the guard and custodian were inside.

[184] Securicor held that the primary responsibility of a driver was to protect the liability and the driver was not to be relied upon by the guard for protection. In support of their contention, they pointed out that drivers must sometimes move the vehicle and cannot always maintain their

surveillance. Securicor also remarked that drivers could not leave the vehicle to assist the guard, and that drivers had been observed in the past to be less than vigilant while waiting for their crews. In one case, they suggested that the driver was unaware that a robbery had occurred.

[185] Response evidence proffered by employees included the fact that Securicor Operations Procedures specified that drivers had to remain vigilant all of the time, and that a Securicor advisory circulated to its employees reminded crews of this requirement. In my opinion, this discounted Securicor claims that the driver was essentially irrelevant as a guard to the guard.

[186] Securicor maintained throughout the hearing that guards had to enter numerous blind spots after the driver had lost sight of them and that this was not different from the blind spots encountered as the guard exited the building to secure the outside location for the custodian. Securicor held that guards had to rely on their own observations, assessments and instincts when securing a location, and in the absence of a driver, needed only to heighten their vigilance.

[187] However, the statistics which established that the majority of robberies occurred outside of the vehicle between the vehicle and the building opposed Securicor's position that guards had to deal with numerous blind spots and that the "blind spot" outside was no different. Common sense suggests that the more intelligence the guard has when exiting a building into the higher risk area, the less likely the guard will be ambushed and harmed. Securicor's position that the guard need only be more vigilant assumed the unlikely situation that guards were not exercising heightened vigilance at this time.

[188] For all of the above reasons, I am satisfied that the absence of a driver to stay with the vehicle constituted a significant potential hazard for the guards and custodians who refused to work when they left the client building to return to the vehicle. Without a driver to stay with the vehicle, there was no one to guard the guard, to monitor the site, to forewarn the guard and custodian, to summon the immediate assistance of police or ambulance or to leave the site in the event of a robbery.

[189] I was also convinced that the absence of a driver to stay with the vehicle constituted a significant potential hazard for the guards and custodians when the guards and custodians were inside the building out of the view of the driver. First, the statistics submitted in the case showed that, despite the fact that the majority of robberies occurred outside the building, they also occurred inside buildings. Secondly, employees readily agreed with C. Peterson in their testimony that their work involved entering numerous

blind spots along their interior route and that an assailant could have been waiting for them at every turn.

[190] On the question of whether or not the security features on the S-Series vehicle replaced the driver, employees testified that there is a security culture in the armoured vehicle industry where everyone is guarded or protected by something or someone. According to that culture, the driver guarded the guard, the guard guarded the custodian and the driver was protected by the vehicle, the only secure location at a stop. I gave considerable weight to this on the strength of their conviction and the fact that Securicor did not dispute their contention. I was further persuaded by the considerable experience that employees had in this regard. The evidence was that employees exchanged roles from shift to shift and during shifts, and so they well understood the interdependency of crew members relative to their health and safety in the work.

[191] I was further persuaded by the fact that the employees who refused to work were unanimous in asserting that they had been warned numerous times by their drivers in the 3-person crew configuration to remain in the building due to suspicious circumstances or persons. They also asserted that it was not uncommon for the driver to investigate suspicious persons or circumstance while waiting outside the building or to call for police to come and investigate or to check with the guard and custodian. They also affirmed that the driver checked with the guard and custodian if the run took longer than expected. I accepted Securicor's argument that the pager provided to employees would warn the guard and custodian if the vehicle was under attack, but the pager was useless for detecting and warning the guard and custodian of a vehicle or person(s) waiting for them to exit the building.

[192] Employees were also unanimous in their testimony that the absence of a driver constituted a danger because the driver was also crucial for removing the vehicle in the event of robbery. They held that this was critical for defusing any situation where they could be taken as hostage and used to gain access to the vehicle and its liability. Securicor responded that there were no statistics in their company of a driver leaving the site, but acknowledged that Securicor procedures permit the driver to leave in the event of a robbery after getting permission from the dispatcher. In addition, the evidence was that Securicor circulated an advisory to employees regarding a driver in another company who had left the site during a robbery. It was suggested that this strategy may have saved the guard left behind from serious injury. Thus, I had to conclude that the risk of injury to a guard or custodian was reduced in the event of a robbery if the driver left with the vehicle.

[193] Securicor advanced the view that the absence of a driver was actually positive because there was no driver to be coerced. Thus the guard and custodian were safer. This view, however, ignored the eventuality that, with no driver, the vehicle could not leave the site and would remain as a prize for assailants. In my view, this increased the risk that the guard and custodian would be taken hostage and coerced in an effort to gain access to the vehicle and liability. The fact that the guard and custodian could not override the security features on the vehicle almost assured that they would be injured if taken hostage unless they were able to convince the assailant(s) of their inability to override the security features.

[194] In terms of the highly technical security features on the S-Series vehicle, I agree with Securicor that they were primarily to protect the liability, and I agree with employees they did not replace the level of security afforded by the presence of a driver to stay with the vehicle during stops.

[195] For all these reasons, I was persuaded that the security features on the S-Series vehicle did not replace the driver.

[196] With regard to adequacy of communications, Securicor conceded that there were numerous locations in Ottawa and outside of the city where cell phone dead zones existed, but argued that crews were fully aware of the cell phone dead zones and it was left for local crews to decide a strategy for dealing with it. However, Securicor did not offer any evidence in this regard. Additionally, the CIA device required line of sight with the vehicle to operate which was not always possible.

[197] The employees who refused to work were also unanimous that the training Securicor provided on the S-Series vehicle and Securicor Operations Procedures with a 2-person-off crew was inadequate in that it was too fast and did not permit them to assimilate the information. Quite frankly, I was astonished by the admission of Securicor that this important training connected to their planned introduction of 2-person-off crews using the S-Series vehicle was voluntary. The fact that Securicor had not consulted its local health and safety committee relative to its introduction of 2-person-off crews using the S-Series vehicle goes far, in my opinion, to explaining why employees were dissatisfied with the organization of the training, the subjects covered in the training and its duration. I was more inclined to believe employees given the fact that Securicor had not consulted with their local health and safety committee regarding employees' potential concerns and the fact that the training was voluntary. I was less persuaded by Securicor’s position that employees had signed that they had received training and were satisfied with it, given my sense that the process was regarded by both employees and Securicor as perfunctory. In my opinion, this, coupled with the absence of a driver to stay with the vehicle during stops, could reasonably be expected to cause

injury to an employee in the event of a robbery, before the hazard could be corrected.

[198] With regard to Securicor's hazard assessment relative to the various tasks and shifts, I found that risks assigned to the various types of work and time when the work was performed appeared arbitrarily without identifying the risk factors considered in the assessment. It further appeared that the risk assessment had not considered local issues such as cell phone dead zones. In my view, this further suggested inadequate consultation with the local health and safety committee.

[199] In terms of the health and safety committee, Securicor maintained that it consulted its vehicle design committee consisting of management, union and employees regarding the new design of a vehicle to increase employee safety, vehicle and liability security. S. Matthews testified that Securicor had never consulted the local health and safety committee regarding their implementation of the 2-person-off crew using the S-Series vehicle in this area. This could explain why Securicor did not proffer any evidence to show that they had implemented prevention measures in connection with their decision to operate with 2-person-off crews using S-Series vehicles that addressed the concerns of the employees who refused to work. In this regard, I would refer Securicor to section 122.2 of the Code which reads:

> 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.

[200] I would further refer Securicor to paragraphs 134.1(4)(*h*) and 135(7)(*i*) of the Code which read as follows:

> 134.1(4) A policy committee
> (*h*) shall participate in the planning of the implementation and in the implementation of changes that may affect occupational health and safety, including work processes and procedures.
>
> 135(7) A work place committee, in respect of the work place for which it is established,
>
> (*i*) shall participate in the implementation of changes that may affect occupational health and safety, including work processes and procedures; and where there is no policy committee, shall participate in the planning of the implementation of those changes; [my underline.]

[201] For these reasons, I find that the absence of a driver to stay with the vehicle constituted in the circumstances a significant potential hazard for the guards and custodians.

[202] Now, I must turn my attention to the question of whether or not that significant potential hazard could in the circumstances have reasonably been expected to cause injury before it could be corrected.

[203] Looking first at the question of whether or not the potential hazard would be corrected before the potential hazard could in the circumstances reasonably be expected to cause injury, it was evident that this was unlikely because Securicor gave no indication that it intended to voluntarily alter the 2-person-off crew arrangement. As a result, the risk of injury due to the absence of a driver remained pending.

[204] With regard to the potential for injury, employees conceded that they could use a land phone at the client's location in the event of a robbery or suspicious circumstances. However, they pointed out that once they left the area where the land phone was located, they could only rely on their cell phone or CIA device to summon the police or an ambulance in the event of a robbery, as there was no driver with whom they could communicate via their 2-way radio. Employees additionally maintained it would be difficult to access and use the cell phone and the CIA device during a robbery and so they would be left without help. Their position appeared to be supported by Securicor's evidence that calls to dispatch regarding a robbery always came after the robbery and not during. Thus, it seems to me that, without a driver to notify the dispatcher of a robbery, the guard and custodian working a night shift could lie injured for hours, unable to summon the police for backup or an ambulance for medical assistance. During the day shift, the response time could also be unnecessarily delayed until the public reacted.

[205] According to the evidence, the batteries in the cell phones failed from time to time, the CIA devices required line of sight view in order to operate and the 2-way radios assigned by Securicor to the guard and custodian could not be used to summon help without a driver. While I accept Securicor's position that the crews could return to base to obtain replacement cell phone or batteries, I could not see how this would help the guard and custodian if the battery failed at an inappropriate time. Moreover, there was no proposed resolution for mitigating the line of sight limitation related to the CIA device.

[206] Further evidence by parties was that crews could pass a stop and return later if they observed anything suspicious at a potential stop. However, the evidence of B. Martin was that they rarely changed the route because doing so could impede their ability to complete their run in the time period assigned. I further noted that despite the fact that the guard and custodian in a 2-person-off crew were isolated at times during night shift stops, there was no evidence that consideration was given by Securicor to a process

whereby Securicor would routinely check with its crews working in isolation.

[207] With regard to the employee's contention that the driver could use the vehicle as a shield or weapon in the event of a robbery, Securicor countered that there was no evidence of this being done. However, common sense suggests to me that in the event of an ongoing robbery where the vehicle has not left, the driver would use the vehicle as a shield or a weapon if the opportunity or necessity presented itself.

[208] In the *Elnicki* case*, supra,* which was rendered prior to the 2000 Part II amendments, the Board confirmed that duties of employees employed in the armoured vehicle industry involve a somewhat high level of inherent danger particular to the nature of the business. In that case, the Board decided that reducing the crew size from 3 to 2 by removing the armed guard who escorted the custodian constituted a danger beyond the high inherent danger associated with the work. The Board enumerated guidelines for deciding whether the work place conditions create a danger for a two-person crew. The criteria included:

- Condition of the location;
- Amount of time the custodian and guard loose visual contact;
- Distance covered by custodian from the vehicle to the location and total duration of the run;
- Safety measures in place to protect the custodian;
- Number of exits and entrances in the location;
- Isolated areas on the premise;
- Time of day;
- Relative importance of the service points;
- Any other factor likely to have a significant level of risk. [my underline]

[209] In the *Loomis* decision, *supra*, RSO McKnight confirmed that armoured vehicle employees were exposed to risk on a daily basis and that a danger existed unless the employer ensured that the employees were adequately informed, trained and supervised. He also found that the absence of communication was sufficient to confirm that a danger that went beyond a normal danger existed. His criteria read as follows:

- Kind of client;
- Valuables being transported;
- Distance from the vehicle;
- Configuration of the work place;
- Security available from the client; and,
- Constant communication. [my underline]

[210] In my opinion previous boards have confirmed that the armoured vehicle industry involves a somewhat high level of inherent danger particular to the nature of the business, that there is a need to ensure that employees are adequately informed, trained, and supervised, and that the absence of

constant communication is sufficient to confirm the existence of a danger that went beyond a normal condition of work. I concur and reaffirm their findings.

[211] For the above reasons, I was persuaded by the evidence that the absence of the driver constituted a significant hazard for the employees who refused to work that could reasonably be expected to cause injury to them in the circumstances that:

- the security features on the S-Series vehicle and the cell phone did not replace the role of the driver;
- constant communications could not be ensured due to deficiencies relative to the cell phones, the CIA and the pager;
- training was voluntary and deficient in its presentation;
- vehicles in some circumstances could not be parked close to the entrance of the building forcing the guards and custodians to walk a greater distance;
- Securicor had not consulted with its local health and safety committee regarding the implementation of the new work procedures; and
- Securicor had not implemented sufficient measures to mitigate the increased hazard connected with removing the driver to stay with the vehicle.

[212] With regard to the question of whether or not an armed robbery was a reasonable possibility in the future, the statistics submitted in the hearing confirm that armed robbery is an inherent risk associated with the work of guards in the armoured vehicle industry. Despite the claim by Securicor that statistics showed that the number of robberies were low and there had been few injuries, I was convinced that the incidence of armed robbery remains a constant threat. Crews carry large amounts of money and they are armed. In my opinion, the risk of robbery with injury remains high, the frequency of robbery has been low in the region where the employees worked, but given that assailants will likely be armed and determined, the severity of injury is likely to be high.

[213] Unlike the park wardens in the *Martin* case, *supra*, the guards and custodians in the appeals did not have the option of withdrawing themselves the moment a robbery occurred. Assailants would be intent on pursuing them to gain access to the liabilities in the immediate possession of the guard and custodian and possibly in the vehicle. That being the case, Securicor had a duty to ensure that they were ready for all eventualities when a robbery unfolded, including forewarnings, communications for summoning help and options for avoiding and/or reacting to a hostage taking situation.

[214] For the above reasons, I find that the risk of robbery and injury remains a reasonable possibility.

[215] Taking into consideration the legislation, the jurisprudence, especially *Verville, supra,* the arguments of parties and the facts in the appealed cases, I find, in the circumstances, that the absence of a driver to stay with the vehicle during stops constituted an important level of protection to the guard and custodian that was not replaced by the employer when Securicor inaugurated the 2-person-off crew procedures using the S-Series vehicle. That being the case, I find that a danger existed for the employees who refused to work.

[216] That being the case, I need only decide whether the danger was a normal condition of work for the employees. For this, it is necessary to consider the interpretation and application of paragraph 128.2(*b*) of the Code which reads:

> 128(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> (*b*) the danger referred to in subsection (1) is a normal condition of employment.

[217] For interpreting paragraph 128.2(*b*), I refer to the following decisions referred to by parties:

Honourable Madam Justice Gauthier wrote in paragraph 55 of *Juan Verville and Service Correctionel Canada, supra*:

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car? [my underline]

Appeals officer Cadieux stated in paragraph 180 of *Parks Canada Agency and Doug Martin, supra*:

> [180] However, I do agree with Mr. Raven's proposition that
>
> > The fact that risk or danger may be inherent to the work itself does not mean that the worker should be expected to assume all risks to his health and safety as part and parcel of his job. The employer must take the necessary measures to decrease the risk to a minimum. [my underline]

Appeals officer Cadieux stated on page 4 and 5 of *Revenue Canada and Robin Edwards*, RSO Decision No. 91-023, December 9, 1991:

Mr. Feeney argued at the hearing that the escort duties assigned to Mr. Edwards, which result from having to make bank deposits, are a normal condition of his employment and that any perceived danger was inherent in his job. Assuming the escort duty assigned to Mr. Edwards is a normal condition of his employment, as claimed by the employer, this would only mean that the employee could not invoke the right to refuse on this basis only. Therefore, Mr. Edwards could not refuse simply because escorting a person is a dangerous task. Nonetheless, in such a situation, the employer would still be responsible to take the necessary measures to reduce the risks to a minimum.

When analyzing the refusal to work statement signed by Mr. Edwards, we are informed that his reasons for refusing are:

> "27 SEPT.1991 I WAS ASKED TO ACCOMPANY PORT DRIVER TO OTHER BRIDGES AND BANK FOR DEPOSIT. DUE TO VALUE OF MONEY, NOT TRAINED TO PROTECT MONEY OR SELF, FEEL UNSAFE BEING INVOLVED WITH SUCH HIGH CURRENCY. FEEL TARGET FOR VIOLENCE ROBBERY. VEHICLE ALSO NOT SECURE." (sic)

It seems to me that Mr. Edwards' main reason for refusing to work goes beyond the fact that the task of escorting the port driver, Ms. Rocco, who collects and transports large sums of money, is dangerous and that this job puts him at risk. It is above all that he is not trained, nor does he have proper safety equipment, to carry out this duty safely. Mr. Edwards's concern for his safety was heightened by the wide publicity that was given to the collection and transportation of these large sums of money which, according to him, is likely to result in robbery and robbery with violence. Hence Mr. Edwards feared for his life.

"Danger" is defined in the Code as "any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected". Hence, the concept of danger is a subjective one. The danger becomes concrete when either the hazard or the condition manifests itself. Consequently, when a safety officer investigates a refusal to work, he/she must determine if the alleged danger is real and present at the time of the investigation.

Several opinions were expressed, in the instant case, by various police authorities respecting the regular and daily transfer of large sums of money to local financial institutions. The Niagara Regional Police Department advised both Revenue Canada and Labour Canada representatives against the current unsafe transportation method because of the increased risk of robbery and robbery with violence. A basis for this concern is the large sums of cash, known to the public because of media coverage, which is transferred on a daily basis and which now runs close to a quarter of a million

dollars. This opinion was subsequently confirmed in writing to Mr. Hamilton by the Niagara Police Department.

…

Whether the danger was present, or immediate, at the time the safety officer investigated appears to be hypothetical. Indeed, it is practically impossible for the employer or the safety officer to certify that, at the time of their investigation, a third party is present in the work place for the clear purpose of carrying out his/her felonious intent. In my opinion, the danger in this case is the fact that the risk of robbery and robbery with violence has increased to the point where it is no longer acceptable to Mr. Edwards or to the police authorities. It is not a risk so remote that it is unlikely to occur. On the contrary, it is a daily risk where the probability of occurrence of a robbery, given the prevailing circumstances, is a matter of time.

I am of the view that the daily and regular transportation of large sums of cash, known to the public in general, by Revenue Canada, Customs and Excise, in a marked van, with inadequate equipment and unqualified personnel to act as an escort creates a situation where the risk of robbery is immediate. Therefore, there exists in Mr. Edwards' work place a condition that can reasonably be expected to cause injury. The mere fact that no robbery has occurred to date is, I believe, a matter of chance. I also believe that time and luck are running out and that Mr. Edwards should not have to put his safety and health at risk to prove his contention that danger exists.

I cannot accept that normal conditions of employment such as making bank deposits or acting as an escort requires Mr. Edwards to put his life, health or safety on the line and accept all the risks of this job regardless of their consequences. I certainly do not believe that the current safety measures advocated by the employer and the corresponding limited training given to Mr. Edwards, which amounts to pulling on a radio pin to advise of a threat of robbery or a robbery in progress, then to take a passive attitude by yielding and not offering any resistance are adequate safety measures to protect Mr. Edwards in a situation of robbery or robbery with violence. In this case, I believe I must err on the side of caution to protect the employee in question.

This approach is, I believe, consistent with the purpose of the Canada Labour Code, Part II which is prevention. The right to refuse is and must be seen as one of the mechanisms entrenched in the Code to support this goal. Hence, the right to refuse is a prevention tool that can be used when everything else fails. [my underline]

[218] I retained from the above noted citations that employers must take the necessary measures to decrease the risk to a minimum. In connection with this sections 122.2 and 124 of the Code specify the following:

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.

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[219] Where, despite best efforts, an employer is unable to eliminate or reduce a hazard connected with certain work, that hazard is deemed to be an intrinsic or essential characteristic of the work and normal to the work. Paragraph 128.2(*b*) of the Code specifies that an employee cannot refuse to work where the danger is a normal condition of the work.

[220] However, this does not mean that employees engaged in the work must put their health or safety or life on the line and accept all the risks of the job regardless of the consequences. To the contrary, when the employer has not discharged its responsibilities under sections 124 and 125 of the Code, it is dangerous for the employee to work under these conditions and the danger does not constitute a normal condition of work referred to in paragraph 128(2)(*b*) of the Code.

[221] In response to Securicor's position that the risk of robbery is normal to the work of an armoured vehicle employee and that an increased risk of injury beyond "normal" danger can only be established by verifiable information such as police reports, it is my opinion that this perception is consistent with the concept of "immediate" or "imminent" danger which no longer applies in respect of the current definition of danger in the Code. It is, therefore, irrelevant to the decision of danger in these cases that the employer and HSOs did not report seeing any evidence of robbers in connection with each of the refusals to work.

[222] In deciding that a danger did not exist for the employees who refused to work, HSOs Marion and Hubert mainly considered whether an immediate danger existed. They reported that there was no evidence of a robber and did not consider whether or not a potential danger existed. The HSOs concluded that whatever danger may have existed was a normal condition of work. They stated that the danger existed regardless of the methodology used to perform the work. However, in arriving at this conclusion they did not consider that the methodology had, in fact, changed when Securicor implemented the 2-person-off crew initiative or the fact that Securicor had not consulted with its employees via the local health and safety committee regarding the implementation of the 2-person-off crew.

[223] For all of the reasons in this decision, I conclude that the absence of a driver in the circumstances constituted a danger that exceeded the "normal" danger associated with the work and that its occurrence in the future was a reasonable eventuality. On that basis, the decision of HSO Hubert regarding the absence of danger and the two decisions of HSO Marion are rescinded.

[224] Having found that a danger existed for the employees who refused to work and given that I am authorized by paragraph 146.1(1)(*b*) of the Code to issue a direction under subsection 145(2), I, hereby, order Securicor to immediately take measures to protect any person from the danger.

[225] CAW and employees requested that I issue a direction requiring Securicor to ensure that a driver remains with the armoured vehicle at all times; improve the communication equipment provided to crews including a sufficient number of portable radios and cell phones and charged batteries to supply each employee; and revise its training program in consultation with the union to ensure that all employees receive complete, detailed training on the S-Series vehicle including a significant training component on guarding in the context of the new truck. However, I believe that the determination of what is required to protect any person is Securicor's responsibility to be exercised in consultation with its health and safety committee and under monitoring by a HSO to ensure that the measures are taken and are adequate.

[226] Finally, the Federal Court and tribunals have previously stated that the right to refuse provisions in the Code are not to be used in the work place to resolve long standing labour disagreements. However, S. Avery, National Safety Specialist, Securicor, stated in a document submitted on behalf of Securicor regarding the refusals to work by C. Brazeau and B. Martin that management was advised that crews would refuse to work if assigned to a 2-person-off crew because of a lack of driver. S. Avery wrote that Securicor changed the first location in anticipation of their refusals to work to enable quick response and minimal impact to the operations and customers. I noted that Securicor also changed the route of B. Thoms and B. Woods prior to their refusals to work.

[227] While this suggests poor judgment on the part of employees for not proactively and effectively raising their health and safety concerns with Securicor through other means prior to refusing to work, the greatest culpability rests with Securicor. Instead of consulting with their employees through their health and safety committee to resolve employee concerns and avoid a refusal to work, Securicor opted to choose the sites where the

refusals to work would have the least impact on their operations and their customers. In effect, Securicor prematurely, and potentially needlessly, involved HSOs and this Office in their disagreement with their employees and, in so doing, potentially put the health and safety of employees at risk in the interim. This I consider to have been an abuse of the Code.

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Douglas Malanka
Appeals Officer

Appendix

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

DIRECTION TO THE EMPLOYEES UNDER PARAGRAPHS 145(2)(a)

Following my inquiry conducted pursuant to section 146.1 of the Code into the circumstances of the decisions of health and safety officers Marion and Hubert that a danger did not exist for the employees who appealed their decisions pursuant to subsection 129(7) and who are referred to in my decision, I find in the circumstances that the absence of a driver in a 2-person-off crew constituted a danger for the following employees while at work that did not constitute a normal condition of employment:

- C. Brazeau and B. Martin:
- B. Thoms and B. Woods; and,
- A. Gour and P. Gour

Therefore, you are HEREBY DIRECTED pursuant to paragraph 145(2.1) of the Canada Labour Code, Part II to discontinue the use, operation or activity or cease the work in that place until the employer has complied with the direction issued to Mr. T. White, General Manager, Securicor Canada Limited pursuant to paragraph 145(2)(a) of the Code.

Issued at Gatineau, Quebec this 16th day of December, 2004.

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Douglas Malanka
Appeals Officer # HQ1594

Appendix

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

Following my inquiry conducted pursuant to section 146.1 of the Code into the circumstances of the decisions of health and safety officers Marion and Hubert that a danger did not exist for the employees who appealed their decisions pursuant to subsection 129(7) and who are referred to in my decision, I find in the circumstances that the absence of a driver in a 2-person-off crew constituted a danger to the following employees at work that did not constitute a normal condition of employment. Those employees included:

- C. Brazeau and B. Martin:
- B. Thoms; and B. Woods; and,
- A. Gour and P. Gour

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, **alter the activity that constitutes the danger or protect any person from the danger** immediately.

Issued at **Gatineau**, this **December 15, 2004.**

Be advised that pursuant to subsection 145(8) of the Canada Labour Code, Part II, you are required to inform a health and safety officer at Human Resources and Skills Development Canada in Ottawa, Ontario, no later than January 14, 2005 of the measures taken to comply with the attached direction, and you shall provide a copy of that written response to the health and safety committee at the work place.

Also, be advised that, pursuant to subsection 145(5) of the Canada Labour Code, Part II, the employer shall without delay cause a copy of this direction to

be posted and give a copy of it to the health and safety committee.

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Douglas Malanka
Appeals Officer # HQ1594

To: Securicor Canada Limited
1303 Michael Street
Gloucester, Ontario, K1B 3M8

SUMMARY OF APPEALS OFFICER'S DECISION

Decision No.: **04-049**

Appellants: C. Brazeau, B. Martin, B. Thoms, B. Woods, A. Ozga, P. Gour and CAW-Canada

Respondent: Securicor Canada Limited

Provisions:

***Canada Labour Code*:** 122(1), 124, 125, 128, 129, 134,135, 145, 146

Keywords: Refusal to work, crew reduction, driver, 2-person-off crew, S-Series vehicle, cell phone, alarm devices, 2-way radios, highly technical security vehicle features, armed robbery, danger, normal danger, training, risk assessment, statistics, , local health and safety committee, shield, weapon, industry culture drive away

Summary:

In three separate instances, three guards and three custodians refused to work. They complained that the employer had reduced their crew size from 3 to 2 persons and, in doing so, eliminated a driver to stay with the vehicle while the guard and custodian completed the pickup or delivery. They held for several reasons that the driver constituted a level of protection which was not replaced by the security measures put in place by the employer included an S-Series vehicle, cameras, alarm devices, cell phones and 2-way radios.

The health and safety officers who investigated the refusals to work decided that a danger did not exist in any of the refusals to work because the employees could not point out anything or anyone that constituted a danger to their health and safety.

Following a review of the appeal by employees, the appeals officer decided that a danger existed in each case because the risk of a robbery remained a constant risk and because the employer had not taken sufficient measures to mitigate the additional level of risk that resulted when the driver was eliminated. The appeals officer ordered the employer to protect the health and safety of all persons immediately.