Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-03-16
Case No.: 2016-09

Between:

Teamsters Local Union No. 419, Appellant

and

GardaWorld Cash Services Canada Corporation, Respondent

Indexed as: *Teamsters Local Union No. 419 v. GardaWorld Cash Services Canada Corporation*

REDACTED VERSION

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour
Decision:	The appeal is dismissed and the appellant's request for the issuance of a direction pursuant to paragraph 146.1(1)(*b*) of the *Canada Labour Code* is denied.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Katherine Ferreira, Koskie Minsky LLP
For the respondent:	Mr. David J. Bannon, Hicks Morley Hamilton Stewart Storie LLP Mr. Thomas Shaw, Hicks Morley Hamilton Stewart Storie LLP
Citation:	2018 OHSTC 2

REASONS

[1] This is an appeal brought under subsection 146(1) of the *Canada Labour Code* (the *Code*) against a direction issued by an official delegated by the Minister of Labour (ministerial delegate), Ms. Kim Mordaunt, on February 29, 2016, at the conclusion of the investigation conducted by the latter at the work place operated by the respondent and situated in Mississauga (Stanfield Road), Ontario.

[2] That investigation concerned a multi-part complaint originating with the appellant and generally concerning Garda's introduction of a new model of armoured vehicle hereinafter referred to as the Peterbilt or "'P' series".

[3] At the conclusion of her investigation, Ministerial Delegate Mordaunt found the respondent in contravention of a number of provisions of the *Code* and of the *Canada Occupational Health and Safety Regulations* (the Regulations). Consequently, she issued to the respondent a direction under subsection 145(1) of the *Code*, said direction or rather the issuance of such being the cause of the present appeal.

[4] As the wording of the said contraventions by the respondent provides a fairly clear picture of what the latter has been found to have violated, and for the sake of clarity for what follows, those contraventions are enunciated below as formulated by Ministerial Delegate Mordaunt:

- Failure to evaluate the effectiveness of the hazard prevention program in consultation with and the participation of the Policy Committee prior to the implementation of the new "P" series truck into the workplace;

- Failure to identify and assess the hazards of the new "P" series truck with the consultation and participation of the Policy Committee prior to its introduction into the workplace;

- Failure to identify and assess the hazards related to the new "P" series [truck] prior to its introduction into the workplace;

- Failure to review the effectiveness of the workplace violence prevention measures prior to introducing a new truck into the workplace; and

- Failure to fully consult with the Policy Committee and allow it to participate in the implementation of the new "P" series trucks prior to their introduction to the workplace.

[5] The direction under subsection 145(1), commonly referred to as a "contravention" direction, that derives from the above noted violations, is being appealed by the union Teamsters Local Union 419 (the union) not because the appellant is in disagreement that the respondent has committed the said violations and failed to fully participate in the Internal Responsibility System (IRS), but rather because it is seeking that there be added a "danger" component or direction under subsection 145(2) of the *Code* as it claims that a number of

design elements of the new vehicle that may differ from previous models of armoured vehicles used by the respondent and that are incorporated in the new "P" series truck render the vehicle a "danger" within the meaning of the *Code*. In addition, the appellant is requesting that the appeals officer issue an order that respondent Garda cease and desist from using the "P" series vehicles until the health and safety hazards it claims are posed by the said vehicles have been adequately addressed.

[6] In her testimony at the hearing and through her investigation report that is part of the evidence, it was made clear that in the late stages of her investigation, consideration was given by the ministerial delegate to also issue a "danger" direction such as what is sought by the appellant in the present case. However, such a direction was not issued for the following reasons provided in testimony as well as stated in the investigation report:

- The lack of participation by the Policy Committee in itself would not constitute a danger;
- The trucks in question had been in use throughout the country for 6-9 months without incident;
- The issues of driver exiting, ergonomic concern, [text redacted] and others [are] being assessed with the involvement of the internal responsibility system;
- A joint [union-employer] information [has] been issued to employees to identify the issues of concern;
- There [is] no [refusal to work] initiated by the employees using the equipment; and
- A contravention direction has been issued to address the lack of participation of the Policy Committee with an expected completion date by the end of June 2016.

[7] It is important to note at this stage that at the outset of the hearing, the parties sought and the undersigned granted a confidentiality order relative to all exhibits (documents) entered at the hearing as well as a redaction order whereby the full text of the present decision would first be provided to the parties for their consideration and agreement as to the portions of the decision needing to be redacted, with the Tribunal retaining final discretion as to what would be redacted in the final text.

Background

[8] As stated above, the starting point of this case was a complaint made by the appellant's representative, Mr. [text redacted], on December 15, 2015, relative, in general terms, to the role awarded to the policy health and safety committee (the committee) in the legislation and the corresponding obligations put on the employer in this regard.

[9] In the course of her investigation, the ministerial delegate received a great deal of documentary information and had many meetings and discussions with employer and employee representatives regarding the contraventions complained of and, in the end, found the respondent at fault of the contraventions noted above. The present appeal however is not directed at the substance of those findings by the ministerial delegate, but rather at the redress that was directed, which the appellant considers should include a "danger" finding. It needs to be noted at this stage that the respondent did, through the opening statement by its counsel, indicate that the contraventions identified in the direction were not being contested by the respondent as issued, that the failures that they represented were being recognized and that those had been or were being rectified. That being said, the factual background basing the conclusion sought by the appellant is somewhat simple.

[10] Garda is a federal undertaking whose main function is the transport/transit of cash and valuables using a variety of vehicles, for the most part armoured vehicles. In the case at hand, the crew operations model is what is commonly referred to as the [text redacted].

[11] In January 2014, Garda acquired another cash transport undertaking identified as G4S and thus acquired the Mississauga branch of G4S as part of the locations covered by the said transaction. At the time of said acquisition, the appellant's representative, Mr. [text redacted], worked out of the Mississauga branch of G4S, as did the two other witnesses called in support of the appellant's case. At the time of the hearing, all three continued to be attached as employees to the now Mississauga branch of Garda, although not actively employed on any armoured vehicle, either as driver or custodian/messenger.

[12] [Text redacted].

[13] Traditional or "early" vehicles can best be described, according to witnesses, as a "steel box with ballistic resistant armour around it and bulletproof glass". Those vehicles were not equipped with any new computerized technology such as [text redacted].

[14] Through the course of this same industry evolution, the "U" series of vehicles were eventually introduced. Those so-called "smart" vehicles are trucks seemingly designed from the bottom up in consultation with Garda's national policy health and safety committee (national committee), equipped extensively with a variety of technological systems or advancements, including [text redacted] as well as [text redacted]throughout, with both crew members [text redacted], as well as being able to access from within the vehicle the different components or compartments of the truck [text redacted]. While there was no evidence presented that would have indicated that such "smart" vehicles were in use at any other location operated by Garda, the evidence has shown that such "smart" vehicles were in use at the Mississauga location when it was still operated by G4S. In point of fact, the "U" series truck can be described as a G4S-style vehicle inherited by Garda when it acquired G4S in January 2014 and the predominant vehicle utilized in the Mississauga branch, although one of only a number of vehicles currently in use in the Garda fleet.

[15] The "P" series model was first presented to the national committee in February 2015 on the occasion of a visit by the whole committee at the Cambli factory, builder of the vehicle, near Montreal. At that time, the appellant had been informed that the respondent had already acquired

1000 such vehicles and on occasion of the visit to the builder, the national committee was presented with a completed model which, according to the evidence, may have been destined to the US market but which presented all of the characteristics of the model destined to Canada.

[16] While the "P" series vehicle has been developed after the "U" or "smart" truck, it does not present all the technological elements or characteristics of the "U" series vehicle. Designed for operation on the "all off" model, the "P" series vehicles [text redacted], based on the Underwriters Laboratories (UL) standard, [text redacted] using the three points of contact method, [text redacted].

[17] The evidence has shown that the "retrofit" trucks and the "P" series trucks offer relatively the same operating mode in that the driver and the custodian are [text redacted]. As it is the technology integrated into the vehicle that essentially makes a vehicle a "smart" vehicle, the "P" series truck can be seen as a "smart" vehicle in that there is considerable technology integrated into the vehicle, including [text redacted], although some of the features that can be found in the G4S "U" series vehicles may be absent.

[18] In short therefore, the "P" series truck destined to become the [text redacted] armoured vehicle used at Garda constitutes a "smart" truck [text redacted] common to the other vehicles used by the respondent [text redacted]. The appellant contends that those four elements render the "P" series truck a danger within the definition of the term in the *Code*.

Issues

[19] Usually, defining the issue(s) raised by an appeal would, as a matter of course, require that one look at the direction(s) under appeal and, depending on whether faced with a "contravention" or a "danger" direction, define the issue(s) to be determined at appeal as whether the ministerial delegate (or the health and safety officer in previous times), was correct, this being stated somewhat simplistically, in concluding, following an investigation into the matter, to a contravention or to a "danger" (or the absence of such) as defined in the legislation. The determination by the appeals officer on this issue is to be arrived at on a balance of probabilities and with the latter acting in a *de novo* capacity, a fact not disputed by the parties to the present appeal.

[20] In the case at hand however, as could be seen above, what the appellant is seeking is an addition to an already issued and not disputed "contravention" direction, this being a "danger" component or direction, claiming that certain design characteristics of a new armoured vehicle, such being a tool of the trade of armoured car service employees, render said new armoured vehicle ("P" series) to be used in the said trade a "danger" within the meaning of the *Code*. Such determination however cannot be arrived at in a vacuum and needs to take into account the actual nature of the tools, tasks and/or work environment that characterize the work of employees in the cash transport industry in this instance. In this respect, the parties to the present appeal are of one mind that that there are inherent risks attaching to the work of armoured car service employees, something that has long been recognized at case law under the *Code*. As such, in 1993, a regional safety officer concluded as follows in *Loomis Armoured Car Service Ltd. and Canadian Brotherhood of Railway, Transport and General Workers, Local 266A,* Decision 93-008 (*Loomis Armoured Car Service*) :

> 21. No one would disagree, I would venture, with the premise that persons employed in the operation of armoured cars are exposed to risks on a daily basis. (...) the Canadian Labour Relations Board noted that " the risk of robbery or assault is part of armoured car service employees lives". One can therefore conclude that danger is inherent in the operation of armoured cars, a situation which is recognized by the Code and which precludes employees from refusing to work solely because of the risk of robbery or criminal attack. However, one must also ask at what level or under which circumstances does this inherent danger become unacceptable?

[21] In more recent times, appeals officers did, in a number of decisions, adopt the same position. In one of those cases, *Brazeau v. Securicor Canada Ltd.*, Decision No. 04-049 (*Brazeau*), the appeals officer stated:

> [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 […]

[22] I see no reason to disagree with this opinion. This being said and accepting the fact of robbery or assault being an inherent risk of the work of armoured car personnel, it stands to reason that to determine "danger", one must therefore look at the vehicle used by said personnel, said vehicle being seen as a tool and protective equipment, to determine whether, given that it is a new vehicle, its design or, to be more specific in this particular case, four elements of its design, would alter, in point of fact increase or exceed, the threat to health or life of employees should the hazard of attack or robbery inherent throughout this industry materialize, to the point that this increased or excess hazard could reasonably be expected to imminently or seriously threaten the life or health of employees using said new vehicle before it could be corrected, said issue(s) needing to be determined on a balance of probabilities.

[23] It is important to note here that where generally, such determination of danger is done relative to a work refusal action by an employee where the work specifics of an individual are part of the equation and considered vis-a-vis the inherent risks of the job as well as the normal conditions of employment, in the present case where there has been no such refusal to work, it is the vehicle itself, or more particularly four specific characteristics of the vehicle, that are presented as generator of "danger" when set only against the said inherent risks of the work.

Submissions of the Parties

[24] The parties are of one mind as to the jurisdiction of appeals officer, and thus of the undersigned, to issue a danger direction in this appeal. The respondent has simply indicated that it neither disputes nor challenges the Tribunal's jurisdiction to issue a "danger" direction under subsection 145(2) of the *Code*, nor does it dispute the submissions made by the appellant on this particular point.

[25] As for the appellant, in addition to noting that an appeals officer has, under the *Code*, all the powers of the Minister and that the Minister does have the power to issue directions under

subsection 145(2) of the *Code*, thus authorizing an appeals officer to issue such direction if the latter comes to the conclusion that such a direction should have been issued, the appellant also bases its submissions on the precedent created by the Federal Court of Appeal in *Martin v. Canada (Attorney General)*, 2005 FCA 156 (*Martin*), which stated that an appeals officer could issue a direction under subsection 145(1) of the *Code* (contravention direction) where a health and safety officer (now Minister) had made the original determination to issue a direction under subsection 145(2) of the *Code* (danger direction).

[26] The appellant also refers to the Tribunal's decision in *Canadian Union of Postal Workers v. Canada Post Corporation*, 2013 OHSTC 23, wherein relying on the rationale in *Martin*, the Tribunal found that an "appeals officer may vary a direction to include other contraventions that the appeals officer determines should have been identified in the context of the investigation for correction of the original direction issued by the HSO." It is the view of the appellant that given the above rationale and the powers with which an appeals officer is vested, there is nothing preventing applying this rationale in the reverse, thus allowing an appeals officer to vary an original contravention direction to also include a danger direction. Quite curiously, in its submissions on this point, the appellant did not specifically refer to the text of the *Code* which clearly states at paragraphs 146.1(1)(*a*) and (*b*) that in addition to its authority to vary, rescind or confirm a decision or direction, an appeals officer has the authority to issue any direction considered appropriate under subsection 145(2) or (2.1), that is, any danger direction.

A) Appellant's Submissions

[27] As a premise to dealing with the four central elements of its case for a finding of danger and the issuance of a danger direction, the appellant notes that this claim of "danger" needs to be examined and considered on the basis of the most recent definition of the term "danger" in the *Code*, thus the definition of 2014, and bases its arguments on the recent decision of this Tribunal, essentially the first interpretation by the Tribunal of the said definition, in *Correctional Service of Canada v. Ketcheson*, 2016 OHSTC 19 (*Ketcheson*), which sets the test to be applied in determining whether a danger exists within the meaning of the *Code*. As such, the appellant notes that in the said decision, the Tribunal referred to the *Canadian Pacific Railway Company v. Woollard*, 2006 FC 1332 decision, wherein the court noted the necessity to adopt a liberal and large interpretation of the provisions of the *Code* that is consistent with the purpose of the legislation, thus leading the appellant to argue that this is the approach that should guide the undersigned in the current case.

[28] Alluding to the 1985, 2000 and 2014 evolution in the terminology used in the *Code* to define "danger", the appellant again refers to *Ketcheson* wherein it is stated in relation to the use of the qualifiers "imminent" and "serious" to describe threats that: "There are two types of 'danger'. They are both high risk but for different reasons. The new definition adds a time frame for assessing probability. It adds the concept of severity of harm. In the context of the rest of the *Code*, a 'danger' is a direct cause of harm rather than a root cause". Based on the same decision, the appellant also notes that in relation to the phrase "imminent or serious threat" in the 2014 definition, the Tribunal used the term "disjunctive", meaning that a threat may be imminent or serious in order to constitute a danger, but that it does not need to be both imminent and serious, and that while an "imminent" threat to health would cover an acute effect as opposed to a

chronic effect, regardless of severity but with the probability that the harm would occur and occur soon, a "serious" threat is not or would not need to be imminent, the qualifying term "serious" having rather to do with the severity of the outcome.

[29] Finally, as regards the words "threat to the life or health of a person", again referring to *Ketcheson*, the appellant notes that the Tribunal stated that "the phrase refers to a large category of harms involving people. It is not about a threat to property, the environment, productivity, quality, business continuity, or other categories of loss associated with accidents and exposures. The purpose of the *Code* is the protection of people and not things". This being said, the appellant notes that the Tribunal has clearly stated the questions to ask in determining whether a "danger" exists as follows:

> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Can this hazard, condition or activity reasonably be expected to be an *imminent* threat to the life or health of a person exposed to it?
>
> Or
>
> 2) b) Can this hazard, condition or activity reasonably be expected to be a *serious* threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[30] Given the "test" enunciated above, the appellant is of the opinion that the "P" series vehicle presents four elements, what the appellant describes as four major health and safety hazards, that pose an "imminent and/or serious threat" to the life or health of employees exposed to them, those being [text redacted]. The appellant is further of the view that said threat will exist before the hazard or condition can be corrected.

[31] The appellant presents its case against the background that workers in armoured vehicles, and more specifically those who work in the cash transport industry, face serious health and safety risks, such as robberies, hostage situations or violence, a fact that is recognized in the Tribunal case law which describes this as a "somewhat high level of inherent danger particular to the nature of the business" (*Brazeau*).

[32] The workers concerned by the present appeal operate in teams of two according to what is referred to as the "all off model", meaning that [text redacted].

[33] The appellant thus submits that the dangerous nature of the work of these workers signifies that where equipment, training or protective measures available for their protection are inadequate, which the appellant submits is the case with the "P" series vehicles; they may face a serious risk of harm. While there may be some inherent danger in the work of these workers, it is the view of the appellant that this does not absolve the employer of its obligations under the *Code* nor does it follow that a danger direction cannot be issued in relation to this work.

[34] In short, and this summarizes the position held by the appellant in the case, to the extent that there is a change from workers' normal conditions of work, such as faulty or ineffective protective equipment, employees may face a danger that goes beyond the dangers inherent in their work. In short then, it is submitted by the appellant that the hazards posed by the "P" series vehicle go beyond the danger inherent in Garda crews' normal conditions of work, such that the vehicle constitutes a danger within the meaning of the *Code*.

[Text redacted]

[35] In a more particularized manner, the appellant has dealt individually with what it describes as the four hazards associated with the "P" series as follows. On [text redacted].

[36] While acknowledging some uncertainty in the evidence as to whether the armouring level was set under the UL or NIJ (National Institute of Justice – US Department of Justice) levels, the appellant submits that both scales establish that [text redacted].

[37] The appellant draws from what precedes the conclusion [text redacted] for workers on Garda crews. Furthermore, the appellant submits that no additional training or personal protective equipment (PPE) was provided to the employees as a means of offsetting the [text redacted].

[Text redacted]

[38] On the subject of *crew separation*, the appellant notes that the evidence shows that in the "P" series vehicle, the crew members [text redacted] by the custodian/messenger, with access through the various components from within the vehicle through the bulkhead being impossible, [text redacted]. From a health and safety perspective, the appellant argues that crew separation represents a hazard on a number of levels.

[39] First, from the standpoint of communication between members of the crew, the appellant contends that the bulkhead renders questionable the possibility to communicate directly by oral means (shouting), or to communicate by use of an available intercom or a telephone where circumstances may impede access to either apparatus, thus affecting crew members' ability to advise each other if they are in danger and assist or take action as the circumstances may render appropriate.

[40] Secondly, from the perspective of possible physical access between crew members, the appellant has argued that the presence of an unbreachable bulkhead between the "P" series vehicle compartments represents a health and safety hazard for the crew members since they would be [text redacted] or in the case of needed medical assistance. Compounding the situation in the case of a driver in distress, for example a heart attack, the custodian would be unable to enter the driver compartment from within to assist the driver and/or prevent a possible vehicular accident. It needs to be pointed out however that in testimony, the appellant recognized that "crew separation" is the existing business standard or "rule".

[41] [text redacted].

[42] [text redacted].

[Text redacted]

[43] The appellant also argues that the driver exiting on the driver's side (left hand), thus often into traffic, may result in serious harm. [text redacted], thus exiting onto the sidewalk most of the time. The appellant recognizes that in traditional armoured trucks, the driver does exit in the same fashion as in the "P" series, although in those traditional vehicles, three person crews are used, in contrast to the two men/all off crews, with the driver therefore not exiting the vehicle when the other two crew members attend at a client's premises.

[44] Additionally on this "exiting" issue, the appellant has noted that drivers exiting (or entering) the vehicle are required to use the three points of contact method, meaning first that the exiting driver [text redacted] the vehicle for potential dangers, and secondly, rendering the driver [text redacted]. In testimony, the appellant has also recognized that exiting [text redacted].

[Text redacted]

[45] The fourth hazard identified by the appellant relative to the "P" series vehicle is [text redacted]; a situation the appellant claims is unique to the "P" series, as all other armoured vehicles in the [text redacted]. The decision by the respondent to withdraw [text redacted] from its new series of vehicles is based on the study conducted by Mr. [text redacted], a former police officer who was tendered and accepted as an expert witness and who recommended that the [text redacted].

[46] It is the appellant's position, however, that this study should be given little weight by the undersigned because of what the appellant considers are numerous shortcomings. Central to the appellant's position in this regard is the latter's opinion that the [text redacted] armoured vehicles may deter persons from attacking the armoured vehicles, with the respondent's expert witness conceding in testimony not having conducted any tests or research regarding the potential [text redacted], restricting himself to simply providing anecdotal evidence to the effect that generally people do not know what [text redacted].

[47] With respect to [text redacted], the appellant notes that at Garda, [text redacted], although testimony was received in the appellant's case that at least in Ontario, [text redacted], such occurring in "close quarter combat", which the appellant contends may be comparable [text redacted] and thus may be of assistance [text redacted].

[48] As a whole however, the appellant is of the view that the [text redacted], which has based the employer's decision to [text redacted] on its new vehicles, is based upon flawed and/or incomplete information which undermines the weight its findings and recommendations should receive.

[49] For instance, in conducting the study, the expert neither received direct input or recommendations from employees or the union side of the national committee, nor was actually given access by the respondent to drivers in order to assist in his analysis and be able to

understand their daily routine, although he was provided with a global picture of a crew's work by [text redacted] who is the national director of training (use of firearms) at Garda. That same witness indicated that for Ontario, [text redacted].

[50] The appellant also notes that the [text redacted], or rather the use of such, only took into account the training provided in Quebec, thereby not considering training variations elsewhere in the country and more specifically the [text redacted].

[51] Additionally, the appellant contends that the expert, in fashioning his recommendation to [text redacted], relied on factors (such as stress or distance to target) that are neither unique nor specific to the "P" series, [text redacted], thereby limiting the weight such factors should receive [text redacted].

[52] According to the appellant, the fact that the study repeatedly refers to policing throughout should be taken into account in assessing the weight it should receive. Policing and cash transport activities are intrinsically different. By way of example, [text redacted] whereas police officers are often required to enter dangerous situations as part of their duties. Because this "policing" aspect would have coloured the thinking of the expert, who recognized his lack of experience with respect to cash transport armoured vehicles, the appellant offers the opinion that little weight should be given to [text redacted].

[53] The appellant also contends that the expert was only asked to provide an opinion as to whether it was safe and effective for an agent [text redacted] and whether it was tactically appropriate not to [text redacted], and thus did not consider such possibility from a health and safety perspective nor was he tendered as an expert in occupational health and safety. It is thus the appellant's view that said study should not be relied upon to conclude that the [text redacted] would be safe and consistent with the *Code*.

[54] The appellant also underlines the fact that the expert's recommendation to [text redacted] was accompanied by two preconditions to wit, "that the vehicles' [text redacted] [be] well maintained [and that] [text redacted] for armoured vehicles and [text redacted] is provided". The appellant submits that these preconditions have not been met as [text redacted].

[55] Furthermore, accumulated rust may also affect [text redacted] and could occur on the "P" series vehicles as it has on others.

[56] The evidence has also shown that [text redacted] have been used on only one occasion by Garda crews. It is the appellant's opinion however that the infrequency of use does not support [text redacted], more so given the preventative and precautionary intent of the *Code* which would stand for the notion that the extent and/or frequency of a protective measure's use and/or degree to which a hazard may appear is not determinative from a health and safety perspective.

[57] To conclude on this fourth hazard it associates with this new "P" series vehicle, the appellant submits that to the extent that there are issues regarding the [text redacted], their sight lines and/or the [text redacted], those issues should be addressed in order to improve the protections available to workers, likely through the national committee, rather than [text

redacted] as Garda has done. Additionally, as the expert did not study the effects of [text redacted] rather than [text redacted], the appellant argues that the study cannot be relied upon to conclude that [text redacted] may resolve some issues related to their use.

[58] It is the conclusion of the appellant that the foregoing supports the position that the health and safety hazards associated with the "P" series vehicles pose an imminent and/or serious threat to the life or health of a person exposed to them. The hazards may result in serious injury or even death to workers, for instance in the event of robbery or attack or a medical emergency, thereby bringing them within the ambit of the "danger" definition under the *Code*.

[59] The appellant further argues that Garda has also not introduced adequate controls in response to the danger posed by the "P" series vehicle, further supporting a finding that a "danger" direction should be issued according to the reasoning in the Tribunal's decision in *Ketcheson* adhering to the logic of the hierarchy of controls which has been widely used and accepted in occupational health and safety practice for many decades and is reflected in section 122.2 of the *Code*, and which stands for the rationale that a hazard is not a danger if there is a reasonable expectation that the hazard can be corrected before there is an imminent or serious threat from the hazard.

[60] In essence, it is the view of the appellant that the evidence before me clearly establishes that the "P" series vehicles were rolled out before the health and safety hazards associated with them had been adequately addressed. Notwithstanding that the national committee had made extensive recommendations regarding the health and safety hazards or concerns posed by the "P" series vehicles following inspection of the vehicle at the Cambli plant, Garda delayed providing an appropriate response to the recommendations and did not implement all of them.

[61] Furthermore, the March 9, 2016, memo in evidence issued by the national committee which outlines outstanding safety issues regarding the "P" series, was issued in order to comply with paragraph 125(1)(*s*) of the *Code* because in the absence of a full hazard prevention program, employees using the new vehicle were potentially not aware that there could be hazards associated with the vehicle or that would not have been properly assessed by the committee. The appellant notes that the said memo was issued by the committee in consultation with Ministerial Delegate Mordaunt and stated at the outset that "there are unresolved health and safety concerns or issues regarding the use of the P330 armoured vehicle" ("P" series).

[62] In the appellant's opinion, the fact of outstanding safety issues at the time of "P" series roll out supports a finding that a threat to life or health from the hazards posed by the vehicles could occur before the hazard or condition could be corrected. Additionally, the appellant contends that control or mitigating measures identified by the respondent in its evidence, [text redacted] are neither adequate or specific to the "P" series, nor do tools such as the [text redacted] adequately protect workers against the hazards stemming from crew separation on the "P" series vehicles.

[63] Regarding the fact established in evidence that in the event of an attack, the armoured vehicle itself can be used for "bunkering", a fact recognized by the respondent in the testimony of its witness, Mr. [text redacted], to the effect that "the vehicle itself acts as a form of protection

for the crew members from assault or attack from outside persons", the appellant points to [text redacted], in comparison to the "U" series, to conclude that [text redacted]in the case of a firearm based attack from outside.

[64] The appellant further notes that, again as per the respondent's evidence, no additional gear or different training was provided to [text redacted], and offers as conclusion that the fact that such hazards posed by the vehicle, and more specifically [text redacted] will likely not be corrected before a threat to life or health occurs supports the issuance of a danger direction.

[65] In the appellant's opinion, support for such a conclusion can also be found in the Tribunal's case law, more specifically in *Brazeau* and in *Dino Frighetto and Daniel Lekarczyk and Group 4 Securicor*, 2011 OHSTC 7, which it claims stand for the conclusion that in the absence of hazard mitigating measures relative to a vehicle already in service, it would be reasonable to expect that injury could occur before the hazards could be corrected.

[66] In view of the foregoing, the appellant is thus of the view that the undersigned should issue a direction pursuant to subsection 145(2) of the *Code* and further order the respondent to cease and desist from using the "P" series vehicles until the health and safety hazards posed by said vehicles have been adequately addressed.

B) Respondent's Submissions

[67] Contrary to the appellant, the respondent is of the opinion that the issuance of a so-called "danger" direction would be inappropriate in the circumstances of the present case as it is of the view that the evidence has not established that there is a danger, as that term is defined in the *Code*.

[68] Stated with more specificity, the respondent submits that the "P" series vehicle, which Garda is introducing as its new armoured vehicle, one that is [text redacted], does not constitute a danger within the meaning of the *Code*. The respondent does however share the opinion expressed by the appellant that an appeals officer does have jurisdiction to issue a direction pursuant to subsection 145(2) should the undersigned arrive at the conclusion that a "danger" direction is warranted in the present case. Stated succinctly, having stated that this new vehicle should not be considered as presenting danger, the respondent pinpoints the main issue in this case as essentially being a labour relations issue.

[69] Noting the four central characteristics of the vehicle that have been raised by the appellant and are at the center of its case, the respondent acknowledges that the "P" series vehicles [text redacted], are designed for crew separation where the driver and the custodian/messenger occupy completely separate compartments, and require the driver to exit on the driver side . This being said, the respondent notes that with the exception of [text redacted], the other three features just mentioned were already present in Garda's armoured vehicle fleet, specifically what is referred to as the retrofit style vehicles, and thus it would be an error to accept the allegation made by the appellant that the "P" series vehicle "introduce(s) crew separation", as this was and continues to be a feature of that segment of the respondent's fleet utilized in a number of locations throughout Canada.

[70] Noting that the appellant's representative, Mr. [text redacted] as well as the other two appellant's witnesses (Mr. [text redacted] and Mr. [text redacted]) are all attached to the Mississauga branch of Garda, albeit some being presently detached to other union related tasks and this branch formerly being part of another undertaking (G4S) prior to the latter's acquisition by the respondent in 2014, the respondent argues that as the vehicle predominantly used at that branch ("U" series) presents features that differ from the proposed "P" series vehicles, this appeal is merely an attempt by a union local, with membership in the said Mississauga branch, to resist a change implemented by Garda that differs from what the former G4S had used and which they were accustomed to.

[71] In this respect, the respondent has submitted that the Tribunal ought to draw a negative inference from the fact that the undersigned has heard no evidence from a single operator of a "P" series truck as the appellant omitted to call as witness a single individual who had or was currently operating such a vehicle. The evidence confirmed that there have been no issues with anyone actually operating a "P" series truck, and none of the appellant's witnesses had ever spoken to an operator of a "P" series vehicle.

[72] Just as the appellant did in arguing its case, the respondent has also looked at the most recent and thus applicable definition of "danger" found in the *Code*. As such, drawing a comparison with the former definition of the term (year 2000), the respondent submits that the most recent definition (October 2014), speaking of "imminent or serious threat to (...) life or health", reflects a clear attempt by Parliament to narrow the scope of what constitutes a danger to focus on imminent or serious danger. In that respect, and given the very limited jurisprudence interpreting the current definition, the respondent submits that the legislative history with respect to the definition of "danger" under the *Code* is a relevant consideration for the Tribunal to take into account, even when conceding that the prior definitions are not identical to the current one.

[73] In this regard, the respondent notes first, that the current (2014) definition of danger is similar to, yet more narrow than the definition (1985) in the *Code* prior to the 2000 amendments, which defined danger in terms of "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". Second, that the current definition is also very similar to the pre-1985 wording of the *Code*, which at the time did not define "danger", yet, in its "refusal to work" provisions, solely spoke of the use or operation of a machine, device or thing or a condition that "would constitute an *imminent danger* [emphasis added]", thus linking the concept of danger to the notion of immediacy, and where in *McIlveen v. Canadian Pacific Airlines Ltd.*, (1983) 2 CLRBR (NS) 67, an adjudicator spoke of the term "imminent" as *not* being "that which arises in what could be considered a normally dangerous occupation", and where in *Les Blindés Loomis Ltée and Guilbault*, Decision 92-010 (*Les Blindés Loomis Ltée*), a regional safety officer equated the defined term "danger" in the 1985 version of the *Code* to being "for all practical purposes identical to the concept of "imminent danger"", thus reaffirming the notion of immediacy of threat to life and health present in the preceding legislative text.

[74] Noting that the two above cases were decided when the legislation's definition of "danger" was more in line with the current definition, the respondent draws a distinction between

the 2000 definition and the current one which, as stated above, it claims represents a narrowing of what constitutes "danger", and submits that decisions involving armoured cars using the (2000) definition of "danger" generally conclude that *any* potential for injury was enough to warrant a "danger" direction such as is sought by the appellant and where in those situations of lack of weaponry, inadequate staff or faulty equipment where such a direction was issued, there was never specifically found to be an imminent or serious threat to employees. This was justified under the pre-2014 definition on the basis that there existed a reasonable possibility that harm could occur at some point in the future.

[75] It is the respondent's submission that under the current narrower definition of "danger", which now *only* includes imminent or serious threats to employee life or health, the appellant had the obligation to provide evidence of an imminent or serious risk to the life or health of a person to establish a danger.

[76] In ascertaining whether a danger exists in the present case, the respondent has noted the need to invoke the test established in the Tribunal's *Ketcheson* decision previously cited by the appellant at paragraph 27 above, but has drawn attention to the comments by the Tribunal to the effect that "the test does not require [a party] to 'try it and see' […] but it does not allow for characterizing generic, hypothetical scenarios as "dangers" when such issues are best considered through other problem-solving mechanisms in the Code".

[77] On this point, the respondent submits that it has not taken the position that employees must "try it and see" in order to establish danger, but that the generic and hypothetical scenarios pled by the appellant concerning "medical emergencies" and "technological malfunctions" do not satisfy the test established by the Tribunal, are best addressed at the national committee level and are mitigated again through various means such as the Job Hazard Analysis (JHA) and the development of training and policies provided in evidence by the latter.

[78] Noting the obvious two types of dangers envisioned by the definition, that of imminent threat and that of serious threat to life or health, the respondent points to the Tribunal's comments in *Ketcheson* to the effect that "In the ordinary usage of words, an employee would understand that a "serious threat" refers to the severity of the harm. There is no time frame as to when the harm might occur", and that in this respect, the definition "is not meant to capture low risk hazards, root causes or disputes about issues other than direct causes of accidents and injuries to health".

[79] The position taken by the respondent is that the true issue before the Tribunal is one of labour relations and that as such, the issues identified by the appellant in relations to the "P" series do not constitute "direct causes of accidents and injuries to health". Furthermore, as the definition of "danger" in the *Code* is based on the generic notion of "threat", the Tribunal did distinguish between "risk" and "threat", commenting that a threat "entails the probability of a certain level of harm" and that "some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger".

[80] Being more specific, the Tribunal added, relative to the notion of "serious threat", that the degree of seriousness means that there is:

> [210] […] A reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future […]. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard, condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[81] The respondent submits that in two further cases, the importance of probability was reinforced by the Tribunal. In *Arva Flour Mills Limited*, 2017 OHSTC 2 (*Arva*), the Tribunal stated: "A conclusion of danger must be based on more than a hypothetical threat. A serious threat requires an assessment of the probability that the threat will cause harm as well as the consequences of the harm, which have to be severe." In the other case, *Keith Hall & Sons Transport Limited v. Robin Wilkins*, 2017 OHSTC 1 (*Keith Hall & Sons Transport Limited*), the Tribunal reiterated that "to conclude that a danger exists, there must therefore be more than a hypothetical threat" and then went on to state that:

> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. […] Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.

[82] On the basis of its consideration of the applicable definition and of the recent Tribunal case law, the respondent has drawn the following conclusions regarding the four central issues raised by the appellant with respect to the "P" series vehicle.

[83] First, it submits that in order to conclude that the union has established a serious threat to the health or life of the employees, the evidence has to show that there is a reasonable expectation that the employees would be faced in the days, weeks, or months ahead with a situation that would cause them serious harm as a result of the [text redacted], not as a result of the inherent risks associated with operating an armoured vehicle.

[84] [Text redacted].

[85] In determining whether the appellant has established a danger that would necessitate the issuance of a direction, the respondent submits that the Tribunal needs to take into account a further factor to wit, the inherent risk(s) associated with the armoured truck industry.

[86] In this regard, Garda submits that in armoured truck cases, the Tribunal has always taken into consideration the fact that armoured car guards are employed in an industry that includes some inherent risk, with the result that when it assesses whether a danger exists, the Tribunal always seeks to determine if the danger is beyond what is to be normally expected in that line of

work. While not arguing that working in an inherently dangerous industry precludes the issuance of a danger direction under the *Code*, the respondent does however submit that the "P" series truck does not significantly increase the risk of attack or injury to the point that the hazard inherent in the industry becomes unusual and unacceptable for the safety of the employees, which represents the test established in *Les Blindés Loomis Ltée* and which, as argued by the respondent, continues to be the test that the appellant has to meet.

[87] [Text redacted].

[88] [Text redacted].

[89] [Text redacted].

[90] The respondent does not challenge the claim by the appellant that the retrofit vehicles are in the process of being phased out, but draws attention to the fact that this is so that they can be replaced by the "P" series as a permanent measure, not, as claimed by the appellant, as an interim measure pending development of the vehicle of the future.

[91] Further, to claim that the "P" series represents a step backwards as regards health and safety, as the appellant has done, is simply inaccurate. In the specific situation at hand, this decision by the employer merely represents a shift away from some of the familiar features some former G4S agents are accustomed to, and thus not an appropriate basis for a danger direction.

[Text redacted]

[92] [Text redacted].

[93] [Text redacted].

[94] As regards the stopping power of the glass on the "P" series, the respondent notes that the evidence before the Tribunal is to the effect that there is an Original Equipment Manufacturer (OEM) product, that is, [text redacted] a situation consistent with the other vehicles in the Garda fleet.

[95] [Text redacted].

[96] Furthermore, given that the training and PPE provided to employees is essentially the same for all employees in this regard, including those who operate a retrofit vehicle which also has [text redacted], the respondent is of the view that no additional training is [text redacted].

[97] As a whole regarding this particular factor, the respondent submits that in order to conclude that the appellant has established a serious threat to the health or life of the employees, the evidence has to show that there is a reasonable expectation that the employees would be faced in the days, weeks or months ahead with a situation that would cause them serious harm as a result [text redacted]. This would essentially mean, according to the respondent, that in order to constitute a danger, there must be established a likelihood [text redacted].

[98] Based on this, the respondent submits that the "P" series having [text redacted] does not constitute a danger as defined under the *Code*.

[Text redacted]

[99] On the second factor raised by the appellant to wit, [text redacted], and the assertion by the appellant that the two crew members in a "P" series truck [text redacted], the respondent submits that the appellant has not provided the Tribunal with any evidence that objectively establishes that [text redacted] on the "P" series truck constitutes a danger within the meaning of the *Code*.

[100] Central to the issue of [text redacted] is the notion of access between the driver and the messenger/custodian compartments of the vehicle. The respondent's submissions in this regard deal with two perspectives to wit, first, [text redacted], and second, access through communications.

[101] On the first, the respondent draws attention to the evidence before the Tribunal that [text redacted].

[102] [Text redacted].

[103] [Text redacted].

[104] [Text redacted].

[105] The respondent also notes that the appellant has conceded that there are a number of other vehicles used in the Garda fleet, including the retrofit, that have [text redacted], and that other than G4S which is the appellant's former employer, crew separation represents the industry standard. The respondent also points to associated safety-related benefits of crew separation. As such, with crew separation, there is a lower likelihood that in case of an attack, the crew as a [text redacted].

[106] The second perspective addressed by the respondent [text redacted]. The respondent submits in this regard that there is evidence before the Tribunal showing that there are numerous ways that crew members can communicate, [text redacted], a possibility that constitutes a mere speculation in the opinion of the appellant, but which the respondent contends should not be disregarded in the absence of evidence to the contrary.

[107] In its submissions, the respondent does not discount that there is always the possibility of technical or technological malfunctions, but argues that such "perfect storm" of factors are remote and should not be used to establish an inability to communicate on the part of crew members. The respondent further argues in this regard that the Tribunal has not received any evidence that would establish any deficiencies related to the agents' [text redacted] or any other communication device available to said agents.

[108] As such therefore, a distinction should be made with the situations of "absence of communication" in the *Loomis Armoured Car Service* decision or the inadequacy of communications (cell phone dead zones) in the *Brazeau* decision founding a finding of danger in those cases.

[109] In addition, the respondent has submitted that on [text redacted].

[110] By comparison, the respondent notes the evidence before the Tribunal to the effect that the manual dead bolts on the retrofit trucks must be engaged at all times when the crew is in the vehicle. It is therefore the submission of the respondent that based on the foregoing, there has been no evidence provided by the appellant that would objectively establish that [text redacted] constitutes a "danger" within the meaning of the *Code*.

[Text redacted]

[111] On the third factor raised by the appellant, that of the driver exiting on the driver side of the vehicle thus, on the traffic side, the respondent submits that the appellant has not provided any evidence that would demonstrate on any standard that, as a result of exiting on the driver side of the vehicle, the driver is reasonably going to be faced with a situation that would cause the latter serious harm. The respondent's submissions in this respect are based first on a number of what the latter presents as concessions made by the appellant.

[112] [Text redacted]

[113] The respondent also points to the concession made by the appellant relative to a question by the undersigned, that the armoured vehicles are often not parked on ordinary city streets, meaning that it is not every time that a driver would be called upon to exit on the traffic side.

[114] Furthermore, the respondent also notes that the appellant has also conceded that any individual, including members of the public, driving any vehicle manufactured in North America exits the driver side of the vehicle every time they exit their vehicle.

[115] In addition, the respondent has argued that the evidence before the Tribunal clearly establishes that Garda employees who operate the "P" series as the driver are trained on how to enter and exit the vehicle. As such, drivers are trained to scan their mirrors (visible reminder stickers to that effect being placed in the driver compartment), look through the windshield and other windows and only exit when it is safe to do so. [text redacted]

[116] While recognizing that when exiting the vehicle using the three points of contact practice, [text redacted] the respondent pointed to the evidence before the Tribunal that such exposure would be for a matter of seconds, not for an extended and significant period of time, that such risk of [text redacted] in this fashion is mitigated by the exiting procedure established by Garda and taught to the drivers.

[117] Furthermore, the respondent points to the evidence before the Tribunal to the effect that if a driver assesses that there is a threat approaching or is under attack while entering the vehicle,

the latter should attempt to get in the vehicle, close the door and drive away, effectively retreating strategically, [text redacted].

[118] Concluding on this, the respondent directs the Tribunal to the evidence provided by witness [text redacted] to the effect that G4S was the only cash transport company that had all crew members exit on the custodian side of the vehicle, something that was neither challenged nor contradicted by the appellant's evidence.

[119] On the whole therefore, the respondent has submitted that having the driver exit on the driver side of the vehicle does not constitute a danger within the meaning of the *Code*.

[Text redacted]

[120] The fourth factor argued by the appellant in support of its appeal, and the one on which the latter was the most assertive in its submissions has to do with the [text redacted]. On this element, the respondent has conceded that the "P" series is the first vehicle series in its fleet to [text redacted], and emphasizes that the decision to [text redacted] from that vehicle was supported, in essence based, on a report prepared by an expert recognized by the Tribunal as an expert in use of force, tactical intervention and specialized equipment and risk analysis, [text redacted].

[121] On the claim by the appellant that [text redacted] that would be lost by their removal, the respondent first points out that none of the appellant witnesses who made such a claim provided any tests or research regarding the [text redacted], solely basing such claim on their best guess and/or belief.

[122] Secondly, the respondent also argues that there is evidence before the Tribunal that [text redacted]. Furthermore, the evidence before the Tribunal is to the effect that Garda employees [text redacted] which would not be the case in a real life attack.

[123] It was also noted by the expert that the [text redacted]. The expert also testified to the effect that the [text redacted].

[124] On the attempt by the appellant to discredit or limit the test results achieved by the expert by focusing on the latter's extensive experience in policing instead of the cash transport industry, the respondent has submitted that the mechanics and angles of shooting are the same regardless of whether an employee is a police officer or an agent in the cash transport industry, and that as such, the expert's policing background had no effect on the results of his testing, nor had the choice of firearm used (9mm Glock).

[125] [Text redacted].

[126] As to the appellant's claim that [text redacted] can be assimilated to [text redacted], the respondent's expert challenged such affirmation, noting that such shooting is not part of the employees' training or requalification training where even as part of the short distance quick-fire training component, [text redacted].

[127] The respondent also noted the opinion expressed by the expert that even if extensive training on [text redacted] were to be provided to Garda employees, [text redacted], representing a risk to the general public and the other [text redacted], because the employee [text redacted].

[128] Furthermore, relative to the loss [text redacted], such being questioned by the respondent through its expert's testimony, such effect would not outweigh the risks associated with [text redacted], and consequently [text redacted] represents the safer option.

[129] In light of this, it is the respondent's submission that [text redacted] does not constitute a danger within the meaning of the *Code*.

[130] [Text redacted].

[131] [Text redacted].

[132] Specifically relative to [text redacted], the respondent argues two elements. First, the latter points to the fact that the appellant's witnesses all conceded [text redacted].

[133] Furthermore, over the years, there has been only one known instance of an armoured [text redacted]. When assessing probability in determining danger, the respondent submits that this lone incident needs to be evaluated against the 4.5 million services performed yearly in Canada by the respondent. As such, it is the opinion of the respondent that a single incident of [text redacted] given the number of annual services it performs is not sufficient to establish anything but an extremely low probability of having to resort to using a [text redacted], such low risk hazard not representing a danger if one considers Tribunal jurisprudence.

[134] Second, the respondent further submits that while dismissing [text redacted] conducted by expert witness [text redacted], the appellant has not provided any evidence to counter its findings, including the somewhat common sense finding that [text redacted] potentially constitutes a danger to the public at large. Significantly, while the appellant has been in possession of that study since December 2015, thus long before the hearing in this matter, it has not tendered any countering report.

[135] Based on the foregoing, the respondent submits that the evidence before the Tribunal does not establish that as a result of [text redacted], the employees will reasonably be faced with a situation that would cause them serious harm, and as such, this does not constitute a danger as that term is used in the *Code*.

[136] To further support its position regarding safety of the "P" series vehicle, the respondent also points to a number of features and procedures submitted in evidence that are destined to mitigate risk. [text redacted].

[137] [Text redacted].

[138] On the other hand, [text redacted].

[139] The respondent also points to the testimony heard by the appeals officer to the effect that employees [text redacted].

[140] Additionally, relative to the respondent's established intention to [text redacted], evidence was provided to the appeals officer regarding the safety-related benefits associated with such a measure. According to the respondent, [text redacted] would allow for improvements to training as there would be a focus on the procedures for a [text redacted] as opposed to [text redacted]. This will also help ensure that all employees are working the same way and with the same procedures, leading in turn employees to having a stronger familiarity with the vehicle and its procedures.

[141] Finally, as regards the March 9, 2016, memo dealing with "outstanding safety features" to be signed off on by every employee using a rolled-out "P" series truck, the respondent has argued that the undersigned should not give weight to the appellant's interpretation of the document's intention, as the evidence provided by a number of respondent witnesses was to the effect that such words merely related to the fact that the JHA and ergonomic assessment were incomplete at the time the rollout of the "P" series began.

[142] To sum up, the respondent submits that the evidence before the appeals officer does not establish that any single aspect of the "P" series truck creates an imminent or serious threat when taken as a whole, a required precondition for the Tribunal to issue a danger direction.

[143] Noting that the undersigned should give preference to the evidence presented by its witnesses, as the latter were more forthright in their testimony before the Tribunal, the respondent submits that based on the Tribunal's own jurisprudence, in order to conclude that the appellant has established a serious threat to the life or health of the employees, the evidence needs to show that there is a reasonable expectation that the employees would be faced in the days, weeks or months ahead with a situation that would cause them serious harm *as a result* of [text redacted], and not as a result of the inherent risk associated with operating an armoured vehicle. The respondent submits that this has not been established.

[144] Invoking again the Tribunal's jurisprudence that a very low risk, either because of low probability or because of low severity, is not a threat, thus not a danger, the respondent notes that the evidence before the Tribunal is that Garda employees perform 4.5 million services a year in Canada, that there has been only a single incident where [text redacted], and that statistics provided by the expert witness demonstrate that nearly all robbery attempts on armoured vehicles occur [text redacted].

[145] Noting that outside of the present proceeding, there have been no concerns about the "P" series or refusal to work by operators of the said vehicles, the respondent is of the opinion that there exists no imminent or serious threat to the life or health of any Garda employee and that consequently this appeal should be dismissed.

C) Reply

[146] The first question addressed by the appellant in its reply has to do with the respondent's claim, throughout its submissions, that the real issue of this appeal is a labour relations issue, an allegation denied by the appellant. According to the latter, the fact that a union local with membership in the Mississauga branch of the respondent has supported the appeal does not lead to the conclusion that the issue before the Tribunal is a labour relations issue.

[147] According to the appellant, when considering this particular question, it is important to note that while that union local includes the Mississauga branch of Garda, the persons in support of the appeal are involved with the national committee. More noteworthy, the appeal was filed by Mr. [text redacted] who, while working out of the Mississauga branch, is the worker (employee) co-chair of the national committee and thus is concerned with health and safety issues across all of Garda and not just the Mississauga branch.

[148] Noting that all three witnesses of the appellant raised health and safety issues and concerns regarding the "P" series, counsel for the appellant submits that simply observing, as done by Mr. [text redacted], that "there is always resistance to change" does not mean that a change may not pose serious and legitimate health and safety risks.

[149] With reference to the legislative evolution of the definition of "danger" in the *Code* (1985, 2000 and 2014), the appellant submits that one would be in error to accept the proposition by the respondent that the current definition is similar to, although more narrow than the 1985 definition, citing in this regard the Tribunal's decision in *Ketcheson* to the effect that:

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

[150] Given these words by the Tribunal, the appellant submits that one should find limited value and relevance in the Tribunal's decisions dealing with the 1985 definition of "danger" relied on by the respondent, and that those cases should not be looked to for guidance when interpreting the current definition of the term.

[151] Having regard to the test developed by the Tribunal in *Ketcheson* , the appellant notes that recent decisions by the Tribunal in *Arva* and *Keith Hall & Sons Transport Limited* have stated that a danger must be based on more than a "hypothetical threat" and that the new definition contains a reasonable expectation requirement. In this regard, the appellant submits that the Tribunal's past jurisprudence supports the fact that the hazards faced by workers in the cash transport industry may lead to serious injury or death. The appellant thus submits that this indicates that the possibility of a serious injury from the hazards posed by the "P" series vehicles is not hypothetical and that there is a reasonable possibility that it could materialize.

[152] Furthermore, and in contradiction to the position taken by the respondent, the appellant

holds the view that the presence of inherent risks in the work performed within the cash transport industry does not mean that the health and safety hazards posed by the "P" series vehicles are inherent dangers of the industry.

[153] It is the appellant's view that since this case did not originate from a "work refusal" by an employee, which was the case with the Tribunal decisions relied upon by the respondent, one should not approach the notion of "inherent danger" in the same manner as in those cases. The appellant adds that while there is inherent danger or the risk thereof in the cash transport industry, that inherent danger or risk does not stem from inadequate protection for workers. Rather, it stems at least in part from the risk posed by threats such as robbery and/or assault which are inherent to working in the cash industry.

[154] To the extent that workers face dangers stemming from inadequate protections or equipment, as is the case with the "P" series according to the appellant, such dangers or risks do not form part of the inherent dangers posed by the cash transport industry. In addition, the "P"series vehicles do not simply represent a shift away from some of the familiar features some former G4S agents are accustomed to, as claimed by the respondent. Rather, the 4 features of the "P" series at issue present hazards and/or pose safety risks that do not exist or do not exist to the same degree on vehicles that have followed the retrofit vehicles, such as the "U" series, represent a step backwards as opposed to a mere change and serve to demonstrate that the "P" series vehicle is not as safe as other smart vehicles that have been developed as armoured vehicles.

[Text redacted]

[155] [text redacted].

[156] For the appellant, there is significance in the armouring variance given the evidence that [text redacted].

[157] Finally on this particular point, the appellant submits that the statement by the respondent that [text redacted] is simply misleading since this is not required [text redacted] a health and safety hazard. In this regard, the appellant argues that health and safety protections under the *Code* are not contingent upon the existence of regulations or standards requiring certain levels or thresholds.

[Text redacted]

[158] [Text redacted].

[159] It is the opinion of the appellant that a medical emergency does not need to have occurred in order to find that [text redacted]. Health and safety protections are precautionary and should aim at preventing incidents before they occur as opposed to simply reacting to event or incidents after their occurrence.

[Text redacted]

[160] The fact that with the “P” series, the [text redacted] has been characterized by the appellant as representing such a health and safety hazard that a “danger” direction would be warranted, regardless of the fact that there have been no complaints from employees about this, that a driver exiting a vehicle in this fashion is essentially the norm in North America or that armoured vehicles are not always or even not often parked on city streets such that a driver exiting on the driver side would not be doing so on the vehicular traffic side.

[161] On this point, the appellant also challenges the position taken by the respondent to the effect that employees are properly trained on the exiting technique (maintain three points of contact). The submission of the appellant is to the effect that such training does not alter the fact that when exiting the driver's side [text redacted].

[162] The appellant does recognize, however, that drivers of other series of armoured trucks, including the retrofit vehicles, do exit facing the vehicle, although it points out that the retrofit trucks are being phased out.

[Text redacted]

[163] Finally, on the fourth feature raised by the appellant, [text redacted] on the “P” series, the latter challenges the respondent’s position and [text redacted], arguing that the claim that [text redacted] merely speculative and that the respondent's expert did not conduct any testing with respect to the [text redacted].

[164] As regards the expert witness presented by the respondent, the appellant submits that the former's lack of experience in the cash transport industry, which is different from policing, is relevant in assessing the expert's evidence. This being said, the appellant also contends that some of the conclusions offered by the expert are merely speculative, particularly where claiming [text redacted] would still be dangerous even if extensive training were to be provided to Garda employees.

[165] The appellant is further of the view that the fact that in testing [text redacted], the expert used a service weapon that is or is to be generally used throughout Canada, with the exception of Ontario, this limits the extent to which the Tribunal can rely on the expert's findings.

[166] The appellant also submits that the danger created by the [text redacted] is not altered by the fact that employees are [text redacted].

[167] Additionally, the lone instance noted in evidence that [text redacted] should not lead to the conclusion that [text redacted] since an incident does not need to occur in order for workers to invoke the health and safety protections under the *Code*. It is the appellant's view that health and safety is concerned with both the frequency and severity of potential hazards and that as such, a hazard may be serious either because of its frequency of occurrence or the severity of its potential consequences. While the [text redacted] may be infrequent, severe consequences are possible where workers come under attack.

[168] As to the security of the public [text redacted], the appellant does note that as is the case

for any use of force situation or instance, employees do need to engage in the same processes and consider the same extrinsic and intrinsic factors noted by the expert witness before taking action.

[169] In conclusion and contrary to the position taken by the respondent, the appellant maintains that there are not sufficient procedures in place to mitigate the risk posed by the "P" series vehicles and a threat to life or health will exist before the hazard or condition can be corrected. In this regard, the appellant notes again that the evidence before the Tribunal has shown that the "P" series trucks began to be rolled out before completion of a JHA and refers to the language of the March 9, 2016 memo in evidence ("unresolved health and safety concerns or issues") and that of the respondent in its submissions ("there was not yet consensus on these issues as between all of the members of the National Policy Committee") to claim that there were still health and safety concerns or issues not addressed at roll out time and that as such, a hazard could arise before those could be corrected, supporting the issuance of a "danger" direction.

[170] Furthermore, the appellant maintains that many measures noted by the respondent, such as [text redacted], are not specific to the "P" series and thus cannot adequately address those concerns that are specific to that vehicle. With reference to the testimony of its witnesses, the appellant opines that in the event of conflict with the respondent's evidence, the evidence provided by the appellant's witnesses should be preferred as, contrary to what was argued by the respondent, they were forthright and candid in their testimony, noting that a witness may decline to concede a point during cross-examination and still be forthright and credible.

Analysis

[171] This appeal could be described as atypical, in the sense that it does not originate with nor is it based on or does it stem from the usual finding of danger or absence of danger that represents the outcome of an initiating refusal to work action by an employee or group of employees relative to one or a number of tasks that they may be required to execute in the course of their work and the investigation that such action would entail.

[172] As stated at the outset, it also is not presented as representing a disagreement with or a challenge to the substance of the "contravention" direction that was issued by Ministerial Delegate Mordaunt at the conclusion of her investigation into complaints that she describes in her investigation report as "complaints from the Policy Committee". Rather, this action by the appellant appears to be the expression of the latter's disagreement with the extent of the ministerial delegate's directions issued at the conclusion of her investigation.

[173] In this respect, one could say that the issue raised by the appeal is wholly separate from the ministerial delegate's conclusions basing the contravention direction. In point of fact, all through the development and hearing of this case, neither party effectively claimed that the findings of contravention by Ministerial Delegate Mordaunt should be reversed. Rather, this appeal amounts to a request that the undersigned expand upon these findings and, on the basis of the facts that led Ms. Mordaunt to intervene, conclude that a danger direction should be issued.
[174] Furthermore, none of the three persons/witnesses who appeared, spoke and testified on behalf of the appellant union, although recorded as employees of the respondent at the

Mississauga branch of the respondent, were actually working on cash delivery armoured vehicles of the said or any other branch at the time of the complaint and this hearing, being instead working at Garda in various other functions, or union functions in the case of Mr. [text redacted], and all being members of the national committee of the respondent, with Mr. [text redacted], being that committee's co-chair (employee side). None had ever worked on a "P" series armoured vehicle and the evidence has shown that the three had had very few occasions to even see the vehicle in question which also was not in use at the Mississauga branch of Garda.

[175] I have already determined at length above what I consider to be the actual issue to be determined in this case and before I deal with this central issue, I am of the view that I should deal briefly with some issues that have been articulated by the parties and which are presented as possibly affecting the manner in which the question of "danger", which is essentially what needs to be determined here, should be addressed.

[176] The first matter relates to the repeatedly enunciated allegation by the respondent, one that would colour my perception of the present case, that the "true issue" in this matter is nothing but a labour relations issue, an "attempt by a union local, with membership in the Mississauga branch, to resist a change implemented by Garda that differed from what the former G4S had used and which they were accustomed to."

[177] Upon hearing the evidence and receiving the submissions of the parties, one cannot avoid reaching the conclusion that effectively, the intention by Garda to eventually replace a favoured vehicle in use at the Mississauga branch with the "P" series apparently did not sit well with part of the local membership. I say "part" of the membership because in fact, apart from the three persons/witnesses who have appeared for the appellant, the undersigned has neither heard nor received any other evidence from other members of the local, which extends beyond the four corners of the Mississauga branch, or other locals for that matter, as to their stand vis-à-vis the proposed new armoured truck.

[178] However, one must note first that of those three individuals noted above (Messrs. [text redacted], [text redacted] and [text redacted]), none has ever worked in a "P" series vehicle as none were assigned to the branch, and second, while the local's membership may include the Mississauga branch of Garda, the persons in support of this appeal are involved with the national committee, particularly Mr. [text redacted] who, while working out of the Mississauga branch, is the employee co-chair of the national committee concerned with health and safety issues across all of Garda and not just the Mississauga branch. In this regard, it is useful to remember that the stated intention of Garda is to [text redacted] and not solely make changes in Mississauga.

[179] Furthermore, one needs to remember that this appeal flows from conclusions arrived at by Ministerial Delegate Mordaunt recognizing the respondent's failure to properly consult with the committee.

[180] Finally, one needs to also specifically note the wording of subsection 146(1) of the *Code* which specifically grants the right of appeal to a "trade union that feels aggrieved by a direction

issued by the Minister", which is essentially the situation that is presented here.

[181] Having said this, I simply do not share the reductive opinion put forth by the respondent that this matter is merely a labour relations issue. While there is no doubt about the dissatisfaction of Mr. [text redacted] and the two other witnesses with the proposed new vehicle, given the seriousness of such allegation and given all the other elements presented at the hearing, it would take more than what has been put forth by the respondent to satisfy the undersigned that the respondent is correct in its allegation.

[182] The second matter or issue has to do with the fact that the present matter did not originate through refusal to work action, which is the most common step leading eventually to an appeal alleging the existence of a "danger" in a work place.

[183] In reply submissions, counsel for the appellant appeared to be suggesting that because this appeal did not stem from an initial refusal to work action, the determination of whether a danger exists in the case at hand should be approached differently. Referring to case law invoked by the respondent, more precisely the recent decisions of this Tribunal in *Arva* and *Keith Hall & Sons Transport Limited*, in its examination of the test for a danger direction, such test having been enunciated in the *Ketcheson* decision, counsel for the appellant submitted that "it is important to note that the decisions relied upon by the respondent involved work refusals. The appeal before the Tribunal does not involve a work refusal and therefore the discussions of the concept of inherent danger contained therein are distinguishable from the current case".

[184] It is true that in the present instance, there has been no originating refusal to work action and thus that one is not evaluating "danger" in relation to the specific circumstances of an individual employee relative to the use or operation of a machine or thing, an existing condition in the work place or the performance of an activity, but rather relatively to the purpose by the appellant, albeit not stated specifically as such, to obtain a finding of danger and a cease and desist order that would affect all of the proposed "P" series trucks [text redacted].

[185] This however does not alter the fact that in the *Code*, "danger" is defined in a single manner and that definition does apply to any and all situations that an appeals officer may be required to consider in determining whether "danger" exists, although the lack or absence of specific circumstances may impact on the consideration of the issue.

[186] In that respect therefore, I do not share the opinion expressed by counsel for the appellant that because the very first decisions by appeals officers interpreting the most recent definition of "danger" all occurred in cases involving refusal to work action, the concept of "inherent danger" examined in those cases should be viewed as distinguishable from the present case.

[187] Finally, a last matter has to do with, for lack of a better expression, the construction of the appellant's case and submissions which, by necessity, has also drawn the respondent into a parallel presentation of sorts, and essentially stems from the somewhat exceptional nature of this case and the type of question that underlies the case. It is important to note again in this regard that this appeal did not originate with a decision on a refusal to work which would deal with specific circumstances of an individual or group of employees, nor does it stem from findings by

a ministerial delegate as to whether there is danger or not regarding the situation central to this matter, which is the proposed introduction in service of a vehicle [text redacted].

[188] While I have already concluded that this action by the appellant relative to the introduction of the "P" series armoured truck does not constitute a mere "labour relations" type of action by the appellant, it has however been made clear through this hearing, and this cannot be ignored by the undersigned, that the appellant, more particularly the three individuals that have spoken in support of the appellant's case at the hearing, do not like the "P" series vehicle in the configuration that it is proposed to be introduced at large and that given the branch of Garda to which they are attached, although not tasked with working on an armoured truck, they are of the view that the "U" series vehicle which is the predominantly used vehicle in Mississauga is a superior armoured vehicle from the standpoint of security and, thus, health and safety.

[189] All through the appellant's presentation of the case and the testimony of all its witnesses, there has been constant comparative reference to this other "U" series as presenting not only different characteristics, particularly as regards the four that are at the center of this case, but also superior to those in the "P" series, as well as others not present in that contested series.

[190] There is however a limit to such comparative exercise. While from an information standpoint, one could find it useful to be aware of the characteristics of other vehicles in Garda's fleet, one must be clear that ascertaining whether the "P" series armoured vehicle presents a danger as defined in the *Code* does not entail a comparative exercise whereby one would consider whether one is a safer vehicle, or not, than the other(s). Rather, this exercise entails looking at the vehicle itself, as a stand-alone, and at its use, in the application of the definition of "danger".

[191] In this regard, the definition of "danger" in the *Code* is relatively new, as it was legislated by Parliament in the *Economic Action Plan 2013 Act, No. 2,* SC 2013, c 40 and came into effect on October 31, 2014. It reads as follows:

> [...] any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.

[192] Central to this most recent definition are the concepts of imminent threat and serious threat to life or health before corrective action can be brought. Because of its newness, the definition has not been commented on or analyzed many times by appeals officers, although there have been comparative comments with the 1985 and 2000 previous definitions and even with the terminology of the *Code* prior to the first definition in 1985 where central to the work refusal process was the concept of imminence.

[193] Of those comments, some expressed the view that this new definition significantly narrows the circumstances where "danger" may be found to exist whilst others contend the contrary and that this most recent definition is merely a re-enactment of the former using less words. As stated above, there have been few pronouncements on this, although in *Ketcheson,* referring to the diverse positions just mentioned, the appeals officer commented as follows:

> [191] The new definition of "danger" is simpler and clearer than the

> previous one. It is misleading to focus on the question of whether the new definition takes us back to an old, more restrictive meaning, [...], or whether the new definition hasn't changed substantively [...]. The new definition of "danger" is different than previous definitions. It represents more clearly what the reasonable employee would perceive as worthy of triggering a work refusal. In context, it is likely to encourage employees to sometimes recognize that their concern is not of high enough risk to be a "danger" and should be handled by other means and the basis of their concern is more of a root cause than a direct cause, and again, is more suitable to be addressed by other mechanisms under the Code.

[194] This being said, the appeals officer in *Ketcheson*, having examined the legislative evolution of the definition and having concluded to it being different from previous ones, drew the following conclusion, which is repeated with approval by the appeals officer in *Brink's Canada Limited v. Robert Dendura*, 2017 OHSTC 9 (*Brink's Canada Limited*) and with which the undersigned is in agreement:

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

[195] Additionally, referring to the dichotomy between "imminent" and "serious" threat in the definition, the appeals officer in *Ketcheson* commented further as follows:

> [193] The caselaw during the period 2000-2014 contained many expressions for probability: "more likely than not"; "likely"; "reasonable possibility"; and "mere possibility". What was often left unstated was the time period in which the probability was to be assessed: the day of the work refusal; the foreseeable future on the day of the work refusal; a year from the refusal? Is something likely? It may be almost certain to occur in the next five years, reasonably foreseeable to occur in the next year, but merely possible in the next five minutes. It is meaningless to talk about probability without specifying the time period. Unlike the 2000-2014 definition of "danger" the 2014 definition, by distinguishing between "imminent threat" and "serious threat", is adding a time frame for probability.
>
> [underlining added]

[196] The definition of "danger" does however remain constructed around the essential notions of hazard, condition or activity that need to be a threat in order for danger to exist. Yet, there is nothing in the legislation that would circumscribe what needs to be the link, the causal relationship or *cause à effet* between hazard and threat.

[197] Again in *Ketcheson*, the appeals officer linked the concepts of probability and severity of risk and offered the following comment:

> [198] In the *New Shorter Oxford English Dictionary* (1993) the word "threat" is defined as: "a person or thing regarded as a likely cause of harm". Thus it can be said that based on that definition, a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat, It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.
>
> [underlining added]

[198] While the word "threat" is the central element of the definition, qualified by the terms "imminent" and "serious", one must still note the obvious, to wit that for a finding of danger to be arrived at, such threat needs to be "to the life or health of a person" exposed to it. Therefore, the threat must be specific in that it must be one that may cause injury or illness to individuals, giving some credence to the opinion that the processes in the *Code* may not have been intended to decide on "danger" at large, as an indiscriminate generalization, without due attention to individual circumstances. I am of the opinion that this may have been part of the rationale held by the appeals officer, again in *Ketcheson,* where the latter stated in dealing with a refusal to work by an individual:

> [192] The definition of "danger" includes the phrase "a threat to the life or health of a person". "Life or health" is very broad. It is intended to cover threats that involve death, injury or disease/ill health as outcomes. "Health" can include the lack of disease as well as bodily integrity (no injuries). The phrase refers to a large category of harms involving people. It is not about a threat to property, the environment, productivity, quality, business continuity, or other categories of loss associated with accidents and exposures. The purpose of the Code is the protection of people and not things.

[199] While the notion of "danger" in the *Code* is constructed on the concept of threat, be it imminent or serious, such concept is not without limits, to wit it requires circumstances that extend beyond what one would present as mere possibility. In this regard, the appeals officer in *Brink's Canada Limited* has referred with approval to the words of the appeals officer in *Keith Hall & Sons Transport Limited*:

> [40] It also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former definition required consideration of the circumstances under which the hazard, condition, or activity could be reasonably expected to cause injury or illness, the new definition requires consideration of whether the hazard, condition, or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the Code, to cause injury or illness to employees.
>
> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard,

> condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.
>
> [underlining added]

[200] In *Nolan et al. v. Western Stevedoring*, 2017 OHSTC 11(*Nolan et al. v. Western Stevedoring*) , the appeals officer reflected along the same lines on the criteria of "reasonable expectation", stating:

> [61] Given that the Code's definition of danger is based on the concept of reasonable expectations, the mere possibility that such an event or incident causing serious harm could occur is not sufficient to conclude to the existence of a serious threat. There must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the alleged hazard, condition or activity.

[201] In that case, the appeals officer did also recognize that while the text of the definition sets "reasonable possibility" as a threshold to be met in order to arrive at a conclusion of "danger", such determination cannot be arrived at in a vacuum. As such he stated:

> [62] The determination of whether the materialization of the threat is a reasonable possibility as opposed to a remote or hypothetical one, is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is examined. It involves a question of appreciation of facts and passing judgment on the likelihood of occurrence of a future event. In my view, an acceptable way to make this determination is to ask the following question: would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is likely to occur.
>
> [underlining added]

[202] With all of what precedes considered, the legal test to be applied in order to determine whether a determination of danger can be arrived at in the particular circumstances of the present case, where such determination would have the potential of affecting the operation of every "P" series vehicle in the respondent's fleet and thus the employees working on those vehicles, can be set out as follows, as one can derive from the *Ketcheson* decision:

> (i) What is the alleged hazard, condition or activity?
>
> (ii) Could this hazard, condition or activity reasonably be expected to be an *imminent threat*?

Or

Could this hazard, condition or activity reasonably be expected to be a *serious threat*?

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

[203] As enunciated by the appeals officer in *Brink's Canada Limited*, "the first question then is to identify the 'hazard, condition or activity' that is alleged to be a threat to the life or health" of *employees*, and here I use the plural since I have already pointed out above that because this case has not originated with a refusal to work by an employee, the question to be addressed here is devoid of any specific or personal circumstances, and thus what is sought by the appellant is a finding of general application, what I could describe as a blanket finding, that would apply to the whole "P" series fleet at Garda's and the employees assigned to it.

[204] This finding or declaration of "danger" that is sought by the appellant would be arrived at in light of a common acceptance by both parties that the work or business of cash transportation involves some inherent risk of violence, that being robbery or attempted robbery effectuated through various means, including the use of firearms, but with no specificity of circumstances, thus putting this general risk at the level of the potential or possible, not the probable.

[205] The appellant has framed the hazard, or rather the alleged hazard in terms of characteristics of a new armoured truck, [text redacted], that it claims pose a threat to the life or health of persons exposed to them, those persons being obviously those employees that would be operating said vehicle, if faced with circumstances that are generically described as the [text redacted]. Those characteristics have been described throughout as the [text redacted] which, the evidence has shown, is a [text redacted] of such, crew separation, driver exiting on driver side and [text redacted], those therefore entirely relating to the vehicle itself.

[206] In its submissions, the appellant took into account said inherent risk to state that "where equipment, training or protective measures available (for the protection of employees) are inadequate, such as in the case of the 'P' series vehicles, workers may face a serious risk of harm", thereby pinpointing the hazard to be evaluated as the vehicle or to be more precise those four characteristics just mentioned, independent of individual or specific circumstances, since the accepted constant is the existence of inherent risk of the industry.

[207] The appellant effectively emphasized the issue by stating that "the hazard(s) posed by the 'P' series vehicles go beyond the danger in Garda crews normal conditions of work such that the vehicle constitutes a danger within the meaning of the Code". The respondent has contested this affirmation by arguing that "the P-Series truck does not significantly increase the risk of attack or injury to the point that the hazard inherent in the industry becomes unusual and unacceptable", thus effectively reinforcing the identification of the alleged hazard as being the vehicle and more precisely those four characteristics mentioned previously.

[208] The threat analysis which makes up the second part of the test requires that one assess

whether what has been identified or put forth as the hazard (condition or activity) can reasonably be expected to be an imminent or a serious threat. I do not need to spend much time on the first element of this analysis, that of whether the hazard, (condition or activity) constitutes an imminent threat, first because when one examines what is being alleged here, one is forced to distinguish the present case from what has been presented as constituting an imminent threat in the first decision of the Tribunal dealing with the new definition of "danger", that being *Ketcheson*, which has been followed in the few decisions that have come after and have been mentioned herein.

[209] In that decision, at paragraph 205, the Tribunal stated:

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

[210] Clearly, there has been no allegation here that the hazard alleged by the appellant could be the source of injury within minutes or hours.

[211] Second, although the parties have not expressed such in so many words throughout their presentation, one can easily understand from those that neither party has suggested that the hazard(s) or what is presented as hazard(s) could reasonably be expected to be an imminent threat.

[212] Considering the next question of whether the identified hazard(s) (condition or activity) could reasonably be expected to amount to a serious threat to the life or health of employees, one must consider that in the circumstances of the present case, where the four characteristics mentioned above, when taken in isolation of specific circumstances, cannot of themselves amount to a threat, and where no individual factual situation is suggested, as this is not a refusal to work case, such a conclusion could only be arrived at where one would find a reasonable expectation or reasonable possibility that employees, any employees working on a "P" series truck would be faced with an attack of some sort and suffer injury as a result of the four characteristics that the appellant is objecting to.

[213] In *Ketcheson*, the appeals officer addressed this notion of serious threat in the situation of a work refusal as follows at paragraph 212 of the decision:

> In order to conclude that the respondent was exposed to a serious threat to his health or life, the evidence has to show that there was a reasonable expectation that the respondent would be faced in the days, weeks or month ahead with a situation that could cause him serious harm as a result of not being able to carry OC Spray and handcuffs on his person.

[214] While I agree with such formulation, one must note, as mentioned earlier, that such a

pronouncement was made in a case involving one individual employee and refusal to work action concerning circumstances and activity specific to that particular individual. In the case at hand, as mentioned repeatedly, where there are no individual or specific circumstances invoked and, as stated earlier, where what is sought is a blanket declaration of danger because of characteristics of a vehicle coupled with the risk inherent to the cash transit industry, a pronouncement similar to the one cited above but adapted to this case could read as follows:

> In order to conclude that the employees represented by the appellant union are or would be exposed to a serious threat to their health or life, the evidence has to show that there is a reasonable expectation that the employees working on a "P" series truck presenting the four characteristics at issue will or would be faced in the days, weeks or month ahead with a situation that is an inherent risk of the industry that could cause serious harm to employees because of those characteristics.

[215] Recognizing, as the appeals officer in *Keith Hall & Sons Transport Limited* did that there must be more than a purely hypothetical threat and that "a threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees", one must recognize that such determination may not be easily achieved.

[216] In *Brink's Canada Limited* (supra), the appeals officer commented in this regard that:

> [143] […] It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is executed. Statistical information is relevant to make an informed factual finding on that question, although in the final analysis, it involves a question of appreciation of facts and judgment on the likelihood of occurrence of a future event […].

[217] One needs to note at this juncture that very little statistical evidence was presented in this case, and none as relates to the frequency of robberies or attempted robberies. What transpires from the evidence is that Garda, or rather its employees, make around 4.5 million services yearly, that there has been [text redacted], this occurring many years ago, and finally that [text redacted]. This evidence suggests that, statistically, the probability of attacks on armoured vehicles is very low.

[218] In *Nolan et al. v. Western Stevedoring* (supra), the appeals officer reflected on the difficulty of differentiating between a reasonable possibility and an hypothetical one, suggesting that the appreciation of facts and judgment on the likelihood of occurrence of a future event could be achieved by asking the following: "would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is *likely* to occur?" [emphasis added].

[219] I have reviewed and considered all of the evidence before me and have assessed it with the acceptance, supported by the position of both parties, that inherent in the work of cash transportation and transit, is the occurrence of unpredictable criminal human behaviour in the form of robbery or attempt at such as a possibility, not a probability, that cannot be eliminated.

[220] This being said however, I have not been persuaded on a balance of probabilities that the four characteristics of the "P" series vehicle at the center of the appellant's case, independent of individual or specific circumstances, alter or increase the risk associated with the possible occurrence of such criminal behaviour. I have also not been persuaded that the four characteristics in issue increase the risk of serious injury to employees that is inherent in the cash transportation business, in the event of an attempted robbery.

[221] In other words, while in the appellant's view, the protection offered by the "P" series vehicle is inadequate, I am not convinced that this armoured truck, considered as such, offers faulty or ineffective protective equipment to Garda employees. For the reasons that follow, I find that its use would not result in employees facing a threat to their life or health that goes beyond the danger that is inherent in their line of work.

[222] Based on my review of the evidence, one must note on those four characteristics of the vehicle that where "crew separation" is concerned, this constitutes the rule or standard in the industry and that suggested shortcomings such as medical issues (e.g., heart attack) for separated members of the crew or malfunctioning of some communication or other equipment do not exceed the domain of the hypothetical. Indeed, as submitted by the employer, the possibility that the "perfect storm" of issues that would be required to arise for "crew separation" to result in serious harm to employees is extremely remote. As such, there is insufficient evidence to persuade the undersigned that there is a reasonable possibility of such occurrence.

[223] With respect to the issue of employees [text redacted], albeit following established procedure and due care and precautions, the evidence indicates that this is also the standard in the industry. Moreover, the majority of the vehicles in the Garda fleet, including vehicles other than the "P" series, already require [text redacted]. For this reason, I cannot accept that the phasing out of so-called "traditional mode" for exiting the vehicle, which, it must be emphasized, was accompanied by training the drivers on how to safely enter and exit the vehicles configured like the "P" series, creates a health and safety hazard that amounts to a "danger", as defined in the *Code*. Besides, I was not presented with any evidence suggesting that the appellant's main concern, that is, [text redacted] exceeds the mere possibility threshold.

[224] Turning to the [text redacted], I find that the conclusions reached by the respondent's expert on the [text redacted] have not been seriously countered by testimonial evidence from the appellant which centers mainly on the perceived, but yet unsupported by cogent evidence, claimed deterrence effect of such. While the appellant questioned certain aspects of the Mr. [text redacted]'s report, the fact remains that this report contains the best evidence before me on the [text redacted], and I find the expert's conclusions to be very relevant and credible. More specifically, I accept his opinion that it might have been preferable to [text redacted]and that, even if extensive training was provided to employees, [text redacted].

[225] [Text redacted].

[226] [Text redacted].

[227] I am also mindful of the various respondent operating procedures centered [text

redacted] and/or [text redacted], the "P" series truck configuration that in my opinion would make it easier to prevent successful robbery, the fact that each service stop of a vehicle is covered by a SRA (site risk assessment), the sophistication of the crew's/vehicle communication tools and [text redacted] and constant communication with the employees as well as effective control of the vehicle where required, and employees' PPE, capacity to trigger alarms and distress calls and capacity to access the various compartments of the vehicle or to prevent such access in the manner described as "bunkering". These all mitigate the likelihood of serious injury to employees as a result of the four characteristics claimed by the appellant to pose a health and safety hazard such that a danger direction should be issued.

[228] While the occurrence of an attack or attempted robbery is seen and is accepted as an inherent risk, i.e. possibility, and that such occurrence may offer the potential for injury, this does not and cannot extend beyond the realm of mere possibility when looking at the industry as a whole, the defensive means offered by the vehicle, the protective equipment provided to all employees, and the lacking evidence to support otherwise. In my opinion, a reasonable person properly informed and advised of the standards and practices of the industry could not arrive at a conclusion of reasonable expectation of injury as a result of the characteristics of the "P" series vehicle.

[229] In my opinion, while the evidence presented in this case does support that there exists a possibility of attack on armoured cars generally, this representing for employees a potential exposure to violence, I was not presented with convincing evidence that the characteristics of the "P" series vehicle that the appellant has objected to increase the potential for injury or that their alteration or cancellation would serve to alleviate that same general possibility.

[230] In summary, as the definition of "danger" in the *Code* is based on the concept of reasonable expectation and that at best, the evidence submitted does not reach beyond the notion of "mere possibility", if even that, I cannot conclude that the four characteristics of the "P" series that the appellant has objected to can reasonably be expected to constitute a serious threat to the life or health of a person operating a "P" series vehicle in that configuration.

[231] Having concluded as I have above, it is not necessary for the undersigned to proceed to the third and final element of the test. Having so found, I also find that the "P" series vehicle in the configuration objected to by the appellant does not constitute a "danger" as defined in the Code when its general use is considered.

Decision

[232] For this reason, the appeal is dismissed and the appellant's request for the issuance of a direction pursuant to paragraph 146.1(1)(*b*) of the *Code*, that is, a danger direction under subsection 145(2), is denied.

Jean-Pierre Aubre
Appeals Officer