

Case No.: 2005-23
Decision No.: CAO-07-015

Canada Labour Code
Part II
Occupational Health and Safety

Parks Canada Agency
appellant

and

Douglas Martin and
Public Service Alliance of Canada
respondents

May 8, 2007

This case was decided by Appeals Officer Douglas Malanka.

Appearance for the appellant

Kirk Lambrecht, Counsel, Civil Litigation and Advisory Services, Justice Canada
J. Sanderson Graham, Counsel, Civil Litigation and Advisory Services, Justice Canada

Appearance for the respondent

Andrew Raven, Counsel

Witnesses for the appellant

Robert Prosper, Chief Ecosystems Protection, Parks Canada
Dr. Philip C. Stenning, Professor and Programme Director, Institute of Criminology, School of Social and Cultural Studies, University of Wellington, Victoria, New Zealand
Inspector Gregory Browning, Acting Director, National Learning Services, Royal Canadian Mounted Police
John Good, private consultant, Good Communication
Bruce van Staalduinin, Manager, Park Operations and Development Section, Ontario Provincial Parks, Ontario Ministry of natural Resources
Guy Mongrain, Manager, Information and Identification Services Directorate, Royal Canadian Mounted Police

Witnesses for the respondents

Sergeant Chris Butler, Head, Skills and Procedures Unit, Calgary Police Service, Calgary, Alberta
Edward Davis, Training Division, Behavioural Science, Federal Bureau of Investigation, USA
Duane Martin, Chief Park Warden and Senior Law Enforcement Officer, Parks Canada

Jurgen Deagle, Park Warden, Jasper National Park, Parks Canada

Mark McIntyre, Senior National Park Warden and Senior Law Enforcement Specialist, Parks Canada

Anders Hawkins, Park Warden, Lake Louise, Parks Canada

Dave Hanna, Conservation Officer III and Team Leader, Alberta Parks and Protected Areas, Kananaski District

Craig Hockley, Manager, Special Investigations and Forensic Services, Fish and Wildlife Division, Alberta Sustainable Resource Development Department

Garry Bogdan, Director, Prairie and Northern Region, Wildlife Enforcement, Environment Canada

Statutes

Canada Labour Code, R.S.C. 1985, c-L-2

Canada National Parks Act, S.C. 2000 c. 32

Criminal Code, R.S.C., c. C-36/C-46

Public Service Staff Relations Act, S.C. 2003

Royal Canadian Mounted Police Regulations, 1998, SOR/94-219

Royal Canadian Mounted Police Act, R.S., c. R-9

Canada Occupational Health and Safety Regulations, SOR/86-304

Case law cited by the Appellant

Re Manning, [1943] 1 D.L.R. 383

Bernadette Hogue-Burzynski, Suzanne Brisson, Margaret R. Hegier and Jennifer Roy and VIA Rail Canada, [2006] CLCAO Decision No. 06-015

Mr. Juan Verville and fifteen other correctional officers and Correctional Service of Canada, Kent institution, CLCAOD No. 02-013

Canadian Freightways Limited and Attorney General of Canada and Western

Canada Council of the Teamsters, 2003 FCT No. 391, T 2279-01

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Attorney General of Canada and Mario Lavoie, [1998] FCJ T-2420-97

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Parks Canada Agency and Mr. Doug Martin and Public Service Alliance of Canada, [2002] CLCAOD No. 8

Snook v. Canadian National Railway (1991), 86 di 74, CLRB

Mr. Juan Verville and fifteen other correctional officers and Correctional Service of Canada, Kent institution, CLCAOD No. 02-013

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Revenue Canada and Robin Edwards, [1991] CLCRSOD No. 23

Annette Robitaille, Leonard Hawkins and Canadian Auto Workers and VIA Rail Ltd., [2005] CLCAOD. No. 55

Brailsford v. Worldways Canada Ltd., (1992) 87 di 98

Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent, 2004 FC 767

Introduction

The complaint

- [1] On June 5, 2000, Douglas Martin, a park warden law enforcement specialist employed by Parks Canada Agency (Parks Canada) at Banff National Park, filed a complaint under Part II of the *Canada Labour Code* (the *Code*). He complained that Parks Canada did not provide park wardens with the defensive equipment defined by the standard of care applicable to peace officers in Canada performing similar work of resource conservation law enforcement, which includes a sidearm and training on its use. According to the *Complaint Registration Form* used by the Labour Program, Human Resources and Social Development Canada (HRSDC), park warden Douglas Martin stated:

I AM A PEACE OFFICER AS DESIGNATED UNDER THE NATIONAL PARKS ACT TO ENFORCE THE NATIONAL PARKS REGULATIONS AND FOR THE PURPOSE OF PUBLIC PEACE IN NATIONAL PARKS. I AM NOT ISSUED ALL OF THE DEFENSIVE EQUIPMENT AS DEFINED BY THE STANDARD OF CARE FOR PEACE OFFICERS IN CANADA PERFORMING SIMILAR WORK OF RESOURCE CONSERVATION LAW ENFORCEMENT. Several Parks Canada studies and management assigned teams have identified that Park wardens performing law enforcement should be equipped and trained to the full level of defensive equipment to the standard of care of Resource Conservation officers in Canada including a sidearm.

- [2] Health and safety officer (HSO) Robert Grundie investigated into park warden Douglas Martin's complaint and, following his preliminary examination, launched a national investigation into the matter. Following his investigation, HSO Grundie decided that a danger existed for park wardens performing law enforcement activities, because such park wardens may find themselves at risk of grievous bodily harm or death and are not provided with the necessary personal protection equipment.

The decision and directions issued by the HSO

- [3] HSO Grundie issued two directions to the Parks Canada Agency on February 1, 2001, pursuant to paragraphs 145(2)(a) and (b) of the Code. One direction was issued to the Chief Executive Officer of Parks Canada and applied to all park wardens engaged in law enforcement in Canada. The other direction was issued to the Field Unit Superintendent of Banff National Park and applied to park wardens conducting law enforcement in Banff National Park. HSO Grundie wrote in the directions:

Wardens [in that Park¹] who are expected to engage in law enforcement activities such as patrols, intelligence gathering, investigations of possible offences, and arrests, for resource management purposes and the maintenance of public peace, activities in the performance of which they may find themselves at risk of grievous bodily harm or death, are not provided with the necessary personal protective equipment. In like circumstances, officials carrying out similar duties such as Fisheries Officers, Environment Canada Wildlife Enforcement Officers and provincial conservation officers, are authorized to carry side arms.

- [4] HSO Grundie's directions ordered Parks Canada, pursuant to paragraph 145(2)(a) of the Code, to take measures within six months to correct the hazard or condition or alter the law enforcement duties of park wardens or to protect park wardens from the danger. They further directed Parks Canada, pursuant to paragraph 145(2)(b), to discontinue the activity that constituted a danger until Parks Canada had complied with the directions issued pursuant to paragraph 145(2)(a) of the Code.

The appeals and judicial review

- [5] Both Parks Canada as well as park warden Douglas Martin and the Public Service Alliance of Canada (PSAC) appealed the directions to an Appeals Officer, pursuant to subsection 146(1) of the Code, through the Occupational Health and Safety Tribunal Canada (Appeals Office). Parks Canada asked that the directions be rescinded, alleging that a danger did not exist for park wardens. Park warden Douglas Martin and PSAC asked that the directions be varied, to expressly require Parks Canada to issue sidearms to park wardens or to develop a procedure for the issuance of sidearms.
- [6] Appeals Officer Serge Cadieux inquired into the appeals pursuant to section 146.1 of the Code and, by written decision dated May 23, 2002, he found that a danger did not exist for park wardens and rescinded the directions that HSO Grundie had issued to Parks Canada.
- [7] Park warden Douglas Martin and PSAC sought judicial review of Appeals Officer Cadieux's decision at the Federal Court. The Federal Court dismissed their application by Order² dated October 6, 2003.

¹ The mention "in that Park" was included only in the direction issued specifically dealing with Banff National Park.

² *Martin v. Canada (Attorney General)*, 2003 FC 1158

- [8] Park warden Douglas Martin and PSAC appealed the Federal Court's decision to the Federal Court of Appeal. In a decision³ dated May 6, 2005, the Federal Court of Appeal allowed the appeal, set aside the decisions of the Federal Court and of Appeals Officer Serge Cadieux and remitted the matter to the Appeals Office for redetermination.

Redetermination of the Matter

- [9] The appeal made by Parks Canada was heard by the undersigned Appeals Officer between November 2005 and July 2006, principally in Ottawa, Ontario. In total, some 34 days were taken up to hear evidence from 16 witnesses and over 170 documents were entered as exhibits. Final arguments were heard in June 2006.
- [10] While both Parks Canada, and Park warden Douglas Martin and PSAC appealed the directions of HSO Grundie, parties agreed that for this review, Parks Canada was the Appellant and Park warden Douglas Martin and the PSAC were the Respondents.
- [11] The present decision reflects the witnesses' testimony and the documents submitted. Parties may rest assured that all testimonies and documents were carefully reviewed and considered.

Testimony of HSO Grundie

- [12] HSO Grundie's investigation lasted approximately six months. He consulted with Parks Canada officials, park wardens, the Royal Canadian Mounted Police (RCMP) and various other law enforcement specialists referred to him by the parties. He also reviewed Parks Canada's policy and procedures documents and Parks Canada's studies on officer safety. HSO Grundie decided that a danger existed for park wardens and therefore issued two directions to Parks Canada.
- [13] HSO Grundie concluded from his investigation that park wardens had a dual law enforcement mandate. They were responsible for both resource management law enforcement and establishing and maintaining public peace in parks, pursuant to the *Canada National Parks Act* and to the *Criminal Code*. HSO Grundie found that park wardens had a secondary responsibility regarding the enforcement of the *Criminal Code* as first responder. HSO Grundie held that this dual enforcement responsibility was confirmed in the various Memoranda of Understanding (MOUs) between Parks Canada and the RCMP and between Parks Canada and the Ontario Provincial Police (OPP). He also noted that the cross-over sharing of law enforcement responsibilities was confirmed in Parks Canada's *Law Enforcement Management Bulletin 2.1.9*⁴.
- [14] HSO Grundie observed that park wardens were authorized to enforce other federal and provincial statutes in parks, such as the federal *Fisheries Act*, the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, the *Migratory Birds Convention Act* and the *Boating Restriction Regulations*. He also noted that federal

³ *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*, 2005 FCA 156

⁴ Parks Canada's *Law Enforcement Management Bulletin 2.1.9* was replaced in March 2003 by *Law Enforcement Management Directive 2.1.9*. See R. Prosper's testimony for more details.

and provincial agencies having primary responsibility for the enforcement of these acts and regulations equipped their law enforcement officers with sidearms. They included Fisheries and Oceans Canada, Environment Canada and nine out of ten provincial conservation agencies.

- [15] Furthermore, HSO Grundie noted that park wardens were appointed as special constables in Ontario, New Brunswick and Prince Edward Island. This conferred them the powers of a police officer to preserve and maintain peace and to enforce provincial statutes on or in relation to all lands and waters administered by Parks Canada in these provinces.
- [16] HSO Grundie testified that park wardens drove distinctively marked vehicles, dressed in distinct uniforms similar in features to the police and wore a duty belt.
- [17] HSO Grundie stated that park wardens were often on their own in the backcountry⁵ when carrying out resource management law enforcement, due to the isolated nature of many of the national parks. They could also be on their own regarding *Criminal Code* matters, because police forces having primary jurisdiction for *Criminal Code* violations were not always available to respond immediately or could be significantly delayed (up to three hours) due to the travel distances.
- [18] HSO Grundie concluded that the communication equipment issued to park wardens by Parks Canada was not always reliable or useful, due to communication dead zones found in various park locations. He also concluded that the information received from the Canadian Police Information Centre (CPIC) was unreliable.
- [19] HSO Grundie noted that, according to Parks Canada's document entitled *Strategic Direction for the Parks Canada Law Enforcement Program*, the level of health and safety protection afforded to park wardens was consistent with similarly mandated agencies. However, he concluded from the evidence gathered during his investigation that the standard of care practiced in Canadian federal and provincial agencies carrying out similar law enforcement mandate included issuing a sidearm for officer protection. He also observed that Parks Canada's document stated that breach of duty allegations could arise from park wardens' failure to act.
- [20] HSO Grundie noted that in 1995, Parks Canada instituted a *Levels of Service* standard to be used by individual parks in the development of their individual law plans. The standard consisted of four law enforcement risk levels, where level four corresponded to the higher risk. HSO Grundie observed that for Banff National Park, Prince Edward

⁵ Neither the *Law Enforcement Administration and Operational Manual* nor *Law Enforcement Management Directive 2.1.9* define the terms "backcountry" or "front country". However, they are defined in individual park law plans. According to the *Banff National Park Field Unit Law Plan for 2003/2004*, backcountry is defined as all Zone II areas; areas which are considered to be undeveloped in nature and to which access is considered to be hard and normally achieved by foot travel, bicycle, horse, aircraft or boat, or achieved by non-paved and some paved highways depending on the road surface/weather/ seasonal conditions. Front country is defined as those areas which are considered to be of easy access and/or suburb to a paved highway or suburban in nature, such as campground, day use areas and most sites with services (water/sewer/ electricity built structures). In the definition, "easy access" means being within 100 m of an access highway or suburban facility, depending on topography. Not all plans defined the terms and others used definitions similar to those used in the aforementioned *Banff National Park Field Unit Law Plan*, with changes to reflect park specific topography.

Island National Park, Bruce Peninsula National Park/Fathom Five National Marine Park and Kouchibouguac National Park, law plans had determined that the overall level of risk was level three, while the level of risk for park wardens was level four. According to the *Levels of Service* standard, a level three risk called for the temporary issue of sidearms under special Parks Canada authority and a level four risk, described as *Advanced Law Enforcement Level of Service*, called for the issuance of sidearms to all park wardens at the parks. HSO Grundie also noted that the law plan for PEI National Park plainly stated that the absence of equipment to address a situation of grievous bodily harm or death could impair the ability of park wardens to protect themselves and park visitors. Despite the law plan recommendations, Parks Canada refused to issue sidearms to park wardens at those parks.

- [21] HSO Grundie cited two third-party studies that Parks Canada commissioned in 1993 and 1997 to look into officer safety relatively to law enforcement by park wardens. Both the 1993 CEGEP Report entitled *A Study pertaining to the Safety of the Duties of Park Wardens in Law Enforcement* and the 1977 Rescue 3 Risk Management Inc. Study entitled *Final Report Recommending a Level of Service for Alberta Regional National Parks* recommended that park wardens be provided with sidearms for personal protection. In both instances, Parks Canada ignored their recommendations.
- [22] HSO Grundie stated that Parks Canada also ignored the findings and recommendations of the 1991 Buker and Frey Study entitled *Officer Safety Implications to Supervisors, Administrators and the Department*. Written by Joe Buker, Law Enforcement Specialist, Prairie and Northern Region, and Ray Frey, Chief Park Warden, Riding Mountain National Park, the report recommended training and the issuance of a sidearm to park wardens involved in law enforcement.
- [23] HSO Grundie referred to a report written by David Jivcoff, National Law Enforcement Coordinator, Parks Canada, entitled *An Officer Safety Issue Analysis Compilation Paper 1999*. The report noted that, in the last two years, the provinces of Saskatchewan, Manitoba, Newfoundland and Labrador and Prince Edward Island had armed their conservation officers, Fisheries and Oceans Canada had armed their enforcement officers and Alberta was in the process of arming its park rangers. David Jivcoff observed that Parks Canada might soon be the only agency below the standard of care. He suggested that endowing the park warden with a sidearm would reinforce the park warden's authority as a law enforcement officer with the general public.
- [24] HSO Grundie referred to studies done by Edward Davis, American Federal Bureau of Investigation (FBI), Criminal Behaviour Science Unit. The studies established that one key factor influencing a subject's decision to initiate an assault on an officer that was likely to cause bodily harm or death to the officer was the officer's image. Edward Davis held that assailants, who would tend to attack a law enforcement officer when confronted, were influenced to do so if they saw an opportunity to attack and if the officer appeared weak. The assailant's assessment of the officer's image was influenced by the officer's physical appearance, the defensive equipment available to the officer and the officer's confidence and professional behaviour. Edward Davis opined that potential assailants were more likely to initiate assault against an officer who, among other factors, was not wearing a sidearm. Edward Davis further stated that one third of assailants who assaulted law enforcement officers with the intent to cause serious bodily harm or death indicated that nothing the victim officer did could have deterred the attack.

- [25] HSO Grundie determined that the key component of risk mitigation for park warden safety is the use of the Incident Management Intervention Model (IMIM), a use-of-force model developed by the RCMP. HSO Grundie noted that the IMIM is used in one form or another by all law enforcement agencies in Canada. The IMIM recognizes that human behaviour is unpredictable and can be influenced by stress, drugs or alcohol. The IMIM further acknowledges that subject behaviour is not progressive or incremental relatively to the risk and can immediately jump from cooperative to grievous bodily harm or death, which authorizes the use of lethal force to control the situation.
- [26] HSO Grundie spoke to Dr. Gary Bell, RCMP training officer, who told him that it is inconsistent to equip someone with pepper spray, a baton and soft body armour without also issuing a sidearm. HSO Grundie concluded that providing to park wardens carrying out law enforcement restricted weapons such as handcuffs, pepper spray, a defensive baton and soft body armour without also issuing a sidearm was inconsistent with the IMIM and inadequate relatively to their health and safety. HSO Grundie added that soft body armour is specifically intended to provide protection to an individual against being shot.
- [27] HSO Grundie found that Parks Canada's practice of authorizing the temporary use of long arms as a defensive weapon, in place of a sidearm, was unwise and unsafe. HSO Grundie listed numerous reasons in his decision why the law enforcement community rejected this as a viable option. These included the fact that the appearance of a park warden with a rifle or shotgun could escalate a situation to the detriment of all those involved; the fact that long arms are an unsuitable defensive tool at close range; and the fact that rifles are high velocity, high penetration weapons, that could result in collateral injury.
- [28] HSO Grundie stated that the Park Wardens Association provided him with law enforcement incidents reports that confirmed that park wardens had either been threatened of harm in the past or felt that there was a possibility of violence escalating to the point of grievous body harm.
- [29] HSO Grundie referred to Parks Canada's documents in evidence that acknowledged that law enforcement is a potentially dangerous activity, which exposes wardens to risk of serious injury or death. The documents included the park warden job description, individual law plans, incidence occurrence reports, internal agency reports and assessments, third party studies and the RCMP IMIM training material.
- [30] HSO Grundie concluded that the nature of park warden Douglas Martin's complaint was not unique to him as a law enforcement specialist within Banff National Park, nor unique to Banff National Park. Instead, he found that a danger existed for all park wardens involved in law enforcement. He held that the issue was whether the training and personal protective equipment that Parks Canada had provided to its wardens carrying out law enforcement met a standard of care consistent with police agencies in Canada and other resource management law enforcement officers such as conservation officer.

- [31] HSO Grundie wrote that risk mitigation means that all reasonable steps be taken to minimize dangers inherent to the law enforcement activities of park wardens. Specifically, park wardens require the training and equipment necessary to deliver the lethal force option of the IMIM in situations of risk of grievous bodily harm or death. He concluded that, for the law enforcement community, this means having a sidearm.
- [32] HSO Grundie also confirmed that his decision that a danger existed for park wardens involved in law enforcement was not altered by the fact that the geographical characteristics of each federal park was different. He believed that the risk connected with resource management and *Criminal Code* law enforcement was a more significant common factor.
- [33] HSO Grundie agreed that park wardens could use the defensive baton to deliver lethal force, but held that such use was contrary to the Police Defensive Tactics (PDT) training they receive from Parks Canada. Moreover, he noted that PDT training does not include specific instruction and training on such use of the baton. He held that a park warden would have to be close to an assailant with an edged weapon to use the defensive baton to deliver lethal force. He deemed that the necessity for close proximity to do so ads unacceptable risk to the situation. He maintained that a sidearm enables park wardens to deliver lethal force at a safe distance in situations of grievous bodily harm or death.
- [34] With regard to the tactical repositioning referred to in the IMIM, HSO Grundie testified that an officer cannot always move to gain advantage or greater safety, because human behaviour is unpredictable.
- [35] HSO Grundie testified that the risk of carrying out law enforcement without a sidearm exceeds any risk that the sidearm might add.
- [36] HSO Grundie confirmed that he was aware that the RCMP's auxiliary constables are equipped with pepper spray, bullet proof vest and batons but not with a sidearm. However, he reiterated that he was told by Dr. Bell that one cannot rationalize issuing someone pepper spray, a baton and soft body armour but no sidearm.
- [37] HSO Grundie conceded that he did not know the specific number of poaching patrols carried out by park wardens in a year nor how many poachers were apprehended. But the hazardous occurrence reports that park wardens gave him confirmed that there definitely were incidents where wardens were assaulted.

Appellant's witnesses

Testimony of Robert Prosper

- [38] Robert Prosper, Chief, Ecosystems Protection, Parks Canada, testified that he has been working for Parks Canada in different capacity, from park warden to superintendent, since 1980 and as Chief, Ecosystems Protection, for approximately the last three years. As such, he is responsible for all policy development; strategic direction and procedures; procedures development; law enforcement standards in Parks Canada; public safety standards; national level resource conservation training; and sitting on various intergovernmental and extra government boards and committees related to fire protection and wildlife law enforcement.

- [39] Robert Prosper stated that all park wardens conduct law enforcement wherever they are employed when dealing with lands under the control of Parks Canada and all have law enforcement responsibilities under the *Canada National Parks Act*. Their duties also comprise resource management, applied science, public safety, including enforcing the *Criminal Code*, and fire related activities. Law enforcement only represents less than twenty-five percent of the park wardens' work. Law enforcement specialists, whose main focus is law enforcement, are the exception to the rule and there are only 3 out of 345 park wardens, all three being employed at the three large mountain parks in the West, *i.e.* Jasper, Banff and Lake Louise/Yoho/Kootenay.
- [40] Robert Prosper provided a brief historical perspective to law enforcement by park wardens. The first national park, the Banff National Park, was established in 1885. The park warden service followed in 1909 and park wardens were appointed to enforce park legislation and fire protection. Their role evolved towards three main responsibilities, including resource management, public safety and law enforcement of the CNPA and its regulations. As visits to Canada's national parks increased over time, their role shifted increasingly to the enforcement of the CNPA and its regulations and public safety.
- [41] In 1967, park wardens Sime and Schuler carried out a comprehensive review of park wardens' duties in response to a greater social awareness towards the environment and environmental protection. Their ensuing *Sime-Schuler Report* concluded that the park wardens' principal role was resource management and that law enforcement and public safety responsibilities should be secondary.
- [42] Notwithstanding the *Sime-Schuler Report*, the role of park wardens in law enforcement continued to expand. Robert Prosper noted that park wardens had taken on ever increasing and expanding law enforcement activities, including enforcing the *Criminal Code* as first responder, the provincial highway traffic legislation and the provincial and federal wildlife and fisheries statutes and regulations outside park boundaries and arresting subjects with outstanding *Criminal Code* offences warrants. In some cases, park wardens were leading international poaching investigations, they were involved in undercover covert operations and they were being deputized or authorized to enforce legislation outside the parks.
- [43] Robert Prosper rationalized that park wardens became good at law enforcement in the absence of other police forces or agencies doing it and they increasingly took on first responder responsibilities.
- [44] Following HSO Grundie's directions on February 1, 2001, Parks Canada initiated two parallel studies, the *Resource Conservation Function Study* and the *Park Warden Officer Safety Study*.
- [45] The *Resource Conservation Function Study* was the second national review of the roles and responsibilities of park wardens, in terms of what resource conservation staff and park wardens were doing compared with Parks Canada's expectations. Park wardens were consulted during the process via prepared question and answer sessions conducted before the final report. The report was finalized in 2002 and essentially reconfirmed the Sime-Schuler report's conclusions that the park wardens' primary responsibility was resource management and that law enforcement and public safety were secondary.

- [46] The Park Warden officer safety study was conducted in consultation with the policy health and safety committee, in parallel with the *Resource Conservation Function Study*. It consisted of a quantitative and a qualitative study. The quantitative study, headed by Dr. Evans, determined the relative risks associated with law enforcement activities conducted by park wardens. Robert Prosper submitted a copy of Dr. Evans' report, entitled *National Assessment of Relative Risk in Warden Law Enforcement Occurrence Reports*, but Dr. Evans was not called to testify.
- [47] Robert Prosper headed up the working group on the qualitative aspect of the *Park Warden Officer Safety Study* and was assisted by RCMP members. The working group never issued a formal report, but its findings, along with Dr. Evans' quantitative assessment, lead to the development of Parks Canada's *Law Enforcement Management Directive 2.1.9*. Finalized and adopted in March 2003, when park wardens restarted their revised law enforcement role, Directive 2.1.9 replaced the previous Bulletin 2.1.9 that applied in past years. It now forms part of Parks Canada Agency's *Law Enforcement Administration and Operational Manual*, which was revised and re-issued in September 2005, even though some parts of the manual have yet to be completed.
- [48] The objective of the new law enforcement policy was to refocus the activities of park wardens from public peace law enforcement to resource conservation. The second objective of *Law Enforcement Management Directive 2.1.9* was to eliminate higher risk law enforcement activities, lower the frequency of other law enforcement activities presenting risk and mitigate any risk that remained. Robert Prosper stated that the mitigating measures include: improved training and communications equipment; improved tracking and response to law enforcement occurrences and violence occurrences; direction to park wardens to use discretion and avoid risk in law enforcement work; direction to individual parks to specify local mitigation needs where required; and annual program evaluation.
- [49] Robert Prosper reviewed in detail the new *Law Enforcement Management Directive 2.1.9*, as well as the accompanying *Law Enforcement Administration and Operational Manual*, to highlight the policy changes.

Law Enforcement Management Directive 2.1.9

- [50] The new *Law Enforcement Management Directive 2.1.9* aimed at achieving the following changes.
- change the law enforcement culture and refocus park wardens on law enforcement related to the protection and management of natural and cultural resources;
 - give discretion to park wardens not to intervene in a law enforcement activity that could place their health and safety at risk;
 - eliminate law enforcement activities having higher risk exposure;
 - modify law enforcement activities to reduce the frequency of risk exposure;
 - establish mitigation measures against any remaining risks;
 - formalize administrative processes to enhance health and safety.

Change the law enforcement culture

- [51] *Law Enforcement Management Directive 2.1.9* changed the law enforcement culture. For example, it deleted reference to the fact that park warden acted as first responders when they observed *Criminal Code* offences incidental to their work. The section on Strategic Direction now confirms that public peace enforcement is the primary responsibility of the jurisdictional police services.
- [52] The Program Objectives section states that Parks Canada will ensure the maintenance of public peace on all lands it administers, through co-operative efforts and memorandum of understanding with other agencies and jurisdictional police services.
- [53] Section 6.1, Authorities, instructs park wardens that their law enforcement duties are limited to those assigned by the Chief Executive Officer, Parks Canada, pursuant to paragraph 13(3)(b) of the *Parks Canada Agency Act*.

Give discretion to park wardens

- [54] *Law Enforcement Management Directive 2.1.9* gives discretion to park wardens not to intervene in any law enforcement activities that could place their health and safety at risk. In this regard, section 2, Principles, states that park wardens are not expected to knowingly put themselves in danger and are not expected to directly intervene when they have determined that they are at risk of grievous bodily harm or death.
- [55] Section 6.1.6 states that park wardens first on a scene are not required to directly intervene in all law enforcement situations. In addition, section 6.1.8 states that park wardens are expected to use discretion in the fulfillment of their duties.
- [56] Section 6.3.5 establishes that the degree of intervention in a public peace incident incidental to regular duties is to be consistent with a park warden's level of training, experience, equipment and other risk mitigation measures that are in place, and that the intervention is to be at the lowest level appropriate to the circumstances.
- [57] In this regard, section 6.1.10, Authorities, promises to indemnify park wardens against personal civil liability, provided that they have acted within the scope of their duties and employment.

Eliminate law enforcement activities of higher risk exposure

- [58] Sections 6.1.16 to 6.1.18 deal with law enforcement activities related to resource protection. Under these sections, park wardens are no longer permitted to enforce federal, provincial or territorial conservation legislation outside of parks. However, section 6.1.17 clarifies that park wardens can enforce the CNPA (or any other legislation they are authorized to enforce) outside a park boundaries if the offence results in an offence inside the park. For example, a hunter outside the park boundary shoots an animal inside a park boundary.

- [59] Furthermore, section 6.2.3 instructs that park wardens can only execute search warrants in respect of a permanent building after the jurisdictional police have secured the scene. Section 6.2.4 eliminates law enforcement activities related to undercover, infiltration or assumed identity operations. But park wardens can still conduct law enforcement activities in plainclothes and from unmarked vehicles or vessels.
- [60] Section 6.2.7 prohibits park wardens from conducting wildlife check stops. But section 6.2.6 confirms that they may stop a vehicle as part of an investigation of a resource protection offence, provided the mitigation measures identified in Appendix A of the directive are met.
- [61] In terms of higher risk, public peace enforcement activities are eliminated. Section 6.2.5 now prohibits park wardens from conducting routine vehicle stops under the *National Park Highway Traffic Regulations*, for such violations as speeding in wildlife zones and moving traffic. Notwithstanding this, park wardens continue to be authorized to enforce the regulations in respect of off-road vehicle travel, snowmobiles or all terrain vehicles (ATVs), to the extent that the activity relates to the protection of natural or cultural resources. Park wardens may still stop a vehicle as part of an investigation of a resource offence, provided the mitigation measures identified in Appendix A are met.
- [62] Section 6.3.3 instructs park wardens not to respond to moving violations on highways beyond observing, recording and reporting the incident.
- [63] In addition, under section 6.3.8, the physical eviction of a person as a result of a public peace offence is to be carried out by the police service of jurisdiction and not by park wardens.
- [64] Finally, the *Law Enforcement Administration and Operational Manual* prohibits park wardens from enforcing unlawful public assemblies or responding to security breaches at park buildings.

Modify law enforcement activities

- [65] Section 3 reduces the frequency of intervention by park wardens relative to permits and licenses and fees. In the past, park wardens verified such documents randomly. They now only respond when advised of a violation by other park staff.
- [66] Under section 6.1.20, park wardens can only use their authority under a provincial wildlife act to respond to resource management issue outside park boundaries (*e.g.* problem wildlife), provided their blanket authorities do not include law enforcement powers.
- [67] Under section 6.2.11, dedicated backcountry law enforcement patrols require a minimum of two peace officers. The appropriate risk mitigation measures identified in Appendix A must be met. The two peace officers may include two park wardens, a park warden and a police officer, or a park warden and a peace officer from another federal or provincial resource conservation agency. Dedicated law enforcement patrols occur, for example, during hunting season or when a poacher is reported. Notwithstanding this, a lot of

backcountry patrols are not related to law enforcement. If the park warden incidentally sees an offence, the warden can decide whether or not to intervene. Also, Parks Canada leaves it up to each park to define, through its law plan, what constitutes backcountry, as this varies according to geography and circumstances, such as ease of access by roads and highways.

- [68] Along the same vein, section 6.2.12 specifies that a law enforcement response to a report of a known or suspected hunting/poaching offence requires a minimum of two peace officers, with appropriate mitigation measures identified in Appendix A.
- [69] In addition, section 6.2.13 specifies that park wardens are not permitted to lead or conduct independent investigations outside of Canada, although they can play a role in them.
- [70] Under section 6.3.4, wardens are not to carry out patrols dedicated to the maintenance of public peace or to be called out as a primary response to public peace complaints. Calls related to a criminal matter are directed to the police. Notwithstanding this, section 6.3.6 permits wardens to conduct directed patrols to enforce compliance with the noise and disturbance provisions of the general and camping regulations in campgrounds and day use areas and to respond to complaints. However, the degree of intervention must be consistent with the park warden's level of training, experience, equipment and other risk mitigation measures in place. In addition, the response must be at the lowest level appropriate to the circumstances.
- [71] In addition, section 6.3.7 states that any patrol or intervention requires a complement of two peace officers. However, these directed patrols must be outlined in the comprehensive compliance strategy and approved in the site law plan. Moreover, the law planning process is to minimize the need for a law enforcement response in this area.
- [72] Section 6.3.5 clarifies that the park warden is authorized to intervene when witnessing a public peace incident in the park while performing other regular duties. However, the degree of intervention must be consistent with the park warden's level of training, experience, equipment and other risk mitigation measures in place. The response must also be at the lowest level appropriate to the circumstances.
- [73] Section 6.3.8 is another example of a law enforcement activity being modified to reduce exposure to risk. According to that section, the physical eviction of a person as a result of a public peace offence is to be carried out by the police service of jurisdiction, not by park wardens.
- [74] Finally, section 6.4.1 confirms that the park warden's responsibility for administrative enforcement of permits and fees is limited to situations where people refuse to complete camping or park use permits or refuse to pay. Park wardens previously conducted directed permit checks, an activity no longer permitted under Directive 2.1.9.

Establish mitigation measures for remaining risks

- [75] Appendix A of Directive 2.1.9, entitled Staff Safety and Risk Mitigation, confirms that there is an inherent element of risk associated with law enforcement activities. However, Parks Canada undertakes effective assessments of risks to employees and implements mitigating measures in all of its parks and sites. Appendix A dictates that park wardens are to limit any law enforcement intervention to observing, recording and reporting when and as long as any of the mitigation measures specified in the park law plan are not met.
- [76] Section 6.10.2 expressly specifies that no law enforcement activities beyond observing, recording and reporting is to be done in front or backcountry areas unless communications meet the standard set out in Appendix A. If dispatch and communications capability does not exist, even temporarily, law enforcement is limited to observing, recording and reporting.
- [77] The national mitigation measures specified in Appendix A include: training requirements; defence equipment requirements; telecommunication requirements for communication with the park warden at the law enforcement location; response systems requirements including CPIC/Occurrence Tracking System (OTS), dispatch mechanism and back-up.
- [78] Section 6.1.2 essentially clarifies that park wardens are not restricted to a specific suite of tools to assist them in the effective use of force where authorized under the *Criminal Code*. Park wardens are not issued a sidearm for delivering lethal force in situations of grievous bodily harm or death, but should the situation arise, they are within their authority to use anything to protect themselves, including a long arm.

Formalize administrative processes

- [79] The term CAPRA --Clients, Acquiring and Analysing Information, Partnerships, Response and Assessment-- was defined and added to Directive 2.1.9, to emphasize to park wardens that the law enforcement policy is based on community policing, information, partnerships and warnings and does not rely only on law enforcement.
- [80] Section 4, Program Elements, confirms that risk mitigation through hazard identification, risk assessment and implementation of mitigating measures are part of the law enforcement policy.
- [81] Section 6.5.1, Law Planning, instructs field units to prepare site specific law plans based on a multi-disciplinary approach to resolving enforcement issues. This way, jurisdictional police services are included in the process, along with facility or visitor service managers or other federal or provincial enforcement agencies that may contribute to a comprehensive law enforcement strategy.
- [82] In the past, the process did not involve the participation of police and other parties having interest in the development of a plan to resolve enforcement issues so that everyone knew what was expected. Presently, if, for example, enforcement of speed zones is needed to protect wildlife, the jurisdictional police service is involved in the development of the law plan for the park and the police recognize that it needs to do so. It was expected that the jurisdictional area police would commit to the necessary enforcement. In this regard, Parks Canada has national MOUs with the RCMP and local agreements with the OPP. However, local police detachments do not enter into signed agreements with individual parks.

- [83] Section 6.5.2 brings about an important change, in that law plans for each park must indicate how the mitigation measures specified in Appendix A are incorporated into park law enforcement activities.
- [84] Section 6.5.3 directs that law plans be submitted for approval by the Field Unit Superintendent and approved by the Director General, National Parks Directorate. In addition, the National Parks Directorate is responsible for having plans reviewed for consistency with national policy and standards. This section ensures that a national review of law plans is carried out and that parks are implementing the policy.
- [85] Section 6.8.1, Training, entrenches park wardens law enforcement training. Section 6.8.3 further specifies that the law enforcement training must include IMIM and PDT training.
- [86] Section 6.9.2, Equipment Issue, Use and Control, directs park wardens to carry the law enforcement protective and defensive equipment specified in Appendix A and made available to them. They include handcuffs, pepper spray, defensive baton and soft body armour. Appendix A specifies the conditions under which this equipment must be carried and used. Section 6.9.4 states that park wardens must wear a visually distinct uniform when carrying out law enforcement duties, except when conducting surveillance in plainclothes and in unmarked vehicle or vessels.
- [87] Section 6.10.1, Communications and Information Management, now clarifies that each field unit park must ensure that park wardens involved in law enforcement are supported with adequate dispatch mechanism and communications infrastructure. This was not required in the past.
- [88] To track law enforcement occurrences, section 6.10 states that each field unit park must collect and maintain law enforcement data in an incident reporting system. In addition, all occurrences, being verbal and written warnings, charges, investigations and case dispositions, will be recorded in the Occurrence Tracking System. The system will include Violence Occurrence Reporting (VOR), *i.e.* all violent occurrences that result in a physical injury or where an individual is verbally abused or threatened. This latter provision constituted a change because the Occurrence Tracking System is new and important for tracking minor and significant occurrences and for determining trends.
- [89] Finally, under section 6.11.1, Program Monitoring, Evaluation and Reporting, the national office, with the assistance of law specialists, must now ensure that field units and parks are meeting standards; deficiencies and ambiguities in national policy standards and procedures are corrected as early as possible; appropriate service levels for both resource protection and public peace, as defined in the site law plans, are being delivered; and MOUs deficiencies and ambiguities are corrected.
- [90] Parks Canada developed a generic job description for park wardens that confirmed what is expected from them relatively to law enforcement, irrespective of where they work.

Law Enforcement Administration and Operational Manual

- [91] Robert Prosper explained that Parks Canada's *Law Enforcement Administration and Operational Manual*, approved in September 2005, provides direction to managers for managing and supervising Parks Canada's law enforcement program in accordance with applicable laws and regulations, *Law Enforcement Management Directive 2.1.9*, individual law plans and human resources values and principles. The following sections of the manual deal primarily with the implementation of *Law Enforcement Management Directive 2.1.9*.
- [92] The manual provides a template table of contents for the preparation of law plans and confirms that there is to be consultation with local municipalities and the jurisdictional police, as well as the local occupational health and safety committee.
- [93] Under the section Interagency Cooperation, park wardens may assist other agencies if they are requested by the agency and if they follow Parks Canada's law enforcement policies. In addition, they are not to give assistance beyond their experience and training.
- [94] The section on Human Resources - Training confirms that the Proficiency Certification (PC) designation PC-4 requires mandatory training in: Resource Conservation Activities; Law Enforcement Component of Recruit Training (12-week course); Law Enforcement Proficiency Workshop Training, including recertification every five years and twenty hours annually to hone muscle memory; IMIM and PDT training, with recertification training every two years; and Compliance Training.
- [95] Under the section on Use of Force/Incident Intervention, park wardens are authorized to use the Incident Management Intervention Model and that they must do so in a manner consistent with the IMIM.
- [96] The section on Law Enforcement Vehicles and Vessels forbids high speed pursuits where the suspect is attempting to avoid apprehension. However, in the case of a suspected highway moving traffic violation, park wardens may follow the subject vehicle to maintain visual contact or signal the vehicle to stop. In such cases, normal speeds must be respected unless circumstances are reasonable and justified in terms of the public's, the park wardens' and the suspect's safety, the gravity of the suspected violation and the possibility of using other reasonable means of apprehending the suspect.
- [97] While the manual confirms that vehicles or vessels will not be arbitrarily or regularly stopped, it authorizes stopping them where the occupant is suspected on reasonable and probable grounds of committing a resource related offence. Additionally, park wardens may stop a vehicle or vessel to further assist with a recent investigation, pursue information and intelligence from passers-by and locate the potential suspects.
- [98] The manual concedes that stopping a vehicle or vessel in the course of investigating a suspected violation is considered a high risk situation. A dispatch mechanism must be notified of a planned impending stop of a vehicle or vessel, and licence, registration number, location and any other pertinent information must be provided.

- [99] Under the Law Enforcement Patrol Procedures section, dedicated patrols, such as boundary patrols in the fall during hunting season, must be performed by two peace officers. However, multifunctional patrols only require one park warden. All patrol wardens must report and register with the dispatch mechanism and specify warden number, area work plan and return or check-in times. Park wardens are reminded to use codes on lines or radio transmissions as they are not secure.
- [100] The section on Accidents confirms that park wardens continue to respond to vehicle accidents, to ensure safety and well-being of the public. If they are first on the scene, park wardens are responsible for traffic control and securing the scene until the jurisdictional police arrive.
- [101] On the subject of Cancellation of Camping Permits and Evictions from Campgrounds, the manual states that it is still appropriate for park wardens to continue having a visible presence and a response capability with respect to controlling noise and disturbance in campgrounds and day use areas. The manual clarifies that this officer presence can be carried out by a park warden operating alone.
- [102] Under the section Joint Force and Patrol Operations, park wardens may engage in joint operations or patrols with the jurisdictional police service or other agencies related to mutual natural and cultural resource protection law enforcement issues. This could include, for example, a joint operation with the RCMP or other agencies along park boundaries in National Marine Conservations areas. However, park wardens are prohibited to perform any activity in any joint operation or patrol that would be contrary to Directive 2.1.9 or the manual.
- [103] Under the section Investigations, a single park warden may investigate alone at a site to decide whether or not an offence has occurred or to collect evidence of a violation. However, serious public peace offences are the responsibility of the jurisdictional police. If a park warden discovers an offence, the warden is instructed to preserve the scene, inform the jurisdictional police and turn the scene to the police at the earliest possible time.
- [104] The section on *Criminal Code* Investigations states that park wardens are responsible for conducting investigations involving offences under the CNPA or other mandated regulatory offences. It confirms that the jurisdictional police have sole responsibility for investigating non-mandated *Criminal Code* or other offences. As to international investigation, the role of park wardens is limited to acting as advisors.
- [105] According to the section on the Canadian Police Information Centre (CPIC), Parks Canada maintains a category 2B status of limited access, no input. The Agency provides either direct or indirect access to the CPIC, in accordance with the officer safety mitigation measures specified in Appendix A of Directive 2.1.9. The dispatcher has access to the CPIC system in parks with full blown dispatch. However, in some parks, CPIC information can only be obtained from a contact person and in others park wardens share the police radio frequency and can obtain CPIC information through the police.

- [106] With regard to Security Incident Alarms, the manual now clarifies that park wardens no longer respond to alarms in Parks Canada buildings and that responding to such alarms is now left to the jurisdictional police.
- [107] According to the section entitled Arrest, park wardens still have the power to arrest, with or without warrant, and to search, seize, charge and prosecute. It clarifies that park wardens are no longer authorized to exercise outstanding warrants, except when connected with resource management law enforcement offences. In such cases, if the CPIC indicates the individual is violent, park wardens are told to refer the matter to the jurisdictional police and to tactically reposition. According to Robert Prosper, park wardens turn over any person arrested and detained to the jurisdictional police, since they have no means of custody, but not all arrest end up in detention.
- [108] In the spring of 2003, Parks Canada forwarded to all parks and sites the *Law Enforcement Planning Guide*. The Guide also pointed out that the basic level of service that a park or site should expect from the jurisdictional police should not be greater than the service accorded to any other private operator or citizen. However, this does not preclude individual parks or sites from agreeing to targeted strategic enforcement with local police service detachments, to address particular law enforcement activities. This could include the enforcement of a weekend ban on liquor to reduce noise and disturbance complaints.
- [109] Robert Prosper also reviewed and commented the following documents: *Banff National Park Field Unit Law Plan, 2003-2004*; *Jasper National Park Law Plan, 2003*; *Riding Mountain National Park of Canada Law Plan, 2005*; *Bruce Peninsula/Fathom Five National Marine Park Law Plan, 2005*; *St. Lawrence Islands National Park Law Enforcement Plan, 2005*; *Gwaii Haanas National Park Reserve and Haida Heritage Site Law Enforcement Plan, 2003*; *Lake Louise, Yoho, Kootenay Field Unit Law Enforcement*; *Yukon Field Unit-Chilkoot Trail National Historic Site, April 2005*; and *Georgian Bay Islands National Park of Canada Law Enforcement Plan, 2005*. Although lengthy, this review is important, as it provides insight into concerns and conditions present in parks and into how they relate to *Law Enforcement Management Directive 2.1.9*.

Banff National Park Field Unit Law Plan, 2003-2004

- [110] Robert Prosper commented on the issue of poaching in Banff National Park and demonstrated how it followed the template for law plans. On the issue of public safety, the law plan confirms the responsibility for enforcing the *Criminal Code*, the provincial *Highway* and *Gaming and Liquor Acts*. Appendix H referred to an MOU with the RCMP and Improvement District No. 9.

Jasper National Park Law Plan, 2003

- [111] The law plan also follows the template. Robert Prosper referred to the *Statistical Summary of 2004 Occurrence Reports* to demonstrate the effect of *Law Enforcement Management Directive 2.1.9* on occurrences. He pointed out that public peace law enforcement occurrences dropped from 678, in 2000, to 42 in 2003 when park wardens resumed law enforcement duties, and rose to 127, in 2004. This demonstrated that the

directive actually reduced exposure to risks connected with public peace law enforcement. He noted that the data for 2001 and 2002 related to years when park wardens were not involved in any law enforcement activities because of HSO Grundie's directions.

Riding Mountain National Park of Canada Law Plan, 2005

- [112] Section 11, Tactical Plans - Noise and Disturbance in Campgrounds and Day Use Areas, states that, in compliance with Directive 2.1.9, park wardens provide proactive public peace enforcement patrols, communications, public safety, resource management patrols and permits cancellation when necessary.
- [113] The section also acknowledges that the RCMP's response depends on the detachment priorities. Robert Prosper commented that park wardens conducted early patrols of campgrounds to quell issues proactively. The reference to directed patrols for public peace was specified in the law plan and in accordance with Directive 2.1.9.
- [114] According to section 11, Tactical Plans - Illegal Possession of Firearms, licensed hunters often carry firearms inside the park boundary in order to gain access to their hunting grounds adjacent to the park. This can lead to illegal hunting within park boundaries during hunting season, when game goes in and out of the park. It also confirms that park wardens will investigate and seize firearms in all instances of hunting within the park boundary, including hunting or carrying firearms along the boundary, in accordance with appropriate mitigation measures.
- [115] According to section 11, Tactical Plans - Illegal Hunting, illegal hunting can occur in remote locations that may be detected at night. Poachers are usually armed, liquor or drugs may be involved and imposed penalties can include loss of hunting rights and property, significant fines and prison time.

Bruce Peninsula/Fathom Five National Marine Park Law Plan, 2005

- [116] Section 5.3, Back-up, states that the OPP provides back-up only in situations of a perceived warden safety issue. The OPP may not always be immediately available to give back-up and the closest OPP detachment is located 80 km south of the park. Moreover, the OPP Superintendent commented that the OPP had not been funded to provide additional or specialized services to Park Canada locations. Thus, any OPP response to issues occurring within the parks is based on availability of personnel and call priority, and response may not be immediate. The superintendent added that response to calls in the Fathom Five National Marine Park would depend on location and availability of the marine unit and that the OPP cannot commit that officers will respond in any given time. Robert Prosper confirmed that headquarters does not review whether jurisdictional police services have sufficient resources to provide the necessary back-up and that there is no agreement with them as to how much law enforcement they will conduct in parks or their minimum back-up response times. The law plan instructs park wardens to limit intervention to observing, recording and reporting public peace offences, including domestic dispute, assault, theft, illegal drinking, vandalism and any other major incident.

- [117] Robert Prosper confirmed that Parks Canada does not play any role in setting or fixing with the RCMP or OPP the resource levels they will use to enforce public peace in parks or give back-up to park wardens. Park wardens are made aware of this and expected to take it into account when deciding how far to intervene in a law enforcement situation. He referred to section 7, Monitoring, Evaluation and Reporting, where one output of the law plan relates to the number of times the OPP was called into the park, its response time and the action taken.
- [118] Finally, Robert Prosper estimated that approximately 15 percent of parks have a MOU with a local police detachment. The rest have an agreement with the police on their respective roles and expectations.

St. Lawrence Islands National Park Law Enforcement Plan, 2005

- [119] The OPP stated that it cannot guarantee a timely response to a call from a park warden because of the size of its jurisdictional area, the nature of the park's marine environment and an overall shortage of staff and vessels. Section 12, Tactical Plans - Public Peace, includes the following comment:

Over the past two years [the OPP] has been requested on numerous occasions (liquor, rowdyism related occurrences), with a response of roughly 50%. In those incidents where the OPP did respond, the actions taking place were not dealt with until the following day, when the activity had ceased being highly confrontational.

(my underline)

Robert Prosper commented that, under the law plan, the OPP will respond to incidents that present danger to life and where there is a demonstrated safety concern. He agreed, however, that the OPP's response would depend on whatever priorities it was dealing with at the time. He confirmed again that headquarters does not review whether jurisdictional police service have sufficient resources to provide necessary back-up and does not specify a response time standard. The law plan did state that this means that the park warden will have to assess each situation prior to a response and determine the need and availability of back-up.

Gwaii Haanas National Park Reserve and Haida Heritage Site Law Enforcement Plan, 2003

- [120] According to section 5, Staff Safety, the park is a backcountry operation and there are few dedicated law enforcement patrols. Park wardens are trained on IMIM and PDT, but are not trained with respect to "death or grievous bodily harm", except to avoid such situations.
- [121] Section 7, Support Systems, indicates that radio communication and satellite phones do not provide 100 percent coverage.

Lake Louise, Yoho, Kootenay Field Unit Law Enforcement Plan, 2005

- [122] The section on High Value Resources refers to commercial mushroom harvesting in prescribed burns having the potential to produce one million dollars worth of mushrooms over a three year period. Poaching is on-going and for a rare specimen, Burgess Shale fossils range in value from hundreds to tens of thousands of dollars. Substantial money could potentially be generated from illegal activities connected to this.

Yukon Field Unit - Chilkoot Trail National Historic Site, April 2005.

- [123] According to section 12, Tactical Plans - Back-Country Permits, hikers without permits are generally detected by wardens as they perform regular compliance/enforcement patrols along the main trail at some point. Associated with unregistered backcountry use is the issue of illegal immigration. The Chilkoot Trail crosses the international boundary at the Pass and persons unable to lawfully enter Canada have been known to use the trail for access.
- [124] The profile of such individuals and the international nature of the park clientele raise the concern as persons from the USA and Europe may be in possession of firearms. The lack of information on unregistered individuals can further complicate enforcement procedures and increase officer safety risk. Robert Prosper agreed that this could also be a problem in other parks that have international boundaries.
- [125] According to section 12, Tactical Plans - Domestic and Group Disputes, law enforcement activities of a public peace nature are infrequent. This being said, however, serious incidents of domestic or group disputes have occurred. The isolated trail environment heightens officer safety risk in such events. Spontaneity and severity of events often require timely intervention, with the park wardens being the first and only responder available. Although the RCMP is responsible for responding to such events, the minimum response time by helicopter is two to three hours under ideal circumstances. Patrols are normally single person, with peace officer back-up several hours away.
- [126] According to section 12, Tactical Plans - Possession of Firearms, it is likely that a portion of summer hikers are carrying a firearm because of concern for bears and, despite the fact that there are no documented case of possession or use, staff may be called to handle situations involving hand guns or other restricted weapons. Robert Prosper agreed that park wardens might have to intervene in poaching situations or for noise and disturbances where the person has a firearm.

Georgian Bay Islands National Park of Canada Law Enforcement Plan, 2005

- [127] According to item 5.1 of section 5.0, Delivery Framework, park wardens conduct compliant and non-compliant (use of force) evictions resulting from resource and administrative law enforcement incidents and compliant evictions caused by public peace law enforcement incidents that are incidental to their regular duties. Non-compliant evictions resulting from public peace incidents are to be referred to the OPP.

- [128] Robert Prosper agreed that the act of evicting someone is essentially the same for all types of offences, being connected with resource management enforcement or public peace enforcement, and the person being evicted would likely not perceive a difference.
- [129] According to the same section, park wardens may respond and enforce public peace offences that are incidental to their other duties, such as liquor offences, assaults on park visitors, operation of a vessel or snowmobile in the park while impaired by alcohol and/or narcotics and possession of narcotics.
- [130] Furthermore, park wardens will immediately respond to all reported park officer and staff safety concerns and requests for assistance. They will provide emergency assistance to secure a scene in order to prevent a violent subject from causing injury or death to officers or park staff. However, they will not pursue subjects who have demonstrated grievous bodily harm behaviour toward a victim officer or park staff and who have fled the scene. This is the responsibility of the OPP. Robert Prosper conceded that such a response would not be unique to this park, but it was the first time he had seen it so explicitly put in a law plan.
- [131] The OPP is reported in section 5.2 to have agreed to respond on a priority basis to incidents that present a danger to life, incidents where there is a demonstrated park wardens' concern and incidents that suggest a criminal offence is being or has been committed. However, the OPP indicated that response time may vary depending on operational priorities and the availability of a vessel or snowmobile transportation to the park.
- [132] Robert Prosper agreed that this perhaps explains the explicit language used in section 5.1 to say that park wardens would immediately respond to all reported officer and staff safety concerns and request for assistance.
- [133] Mention was made about a memorandum from the Director General, National Parks, to Field Unit Superintendents and Directors, Service Centres. It referred to earlier correspondence, on March 8, 2005, where the Director General highlighted five points to be addressed in the next approval cycle of law plans. One point dealt with reducing two-person patrols. Robert Prosper explained that two-person patrols were used for regular backcountry patrols that were not specified in Directive 2.1.9.
- [134] Regarding the selection and use of the soft body armour (SBA) protective vest provided to park wardens, Robert Prosper testified that he selected the level II SBA after looking into the available options. He conceded that the only certified use of the level II ballistic SBA is to protect against firearms. But he chose it because one supplier, Second Chance Body Armour, gave him user anecdotal evidence suggesting that it also protected against trauma injury (*e.g.* motor vehicle accident), edged weapons, animal attacks and blunt object weapons. He also considered the finding that no FBI agents had been fatally stabbed since they were issued level II ballistic SBA. It was these other safeguards that influenced him to choose the level II ballistic SBA, not because there was a realistic threat of a park warden being shot.

- [135] Robert Prosper declared that the RCMP is the jurisdictional police in most parks, so it is the RCMP which enforces public peace and highway traffic legislation in parks and provides back-up. Any involvement of park wardens is considered to be a law enforcement occurrence, even if it results in voluntary compliance, which happens some 94 percent of the time. He confirmed that a park warden cannot stop traffic for public peace purposes, but can stop vehicles if resource conservation or administrative offences are suspected.
- [136] Robert Prosper reviewed the 1987 MOU between Parks Canada and the RCMP, which is still in force. He pointed out that the duties of park wardens as first responder on a scene are now limited by the provisions of *Law Enforcement Management Directive 2.1.9*. For example, park wardens are no longer to be involved in the enforcement of provincial highway traffic acts. He confirmed that, on a national basis, Parks Canada headquarters do not track or review local park or site agreements with jurisdictional police services, beyond reviewing individual park or site law plans to verify if resource requirements committed by the police services are adequate to meet law enforcement needs. He nevertheless countered that police services have a policing responsibility in parks, whether or not an MOU is in place.
- [137] Robert Prosper was involved with the RCMP in developing a more current MOU, but the agreement has not yet been approved. Once it is signed, park wardens will no longer be called out as first responders to public peace incidents reported to a Parks Canada centre and if they witness a public peace incident on the highway, they will not intervene beyond observing, recording and reporting to the RCMP. In addition, the MOU confirms that the responsibility for highway traffic enforcement within Parks Canada property still remains the responsibility of the RCMP.
- [138] Robert Prosper testified regarding the *Report of the Auditor General of Canada on the Royal Canadian Mounted Police - Contracting Policy*, submitted to Parliament in 2005.
- [139] The heading to section 1.16 reads that "[c]ontract clients help set priorities regarding decisions on resources allocation, but receive limited information on progress". Robert Prosper confirmed that Parks Canada had never met with the RCMP to discuss minimum service levels or minimum policing standards in controlled parks and sites. He admitted also that it does not receive reports from the RCMP on minimum policing standards. Thus, Parks Canada does not actually know if the RCMP has sufficient staff to provide services to parks, including back-up services, but it expects the same level of service than any member of the public.
- [140] Under the heading Inadequacies found in identifying resources required for contract policing, the report observed in section 1.33 that "the RCMP has not clearly defined a minimum standard for each province and territory. In 2003, an internal RCMP survey confirmed that there was no clear definition of minimum standards for provinces, which was seen as a major problem when trying to justify levels of human resources that it required."

- [141] Under the heading Inadequacies in filling staff absences leave numerous gaps in detachments, the report observed in section 1.38 that "[t]he RCMP has, for the most part, met its contract obligations to staff contract positions requested by its clients. Once detachments are staffed, however, they can still experience short and long term absences due to illness, injuries, and parental leave. This is a particular concern in small detachments, which do not have the capacity to cover these shortfalls without transferring in additional peace officers." In section 1.41, the report stated that "peace officer absences can be more significant at the detachment level, because they are often not replaced, and the remaining peace officers in the detachments must take on the additional work, or it is not done." Robert Prosper offered no comment on the matter.
- [142] Under the heading Failure to requalify and recertify for mandatory training, the report observed in section 1.57 that there is a failure on the part of the RCMP to requalify and recertify its officers in the use of pistol, baton, pepper spray and carotid control and recertify in first aid. It states: "Overall, the number of peace officers that met all six mandatory training requirements dropped from 57 percent in 2003 to 6.2 percent in 2004." This is important because, where applicable, these officers could be called upon for back-up by park wardens. Robert Prosper agreed that the RCMP response to emergencies was an important element in the risk mitigation strategy for park wardens. However, this was never raised nor discussed between the RCMP and Parks Canada.
- [143] On the subject of the CPIC system, Robert Prosper agreed that the driver of a vehicle may not be its owner. Therefore, a CPIC check would not provide the park warden with early notice that the driver has a history of violence or an outstanding arrest warrant. Robert Prosper stated that after the park warden has stopped a vehicle and checked the driver's licence through CPIC, the park warden would reposition to observe, record and report if the driver was known to be violent or had an outstanding arrest warrant. He acknowledged that there was no policy or instruction to park wardens on how to reposition without raising the suspicion of the driver whose licence the park warden is still holding.
- [144] Robert Prosper was asked to comment on the occurrences that Randy Fingland, senior park warden at Jasper National Park, provided to HSO Grundie at the time of his investigation, in terms of the changes to *Law Enforcement Management Directive 2.1.9*. Robert Prosper agreed that park wardens would still have a role under that directive in six of the eleven following law enforcement incidents that were reviewed.

[145] **Incident 96-1048**

A complaint was received from the east gate of the park that a vehicle had not stopped at the park gate, but had driven through the gate at a speed estimated at over fifty miles per hour. When a park warden intercepted the vehicle, the driver refused to produce any identification and made verbal threats about physical violence against the park warden. The driver attempted to exit the vehicle but the park wardens blocked the door. The driver drove away from the scene. The driver was later found to have a criminal record which identified the person as being violent and an escape risk. His record included two counts of peace officer assault, five counts of assault, eight counts of impaired driving, two counts of mischief and failure to remain at the scene of an accident.

Initially, Robert Prosper agreed that Directive 2.1.9 still authorized park warden's intervention as failure to pay park fee related to an administration law enforcement action. However, he clarified that if the issue was limited to failure to obey a stop sign, it would become a highway traffic violation dealt with by the police. The Jasper law plan indicated that Jasper park wardens will not react to a failure to pay.

[146] **Incident 96-451**

A park warden on patrol at approximately 06:30 observed a car in a ditch approximately 20 km south of Jasper. There was one subject at the scene that appeared to be intoxicated. The subject would not tell the park warden how his vehicle ended in the ditch and the park warden summoned the RCMP. The subject then went to the trunk of his car and produced a machete and threatened to commit suicide. The park warden wrestled with the subject and seized the machete. The subject subsequently went to the trunk of his car and produced a shot gun and threatened again to commit suicide. The park warden wrestled the shot gun away. The entry noted that park wardens have discovered other suicides in progress and must maintain the scene until the RCMP arrives. The entry also stated that a mentally unstable person trying to commit suicide poses a hazard both to the public and to park wardens.

The park warden's response would be the same under the new Directive 2.1.9. However, the warden would be free to determine the appropriate level of intervention, which could be to reposition and wait for the RCMP. Furthermore, it was now inappropriate for park wardens to attempt to wrestle the weapons from the subject.

[147] **Incident 96-0193**

At approximately 14:50 hrs, two park wardens observed a vehicle parked on the highway approximately 20 kms from Jasper and since this was an area associated with antler collectors, conducted a foot patrol of the area. The subjects were seen but avoided contact. Eventually, contact was made with both subjects who provided their names but did not have any identification. A subsequent CPIC inquiry showed that both subjects were flagged as armed and dangerous.

This incident was related to an aboriginal blockade and park wardens no longer deal with unlawful gatherings. These are handled by the RCMP. If it had not constituted an aboriginal blockade, it would have fallen under the jurisdiction of park wardens.

[148] **Incident 95-1763**

A tour bus driver was observed feeding sheep approximately 75 kms from Jasper. A park warden stopped to intervene and the driver admitted the offence. The subject was aggressive, very argumentative and physically threatening towards the park wardens. The driver had a criminal record which included a caution against violence. His record included six counts of assault, cause of disturbance, possession of narcotics, theft and breach of parole.

The new Directive 2.1.9 would authorize a park warden's intervention.

[149] **Incident 94-1480**

A park warden stopped a overweight tractor trailer without a licence plate. All three subjects had outstanding arrest warrants. A consensual search found a baggie of drugs. All three subjects were found to have extensive criminal records which, for some individuals, included violence, assault causing bodily harm, possession of narcotics and concealment of a weapon.

The new Directive 2.1.9 does not authorize park wardens to stop traffic or to deal with overweight vehicle offences.

[150] **Incident 95-1323**

A vehicle was stopped as part of an interagency check stop. The driver was hostile to Department of Fisheries Officers and to park wardens. The driver subsequently admitted to having firearms in his camper. The subject became aggressive and was waving the firearm around but not aiming it at any of the officers. A CPIC inquiry confirmed that the subject was under caution/violence. He had many dealings with the police and resource enforcement agencies and attempts to intimidate officers when they meet up with him alone. He was under investigation for the manufacture of explosives and known to carry concealed restricted weapons.

The new Directive 2.1.9 does not permit park wardens to undertake vehicle wild life check stop alone or with other agencies.

[151] **Incident 95-838**

A park warden stopped a tractor unit of a semi trailer on the highway approximately 80 kms south of Jasper for being overweight. The truck was stolen and associated with the theft of diesel fuel. The driver had outstanding arrest warrants and was prohibited from driving a vehicle. He also had just been released from Saskatchewan provincial prison. A park warden had a similar incident in 1991 at approximately the same location. In that case, the tractor unit was stolen and there was a shot gun under the seat of the vehicle. The driver had an extensive criminal record for theft, fraud, escape and forgery.

The new Directive 2.1.9 does not permit park wardens to stop overweight vehicles.

[152] **Incident 95-1307**

A vehicle was stopped for speeding and wildlife endangerment. The driver produced false identification and address. He was found to have had a criminal record which included offences related to violence, possession of narcotic and possession of a prohibited weapon.

The new Directive 2.1.9 does not permit park wardens to stop speeding vehicles.

[153] **Incident 95-521**

At 22:35 hrs, Jasper Dispatch notified the standby warden of a vehicle breakdown on the highway approximately 90 kms south of Jasper. A second call indicated that the occupants appeared to be drunk or high on drugs. The park wardens spoke to the complainant and requested another park warden backup attend the scene. On arriving at the scene, the park wardens observed a green vehicle with the rear doors open and debris scattered on the ground. A CPIC inquiry was done on the licence plate of the vehicle. The subjects approached the warden vehicle and the one who identified himself as the driver appeared intoxicated. As the wardens approached the vehicle they observed a rifle and handgun on the rear bumper of the vehicle. A loaded .22 calibre rifle and a replica air gun was seized and the driver was handcuffed. The CPIC inquiry on his driver's licence confirmed the vehicle was stolen and associated with an armed robbery. Both subjects had extensive criminal records and one individual was on probation. The other had an outstanding arrest warrant and was caution/escape and caution/mental. A search of the vehicle turned up stolen electronic appliances and more rifles found to be loaded. There were spent rounds and shot gun casings on the ground around the vehicle. The RCMP arrived within the hour and took custody. The subjects told the RCMP that they had planned to shoot any officer that showed up.

A call from dispatch to assist a vehicle with mechanical problems is still authorized under the new Directive 2.1.9. But once park wardens learned that the driver was impaired, the matter became a public peace matter that falls under the jurisdictional police, in this case the RCMP.

[154] **Incident 95-230**

The highway was closed due to avalanche control. The subject drove off the road and around the large steel barricades and continued to travel until he was intercepted by a park warden approximately 90 km south of Jasper. The subject was aggressive and threatening to the park warden. The subject had 3 outstanding arrest warrants from Alberta and nine from Quebec for assault and impaired driving. The same individual was stopped speeding approximately 20 kms from the town of Jasper. He was aggressive and threatening to the park warden. He was violent in his cell at the RCMP detachment after being arrested.

Park wardens are still authorized to conduct road closures under the new Directive 2.1.9 but do not enforce the *Highway Traffic Act* in respect of speeding.

[155] **Incident 95-473**

A member of the public reported an illegal camp and fire. The park warden said that the subject was from outside of Alberta and had an extensive criminal record which included robbery and break and entry.

Robert Prosper was not asked to comment on this incident.

[156] Robert Prosper agreed that park wardens perform the same law enforcement activities as the police as long as they are incidental to their prime mandate, which is resource protection and enforcement of park legislation, as well as of other legislation consistent with park legislation, including *Criminal Code* offences such as not providing identification, and obstructing and assaulting a peace officer. He noted however that, to make an arrest, a park warden must be assisted by another park warden or peace officer.

[157] For example, a park warden could deal with an assault with a weapon in a campsite, if coming across it while doing a routine resource management patrol. However, if the park warden is informed of the assault through a complaint call, the complaint is referred to the jurisdictional police for action. If the complaint concerns an assault in progress, two park wardens can go and try to remove the assault victim from the scene. Even so, under Directive 2.1.9, park wardens are not to arrest the aggressor because this is a *Criminal Code* matter which is beyond their primary mandate. Nonetheless, Robert Prosper agreed that because of their uniform, park wardens are often perceived as having law enforcement responsibilities.

Testimony of Philip C. Stenning

[158] Dr. Philip C. Stenning, Professor and Programme Director of the Institute of Criminology School of Social and Cultural Studies, Victoria University of Wellington, New Zealand testified as an expert in policing and policing policy, including the accountability system and firearm use, with particular reference to risks of issuing firearms as standard equipment.

[159] Dr. Stenning reviewed the legal and historical framework of policing in Canada during his testimony on the accountability aspect of sidearm use by law enforcement services. He explained that in the late nineteenth century, the meaning of the term “police” shifted from referring to a state of affairs, specifically of good governance, to referring to a particular governmental institution, a police force. The term came to be applied to federal, provincial and municipal police forces, such as the RCMP and the OPP, and police forces became subject to formal regulations on such things as conduct, uniforms and equipment. Policing was largely seen as crime control and enforcement of order, even though these constituted only a small portion of police work. It became regarded as the exclusive professional expertise of police officers and police forces.

[160] Notable changes to policing have taken place over the last thirty to forty years. The focus shifted from crime control and law enforcement to crime prevention. At the same time, there was a growing recognition that the police could not do policing by themselves and that they required substantial cooperation and input from the public. Community based policing developed and partnerships were established with community members and

other government agencies. In addition, the private policing sector burgeoned. Owners of private property establishments for mass public use, such as arenas, shopping malls, universities and condominium estates, organized or employed private sector policing on their own instead of relying on the police force. So the whole policing structure has changed dramatically with the entry of individuals that have different ideas and techniques on how to police.

- [161] With the increase in policing by individuals that are not members of traditional police forces, the descriptor “police” is progressively less helpful. The term peace officer is established in the *Criminal Code* and in common law and peace officers have the general role of enforcing laws. But under the *Criminal Code*, a peace officer includes airplane pilots, ship captains, mayors, sheriffs and jail guards who all have enforcement powers to varying degrees.
- [162] The critical element of policing includes the maintenance of some kind of duly authorized order in a community or society, such as prescribed in law, by a police whose duty and responsibility is to maintain and preserve the order set by government or private companies.
- [163] Over the last ten to fifteen years, recognition has grown that policing is now provided by a wide variety of public and private organizations and that the development of policing policy needs to focus on more than traditional police forces. Moreover, policing services are provided by a wide variety of different people and institutions. For example, policing at a major airport may require anti-terrorist trained individuals with specialized equipment, preparation and expertise, contrary to policing at an old age home. The two police agencies may have similar mandates, but not the same responsibilities, duties and equipment. These specifications are made by the public and private policing agency. This is the approach taken in Parks Canada’s law enforcement directive. So to distinguish the police officer's role, one has to look at the specific work environments, usage and nature of responsibilities.
- [164] Changes have also been made to police equipment in Canada in the last forty to fifty years. Officers now wear bullet proof vests and utility belts equipped with everything from handcuffs, batons, pepper spray and radios to sidearms. The equipment not only increased and improved the level of protection and safety to the individual, but the individual’s sense of security. This sense of security is important but is not to be confused with the officer's image.
- [165] The content and frequency of police officer training varies widely from one Canadian jurisdiction to another. Historically, training tended to focus on combat, self-defence techniques, weapons handling, target shooting and a review of laws and policies relating to the use of force and firearms. In recent years, it has increasingly stressed verbal communication and conflict management, de-escalation and avoidance skills and judgment, and an increasing use of computerized, interactive video simulators. Police services have also developed a variety of force models as a basis for their training.
- [166] Dr. Stenning testified regarding risks attributable to the issue of sidearms, including: the weapon’s effect; victimization by one’s own firearm; inadvertent injury or death to members of the public; suicide-by-cop; and manslaughter or murder by a police officer.

- [167] In the case of the risk due to the weapon's effect, where the mere sight of a sidearm on a peace officer can cause an individual to appear to have a more aggressive response to a situation, much of the research is dated, sparse and sourced in the USA, as opposed to Canada. The studies on which conclusions were based were mainly clinical studies, as opposed to field studies, and there is little wide acceptance of their findings. Dr. Stenning conceded that the risk due to the weapon's effect might be relatively low, but opined that it is not non-existent.
- [168] The risk of victimization by one's own firearm could include the use by a police officer of a sidearm to commit suicide. According to Canadian studies, the police officer's risk of fatality or injury by an assailant is relatively low. One study that examined in-service mortality in four Canadian police forces between 1970 and 1990 revealed that in 19 cases, the officer was the victim of homicide and in one case only, the officer was shot with his own service revolver. A more up-to-date review indicated that 3 out of 96 officers killed by gunfire were shot with their own revolver by an assailant. Dr. Stenning believed that these results are a reminder of the necessity of high quality training in weapon retention and the use of body armour.
- [169] In the case of risk of inadvertent injury to or death of members of the public, Dr. Stenning reported that between 1970 and 1981, the total number of deaths by legal intervention for all Canadian provinces and territories was 126. Between 1990 and 2002, 89 people were killed by police use of firearms. The situation worsened after the introduction of the Glock semi-automatic service revolver, but modifications to the trigger mechanism and improved holster have lowered the risk.
- [170] Regarding the risk of suicide-by-cop, Canadian studies show that the suicide rate of police officers is less than the rate of suicide for the general population of men between the ages of 19 and 64. However, the weapon of choice of these officers was the service revolver. Notwithstanding the Canadian data, international literature on police suicides agrees that the findings on police suicide rates are inconclusive.
- [171] With regard to the risk of manslaughter or murder by a police officer, findings of criminal responsibility on the part of police officers who have shot civilians are rare in both Canada and the USA. Nonetheless, the possibility of civil liability has been recognized as having an important impact on police forces to control shooting by officers.
- [172] As to the possible impact of his findings on park wardens, Dr. Stenning commented that very little Canadian or American data is available on the use of firearms by or against park wardens or conservation officers. A 1996 report of the U.S. Department of Interior, Fish and Wildlife Service, Law Enforcement Division, examined the number of conservation officers killed and assaulted in Canada from 1990 to 1992 inclusively: There was a total of 1869 provincial and federal conservation officers in Canada in 1992 and an average of 34 officers were assaulted each year in that period. In almost half of the 97 assaults recorded, the assailants were unarmed and used their fists and feet as a weapon. Firearms were used in 10 assaults, while other weapons such as beer bottles and sticks were used in another 10 assaults. Six percent of assaults involved knives or other cutting weapons and five percent involved the use of a motor vehicle. Most of the

assaults (22 percent) occurred at night when the conservation officer confronted a violator without a warrant, 20 assaults (22 percent) occurred during routine patrols, 15 assaults (16 percent) occurred during the day when an officer confronted a violator without a warrant and 15 assaults (16 percent) occurred during a routine hunting licence check.

- [173] Dr. Stenning concluded that park wardens will face heightened public aggression by virtue of possessing a firearm. It is quite conceivable that they will be prone to being victimized by their own sidearms, as are public police officers. Like them, park wardens contemplating suicide may also be likely to use their service weapon. Moreover, park wardens who shoot a citizen, fatally or not, will likely face the same scrutiny as any police or other law enforcement agency.

Testimony of John Good

- [174] John Good of Good Communication, Warsaw, Ontario conducted a survey to compare Parks Canada's wardens with employees of other jurisdictions seemingly carrying out similar work. The survey looked at park sizes and visits, peace officer status, powers of law enforcement, arrest and seizure, and personal protective equipment provided to officers in each jurisdiction, including sidearms. He testified regarding the results that he obtained in the survey.

Testimony of Bruce Van Staalduinin

- [175] Bruce van Staalduinin, Manager, Park Operations and Development, Ontario Parks, Ontario Ministry of Natural Resources, testified on the roles and responsibilities of Ontario provincial parks wardens.
- [176] The majority of Ontario park wardens are seasonal employees who typically work from May to October. During the months of July and August, there are some 2500 employees spread across Ontario parks. Of these, only about 225 are full time employees, with approximately 135 working at the park level as superintendents, assistant superintendents, administration staff, maintenance staff and interpretation staff. Of the approximate 2500 employees employed in Ontario parks during the months of July and August, 250 are seasonal park wardens primarily recruited from colleges and universities. There are approximately 5 full-time Ontario conservation officers armed with a sidearm who are available to assist the various parks.
- [177] According to a ministry document entitled *Park Warden Guidelines, Policy No. PM 3.00*, a park warden is a park employee designated under the *Provincial Parks Act* for the purposes of the Act and associated Regulations. Such designation does not apply outside a provincial park. A park warden also a person who has been granted the power and authority of a member of the Ontario Provincial Police Force under section 13 of the *Provincial Parks Act*.
- [178] This appointment is necessary to enable park wardens to issue provincial offences notices under the *Provincial Parks Act*, the *Liquor Licence Act*, the *Trespass to Private Property Act*, the *Highway Traffic Act*, the *Off-Road Vehicles Act* and the *Motorized Snow Vehicles*

Act. Park wardens are not appointed as police officers nor designated under the *Police Services Act*. As a result, they are not statutorily compelled to take action in all situations. They cannot be criminally charged for not taking action and the Ministry will support against a civil action any park warden who acted in accordance with the policy

[179] Park wardens' responsibilities are specified in the policy as follows:

- providing information and assistance to park visitors;
- enforcing park regulations and other related legislation and regulations, as directed by park superintendents;
- responding to complaints and call for assistance from the public;
- explaining and promoting park rules and regulations;
- documenting violations and significant occurrences;
- issuing warnings;
- referring physical confrontations and occurrences or violations of a serious or criminal nature to the OPP or municipal police;
- taking safeguards, including using a breath screening device, to prevent impaired drivers who are evicted from a park from driving;
- preparing information for court appearance; and
- protecting the scene of apparent criminal offences for the police.

[180] According to the policy, Ontario park wardens are not to risk life in the performance of duties; engage or attempt to engage in any form of enforcement activities or duties outside a provincial park; exercise the full authority of a police officer by laying charges under the *Criminal Code*, the *Narcotics Act* or the *Food and Drug Act*; or pursue fleeing drivers for alleged infractions

[181] Furthermore, park wardens are not to take the lead role in arresting individuals, except in low risk situations, or settling violent domestic disputes, assaults and other violent situations. Instead, such occurrences are to be reported to the OPP. They are instructed that physical intervention should only be contemplated when there are sufficient staff resources available to intercede at no personal risk to them. In addition, they are not to transport individuals who have been arrested and retained unless they have been specifically trained and equipped to do so and the transport is not conducted outside of park boundaries. Moreover, they are not to investigate or lay charges under the *Criminal Code*, the *Narcotics Act* or the *Food and Drug Act*, nor investigate or respond to reports of breaking and entering in cottages, concessions, vehicles, accommodations, equipment, etc. Such occurrences are also to be reported to the OPP.

[182] With regard to arresting individuals in low risk situations, park wardens will only proceed if knowledgeable in the power of arrest and its related responsibilities and the action would not increase the risk of physical confrontation. They must disengage if met with confrontation to the point of risk. Moreover, they will turn the person to the OPP for transport and disposition if the individual is not subsequently released.

- [183] Bruce van Staalduinin explained that to qualify as an Ontario park warden, an individual must be at least 19 years old, possess a valid driver's licence, have a satisfactory criminal check and must have worked for one season in a provincial park, plus graduated from the two-week park warden course. As an alternate to this last requirement, the individual must either have graduated from the Level One Conservation Officer Course, a previous designation and experience as a police officer or park warden for some other agency, plus graduated from the two week park warden course, or the person must have successfully completed at least one year of a community college law enforcement and security course, plus graduated from the two week park warden course. When park wardens return to employment the next year, they must complete the three-day park warden zone refresher training.
- [184] The two-week course includes instruction on Policy 3.00, a 21-hour segment on use of force, and segments on arrest, conflict avoidance, officer safety, empty hand techniques, handcuffing techniques and use of baton. Park wardens are told that their primary focus is on parks and liquor charges and that the OPP has the major role with regard to deaths, assaults, impaired driving and *Criminal Code* offences.
- [185] Park wardens wear distinctive uniforms with a crest and badge on the shoulder and are provided with a badge wallet and identification card. In addition, they are provided with a duty belt that holds a two-way radio, handcuffs, an ASP 21 collapsible baton and a flashlight. They do not wear soft body armour and are not issued pepper spray or a sidearm.
- [186] The type of radios carried by park wardens is a low band system. It allows them to communicate with park staff and vehicles and with the Provincial Communication Centre, which has access to CPIC, can communicate with the OPP and has a fleet of airplanes and helicopter.
- [187] Bruce van Staalduinin clarified that two Ontario conservation officers equipped with soft body armour, pepper spray and a sidearm are employed at two specific parks. They are available to assist various parks during long weekends. In addition, two other armed conservation officers have offices in two parks, even if they are not officially employed there.
- [188] On the subject of police back-up, Bruce van Staalduinin stated that the parks with the highest level of visitation are located in southern Ontario and the OPP is quite close nearby. For example, some detachments are either in the park, near the park boundary or close to the park boundary.
- [189] Bruce van Staalduinin confirmed that Ontario park wardens' arrests are principally under the *Liquor Licence Act*, for offences related to possession of alcohol in a public place, under age drinking and refusal to identify oneself. Ontario park wardens do not have the power of arrest under the *Provincial Parks Act* and while they could lay charges under the *Criminal Code*, as a matter of policy, this is left to the OPP.

[190] Bruce van Staalduinin confirmed that Ontario Parks do not maintain statistics related to assaults on park wardens, but considers anecdotal accounts when reviewing training needs each subsequent summer.

Testimony of Guy Mongrain

[191] Mr. Guy Mongrain, Manager, Information and Identification Services Directorate, RCMP testified regarding the CPIC. He provided comprehensive testimony on the CPIC computer system, the agencies that have access to the system, the status of the hardware and software updates to the CPIC system as a result of renewal, the nature of the information in each of the databases, files and sub-files of CPIC, how that information can be accessed remotely and the statistical measurement of its operational capacity.

[192] Mr. Mongrain confirmed that the CPIC system was overhauled after the Auditor General's Report in 2000 that was critical of the many deficiencies in the CPIC system. He testified that CPIC is now operational 97.79 percent of the time and when the system will be unavailable due to system upgrades, a broadcast is sent to all users to advise them of the time of the planned event. He confirmed that the preferred time for such system updates is Sunday morning since this is the least load for CPIC.

[193] Mr. Mongrain confirmed that the province of Quebec, Ontario, Alberta and British Columbia do not provide CPIC with tapes on their register owner information. As a result, that information may be unavailable when their systems are being updated. When the unavailability is planned the provinces inform CPIC and CPIC generates a broadcast advisory. However, if those four provinces do not advise CPIC then there is no advisory. Mr. Mongrain submitted a document that listed all the broadcasts sent in the last six months advising of CPIC outages. The seventeen entries indicated durations from fifteen minutes to 5 hours.

[194] Mr. Mongrain testified that query agencies are required to train staff for accessing information on CPIC. He stated that there have been situations in the past where the CPIC user was unaware of a feature available on CPIC.

Testimony of Gregory Browning

[195] Inspector Gregory Browning, Assistant Director, National Learning Services, RCMP, testified as an expert on the IMIM --Incident Management Intervention Model--, on CAPRA --Clients, Acquiring and Analysing Information, Partnerships, Response and Assessment --, on the principles underlying those models and on their practical application within the RCMP mandate.

[196] The purpose of the IMIM is to assist peace officers in determining the level of risk and the use of force options available to them. The IMIM also helps them explain to a trier of facts the use and level of force they applied. The authority invested in officers to use force in the performance of their duty originates in the *Criminal Code*, not the IMIM.

- [197] The IMIM has evolved since its implementation in 1994. The current model reflects the importance of problem solving and the need for continual assessment of risk in any given situation. It also reflects the importance of verbal intervention and the ability to tactically reposition in situations clearly beyond the officers' capability to resolve them or where doing so lessens the danger to the public or themselves. To understand the IMIM, peace officers must understand its underlying principles and the RCMP's Community Policing Problem Solving Model, referred to as CAPRA, because they provide context when determining the most appropriate level of force to intervene in a given situation.
- [198] The underlying principles of the IMIM provide that:
- the primary objective of any intervention is public safety;
 - police safety is essential to public safety;
 - the intervention model must always be applied in the context of a careful assessment of risk;
 - risk assessment must take into account the likelihood and extent of life loss, injury and/or damage to property;
 - risk assessment is a continuous process and must evolve as situations change;
 - the best strategy is to use the least intervention to manage the risk; and
 - the best intervention causes the least harm or damage.
- [199] CAPRA provides to a police officer the problem solving strategy required to assess risk given the situational factors. The model focuses on determining who is affected, analyzing available information, effective partnering, finding the best response and assessing the actions. The acronym stands for:
- "C" Client: who they are, including direct and indirect clients;
 - "A" Acquire/Analyse information or Assess risk;
 - "P" Partnerships: Who could assist in resolving the incident and preventing its reoccurrence;
 - "R" Response: What is the most effective response given the IMIM options;
 - "A" Assessment of Actions: What can be learned from the experience.
- [200] Officers are instructed regarding seven stages of risk assessment that may occur during a typical response. The seven stages are: information gathering; en route; arrival; approach; entry; interior; and exit. These stages reinforce the notion that risk assessment must be continual and that certain stages present unique situational factors.
- [201] The situational factors include: nature of the call for assistance/location; number of officers versus number of subjects; officer's age, sex, height and weight versus that of the subject(s); officer's skill level versus that of the subject (*e.g.* fight skills); officer's current physical fitness level versus the apparent fitness level of the subject(s); police officer's injuries or level of exhaustion; and, threat cues.

- [202] Inspector Browning described the IMIM in detail and provided definitions. He explained that the inner and outer rings of the IMIM represent the levels of resistance that may be encountered and a series of intervention options that may be employed. They are depicted in a circle to indicate visually that no continuum of force/intervention must be followed. Officers may transition to and from intervention response based on their continual risk assessment. The model reflects that situations can change rapidly and officers may have to escalate or de-escalate their intervention strategy.
- [203] With regard to tactical repositioning, officers may move or reposition if there is greater chance of successfully resolving the situation by relocating to a position that lessens risk to the suspect, to the public and/or to the officers. Tactical repositioning does not mean disengaging entirely or doing nothing. But it increases safety and affords the opportunity for the officers to better gather and interpret information and identify appropriate intervention options or strategies.
- [204] The IMIM does not mandate issuing or using a sidearm. It simply identifies that lethal force is an appropriate response to a threat of death or grievous bodily harm. Subsection 25(4) of the *Criminal Code* establishes the police officers' authority to use force that is intended or likely to cause death or grievous bodily harm. However, neither the *Criminal Code* nor the IMIM specifies the manner by which lethal force is or may be delivered. Nevertheless, the IMIM assumes that officers will be trained in the use of a sidearm and all other intervention options, and they may use anything, including their baton, their vehicle or any other object. The key is that the *Criminal Code* authorizes the use of lethal force, but does not specify the means.
- [205] On the question of whether or not the IMIM requires the use of lethal force where the threat of death or grievous bodily harm is perceived, inspector Browning opined that officers have no obligation to do so even where faced with a situation that could justify it. They have the latitude to apply the underlying principles of the IMIM, including recognition that the best strategy is to manage the risk by the least intervention and the best intervention is the one that causes the least harm or damage.
- [206] Inspector Browning explained that IMIM training does not require firearm training. RCMP officers carry sidearms because it is required by the RCMP's policy, as are other tools, to respond to varying levels of resistance. As well, the policy requires that officers be trained in the use of each intervention option and that they maintain a level of proficiency. Inspector Browning noted that the RCMP has trained other agencies and non-regular members who do not carry firearms on the IMIM.
- [207] Inspector Browning also commented on a power point presentation he included in his expert report regarding tactical principles. It specified in the trainer's notes section that, to achieve and maintain control of a situation, the officer's level of reaction must be one step higher than the subject's level of resistance. Inspector Browning clarified that this was not completely valid, because officers always respond by also using verbal intervention, which, along with tactical repositioning, can succeed.

- [208] According to the presentation, the closer the officer is to the threat, the greater the officer's sense of fear becomes. This can in turn lead to increased heart rate, auditory exclusion, tunnel vision, loss of fine and complex motor skills, memory loss about the incident, slow motion and reliance on gross motor skills. Also, the greater the distance between officer and subject, the greater the reaction time and the lesser the feeling of vulnerability. More time equates to better judgement and appropriate level of intervention. The reaction gap allows the officer to perceive, analyse, formulate and initiate and the officer may have more intervention options due to the reaction time offered. The presentation also showed that when facing an edged weapon, the very minimum distance between officer and assailant should be 25 feet, whether the sidearm is holstered or not. If there is less than 25 feet, the officer should use any available barrier.
- [209] Officers are also told to ask themselves the following three questions: "Am I or others in immediate danger? Am I in control? What can I do to lessen the danger?"
- [210] Inspector Browning provided documentation in his expert report regarding the RCMP Auxiliary Constable Program. Auxiliary constables can be appointed as peace officers if it is provided for in provincial or territorial legislation. They are volunteers whose primary purpose is to participate in community policing services, such as public safety and crime prevention. They are said to complement RCMP, municipal, provincial and federal personnel by providing assistance in low risk, non emergency and civil emergency operations. Their activities are authorized by the commanding officer or delegate, under the supervision of an RCMP regular member or, indirectly, under the general supervision of a detachment. Their duties may include neighbourhood and business watch, home and business security checks, parades, public speaking, block parent programs, training, traffic control, drug awareness and victim assistance. They have the power of arrest, but cannot use it unless under the direct supervision (*i.e.* eye contact) of a regular RCMP member or under indirect supervision where the commander has decided that risk is low and there is no need for direct supervision.
- [211] Auxiliary constables are not trained to the same level as RCMP members and cannot be involved as respondents in any incident requiring special skills and intervention training, such as violent acts, domestic assaults, weapons, domestic violence, chemical, biological, radiological and nuclear incidents, or where grievous bodily harm may be suffered. However, they receive the auxiliary or reserve constable training, as well as training on the use of force other than firearm and on the use of the baton and pepper spray. They wear a uniform and carry a duty belt that is provided to them and similar to that of a regular RCMP member. They are also provided with soft body armour, handcuffs, ASP baton, pepper spray, a flash light and rubber gloves. They are not provided with a sidearm.
- [212] Inspector Browning testified that officer's presence is viewed as one level of intervention and depends on the subjects' ability to recognize the officer by the uniform, the vehicle or another sign. The officer's presence can de-escalate or escalate a situation within seconds. In some cases, the situation can change instantly from being cooperative to lethal, and there will be few clues to forewarn the officer. For example, a police officer stops when seeing a driver changing a flat tire on a vehicle because, not knowing that the driver has a violent criminal record or is fleeing the scene of a crime, the officer initially considers the situation as low risk.

- [213] Inspector Browning stated that tactical repositioning constitutes any motion that will give the officer an advantage or increase the officer's safety. It may include tactical repositioning for better communications or better stance, creating a reaction gap or leaving the scene. However, some situations can suddenly become violent and there is very little the officer could do to reposition, including leaving the scene. With regard to the reaction gap, the more time and distance the officer has, the greater the officer's ability to plan, prepare and react to threat cues, which may include how the person is dressed, non-verbal clues like clenched fist or a fleeting look and a sense that the person is sizing up the officer.
- [214] Inspector Browning also agreed that conversely, the subject may also be assessing the situation to decide how to respond to the police officer, and that assessment can include the number of officers there, the presence of back-up, the location and the officer's ability to reposition. As most assaults on officers occur at a distance of four to five feet, it was therefore reasonable to conclude that they occur at the point where information is being exchanged between the person and the officer or during the course of an arrest.
- [215] Inspector Browning confirmed that an officer takes on average 1.5 second to draw a sidearm, proficiently acquire the target and discharge two shoots. This means that lethal force options begin to disappear as the subject with an edged weapon get closer to the officer. He clarified that officers are not instructed to only draw their sidearm if they intend to discharge it and they may draw it after assessing the situation. Drawing a sidearm is an access option relative to time and distance to react and if faced with death or grievous bodily injury, officers are authorized to do so.
- [216] Inspector Browning agreed that while officers are rarely in a situation where it is appropriate to use lethal force, it is essential to public and officer safety that they be trained and equipped to respond.
- [217] Referring to the 1998 review of Darrell Kean and Associates Consulting Ltd., Criminal Justice Training and Research, entitled *British Columbia Auxiliary/Reserve Constable Review*, included in his expert report, inspector Browning confirmed that he was not familiar with the recommendation of the Justice Institute of British Columbia to the British Columbia Transit Authority to equip its security personnel with sidearms.
- [218] According to this review, there was little empirical research on risk and harm experienced by Canadian police. Inspector Browning agreed with the authors' comment that the extensive research in the USA should not be simply discounted, because the demonstrated trends are consistent in Canada. What is different in Canada is the risk frequency.
- [219] The review listed the causes and events where 37 Canadian police officers were killed by firearm between 1984 and 2004. This number included 8 officers killed at traffic stops, of which two were cyclists; 4 instances where the officer was not doing anything particular; 4 instances where there was no information on the murders; 3 instances that happened during a break and entry; 1 instance that took place during a robbery; and 2 instances that were in connection with drug offences.

- [220] Inspector Browning agreed that officers are made aware through scenario based training that situations that appear innocuous or unknown carry a potential for violence where officers could be fatally injured. For example, officers are at risk of being killed while attending to disturbance calls, conducting arrests, investigating suspicious persons and conducting traffic enforcement.
- [221] Inspector Browning also agreed that the following were correlated assault behaviour: drinking/intoxication; unemployment; the fact that both the officer and offender were males; the suspect hitting or pushing the officer; an argument related call; certain geographical locations; and the fact that it was between 10:00 p.m. and 2:00 a.m.
- [222] Inspector Browning agreed with the Donahue and Horvath study findings referred to in the B.C. Transit Authority review that suspects killed by an officer generally had more serious and extensive criminal histories than suspects that were wounded by officers. In many cases, the officer had not known the criminal history of the assailant before shooting began.
- [223] Inspector Browning recognized that many of the circumstances requiring a police officer to use lethal force are beyond the control of the officer, so the officer must be prepared to react when a lethal force situation arises. He also agreed that it is the activity and the suspect that significantly determine the outcome of a situation, not the law enforcement agency individual officer. Moreover, he also agreed that one cannot predict human behaviour.
- [224] Inspector Browning commented on a report made by Donald J. Loree, Community, Contract and Aboriginal Policing Services, RCMP, entitled *Violent Incidents*, regarding the issue of police officer back-up. He admitted that the availability of back-up is often regarded as a critical factor and is an integral part of an officer's risk assessment. He accepted the report's finding that RCMP members referred to in the study called for back-up in fifty percent of the cases, that back-up was considered unnecessary in thirty percent of the cases and that the officer did not have time to call for back-up in thirteen percent of the cases. He added that sometimes, back-up is not called because of a technical failure in radio communications or the officer is working in the backcountry. In twelve percent of the cases where back-up was called, the study found that it did not arrive in time.
- [225] When asked about the stress level that an officer might be in without a sidearm and knowing that back-up was thirty minutes away, Inspector Browning stated that he could not think of an instance where an officer did not have a sidearm. When pressed to examine the hypothetical nature of that question, he answered that the only time an officer would not have a sidearm would be when off duty.
- [226] Inspector Browning made the following additional comments regarding the RCMP auxiliary constables. Auxiliary constables do not provide back-up to regular RCMP members and are not used to supplement them. They may spend time riding along during a regular officers' general patrol, but their duties and the nature of the calls they answer are restricted. For example, they are not allowed to participate actively in calls for assistance involving a potential for harm or violence, which would take into account the unpredictability of human behaviour.

Respondents' witnesses

Testimony of Chris Butler

- [227] Sergeant Chris Butler, Sergeant in charge of Skills and Procedures Unit, Calgary Police Service, testified as an expert witness on the use of force in a law enforcement context, including on use-of-force models and their application.
- [228] Most intervention models used by the different police forces in Canada are virtually identical in application. There are differences in terminology with respect to descriptions of subject behaviour and officer response, but, from a tactical or operational application, the differences are insignificant.
- [229] In the national (RCMP) use-of-force model and the Alberta Association of Chiefs of Police (AACP) use-of-force model, the impact factors are essentially the same as what is taught relatively to CAPRA. In the AACP use-of-force model, the centre reads "Situation, Assess, Plan and Act."
- [230] The incident evaluation process used by an officer involves three closely related factors: the situation itself, the subjects observed or their known behaviour, and the officer's perception and tactical considerations. As the officer integrates these factors, the officer is able to undertake a reasonable use-of-force response and to explain how the situation was perceived, assessed and responded.
- [231] With regard to the situation, the officer must assess a number of critical variables to manage an incident. One of these is the environment. This includes everything, such as the physical layout of the location and the availability of cover and concealment, the weather conditions and the time of day or night.
- [232] Another critical variable is the number of subjects. A review of incidents where officers were assaulted and killed has shown a consistent increase in the number of multiple assailants' attacks. According to Sergeant Butler, many mistakenly believe that more officers equates less risk. On the contrary. Research clearly shows that there is no direct correlation between officer number and risk of harm. The previously mentioned research done by the FBI Criminal Science Behaviour Unit in 2004 established that out of the 57 officers feloniously killed in that year, 15 were alone, 35 were accompanied or assisted by other officers and 7 were off duty. Sergeant Butler held that the U.S. law enforcement trends and statistics are applicable in Canada. The only difference is the number of incidents or their frequency.
- [233] Sergeant Butler commented on the provision of Directive 2.1.9 which specifies that certain particular enforcement activities require more than one peace officer. He believed that this risk mitigation measure is not supported by research. Officers are cautioned during use-of-force training against believing that an offender is less likely to attack because they have visible back-up. In connection with this, he referred to the 2005 incident where four RCMP officers from the Mayerthorpe and Whitecourt detachments, in Alberta, were murdered at Rochfort Bridge by James Rosko, while they were guarding his rural hydroponics marijuana growth operation. The owner returned and ambushed and murdered all four officers. This confirms that, while Directive 2.1.9 legitimately attempts to mitigate risk by requiring two peace officers in specified situations, having two peace officers does not mitigate the risk that they are not equipped with a sidearm.

- [234] Another impact factor with regard to the officer's evaluation is the perceived abilities of subjects. This affects the level of force that an officer may try to use to control an individual. For example, subjects under the influence of alcohol or drugs typically do not respond very well to lower level pain compliance techniques of the use-of-force model and the officer may have to rule out their use. In addition, the physical size of the individual compared to the officer's may cause the officer to opt for a higher level of force response.
- [235] The officer's knowledge of the subject is the key to evaluation. Prior knowledge on a subject may affect the risk assessment. The officer may obtain information via prior contacts or knowledge or from police computers, including the CPIC. However, in the majority of cases, the officer has no information about the individual involved in an incident.
- [236] Time and distance are at the crux of an officer's risk assessment. Given enough discretionary time to conduct a full risk assessment, the officer will have an expanded view of the range of options available. In the IMIM, the officer's ability to use time and distance to delay a response is called tactical repositioning. However, there are three reasons why tactical repositioning may not work and the officer may be compelled to use force to control the subject or resolve the issue. First, the physical environment, including physical barriers or the presence of other subjects, may prevent an officer from doing so. Second, the officer may be compelled by law to use force immediately if there is an imminent risk to another person. Third, the officer may be unable to tactically reposition because of being assaulted by the subject. An officer's erroneous belief that tactical repositioning is always an option directly results in a complacent attitude and over-confidence, two of the prime reasons officers are assaulted, injured and killed.
- [237] Sergeant Butler explained that a subject may not give clues of an impending attack and the assault may come at the officer seemingly unprovoked. In these circumstances, it is recognized that there is insufficient time to disengage and the officer is compelled to take immediate action to eliminate the risk of personal jeopardy. In addition, the national use-of-force model recognized that the option to tactical repositioning may be precluded due to insufficient time and distance or the nature of the situation.
- [238] Central to the AACCP model of "Situation, Access, Plan, Act" or the CAPRA model of "Clients, Acquiring and Analysing Information, Partnerships, Response and Assessment", is the observed behaviour of the subject. All use-of-force models discussed record five different categories of subject behaviour in relation to the situational factors. They are: co-operative; passive resistance; active resistance; assaultive or combative; and death or grievous bodily harm.
- [239] Perception and tactical considerations are two separate but inter-related factors that impact on the officer's overall assessment of the situational factors. Perception is how the officer sees the situation which, in part, is a function of the personal cultural, physical, psychological and mental characteristics of the officer. A significant number of factors affect an officer's tactical assessment of a situation, including uniform and equipment, number of officers or availability of back-up, availability of cover, agency policies and guidelines, and practicality of containment, distance and communications.

- [240] According to Sergeant Butler, the situation, the subject's behaviour and the officer's perception and tactical consideration drive the use-of-force response options available to the officer. There are five options in the national model and five options in the IMIM. Use-of-force options vary from officer presence to lethal force. Unlike the categories of subject behaviour, there is a great deal of overlap between the available response options. For example, communications or verbal intervention overlaps with all force response options and indicates that the officer may use more than one force option response simultaneously to control the incident with the least amount of force necessary given the circumstances. The dynamic nature of a situation requires continual assessment so that the officer can decide whether to escalate or de-escalate and, when possible and appropriate, to tactically reposition.
- [241] Sergeant Butler commented on the one-up principle as follows. Also known as the plus-one principle, it means that an officer needs to select one level of force higher than the level of resistance of the subject. The objective is to enable the officer to get immediate physical control of the subject in as short a time as possible, using a reasonable amount of force. It is felt that the longer a confrontation goes on, the greater the likelihood of injuries, both to the subject and to the officer.
- [242] On the subject of weapons of opportunity, the *Criminal Code* authorizes the use of lethal force where there is a risk of death or grievous bodily injury. When this occurs, officers can use anything at their disposal. However, the reality is that, unless the officer is trained on all those different tools, it is very unlikely that, in such a stressful situation, the officer will be able to use anything at all. Sergeant Butler explained that, in a lethal force confrontation, the sympathetic nervous system takes over from the normal parasympathetic system and releases all sorts of hormones into the body. One process connected with this release is a shift from cognitive thinking to subconscious or mid-brain thinking. As a result, while the person can function through significant pain, the chances are very remote that the person will be able to effectively employ any use-of-force option, unless the person has received extensive scenario based training on that option.
- [243] The simple presence of a uniformed officer and/or marked law enforcement vehicle at a scene can negatively or positively affect the subject's behaviour or situation. The majority of individuals respond positively to an officer's presence and that may be all that is needed. However, in some situations, the subject responds negatively and the officer's presence may be the catalyst to cause the situation to suddenly escalate. Statistics confirm that officers are assaulted or killed before they had the opportunity to engage in verbal intervention. Sergeant Butler declared that in Calgary, for example, ambulance paramedics were assaulted because their uniforms had some similarities to law enforcement officers' uniform and they were mistaken for law enforcement officers.
- [244] With regard to the application of lethal force, Sergeant Butler confirmed that lethal force options involve the use of any weapon or empty hand technique designed, intended or likely to cause death or grievous bodily harm. Law enforcement agencies recognize that officers must be equipped with weapons which will allow them to quickly mitigate the risk when faced with situations presenting the risk of death or grievous bodily harm. The

decision of what constitutes proper equipment is a balance between the statistical likelihood of the need for such a weapon and the consequences for the officer of not having the weapon should the need arise. A statistically low probability of lethal assault against the officer is practically irrelevant if the risk of harm is death or grievous bodily harm. In this regard, Sergeant Butler noted that according to a Justice Department study In the USA, less than one in five arrests involved any use-of-force. In 2.1 percent of the arrests, officers used a weapon such a baton or chemical irritant and only in 0.2 percent of arrests did the officers use their firearm.

- [245] According to Sergeant Butler, no use-of-force model dictates what tactics, training or equipment an agency should provide to its officers. Each agency must rely on the experience of subject matter experts to determine what control techniques are to be taught and how they are to be employed. The use-of-force model provides guidance on where those techniques should fall.
- [246] Managers are given guidance to determine the training and equipment to provide to officers by federal Bill C-45, which received Royal Assent on November 7, 2003. Bill C-45 amended the *Criminal Code* so that corporations and public bodies and organizations be held criminally liable for acts of omission or commission resulting in bodily harm to employees. With respect to the safety of employees, the addition of section 217.1 to the *Criminal Code* provides that any person responsible for directing the work of others has a legal duty to take reasonable steps to prevent bodily harm to any person arising from such work.
- [247] Sergeant Butler opined that this provision clarifies the existence of a legal duty and facilitates the finding of criminal negligence. He further stated that the firearm is the industry standard weapon with which law enforcement officers are equipped to protect themselves and members of the public from lethal assault. He noted that this had been clearly articulated in the occupational health and safety report of HSO Grundie.
- [248] Sergeant Butler referred to the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, Cuba, on September 7th, 1980, to which Canada is a signatory. The document details 26 guiding principles for law enforcement agencies respecting the issuance, deployment, training and reporting of firearms. The following was cited:

Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of the right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct... Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force constantly in review.

- [249] Sergeant Butler added that in 9 out of 10 provinces, provincial conservation officers are provided with firearms. It is relevant to note that the use of firearms by law enforcement officers is deemed as necessary by the United Nations.
- [250] Following his review of the literature on the weapons effect referred to by Dr. Stenning in his expert report and testimony, Sergeant Butler declared that there is insufficient solid research to confirm the validity of this effect. To the contrary, the research on operational policing tends to indicate that the weapons effect is not supported.
- [251] On the subject of the dynamic and spontaneous nature of inter-personal human aggression and its effect on an officer's ability to disengage or tactically reposition, Sergeant Butler held that tactical repositioning must be reviewed in connection with the use-of-force principle that the most successful police intervention is the one that causes the least harm. Tactical repositioning requires that the officer have adequate time to perceive all that is occurring and to consider other tactical considerations.
- [252] In the real world of policing environment, assaultive or deadly force confrontation often come at the officers seemingly from nowhere, without prior warning or indication that anything was amiss. In many situations, the offender is within arms reach of the officers and, prior to attack, has already made a mental assessment of the officers' demeanour and physical ability to defend themselves. Sergeant Butler reported that the RCMP states in its handbook entitled *Public and Police Officer Safety Course Handbook* (K Division, 1999) that "the complacent or unprepared officer is a danger not only to themselves but also to other officers and the general public ... Officers must be aware that life threatening confrontations can happen at any time and without warning."
- [253] Sergeant Butler referred to the research conducted by Dr. Donald Loree, RCMP, in 1995, into violent incidents that occurred against members of the RCMP during the year 1995. The findings of the research were compiled into a technical report that was submitted to the Canadian Police Research Centre in April 1995. Sergeant Butler held that the research underscores the reality that a large percentage of violent incidents against law enforcement officers occur spontaneously and seemingly without warning, making tactical repositioning impossible.
- [254] According to Sergeant Butler, the enforcement community considers the agency issued sidearm as the standard for close personal protection. The sidearm is typically viewed by the public and law enforcement officers as a defensive tool necessary for the safety of the public and the officer. The sidearm is typically worn in a holster on the officer's duty belt, where it is ready in exigent circumstances.
- [255] Sergeant Butler claimed that the sidearm is tactically superior to a shotgun or a rifle for close quarter situations. This is because, in those situations, the officer will be using at least one free hand to attempt to control the offender's lethal attack. Since the pistol is designed to be accessed and operated with one hand, it functions well in close quarter situations. For its part, the long arm is designed to be aimed and fired using both hands. This leaves the officer at a tactical disadvantage in close quarter situations. Moreover, the long arm requires significant distance between the officer and the offender to be deployed, but the statistics and research prove that spontaneous attacks occur at close range. At close range, it is easy for an offender to defeat an officer's attempt to bring a long arm to bear and render the possession of the shoulder weapon useless.

- [256] Sergeant Butler wrote that most use-of-force trainers instruct officers how to deploy a sidearm in a close quarter lethal attack relatively to escalation and de-escalation tactics, drawing, holstering, overcoming the offender's attempts to take away the officer's firearm and delivering effective fire from extremely close quarters in a variety of positions. These tactics are typically not applicable to the use of the shoulder weapon. He gave the example that a shoulder weapon makes it extremely difficult to de-escalate to lesser use-of-force options, because the officer's hands are tied to the long arm, making it difficult to drop or sling it as the situation requires.
- [257] Based on his expertise, Sergeant Butler agreed with the statement made in a research report by Steve Hess, of the Justice Institute of B.C., that, if they occurred outside of a park, many park warden activities would be attended by a fully armed police officer, responding with one or two officers as back-up. He clarified that the presence of multiple officers in a situation does not, in itself, equate to less risk of injury to either the individual(s) or the officer(s), even though that might be the outcome. He added that the research shows that the presence of multiple law enforcement officers in situations where use-of-force was applied to gain compliance had little bearing on that use of force or on the resulting injuries for the individual or law enforcement officer(s).
- [258] Regarding the level II soft body armour and sharp edged weapons, Sergeant Butler commented that it provides a substantial degree of protection for slashing attacks, but virtually no protection from straight thrusts. The soft body armour protects against the vast majority of hand guns, including the officer's own sidearm, against shot gun rounds and against a rifled slug, but it will not protect against all high powered rifles.
- [259] Regarding the use of the baton, Sergeant Butler stated that officers are instructed that its purpose is to get the person off his/her feet to the ground, to effectively end the assaultive behaviour. The baton can be used to deliver lethal blows to certain parts of the body, but officers are trained to consider these as prohibited target areas. Officers are not trained to use the baton to react to a death or grievous bodily injury threat.
- [260] Regarding the use of pepper spray, Sergeant Butler declared that it is not a rapid deployment device and it is used to temporally incapacitate an individual, so that the baton can then be used to get him/her to the ground and under control. Pepper spray has a range of about 12 to 15 feet under ideal environmental conditions. Again, officers are not trained to use it to respond to a death or grievous bodily injury threat. Also, they are trained to be cautious about deploying pepper spray on people under the influence of drugs, because these persons are not responsive to pain and pepper spray is a pain compliance device, and because it can increase their level of aggression. Also, at close quarters, it would be difficult to get the spray where it is needed.
- [261] Sergeant Butler referred to the RCMP IMIM, which indicated that pepper spray can be used as a response to subject behaviour exhibiting active resistance up to situations of risk of death or grievous bodily harm. Impact weapons such as the baton can be used for subjects exhibiting combative behaviour up to situations of risk of death or grievous bodily harm.

- [262] Sergeant Butler clarified that lethal force has nothing to do with killing. It has to do with stopping the behaviour of the subject. Over 60 percent of individuals shot by a law enforcement officer are, in fact, not killed. So killing is not what is in the mind of the law enforcement officer.
- [263] Sergeant Butler testified that risk assessment is multi-factorial. To assess risk, an agency must look at its own experiences and, given their relevance, at the experiences of other agencies that carry out similar activities.
- [264] Sergeant Butler confirmed that he had not investigated the mandate of conservation officers and wildlife officers in some provinces when he prepared his expert report. However, he had personal knowledge of the mandate of conservation officers in Manitoba, Saskatchewan, Alberta and the Yukon. Sergeant Butler gave the example of a conservation officer in Saskatchewan involved in resource protection activities, which is the primary mandate of such officers. If the conservation officer came upon a drunk driver while carrying out resource protection work, the officer, as a peace officer whose mandate included preservation of the public peace, would be required under the *Criminal Code* to arrest, contain and control the individual. At the first reasonable opportunity, the officer would transfer the individual to a member of the RCMP.
- [265] Sergeant Butler opined that it is likely that park wardens will encounter in national parks high risk individuals who pose a potential risk and who could be under the influence of drugs or alcohol. He could not see how risk related to responding to noise and disturbance, domestic disputes and other situations would be any different than a similar risk in a city. More specifically, Sergeant Butler believed that the following situations, which are discussed in the Hess Report, would be characterized as high risk: attending to noise and disturbance incidents in a park where alcohol and drugs are involved; arresting persons for CNPA violations; handling persons who have been arrested for CNPA violations; investigating persons suspected of a CNPA violation; and conducting a traffic stop of someone suspected of a CNPA violation.
- [266] Sergeant Butler finally opined that the fact that the CNPA provided for fines of up to one million dollars and prison terms of up to five years is a substantial incentive for someone to resist being arrested.

Testimony of Edward Davis

- [267] Edward Davis, Training Division, Criminal Behavioural Science Unit, FBI, testified as an expert in law enforcement, in use-of-force in law enforcement, including the use of firearms by law enforcement personnel, and in the issue of violence against law enforcement personnel and officer safety. He addressed the following issues: the unknown risks of vehicle stops; the unpredictability of human behaviour and its implications for law enforcement personnel; the relative risks of being shot with one's own weapon; the relative merits of a sidearm v. a long arm; and violence against law enforcement personnel. He offered a caveat regarding studies referred to in his report, saying that they were limited, in that they might not be reproducible in all law enforcement contexts and that their findings were only offered for information.

- [268] Upon reviewing Directive 2.1.9, Edward Davis found that it establishes that park wardens have law enforcement duties. Pursuant to section 6.2, park wardens have primary law enforcement responsibility for enforcing legislation related to the protection and management of natural and cultural resources in parks. For this, their activities include charges, arrests, seizures and prosecutions.
- [269] Edward Davis further noted that, under section 6.1.3, park wardens have a duty to preserve and maintain public peace in national parks within established policies. Uniform, duty belt equipment and enforcement vehicles and vessels give park wardens every appearance of a law enforcement officer. He reported that a reasonable person witnessing a crime or being victim of a crime and who saw a law enforcement marked vehicle driven by a person wearing a visually distinctive uniform would most probably attempt to get the driver's attention to report the crime.
- [270] Based on his expertise, Edward Davis opined that, if the park warden stopped to assist such a person, the park warden could become involved in a situation that could immediately place him/her at risk of harm or death before any police officer could respond. He added that waiting for the police to respond may not be an effective or efficient option.
- [271] In this regard, Edward Davis referred to his published research entitled *Killed in the Line of Fire*, according to which the longer an officer waits to take control, the greater the possibility that the offender will perceive the officer as unprepared and/or indecisive and attack. The study also revealed that 62 percent of the offenders reported using drugs, alcohol or both at the time of the assault on the officer.
- [272] Edward Davis held that any risk mitigation developed to assist law enforcement officers should consider three interrelated factors: the officer, the offender and the situation which brought them together. He critically noted that Directive 2.1.9 does not address mitigation measures regarding the offender and does not deal with a standard part of the law enforcement equipment provided to law enforcement officers, *i.e.* the sidearm.
- [273] Edward Davis testified that findings reported in his two publications, *Killed in the Line of Fire* and *Killed in the Line of Duty*, demonstrated that the officer's willingness and ability to use deadly force in a felonious attack constituted the major difference between the officer's survival or not. He stated that, without a sidearm, park wardens would not be able to use deadly force to help them survive a felonious attack.
- [274] On the subject of unknown risks of vehicle stops, Edward Davis commented that most offenders stopped for minor offences during vehicle stops had committed other crimes before the stop. They paid very close attention to the officers' behaviour prior to killing them and believed that the victim officers were unprepared and indecisive when the assault started.
- [275] With regard to the second issue, the unpredictability of human behaviour and its implications for law enforcement personnel, Edward Davis referred to statistics contained in a publication entitled *Crime in the United States*, as well as his current study, *Felonious assaults on America's Law Enforcement Officers*, which is pending

publication. He stated that there is no single offender profile for killers or assaulters of law enforcement officers. However, most killers were diagnosed as having some sort of personality disorder, both killers and assaulters have demonstrated abuse of drugs or alcohol and some have attempted to take their own life. Edward Davis agreed that the problem of spontaneous attack cannot be fixed by providing all officers with a sidearm. However, the sidearm could give the officer a better chance to survive a spontaneous attack.

- [276] On the issue of the relative risk of being shot with one's own weapon, Edward Davis stated that weapon retention has been and still is a major concern for law enforcement officers. He reviewed the statistics in the USA where a sidearm or long arm was taken from and used against an officer. He concluded that officers must be trained to protect their weapons and be able to use them to survive potential lethal situations.
- [277] On the issue of the relative merits of sidearm v. long arm, Edward Davis referred to statistics in the USA. His study entitled *Killed in the Line of Fire* confirmed that the average distance an offender shot an officer with a rifle was 174 feet, while the average distance with a handgun was 14 feet. He was not aware of any law enforcement agency in the USA that did not equip its officers with sidearms and he knew of no agency that issued long arms as the defensive protective device to administer lethal force instead of a sidearm.
- [278] With regard to the last issue, violence against law enforcement personnel, Edward Davis reviewed assault statistics in the USA related to federal law enforcement officers, the National Park Service, the U.S. Fish and Wildlife Service and local and state law enforcement agencies. He concluded that no location is exempt from crime and criminals in today's world.
- [279] Edward Davis agreed with Inspector Browning's statement that the purpose of the use-of-force model is to assist peace officers in making decisions on the application and use of force and that risk assessment is the key to law enforcement safety issues. However, he held that officers take an uninterrupted risk when they put on a uniform identifying them as a law enforcement officer and enter and exit their marked law enforcement vehicles. Risk and threat assessment is a complex issue that officers face when initiating contact with an individual who presents the appearance of being calm, friendly and co-operative and who suddenly, without hesitation, produces a knife or handgun and attacks.
- [280] Referring to his *Killed in the Line of Fire* publication, Edward Davis stated that 64 percent of the officers assaulted reported that they did not realize that they were about to be assaulted, whereas 62 percent of the offenders described the officers as being surprised, unprepared or indecisive.
- [281] Edward Davis also referred to an annual publication entitled *Law Enforcement Officers Killed and Assaulted*, which coined the term killing zone to represent the distance of approximately 10 feet or less wherein the vast majority of officers were killed throughout the United States. The reference to the killing zone is to make officers aware that they have to be extra cautious when they get close.

- [282] With respect to the provision of Directive 2.1.9 specifying that park wardens are to observe, record and report where they perceive danger, Edward Davis stated that every incident represents a dynamic situation and that officers may be unable to understand the complexity of what is going on without getting closer to examine and evaluate the situation. Once a park warden does get closer to examine and evaluate the situation, it may be unreasonable to expect the warden to back-up and get closer again, thereby creating a deadly and dangerous situation.
- [283] According to Edward Davis' research, the vast majority of officers killed and assaulted were hard working and they were the ones who initiated the intervention when they saw a problem, before it was reported to them. It was recommended in the most recent edition of *Violence against Law Enforcement Officers* that law enforcement agencies' supervisors constantly monitor whether officers are actually implementing safety- related practices when conducting activities.
- [284] Asked if two-person patrols give officers the ability to develop teamwork and therefore work more effectively, Edward Davis replied that two officers put together do not necessarily become a working team, unless they are trained to do so.
- [285] On the subject of accessing police information and back-up, Edward Davis stated that an officer should access any available police information if the situation permits and/or wait for back-up. However, studies show that police officers will respond to a scene when they hear screaming and shouting before back-up arrives, even if it might be more prudent to wait for back-up and not place himself/herself in danger.

Testimony of Duane Martin

- [286] Duane Martin, Senior Law Enforcement Officer, Parks Canada, started working for the agency in 1966, as a seasonal park warden at Waterton National Park, in Alberta. He then served as a full time assistant park warden at the Saskatchewan Crossing Warden Station, in Banff, Alberta, for 1.5 years. After five years in the private sector, he rejoined Parks Canada, working as a park warden at the Jasper National Park for approximately 2 years. At that time, the park warden's resource management function was to assist Canadian Wildlife Service officials who carried out studies. Law enforcement tended to be seasonal and related to patrolling and responding to noise and disturbance complaints and wildlife problems (*i.e.* bears) in connection with two large camp grounds in Jasper. Park wardens in the 1970s were not equipped with duty belts, but as the number of arrests increased over the years, personal protective equipment started to be provided.
- [287] In 1981, Duane Martin became National Warden Service Coordinator at Headquarters, in Ottawa. He was responsible for developing law enforcement policies, staffing protocols, training and classification exercises. He developed the law enforcement policy referred to as Bulletin 2.1.9. Authority for the bulletin was renewed annually, but the document changed little from when it was first authorized in 1987. He also co-authored a Memorandum of Understanding with the RCMP, which was signed by senior officials of both agencies and was still in effect at the time of the hearing.

- [288] In 1987, Duane Martin moved to the Calgary Regional Office, where he became Law Enforcement Specialist. This was a new position created in connection with the Federal Government Green Plan, which was aimed at improving the environment and included funding for 50 to 60 new park wardens to protect park environment. He was responsible for providing operational support to park wardens and managers, as well as advising on and interpreting policy, including Bulletin 2.1.9, and assisting park wardens in major investigations related to poaching and trafficking of park wildlife and resources.
- [289] In 1995, he became Senior Law Enforcement Specialist and additional Law Enforcement Specialists reported to him. His duties essentially remained unchanged, but he also had responsibilities for advising the Director General, Western and Northern Region, on law enforcement. He was also fully aware of the role of RCMP auxiliary constables, as he was part of that group for approximately three years.
- [290] As Senior Law Enforcement Specialist, Duane Martin has represented Parks Canada on the National Special Investigations Training Management Team since 1995. The team's mandate included the design and delivery of focused training for officers in the federal and provincial governments whose responsibilities dealt with poaching and traffic offences. He was also a member of the Canadian Intelligence Services Alberta Group. Consisting of federal and provincial law enforcement agencies, the group met twice a year to provide bulletins on criminal and intelligence matters. He added he received notice from this group regarding an RCMP program referred to as Operation Pipeline in Alberta that was targeting the transport of drugs and money between Calgary and Vancouver.
- [291] Duane Martin testified regarding the evolution of Bulletin 2.1.9 to the current Directive 2.1.9. Bulletin 2.1.9 was developed and implemented to clarify, for park managers and wardens, the law enforcement role of park wardens, not to alter the focus or law enforcement activities of park wardens. In 1994, the practice of re-authorizing Bulletin 2.1.9 was altered and its 1994 version was adopted. This version was still in force at the time of HSO Grundie's investigation in 2000. Duane Martin also confirmed that training on the RCMP IMIM began in 1994.
- [292] Duane Martin reviewed the 1993 version of Bulletin 2.1.9 and compared it with Directive 2.1.9. The Bulletin provided for a standardized national data base and a data base referred to as OTIS was developed, but it was not maintained. Park wardens developed and used their own data base at the park level. It was referred to as Mile+ and operated for several years. Like Directive 2.1.9, Bulletin 2.1.9 provided for public education and awareness as a prevention tool, but not for formal procedures.
- [293] Section 3 of Bulletin 2.1.9 defined and clarified the respective roles of park wardens and jurisdictional police services and led to a companion document, the MOU between Parks Canada and the RCMP. In connection with this, Duane Martin referred to a note in the background section of the bulletin, which stated that there were times where circumstances demanded that each agency play a lead role in the other's area of prime responsibility.

- [294] Duane Martin also pointed to section 3.3 of Bulletin 2.1.9, which stated that Parks Canada was responsible to ensure a sufficient level of police coverage in parks, through arrangements with the jurisdictional police and/or Provincial Attorney Generals.
- [295] Section 3.4.6 of the bulletin permitted park wardens to enforce or investigate other federal or provincial statutes in certain circumstances, including where an observed or reported criminal or provincial offence endangered human life, safety or property and the jurisdictional police was unable to respond within a reasonable time. This happened routinely and the provision simply reflected that. The term "within a reasonable time" was not defined, but depended on the urgency of the situation and any risk assessment that the park wardens would carry out.
- [296] For example, an RCMP officer took the lead regarding a resource offence if it was detected incidentally to his/her activity. Similarly, a park warden on a trail or highway would stop or prevent criminal or provincial offences such as thefts and assaults when it was discovered incidentally to his/her work and then turn the matter over to the RCMP.
- [297] Joint cooperation with the jurisdictional local police forces was routine and ongoing over the years. Park wardens and provincial and federal resource law enforcement officers frequently participated in joint patrols along park boundaries to detect poaching and park wardens participated on multi-agency check stops on parks highways to check for firearms, possession of wildlife and other contraband.
- [298] Duane Martin stated that Robert Prosper was the primary author of the new Directive 2.1.9 and he was not involved or consulted on it. However, he uses it daily to provide advice, guidance, and assistance on its interpretation to park wardens and park managers. He also gives instruction on it in connection with the park wardens' recruit training courses and the proficiency training provided to active park wardens.
- [299] Despite changes in Directive 2.1.9, the work of park wardens essentially remains unchanged. Public expectation about the park wardens' role has always been there in the past and continues. Park wardens are the front line uniformed presence in national parks, operating marked vehicles and wearing a distinctive uniform. Their stations are identified if information or assistance is needed. The first C in the RCMP use-of-force model of CAPRA that Parks Canada has adopted stands for "client" and the agency's mandate and training of its park wardens confirm that client's expectation is a key feature of law enforcement.
- [300] On the issue of the back-up provided by the various jurisdictional police services, Duane Martin held that park wardens are generally satisfied that the police services will do their best, although they know that the police have limited resources so back-up is uncertain. It has always been that way. He submitted photos of different locations in Banff, Jasper, Kootenay and Yoho Parks, where park wardens conduct solo patrols dealing with resource management and public safety. It takes 2 to 3 days to reach these locations by horseback and one hour to an hour and a half by helicopter, assuming the weather is good. There can be technical problems with the radio signal, as in the evening and at night, the cold can cause the repeater batteries to fail. Also, cell phones often do not work.

- [301] Duane Martin commented that Bulletin 2.1.9 provided for applications whereby park wardens could be issued a sidearm or long arm as a support tool for law enforcement. He recalled that there were eight to ten applications for sidearms, but none were granted. In two of the applications, Parks Canada authorized the use of a shot gun for protection. One of the cases dealt with an individual who had accosted park wardens at gun point for the past four to five years and taken their horses and radio from them and who assaulted a park warden.
- [302] Duane Martin could remember one occasion only where a park warden was authorized to use a sidearm for a limited period of time. This related to a bear study on which the park warden was working jointly with other resource agency officers who were armed with a sidearm. He stated that it was common for biologists and persons handling bears to wear a sidearm for personal protection when the officers did not have immediate access to a long arm. He added that most resource protection agencies in Canada issue a sidearm to their officers for personal protection. To deal with animals, the sidearms are often of higher calibre than the ones used by police forces.
- [303] Duane Martin testified regarding a document that Shawn Mackenzie, a park warden at Riding Mountain National Park, sent to him. According to the unsigned and undated document, an offender data base maintained by park wardens at the park over the last six to eight years contained the names of 83 individuals known to be resource protection offenders and to operate on the park boundary. Seventy nine of the individuals had a criminal record, the CPIC had flagged 59 as violent and 11 as an escape risk, and 14 had assaulted a peace officer. Duane Martin confirmed that the document preceded the new Directive 2.1.9 and that it did not establish that these individuals had operated in the park.
- [304] Duane Martin spoke about a summary that he prepared in 2004 on a poaching incident in Banff National Park, involving a bighorn sheep that had been illegally killed and removed from the park. The investigation partnered with Alberta Conservation Officers, the Alberta Conservation Officers' Special Investigation Unit and members of the RCMP Major Crimes Unit at Banff, Canmore and Kelowna. The main suspects and two of their associates had criminal records, with notes on their potential for violence and access to and use of firearms. This file was not unique in terms of crime and offenders and was also indicative of the type of partnerships that operated at all parks prior to the changes to *Law Enforcement Management Directive 2.1.9*.
- [305] Duane Martin confirmed that Directive 2.1.9 states that public peace maintenance is the responsibility of the jurisdictional police. He added that this has always been the case. Furthermore, he maintained that the routine stopping of motor vehicles for highway traffic offences was no longer being conducted by park wardens. However, he did not know if the police had increased the number of its officers or patrols in the western parks to take up these activities vacated by park wardens in accordance with Directive 2.1.9. If not, this would, in his opinion, increase the risk to park wardens and others who used the highways.

- [306] Duane Martin testified that western park wardens have expressed health and safety concerns relatively to RCMP back-up. In the front county, it can be unavailable or delayed due to the limited RCMP resources and their need to address priorities based on their primary law enforcement responsibilities. This affected the confidence that park wardens had in their safety as related to the mitigation measures specified in appendix A of Directive 2.1.9. In the backcountry, as the RCMP makes no routing patrols, park wardens feel that RCMP members may not have sufficient backcountry experience and training to provide effective back-up.
- [307] Duane Martin described the CPIC system as an effective and efficient system to obtain the necessary information on potential offenders. Jasper, Banff and Calgary have direct access to it and Jasper National Park operates a dispatch system twenty-four hours a day, seven days a week, in French and English. Park wardens do not have direct access to the system and must rely on contact with a park dispatcher to obtain and communicate the information. However, dispatch can be delayed from five to twenty minutes. Some parks do not have access to the Jasper dispatch. For example, in Waterton, park wardens must contact a RCMP dispatch centre to obtain the CPIC information. There can be problems reaching it by cell phone due to communication dead zones and there can be delays while the RCMP dispatch centre obtains and communicates the CPIC information. Duane Martin did not know if there were time standards at Parks Canada that mandated minimum CPIC response times.
- [308] With regard to the Victoria Committee, Duane Martin stated that neither he nor the committee were given any indication by Parks Canada that the committee's approach or recommendation that park wardens involved in law enforcement be equipped with a sidearm was flawed. He noted that Gaby Fortin, Director General for Western and Northern Canada, Parks Canada, was present and spent some time with the committee, he reviewed the third draft of the committee's report and he did indicate any disagreement.
- [309] Duane Martin confirmed that people have mistaken him for a police officer on many occasions. He recalled one offender who essentially said that he would have resisted arrest had he realized that he was not a police officer. The uniform and the duty belt he wore when carrying out law enforcement were similar to those of Sergeant Butler. His shirt has a shoulder badge that identifies him as a Parks Canada warden and so does his summer and winter headgear. His winter parka is the same style as that of a RCMP member, except for the colour.
- [310] Duane Martin opined that a sidearm to deliver lethal force in a grievous bodily harm or death situation is primary and park wardens cannot rely on finding or using a weapon of opportunity for their safety. During his 33 years of experience, he has spoken with many conservation and other agency officers armed with a sidearm and noted that they would not do their job without it even if they may never have had to use it.
- [311] Duane Martin believed that HSO Grundie's comparison of park wardens to police forces in Canada was not surprising for several reasons. Historically, under the 1932 version of the CNPA, park wardens were appointed as police constables for the purpose of enforcing public peace. Presently, the maintenance of public peace remains a part of the legal mandate of park wardens. In addition, the RCMP, who was contracted by Parks Canada to provide park wardens with law enforcement training, looked at the mandate of park wardens and teaches them criminal law and criminal law enforcement.

- [312] Notwithstanding this, Duane Martin did not see park wardens as police officers, but, rather, as officers authorized to enforce public peace within the agency's policy. He agreed that as a result of Directive 2.1.9, park wardens were no longer obliged to intervene in a public peace issue if it put their health and safety at risk. He also agreed that park wardens must assess the risk before any intervention, but held that risk can escalate suddenly and rapidly to dangerous levels without warning. So, in that way, the policy has not completely mitigated the risk connected with law enforcement.
- [313] Duane Martin recognized that there is a communications gap between Parks Canada managers and park wardens relatively to Directive 2.1.9 and park wardens' concerns about their health and safety. He agreed that Directive 2.1.9 no longer permits highway traffic stops, random car stops, high speed chases and undercover investigations. Nevertheless, he held that park wardens' concerns related to the uncertainty they feel as to enforcing the law or not. He agreed that the outcome of this and Directive 2.1.9 led to a reduction in the number of law enforcement investigations.

Testimony of Anders Hawkins

- [314] Anders Hawkins, park warden at Lake Louise, Alberta, has been with Parks Canada for approximately fifteen years. He has worked in Gwaii Haanas, Banff, Yoho and Kootenay National Parks. In 2001 and 2002, he acted as liaison with RCMP members responsible for enforcing resource management laws in national parks on behalf of Parks Canada. In 2002 and 2003, he assisted in the preparation of the Gwaii Haanas law plan and in the reintroduction of park wardens into law enforcement activities. In Banff National Park, he was part of a two-person dedicated law enforcement patrol to detect hunters that might be operating along the park boundary during hunting season.
- [315] Park warden Hawkins had just finished a two-year period of work in the backcountry, in an area known as the Cyclone District, an alpine district that is approximately two days by horseback from Lake Louise and from forty to sixty minutes by helicopter if weather conditions are good. He was on his own ninety-eight percent of the time and was snow bound four times for approximately three days in the past summer. Law enforcement activities consisted of knowing who was visiting the park, examining fishing licences and checking any resource management offences. In terms of back-up from the RCMP, he doubted that many RCMP members would be sufficiently experienced to operate in that backcountry. Back-up therefore would have to include another park warden. His backcountry work typically lasted from April to November, after which he would join the general pool of park wardens in the front country.
- [316] While working in the front country, park warden Hawkins has observed vehicles travelling anywhere from 20 to 70 km past the 90 km posted speed for the four lane highway from Banff to Lake Louise. While park wardens no longer stop vehicles for speeding, they are frequently called upon by other agencies, such as volunteer fire departments and ambulance services, to respond to motor vehicle accidents caused by speeding that have resulted in trauma and death and even to clear and secure a safe area for a helicopter to land. They are also called upon by the RCMP to respond to accident scenes when its members are tied up at another accident scene or unavailable for other reasons.

- [317] Park warden Hawkins was trained by the RCMP in 2000 to provide police defensive training to Parks Canada wardens. This training mirrors the RCMP IMIM training, but does not address delivering lethal force in situations of grievous bodily harm because Parks Canada does not equip its wardens with any specific tool to that end. He stopped participating in the training provided to park warden recruits and to the proficiency training provided to park wardens after Parks Canada implemented Directive 2.1.9, in 2003. He did so because he could not, in conscience, continue in the absence of tools to deal with grievous bodily harm. He feared that he and other park wardens could find themselves at dire risk if a situation escalated to the level of grievous bodily harm. This detracted from his personal sense of professionalism and ability to take charge of and resolve a situation.
- [318] Park warden Hawkins testified regarding the document entitled *High Risk Officer Safety Incidents* that he provided to HSO Grundie. It described a dozen or so incidents in which he was involved that illustrated how seemingly innocent situations turn out to involve impaired, menacing and violent individuals.
- [319] Park warden Hawkins gave evidence regarding two recent incidents that occurred after Directive 2.1.9 was implemented. The first related to an incident where he and another park warden closed the Trans Canada Highway to deal with avalanche conditions. When he called to obtain CPIC information on an uncooperative and threatening driver to whom he was explaining the reason for the road closure, he had to wait more than 45 minutes for the Banff dispatcher to obtain confirmation that the individual had a violence caution. The dispatcher also advised him that no one at the RCMP detachment on his side of the avalanche closure was available for back-up. Park warden Hawkins explained that he had difficulty reaching the Banff dispatcher because several of the mountain radio repeaters had been out of order for days.
- [320] On the second incident, he observed a RCMP member on the side of the road with five individuals that he had stopped. The RCMP member gladly accepted his assistance because there was no other member available. He asked park warden Hawkins to provide him with cover while he searched the contents of bags in the individuals' automobile. The member found drugs and a baton, which is illegal to carry and conceal. He arrested the driver and passengers and park warden Hawkins assisted in the transport of the prisoners to the jail.
- [321] Park warden Hawkins' main health and safety concern is that Directive 2.1.9 does not address how park wardens are to deal with situations that escalate to grievous bodily harm or death. Wardens do not know what they are going to face until a situation starts and then it may be impossible to tactically reposition. This uncertainty adds to the risk faced by park wardens.
- [322] Park warden Hawkins commented that the RCMP detachments in Lake Louise, Golden and Invermere were typically going through a lot of staff changes and did not expect new staff. He could not recall the last time that he saw an RCMP member in the Yoho or Kootenay National Parks. Additionally, he had recently called RCMP members to Kootenay and Yoho regarding public peace offences on the highway but they were unable to respond.

- [323] Park warden Hawkins testified that two-way radios are subject to battery failure. Cell phones only operate in the immediate area of Lake Louise because there is one tower at the ski hill, but they do not work in the Kootenay or Yoho National Parks. Satellite phones are only provided for backcountry work and are great to have. Sometimes, you have to be high out a valley to use them and so he has experienced dead zones. Also, the average battery last for about 20 minutes, and one might have two good conversations in nine days for each battery set carried.
- [324] Park warden Hawkins has been mistaken for law enforcement personnel but not frequently. He has also been mistaken for a Fisheries and Oceans Canada officer, a provincial wildlife officer and a conservation officer, who are all armed with a sidearm.
- [325] Park warden Hawkins informed his manager about the problems with the CPIC dispatch delays and they were addressed each time, because for park wardens and management, money was always short and so issues were dealt with on a reactive basis as opposed to a long term solution.

Testimony of Jurgen Deagle

- [326] Park warden Deagle worked as a seasonal park warden from 1990 to 1992. He graduated from the University of Waterloo in 1993 with a degree in Environmental Recourse Studies. He joined the Parks Canada Warden Service in Jasper, Alberta, in 1995, as a full time park warden. While he is employed as an environmental specialist, he stills does operational work, which includes law enforcement and public safety operations in the front and backcountry. He has worked in more than twenty four parks.
- [327] Jasper National Park employs approximately 20 to 30 park wardens during the winter months and some 35 to 40 during the summer, many as seasonal workers. Since the implementation of Directive 2.1.9, the Warden Service is now referred to as the Resource Conservation Service. It includes park warden generalists and specialists, and resource protection specialists responsible for law enforcement and protection operations.
- [328] Park warden Deagle confirmed that the uniform and duty belt provided by Parks Canada was the same as other park wardens, but because his work at Jasper National Park included working with wild animals, he also carried a starter pistol, which discharges different types of noise makers to frighten wild animals away. This pistol has been mistaken by visitors as a sidearm on many occasions and has drawn questions regarding its make and calibre.
- [329] With his uniform and duty belt also similar to law enforcement officers, park warden Deagle has been mistaken by park visitors as a police officer, a Fisheries and Oceans Canada officer and a game and wildlife officer, who are all equipped with and wear a sidearm. Also, a label on his soft body armour states that it is not intended to protect from rifle fire or sharp edged or pointed weapons.
- [330] During his first year of employment, park warden Deagle worked in the backcountry of Jasper National Park. Approximately 98 percent is wild backcountry, accessible only by foot or horseback. The most remote part of the park is a four to five day travel from the nearest highway. Work in the backcountry involves fourteen or fifteen days in the woods, mostly in solo patrols. During hunting seasons, park wardens conduct overt and

covert dedicated patrols. The overt patrol's purpose is to be seen and gain compliance to park legislation through the officer's presence. The covert operations are to detect and act on hunting offences. While dedicated patrols require two park wardens, the policy does not prohibit park wardens from splitting up for periods of time to look for hunters or hunting offences and the practice is common. In the backcountry, park wardens can be twenty to thirty minutes apart. In the front country, they can be in separate vehicles or patrolling in separate areas and be apart 10 to 15 minutes.

[331] Trophy hunting of sheep in the fall along the park boundary is a significant issue. At that time, sheep begin to leave the park for lower elevations. Hunters eagerly await them at the boundary locations and one might see 40 to 50 hunters along a 20 km segment. Park warden Deagle recalled an incident in 2000 when three armed hunters traversed into the park by about 15 km. He responded with the RCMP by helicopter but the RCMP members were unwilling to trek into the park to find the hunters, so the park wardens had to do it themselves. Park warden Deagle observed that RCMP members are generally not equipped or trained for the wilderness.

[332] Park warden Deagle agreed with the following excerpt, included in the *Jasper National Park Law Plan, 2003*:

Park wardens dealing with wildlife offenders or suspects are at a high risk since the location can be remote, or late at night and these persons are usually armed, liquor or drugs may be involved, and the penalties imposed can include: loss of hunting rights and property, significant fines and times in prison.

[333] In addition to his law enforcement work, park warden Deagle worked as a dispatcher at Jasper National Park in the past and continues to relieve dispatchers there when they have to leave their post temporarily during a shift. Jasper acts as a dispatch clearing house for some 17 parks across Canada and the north, as well as the Alberta Fish and Wildlife Agency and Environment Canada. During the summer months, Jasper has two dispatchers for the day shift and one for the evening shift. There is only one dispatcher during the winter months.

[334] According to park warden Deagle, responding to CPIC inquiries is a minor part of the dispatchers' work. They are responsible for keeping track of the location of park wardens, providing park wardens with information on road conditions, responding to public calls or complaints regarding resource offences and public safety. The priority order for responding to calls is as follows: 911 calls on the emergency phone regarding accidents or health related incidents such as "heart attacks"; "radio traffic" calls, which includes CPIC requests; and calls or complaints regarding resource protection, such as bear jams or noise and disturbance at a campground.

[335] On the subject of the CPIC, park warden Deagle stated that it is an important information tool, but it is not infallible. It has a planned system shutdown on Sunday morning and advises its users of other necessary shutdowns, and some components can be down at times for maintenance. Shutdowns on Sunday mornings are problematic for Parks

Canada, because Friday evening, Saturday and Sunday mornings record higher than average activities, campers are normally scheduled to leave on Sunday morning and evictions can then be up.

- [336] Park Warden Deagle also testified that JNP was unable to obtain information on the CPIC system on January, 31, 2006. The dispatcher on duty attempted to obtain CPIC information for a park warden on a vehicle ownership check and the CPIC system was said to be down everywhere. The system subsequently provided the information sixteen minutes after the inquiry, but Park Warden Deagle held that that incident convinced him that CPIC is not infallible.
- [337] In terms of back-up from the jurisdictional police service, park warden Deagle noted that Parks Canada has not specified a required minimum back-up time. The RCMP has a detachment office in the town of Jasper. Access to the backcountry would be by helicopter, which could reach a park warden within forty minutes to a few hours or days, depending on weather conditions. Pilots are not permitted to fly in mountainous regions after sunset, so back-up would be postponed at least until the next morning. Also, members of the RCMP are generally not equipped or trained for the wilderness and are usually not familiar with the geography of the mountain parks, so they would have to be guided or accompanied by another park warden.
- [338] Park warden Deagle opined that situations of grievous bodily harm or death can arise spontaneously and without warning. He therefore felt that Directive 2.1.9 was confusing where it stated that park wardens were not to intervene in these situations. Furthermore, he believed that any uncertainty on the part of park wardens could be interpreted by an individual as weakness and embolden him/her to attack. Also, Directive 2.1.9 is at odds with the IMIM and the CAPRA models, which address the public's expectation of officers' assistance, regardless if the situation can cause grievous bodily harm or death.
- [339] Park warden Deagle further maintained that the absence of a sidearm undermines the park warden's confidence and that the measures established in Directive 2.1.9 do not mitigate against the hazard of not carrying a sidearm. He believed that a sidearm is needed to defend against the unpredictability of human behaviour.
- [340] Park warden Deagle also found Directive 2.1.9 to be confusing relatively to the enforcement of the *Criminal Code* by park wardens. The directive states that park wardens are not to enforce it, but authorizes them to deal with noise and disturbance complaints. To him, there is no real differences between noise and disturbance and the public peace under the *Criminal Code* and could be, in reality, an assault in progress.
- [341] Park warden Deagle commented that, while maintaining public peace is not a primary responsibility of park wardens, they are still authorized by Directive 2.1.9 to stop vehicles for resource protection purposes, for public safety reasons such as motor vehicle accidents, forest fire or avalanche, and for off-road driving offences and off road impaired driving. The directive is inconsistent and confusing to park wardens and it is inconsistent with the IMIM and CAPRA training that Parks Canada arranged for park wardens. Not reacting to these situations raises moral issues for them, in that it seems

morally wrong to be directed not to stop and detain an impaired driver found at the side of a road until the police arrive. The public or other park wardens using the highway are put in danger by the policy. There have been cases where a park warden advised the RCMP that there was an impaired driver, but the RCMP was unable to find the driver when it was available to respond. In his opinion, the number of RCMP members in Jasper National Park has decreased since Directive 2.1.9 has been implemented and park wardens stopped carrying out traffic enforcement. However, he believed that Parks Canada's policy of not stopping vehicles on highways did not significantly reduce the risk that park wardens face on highways.

- [342] On the subject of Directive 2.1.9 and dedicated patrols involving two park wardens and incidental patrols, park warden Deagle said that the risk connected with solo patrols is greater because there is little advance information prior to the park warden's intervention. In addition, he did not believe that the policy regarding two person dedicated patrols mitigated the potential hazards of an intervention because two park wardens do not make a situation safer. Nonetheless, he conceded that Jasper National Park has extended the policy and requires the presence of two park warden officers in situations of known or suspected poaching when an arrest is imminent.
- [343] Park warden Deagle testified regarding the BOLF notices --be on the lookout for -- that Parks Canada receive from other law enforcement agencies. BOLF notices report on vehicles or persons involved in offences and provide information regarding the last known location of the suspects, their expected or probable destination and any caution or danger warning. Jasper National Park receives two or three BOLFs weekly. However, they are communicated to park wardens that have operational responsibilities by email message, not directly to park wardens that are in their vehicle and may need to be notified. BOLFs that are not given directly to park wardens having operational responsibilities are put into a paper file in the dispatch office, for general review afterwards by all park wardens.
- [344] Park warden Deagle was trained and subsequently certified by the RCMP in 2000 as a police defensive tactics instructor. He is giving PDT training to Jasper National Parks' wardens and to other park wardens. He uses the manual provided by the RCMP PDT instructors and a version of the RCMP manual that Parks Canada has vetted and modified to reflect the terminology applicable to the agency and to its law enforcement policy, Directive 2.1.9. He now gives 5 or 6 PDT courses per year.
- [345] Park warden Deagle cited several excerpts from the RCMP PDT training manual giving caveats related to the various defensive tools and methods covered in the training.
- [346] On the subject of pepper spray, the manual mentions several disadvantages associated with the use of the spray. For example, its range is limited to 1 to 3 metres and it can be adversely affected by wind and rain. Its overall effectiveness may be reduced if the subject is wearing eyewear or a hat or is under the influence of alcohol or drugs. More significantly, some subjects are not affected by it and may in fact become more aggressive when it is used. It can take minutes to have the expected effect and cannot be used to react to edged weapons.

- [347] On the subject of defences against edged or impact weapons, the manual states that the purpose of these defences is not to deal with the threat of attack where the officers have time to deploy their sidearm in accordance with the IMIM training. Furthermore, the best primary response option is the firearm if the distance and time ratios are suitable.
- [348] On the subject of tactical repositioning, the manual states that in most circumstances when confronted with a subject armed with an edged weapon, the officers should try to tactically reposition to a safe distance and draw their sidearm. Tactical repositioning can only work if the subject is not already attacking or if the attack is not imminent. If the assailant drops his/her weapon but is still attacking, the officers control the behaviour of the individual with pepper spray or their baton. Park warden Deagle opined that a park warden using a long arm as a defensive weapon, as implied by Directive 2.1.9, would have to put the long arm on the ground to react to the assailant and would not likely be able to access it again if the situation escalated.
- [349] In the section entitled Target Zones, Closed Mode Strikes, Take down from the Closed Mode, the manual states that the defensive baton is not designed as a lethal weapon and is not an alternative lethal force. Instead, it is to be used to counter or stop an aggression. The officers must be aware of the parts of the body which, when struck, will allow control with the least possible harm or damage.
- [350] In the section entitled Open and Closing Low Profile Carrying, Open Mode Strikes Take Down from Operating Model Defensive Baton, the manual states that the firearm is the preferred intervention option against an armed assailant, but the defensive baton may be appropriate under certain circumstances. According to research, the officer needs 21 feet between him/herself and an assailant during an unsuspected attack to be able to draw the baton.
- [351] According to park warden Deagle, a critical component of the PDT training is practising the use of any tool or technique taught. This "muscle memory" is critical so that reactions are automatic when the park warden is under high stress and lethal force is appropriate. The so-called weapons of opportunity require no training or muscle memory and using the baton to deliver lethal force neither, even if memory training on the use of the baton will likely influence the park warden to direct blows to non-lethal body areas.
- [352] The section of the manual entitled Legal Articulation states that tactical repositioning is not an option where repositioning would be beneficial to the officer but detrimental to the public. Park warden Deagle held that this was another example where Parks Canada's law enforcement policy, Directive 2.1.9, was contrary to IMIM training.
- [353] Asked to comment on the apparent reduction, from 1422 to 498, of law enforcement occurrences between 2000 and 2004, reported in the *Jasper National Park Law Plan*, park warden Deagle replied that it can be explained in three ways. First, and more importantly, it was difficult to enter these occurrences into the electronic record when the Occurrence Tracking System was implemented in 2004. So, initially, minor occurrences, like a "dog off leash", were no longer entered. Second, Jasper became a separate municipality during the period 2000 to 2004. Therefore, occurrences which were

previously handled by park wardens, such as "barking dogs" or "dogs running loose", were handled by the town itself and statistics related to such occurrences were no longer included in the OTS. Thirdly, Parks Canada went to bulk files whereby a type of occurrence would be listed once. For example, the OTS system would generate one incident for illegal camping, even though there may have been forty to fifty actual events with different times, locations or dates.

Testimony of Mark McIntyre

- [354] Mark McIntyre, Senior National Park Warden and Law Enforcement Specialist, started working for Parks Canada in the summer of 1991 as a seasonal park warden at St. Lawrence Islands National Park. The following year, he was employed at Point Pelee National Park for three months. Later in the year, he transferred to Georgian Bay Islands National Park as a national park warden. He was appointed in his current position in 1994.
- [355] Park warden McIntyre holds the following designations: National Park warden/ Peace Officer; Special Constable, Ontario Provincial Police; Fishery Officer; Game Officer under the *Migratory Birds Convention Act*; Conservation Officer under the *Fish and Wildlife Conservation Act*; and Enforcement Officer under the *Species at Risk Act*.
- [356] Park warden McIntyre is a certified instructor and provides training in Parks Canada in the Police Defence Tactics Instructor Certification (RCMP); the ASP Collapsible Baton Instructor Certification (RCMP); and the O.C. Spray Instructor Certification (RCMP).
- [357] As a law enforcement specialist, park warden McIntyre oversees all law enforcement activities of park wardens inside and outside of the park, where park wardens can also act when an offence originates in the park.
- [358] As a park warden, Mark McIntyre has conducted investigations into poaching and patrols on foot, vessel, snowmobile, bicycle and all terrain vehicles to detect and deter illegal activity. He has assisted in the implementation of the bear and wildlife response program, coordinated the issuance, control and repair of all cell phones and related telecommunication equipment used by park wardens and developed the Emergency Response Protocol to be followed when park wardens or staff find themselves at risk of serious injury or death from a violent subject. He also enforces the *Controlled Drugs and Substances Act*, the *Liquor Licence Act* and provincial legislation as an OPP special constable and reviews and updates the MOU between Parks Canada and the OPP regarding their respective roles.
- [359] Park warden McIntyre explained that the Georgian Bay Islands National Park consists of 59 islands scattered over approximately 56 km and is located approximately two hours north of Toronto. There are no fences or gates to control access and registration and payment of park fees to dock boats or to use camp grounds are self reporting. Access in the summer is only by boat and access in the winter is by snow vehicles. Parks Canada maintains two park warden offices on the mainland at Honey Harbour and Midland.

- [360] In 2004, there were 44,000 registered visitors, which probably is an underestimation of total visitation. Boats often tie up in groups of up to 6 and there may be 40 to 60 boats moored at a dock. In the current year, the park implemented a zero tolerance policy regarding self reporting and payment of fees into payment boxes.
- [361] Park warden McIntyre referred to the *Georgian Bay Islands National Park of Canada Law Enforcement Plan*, dated April 2005, which stated that park wardens conduct three types of patrols at the park, resource patrols, general patrols and targeted patrols. The resource patrols are used to monitor the conditions of natural or cultural resources and there is a low probability of encountering persons committing offences since this type of patrol is conducted in low visitor areas. The primary purpose of general patrols is to monitor the condition of natural or cultural resources and ensure public safety. These patrols are conducted in moderate to high visitor areas, so there is a greater probability of encountering individuals committing offences and an increased likelihood of park wardens initiating a law enforcement response. The primary reason for targeted patrols is to investigate, detect and deter priority enforcement and compliance offences or problems identified in the law plan. This type of patrol can be conducted anywhere in the park.
- [362] Park wardens conduct compliant and non-compliant evictions resulting from resource and administrative law enforcement incidents, as well as compliant evictions resulting from public peace law enforcement offences encountered incidentally to their regular duties. Non-compliant evictions for public peace offences are referred to the OPP.
- [363] Park warden McIntyre testified that, notwithstanding the fact that Directive 2.1.9 specifies that park wardens are not to act as first responders, the park's law plan states that park wardens respond to all reported officer and staff safety concerns and requests for assistance. The plan further specifies that responding park wardens are to provide emergency assistance to other park wardens, the police, conservation officers and park staff requesting help to stop or deter violent subject behaviour. Park wardens are to confirm that the OPP have been notified of any such behaviour and are responding to the incident. The law plan further specifies that park wardens are to provide emergency service to prevent a violent subject from causing injury or death to officers or park staff, but are not to pursue subjects who have displayed grievous bodily harm or death and have fled the scene. Pursuit and apprehension to be left to the OPP.
- [364] Park warden McIntyre stated that this clarification was included in the law plan because of confusion over how to interpret sections 6.1.9 and 6.3.5 of Directive 2.1.9. He developed a communication protocol to ensure proper response occurred if a park warden or park staff was exposed to violent behaviour.
- [365] Park warden McIntyre stated that the more common public peace offences during the summer include trespass, consumption of alcohol, liquor offences, narcotics offences, noise and disturbance and vandalism to park property. In the winter, the common public peace offences include trespass, consumption of alcohol, liquor offences, narcotics offences and littering garbage. He noted that Directive 2.1.9 specifies that park wardens can only react to public peace offences discovered incidentally to non-dedicated patrols, but this has not significantly changed the number of law enforcement occurrences.

- [366] Park warden McIntyre testified that in the summer, patrols are done with two park wardens in the boat, but during winter, he carries out solo patrols lasting between 4 to 6 hours, 5 days a week. He justified the use of solo patrols by the fact that another park warden is either patrolling close by or monitoring the radio and available to come immediately, saying that this is how the park's management has interpreted the two person patrol policy in Directive 2.1.9. He conceded, nevertheless, that he appears in solo to subjects using the designated snow trails or trespassing.
- [367] The closest OPP detachment is located in Midland, approximately 30 minutes from Honey Harbour by land. From May to November, the OPP patrols on water in the Georgian Bay but their jurisdictional zone is vast. In the winter, the OPP officers on snowmobiles monitor snowmobile trails, but their presence in the park has substantially decreased since 1994 after one of the officers plunged through the ice with his snowmobile during an enforcement incident. Mark McIntyre opined that OPP officers are not as familiar with the area as park wardens and so are uneasy when patrolling the park.
- [368] Park warden McIntyre referred to an MOU between the OPP Midland Detachment and the park signed in 1995. The MOU was to be reviewed annually but has not been reviewed for the last four or five years because the OPP informed Parks Canada that it no longer wanted to have signed agreements at the local detachment level. Despite that, the MOU is considered an informal document of intent.
- [369] Park warden McIntyre pointed out that paragraph 2.2.1.2 of the MOU still provides that park wardens first on the scene will act as first responders and will secure the scene or evidence and/or maintain public safety until the arrival of the OPP in respect of *Criminal Code* offences. He also pointed out that under paragraph 2.2.1.3 of the MOU, the OPP may request park wardens to assist in investigations or other law enforcement operations within the park or immediately adjacent to it. This still constitutes present practice.
- [370] Park warden McIntyre confirmed the information given in the 2005 park's law plan about the MOU between Parks Canada and the OPP that the OPP cannot as a matter of course provide general patrol services specific to national parks. The MOU states that response time may vary depending on operational priorities and availability of OPP staff and field equipment in operation at the time of the request for back-up.
- [371] Park warden McIntyre testified regarding a letter that the Midland OPP Detachment Commander sent to Mr. Hugh Bremner, Chief Park Warden, on April 11, 2000. The letter refers to the excellent working relationship that has existed between park wardens and the OPP at the Georgian Bay Park but pointed out that response time will vary. Transportation of OPP members from the mainland to the islands would be the responsibility of park wardens, except if an OPP marine unit was in the area, but response time would be greater if the OPP vessel was at one extreme end of the park. The letter stated that delays would also occur if OPP officers were tied up with another priority and that response time could vary from fifteen minutes to about an hour. It also said that the investigating park warden had to be available both to brief and assist OPP officers present to enforce any part of the *National Parks Act*.

- [372] Park warden McIntyre illustrated the problem of back-up in connection with a narcotics arrest that he made in January of 2005. He stated that, weather permitting, the average response time of the OPP varies from 20 to 30 minutes if the OPP are already on the water or on snowmobiles patrolling the trails. However, that day, there was no OPP member available for back-up and he had to release the individual.
- [373] On the issue of the BOLFs, the MOU states that the OPP will supply them to park wardens as timely as possible. Park warden McIntyre testified that he has yet to receive a BOLF from the OPP.
- [374] Notwithstanding this, park warden McIntyre testified that he routinely runs the names of individuals he has encountered during his patrols through the CPIC system. He stated that he can access CPIC via the Ontario Provincial Coordination Centre by telephone or via Jasper National Park Dispatch Centre using his two-way radio. Quite often, the CPIC response confirms that the subject has been involved in such things as drugs or theft and has a violence flag. He opined that it is unwise for park wardens to assume that every individual they met is law abiding and poses no threat to the officer.
- [375] Park warden McIntyre also stated that the CPIC provides good information, but sometimes, codes used by CPIC query agencies to confirm the status of an individual vary widely. For example, in the winter of 2005, he stopped a snowmobile operator because there was no licence sticker on the snowmobile's licence plate. When he queried the individual's name on the CPIC through the Ontario Provincial Coordination Centre, he was told that the person had an outstanding arrest warrant and a criminal history. At the same time, he ran the subject's name through the CPIC dispatcher in Jasper National Park and was told that there was no record of warrant. He called the Midland OPP detachment who confirmed that the warrant was valid, but nobody could come and pick up the subject. He released the individual because he was not authorized by Directive 2.1.9 to exercise a warrant and he could not make the arrest without the OPP back-up.
- [376] Park warden McIntyre added that there can also be delays with CPIC queries if the Ontario Provincial Coordination dispatchers are not familiar with the park warden making the query. Dispatchers are permitted to release CPIC information only to authorized persons, which include park wardens, but there can be delays while the dispatcher checks the park warden's identity.
- [377] Park warden McIntyre testified concerning the soft body armour approved by directive of Chief Park Warden Hugh Bremner. He pointed out that soft body armour is issued to stop park wardens from being seriously injured or killed by subjects who accidentally or intentionally shoot them. The directive confirms that the Georgian Bay Islands park wardens regularly encounter individuals or groups of individuals who have criminal records for narcotic offences, weapons offences and assault offences. Also, between 1983 and 2002, nine law enforcement occurrences in the park document subjects resisting arrest by park warden with the intent to escape lawful custody. In eight of these nine occurrences, park wardens were physically assaulted with and without weapons and subjects threatened park wardens of serious injury.

- [378] Park warden McIntyre testified that in 2002, he wrote to Mr. Bremner that park wardens had health and safety concerns with regard to what was being proposed in the new Directive 2.1.9 to the effect that park wardens were not to respond to public peace complaints, but refer them directly to the jurisdictional police, in this case the OPP. He cited a recent incident involving an employee at the Honey Harbour administrative office after the rest of staff had left the office. Around 4.30 p.m., an intoxicated man entered the office acting strangely and refused to leave. The employee felt threatened and called the OPP. She also contacted park warden McIntyre by radio and explained the situation. The situation did not end badly, but everyone was concerned that Directive 2.1.9 prohibited park wardens from responding if they were available and could do so sooner than the OPP. Mr. Bremner answered that he would not allow employees' safety to be jeopardized by Directive 2.1.9 and authorized park wardens to respond to secure the scene should a similar situation arise and take whatever action they felt was necessary while maintaining their own safety.
- [379] Park warden McIntyre stated that a situation arose in 2003 after Directive 2.1.9 was implemented, where a park employee at Cedar Spring Campground, on Beausoleil Island, was threatened by a man who had been warned a couple of times about his dog running off leach. The employee was frantically calling for assistance from the duty park warden. Park warden McIntyre and another park warden had just moored their boat at Honey Harbour when they heard the radio communication and they went immediately to assist the employee with sirens and lights on. The subject was arrested and subsequently evicted from the park.
- [380] Park warden McIntyre testified regarding a Parks Canada site arming application report that was completed on the recommendation of the Georgian Bay Islands health and safety committee. He explained that in 2002, park wardens brought to the workplace committee their health and safety concerns about not being armed with a sidearm while they worked. The committee discussed and documented in the report the history of real and threatened violence against park wardens. It also gave a summary of the criminal history of individuals that park wardens had encountered at the park from 1992 to 1999. The summary listed 37 criminal records, including violence, peace officer assault while impaired, drug possession, motorcycle gang, failure to provide breath sample, dangerous operation of a vessel, theft, one active arrest warrant and other *Criminal Code* offences. The site arming application report was not processed because the Chief Park Warden, H. Bremner, and the Park Superintendent, Robert Prosper, refused to sign it.
- [381] Park warden McIntyre testified regarding an email that he received from Brett Moore, Manager for Resource Conservation, in May 2000, in response to an email that he sent to him earlier in 2000, to ask him what would happen if law enforcement risk mitigation measures considered in the new Directive 2.1.9 failed. He referred to various sections of Mr. Moore's response, of which I noted the following:

There is a policy in place. It does not include the issuance of sidearms. Continued arguments based on rhetoric are not productive. We have been directed to complete the law enforcement plans based on this policy and including risk assessment/mitigation to maximize officer safety within the bounds of the tools authorised.

There are inherent risks in performing law enforcement duties. ...It is recognized that there are no guarantees.

...With specific reference to your memo: -Parks Canada does not believe that risk mitigation can eliminate the need to deploy or use defensive equipment. It does believe that the IMIM is intended to ensure that only the appropriate tool or necessary force is used in response to a given behaviour. Officers may find themselves in a situation where deadly force is required to defend themselves or someone else. They are authorized to use the tools at their disposal. This includes self defence with firearms in their possession such as shotguns or rifles being carried for wildlife protection....

...Risk mitigation is not a substitute for defensive tools. That is why wardens are issued handcuffs, OC Spray, Defensive Batons, and soft body armour. The repeated reference to an "industry standard" as the basis for including sidearms as an essential tool is not accepted as sufficient justification.

Law enforcement has been and will continue to be an essential part of Warden Duties in achieving compliance and protecting heritage resources as provided under the NPA. It is recognized that there are inherent risks when performing these duties. ...There is no guarantee that an officer can contain the situation at the Co-operative level. Training and tools are to enable an officer to deal with escalation beyond this point, to defend themselves relative to the behaviour, and to recognize when it appropriate to tactically reposition.

Law planning and risk assessment is to anticipate and, to the degree possible, to avoid or minimize risk to officers. There are no guarantees with or without a firearm....

...Mitigation will occur in conjunction with the issuance of defensive tools. Not including sidearms....

...We know that both management (verbal tactics) and anticipating subject behaviour can fail. We know there are no guarantees.

The policy stands....

- [382] Park warden McIntyre commented that he has been taught as an IMIM instructor to tell park wardens to use the carotid artery technique for grievous bodily harm and death situations where the subject is unarmed. However, this technique is not appropriate when the subject is attacking with a club or knife, as it requires the park warden to come close to the subject to apply it. Thus, park wardens are not provided with instruction or training on any tool to deliver lethal force where the assailant attacks with a club, knife or firearm. The position of Parks Canada that park wardens can rely on their long arm, shot gun or any other weapon of opportunity to deliver lethal force in a situation of grievous bodily harm or death is impractical because officers need to develop muscle memory regarding the use of the tool in order to be effective under high stress. In addition, it could be difficult to find weapons of opportunity in marine settings, after sunset and during inclement weather. Park warden McIntyre provided several examples of law enforcement incidents in the past where park wardens had to function under high stress.

[383] Finally, park warden McIntyre opined that the risk mitigation measures of Directive 2.1.9 do not address how an offender reacts to a park warden, especially with respect to grievous bodily harm or death situations. It only deals with what the park wardens do and does not prevent subject behaviour.

Testimony of Dave Hanna

[384] Dave Hanna, conservation officer III and team leader, Parks and Protected Areas, Kananaski District, Province of Alberta, began working for Alberta Park Services in 1976 as a seasonal warden and became a fulltime park warden in 1979. In 2000, his agency was reorganized and he was appointed conservation officer. He currently is a level three conservation officer and is supervisor to four conservation II officers and two seasonal officers. In 2000, conservation officers in Alberta were equipped with a sidearm and trained on its use.

[385] Like federal park wardens, the focus of Alberta conservation officers is to manage resources in parks and protected lands and to ensure visitors have a good experience in the parks. Alberta conservation officers are appointed as peace officers and have the power to arrest. Their work consists of law enforcement in respect of resource protection, public safety, heritage protection and administration. It involves protecting fossil resources, conducting campground patrols, responding to noise and disturbance, dealing with public peace incidents, dealing with wildlife and verifying various administrative permits. In addition to enforcing provincial park legislation, conservation officers enforce other resource acts such as the *Forest Act* and the *Wildlife Act*. They also enforce traffic regulations in parks and day use areas, but not on public highways, which are the RCMP's responsibility.

[386] The wildlife law enforcement activities of conservation officers consist of dealing with poaching events and a myriad of administrative permits related to hunting licences, animal tagging and loaded weapons found in cars. The officers made less than 10 poaching investigations last year.

[387] Dave Hanna's jurisdiction is adjacent to Banff National Park and he has had frequent contact with federal park wardens. He has worked with them on boundary patrols, shared intelligence, sat on a joint committee on wildlife issues, participated with local Parks Canada management in the development of the park's law plan. He opined that conservation officers and park wardens do very similar work.

[388] Dave Hanna confirmed that he was often mistaken for one type of law enforcement officer or other. He has been mistaken for a park warden, a fish and wildlife officer and a member of the RCMP while standing beside an RCMP member. Dave Hanna's uniform is similar to that of park wardens and only varies with respect to colour and badges.

[389] Conservation officers are equipped with and wear a soft body armour, as well as a duty belt that includes the same tools as those carried by park wardens: handcuffs, flashlight, pepper spray and baton. They also carry a Glocke sidearm and two magazines, which is their primary equipment for applying lethal force in grievous bodily harm or death situations.

- [390] In addition to their sidearm, full time conservation officers are provided with a long arm meant for use against wildlife. They receive no training on its use as a defensive weapon, because it could too easily be taken away from them, it would interfere with their use of other defensive tools on their duty belt and its potential for unintended collateral damage is higher.
- [391] Dave Hanna stated that despite the fact that conservation officers are equipped with a long arm, he considers the sidearm absolutely essential against wildlife, because in some situations, it is not possible to hold a long arm while managing equipment or campers may be in the vicinity of a mauling and the long arm could cause collateral injury or damage.
- [392] Dave Hanna has never discharged his sidearm for law enforcement and has only needed to draw his weapon three times. In all cases, the incident was dealt with by the RCMP.
- [393] Dave Hanna stated that his agency applies the AACP use-of-force model, which is very similar to the IMIM model used and taught by the RCMP. The two models use different terminology but are essentially the same.
- [394] Dave Hanna was familiar with the principle of one-up. This principle is not part of the use-of-force model, but is often discussed during use-of-force training. According to it, the law enforcement officer should have the ability to have advantage to defuse or deescalate a situation. It does not justify the use of lethal force in a situation of grievous bodily harm or death, but suggests that drawing the sidearm in such a situation where there is adequate time and distance to do it safely would be consistent with the use-of-force model.
- [395] Dave Hanna stated that the CPIC system is generally reliable but is often down for updating on Sunday mornings, which is a problem for conservation officers because Friday evenings, Saturday afternoons and evenings and Sunday mornings are when they face unruly campers.
- [396] Dave Hanna commented on the difference between noise and disturbance offences and *Criminal Code* offences. Many offences committed in parks essentially fall under the *Criminal Code*. However, because park statutes have included noise and disturbance offences, conservation officers can deal with noise and disturbance as a public peace issue rather than as a *Criminal Code* matter, which is a softer way of dealing with *Criminal Code* offences.
- [397] Dave Hanna testified that RCMP back-up is variable and he has experienced delays varying from 2 to 5 minutes and up to 2 days. Back-up depends on the staffing situation at the detachment and on other responsibilities they have at any given time. He felt that staff shortages were not uncommon. In addition, the RCMP often asks conservation officers to assist them in transporting subjects.
- [398] On the subject of communication equipment, Dave Hanna stated that all conservation officers are equipped with personal radios and with truck mounted radios. However, there are lots of dead zones due to problems with radio repeaters in the mountains. Cell

phones are of limited use in 30 to 40 percent of the district. Satellite phones are provided for use in the backcountry but unlike a cell phone, the calls must be scheduled as they have to be aligned with a satellite, which can take 2 to 5 minutes.

- [399] Dave Hanna stated that the agency employs some 65 seasonal conservation officers in the summer, usually students, and second year seasonal conservation officers are appointed as special constables instead of peace officers. They are provided with a duty belt and a soft body armour, a baton, pepper spray, handcuffs, but no sidearm. They carry out front country and backcountry patrols but are not provided with long arms. As special constables, they do have the power of arrest in connection with offences under the *Gaming and Liquor Act*, the *Highway Act*, the *Wildlife Act*, the *Fisheries (Alberta) Act* and the *Alberta Sport, Recreation, Parks and Wildlife Foundation Act*. However, before undertaking law enforcement activities, they must obtain authorization from a conservation officer, who will try to go with them.
- [400] Dave Hanna agreed that organizations can use policy to direct the activities of their law enforcement officials. However, policy does not override the legal obligation that a conservation officer takes on through being appointed as a peace officer. He has thought a lot about being armed with a sidearm and, given the current situations in parks, he would work without a sidearm to deliver lethal force in situations of grievous bodily harm or death: his family is too important to him.

Testimony of Craig Hockley

- [401] Craig Hockley, Manager, Special Investigations and Forensic Services, Fish and Wildlife Division, Alberta Sustainable Resource Development Department, has held his current position for 19 years. Previous to it, he worked for 11 years as a seasonal national park warden, a full time federal fisheries officer and a conservation officer in British Columbia.
- [402] Craig Hockley supervises 8 full time fish and wildlife officers, 3 forensic scientists, 5 undercover fish and wildlife officers and 16 surveillance operators. He can access additional fish and wildlife officers from Enforcement Field Services according to project needs. The fish and wildlife officers are responsible for both resource management and law enforcement, including special investigations and undercover operations related to the illegal commercialization of wildlife as well as fish, and are armed with a sidearm. They are also responsible for client education in an effort to promote voluntary compliance to legislation. Moreover, they cooperate with Alberta conservation officers, who do similar work in provincial parks.
- [403] Both Alberta conservation officers and fish and wildlife officers wear a uniform that is similar and both carry a similar duty belt and suite of equipment that includes handcuffs, flashlight, baton, pepper spray and a utility knife. They also receive the same use-of-force training.
- [404] Alberta Fish and wildlife officers are responsible for enforcing the *Wildlife Act*; the *Fisheries (Alberta) Act*; the *Fisheries Act*; the *Migratory Birds Convention Act*; the *Forest Act*; the *Gaming and Liquor Act*; the *Highway Act*; portions of the *Environmental Protection and Enhancement Act*; and the *Criminal Code*.

- [405] Their principal activities are educating the public, dealing with problem wildlife, undertaking general patrols, responding to an array of public complaints and conducting investigations. They work in the wilderness and backcountry, which they access on horseback, foot, snowmobiles, ATVs and a variety of watercrafts. They are appointed as peace officers and have the power of arrest and seizure with or without warrant.
- [406] The undercover officers do not carry sidearms when working. To mitigate against the resulting gap in the use-of-force model for delivering lethal force, they receive supplemental instruction and training on hand to hand combat, including karate, open hand techniques and the use of a knife, as well as a form of mental training characterized as survival training in the face of desperate grievous bodily harm or death situations.
- [407] Craig Hockley agreed that officers might attempt to use any weapon of opportunity as well as other options in a situation of grievous bodily harm or death. However, it is important that they have a full suite of tools and training to be able to protect themselves or others in these situations. Their training must include the development of muscle memory in the use of tools or techniques, so that they become automatic and a reflex under high stress situations. The sidearm is important because it allows them to follow the up and down transitions from cooperative to combative in the subject's behaviour.
- [408] Craig Hockley held that the employer has a duty to equip and train its employees to deal with hazards that have a high risk of causing illness, injury or death, whether or not the risk frequency is low. He opined that, without a sidearm, officers are at a disadvantage when a situation is heading toward grievous bodily harm or death. He was not aware of any agency that used a long arm as a defensive law enforcement tool.
- [409] In his nineteen years of service with a sidearm, Craig Hockley has never discharged his weapon to enforce the law and has only drawn it on three occasions. He did draw and discharge his sidearm when assisting in the handling or hazing of wildlife.
- [410] Craig Hockley confirmed that he and his officers are equipped with a long arm and shotgun to deal with wildlife, but the sidearm is useful in that it does not have to be set down when one's hands are otherwise occupied.
- [411] The fish and wildlife officers do not enforce the *Highway Act* routinely, but, if they are driving a vehicle identified as a law enforcement vehicle and they see an unsafe act or driver, they will incidentally intervene. However, they are prohibited from engaging in high speed chases.
- [412] Craig Hockley was aware of the one-up or plus-one principle. He explained that, as an assailant's behaviour transitions up from cooperative to resistant or combative, the officer is behind the transition and, therefore, at a disadvantage. So plus-one is an action that officers take to catch up in time and distance to an assailant's escalation, in order to protect themselves or others and to take control of and deescalate the situation.
- [413] Craig Hockley commented on Robert Prosper's reference to the number of poaching occurrences connected with the work of his fish and wildlife officers. Not all statistics represented poaching incidents. Occurrences could have related to animal tagging offences, wrongly coloured vests or improperly stored firearms.

[414] Craig Hockley made observations on the communication equipment issued to and used by fish and wildlife officers. They are provided with two-way radios, cell phones and satellite phones when working alone. There were problems with each of these devices and satellite communications can be adversely affected by foliage and mountain valley locations.

Testimony of Garry Bogdan

[415] Garry Bogdan, Director, Prairie and Northern Region, Wildlife Enforcement, Environment Canada, has been working for Environment Canada for 28 years and a peace officer for 32 years. He manages the law enforcement and compliance program of the Canadian Wildlife Service. He presently supervises 11 wildlife enforcement officers, 3 forensic scientists and 5 undercover officers. Wildlife enforcement officers are appointed as peace officers and have the power of arrest. They are armed with a sidearm.

[416] The principal duties of his Branch involve inspections and investigations directly related to the enforcement of the *Migratory Birds Convention Act*, the *Canada Wildlife Act*, the *Species at Risk Act* and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

[417] The *Migratory Birds Convention Act* regulates the hunting of birds and protection of bird sanctuaries. Most jurisdictions in Canada have blanket authority to enforce the act, except for national park wardens. Some park wardens are designated under the *Migratory Birds Convention Act* when authorized by a specific park superintendent. The *Canada Wildlife Act* establishes national wildlife areas across Canada for the preservation of nature. Some wildlife areas permit access and others do not. Law enforcement activities related to the act include enforcing no-access where prohibited and verifying permits where access and hunting are controlled by permit. The *Species at Risk Act* is the joint responsibility of Parks Canada, Fisheries and Oceans Canada and Environment Canada. The *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* regulates the trade of species from one country to another. In this regard, wildlife enforcement officers spend a lot of time and effort at border points working with Customs officers to detect and deter violations.

[418] Wildlife officers under Garry Bogdan conduct overt and covert law enforcement operations. Overt operations involve uniformed and non uniformed officers dealing with hunters, permit inspections and the routine inspection of hunters and non-hunters. This entails working in the backcountry alone or in conjunction with other agencies, such as the RCMP, Parks Canada, provincial conservation officers, Agriculture Canada officers and officers of foreign countries.

[419] Covert law enforcement activities include special investigations where other compliance measures have failed. They are mainly carried out by wildlife enforcement officers in plain clothes, who assume a different identity to infiltrate and catch criminal organizations profiting in the illegal trade of wildlife and wildlife parts. Wildlife enforcement officers do not wear their sidearm during covert operations, but are trained in specialized hand to hand combat survival training.

[420] The incidence of wildlife poaching and illegal trade is significant and underreported. Garry Bogdan currently had from 50 to 60 open files on the illegal commercial transport of wildlife across provincial boundaries. The wildlife enforcement officers deal with offences under the *Canada National Parks Act* through park wardens if a park warden has been appointed under the *Migratory Birds Convention Act* or in conjunction with park wardens when there is none. Their activities include traffic stops, to which they still invite park wardens to take part.

[421] Garry Bogdan is responsible for ensuring the employees' health and safety by evaluating the danger during field operations and ensuring that officers have the necessary training to maintain their safety. He is also responsible for assuring the availability and proper working order of equipment needed for operations. As well, he cancels any operation that may endanger the officers because of the equipment or the danger involved by the investigation.

[422] Garry Bogdan confirmed that his job description includes the following danger notations:

When conducting inspections and investigations, psychological discomfort of dealing with alleged violators who may be angry, tense, and possibly hostile or confrontational.....

...Being away from home for extended periods of time, in adverse weather conditions and dealing with foul mouthed, armed, angry suspects causes psychological discomfort. This occurs over several days at certain times of the year.

Investigation and enforcement activities performed once or twice per week particularly during hunting season September to December involves driving to and from remote field locations on rough roads, travel by boat and small chartered airplane; exposure to inclement weather on rivers and the ocean, wearing protective clothing or body armour, and occasionally the threat of physical injury from armed or potentially dangerous suspects/offenders.

[423] The section of his job description entitled Risk to Health states that

there is a risk of serious injury or death from the possibility of firearm discharge while carrying a firearm during investigations, inspections and patrols: when serving summons and executing Search Warrants; practicing and qualifying in firearms use; assisting officers of other enforcement agencies; conducting significant or high-risk investigations and enforcement activities that may involve facing armed and potentially dangerous suspects/offenders; using force to take an accused into custody; and dealing with MBCA patrols and checking hunters. This occurs 4-8 hours at a time, 15 to 20 times per year, particularly during the hunting season September to December.

[424] G. Bogdan confirmed that, in the section entitled Environment, the job description of the wildlife enforcement officers states that

as an armed peace officer, the nature of the work is such that the incumbent is constantly faced with the potential for exposure to unpredictable behaviour or reactions when dealing with distressed, angry or confrontational clients and hunter.

He believed that the word "armed" could be removed without altering the statement.

[425] Garry Bogdan also confirmed that the job description of the wildlife enforcement officers states, in the section entitled Risk to Health, that

carrying a firearm during investigations, inspections, patrols, serving summons, practicing, qualifying and assisting other enforcement agencies, there is a risk of accidental discharge by any other peace officer involved in the operations. In dealing with the MBCA patrols and checking hunters, there is a risk of being assaulted or shot by the client. Both circumstances could result in disabling injuries or death. This can occur 8-12 hours at a time, 175 times per year.

[426] Environment Canada has its own instructors, who have been trained by the RCMP to provide training on the IMIM, firearms and PDT to its wildlife enforcement officers. While Environment Canada applies the RCMP's IMIM use-of-force model, it does not instruct its officers on CAPRA and substitutes it with its own version.

[427] Garry Bogdan confirmed that the IMIM training provided to wildlife enforcement officers deals with all subject behaviours up to lethal force and that the training for lethal force is the sidearm. However, he agreed that wildlife enforcement officers could use other weapons, such as a knife, a long arm and a vehicle, to deliver lethal force in order to stop a situation where the officer or a member of the public could be harmed. In fact, wildlife enforcement officers are instructed on the sidearm as the primary defensive weapon for delivering lethal force and the long arm as a secondary defensive weapon for delivering lethal force. Essentially, the long arm is used during road blocks or house clearings as a back-up defensive tool by officers wearing a sidearm. The sidearm is used most of the times, because it allows the officers to have their hands free and, during transitioning down (in response to subject behaviour), they would have to put the long arm down, which could be detrimental in situations where there are more than one individuals. The sidearm has the advantage of enabling the officer to transition up or down safely in response to subject behaviours.

[428] Garry Bogdan was familiar with the term one-up or plus one and understood to mean that the officer uses whatever IMIM use-of-force tool or technique is needed to regain and maintain control of the situation when the subject's behaviour transitions up. In other words: "don't bring a knife to a gun fight."

- [429] Garry Bogdan has worked with park wardens or adjacent to park wardens for more than 25 years. Before joining Environment Canada, he was an Alberta conservation officer and worked closely with park wardens at Prince Albert National Park. In the more recent past, the officers under him have dealt with the same big game species found in national parks. They have worked with park wardens on joint boundary patrols and the illegal sale of bear parts.
- [430] Although he has not observed park wardens carrying out their activities in the last two or three years, Garry Bogdan nonetheless held that the work of park wardens and wildlife enforcement officers was similar, in that they are both responsible for resource protection and perform similar duties in connection with it. He added that the wildlife enforcement officers' uniforms used to be purchased from the same supplier and four years ago, their uniforms were almost identical, except for the shoulder flashes and identifiers. Presently, the wildlife enforcement officers' uniform has the same colour as Fisheries and Oceans Canada's officers, but it still looks like the park wardens' uniforms. In addition, wildlife enforcement officers wear the same Stetsons as park wardens. Like them also, wildlife enforcement officers are equipped with a similar duty belt and suite of defensive tools. The one exception is that wildlife enforcement officers are issued sidearms and always carry them except for covert operations.
- [431] Garry Bogdan discussed the subject of the unpredictability of human behaviour with the RCMP training officer, Dr. Gary Bell, and agreed with his position. He did his own research after Dr. Bell's report and found that approximately 60 percent of the individuals they had charged during a 2-year period had serious *Criminal Code* violations and 35 percent had violence codes. He was also involved in a study on night hunters done by the Province of Saskatchewan, which found that over 80 percent of those offenders had perpetrated other *Criminal Code* violations. He believed that approximately 90 percent of the people are law abiding, 5 percent commit violations because of stupidity or ignorance of the law and approximately 5 percent have the *mens rea* intention to break the law in order to capitalize for personal gain or reputation. These are the individuals that are considered potentially violent.
- [432] Garry Bogdan testified that wildlife enforcement officers are equipped with cell phones, two-way radios on their person and in their vehicles and satellite phones. The communication equipment is useful to have, but any equipment is subject to failure, due to such things as battery limitations and dead zones, and cannot always be relied upon. That is why Environment Canada generally operates with the expectation that communication may not be possible.
- [433] Garry Bogdan essentially expressed the same opinion regarding the CPIC system. The system is subject to planned shut downs and this may be the time when the system is needed.
- [434] Garry Bogdan explained that wildlife enforcement officers must often work alone, but Environment Canada's policy on that subject encourages them to ask other agencies' officers as back-up where possible. An unarmed park warden would be considered as giving assistance, but would not be considered as back-up. He believed that an unarmed officer is a liability.

- [435] Garry Bogdan confirmed that he only drew his sidearm on three occasions during law enforcement operations, but never needed to discharge it. He personally knows RCMP officers who have never drawn or discharged their sidearm during law enforcement activities. He believed that subjects who are possibly under the influence of drugs or alcohol and who see that an officer is unarmed and outnumbered could be emboldened by the fact that the officer is unarmed to attack. Wildlife enforcement officers are taught by the IMIM that presence is part and parcel of law enforcement. They are taught that they are perceived as a person in authority who is worthy of respect. Even hardened criminals will think twice in the presence of an officer who appears confident and who is armed with a sidearm. On the other hand, the public expects a peace officer to assist them when needed and to enforce the law.
- [436] Garry Bogdan said that, at one time in the past, he did this type of work without a sidearm. Now, however, he would not work without a sidearm and neither would he expect his officers to do so. If a wildlife enforcement officer has not maintained his/her firearm certification, he/she will not participate in any law enforcement operation and will remain in the vehicle even if he/she is in uniform. All of his officers have been verbally or physically assaulted, but none have ever been killed in the line of duty. He believed that, whether spending 5 or 60 percent of the time in law enforcement activities, peace officers need a sidearm to do a professional job and to protect themselves and the public.
- [437] With regard to the option of observing, recording and reporting on a situation, as opposed to intervening, Garry Bogdan stated that this is what Environment Canada and the provinces instruct citizens to do when they see an offence being committed. Peace officers, on the other hand, are equipped and trained to enforce the law and the public expects that they will act. He believed that the strategy of observing, recording and reporting would not prevent officers from being attacked, because it is not the kind of strategy that an offender would expect from a person who is in authority, driving a marked vehicle and vessel, wearing a uniform and carrying a suite of defensive tools.
- [438] On the subject of tactical repositioning, Garry Bogdan reiterated the opinions expressed by others that it may not be possible for an officer to tactically reposition in all situations. There may be no escape route, the officer may be outnumbered or the attack may have already started.
- [439] On the subject of RCMP back-up, Garry Bogdan observed that, since 1985, Environment Canada has seen a constant decrease in the involvement of RCMP members in other than *Criminal Code* enforcement activities. The RCMP may initially agree to assist in departmental operations, but his experience has been that in nine out of ten times, the RCMP members are called away. Environment Canada relies on the RCMP to provide cells to hold arrested individuals and to do fingerprinting, but it cannot expect that it will transport those individuals to the holding cells.
- [440] On the subject of sidearms and working with wildlife, Garry Bogdan stated that scientists and technical staff are equipped with and carry sidearms when they are conducting research. They also carry long arms, but because they often need their hands to be free to do tagging, baiting and measuring, they cannot hold it for long. He added that Environment Canada also employs approximately 150 pollution control officers, who are appointed as peace officers and have the power of arrest, but who do not carry sidearms.

- [441] On the subject of Environment Canada's law enforcement statistics, Garry Bogdan confirmed that, the previous year, a wildlife enforcement officer conducted a road check of 200 hundred people, including hunters transporting firearms. Additionally, according to the statistics, an officer could do as much as 400 stops in one season. Most of the stops involved lawful hunters.
- [442] Finally, Garry Bogdan confirmed that he was aware that, unlike wildlife enforcement officers, park wardens no longer conduct highway stops, carry out undercover work, execute search warrants or conduct solo dedicated patrols.

Appellant's Submission

- [443] Mr. Graham and Mr. Lambrecht presented oral and written summation arguments for Parks Canada. While their submission is not reproduced here, it has been carefully reviewed and considered in my decision. I retain the following for the purposes of my decision.
- [444] Mr. Graham reviewed the evidence of witnesses. He first noted that HSO Grundie testified that he had no previous experience or understanding of sidearms or of law enforcement work carried out by national park wardens. He also pointed to HSO Grundie's testimony that this was his first national investigation and he had no guidelines for completing such an investigation.
- [445] Mr. Graham held that HSO Grundie's decision that a danger existed for Parks Canada wardens and his subsequent directions to Parks Canada should be rescinded. HSO Grundie had erred because he accepted the anecdotes or opinions that were given to him by PSAC or the Park Wardens Association which, said Mr. Graham, was a pro-arming group. HSO Grundie fell victim to confirmation bias and ultimately erred in his decision when he confused risk with danger.
- [446] Mr. Graham referred to the testimony of Dr. Phillip C. Stenning relative to institutional accountability mechanisms in place with respect to police agencies whose members are authorized to use lethal force. He pointed out to Dr. Stenning evidence that available research suggests that routine carriage of firearms by police may lead to increased aggression from subjects (the weapons effect), victimization of officers by their own firearms and police officers being charged with manslaughter or murder.
- [447] Mr. Graham recalled that Dr. Stenning had opined that the term police can be used in different senses. He referred to Dr. Stenning's evidence that, while the term traditionally refers to police agencies appointed pursuant to policing acts, policing services are increasingly provided by a wide variety of people and institutions having different mandates in terms of duties and responsibilities. He held that the provision of training, equipment and resources to such individuals is a function of what the individuals do rather than of their legal powers.
- [448] Mr. Graham noted in Dr. Stenning's testimony that the chief characteristic of the use-of-force model was a strong emphasis on avoiding the use of lethal force unless absolutely necessary in light of the nature and extent of the threat faced.

- [449] Mr. Graham argued that this review was not to decide whether or not public safety was jeopardized by the changes to park warden law enforcement activities following HSO Grundie's direction to Parks Canada. Nor was it to decide whether park wardens should take their instructions from members of the public who report serious crimes in progress and expect park wardens to deal with those. Rather, he held, it is about the application of the *Canada Labour Code* to a focused law enforcement setting.
- [450] Mr. Graham recalled the testimony of Robert Prosper that the park wardens' role consists of resource management, public safety and law enforcement. He further recalled that, according to Robert Prosper, the resource management function was increasingly important to Parks Canada and this was reflected by the fact that 23 to 30 percent of park warden recruits possessed a University Masters or Doctorate degree. Robert Prosper's further evidence was that most of the 400 plus park wardens in Canada performed law enforcement for about 15 to 25 percent of their time. Robert Prosper stated that some park wardens never engaged in law enforcement and a few were involved in law enforcement 100 percent of the time.
- [451] Mr. Graham called to mind that, according to Robert Prosper, the *Law Enforcement Administration and Operational Manual* and *Law Enforcement Management Directive 2.1.9* were revised following the *Resource Conservation Function Study* and the *Park Warden Officer Safety Study* that Parks Canada conducted, which looked critically at the roles and responsibilities of park wardens. Robert Prosper's evidence was that the overall strategy of the new law enforcement policy is to eliminate and minimize risk by reducing the frequency of exposure to risk or to mitigate the remaining risk.
- [452] With regard to eliminating higher risk law enforcement activities, Mr. Graham pointed out that Directive 2.1.9 no longer authorizes park wardens to conduct wildlife enforcement activities related to hunting outside park boundaries, undertake house searches without the jurisdictional police first securing the scene, undertake undercover, infiltration or assumed identity operations, or conduct highway traffic enforcement. He noted that, under Directive 2.1.9, park wardens no longer conduct wildlife vehicle stop checks, arrest for outstanding warrants unless they are for *Canada National Park Act* offences, or respond to incidental public peace occurrences on highways, where their intervention is limited to observing, recording and reporting the occurrence to the jurisdictional police.
- [453] Mr. Graham recalled that according to Directive 2.1.9, park wardens do not respond to public peace complaints as a first responder, undertake specific patrols to detect or intervene into public peace incidents, except for noise and disturbance in campgrounds, or conduct evictions related to public peace incidents, including noise and disturbance in campgrounds. Such evictions are carried out by the jurisdictional police. He also pointed out that Directive 2.1.9 does not authorize park wardens to set up road blocks for apprehending speeding vehicles, conduct high speed pursuits, break up unlawful public assemblies or respond to security breaches at park buildings.

- [454] On the subject of minimizing hazards exposures related to law enforcement, Mr. Graham referred to *Law Enforcement Management Directive 2.1.9* and the *Law Enforcement Administration and Operational Manual* and to the testimony of Robert Prosper. He held that according to the evidence, park wardens are no longer required to intervene incidentally in all public peace offences and are not expected to expose themselves to danger if they do intervene within established policies. Furthermore, park wardens are no longer required to intervene directly in all law enforcement incidents and their intervention can vary depending on the risk assessment. He recalled that Robert Prosper had testified that park wardens could call the jurisdictional police service for back-up. Finally, he brought to mind that park wardens no longer carry out directed patrols targeting administrative enforcement.
- [455] Mr. Graham also referred to those documents and Robert Prosper's testimony to argue that, based on the evidence, park wardens can no longer intervene beyond observing, recording and reporting, unless mitigation measures are met relatively to: access to the CPIC; dispatch; back-up; communications reliability; uniform; defensive equipment; and soft body armour. Additionally, park wardens are not expected to directly intervene in an offence where they are at risk of grievous bodily harm or death and they are not restricted to a specific suite of tools to assist them in the effective use-of-force, provided it is justified.
- [456] Mr. Graham further pointed that park wardens are no longer authorized by Directive 2.1.9 to undertake dedicated backcountry law enforcement patrols without another peace officer or park warden. He also recalled that Directive 2.1.9 prohibits park wardens from responding to a report of known or suspected poaching without another peace officer or park warden, or intervening in a noise and disturbance complaint without another peace officer or park warden.
- [457] Mr. Graham added that pursuant to Directive 2.1.9, park law plans must identify local mandatory officer safety risk mitigations that are to be employed in addition to the national safety risk mitigations specified in the directive. Also, park wardens are required to take officer safety training (IMIM/PDT) semi-annually, with 20 hours of skill practice to improve muscle memory.
- [458] Mr. Graham referred to John Good's evidence regarding the comparative study that he carried out for Parks Canada on law enforcement in Canada's national, provincial and territorial parks. According to this evidence, most jurisdictions in Canada employ full time and seasonal park officers who are appointed as peace officer under the *Criminal Code* but are not armed with a sidearm. These officers, he held, have the power of search and of seizure.
- [459] Mr. Graham maintained that John Good's study demonstrated that the number of law enforcement occurrences and assaults and injuries to park officers are consistently low, the upper estimate being 10 assaults in Manitoba. The study also showed that most of the offences reported related to public peace or resource protection while poaching accounted for a small percentage.

- [460] Mr. Graham noted that John Good's survey results established that all jurisdictions provided their park officers with uniforms and radios and that many jurisdictions provide their park officers with pepper spray, handcuffs and a collapsible baton. He recalled that some jurisdictions also provided long arms for wildlife purposes, while only the provinces of Manitoba and Alberta provide their park officers with a sidearm and a long arm for their law enforcement programs. The study also showed that conservation officers responsible for enforcing hunting and fishing law in the provinces of Alberta, Manitoba, Nova Scotia, Ontario, Saskatchewan and the Yukon Territories are equipped with sidearms.
- [461] Mr. Graham stated that according to Bruce van Staalduinin's evidence, Ontario provincial parks employ approximately 250 park wardens throughout the park system who are not issued sidearms for the purpose of the *Provincial Parks Act*. The overwhelming majority of them are seasonal employees working from May to Thanksgiving Day.
- [462] Mr. Graham referred to Bruce van Staalduinin's testimony regarding the similarities between federal and Ontario park wardens. For example, Ontario park wardens are not expected to lay charges under federal criminal or drug laws, but to refer such cases to the OPP. Moreover, they are not expected to pursue fleeing vehicles nor to do more than receive complaints for a variety of other matters and to attempt to preserve the scene of the offences.
- [463] Mr. Graham noted that Ontario park wardens do not have the power of arrest under the *Provincial Parks Act*, but they do have that power under the *Liquor Licence Act*, the *Highway Traffic Act* and the *Trespass to Private Property Act* and the *Criminal Code*. Ontario park policy is also that park wardens must exercise discretion and not take action which could place them at risk or increase the risk of physical confrontation nor where a subject becomes confrontational or threatening.
- [464] Mr. Graham recalled evidence that Ontario new park wardens must complete a two week course that covers their authorities, responsibilities, accountabilities and liabilities and provides three days of use-of-force training on the provincial use-of-force model. Returning park wardens must complete a one day and a half course on use-of-force to be recertified on that subject.
- [465] Mr. Graham pointed out that the evidence was that Ontario park wardens, like federal park wardens, wear distinctive uniforms with crests and carry a wallet badge, they are equipped with duty belts on which they carry a radio, a flashlight, handcuffs and an ASP 21 extendible baton. However, Ontario park wardens do not carry pepper spray or wear soft body armour.
- [466] Mr. Graham reviewed the evidence of Inspector Browning. He pointed out that the IMIM assists members of the RCMP in making decisions concerning the use-of-force. He stated that, according to Inspector Browning, it is also used to debrief members of the force following an intervention and to assist them in articulating their decision making process. He recalled Inspector Browning's evidence that the IMIM does not require officers to use a level of intervention greater than the level of resistance offered by a subject. This was referred to as the one-up or plus one rule.

- [467] Mr. Graham referred to Inspector Browning's evidence that verbal intervention/negotiation skills are the most important IMIM options that may be used effectively in response to any level of resistance. Inspector Browning also testified that RCMP members are not trained to use their baton to deliver lethal force but understand that they can use it, or any other device of opportunity, to deliver lethal force in situations of grievous bodily harm or death.
- [468] Mr. Graham stated that Inspector Browning testified that the IMIM does not require that officers who use it be equipped with a sidearm or trained in the use of a sidearm. According to Inspector Browning's testimony, the decision to equip RCMP members with a sidearm was a matter of policy and not a requirement of the IMIM.
- [469] Mr. Graham recalled that Inspector Browning also confirmed that there are a risk associated with drawing a sidearm should a struggle ensue and the officer loose his/her weapon.
- [470] Mr. Graham reviewed the evidence of Guy Mongrain who described the CPIC computer system, the agencies that have access to the system, the status of the hardware and software updates to the CPIC system as a result of renewal, the nature of the information in each of the databases, files and sub-files of the CPIC, the ways to access that information remotely and the statistical measurement of its operational capacity. Mr. Mongrain's evidence explained the message side of the CPIC and BOLF messages and of the messages sent to warn all users of routine scheduled maintenance periods.
- [471] For his part, Mr. Lambrecht argued that the Appeals Officer's review is a *de novo* review and should examine the contemporary law enforcement policies and practices in place at Parks Canada, as opposed to the policies and practices that were in effect when park warden Douglas Martin filed a health and safety complaint in 2000. In this regard, he cited the decisions made by Appeals Officer R. Lafrance in *Bernadette Hogue-Burzynski et al. and VIA Rail Canada*⁶, by the Federal Court of Appeal in *Douglas Martin, supra*, at paragraph 28, and in by the Federal Court in *Juan Verville and Service Correctionnel du Canada*⁷, at paragraph 32.
- [472] Mr. Lambrecht held that the issue in this case is whether contemporary law enforcement activities carried out by park wardens without a sidearm as standard issue equipment constitutes a danger under Part II of the *Canada Labour Code*. He maintained that a danger does not exist for park wardens carrying out law enforcement without a sidearm, because it is not reasonably likely that they will be exposed to a situation of grievous bodily harm or death in the current circumstances, given the current focused law enforcement mandate of park wardens and the current law enforcement policies and practices reflected in the revised *Law Enforcement Administration and Operational Manual* and *Law Enforcement Management Directive 2.1.9*. He made particular reference to the personal protective equipment, training and operational mitigations in Directive 2.1.9.

⁶ *Bernadette Hogue-Burzynski, Suzanne Brisson, Margaret R. Hegier and Jennifer Roy and VIA Rail Canada*⁶, [2006] CLCAO Decision No. 06-015

⁷ *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent*, 2004 FC 767

[473] With regard to the nature and scope of law enforcement duties of park wardens, Mr. Lambrecht stated that park wardens are appointed pursuant to section 18 of the *Canada National Parks Act*, which reads:

18. The Minister may designate persons appointed under the *Parks Canada Agency Act*, whose duties include the enforcement of this Act, to be park wardens for the enforcement of this Act and the regulations in any part of Canada and for the preservation and maintenance of the public peace in parks, and for those purposes park wardens are peace officers within the meaning of the *Criminal Code*.

[474] Mr. Lambrecht stated that the statutory definition of peace officer is set out in section 2 of the *Criminal Code*. He noted that it includes, but is not limited to police. He concluded from this that police officers are peace officers, but not all peace officers are police officers.

[475] Mr. Lambrecht maintained that, instead of creating a police force, section 18 of the CNPA only authorizes the Minister to designate park wardens for specific law enforcement purposes. In that regard, he held that sections 4 and 8 of the *Canada National Parks Act* confirm that the core mandate of Parks Canada and its employees is resource management. He added that designation under section 18 enables a park warden to enforce the *Criminal Code* within the scope of pre-existing authority and to benefit from certain protections granted only to peace officers.

[476] Mr. Lambrecht insisted that the CNPA does not create a police force. These, he held, are created by specific legislation, like the *Royal Canadian Mounted Police Act* or the equivalent provincial legislation. He stated that the *Royal Canadian Mounted Police Regulations* specifically require RCMP officers to maintain law and order in national parks. In this regard, Mr. Lambrecht referred to section 42, Code of Conduct, of the RCMP Regulations which reads:

42. A member, other than a civilian member, shall take appropriate police action to aid any person who is exposed to danger and who is in a situation where danger may be impending.

[477] Mr. Lambrecht further held that conferring peace officer status to park wardens does not make the park warden a police officer, nor does it mean that park wardens have a police mandate. Rather, it provides authority enabling a park warden to enforce the *Criminal Code* within the scope of Parks Canada authority. In this regard, he cited the Supreme Court of Canada in *R. v. Nolan*⁸:

On the level of principal, it is important to remember that the definition of “peace officer” in section 2 of the *Criminal Code* is not designated to create a police force. It simply provides that certain persons who derive their authority from other sources will be treated as “peace officers” as well, enabling them to enforce the *Criminal Code* within the scope of their pre-existing authority, and to benefit from certain protections granted only to “peace officers”. Any broader reading of s. 2 could lead to considerable constitutional difficulties.

⁸ *R. v. Nolan*, [1987] 1 S.C.R. 1212

[478] Mr. Lambrecht stated that, while section 18 of the CNPA confers a general authority, it does not specify how it is to be carried out. This is done largely by policy, which defines the obligations of park wardens conducting law enforcement. These policies are specified in the *Law Enforcement Administration and Operational Manual* and *Law Enforcement Management Directive 2.1.9*. The policies limit intervention. Mr. Lambrecht argued that the general authority conferred on park wardens by section 18 of the *Canada National Parks Act* does not trump or override the policies of the employer.

[479] In this regard, Mr. Lambrecht cited that the capacity of police to influence mandate and the exercise of individual discretion is described in paragraph 118 of the English decision in *R. v. Commissioner of Police, Ex parte Blackburn*⁹, which reads:

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution sought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. He can also make policy decisions and give effect to them, as for instance, was often done when prosecutions were not brought for attempted suicide.

[480] Mr. Lambrecht held that testimony of some park wardens interpreted that the phrase “preservation and maintenance of public peace in parks” created a duty to intervene in *Criminal Code* matters beyond the law enforcement duties set out in Directive 2.1.9 as if they were the police. He held these park warden witnesses thought that there was an alleged conflict between the subjectively perceived “public expectations” or “ethical obligation” to respond to requests from the public to engage in law enforcement that exceeded policy limits and placed their lives in danger. He held that the phrase “preservation and maintenance of public peace in parks” only affords park wardens the protection of sections 231 and 235 of the *Criminal Code*.

[481] Mr. Lambrecht argued that the protection of section 231 of the *Criminal Code* arises because Parliament saw fit to include the phrase “preservation and maintenance of public peace in parks” within section 18 of the CNPA. This brings within the scope of the protection of sections 231 and 235 of the *Criminal Code* park wardens who are acting within the course and scope of their duties when engaged in the preservation or maintenance of public peace. He stated that, by virtue of subsection 231(4), murder of any person employed for the preservation and maintenance of the public peace, acting in the course of duties, is first degree murder, irrespective of whether it is planned or deliberate, and section 235 specifies that the penalty of life imprisonment is a minimum punishment. He added that section 25 of the *Criminal Code* enables park wardens to use lethal force. However, said Mr. Lambrecht, the legal threshold for use of lethal force is

⁹ *R. v. Commissioner of Police, Ex parte Blackburn* [1968] 2 QB 118

also set out in the *Criminal Code* and is described by the Supreme Court of Canada in *R. v. Pétel*¹⁰ as follows:

...there are three constituent elements of self-defence when, as here, the victim has died: (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary.

- [482] In this regard, Mr. Lambrecht added that none of the witnesses described an event where that threshold had been reached. He asserted that the assessment of the probability of danger in this case, and the necessity for sidearms as a standard issue equipment, must have regard to the fact that such equipment is only used where the legal criteria outlined in *R. v. Pétel*, *supra*, are met.
- [483] Mr. Lambrecht argued that park wardens are not police and do not have the same mandate or risk as municipal, provincial or federal police forces. He pointed out that Sergeant Butler testified that he had made hundreds of arrests over eight years of service and that his experience was similar to other officers of the Calgary Police Department. He referred to Duane Martin's testimony that he had never made an arrest since 1993. He held that the difference in arrest frequencies illustrates the differences in risk between a police mandate and the law enforcement mandate of the Parks Canada wardens.
- [484] Mr. Lambrecht further argued that park wardens cannot be compared with conservation officers or Canadian wildlife enforcement officers. This, he stated, is because they are only engaged in law enforcement for approximately 15 to 25 percent of their time and national park wardens are not similarly mandated to approach armed hunters to conduct licence checks. On that basis, he held that the law enforcement activities of park wardens are more comparable to provincial conservation officers who are unarmed, and any consideration of an industry standard vis-à-vis arming park warden cannot overlook provincial conservation officers in Ontario and Alberta.
- [485] Mr. Lambrecht held that park wardens are not required to check for recreational hunting licences inside park boundaries because hunting was prohibited in national parks. He maintained that similarly mandated agencies that have peace officer status, enforce some criminal law, have and exercise the powers of arrest and wear ballistic vests are not issued sidearms. He argued that the duties of park wardens are more comparable to those of unarmed provincial park wardens. On that basis, he asserted, any consideration of sidearms as an "industry standard" cannot overlook or ignore provincial park wardens.
- [486] Mr. Lambrecht reiterated that Parks Canada's current law enforcement policy eliminates higher risk activities, reduces the frequency of exposure to other law enforcement activities and mitigates any remaining risk associated with law enforcement activities carried out by park wardens. He compared Parks Canada's review of its law enforcement program with the requirements in Part XIX (Hazard Prevention Program) of the *Canada Occupational Health and Safety Regulations* made pursuant to Part II of the *Canada Labour Code* to show that Parks Canada was in compliance.

¹⁰ *R. v. Pétel* [1994] 1 S.C.R. 3

- [487] Mr. Lambrecht argued that Parks Canada has introduced a compliance strategy into its overall functions and this serves to reduce the number of occasions when a law enforcement activity arises.
- [488] Mr. Lambrecht held that park wardens are given modern training in a contemporary use of IMIM and the use of police defence tactics so that they can respond to situations in which they may be assaulted or threatened. He noted that few had reported using PDT techniques extensively outside of training.
- [489] Mr. Lambrecht pointed to the fact that park wardens are provided with modern defensive protective equipment and given access to modern communications equipment enabling communications across in parks and timely access to the CPIC.
- [490] Mr. Lambrecht maintained that the inherent risks faced by park wardens conducting law enforcement are mitigated through hazard identification and assessment methodology, reporting requirements within an Occurrence Tracking System, employee education and program evaluation. Also, park wardens engage in law planning exercise in which additional local mitigation measures are identified and applied.
- [491] Mr. Lambrecht asserted that park wardens understand that they may intervene to aid a person exposed to danger, if doing so does not place them in danger or cause them to exceed Parks Canada's law enforcement policy limits in Directive 2.1.9. According to that directive, if the park wardens cannot intervene to aid a person exposed to danger without placing themselves in danger or causing them to exceed Parks Canada's law enforcement policy limits in Directive 2.1.9, the park wardens should observe, record and report (ORR) the incident to the police and/or other appropriate authority. These, Mr. Lambrecht held, are the rules of engagement for park wardens.
- [492] Mr. Lambrecht held that there is no regular or anticipated exposure to risk as such situations are exceptionally rare and unknown in a national parks law enforcement environment. He referred to the officer safety study conducted by Dr. Evans, which was based on thousands of occurrence reports from park wardens across Canada. He also referred to the Occurrence Tracking System that had been put in place since 2003. Neither the officer safety study nor the Occurrence Tracking reveal situations where park wardens were seriously injured or killed while performing law enforcement activities. The studies data confirm that the risk of a park warden being exposed to grievous bodily harm or death is rare and the risk of injury even rarer.
- [493] Mr. Lambrecht held that park wardens have the measures in the new *Law Enforcement Management Directive 2.1.9* to resolve every circumstance in which they have been involved without injury or death. He referred the testimony of park warden Hawkins regarding several incidents in which he had been involved and noted that all had been resolved through verbal negotiation, tactical repositioning and reliance on police support. He added that park wardens are not restricted to a specific suite of tools to assist in the effective use-of-force, provided the use-of-force is justified. Thus park wardens could use their long arm or any other weapon of opportunity.

- [494] Mr. Lambrecht stated that the unpredictability of human behaviour would not be corrected if all park wardens were given sidearms as PSAC and park warden Douglas Martin requested. He argued that there is only a very remote possibility that a park warden might be threatened by grievous bodily harm or death in circumstances where the use of lethal force by a park warden, through the use of a sidearm, would be the only effective means of response. He added that it is not certain that a sidearm would be useful or necessary in such a situation. He reasoned that the threat could come from outside of the effective range of a sidearm or within the so called "21 foot rule".
- [495] Mr. Lambrecht added that issuing sidearms to park wardens could represent a risk for them. He cited the testimony of Dr. Stenning that the sight of a sidearm could cause a subject to be more aggressive towards a law enforcement officer; the sidearm could be taken from and used against the officer; the sidearm could be used in a suicide attempt, including by the officer; or accidental discharge of the sidearm could injure a subject and result in the officer being charged in a criminal case. He reiterated that park wardens have other alternative options likely to be available, including tactical repositioning, verbal de-escalation or intermediary defensive weapons.
- [496] Mr. Lambrecht argued that a sidearm is only for situations of grievous bodily harm or death. It is not to make a park warden feel more confident, to coerce someone to comply with the law or to embolden to respond to public peace incident at the behest of a member of the public.
- [497] Mr. Lambrecht argued that PSAC had not tendered any evidence beyond anecdotal opinion or conjecture to support its position that there is increased risk to park wardens conducting law enforcement because of high penalties under the CNPA. He maintained that penalties under the CNPA were significantly increased by legislative amendment to the CNPA in 1988. He held that there has been no proof in the 18 years since the amendments that there is a cause and effect linking penalties to risk faced by park wardens.
- [498] Mr. Lambrecht also argued that the CNPA provides for a range of penalties with a maximum ceiling. He noted that the respondent did not cite any case investigated by a park warden where the maximum penalty under the CNPA was applied by the Courts.
- [499] Mr. Lambrecht added that any park warden who anticipates being exposed to danger can refuse to work under Part II of the *Canada Labour Code*. He noted, in this regard, that only park warden Douglas Martin has done so.
- [500] With regard to the OTS, Mr. Lambrecht pointed out that the system tracks all violent incidents, including situations where a park warden is verbally abused or threatened. He stated section 6.11 of Directive 2.1.9 provides for annual monitoring and evaluations of the law enforcement program to ensure that field units and parks are meeting the standard of the policy and that any deficiencies and ambiguities in national policy, standards and procedures are corrected in a timely matter.

- [501] Mr. Lambrecht noted that the allegation had been made that Parks Canada is intransigent because it refused to accept recommendations from outside third parties regarding the arming of park wardens. He maintained that this allegation overlooks entirely that these third parties made many other recommendations concerning the health and safety of park wardens, many of which were accepted by Parks Canada. He added that a modern MOU with the RCMP is being developed and that Parks Canada is in compliance with paragraph 125(1)(z.03) of the *Canada Labour Code* and Part XIX of the *Canada Occupational Health and Safety Regulations*, Hazard Prevention Program.
- [502] Mr. Lambrecht noted that the Federal Court has confirmed that anecdotal evidence can be received by an Appeals Officer but leaves the weight that the Appeals Officer gives to it subject to judicial review. He held that this case has featured anecdotal and opinion evidence in support of the complaint. Mr. Lambrecht cautioned that anecdotal evidence can be mistaken or false and that deductions based on such evidence can be wrong because it is not necessarily typical.
- [503] Mr. Lambrecht maintained that no law enforcement agency of any kind issues equipment to meet all conceivable risks. Thus there is no breach of duty by Parks Canada pursuant to subsection 145(1) (contravention) and section 124 (duty of employer) or subsection 145(2) (danger) of the *Canada Labour Code*, related to not issuing a sidearm as standard equipment to park wardens.
- [504] Mr. Lambrecht maintained that it is not necessary for the employer to prove that HSO Grundie was in error in order to obtain relief from the Appeals Officer. In this regard, he cited the decision of the Federal Court in *Canadian Freightways*¹¹ and, more recently, the decision of Appeals Officer Cadieux in *Mr. Juan Verville*¹².
- [505] Notwithstanding its position on the onus of proof, the employer submitted that HSO Grundie committed fundamental errors in methodology and in reasoning. For example, HSO Grundie never observed any law enforcement activities conducted by any park warden anywhere in Canada, despite his lack of knowledge about the mandate and duties of park wardens. Additionally, HSO Grundie kept no written notes of the content of any communication with the complainant Douglas Martin. Furthermore, HSO Grundie did not interview a senior manager until the very end of his investigation and then only asked three brief questions. He did not ask about the position of the Agency in relation to documents or issues which were referred to and relied upon in his Reasons for Decision, including the standard of care, the Strategic Direction and the mandate of park wardens compared to police and conservation officers.
- [506] According to the submission, HSO Grundie also failed to include all relevant documents in his report after gathering documents through PSAC and the Park Wardens Association. Specifically, HSO Grundie did not include in his final report the email account of an assault on an off-duty warden, in which the park warden wrote that he feared that, if he had been armed with a sidearm, it would have been taken from him and used to take his life.

¹¹ *Canadian Freightways Limited and Attorney General of Canada and Western Canada Council of the Teamsters*, 2003 FCT No. 391, T 2279-01

¹² *Mr. Juan Verville and fifteen other correctional officers and Correctional Service of Canada, Kent institution*, CLCAOD No. 02-013

- [507] Mr Lambrecht held that HSO Grundie erred when he compared the law enforcement mandate of Parks Canada to that of any municipal, provincial or federal police force, without first obtaining the mandate of any police force in Canada. While he interviewed Sergeant Butler of the Calgary City Police, his notes of that interview do not reflect an appreciation of the focused equipment issued to the Calgary City Police, which included armoured personnel carrier, bomb detection equipment, chemical detection equipment, riot squad and sniper squad equipment.
- [508] According to Mr. Lambrecht, HSO Grundie erred when he compared park wardens to conservation officers, a provincial officer in most provincial jurisdictions across Canada, without knowing anything of the work of such officers or the conditions under which they work. Particularly, HSO Grundie knew nothing about hunting as a primary activity regulated by conservation officers.
- [509] Additionally, HSO Grundie did not compare park wardens to provincial park rangers. Consequently, he did not know that provincial officials in Alberta and Ontario conducted law enforcement activity, including *Criminal Code* enforcement, without having a sidearm as standard equipment. In this regard, park warden Douglas Martin did not inform HSO Grundie of provincial officers in Kananaskis Provincial Park, adjacent to Banff National Park, that conduct law enforcement without a sidearm even though it must be taken that he had this knowledge.
- [510] Mr. Lambrecht also held that HSO Grundie erred because he applied the wrong standard for determining the existence of danger by mistaking possibility for probability.
- [511] Mr. Lambrecht argued that Part II uses terms like risk, hazard and danger, but only defines the term danger. He held that in plain language, risk and danger are terms which overlap to some degree and which, when used in sequence, reflect an increasing degree of probability of injury or illness to the person exposed thereto. He stated that the integration of probability into the statutory definition of danger found in section 122 of the Code is given by the wording “that could reasonably be expected to cause injury or illness...”
- [512] Mr. Lambrecht argued that this phrase was considered by Judge Rothstein in paragraph 37 of *Douglas Martin, supra*. There, he stated, the unanimous Court applied the civil standard of probabilities to describe the task of the Appeals Officer in accessing a claim of danger. Judge Rothstein wrote that “[t]he task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.” According to Mr. Lambrecht, this involves a weighing of probability of the civil standard often described as the balance of probabilities. He held that this standard is far lower than the criminal standard of proof “beyond a reasonable doubt”, but it is higher than the alternative standard of “reasonable possibility” suggested in other cases.
- [513] Mr. Lambrecht held that the directions issued by HSO Grundie should be rescinded because five years have passed since they were issued and they applied to law enforcement practices and policies which no longer exist. Mr. Lambrecht further held that an adverse inference should be drawn from the fact that park warden Douglas Martin failed to testify.

[514] Mr. Lambrecht requested that the appeal of the employer be allowed and the appeal by PSAC and park warden Douglas Martin be dismissed.

Respondents' Submission

[515] Mr. Raven presented oral and written arguments in summation. While they were carefully reviewed and considered in my decision, they are not fully repeated here. However, I have retained the following for the purpose of my written decision.

[516] Mr. Raven stated that this is an important case with respect to sorting out the definition of danger in law enforcement work. He declared that it involves appeals against two directions of HSO Grundie issued on February 1, 2001, pursuant to Part II of the *Canada Labour Code*, following his investigation of a complaint made by Douglas Martin, an employee of Parks Canada at Banff National Park.

[517] Mr. Raven recalled that HSO Grundie directed the employer, Parks Canada, to take measures to “correct the hazard or condition or alter the law enforcement activity of wardens” or to “protect the wardens from the danger”. The direction was issued pursuant to paragraphs 145(2)(a) and 145(2)(b) of the Code. He wrote in his decision:

Wardens who are expected to engage in law enforcement activities such as patrols, intelligence gathering, investigations of possible offences and arrests, for resource management purposes and the maintenance of the public peace, activities in the performance of which they may find themselves at risk of grievous bodily harm or death, are not provided with the necessary personal protective equipment. In like circumstances, officials carrying out similar duties such as Fisheries Officers, Environment Canada Wildlife Enforcement Officers and provincial conservation officers, are authorized to carry side arms.

[518] Mr. Raven stated that park warden Douglas Martin, represented by PSAC, appealed the direction of HSO Grundie because the direction should have included an order calling for the issuance of sidearms to park wardens performing law enforcement duties. He pointed out that park warden Douglas Martin and PSAC also request that the Appeals Officer establish a procedure for the identification and arming of park wardens involved in law enforcement responsibilities.

[519] Mr. Raven noted that in *Douglas Martin, supra*, the Federal Court of Appeal did not prescribe the criteria with which to assess Parks Canada’s obligation to ensure the health and safety of its employees. However, park warden Douglas Martin and PSAC hold that it did provide significant guidance on the evidence to be considered by the Appeals Officer. These included evidence of previous incidents, the nature of protective equipment and evidence regarding the particulars of the park warden's law enforcement work.

[520] Mr. Raven argued that park warden Douglas Martin and PSAC adduced evidence on each of these criteria through their witnesses and their cross examination of Parks Canada's witnesses. He held that the evidence establishes that law enforcement inherently involves unpredictable subject behaviour. Furthermore, as peace officers, park wardens conduct a wide range of law enforcement activities which place them at risk of physical assault,

grievous bodily harm or death without warning. The evidence confirms that park wardens may become engaged in physical confrontation with armed individuals involved in criminal activities.

- [521] Mr. Raven pointed out that each one of the witnesses that park warden Douglas Martin and PSAC presented offered sworn testimony dealing with these issues. It was noted that all of them, with the exception of Edward Davis, were familiar with the work of federal park wardens, either because they performed the duties themselves or as a result of contact with park wardens in the course of their work responsibilities.
- [522] Mr. Raven also noted that, of the five witnesses presented by Parks Canada, Robert Prosper was the only one employed by Parks Canada. However, he had not performed law enforcement duties under the current *Law Enforcement Management Directive 2.1.9*. The other witnesses did not profess any familiarity with the work of park wardens.
- [523] Mr. Raven's summation included a review of the *Canada Labour Code*, Part II, and incorporated relevant past decisions of the Federal Court, the Federal Court of Appeal, the Appeals Officers and the Canada Industrial Relations Board (CIRB). The following assertions were made in respect of this case:
- Part II of the Code applies to Parks Canada and Parks Canada employees, as stated in the *Public Service Labour Relations Act*, R.S.C. 2003, c. 22, s.240.
 - The amended Code provides that, for the purpose of an appeal of a direction issued by a health and safety officer, the Appeals Officer has all the powers and duties of a health and safety officer.
 - Following an appeal, the Appeals Officer is empowered by subsection 146.1(1) to vary, rescind or confirm the health and safety officer's decision or direction and may issue any direction considered appropriate under subsections 145(2) or (2.1).
 - The powers of an Appeals Officer with respect to the conduct of an appeal are set out in section 146.2 of the Code.
 - The combined effect of the amended sections of the Code is that an appeal conducted before an Appeals Officer is *de novo*, allowing the Appeals Officer to examine evidence which was not before the health and safety officer and to apply sections of the Code which were not considered by the health and safety officer. See *Mr. Juan Verville, supra*, at paragraph 15; *H.D. Snook*¹³, at paragraph 2; *Douglas Martin, FCA 156, supra*, at paragraphs 27-29.
 - In paragraph 28 of *Douglas Martin, supra*, the Federal Court of Appeal accepted that the Appeals Officer has the power to determine anew what sections of the Code apply to a particular situation.
 - In paragraph 29 of *Douglas Martin, supra*, the Federal Court of Appeal ruled that it is within an Appeal's Officer jurisdiction to determine that sections of the Code not considered by the health and safety officer are applicable, and once an appeals officer has determined that another section may be applicable, the appeals officer must exercise jurisdiction by fully assessing the applicability of the section. To do anything less is patently unreasonable and a wrongful declining of jurisdiction.

¹³ *Snook v. Canadian National Railway*, (1991), 86 di 74, CLRB no. 895

- In paragraphs 20 to 24 and paragraph 28 of *Douglas Martin, supra*, the Federal Court of Appeal confirmed that matters related to the employer's general duty under section 124 of the Code are fully within the authority of the Appeals Officer to consider in disposing of an appeal. However, as HSO Grundie decided, pursuant to subsection 145(2), that a danger existed for park wardens and issued directions in that regard, the applicability of section 124 and subsection 145(2) should be fully explored in this case.
- In paragraph 25 of *Douglas Martin, supra*, the Federal Court of Appeal drew specific attention to section 122.1, Purpose of the Code, and section 122.2 of the Code, Preventive measures. In accordance with this, an Appeals Officer who determines that the elimination of hazards is not feasible or sufficient has the authority, pursuant to subsection 145(1) and 145.1(2), to direct the employer to provide an appropriate level of personal protective equipment, including sidearms, if the Appeals Officer deems it necessary to achieve compliance with section 124. Section 122.2 reads:

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

- The definition of danger was modified in 2000 when the Code was amended. The new definition of danger clarified that the danger does not have to be impending. See *Annette Robitaille et al. and VIA Rail Ltd.*¹⁴ at paragraph 68.
- In paragraphs 37 to 41 of *Douglas Martin, supra*, the Federal Court of Appeal emphasised that, in the course of assessing whether a potential hazard, condition or future activity could constitute a danger, it was appropriate to consider evidence of past and present circumstances in order to determine the level of likelihood of future events. The Court also accepted that anecdotal evidence of past incidents involving park wardens, evidence that park wardens were issued bullet-proof vests, long arms and other personal protective equipment, and job descriptions which specified law enforcement activities, including physical confrontations with violators, was all pertinent evidence that should have been considered when assessing whether danger had been established by PSAC and Douglas Martin.
- As well, in paragraphs 48 to 51 of *Juan Verville, supra*, the Federal Court addressed the types of evidence that a trier of facts could accept as sufficient to support a finding of danger in unpredictable circumstances which could cause injury to an employee. Justice Gauthier identified that expert opinions and opinions of ordinary witnesses who, by reason of their job experience, possess important expertise are acceptable types of evidence. The Court found explicitly that the evidence did not need to consist solely of previous incidents of injury involving the exact same evidence. See also *Douglas Martin, supra*, at paragraph 37.
- The Federal Court of Appeal soundly rejected the conclusion of Appeals Officer Cadieux that the risk of injury resulting from the unpredictability of human behaviour could not constitute a danger within the definition in the Code. See *Douglas Martin, supra*, at paragraph 35.

¹⁴ *Annette Robitaille, Leonard Hawkins and Canadian Auto Workers and VIA Rail Ltd.*, [2005] CLCAOD. No. 55

- A hazard or condition would fall under the definition of danger if it were capable of coming into being or action, even if one could not ascertain when it would do so, as long as it could reasonably be expected to cause injury when it did. See *Martin, supra*, at paragraphs 35-41, and *Juan Verville, supra*, at paragraphs 39-43.
- In paragraph 33 of *Douglas Martin, supra*, the Federal Court of Appeal rejected the finding of Appeals Officer Cadieux that the risk to park wardens was sufficiently mitigated by their training and their personal protective equipment. The Court also questioned the fact that Appeals Officer Cadieux did not explain why further mitigation measures, such as providing a sidearm, would not reduce the risk of injury further.
- Furthermore, the Federal Court ruled in *Juan Verville, supra*, that there is a distinction between the risk level inherent to a job and the risk level that depends on the method used to perform a job or an activity. The Court said:

[55] ...It would be illogical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity....

[524] Mr. Raven held that sections 18 and 19 of the *Canada National Parks Act* specify a dual mandate for park wardens, including the enforcement of the Act anywhere in Canada and, as peace officers, the preservation and maintenance of public peace in parks. Section 21 of the Act gives them powers to arrest without a warrant for any offence under the Act or any other statute in a national park. The exercise of these powers is supported by the express granting of powers of search and seizure.

[525] Mr. Raven stated that section 26 of the CNPA establishes harsh penalties for those convicted of breaching the Act. For example, hunting or trafficking in or in possession of wildlife such as falcons, rattlesnakes, grizzly or polar bears, in or from a park, are subject on conviction to fines between one hundred and fifty to two hundred and fifty thousand dollars and up to five years of imprisonment. Hunting or trafficking in or in possession of wildlife such as wolves, deer, moose, salmon, caribou, or black bears, in or from a park, are subject on conviction to fines between fifty to one hundred thousand dollars and up to five years of prison.

[526] Mr. Raven pointed out that, as peace officers, park wardens are expressly authorized by section 25 of the *Criminal Code* to use a variety of force levels, including lethal force, provided it is necessary. They are also entitled to the protections of section 34 of the *Criminal Code* in respect of the use of lethal force.

[527] Mr. Raven maintained that HSO Grundie took account of all necessary considerations to reach a determination on the issue. HSO Grundie interviewed employees, management, union and experts in the field of law enforcement and use-of-force, including Dr. Gary Bell regarding his report on Saskatchewan conservation officers. He examined hundreds of officer safety incident reports from across Canada, which documented park warden being assaulted or having their life threatened. He considered the major studies, assessments and recommendations related to the issue of safety and the arming of park

wardens, including a history of the arming issue. He reviewed the law enforcement duties and responsibilities of park wardens pursuant to the *Criminal Code*, the CNPA and Law Enforcement Bulletin 2.1.9, in force at the time. He examined the use-of-force training provided to park wardens, the personal protective equipment issued to park wardens, the dictates of the IMIM, the issues of unpredictability of human behaviour in the context of law enforcement by park wardens and the merits of the long arm as a piece of personal protective equipment. He gave consideration to the image concern raised by Parks Canada, as well as the impact of a weak officer's image on a subject's decision to assault the officer. He looked at the MOU between the RCMP and Parks Canada and between the OPP and Parks Canada.

- [528] Mr. Raven pointed out that the safety of park wardens is not a new issue. HSO Grundie reviewed related studies during his investigation of park warden Douglas Martin's complaint that wardens performing law enforcement responsibilities were routinely placed in situations of danger within the meaning of the Code.
- [529] In this regard, Mr. Raven referred to the 1991 Buker and Frey Study, which essentially concluded that wardens do not feel safe while performing law enforcement duties and that Parks Canada should not permit them to respond to mandated law enforcement responsibilities without the proper policy, equipment and training. He noted that the study was paid for by Parks Canada and that Parks Canada did not present any evidence to contradict the credibility of the study.
- [530] Mr. Raven referred to the CEGEP de Trois-Rivières Report of 1993, also mandated and paid for by Parks Canada. He noted that it examined the work environment of park wardens in the context of five typical activities and made a number of recommendations. One of them was that park wardens be issued a service revolver for their protection. Mr. Raven commented that Parks Canada did not call any evidence to impeach the credibility of this study either. By the same token, he noted that Parks Canada took no action on the CEGEP recommendation to provide park wardens with sidearms.
- [531] Mr. Raven recalled that, in 1996, Dr. Gary Bell conducted a literature review, engaged in qualitative data gathering and undertook a cross-jurisdictional analysis of the industry standard in order to determine whether Saskatchewan conservation officers having a resource conservation function should be issued sidearms. Dr. Bell observed that risk mitigation does not obviate the need for personal protective equipment. Mr. Raven referred to page 19 of Dr. Bell's report, where he wrote that "[t]he fact is that the arrival of a peace officer may prompt a totally unanticipated attack with lethal force." Dr. Bell also wrote that the sense of cope ability is strengthened when conservation officers feel they are trained, equipped, supervised and well prepared. Dr. Bell recommended that Saskatchewan conservation officers be equipped with sidearms. In 1997, they were so equipped, pursuant to an order from a Saskatchewan Labour Department Occupational Health Officer.
- [532] Mr. Raven noted that at approximately the same time as the Bell Report, Parks Canada commissioned the Rescue 3 Study to determine the level of service for Alberta parks. The study recommended that national parks in the Alberta region be classified as "Level 4" parks, such that warden staff be trained and properly equipped with a sidearm. Parks

Canada took no action pursuant to this recommendation and did not produce any evidence that it disagreed with the finding of the Rescue 3 Study. To the contrary, Mr. Raven recalled that the evidence was that Gaby Fortin, Western Director of Parks Canada, described the report as "well researched" and "a valuable product".

- [533] Mr. Raven referred to the *Firearms Issues Analysis Paper, 1999*, by David Jivcoff, National Law Enforcement Coordinator for Parks Canada. The paper was prepared for *Refining the Current Arming Policy and to Implement the Partial Issuance of Firearms to the Warden Service*. Mr. Raven held that Mr. Jivcoff focused at length on the industry standard for officers with a resource protection mandate and for officers with a public peace mandate. He stated that Mr. Jivcoff concluded in his paper that Parks Canada fell short of meeting this standard for its park wardens because of its refusal to provide them with sidearms. Mr. Raven held that Mr. Jivcoff also reviewed the related merits of a long arm as a piece of personal protective equipment and recommended that sidearms be issued to wardens with law enforcement duties.
- [534] Mr. Raven then recalled that the National Working Group, referred to as the Victoria Committee, was established in 1999, to provide recommendations on refining the arming policy. Parks Canada management acknowledged that there were circumstances where arming wardens would be necessary. The Victoria Committee had before it the detailed resource paper prepared by Mr. Jivcoff. Following deliberations, the Committee recommended the criteria to be used to issue sidearms to park wardens. However, Parks Canada CEO, Tom Lee, categorically rejected this recommendation: "If this measure had been accepted, he explained in a January 28, 2000 memo, a significant number of wardens might have become eligible to carry sidearms."
- [535] Mr. Raven pointed out that Parks Canada contracted with the B.C Justice Institute in 2001, to provide recommendations regarding the law enforcement duties of park wardens. He noted that Parks Canada mandated that these recommendations were to be consistent with Parks Canada's existing policy of non-arming park wardens with sidearms.
- [536] Mr. Raven noted that Steve Hess, of the B.C Justice Institute, stated that he considered data relating to risk and injury among provincial conservation officers and among police officers, in order to assess the potential for injury within the park warden service. He referred to page 11 of the report, where Mr. Hess stated:

While to date it appears that Wardens are not being significantly harmed by humans while conducting law enforcement duties it is clear that the issue is not if but when a Warden will be seriously injured or killed while conducting law enforcement duties. Law enforcement is unpredictable and nothing can be done to remove all risk. Professional law enforcement agencies recognize this fact and strive to provide their people with up-to-date training and equipment to enable employees to best address unpredictable and seemingly arbitrary violent events.

(emphasis added by Mr. Raven)

- [537] Mr. Raven further noted that Mr. Hess described a risk prevention model that provides all necessary protective equipment to law enforcement officers, with an attendant level of training. According to Mr Hess, this proactive approach to risk mitigation was "one adopted by every police force and most resource management agencies in North America."
- [538] Mr. Raven also noted that Edward Davis, criminal investigative instructor at the Criminal Behavioural Science Unit of the FBI Academy, testified as an expert in the use of force in a law enforcement context, including the use of firearms by law enforcement personnel, as well as in the field of violence against law enforcement personnel.
- [539] Mr. Raven stated that Edward Davis conducted interviews with persons convicted of killing law enforcement officers as well as with law enforcement officers who survived assaults. The results of his research are contained in a series of articles and reports, many of which were entered into evidence.
- [540] Mr. Raven noted that Edward Davis determined through his research that individuals who are considering attacking a law enforcement officer will typically assess first whether they will be successful. That is, a law enforcement officer who appears hesitant, distracted, untrained or ill equipped - in short, an officer who projects a "weak" image - is at an increased risk of a spontaneous attack. According to Edward Davis, officers who were assaulted reported having no warning of the attack.
- [541] Mr. Raven stated that it is noteworthy that the reports from Inspector Browning, Edward Davis, Sergeant Butler and the Justice Institute of B.C. tendered in evidence all acknowledged the value of U.S. data and commended its relevance to the Canadian law enforcement context.
- [542] Mr. Raven referred to the 2004 Report by the B.C. Justice Institute entitled *Review of Force Options Requirements of Greater Vancouver Transportation Authority Policy Service (GVTAPS) Designated Constables*. According to the authors, twenty years of law enforcement research confirm that law enforcement officers are at considerable risk of being killed while conducting routine activities such as attending disturbance calls, arresting individuals, investigating suspicious persons and interacting with the public during a traffic stop. The report also established that aggression toward a law enforcement officer often occurs when a suspect is intoxicated, an officer attends at an incident between 10 p.m. and 2 a.m., an officer responds to a report of an argument or disorderly conduct and a male officer attends incidents in which the suspects are also male.
- [543] Mr. Raven noted that a 1995 Study by RCMP Officer Donald Loree regarding the circumstances of assaults on RCMP officers established that alcohol and drugs contributed to subject behaviour in 69% of incidents. In 25% of the cases in which officers requested back-up, the officers needed to resolve the incident by themselves, either because back-up was unavailable or because it did not arrive in time. According to the report, significantly, in 13% of all violent incidents, the assaulted officers did not have time to request back-up.

- [544] Mr. Raven recalled the 2002 study by RCMP Corporal Brian Largy regarding Canadian police officers murdered between 1980 and 2002. Corporal Largy found that the incidents which gave rise to 36% of police murders were vehicle stops, family disputes and routine checks of individuals. Mr. Raven stated that Corporal Largy's research disproves the theory that the mere presence of multiple police officers will keep an officer out of harm's way, since in 54% of the murders; more than one officer was present. He added that this study established that changes to holster design and weapons retention training have coincided with a significant reduction in injury or murder by an officer's own weapon: there were no Canadian police officers slain with their own weapon between 1991 and 2002.
- [545] Mr. Raven held that various use of force models were tendered into evidence, including the Incident Management Intervention Model and the Alberta Association of Chiefs of Police Use-of-Force Model; as well as the National Use of Force Framework. He maintained that, irrespective of the particular scheme, the purpose of these visual representations is to assist the public in understanding the level of risk and the response options available to officers conducting investigations and carrying out law enforcement initiatives generally. He noted that the model also assists officers in determining the appropriate level of force in given situations up to and including the option of lethal force in response to threats of grievous bodily harm or death.
- [546] Mr. Raven noted the evidence that an officer is not required to proceed sequentially through the use of force options set forth in the IMIM but, rather, to respond to a subject's level of force. He stated that risk assessment is not static but a continual process. Hence, as the subject's behaviour changes, so too does the appropriate response by the law enforcement officer. In any case, the purpose of any intervention is public safety and it is recognized that officer safety is essential to it.
- [547] Mr. Raven maintained that the evidence was that, therefore, a law enforcement officer must be able to transition through appropriate responses as a subject's behaviour changes. The evidence shows that this can only be accomplished if the officer is physically unencumbered in his ability to do so. He noted that while the IMIM does not mandate the tool or technique with which to give a lethal force response, the model is premised on an officer's ability to transition from lethal force to lesser force options and back to lethal force if necessary.
- [548] Mr. Raven stated that all witnesses who were expert on the subjects of use of force and violence against law enforcement personnel agreed that officer presence can have the effect of escalating or de-escalating subject behaviour. They also agreed that the very fact that a law enforcement officer appears as an agent of social control is sufficient to have this effect on a subject.
- [549] Mr. Raven recalled that Edward Davis' thesis that an officer's diminished confidence can contribute to increased aggression by a subject was confirmed by several law enforcement officers. That is, a weak officer's presence can also have the effect of escalating subject behaviour.

[550] Mr. Raven stated that, according to the evidence, the IMIM establishes that any intervention requires an officer to consider the option of tactical repositioning. He noted, however, that all witnesses, without exception, agreed that it is not always possible to tactically reposition. According to the evidence, it is not possible in the following circumstances: when the officers are physically limited in their ability to do so, for example because of physical barriers; when public safety precludes an officer from so doing; or when the subject prevents the officer from doing so, as in the case of an assault on an officer.

[551] Mr. Raven noted that Sergeant Butler emphasized the importance of teaching officers that tactical repositioning or "disengagement" may not be possible. He explained:

Failure to do so could lead an officer to erroneously believe that disengagement is always a possibility. This belief could (and has) resulted in officers entering into situations they should not have because they believed they could simply 'tactically reposition'. This unrealistic belief results directly to a complacent attitude and overconfidence; two of the prime reasons officers find themselves assaulted, injured and killed.

[552] Mr. Raven stated that Sergeant Butler testified that the baton and pepper spray are intermediate devices which a law enforcement officer can use to respond to combative behaviour. They are not intended to respond to the threat of grievous bodily harm or death. That is why the Appeals Officer did not hear any evidence of training that teaches officers how to administer lethal force with pepper spray or a baton.

[553] Mr. Raven held that it was unopposed that, in any stressful encounter, an officer falls back on the training he receives. Since park wardens receive training to avoid administering lethal force with a baton, the expectation that park wardens would overcome that training during an assault and use the baton to lethal effect is as unrealistic as it is unreasonable. Park warden witnesses called by the respondents expressed doubt that they could devise and carry out such a plan when their lives were at risk: "Blind panic" was how Mark McIntyre characterized his cognitive potential if his life was threatened. Sergeant Butler and Craig Hockley also doubted the success of such a strategy.

[554] Mr. Raven referred to the evidence that pepper spray is not consistently effective and may have the effect of antagonizing rather than controlling a subject. He stated that Sergeant Butler and park warden Deagle both described a range of limitations inherent to this device: it requires several seconds to take effect; it may have no impact at all on a subject, particularly one under the influence of alcohol or drugs; it may contaminate the officer; it is ineffective against subjects wearing glasses; and, for obvious reasons, it is dangerous to use in a windy setting.

[555] Mr. Raven held that every witness who carries a sidearm spoke of the importance of the sidearm as an essential device to deliver lethal force in response to a threat of grievous bodily harm or death. Without exception, every witness so equipped said that they would not perform law enforcement work without it. Moreover, several witnesses explained that the sidearm is the only firearm that allows law enforcement officers to quickly mitigate the risk of grievous bodily harm or death while also enabling them to transition through lesser force options.

- [556] Mr. Raven referred to the evidence confirming that the advantages of the sidearm over the long arm are as distinctive as they are numerous: the sidearm only requires one hand to deploy, leaving the officer's other hand free; as it requires only one hand, it can be deployed more quickly; it is far more portable than a long arm; it is easier to retain in a struggle; it can be more easily managed at distances at which most assaults take place; it does not cause the collateral damage of a long arm and it does not cause as much anxiety among the public as is generated by the sight of a long arm. In short, an officer has unobstructed access to a sidearm even when risk cannot be predicted.
- [557] Mr. Raven referenced the testimony of Inspector Browning, who explained the need for a sidearm in the following way:
- ...there is a realization that within police work police officers are going to be required at times to place themselves in harm's way. The firearm is issued to them to answer your question, to fulfill their mandate of both public and police safety.
- [558] Mr. Raven stated that numerous Parks Canada documents, such as *Law Enforcement Management Directive 2.1.9* and the *Law Enforcement Administration and Operational Manual*, acknowledge that park wardens may find themselves in precisely the same dire circumstances. Brett Moore, former Parks Canada Resource Conservation Manager, confirmed this same reality of potential injury or death for park wardens:
- It is recognized that there are no guarantees. Officers may find themselves in a situation where deadly force is required to defend themselves or someone else.
- [559] Mr. Raven stated that Sergeant Butler testified that it is appropriate for a law enforcement officer to use one level of force higher than the level of force or resistance exhibited by the subject in order to ensure the safety of the public and the officer.
- [560] Mr. Raven pointed to the testimony of numerous witnesses regarding the one-up principle. He held that witnesses trained in the use of force confirmed that the one-up principle is broadly consistent with the legal principle of self-defence. Over 90% of violent conflicts with law enforcement personnel are initiated by the subject and the one-up principle reflects a realistic need for a law enforcement officer to establish control through a paramount response option.
- [561] On the subject of the unpredictability of human behaviour, Mr. Raven pointed to several expert witnesses' testimony that human behaviour is often unpredictable. There was further evidence that a substantial number of assaults on law enforcement officers are spontaneous and cannot be discerned by a risk assessment. Witnesses agreed that law enforcement officers can be placed in situations giving rise to a threat of grievous bodily harm or death with no warning.
- [562] Mr. Raven referred to the testimony of park wardens who held that their concerns for their health and safety are directly attributable to their lack of training and the absence of equipment to respond to such spontaneous threats of grievous bodily harm or death. It was significant to note that this concern existed when park wardens were conducting law enforcement under the former *Law Enforcement Management Bulletin 2.1.9* and continues under the current Directive 2.1.9.

- [563] Mr. Raven reiterated that both the Federal Court and the Federal Court of Appeal have rejected the notion that the unpredictability of human behaviour cannot constitute a danger in respect of law enforcement activities.
- [564] Parks Canada has established in its *Law Enforcement Management Directive 2.1.9* of 2003 a range of strategies to mitigate the risk to park wardens of exposure to injury or death. The respondents submit that any risk mitigation policy must address the dynamic interactions at play in a dangerous situation and the consequences for the officer.
- [565] With respect to the dynamic interactions at play, Mr. Raven stated that Edward Davis' expert evidence was that the interaction between the law enforcement officer, a subject and the circumstances that bring them together are the constituent elements of any potentially dangerous situation. He noted that Edward Davis described it as "the deadly mix".
- [566] Mr. Raven held that, while amended Directive 2.1.9 aims to address park wardens' behaviour, it does not address the circumstances giving rise to an encounter, nor does it address the subject's behaviour.
- [567] With respect to the consequences for the officer, the respondents submitted that any policy on the need for protective equipment should be premised on the "Low Frequency, High Risk" principle. Mr. Raven wrote that the evidence of Sergeant Butler and Craig Hockley was that this principle is grounded in the belief that, where the consequences of a particular event are dire or critical for an individual, prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of the event occurring.
- [568] Mr. Raven added that Craig Hockley, Dave Hanna and Garry Bogdan all testified that they had never discharged their sidearms for a law enforcement purpose. However, all confirmed that they would not perform their law enforcement duties without it.
- [569] The respondents submitted that Parks Canada has not offered any coherent rationale for its decision to implement these particular risk mitigation strategies. Despite its stated intention to have Dr. Brian Evans testify at the hearing and establish a statistical basis for the changes made to the law enforcement duties of park wardens, Parks Canada did not do so.
- [570] Mr. Raven referred to the evidence of Duane Martin, primary author of the former Bulletin 2.1.9 and law enforcement specialist responsible for interpreting and explaining Directive 2.1.9. His evidence confirmed that law enforcement responsibility connected with resource protection continues under Directive 2.1.9. Mr. Raven added that public peace remains a subset of what park wardens continue to do. Duane Martin further testified that: the equipment issued to park wardens is the same; park wardens still engage in education, investigations, patrols, surveillance, obtaining and executing search warrants; park wardens still have powers of arrest under the CNPA as well as for *Criminal Code* offences; park wardens still issue warnings; and park wardens still engage in search and seizure initiatives.
- [571] Mr. Raven stated that Mark McIntyre's testimony confirmed that law enforcement arising out of incidental public peace was just as frequent under Directive 2.1.9 as under former Bulletin 2.1.9. He also testified regarding his application for sidearms for performing law enforcement work under former Bulletin 2.1.9, which was never approved.

- [572] Mr. Raven referred to the testimonies of Robert Prosper and Duane Martin and to Directive 2.1.9 and Bulletin 2.1.9 and stated that the very definition of law enforcement under the new Directive makes clear that park wardens continue to engage in the same range of law enforcement activities specified in the definition of law enforcement under the old Bulletin 2.1.9. In particular, park wardens continue to investigate disturbances, conduct traffic stops, investigate resource protection offences, including poaching incidents, and continue to interact in a law enforcement context with individuals under the influence of alcohol and/or drugs. They continue to do this work at night and in locations that are remote and are otherwise geographically inhospitable, with no reasonable expectation of viable back-up. All of these have been characterized in evidence, in clear terms, as dangerous. Mr. Raven noted that Parks Canada called no park wardens having a working experience of the new Directive 2.1.9 to counter this evidence.
- [573] Mr. Raven referenced the testimonies of park wardens Deagle, McIntyre and Hawkins who testified that, in the front country, law enforcement work arises from intervening in noise and disturbance issues, registration checks, dealing with human-wildlife conflicts, investigating resource protection offences and campground patrols. Their testimonies also confirmed that law enforcement activities in the backcountry also include checking permits, campground patrols, overt and covert activities to apprehend poachers, investigating reports of resource protection offences and incidental resource protection offences arising from the operation of vehicles, such as snowmobiles.
- [574] Mr. Raven pointed out that, according to park warden Deagle, park wardens may also establish road blocks and intercept vehicles to announce road closures. They stop vehicles for resource protection violations, for off-road driving infractions under the CNPA and for public safety matters. They also attend to vehicles that are stopped or in need of assistance, by the roadside.
- [575] Mr. Raven noted that all park wardens who testified concurred that approximately 25 percent of the park wardens' work consists of law enforcement. It may be incidental to their other duties and they are routinely required to respond to a call from a dispatcher or another park staff member with little information
- [576] Mr. Raven stated that park warden Hawkins described numerous incidents that gave him cause to fear for his safety, the vast majority of which he would still perform under the new Directive 2.1.9. Park warden Deagle confirmed that park wardens have not seen a significant difference in their work under the new Directive.
- [577] Mr. Raven pointed to the evidence that all park wardens are also designated as fishery officers under the *Fisheries Act*, to enforce that legislation. Individual park wardens, such as park warden McIntyre, are also authorized to enforce the *Migratory Birds Convention Act*.
- [578] Mr. Raven noted the testimony of park warden Hawkins that his doing other things like public safety or wildlife research does not diminish, detract or take away the fact that, first and foremost, he was a park warden responsible under section 18 of the *Canada National Parks Act* for ecological integrity and maintenance of the public peace. Park

warden Hawkins stated that, when he was not doing those other things, that is what he was thinking about and that is what his colleagues are thinking about when they are out doing their daily work.

- [579] Mr. Raven recalled that Edward Davis testified that park wardens are easily identifiable as law enforcement officers. They wear a uniform similar to the RCMP, a duty belt with a range of protective equipment, including handcuffs, pepper spray and a baton, all visible on the belt, and a soft body armour. They drive vehicles that are marked with an official designation and are equipped with bar lights. He noted also that numerous witnesses testified that park wardens are routinely confused with other law enforcement personnel, including members of the RCMP and other agencies' employees equipped with sidearm protection.
- [580] Mr. Raven referred to the testimony of park warden Duane Martin and Inspector Browning and the expert report of Edward Davis according to which law enforcement officers may have little or no information about the subjects with whom they are interacting. However, subjects may assume that their history of criminality has been or is being disclosed to the officers, through the CPIC for example. This may be particularly true if these individuals are under the influence of alcohol or drugs and are paranoid or otherwise uninhibited about attacking the officer.
- [581] Mr. Raven recalled the evidence of Sergeant Butler that, in this context, a seemingly "low risk" activity such as approaching a camper with a storm warning may cause the subject to initiate an attack. The uncontradicted fact is that assaults arising out of routine interactions are often not linked to the immediate reason for the interaction.
- [582] Mr. Raven held that Sergeant Butler evidenced further that, according to FBI research, in 2004, almost half to 42% of all attacks on law enforcement officers took place within 5 feet of the officers, the distances at which law enforcement officers interact with the public. He stated that the Loree Study on assaults on RCMP members conclusively established that a significant portion of the time, officers had no time to request back-up before they were assaulted. He held that this suggests that a large number of attacks on law enforcement officers occur spontaneously, without warning. He added that tactical repositioning is not an option in situations where an officer is under attack.
- [583] Mr. Raven pointed to the testimonies of expert witnesses Inspector Browning and Edward Davis and of park wardens Martin, Deagle, Hawkins and McIntyre, who provided unopposed evidence that information gathering is crucial to assessing risk. They stated that it was therefore counter productive for Parks Canada to prohibit park wardens from responding to reported information about a public peace incident but to permit them to engage in law enforcement activities for public peace incidents which they encounter without warning. Park wardens engaged in law enforcement activities under the revised *Law Enforcement Management Directive 2.1.9* reported serious concerns that this aspect of the policy put them at greater risk. The respondents submitted that there was simply no evidence that this will enhance park wardens' safety and, in fact, there are compelling reasons to believe that incidental law enforcement work without background information is more dangerous than responding to a call. Mr. Raven further noted that in one park, Georgian Bay Islands National Park, this policy has been directly overridden by management at the field unit level and park wardens have been directed to respond to park staff's reports of safety concerns.

- [584] Mr. Raven stated that all park warden witnesses confirmed that stopping vehicles for a variety of reasons are part and parcel of park wardens' responsibilities. He pointed out that, according to Sergeant Butler and Edward Davis, law enforcement officers are not in a position to know with any certainty what the individuals they approach are thinking or in what criminal activities they have recently engaged. He held that the videos introduced by Sergeant Butler graphically illustrated this point, as did the research cited by Sergeant Butler and Edward Davis in their reports. He noted that both Jurgen Deagle and Anders Hawkins also recounted incidents when they approached vehicles for a public safety purpose, only to find an occupant who was extremely aggressive or known to be violent toward police.
- [585] Mr. Raven pointed out that the risk inherent in conducting traffic stops may be assumed from the fact that neither Sergeant Butler nor Inspector Browning would characterize these activities as "low risk". They were more properly described as "unknown risk", the officers said, in part to counter complacent thinking on the part of officers.
- [586] Mr. Raven stated that several park wardens as well as other witnesses engaged in resource protection described the dangers associated with intercepting poachers and other individuals committing resource protection offences. Duane Martin presented evidence of poachers in and around Riding Mountain National Park, in southern Manitoba, who are known to have lengthy criminal records, including those who are tagged on the CPIC system with a "caution violent" designation. Craig Hockley explained the black market for animal parts as well as for trophy animals and described poaching as a lucrative activity as long as an individual could avoid detection.
- [587] Mr. Raven referenced the testimony of Garry Bogdan, who described studies confirming that over 60% of individuals charged with a resource protection infraction had a *Criminal Code* violation and over 35% of those had "violence" codes or had been charged with serious violations under the *Criminal Code*. Garry Bogdan also reported data from the province of Saskatchewan regarding night hunters and said that more than 80% of the individuals charged had other *Criminal Code* violations. Garry Bogdan held that poachers may also be under the influence of alcohol or drugs while in possession of high-powered firearms. Garry Bogdan added that wildlife was just a commodity where poachers think money can be made and the chances of getting caught are minimal.
- [588] Mr. Raven recalled the testimony of park warden Deagle and the *Jasper National Park Law Plan* to say that one should remember that park wardens encounter poachers in extremely remote locations, without back-up readily available and, at times, without functioning communications equipment. They may also encounter poachers while they are working alone. The Jasper law plan, for example, notes the potential danger of interaction with poachers and points out that the number of poachers apprehended does not accurately reflect the magnitude of the illegal activity.
- [589] Mr. Raven held that several law plans evidenced additional safety concerns for park wardens. He referred to the *Chilkoot Trail Law Plan*, which described that persons unable to lawfully enter Canada have been known to use the trail for access and that they may be in possession of firearms. He referenced the *Riding Mountain National Park Law*

Plan, which explained an issue with open liquor and unsafe boating. He pointed to the *Gwaii Haanas National Park Reserve Law Plan*, which noted that park wardens may encounter individuals who are armed or have ready access to potential weapons, or individuals engaged in smuggling activities or immigration violations. According to Mr. Raven, the Yoho, Kootenay and Lake Louise's law plan states that there are many officer safety issues associated with the Trans Canada Highway, including the transport of drugs and other contraband. This was confirmed by Duane Martin. The law plan also notes that wardens may come into contact with these individuals through enforcement activities resulting from resource management violations.

- [590] Mr. Raven pointed out that Parks Canada *Law Enforcement Proficiency Training Manual* describes a range of violent activities which park wardens may be expected to encounter during the course of their duties, including attacks with knives and baseball bats or clubs, use of a firearm and kicking an unconscious person. Moreover, the training scenarios for park wardens are premised on the understanding that police back-up will not be available. The respondents submit that this is only fitting, in view of the reality of police absence in the national parks.
- [591] Mr. Raven noted that, in his review of park warden law enforcement activities, Steve Hess stated that the circumstances in which police officers are most at risk of being injured or killed included attending disturbances, arresting persons, handling prisoners, investigating suspicious persons and conducting traffic stops. Mr. Raven observed that park wardens engage in all of the aforementioned activities, with the possible exception of bar fights, and that if many of these activities were to occur outside a national park, it would bring in a fully armed police officer response, with one or two other police officers as back-up. Sergeant Butler confirmed this assessment in testimony.
- [592] Mr. Raven referred to the evidence of Sergeant Butler, park wardens Deagle and McIntyre and Georgian Bay Islands National Park's directive and stated that the soft body armour provided to park wardens does not protect them against many of the assaults they may encounter in the course of their law enforcement work. These assaults include stabs by edged weapons, such as fishing or hunting knives, and shots from high powered rifles as well as from the most common types of hunting rifles used by poachers. In fact, the inner panel of the body armour acknowledges the limitations of its protective use. Mr. Raven held that soft body armour is intended to provide protection against offenders who are prepared to assault with a sidearm and this is clear recognition that Parks Canada accepts the reasonableness of this threat.
- [593] Mr. Raven pointed to the RCMP research as well as the *viva voce* evidence of experts Butler and Davis, which established that the mere presence of multiple police officers is not, in and of itself, a deterrent to assault. In 53.8% of cases of police officers murdered between 1980 and 2002 in Canada, more than one officer was present when it happened. He noted that both Sergeant Butler and Edward Davis categorically rejected the suggestion that two-person patrols were a legitimate substitute for a sidearm. Their testimonies were not contradicted.
- [594] Mr. Raven referred to the testimonies of park wardens Deagle, Hawkins, McIntyre, of Messrs. Hanna, Bogdan and Mongrain and of Sergeant Butler regarding the CPIC system. Mr. Raven held that, while it is important, it is not infallible as a component of

risk mitigation. The CPIC system has documented "planned" as well as "unplanned" outages, during which time CPIC users are unable to access the database. He also pointed out that park wardens and other law enforcement officers testified regarding the routine unavailability of CPIC on Sunday mornings and that witnesses also described the delays in receiving a response to their query.

- [595] Mr. Raven maintained that, at its most functional, the CPIC system provides information about individuals who have been entered into the system. However, It does not provide information about persons who have eluded police, vehicles that have been rented or their drivers, or persons who are of interest to the police because of a concern about their use of firearms, and it does not permit park wardens to input information into the system to provide instantaneous alert to other park wardens in other parks.
- [596] Mr. Raven argued that the communications equipment provided to park wardens is not consistently functional. He referred to park wardens' testimonies that each of the three communication method involving two-way radio to dispatch, satellite phone and cell phone has inherent weaknesses, and that equipment dysfunction is generally attributable to terrain, weather or limitations in the power source.
- [597] Mr. Raven noted that Duane Martin related that a park warden working solo in the Lake Louise area is, at times, unable to use his radio due to the breakdown of the repeater in cold weather, his/her cell phone also does not function in this area and he/she is not provided with a satellite phone for front country work on the highway.
- [598] Mr. Raven referred to Anders Hawkins' testimony, who reported a similar experience with a repeater that was dysfunctional for two and a half weeks. He said that battery powered communications equipment can and has failed because of defective batteries or batteries have discharged during a tour of many days in the backcountry. Mr. Raven held that it was his unchallenged evidence that the entire parks of Kootenay and Yoho were "dead spots" in terms of cell phone coverage and that dead spots occur for satellite phone usage as well, as do battery failures.
- [599] Mr. Raven recalled Mark McIntyre testimony that the unreliability of batteries continues to be a problem today, and that cell phone coverage is also unavailable in some locations in Georgian Bay Islands National Park. Park warden McIntyre also testified that there can be a lot of communications in the height of the summer, and if you have an occurrence near the end of your shift, the batteries can be depleted.
- [600] Mr. Raven held that the unreliability of communications equipment was confirmed by other resource protection officers who gave evidence. Craig Hockley, who is based in Alberta, explained that satellite reception is compromised in valleys because the phone's exposure to the sky is obstructed by the mountains. According to Craig Hockley, foliage is also an impediment to satellite phone use. Moreover, he estimated the amount of time needed to make a satellite phone fully functional to be between two and five minutes. Dave Hanna reported that cell phones only functioned in 30 to 40 % of his district.

- [601] Mr. Raven noted that Garry Bogdan, whose jurisdiction includes the Prairies and Northern Region, was emphatic that communications equipment cannot be relied upon due to batteries going down and dead spots for cell phone and for satellite phones.
- [602] On the subject of police back-up, Mr. Raven held that as early as 1991, Parks Canada was advised that police back-up for the warden service is inadequate. He referred to the Buker and Frey Study, where the authors described the "myth" of a timely RCMP response to warden calls for assistance when a dangerous situation develops. Mr. Raven referred to page 8 of the study, where the authors wrote:
- Many parks/sites do not have RCMP detachments nearby to provide immediate assistance. Even in locations with detachments, members are busy and not available on short notice. In backcountry situations, the RCMP often request warden assistance/escort. This organization is more and more becoming an urban police force. Members' backcountry travel skills are decreasing and equipment availability is also a problem.
- [603] Mr. Raven referred to numerous contemporary law plans entered into evidence that confirmed the delay in police response. He stated that a typical caution around police response is found in the *St. Lawrence Islands National Law Plan*, which states that the OPP may not always be immediately available to provide support and a timely response to a call from the parks wardens cannot be guaranteed. Mr. Raven noted that the *St. Lawrence Islands law plan* estimated that over the past two years, the OPP have been requested to attend on numerous occasions, with a response rate of roughly 50%.
- [604] Mr. Raven referred to the *Bruce Peninsula Law Plan*, which quotes the OPP detachment commander as advising that the OPP was not funded to provide any additional services to the park location and that any response will be based on availability of personnel and call priority. The OPP confirmed not being in a position to commit that its officers will respond in a given amount of time.
- [605] Mr. Raven noted that the Lake Louise law plan reported that long distances from most detachments have the potential to create long RCMP response times. Similarly, the Gwaii Haanas law plan estimated the RCMP response time to be 1 to 5 hours, at a minimum.
- [606] Mr. Raven referred to the evidence of park wardens Deagle, McIntyre and Duane Martin and of Garry Bogdan that officers working in the backcountry cannot be easily located by the police service of jurisdiction. Back-up can be further delayed due to mountainous terrain, darkness, winter conditions, open water and inclement weather. Mr. Raven held that the unopposed evidence was that the police services of jurisdiction are often not familiar with the terrain and are not trained to provide park wardens with viable back-up in the backcountry.
- [607] Mr. Raven held that observing, recording and reporting does not mitigate risk and that merely dressing as an authority figure can put a law enforcement officer at risk.

- [608] In this regard, Mr. Raven referred to the evidence of Edward Davis that officers take risks when they put on a uniform that identifies them as a law enforcement officer and this risk continues when they enter and exit their marked law enforcement vehicle.
- [609] Mr. Raven referred to the testimony of park wardens Deagle and McIntyre that Park Canada cannot seriously propose observing, recording and reporting as a substitute for the sidearm, given the unopposed evidence of the unpredictability of human behaviour, the split-second acceleration of subject violence and the impossibility of tactically repositioning in many situations.
- [610] Mr. Raven maintained that the lack of lethal force training means that park wardens have not developed the muscle memory essential to have an instantaneous response to the threat of grievous bodily harm or death, when a split-second may make the difference to their life. In this regard, he referred to the evidence of Sergeant Butler that it is crucial in situations of stress, such as those in which law enforcement officers face grievous bodily harm or death, that officers have a tool or technique that will allow them to quickly stop the threat. Sergeant Butler testified that the purpose of training is to develop muscle memory, to enable officers to react quickly and appropriately to subject behaviours without having to first formulate a plan. He held that it was unlikely that an untrained person will be able to apply lethal force, because a person under stress is using cognitive thinking less and the person's sympathetic nervous system is engaged.
- [611] Mr. Raven stated that several witnesses spoke of the perils of relying on a brain "under stress". Mark McIntyre related the fallacious thinking of a colleague who, when surrounded by assailants, threw his car keys into the woods to prevent his attackers from having access to his long arm. The officer failed to register that the subjects were already equipped with rifles.
- [612] Mr. Raven maintained that the evidence Edward Davis and park wardens Martin, Deagle and McIntyre established that parks wardens receive no training related to performing law enforcement at night, despite the evidence that law enforcement officers are at the greatest risk of serious injury or death at night. In addition, they receive no training to mentally prepare for the application of lethal force or to recognize, retain or use weapons of opportunity.
- [613] Mr. Raven held that Parks Canada has not provided park wardens with any direction as to what constitutes viable back-up and how two-person patrols are to be conducted in a manner that enhances officer safety.
- [614] In any case, Mr. Raven pointed out that Parks Canada had given the somewhat contradictory direction to its park wardens that the parks are to reduce their "over reliance" on two-person patrols.
- [615] Mr. Raven argued that all park wardens who carry out law enforcement duties under the new Directive 2.1.9 find the policy to be lacking in clarity. The park wardens who testified confirmed that park wardens confusion arising from the new policy relates to a wardens' civil liability for failure to act; employer support for park wardens who

intervene in law enforcement activities; the difference between cancellation of camping permits and evictions; conflicting directions from Parks Canada regarding the interception of impaired drivers; the distinction between a "public peace" incident and a "noise and disturbance" incident; how to balance law enforcement policy to observe, record and report with the client's expectation and the instruction that public safety is paramount; and the use of a long arm for law enforcement purposes.

- [616] Mr. Raven recalled the testimony of Jurgen Deagle, who expressed significant concerns that the confusion in policy would cause hesitation on his part or would otherwise negatively impact on his presence and, ultimately, his health and safety.
- [617] On the subject of the use of a long arm, Mr. Raven referred to the recently distributed Parks Canada authored *Law Enforcement Administration and Operational Manual*, which he held could fairly be characterized as an extensive articulation of the manner in which park wardens are required to conduct law enforcement. Yet, he noted, nowhere in the document does Parks Canada explicitly authorize the use of a long arm for law enforcement purposes. Directive 2.1.9 states at 6.1.11 that "[r]ifles and shotguns will be issued to wardens for duties related to resource management."
- [618] Mr. Raven also noted that the section entitled Personal Protective Equipment does not include the long arm in the list of authorized protective or defensive equipment. Instead, it directs that "only Parks Canada issued protective or defensive equipment shall be carried or worn on duty."
- [619] Mr. Raven further noted that the section in Directive 2.1.9 entitled Use of Force/ Incident Intervention reiterates that "[w]ardens will only carry defensive equipment that have been approved and issued by Parks Canada." Also, the draft *Firearms Directive 2.1.25* makes no mention of long arm use for personal protection.
- [620] Mr. Raven submitted that these documents provide numerous opportunities to explicitly articulate support for the long arm as a defensive tool and to provide direction and training for its use. For reasons that have not been explained, Parks Canada did not do this.
- [621] Regardless, Mr. Raven argued that the unsuitability of a long arm for defensive purposes had been established to an incontrovertible degree. For example, Sergeant Butler stated that he was not aware of any law enforcement agency, other than Parks Canada, that issued a long arm to their law enforcement officers as their primary defensive weapon to respond to a threat of grievous bodily harm or death. Edward Davis, Craig Hockley and Duane Martin confirmed this.
- [622] On the subject of undefined weapons of opportunity, Mr. Raven held that the use of a weapon of opportunity presumes that one will be available and can be recognized as such when a park warden needs one. He pointed out that no evidence was called to establish that in a stressful situation, a park warden will be able to identify access and successfully utilize an object as a weapon of opportunity.

- [623] Mr. Raven referred to witnesses' testimony that sidearms were necessary to protect the health and safety of park wardens while they are engaged in resource protection work. He said that park wardens encountering or handling bears or cougars, for example, spoke of the need for sidearms to protect themselves against being mauled by aggressive animals. For example, a long arm may be out of reach, knocked from their hands or too cumbersome to deploy. In some circumstances, it may be hazardous to have a long arm slung over the park warden's shoulder.
- [624] Mr. Raven argued that, through training, park wardens must consider the public's expectation. Park wardens are instructed that in any law enforcement situation, their client includes the public, whether directly or indirectly affected by the incident. They are further instructed that the public's expectation is that they will intervene to resolve or otherwise "control" the situation.
- [625] Mr. Raven held that the public's expectation that wardens carry authority to resolve conflict is corroborated by Parks Canada training material for park wardens. The Law Enforcement Proficiency material instructs park wardens that the client's expectation is that when they are called to an incident in progress, they will "deal with the problem" and "stop continuation of the offence." It similarly instructs that, when a park warden interacts with a problematic or potentially violent person, the client's expectation is that the park warden will "inform, educate and control in addition to compliance and law enforcement staff safety."
- [626] Mr. Raven noted that park wardens are also taught that under the IMIM model, they can tactically reposition only if it is in the public's interest to do so; if the likelihood and extent of harm to the public can be reduced; if there is fear of death or grievous bodily harm, providing it does not expose others to injury of deadly force; if seeking assistance will help to ensure public and officer safety; if buying time and gaining distance will help to ensure public and officer safety; and if they have ensured that the scene has been contained and there is no potential for harm.
- [627] Mr. Raven argued that this characterization by Parks Canada of the park wardens' role in a conflict is broadly consistent with the evidence of numerous witnesses that, as law enforcement officers, the public regards park wardens as the appropriate legal authority responsible for resolving the issue. It is also broadly consistent with the recognition of a park warden's law enforcement mandate and peace officer status under section 18 of the CNPA. While park wardens have other duties such as resource protection, public safety and fire protection, their authority under section 18 is directly linked to their role as law enforcement officers.
- [628] Mr. Raven pointed out that all park warden witnesses called by the respondents displayed a professional attitude toward, and passion for, their work. They also displayed a genuine concern for their own safety while doing this work. Duane Martin, for example, purchased his own soft body armour before Parks Canada had issued any. Mark McIntyre installed his own recording equipment in his car in order to document any injuries he might incur while conducting traffic stops. Park warden Deagle expressed his moral discomfort in permitting impaired drivers to operate a motor vehicle. Park warden

Hawkins described his own dilemma teaching recruits that they were permitted to exercise lethal force when they were not provided with any viable equipment or technique with which to do so. They also regarded, with sincere gravity, their roles as peace officers with a responsibility to meet the public's expectation as they have been instructed by Parks Canada to do. He submitted that careful consideration should be given to the dedication, credibility and professionalism of these witnesses.

- [629] Mr. Raven stated that section 18 of CNPA establishes a dual mandate for wardens to enforce the provisions of the Act and, in their capacity as peace officers, to maintain the public peace in parks. He held that similarly mandated agencies who perform law enforcement work of this nature equip their officers with sidearms.
- [630] Mr. Raven recalled that every Parks Canada mandated study for the last fifteen years agreed. He cited the Buker and Frey Study " which referred to the "sister agencies" of Parks Canada, the RCMP, the provincial police forces and other wildlife enforcement agencies in Canada and the U.S. He stated that the *Firearms Issues Analysis Paper* by David Jivcoff provided a useful summary of the industry "standard of care" for peace officers, both in respect of the resource protection and public peace mandates. In that study Mr. Jivcoff observed: "The standard of care indicates Parks Canada may soon be the only agency which is below the standard."
- [631] Mr. Raven referred to the Rescue 3 Study that recommended providing sidearms to park wardens. He noted that the report's author explained: "This conclusion is based on the legislated "mandate" ...in conjunction with the "standard of care" represented by the approach other similarly mandated agencies have taken. It should not be based on how many wardens have been assaulted." He noted that the Victoria Committee had recommended arming park wardens, which was consistent with the standard established by the jurisdictional police force. He stated that the 2001 Justice Institute of B.C. report reviewed the work of conservation officers in Canada and the data on U.S. police officers, in order to assess the risk to park wardens. He noted Mr. Hess's conclusion that: "[w]ardens responding to these complaints without adequate protection are falling substantially short of the 'police industry' standard."
- [632] Mr. Raven recalled the evidence of Craig Hockley that conservation officers in every province in Canada as well as in the Yukon are equipped with sidearms.
- [633] Mr. Raven referenced the evidence of Garry Bogdan and the evidence of HSO Grundie. He held that it establishes that the resource protection mandate of conservation officers makes their work eminently comparable to the work of park wardens. He noted that Garry Bogdan testified that the duties and responsibilities of Environment Canada wildlife enforcement officers and park wardens are very similar and that wildlife enforcement officers have worked and alongside park wardens. He held that they both perform their work in backcountry and on some occasions, in national parks; they are both responsible for resource protection and for enforcement of a federal statute; and they both have the authority to arrest. Mr. Raven cited the job description of a wildlife enforcement officer, which states that the nature of law enforcement work brings officers into contact with hostile and abusive people. Mr. Raven argued that this is also true of the law enforcement work of park wardens, as evidenced by the numerous occurrence reports.

- [634] Mr. Raven argued that park wardens and Alberta conservation officers also deal with law enforcement issues in campgrounds, resource conservation issues, resource protection issues and wildlife issues. Both have peace officer status and authority to arrest under the *Criminal Code*. Mr. Raven noted that the populations of park users and park wildlife are virtually the same, given the proximity of Banff National Park and provincial land. He added that Alberta conservation officers have worked with federal park wardens and shared intelligence. He recalled the testimony of Dave Hanna that the work of Alberta conservation officers and that of federal park wardens was quite comparable.
- [635] Mr. Raven referred to the testimony of Craig Hockley that Alberta fish and wildlife officers, like park wardens, deal with problem wildlife and engage in public safety work, law enforcement in campgrounds, backcountry patrols and intercepting poachers. His evidence was that the work of park wardens and fish and wildlife officers is comparable.
- [636] Mr. Raven submitted that the overwhelming quantum of evidence supports the proposition that the firearm issued to officers with a similar mandate to park wardens is the sidearm.
- [637] Mr. Raven referred to the 1987 MOU between Parks Canada and the RCMP regarding the role of the jurisdictional police. The MOU currently governs the roles and responsibilities of the police in Canadian national parks. While a new MOU has been drafted, it has not been signed yet.
- [638] Mr. Raven submitted that both the current and the proposed MOU explicitly describe the RCMP as having a proactive commitment to law enforcement in national parks, rather than a merely reactive one. He declared that the 1987 MOU states that: "The RCMP has a responsibility to detect, investigate and process breaches of the *Criminal Code* ..." (emphasis added by Mr. Raven). Moreover, the proposed MOU states that the RCMP is responsible to: "perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime ... and the apprehension of criminals ..."
- (emphasis added by Mr. Raven)
- [639] Mr. Raven argued that unchallenged evidence of park wardens testifying for the respondents was that no police service, whether in Jasper, Banff, Georgian Bay, Yoho, Kootenay or Lake Louise, conducts regular patrols in the parks. This is confirmed by the law plans tendered into evidence. The Grasslands National Park Law Plan, for example, states that the RCMP will only respond "on a reactionary basis" to public peace incidents. The Gwaii Haanas Law Plan states that "[t]he RCMP generally do not patrol Gwaii Haanas ..." The Riding Mountain National Park Law Plan states that an RCMP response to a public peace complaint will only be available "on a priority basis as determined by the RCMP members". The St. Lawrence Islands National Park Law Plan similarly states that "... the Park has been informed that because of the size of their jurisdictional area, the nature of the park (marine environment) and an overall shortage of staff and equipment (boats), a timely response to a call from a park warden cannot be guaranteed."

- [640] Mr. Raven held that these vague commitments to a police presence in national parks fall short of the standard set forth in the MOU between the RCMP and Parks Canada to "detect" or otherwise engage in crime prevention. Moreover, despite undertakings in the 1987 MOU, there have been no meetings of a Headquarters Liaison Committee to discuss issues at a national level. Parks Canada has not monitored the back-up service of the RCMP in national parks nor was Robert Prosper aware of the nature of the contract for services between the RCMP and each provincial Attorney General.
- [641] Mr. Raven noted that *Law Enforcement Management Directive 2.1.9* has removed the purview of park warden responsibility for such activities as highway traffic enforcement and wildlife stop checks. He referred to the testimony of all park wardens that they had not observed any increased police activity to step into the breach created by the new policy. To the contrary, they reported that police patrols in their parks have declined and are generally rare. Mr. Raven stated that the Auditor General's report of November 2005 confirmed that the RCMP are having difficulty resourcing, training and maintaining a full complement of officers to such an extent that members' positions, in some cases, go unstaffed.
- [642] Mr. Raven argued that the health and safety concern is national in scope. He held that Parks Canada had not provided any evidence to support the proposition that park warden Douglas Martin's complaint was unique to him or to Banff National Park. To the contrary, he stated, HSO Grundie testified that park wardens representing a range of national parks in Western Canada attended the Canmore Alberta Meeting in February 2000.
- [643] Mr. Raven maintained that numerous park wardens identified that their concerns existed whether or not they were stationed in marine parks, mountain parks, B.C., Ontario or Alberta. Their concerns stem from the Parks Canada-wide decision not to provide them with sidearms rather than from anything unique to their park. Their concerns arise as a result of the risks attendant to performing law enforcement duties and because of their identification as authority figures. In short, it has been, and continues to be, a health and safety concern for park wardens across Canada. This evidence has not been challenged in this hearing.
- [644] Mr. Raven stated that the respondents maintain that HSO Grundie properly interpreted and applied the current definition of "danger" in Part II of the *Canada Labour Code* as interpreted by recent jurisprudence. Mr. Raven submitted that the finding of danger made by HSO Grundie was valid and reasonable in the circumstances and is entirely supported by the evidence. He further submitted that HSO Grundie amassed an enormous amount of documentation and information and properly considered all of the issues relevant to the determination of danger.
- [645] Mr. Raven held that Parks Canada has recognized the inherent danger of park wardens' work, as evidenced in Parks Canada authored documents. These include the current *Law Enforcement Management Directive 2.1.9*, the former Bulletin 2.1.9, the Parks Canada *Law Enforcement Administration and Operational Manual* and a memo from a Parks Canada manager, Brett Moore. All recognize that there is a risk of physical assaults, serious injury and possible death when park wardens are engaged in law enforcement duties. He argued that Parks Canada is therefore estopped from denying the danger faced by park wardens in the fulfillment of their law enforcement duties.

- [646] Mr. Raven stated that the evidence confirms that the activities in which park wardens routinely engage include traffic stops, campground patrols, noise and disturbance investigations, poaching investigations, arrests for resource management, violations and infractions to public peace. He maintained that park wardens have the clear authority to perform these activities pursuant to the *Canada National Parks Act* and Parks Canada policy. He held that park wardens continue to exercise a full range of law enforcement responsibilities up to and including prosecution in criminal courts.
- [647] Mr. Raven added that it must be noted that many of these duties are routinely performed alone or in the backcountry where back-up from an armed presence is not immediately available. He reiterated that the evidence as a whole confirms that RCMP or OPP back-up is not normally immediately available given the national park work environment. He held that pepper spray, baton, communication equipment would be useless if a law enforcement officer were confronted by a lethal attack on his life.
- [648] Mr. Raven maintained that the fact that park wardens are required to wear soft body armour confirms the danger they face in their law enforcement work. He rejected Robert Prosper's suggestion that they are required to wear this armour to protect them from a motor vehicle trauma as being disingenuous in the extreme. He argued that poachers, by definition, are armed individuals engaged in criminal activity in national parks. That, in itself, suggests that a higher level of protective equipment is required to respond to the threat of lethal force which poachers are capable of delivering.
- [649] Mr. Raven noted that Directive 2.1.9 requires park wardens to exercise judgment and to take into account the risks and circumstances involved before and during a law enforcement intervention. He maintained that the dynamics of human interaction, the close proximity of spontaneous attacks and the inability of a park warden to tactically reposition all point to the need for a timely, reliable weapon to counter a lethal threat. The lack of such a tool can result in a lack of confidence on the part of park wardens, which, in itself, creates a liability. A situation can escalate to such a point that the need for a sidearm as a piece of safety equipment becomes essential.
- [650] Mr. Raven pointed to the documentation collected by HSO Grundie and the *viva voce* and documentary evidence at the hearing. He held that it confirms that the new *Law Enforcement Management Directive 2.1.9* has not kept park wardens from this potential harm and that it is only a matter of time before a tragedy occurs. He added that Mr. Hess, an independent third party tasked with studying the law enforcement issue for Parks Canada, similarly believed that grievous bodily harm or death were an eventuality for the park warden community doing law enforcement work. He referred to the expert evidence of Sergeant Butler that corroborated the view that any law enforcement work conducted in the absence of a sidearm is high risk in nature. He emphasized that Parks Canada offered no alternative vision of managing risk arising from law enforcement duties.
- [651] On the matter of the use-of-force training and sidearms, Mr. Raven noted that use-of-force models, whether the IMIM or the AACP, provide for a full force continuum of options which contemplates the application of lethal force in circumstances involving the threat of grievous bodily harm or death. He noted Parks Canada endorses the use and application of the IMIM by its park wardens, but prohibits the application of lethal force with a sidearm, which is the protective equipment of choice accepted by virtually all similarly mandated law enforcement agencies. Mr. Raven conceded that, while the

IMIM does not mandate a specific piece of equipment with which to respond to subject behaviour, it does require that law enforcement officers be able to transition through different use of force options consistent with the jurisprudence on the application of lethal force. He concluded, therefore, that the use-of-force models preclude the long arm as an appropriate defensive weapon because it cannot be easily or safely integrated into the suite of tools used to apply force. He held that to suggest that a long arm is a suitable alternative to a sidearm is unrealistic. He added that the suggestion by Gaby Fortin at the Canmore meeting, in February 2000, that park wardens could use shovels in their defence was likewise unrealistic.

- [652] Mr. Raven held that the IMIM is premised on an officer's ability to engage a full continuum of responses to a full continuum of behaviours. He maintained that the split-second acceleration of aggression, as demonstrated by Sergeant Butler and Douglas Martin, establishes that those responses must be immediately available in order to be effective.
- [653] With regard to tactically repositioning, Mr. Raven stated that the unchallenged evidence demonstrates that it is not always possible for a law enforcement officer to tactically reposition when faced with a spontaneous attack and that at all times the ability to tactically reposition may be negatively affected by the darkness, the weather or the physical environment. He held that this fact alone confirms that a danger exists for park wardens and the position asserted by Parks Canada reflects the continuing erroneous assumption that park wardens can simply disengage at will from an undesirable situation.
- [654] Mr. Raven submitted that Parks Canada's position that limiting park wardens' law enforcement responsibilities mitigates danger must be rejected because it fails to acknowledge that genuine danger is faced routinely by these uniformed law enforcement employees. He held that if the position asserted by Parks Canada were correct, there would be no need for park wardens to be equipped with soft body armour, batons or pepper spray.
- [655] Mr. Raven argued that it is incorrect for Parks Canada to say that anything can be used to stop a lethal threat. He held that the response to such a threat must be automatic, the weapon with which to deliver this response must be available and issue only as much force as is necessary. He reiterated that every other law enforcement agency recognizes that the sidearm is the only viable piece of personal protective equipment that permits a law enforcement officer to appropriately and effectively respond to a lethal threat occasioned by arbitrary, unpredictable violence.
- [656] Mr. Raven referred to the evidence of numerous witnesses that supported the proposition that an officer appearing to be weak or unprepared can affect an offender's behaviour. He submitted that the presence of a sidearm would contribute to the reinforcement of these peace officers' authority with the general public and give the proper confidence to officers.
- [657] Mr. Raven took the position that HSO Grundie properly recognized that the standard of arming for peace officers includes sidearms. He held that there is ample evidence demonstrating that all federal and provincial resource protection agencies with law enforcement mandates similar to those of Parks Canada provide their law enforcement professionals with sidearms. For example, federal Fishery and Oceans officers and

Environment Canada Wildlife Service enforcement officers all carry sidearms for resource protection work. Mr. Raven noted that all ten provinces issue sidearms to their conservation officers, as does the Yukon Territory. These facts clearly indicate a standard of arming for peace officers which includes sidearms.

- [658] Mr. Raven added that, whether Parks Canada accepts it or not, there is an industry standard within conservation agencies throughout Canada. He noted that every study conducted by Parks Canada concluded that the sidearm is the industry standard weapon, as practiced by other resource protection based agencies or other agencies with law enforcement mandates similar to those in issue here. Every resource conservation officer who gave evidence assessed their work to be very similar to the work in which park wardens engage and testified that they would not perform it without a sidearm.
- [659] Mr. Raven further argued that, irrespective of the issue of similarly mandated agencies, the uncontradicted evidence is that the law enforcement activities which give rise to interactions with the public put park wardens at risk. Such activities as investigating a disturbance, confronting people who are drinking or under the influence of drugs and arresting subjects are all activities that are of potentially the greatest danger to law enforcement officers. He added that police officers, Wildlife Service enforcement officers and Fishery and Oceans officers are armed while park wardens, who have an identical mandate, are not.
- [660] Mr. Raven argued that the Federal Court of Appeal has confirmed the jurisdiction of an Appeals Officer to consider issues arising under sections 124 and 125(1)(l) of the *Canada Labour Code*.
- [661] In the alternative, Mr. Raven submitted that, notwithstanding the evidence of danger in respect of park wardens' law enforcement activities, abundant evidence has also been adduced for a finding that Parks Canada must issue sidearms to park wardens who have law enforcement duties, pursuant to section 124 of the Code, which obliges the employer to ensure the health and safety of its employees. Mr. Raven submitted that the only coherent model of risk management presented at the hearing requires that any person who engages in an activity that carries a high risk of injury or death must be equipped with protective equipment equivalent to the risk. That is, high risk equates full protection, irrespective of the probability of injury occurring. He held that this is an entirely reasonable standard of protection to require Parks Canada to provide pursuant to section 124. He maintained that Parks Canada has provided the appropriate equipment to enable park wardens to respond safely to all levels of subject behaviour, except the threat of grievous bodily harm or death.
- [662] Mr. Raven added that it must be emphasized that the parks are the park wardens' workplace and it is incumbent on Parks Canada, as an employer, to ensure that the workplace is safe. Parks Canada has withdrawn park wardens from the ability to intercept speeding motorists, impaired drivers and people carrying firearms illegally, but has not made any efforts to ensure that the jurisdictional police is patrolling or otherwise intercepting people who are engaging in these activities in an effort to make the highways and other areas of the parks safe for park wardens as well as the public. Mr. Raven stated that, given their peace officer status and their unique familiarity with their parks

including the backcountry, it is reasonable to require Parks Canada to equip its park wardens with sidearms and provide training so that they may intercept illegal activity and assist in securing the safety of their workplaces.

- [663] Mr. Raven stated that evidence was heard regarding eight different parks of different sizes, of different geography, in three different provinces, with radically different visitation levels. All evidence indicated that the health and safety concerns giving rise to the complaint filed by park warden Douglas Martin are not unique to one park, but span the country. He submitted that park wardens often find themselves in situations of danger regardless of the national park concerned.
- [664] Mr. Raven further submitted that the Appeals Officer has the authority to direct the employer to take specific steps that will lead to the provision of sidearms to park wardens engaged in law enforcement activities.
- [665] Mr. Raven argued that such direction should be issued nationally, precisely because the evidence heard regarding different parks of different size, geography, location and visitation levels indicated that park warden's Douglas Martin health and safety concerns are not unique to one park, but span the country.
- [666] Mr. Raven requested that the appeal of Parks Canada be dismissed and that the appeal of park warden Douglas Martin be sustained. Accordingly, Mr. Martin and the PSAC respectfully requested that the Appeals Officer direct Parks Canada to immediately equip all Parks Canada wardens engaging in law enforcement activities with a suitable sidearm and that they be properly trained in its use.

Decision

- [667] In the case of *Douglas Martin, supra*, the Federal Court of Appeal wrote, in paragraph 28 of its decision, that an appeal before an appeals officer is *de novo*. The Court added that an appeals officer may make a determination under subsection 145(1) of the Code if the appeals officer finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction pursuant to subsection 145(2). This, the Federal Court of Appeal stated, is due to the wide powers that appeals officer have under section 146.2 of the Code and the fact that subsection 145.1(2) of the Code gives an appeals officer all the powers of a health and safety officer,. Paragraph 28 reads:
- [28] An appeal before an appeals officer is *de novo*. Under section 146.2, the appeals officer may summon and enforce the attendance of witnesses, receive and accept any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).

[668] The issue in this case is whether or not conducting law enforcement without being issued a sidearm as standard personal protective equipment constituted a danger for park wardens at the time of HSO Grundie's investigation, or a contravention of the Code. For this, it is necessary to consider the law enforcement activities of park wardens and the circumstances that existed at the time of HSO Grundie's investigation. In light of the considerable time that has passed since HSO Grundie's directions to Parks Canada on February 1, 2001 and of the changes that Parks Canada has made to its law enforcement program, it is also necessary to consider the present law enforcement activities of park wardens and circumstances for deciding if a danger or a contravention of the Code currently exists. This is necessary because, in the end, I must decide whether or not to vary, rescind or confirm the directions that HSO Grundie issued to Parks Canada. If I find that a contravention of the Code existed, I must also consider whether or not to issue a direction under subsection 145(1) or 145(2).

[669] For this, I must consider the relevant provisions of the *Canada Labour Code*, Part II, the facts of the case and the jurisprudence cited by parties.

Authority of the Appeals Officer

[670] Subsection 146(1) of the Code specifies that an Appeals Officer who is seized of an appeal brought under subsection 129(7) or section 146 is mandated to inquire in a summary way and without delay into the circumstances of the decision or direction and the reasons for it. He may then vary, rescind or confirm the direction or decision and issue any direction considered appropriate under subsection 145(2) (danger) or 145(2.1). As noted above, the Federal Court of Appeal confirmed that this includes issuing a direction under subsection 145(1) (contravention).

Subsection 146.1 reads:

146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction; and

(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

Section 145(1) and (2) respectively read:

145 (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

(a) terminate the contravention within the time that the officer may specify; and

(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

145(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

- (a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to
 - i. correct the hazard or condition or alter the activity that constitutes the danger, or
 - ii. protect any person from the danger; and
- (b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

(2.1) If a health and safety officer considers that the use or operation of a machine or thing by an employee, a condition in a place or the performance of an activity by an employee constitutes a danger to the employee or to another employee, the officer shall, in addition to the directions issued under paragraph (2)(a), issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with the directions issued under that paragraph.

[671] Mr. Raven held that the Federal Court of Appeal accepted at paragraph 28 of *Douglas Martin, supra*, that the Appeals Officer has the power to determine anew what sections of the Code apply to a particular situation. He added that the Federal Court of Appeal also established at paragraph 29 that it is within an Appeal's Officer jurisdiction to decide that sections of the Code not considered by the health and safety officer are applicable. Once the Appeals Officer has determined that another section may be applicable, he is required to exercise his jurisdiction by fully assessing the applicability of the section. To do anything less, he stated, is patently unreasonable and a wrongful declining of jurisdiction.

[672] In connection with this case, I received evidence and arguments from the respondents that Parks Canada's decision not to issue sidearms to its park wardens when handling or controlling dangerous wildlife also constituted a danger under Part II.

[673] While I agree with Mr. Raven that I am authorized by the Code to examine evidence which was not before the health and safety officer and to apply sections of the Code which were not considered by the health and safety officer, the issue raised with regard to sidearms for handling or controlling dangerous wildlife is, in my opinion, outside of my jurisdiction. This is because it was not related to park warden Douglas Martin's original complaint that Parks Canada required park wardens to conduct law enforcement without a sidearm.

[674] Mr. Lambrecht argued that there is no onus on either party in respect of an inquiry carried out by an Appeals Officer pursuant to subsection 146.1(1) of the Code. In this regard, he referred to the Federal Court decision in *Canadian Freightways Limited and Attorney General of Canada and Western Canada Council of the Teamsters supra*. Justice Dawson confirmed that the Appeals Officer is simply conducting an investigation into the circumstances of a decision or direction of a health and safety officer and there is no onus on any party. She wrote in paragraphs 25 and 26:

[25] More recently, in *Verville and Canada (Correctional Service)*, [2002] C.L.C.A.O.D. No. 12 at paragraph 15, an appeals officer described the nature of an appeal of the type at issue in the present proceeding as follows:

The Code permits anyone who is "aggrieved" by a direction to appeal this direction to an appeals officer (s. 146(1)). The appeals officer then shall, "in a summary way", inquire into the circumstances of the direction, and may vary, rescind, or confirm the direction (s. 146.1(1)). The job of the appeals officer is to place himself or herself in the shoes of the health and safety officer and make the determination that he or she ought to have made. An appeal under s. 146(1) is not an "appeal" in the technical sense, and thus there is no onus on anyone (see H.D. Snook [...]). Guided by s.122.1, which states that the purpose of Part II of the Code is to "prevent accidents and injury to health arising out of, linked with or occurring in the course of employment", an appeals officer is simply concerned with coming up with the correct decision from a health and safety perspective.

[26] These authorities suggest that the hearing into an appeal of a discretion is in the nature of a *de novo* hearing where the appeals officer is to view all of the circumstances and then make a decision.

Applicable Part II Legislation and Case Law

[675] Section 122.1 states that the purpose of Part II is the prevention of accidents and injury to employees. It reads:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[676] In section 122.2, the Code instructs that the hierarchy of prevention measures should consist of first eliminating hazards, then reducing hazards that cannot be eliminated and then providing personal protective equipment, clothing, devices or materials. Section 122.2 reads:

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

[677] Section 124 of the Code requires the employer to ensure that the health and safety of employees is protected. It reads:

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

[678] The term danger is defined in section 122 as follows:

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.	« danger » Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d’avoir des effets à long terme sur la santé ou le système reproducteur.
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[679] The first decision of an Appeals Officer regarding the interpretation and application of the new definition of danger that came into force in September 2000 was issued by Appeals Officer Serge Cadieux in the *Darren Welbourne and Canadian Pacific Railway Company*¹⁵. Appeals Officer Cadieux stated in paragraphs 18 and 19:

[18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer’s investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines “*potential*” to mean “possible as opposed to actual; capable of coming into being or action; latent.” Black’s Law Dictionary, Seventh Edition, defines “*potential*” to mean “capable of coming into being; possible.” The expression “*future activity*” is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[my underline]

¹⁵ *Darren Welbourne and Canadian Pacific Railway Company*, CLCAOD No. 01-008

- [19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.
- [680] Appeals Officer Cadieux's statement in paragraph 18 that the danger can be prospective to the extent that the hazard, condition or activity is capable of coming in being or action is also conveyed by the above noted French definition of danger in the Code. According to the French definition, danger means « Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade ». *Le Nouveau Petit Robert de la langue française*, 1996 edition, writes that the term « susceptible de » means:
- ... qui peut éprouver; capable de; qui peut éventuellement; apte.
- [681] What needs to be underscored here is that both definitions of danger in the Code refer to the possibility, versus the probability, of a potential hazard or condition or future activity coming into being, in respect of their interpretation and application. For a finding of danger, it is necessary to determine that the hazard, condition or activity that is capable of coming into being is also reasonably expected to cause injury or illness before the hazard or condition can be corrected or the activity altered. The reasonableness of that expectation is determined based on the civil standard of probabilities which is the balance of probability.
- [682] Two decisions later emanated from the Federal Court, in 2003 and 2004, which represented a significant searching and testing of the interpretation and application of the revised definition of danger:
- *Martin v. Canada (Attorney General)*, 2003 FC 1158, made by Justice Tremblay-Lamer on October 6, 2003; and
 - *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent*, 2004 FC 767, issued by Justice Gauthier on May 26, 2004.
- [683] In her *Martin, supra*, decision, which included reference to the *Darren Welbourne, supra*, decision, Justice Tremblay-Lamer confirmed, in paragraph 58, that the Code does not specify that the injury or illness must occur immediately for a finding of danger. However, in paragraph 59, she wrote that the new definition of danger still requires an impending element because there must be a reasonable expectation that the injury or illness will occur before the hazard or condition can be corrected or the activity altered. Justice Tremblay-Lamer wrote, in paragraphs 58 and 59:
- [58] However, the new definition also clearly states that a hazard, condition or activity could constitute a danger "**whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity**". As such, contrary to what was indicated by the appeals officer, I am of the view that it is not necessary that there be a reasonable expectation that the injury or illness will occur **immediately** upon

exposure to the activity in order to constitute danger within the meaning in the Code.

- [59] Nevertheless, in my opinion, the new definition still requires an **impending element** because the injury or illness has to occur "before the hazard or condition can be corrected or before the activity is altered".
- [684] Justice Gauthier's decision followed and considered the decision of Justice Tremblay Lamer. Justice Gauthier stated, in paragraphs 34, 35 and 36, that the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered; that the definition of danger does not require the reasonable expectation that the condition or activity will cause injury or illness every time that they occur; and that it is not necessary for a finding of danger to establish precisely the time when the hazard or condition will occur. Paragraphs 34, 35 and 36 read:
- [34] The above statement is not entirely accurate. As mentioned in *Martin, supra*, the injury or illness may not happen **immediately** upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.
- [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.
- [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
- [685] Justice Gauthier wrote, in paragraph 36 of her decision, that the definition of danger only requires one to ascertain the circumstances in which a potential hazard or condition or future activity could be expected to cause injury and to establish that such circumstances will occur in the future as a reasonable possibility:
- [36] ...Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[686] Justice Gauthier also addressed the concept of danger normal to the work, in paragraph 55 of her *Juan Verville, supra*, decision. She stated that a danger normal to the work includes a risk that is an essential characteristic of the work, but logically excludes a risk which depends on the method used to perform the job or activity. She wrote:

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

[687] The Federal Court of Appeal also commented on normal or inherent danger at paragraph 33 of the *Douglas Martin, supra*. Specifically, the Court questioned the Appeals Officer for not explaining why further mitigative measures would not reduce the risk of injury further. Justice Rothstein wrote:

[33] Mr. Cadieux finds that the risk of injury, which is part and parcel of the job of a park warden, has been mitigated effectively through specialized knowledge and training and by the provision of personal protective equipment. He does not explain why further mitigative measures, such as the provision of a sidearm, would not reduce the risk of injury further.

[688] In the *Douglas Martin, supra*, decision, the Court rejected, at paragraph 35, the notion that the unpredictability of human behaviour cannot constitute a danger under the Code. Justice Rothstein wrote:

[35] Because law enforcement activity inherently involves the unpredictability of human behaviour, Mr. Cadieux finds that it cannot constitute a "danger" within the meaning of the definition. This would exclude a finding of "danger" in respect of any law enforcement activity generally. There is no explanation as to why, categorically, this would be the case.

[689] In connection with this, the Federal Court commented, in *Juan Verville, supra*, on the standard of proof to establish a contravention under section 124 of the Code. Justice Gauthier wrote, at paragraph 68, that an employer must take all reasonable steps to identify health and safety hazards in the workplace and, once a hazard has been identified, take reasonable steps to eliminate or minimize it as much as reasonably practical. Paragraph 68 reads:

[68] As to the other statements made by the appeal officer in paragraphs 19, 20 and 24, I construe them to mean that an employer must take reasonable steps to identify the health and safety risks in the workplace and once a

risk has been identified, either through a risk analysis, a complaint by an employee, he must take reasonable steps to eliminate or minimize it as much as reasonably possible.

[690] Finally, in the same *Juan Verville, supra*, decision, the Federal Court addressed the types of evidence that a trier of facts could accept as sufficient to support a finding of danger. Justice Gauthier stated, in paragraph 51, that a trier of fact can rely on expert opinion, on experience based expert opinion of ordinary witnesses and on inference arising logically or reasonably from known facts. I have interpreted this as job-experience based opinion. Paragraph 51 reads:

[51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form an opinion. It could even be established through an inference arising logically or reasonably from known facts.

[691] Mr. Lambrecht argued that this case featured considerable anecdotal and opinion evidence from park wardens in support of the respondents. He cautioned that both have limitations in that anecdotal evidence is not necessarily typical and opinion evidence can be tailored. While he conceded that the Federal Court has confirmed that an Appeals Officer can receive anecdotal and opinion evidence, he cautioned that the Court leaves the weight that the Appeals Officer assigns to the evidence subject to judicial review.

[692] In this regard, the weight that I gave to the job experience based opinion evidence submitted in the present case was a function of several factors. These included: the specificity, the relevance; the impartiality and probative value of the evidence; the credibility and veracity of the witness; the breadth of experience upon which the job experience anecdotal and opinion evidence was based; and its consistency with other evidence submitted in the case.

[693] For the record, I was impressed by the experience, the knowledge, the maturity, the candidness, the conscientiousness and the professionalism of the park wardens who testified at the hearing. I found them to be principled and having an overall dedication to the health, safety and well-being of themselves and other park wardens. This was considered in the weight that I gave to their job experience based anecdotal and opinion testimony.

[694] As I previously indicated, for deciding if the fact that park wardens conduct law enforcement without being issued a sidearm constituted a danger or a contravention of the Code at the time of HSO Grundie's investigation and constitutes one now, it is necessary to consider the law enforcement activities and the circumstances under which they are conducted.

[695] For this, I must examine the appointment of park wardens as peace officers under the *Canada National Parks Act*, the law enforcement activities conducted by park wardens and how the law enforcement activities have changed under Parks Canada's revised law enforcement program. It is also necessary to consider the adequacy of the risk mitigation measures in place to minimize the inherent risk associated with law enforcement, which is the unpredictability of human behaviour, especially where the person may be mentally unstable, aggressive towards authority or under the influence of drugs or alcohol. Finally, it is necessary to consider whether or not further mitigation measures such as the provision of a sidearm to park wardens conducting law enforcement would reduce the risk of injury for them and is therefore necessary and appropriate. In connection with all of this, it is necessary to review the national scope of the direction that HSO Grundie issued to Parks Canada.

Appointment of Park Wardens

- [696] In his investigation, HSO Grundie found that park wardens were appointed as peace officers under section 18 of the *Canada National Parks Act*. He concluded that park wardens had a dual law enforcement mandate, being responsible for both resource management law enforcement and for maintaining public peace in parks.
- [697] HSO Grundie also found that Parks Canada's *Law Enforcement Management Bulletin 2.1.9* confirmed that park wardens had a secondary responsibility for *Criminal Code* law enforcement, as a "first responder". He added that this dual enforcement responsibility was confirmed in the various MOUs between Parks Canada and the police services of jurisdiction.
- [698] HSO Grundie further established that park wardens were authorized to enforce other federal and provincial statutes in parks, such as the federal *Fisheries Act*, the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, the *Migratory Birds Convention Act* and the *Boating Restriction Regulations*. He noted that park wardens were appointed as special constables in Ontario, New Brunswick and Prince Edward Island and that the appointment conferred on park wardens the powers of a police officer to preserve and maintain peace and to enforce provincial statutes on or in relations to all lands and waters administered by Parks Canada in each respective province.
- [699] The evidence in the case confirms that park wardens are currently still appointed as peace officers pursuant to section 18 of the *Canada National Parks Act*. Their appointment confirms that they have a dual law enforcement responsibility for both resource management law enforcement and for maintaining public peace in parks, pursuant to the *Canada National Parks Act* and the *Criminal Code*. Section 18 reads:
18. The Minister may designate persons appointed under the *Parks Canada Agency Act*, whose duties include the enforcement of this Act, to be park wardens for the enforcement of this Act and the regulations in any part of Canada and for the preservation and maintenance of the public peace in parks, and for those purposes park wardens are peace officers within the meaning of the *Criminal Code*.

[700] Sections 21 and 22 of the CNPA give park wardens the power to arrest without a warrant for any offence committed under the Act or any other statute in a national park. The exercise of these powers is supported by the express granting of powers of search and seizure. They read:

Arrest by warden or officer

21. (1) A park warden or enforcement officer may, in accordance with and subject to the *Criminal Code*, arrest without warrant

- (a) any person whom the warden or officer finds committing an offence under this Act; or
- (b) any person who, on reasonable grounds, the warden or officer believes has committed or is about to commit an offence under section 26.

(2) A park warden may, in accordance with and subject to the *Criminal Code*, arrest without warrant any person whom the warden finds committing an offence under any other Act in a park

Search and seizure

22. (1) A park warden or enforcement officer may

- (a) enter and search any place and open and examine any package or receptacle in accordance with a warrant issued under subsection (2) at any time during the day or, if so specified in the warrant, during the night; and
- (b) seize any thing that the warden or officer believes on reasonable grounds is a thing described in subsection (2).

[701] As peace officers, park wardens are authorized by subsections 25(1) and (4) of the *Criminal Code* to use force, including lethal force, as prescribed. It reads:

25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person;
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

25(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- (c) the person to be arrested takes flight to avoid arrest;
- (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- (e) the flight cannot be prevented by reasonable means in a less violent manner.

[702] The evidence also confirms that park wardens are still authorized to enforce other federal and provincial statutes in parks, such as the federal *Fisheries Act*, the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, the *Migratory Birds Convention Act* and the *Boating Restriction Regulations*. Furthermore, it confirms that a number of park wardens, such as park warden Mark McIntyre, are still appointed as special constables in Ontario, New Brunswick and Prince Edward Island.

[703] Thus, in terms of the appointment and authority of park wardens as peace officers, I would agree with HSO Grundie that the appointment includes a dual law enforcement mandate under the *Canada National Parks Act* and the *Criminal Code*.

Law Enforcement Activities Eliminated and Reduced under Directive 2.1.9

[704] Mr. Lambrecht maintained that the general authority conferred on park wardens by section 18 of the *Canada National Parks Act* does not trump or override the policies of the employer. In support of his assertion, he cited paragraph 118 of the English decision of *R. V. Commissioner of Police, supra*.

[705] Mr. Lambrecht held that Parks Canada used its prerogative as an employer and by policy, through *Law Enforcement Management Directive 2.1.9*, eliminated some of the higher risk law enforcement activities, reduced the frequency of others and implemented mitigation measures to deal with any risk that remained. He added that Directive 2.1.9 gives park wardens the discretion to intervene or not in law enforcement situations and, depending on the risk, confirms that park wardens may discharge their duties by observing, recording and reporting the incident to the jurisdictional police.

[706] While I accept Mr. Lambrecht's contention that Parks Canada can use internal policy to modify or reduce law enforcement tasks, it cannot cause its park wardens to derogate from, reduce or avoid application of the law, especially where an omission to do the act may be dangerous to the life of a park warden or any other person.

[707] Mr. Lambrecht stated that the law enforcement principles found in section 2, entitled Principles, and section 6, entitled Policy Guidelines, of *Law Enforcement Management Directive 2.1.9* instruct park wardens relative to the discretion provided to them. They read:

- Wardens, or any Parks Canada employee, are not expected to knowingly put themselves in danger as defined in the *Canada Labour Code* when intervening in a law enforcement matter.
- A warden is not expected to directly intervene when they have determined that they are at risk of grievous bodily harm or death.
- Wardens, as peace officers and first on the scene, are not required to directly intervene in all situations pertaining to the enforcement of the CNPA and the preservation of peace in national parks. The form of intervention...may vary considerably depending on the [warden's] assessment of the risk in any given situation.
- Park wardens are expected to use discretion in the fulfillment of their duties.
- The degree of intervention in a public peace incident, incidental to regular duties, will be consistent with a warden's level of training, experience, equipment, and other risk mitigation measures that are in place. The intervention will be at the lowest level appropriate to the circumstances.

[my underline]

[708] In my opinion, the meaning of terms such as “not expected”, “not...in all situations”, “appropriate to the circumstances” or “expected to use discretion” is imprecise and unhelpful to park wardens at a critical moment. Essentially, I interpret these principles to mean that park wardens appointed pursuant to section 18 of the CNPA can enforce resource conservation law and preserve and maintain public peace in national parks whenever they think they can do it without getting injured or killed.

[709] Moreover, the discretion that Directive 2.1.9 imposes on park wardens places a reverse onus on them to protect their own health and safety. This onus exceeds the obligation of employees specified in paragraph 126(1)(c) of the *Canada Labour Code* and falls short of the employer's duty in section 124 to ensure the employees' health and safety.

[710] Parks Canada is correct that employees have a general duty, pursuant to paragraph 126(1)(c) of the Code, to take all reasonable and necessary precautions to ensure their health and safety. However, this does not supersede or alleviate the employer's responsibility under section 124 to ensure that the employees' safety and health is protected. Paragraph 126(1)(c) reads:

126(1) While at work, every employee shall

- (c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;

[711] In my opinion, the discretion imposed by Directive 2.1.9 exceeds the employee's duties in paragraph 126(1)(c) of the Code, because they presuppose that park wardens can determine with a reasonable degree of certainty whether or not a law enforcement

intervention will expose them to injury or death. Such a premise is contrary to the reality confirmed by the IMIM, as well as by all the experts who testified, that a law enforcement intervention can escalate from an innocuous situation to one of grievous bodily harm or death within seconds and without any provocation on the park warden's part. Thus, the reality is that park wardens may have little or no time to reflect on potential risk, or to immediately disengage. It is akin to walking into what appears to be a mud puddle only to find you are standing in quicksand.

- [712] With regard to the law enforcement strategy of observing, recording and reporting, Garry Bogdan and Edward Davis testified that it would not prevent the officer from being attacked because this is not the strategy that the offender would expect from a person in authority who is operating marked vehicles and vessels, wearing a uniform and carrying a suite of defensive tools. Edward Davis testified that officers take risks when they put on a uniform that identifies them as a law enforcement officer. He said that this risk continues when they enter and exit their marked law enforcement vehicle. Garry Bogdan stated that "observe, record and report" is what Environment Canada and the provinces expect citizens to do when they witness an offence. Based on Garry Bogdan's lengthy resource conservation law enforcement experience and the fact that this experience is consistent with the research finding of Edward Davis, I am inclined to give the opinion of both witnesses considerable weight.
- [713] During his summation, Mr. Lambrecht held that some park wardens have misinterpreted the phrase "preservation and maintenance of public peace in parks" in section 18 of the CNPA, to create a duty to intervene in *Criminal Code* matters that is beyond the law enforcement duties set out in Directive 2.1.9. He maintained that the phrase "preservation and maintenance of public peace in parks" only affords park wardens the protection of sections 231 and 235 of the *Criminal Code*.
- [714] However, park warden Duane Martin testified that under CAPRA, the problem-solving part of the RCMP use-of-force model that Parks Canada has adopted, the first "C" stands for client. He noted that the training provided to park wardens and Parks Canada's mandate confirm that client expectation is a key feature of law enforcement. Park warden Deagle pointed out that the view held by park wardens is consistent with the IMIM and the CAPRA model, which addresses the public's expectation that officers are to assist the public regardless of situations of grievous bodily harm or death. He added that the *Law Enforcement Proficiency Training Manual* instructs park wardens that the clients expect that when wardens are called to an incident in progress, they will "deal with the problem" and "stop continuation of the offence."
- [715] I also recall that park warden Duane Martin testified that the reality is that park wardens are the front line uniformed presence in national parks, operating marked vehicles and wearing a distinctive uniform. Also, park warden stations located in parks are marked to identify them to the public if they need information or assistance.
- [716] I did not receive sufficient evidence or argument to comment on Mr. Lambrecht's contention that the phrase "preservation and maintenance of public peace in parks", in section 18 of the CNPA, only affords park wardens the protection of sections 231 and

235 of the *Criminal Code*. However, I am persuaded by the evidence that neither Mr. Lambrecht's assertion nor Directive 2.1.9 are consistent with the IMIM and CAPRA and with the law enforcement proficiency training relative to the public's expectation and park wardens' law enforcement response. I am further inclined to agree with park wardens that this is a source of confusion and doubt which can ultimately add risk to law enforcement interventions.

[717] Turning to Mr. Lambrecht's position that Parks Canada has eliminated some of the higher risk law enforcement activities of park wardens and reduced the frequency of others through its *Law Enforcement Management Directive 2.1.9*, I conducted a close examination of the specific provisions of the Directive relative to resource protection, public peace and administrative law enforcement. The following is what I retained regarding each aspect of these law enforcement activities.

Elimination and Reduction of Higher Risk Activities - Resource Protection Law Enforcement

[718] Section 6.2 of Directive 2.1.9 instructs that park wardens no longer: enforce any legislation where an offence is committed outside of a park and no collateral offence is committed inside the park; conduct wildlife enforcement outside of park boundaries; undertake house searches without the jurisdictional police first securing the scene; undertake undercover, infiltration or assumed identity operations; conduct highway traffic enforcement; conduct wildlife stop checks; and arrest subjects for outstanding arrest warrants unless they are under the *Canada National Park Act*. Mr. Lambrecht added that sections 6.2.11 and 6.2.12 of Directive 2.1.9 require a minimum of two peace officers, with the appropriate risk mitigation measures specified in Appendix A of Directive 2.1.9, to conduct dedicated or planned backcountry law enforcement patrols and respond to reports of a known or suspected hunting or poaching.

[719] Notwithstanding these limitations, however, the evidence confirms that park wardens are still permitted to: conduct surveillance inside a park while in plainclothes or an unmarked vehicle or vessel; conduct building searches after the police have secured the scene; enforce the *National Parks Highway Traffic Regulations* in respect of off-road vehicles; stop a vehicle as part of an investigation of a resource protection offence under the *Criminal Code*; exercise enforcement authority outside of national parks related to an offence under the CNPA or any other act wardens are empowered to enforce; set up a roadblock for environmental management, emergency situations or public safety reasons; and patrol boundary areas.

[720] In my opinion, the elimination and modification of law enforcement activities has altered the frequency of park wardens' exposure to risk, but has not altered the essential nature of the risk associated with these activities to which park wardens are exposed. That risk is the unpredictability of human behaviour which is exacerbated by the fact that the individual may have violent tendencies, dislike authority, be mentally unstable, or be under the influence of alcohol or drugs.

- [721] In addition, the respondents argued that the prohibition specified in Directive 2.1.9 relatively to enforcing legislation outside of park boundaries actually adds risk for park wardens because it prohibits them from requiring hunters operating along the boundary to identify themselves. Moreover, the uncontested evidence of the respondents was that park wardens now have no way to learn if there is a violence or caution flag connected with a hunter they encounter near the boundary who could subsequently illegally enter into the park.
- [722] The respondents also raised concerns regarding the two-person patrols policy in Directive 2.1.9 because they held that it is a myth to believe that it enhances the law enforcement officer's safety. In support of their position, they stated that RCMP research as well as the *viva voce* evidence of experts Butler and Davis established that the mere presence of multiple police officers is not, in and of itself, a deterrent to assault.
- [723] In this regard, the 2002 study by RCMP Corporal Brian Largy regarding Canadian police officers murdered between 1980 and 2002 stated that, in 53.8% of the cases in Canada between 1980 and 2002, more than one officer was present when an officer was killed. In addition, both Sergeant Butler and Edward Davis disagreed that two-person patrols were a legitimate substitute for a sidearm. Sergeant Butler testified that such a belief can breed complacent thinking where officers feel that they will be safer. Edward Davis expressed doubt that two officers together form a team, especially if they are not trained or practiced on this.
- [724] I further noted that the Justice Institute of British Columbia report of December 14, 2004 entitled *Review of Force Options Requirements of Greater Vancouver Transportation Authority Police Service (GVTAPS) Designated Constables* considered the use of multiply officers for increasing security. The report stated that some agencies believed that having more officers present at an incident would enable a safe resolution of the incident. It also stated that "this approach may not be appropriate especially where the officers have the same limited use-of-force option tools.". The example was given of two or three officers equipped with batons at an incident involving a suspect armed with a knife. According to the report, this does not increase the security of the law enforcement officers since a baton (regardless of their number) cannot be adequately used to defend against an edged weapon. The report concluded that agencies have actually increased their exposure to liability by applying this theory of multiple officer response.
- [my underline]
- [725] The expert opinions and the RCMP research cited by respondents that having multiple officers at a scene does not ensure officer safety were not refuted by Parks Canada. In addition, Parks Canada provided no evidence such as a job hazard analysis to confirm the effectiveness of their two-person patrol in the circumstances for which it is applied. Nor is there any rationale in Directive 2.1.9 or the *Law Enforcement Administration and Operational Manual* for this policy.
- [726] To the contrary, the *Jasper National Park Law Plan, 2003* states that "RCMP backup is recommended in situations where a warden has prior knowledge or investigation has determined that firearms are present or suspected". In my opinion, this demonstrates that

it is well understood that two unarmed park wardens may not be sufficient to ensure the park wardens' safety.

- [727] Moreover, the testimony of park wardens Deagle and McIntyre was that it was common practice for park wardens to split up during two-person patrols in the front and back country because of practical considerations. Of greatest concern to me was that Robert Prosper appeared to be unaware of this departure from policy in the field, despite his assurance to me that park law enforcement programs are reviewed annually with corrective measures taken promptly, or worse, that Parks Canada ignored this departure from policy.
- [728] I was also concerned by the National Parks Director General's memorandum that held that two-person patrols were being overused. Robert Prosper emphasized in testimony that parks are mandated by the *Law Enforcement Administration and Operational Manual* to enhance the national mitigation standards as they see appropriate. It seems inappropriate and inconsistent with *Law Enforcement Management Directive 2.1.9* that headquarters would overrule individual parks without providing its reasons and, more significantly, alternatives to two-person patrols.
- [729] I can only conclude that the effectiveness of this policy of two-person response for mitigating risk associated with the law enforcement activities for which they are prescribed in Directive 2.1.9 is doubtful.

Elimination and Reduction of Higher Risk Activities - Public Peace Law Enforcement:

- [730] With regard to public peace enforcement, Parks Canada concedes in section 3 of Directive 2.1.9 that it is responsible for ensuring an adequate level of resource protection and public peace enforcement on lands under its administration and control.
- [731] However, Parks Canada tells its park wardens in that same section that the jurisdictional police have primary responsibility for public peace enforcement. Later, in section 6.3.2, Parks Canada states that "Parks Canada will negotiate MOUs as required with the RCMP, OPP and SQ municipal or First Nations police services for the delivery of effective public peace enforcement on Parks Canada's lands." Robert Prosper stated further that local parks meet with local police detachments during park law planning process, to get their assurance that they will deliver an adequate level of public peace law enforcement and back-up to its park wardens.
- [732] On the face of it, this would appear to imply that the role of park wardens in public peace enforcement is minor and, at the least sign of risk, park wardens can back out and call in the police. However, examination of the facts confirms that this is not the case.
- [733] First, the evidence corroborates that neither the national MOU with the RCMP nor any of the local agreements with jurisdictional police services at the park level (other than in-park town specific agreements) deal with the level of policing that these police services will provide as to enforcement or park warden back-up. In fact, the testimony of Robert Prosper and the *Law Enforcement Administration and Operational Manual*

confirm that Parks Canada accepts that the level of policing response it receives from the various police services, including in emergency situations requiring back-up for park wardens, is what any ordinary citizen would expect.

- [734] The November 2005 Report of the Auditor General of Canada to the House of Commons was given in evidence. It confirmed that the RCMP Agency had serious staffing problems. This comment was consistent with testimonies to the effect that policing is not routinely evident in all park areas and that police presence has not increased since Parks Canada revised its law enforcement policy.
- [735] In his testimony, park warden Hawkins explained that the Lake Louise RCMP detachment has four members so there is only one on day duty. If the officer is sick, there may not be any replacement and on Mondays, the RCMP member may not be available at all because of possibly being required to attend court for most of the day.
- [736] Park warden Deagle testified that it was his observation that the number of RCMP members in Jasper National Park had decreased since Directive 2.1.9 was implemented and park wardens no longer carry out traffic enforcement. In this regard, I also noted that the *Jasper National Park Law Plan, 2003* observed that the number of law enforcement occurrences had dropped from 678 in 2001 to 211 and 110 in subsequent years while the RCMP was conducting law enforcement in place of park wardens.
- [737] Dave Hanna testified that RCMP backup is variable and that he has experienced delays from two to five minutes and up to two days. He felt that RCMP staff shortages in his jurisdiction were not uncommon and noted that RCMP members often call upon his conservation officers to assist them in transporting subjects.
- [738] Park warden Duane Martin also testified that he was not aware that the jurisdictional police had increased the number of officers or the number of patrols in the western parks, to take up activities vacated by park wardens in accordance with Directive 2.1.9. He expressed the opinion that this increased the risk to park wardens and others who used the highways.
- [739] The findings of the Auditor General of Canada are consistent with Robert Prosper's testimony, who confirmed that Parks Canada does not receive national reports from the RCMP regarding minimum policing standards and timeliness of back-up. Thus, Parks Canada does not actually know if the RCMP or other jurisdictional police services have sufficient resources to enforce public safety in parks as indicated in Directive 2.1.9 and to provide timely backup service to park wardens. Robert Prosper could only express confidence that the RCMP and other police services would act appropriately.
- [740] Finally, the law plans from the various parks confirm that the resources of other police services of jurisdiction are equally strained.
- [741] This evidence leaves me with an abiding impression that there is a disconnection between the current *Law Enforcement Management Directive 2.1.9* policy and the actual practice of public peace enforcement in parks by the jurisdictional police. This cannot but have an impact on the public expectation towards park wardens and the desire of park wardens to assist according to their training on client expectation.

- [742] As part of my review, I conducted a close examination of Directive 2.1.9 relative to public peace law enforcement. In this regard, I note that public peace includes, but is not limited to, domestic dispute, assault, theft, illegal drinking, vandalism, liquor offences, noise and disturbance, illegal drugs and obstruction of a peace officer in his or her duties.
- [743] Section 6.3.3 of Directive 2.1.9 prohibits park wardens from responding to public peace occurrences on a highway beyond observing, recording and reporting. However, the *Law Enforcement Administration and Operational Manual* indicate that park wardens may exceed this limited response in situations where the safety to the public is considered.
- [744] Section 6.3.4 of Directive 2.1.9 prohibits park wardens from carrying out patrols dedicated to the maintenance of public peace or from being called out as a primary response to public peace complaints. However, park warden McIntyre testified that, in the Georgian Bay Islands National Park, the practice is that park wardens will give a primary response if the complaint comes from a park warden or other park staff, because the response time of the OPP is not sufficient. Robert Prosper testified that he was not surprised by this initiative and expected that it was done in other parks. The importance of this revelation is twofold. First, it is a departure from the policy and headquarters was either not aware of this practice in the field, despite Robert Prosper's assurance that the law enforcement program is reviewed annually and corrective measures taken promptly, or, worse, chose to ignore this departure from policy. Secondly, the departure from policy indicates that Directive 2.1.9 is not practical in the field.
- [745] Moreover, section 6.3.6 of Directive 2.1.9 permits park wardens to conduct directed patrols involving two peace officers, to respond to contraventions regarding the noise and disturbance provisions of the general and camping regulations in campgrounds and day use areas, as part of a compliance strategy outlined and approved in the site law plan. I have already commented on the safety of two peace officers patrols.
- [746] Section 6.3.5 of Directive 2.1.9 permits park wardens to intervene when they observe or are made aware of an offence that affects public peace, incidentally to their other work, provided the intervention does not place them in danger and risk mitigations specified in Directive 2.1.9 and Appendix A are met. The effectiveness of these risk mitigation measures will be addressed in detail later, but suffice to say here that, in my opinion, those measures are never infallible.
- [747] It is relevant to note here, in connection with section 6.3.5 of Directive 2.1.9, that the previous *Law Enforcement Management Bulletin 2.1.9* acknowledged that there were times when circumstances demand that each Parks Canada wardens and jurisdictional police services play a lead role in the other's prime area of responsibility. Parks Canada held that park wardens no longer provide a first responder role regarding public peace offence. However, it is my opinion that this incidental response referred to in section 6.3.5 is not significantly different from the previous first responder role.
- [748] Mr. Raven pointed to the testimonies of expert witnesses Browning and Davis and of park wardens Duane Martin, Deagle, Hawkins and McIntyre that information gathering is crucial to assessing risk. Mr. Raven held that there are compelling reasons to believe that

incidental law enforcement work without background information is more dangerous than responding to a call. I agree with this view entirely.

[749] Finally, section 6.3.8 prohibits park wardens from carrying out evictions resulting from public peace offences. However, Robert Prosper confirmed that park wardens can intervene in the eviction up to when the jurisdictional police is called. In my opinion, this policy does not acknowledge that the situation can suddenly escalate from cooperative to grievous bodily harm or death before the police arrives. Again, I have already commented regarding the safety of two-peace officer patrols.

Park Wardens' Confusion as to Public Peace Law Enforcement

[750] I note that park wardens additionally complained that Directive 2.1.9 is ambiguous regarding their law enforcement responsibilities when they observe a public peace offence on a highway incidentally to their regular duties or when they are informed of a public peace offence. They expressed the concern that they could be exposed to civil or criminal action if they take no action beyond observing, recording and reporting.

[751] Park wardens gave the example of an incident involving a park warden who stopped to assist a person whose vehicle was parked at the side of a road. Robert Prosper confirmed that these situations arise frequently and park wardens are authorized by Directive 2.1.9 to stop and provide assistance where they come upon an accident or a vehicle stopped on the side of a road, incidentally to their regular duties.

[752] In the above mentioned incident, the driver of the parked vehicle was clearly impaired. The issue was whether the park warden should secure the scene and prevent the driver from leaving it until the police arrived, or permit the driver to drive away in an impaired state. Park wardens were concerned that permitting an impaired driver to drive off could risk potential injury to a co-worker patrolling in the area or to a member of the public. They were also concerned that if they permitted the impaired driver to drive away, they faced the risk of being exposed to civil or criminal negligence action should a member of the public be severely injured as a result of the park warden's inaction.

[753] Following my examination of Directive 2.1.9 regarding public peace law enforcement, I agree with park wardens that there is no clear instruction on what to do if they find an impaired driver stopped on a road side.

[754] I would also agree that park wardens are correct to be concerned about permitting an impaired driver to drive away under Directive 2.1.9. Under paragraph 126(c) of the *Canada Labour Code*, they are required, as employees, to take all necessary precautions to ensure that their acts or omissions do not place the health and safety of other employees or persons at risk. Paragraph 126(c) reads:

126(1) While at work, every employee shall

(c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions[.]

[my underline]

[755] Mr. Lambrecht referred to section 6.1.10 of Directive 2.1.9, which promises to indemnify park wardens against personal civil liability provided they have acted within their scope of duties and employment. Section 6.1.10 reads:

6.1.10 ...Parks Canada will indemnify park wardens against personal civil liability so incurred provided that they acted honestly and without malice within their scope of duties and employment.

[756] How the Courts might interpret the phrase "within their scope of duties and employment" is open to conjecture. However, I would expect that they would consider the role assigned to park wardens under section 18 of the *Canada National Parks Act* and the oath of office that park wardens must take pursuant to subsection 20(1) of the act. In the "Oath of Office for Wardens" specified in *the Law Enforcement Administration and Operational Manual*, a park warden agrees to "fully execute and perform the office and duties of park wardens according to the true intent and meaning of the CNPA and regulations made thereunder." [my underline]

[757] So it would appear that, for the protection afforded by section 6.1.10 of Directive 2.1.9, park wardens must consider whether failing to intervene could later be construed by Parks Canada and the Courts as not having acted within the scope of their duties and employment, given the nature of the threat to the public and any other circumstances that might be in play. This corresponds to the precise moment that the IMIM instructs park wardens to assess the risk posed to themselves and the public. Again, in my opinion, Parks Canada's Directive 2.1.9 has the effect of undermining wardens' certainty and confidence at a time when so doing adds risk to them.

[758] Park wardens also complained that Directive 2.1.9 does not provide them with information on how to balance law enforcement policy to observe, record and report with their IMIM training, which instructs them that client expectation and public safety is paramount. I would agree with park wardens that Directive 2.1.9 is not consistent with the law enforcement function of park wardens under that NCPA and represent another factor that places park wardens in tension with Directive 2.1.9 and situational imperatives. This is exacerbated by the absence of agreements between Parks Canada and jurisdictional police services to ensure adequate levels of public peace enforcement and by the evidence that the level of police presence is relatively minor in many parks.

[759] On the subject of the CPIC system, Robert Prosper agreed that the driver of a vehicle parked on the side of a highway may not be the owner of the vehicle. Therefore, he agreed that a CPIC check on the vehicle licence plate may not tell the park warden whether or not the driver had a history of violence or an outstanding arrest warrant.

However, he held that the park warden would learn if the driver had a history of violence or an outstanding arrest warrant when running the driver's licence through the CPIC system and, at that point, could tactically reposition and wait for the police. Nevertheless, he acknowledged that Directive 2.1.9 provides no policy or instruction to park wardens on how to tactically reposition safely, given that they are still holding the driver's licence and that the driver can only assume that they are aware of the notice of violence or outstanding arrest warrant and that, given the wardens' police-like uniform, duty belt and marked vehicle, they will probably execute the arrest warrant.

- [760] Finally, Directive 2.1.9 confirms that Parks Canada is responsible for ensuring an adequate level of public peace enforcement in parks. However, I could find no guidance in Directive 2.1.9 to park wardens regarding a public peace offence in progress, where there is clear evidence that a danger exists for a member of the public and it is unlikely that a member of the police will arrive in a timely manner. The uncertainty in Directive 2.1.9 can only constitute a source of frustration and stress for park wardens, at a critical time when they are assessing risk pursuant to their IMIM training.

Elimination and Reduction of Higher Risk Activities - Administrative Enforcement

- [761] With regard to administrative enforcement, section 6.4.1 of Directive 2.1.9, entitled Administrative Enforcement, confirms that park wardens are still responsible for dealing with administrative offences, including such things as not possessing a valid camping or park user permit. Robert Prosper testified that the change is that park wardens now reply to complaints from other staff, as opposed to conducting patrols for this. However this may affect the frequency of such interventions, it does not alter the nature of the risk associated with it.

Overall Assessment of Law Enforcement Activities Eliminated and Reduced under Directive 2.1.9

- [762] The testimonies of park wardens Duane Martin, Hawkins, Deagle and McIntyre was that the law enforcement duties of park wardens essentially remain unchanged despite the changes to *Law Enforcement Management Directive 2.1.9*.
- [763] According to park warden Duane Martin, resource management law enforcement still remains the primary mandate of park wardens. Park wardens still engage in investigations, patrols, surveillance, in search and seizure and in obtaining and executing search warrants; they still issue warnings; and they still have powers of arrest for *Canada National Parks Act* and *Criminal Code* offences. Also, the public expectation has always been there in the past and continues.
- [764] According to park warden McIntyre, public peace enforcement is just as frequent under Directive 2.1.9 as it was under the old Bulletin 2.1.9 because the amount of incidental interventions has not significantly changed.
- [765] I gave significant weight to the job-experience based opinions of these park wardens. Park warden Duane Martin's experience as a park warden stretches over 33 years, he

headed up the development and implementation of the previous law enforcement bulletin and he is currently responsible for interpreting the new *Law Enforcement Management Directive 2.1.9* for park wardens and managers. Park wardens Deagle and McIntyre are responsible for officer training and their testimony indicated a thoughtful awareness and appreciation of risk associated with law enforcement activities and concerns of park wardens.

[766] Robert Prosper testified that the mitigation measures in Directive 2.1.9 considered Dr. Evans' quantitative assessment contained in his report entitled *National Assessment of Relative Risk in Warden Law Enforcement Occurrence Reports*. Robert Prosper characterized Dr. Evan's study as a significant one, which findings were based on a data set of some 14,000 law enforcement occurrences recorded in parks across Canada.

[767] However, Dr. Evans concluded in his study "that it is the nature of the specific hazards and the circumstances surrounding exposure to hazards", along with consideration of risks, training, education and equipment, that largely determines appropriate and reasonable management and mitigation strategies. He pointed out that consideration of these was outside the scope of his report.

[my underline]

[768] Parks Canada submitted annual statistics regarding a reduction of law enforcement occurrences in Jasper National Park following the implementation of the *Law Enforcement Management Directive 2.1.9*. However, the testimony of park warden Deagle was that the reported reduction in law enforcement occurrences at Jasper National Park was not necessarily attributable to the new *Law Enforcement Management Directive 2.1.9*. While park warden Deagle's testimony was limited to Jasper National Park and may not be typical, it raises questions that, in my opinion, were not satisfied by the evidence I received from Parks Canada.

[769] But more importantly, the evidence confirms that the modifications in Directive 2.1.9 have not changed the nature of the risk to park wardens conducting law enforcement.

[770] As a result of the vague principles stated in Directive 2.1.9, the fact that local parks are not following Directive 2.1.9 relative to two-person patrols and responding to public peace emergency calls from staff or other park wardens and the concern that strict compliance with Directive 2.1.9 could potentially lead a park warden to a contravention of paragraph 126(c) of the Code, I am left with the impression that there is, in important areas, a disconnection between the policy established in *Law Enforcement Management Directive 2.1.9* and the actual practice in the field.

[771] With regard to this issue and the circumstances that existed at the time of HSO Grundie's investigation of park warden Douglas Martin's complaint, I recall the evidence of Robert Prosper that park wardens had taken on ever increasing and expanding law enforcement activities, including: enforcement of the *Criminal Code* as first responder; enforcement of provincial highway traffic legislation; enforcement of provincial and federal wildlife and fisheries statutes and regulations outside park boundaries; and arrest of subjects with outstanding *Criminal Code* offences warrants. Furthermore, he stated that, in some circumstances, park wardens were leading international poaching

investigations, were involved in undercover covert operations and were being deputized or authorized to enforce legislation outside of the parks. He rationalized that park wardens became good at law enforcement in the absence of other police forces or agencies to do it and they increasingly took on first responder responsibilities.

Risk Mitigation Measures

[772] According to Appendix A of *Law Enforcement Management Directive 2.1.9*, in every case of resource protection, public peace or administrative law enforcement, the park wardens' intervention is limited to observing, recording and reporting, when any risk mitigation measure specified in Directive 2.1.9 and Appendix A cannot be met. These mitigation measures include: training; defensive equipment; telecommunication devices; soft body armour; CPIC/OTS; dispatch mechanism and back-up. I make the following findings with regard to each of these mitigation measures.

Training

[773] With regard to section 6.8.1 of Directive 2.1.9, the respondents did not present evidence that disagreed or indicated dissatisfaction with the general training requirement specified in Volume 3, Part III, Chapter 1, Training, of the *Law Enforcement Administration and Operational Manual*. The Manual confirms that PC-4 card designation includes mandatory training in: Resource Conservation Activities; Law Enforcement Component of Recruit Training (12-week course); Law Enforcement Proficiency Workshop Training, including recertification every five years and twenty hours annually to hone muscle memory; IMIM and PDT training, with recertification training every two years; and Compliance Training.

Soft Body Armour

[774] The respondents did not dispute the adequacy of the level II ballistic soft body armour against assault with a sidearm.

Telecommunications Devices

[775] Parks Canada held that park wardens are given access to modern communications equipment, enabling communications access over vast distances and allowing reasonably timely access to the CPIC and the officer safety information contained in the system. Parks Canada has enhanced the accessibility of communications since the hearing before Appeals Officer Cadieux, by upgrading radio equipment and obtaining satellite communications technology.

[776] The evidence from park wardens who testified and from Dave Hanna, Craig Hockley and Garry Bogdan was that communication failure is generally attributable to terrain, weather or limitations in the power source. Park warden Duane Martin testified that a park warden working solo in the Lake Louise area is sometimes unable to use his radio due to the breakdown of the repeater in cold weather. Park warden Hawkins testified that a telecommunication repeater was dysfunctional for two and a half weeks and that battery powered communications equipment has failed because batteries were defective or had

discharged during a tour of many days in the backcountry. He stated that the entire parks of Kootenay and Yoho were "dead spots" in terms of cell phone coverage. He added that he is provided with a satellite phone for work in the backcountry, but the average satellite phone battery lasts for about 20 minutes, or two good conversations, so he has to carry backup sets of batteries. Park warden McIntyre testified that the unreliability of batteries continues to be a problem today and that cell phone coverage is also unavailable in some locations in Georgian Bay Islands National Park. Craig Hockley testified that satellite reception is compromised in valleys because the phone's exposure to the sky is obstructed by the mountains or tree foliage. Dave Hanna testified that cell phones only functioned in 30 to 40 % of his district. He estimated the amount of time needed to make a satellite phone fully functional to be between two and five minutes. Garry Bogdan was emphatic that communications equipment cannot be relied upon because of batteries and a number of dead spots for cell phones and for satellite phones.

- [777] I also recall the testimony of Robert Prosper, who said that the Banff law plan stated that communication coverage is greater than 85% in the field unit for staff who have access to VHF radios, cell phones and satellite phones. According to the law plan, there are some geographical locations where communications is known to be problematic owing to surface geography; however these are recognized and mitigated for in specific tactical plans for the present. Robert Prosper stated that this deficiency is known and the mitigating measures were addressed in the Tactics section of the law plan, for the various activities related to resource management, public peace and administrative law enforcement. However, the mitigation he referred to is compliance with Appendix A of Directive 2.1.9, according to which there must be reliable communications contact as to the location of the enforcement/ compliance incident.
- [778] It is clear from the evidence that Parks Canada has significantly improved communications since HSO Grundie's investigation that led to his two directions, and that improvements continued to be made. That stated, two-way radios, cell phones and satellites are still not always reliable because they require batteries to operate and these often become depleted while on patrol. Additionally, cold weather can decrease battery life time on the devices and on the communication repeater towers. I am mindful of Mr. Lambrecht's concern that anecdotal evidence may not be typical and may lead to incorrect conclusion. However, I was not persuaded that the witnesses' anecdotes confirmed that there is a system wide problem connected with depleting batteries and communication dead zones caused by foliage and mountains. However, their evidence is sufficiently persuasive to satisfy me that remote or wireless communications devices and equipment used by park wardens is, by their reliance on battery supplies, prone to such failure that could reasonably fail at a critical moment. While Parks Canada's efforts to improve communications are laudable and effective, the fact is that the remote communication devices and infrastructure are not infallible and emergency assistance for park wardens is compromised when failures occur.
- [779] With regard to this issue and the circumstances that existed at the time of HSO Grundie's investigation of park warden Douglas Martin's complaint, I also note that the situation was significantly worse then, as Parks Canada had not undertaken measures to improve communications.

CPIC

- [780] The respondents held that the CPIC system, while important, is not infallible as a component of risk mitigation. It has documented "planned" as well as "unplanned" outages, during which time CPIC users are unable to access the database. Park wardens as well as other law enforcement officers testified regarding the routine unavailability of the CPIC system on Sunday mornings. Witnesses also described delays in receiving a response to a CPIC query.
- [781] The respondents maintained that, at its most functional, the CPIC provides information about people who have been entered into the system. It does not, however, provide information about persons who have eluded police, vehicles that have been rented or their drivers and persons who are of interest to the police because of their use of firearms, and it does not permit park wardens to input information into the system, which would provide an instantaneous alert to other park wardens in other parks.
- [782] The conclusion that I draw from Guy Mongrain's testimony and evidence is that the CPIC system itself appears to be extremely useful with an operation record of 97.79 percent. Where system upgrades are required, the CPIC advises users of the planned event. That stated, it is not an infallible system because of its reliance on the timeliness of data provided by other federal and provincial agencies and timely notice from other agencies, especially from the four provinces mentioned, that their information system will be unavailable for upgrade reasons. Mr. Mongrain also suggested that problems can occur at the user end, where their query staff training is insufficient or not current and where their computer hardware is becoming outdated. Also, for park wardens and witnesses from the other conservation agencies, Sunday morning appears to be particularly unhelpful because this corresponds with one of their busier times.
- [783] With regard to this issue and the circumstances that existed at the time of HSO Grundie's investigation of park warden Douglas Martin's complaint, I also note that the situation was significantly worse then, as the CPIC had not undertaken measures to correct its system deficiencies.

Back-Up

- [784] The 1991 Buker and Frey Study described as a "myth" the timely RCMP response to warden calls for assistance when a dangerous situation develops.
- [785] When I examined Directive 2.1.9, I found that the term back-up only appears in Appendix A. Appendix A states in footnote no. 4 that "[p]arameters for appropriate dispatch mechanism and back-up will be included in local law plans and will include consultation with local OSH committees as per the *Canada Labour Code*." Nowhere in the Directive or Appendix A is the term back-up defined or explained. I did note, however, that the definition of the term dispatch mechanism in Directive 2.1.9 refers not to police back-up, but to "a duty warden back-up system". A duty warden would not be armed with a sidearm.
- [786] Robert Prosper testified that Directive 2.1.9 specifies that Parks Canada ensures the maintenance of peace on all lands it administers through MOUs with the RCMP and

other jurisdictional police agencies. He referred specifically to the long standing MOU that Parks Canada has with the RCMP since 1987. Close examination of this MOU confirms that it contains no provision to the effect that the RCMP will provide back-up to park wardens. However, in section 4, Parks Canada agrees to provide back-up to the RCMP. Robert Prosper testified that he had met with the RCMP to develop a MOU reflecting *Law Enforcement Management Directive 2.1.9*. While a new MOU has been drafted, it had not yet been signed. Nonetheless, I examined the draft Parks Canada/RCMP MOU to see if back-up service to park wardens was included. It is not, but, as in the current MOU, Parks Canada agrees to provide RCMP members with the back-up they may request.

- [787] A similar examination of the two other unsigned MOUs, one between Parks Canada and the OPP and the other between Parks Canada's Grasslands National Park and the RCMP, confirmed that there is no reference to back-up by the police service of jurisdiction.
- [788] When asked about minimum response time standards for back-up from the jurisdictional police, Robert Prosper confirmed that Parks Canada has not developed such a standard and there is no agreement with the police services on this matter. He reiterated that any request for assistance from a park warden would be treated the same as though it came from a private citizen. That is, response by the jurisdictional police service would depend on the police services' priorities and any other mitigating factors such as the availability of their resources.
- [789] Robert Prosper confirmed that Parks Canada does not receive national reports from the RCMP regarding minimum policing standards and timeliness of police back-up. Thus, Parks Canada has no way of actually knowing if the RCMP or other police services have sufficient resources to enforce public safety in parks, as indicated in Directive 2.1.9, or to provide timely back-up to park wardens. Robert Prosper could only express confidence that the RCMP and other police services would act appropriately.
- [790] Since, according to Robert Prosper, the law plans must include local mitigation measures, I re-examined the ones that were submitted, to determine what was understood by local park management and park wardens regarding back-up by the jurisdictional police.
- [791] None of the law plans submitted confirmed any minimum response time from the jurisdictional police service, despite that local park managers are to consult with the police when developing the law plans. To the contrary, many law plans caution its park wardens that the jurisdictional police cannot guarantee a minimum response time or, in fact, that they will be able to respond to all situations.
- [792] It is stated in the St. Lawrence Islands Law Plan that the jurisdictional police, the OPP in this case, may not always be immediately available to provide support and a timely response to park wardens' calls cannot be guaranteed. The plan estimated that over the past two years, the OPP have been requested to attend on numerous occasions, with a response rate of roughly 50%. The Bruce Peninsula Law Plan quotes the OPP detachment commander as advising the park that any response would be based on availability of personnel and call priority and the OPP could not commit to a response in a given amount of time. The Lake Louise Law Plan stated that long distances from most detachments have the potential to create long RCMP response times. Similarly, the

Gwaii Haanas Law Plan estimated the RCMP response time to be 1-5 hours, at a minimum.

- [793] In addition, there are no local agreements with jurisdictional police services to provide back-up and certainly no agreement with regard to minimum response time. Instead, the police have simply confirmed that they will do their best if they receive a call for park warden assistance. Even so, they feel compelled to advise Parks Canada of the resource and practical pressures under which they operate.
- [794] Looking specifically at the mitigation measures, I note that the various law plans caution park wardens to: verify that back-up is available; decide if assistance is needed from the police; consider the response time likely; and decide if they feel prepared to make an intervention related to a dedicated or directed law enforcement activity. Both the law plans and the job-experience based testimonies of park wardens confirmed that back-up from park wardens or jurisdictional police services can vary from minutes to hours and it often depends on weather conditions if back-up can be sent right away.
- [795] Notwithstanding all of this, I am persuaded that, while the jurisdictional police services make every effort to respond to a call for back-up from park wardens, the evidence is that the lack of resources does not enable them to guarantee reliable and timely back-up to park wardens.
- [796] In my opinion, the absence of a formal standard at Parks Canada for back-up explains the testimony of park warden McIntyre that the Georgian Bay islands National Park Law Plan requires park wardens to respond to all reported officer safety and staff safety concerns and requests for assistance. According to him, park wardens are to provide emergency back-up to other park wardens, to police, conservation officers and park staff requesting help to stop or deter violent subject behaviour from causing injury or death to victim officers or park staff. However, park wardens are not allowed to pursue subjects who have threatened of grievous bodily harm or death and have fled the scene. Pursuit and apprehension is to be left to the OPP. It also explains Robert Prosper's lack of surprise regarding this departure from Directive 2.1.9 at Georgian Bay islands National Park and his expectation that other parks have similar response policies.
- [797] The Auditor General observed in section 1.57 of her report that there is a failure at the RCMP to re-qualify and recertify its officers in the use of pistol, baton, pepper spray, carotid control and first aid. Overall, the number of peace officers that met all six mandatory training requirements dropped from 57 percent, in 2003, to 6.2 percent in 2004. This is important because these peace officers could be redeployed to respond to emergencies. Robert Prosper agreed that the RCMP response to emergencies was an important element in the risk mitigation strategy for park wardens, but confirmed this was never raised or discussed between the RCMP and Parks Canada.
- [798] Steve Hess, Director, Contract Law Enforcement Programs, Police Academy, Justice Institute of British Columbia, wrote in his report to Parks Canada entitled *Final Report of the Third Party Review of Strategic Policy and Operational Guidelines of the Parks Canada Agency Warden Service, September 2001*, that:

A significant mitigation strategy proposed by Warden Service is the requirement for a 30-minute response time for emergency back-up. The 30-minute back-up risk mitigation is impractical. Situations involving hostile people can accelerate within minutes, and when they do, back-up is needed immediately.

[my underline]

- [799] Park warden Duane Martin testified that western park wardens have expressed their health and safety concerns relative to RCMP back-up. They told him that RCMP back-up in the front county can be unavailable or delayed due to the limited RCMP resources and their need to address priority matters related to their primary law enforcement responsibilities. They also told him that the RCMP does not conduct routine patrols in the backcountry and they feel that RCMP members may not have sufficient backcountry experience and training to provide effective backup.
- [800] Park warden Deagle's evidence was that the RCMP has a detachment office in the city of Jasper and its access to the backcountry would be by helicopter, which could take from forty minutes to a few hours or days depending on weather conditions. He added that pilots are not permitted to fly in mountainous regions after sunset, so backup after sunset would have to wait at least until the next morning, weather permitting.
- [801] Park warden McIntyre illustrated the problem of backup in connection with a narcotics arrest that he made in January 2005. That day, no OPP member was available for back-up and he had to release the individual.
- [802] Dave Hanna testified that RCMP backup is variable and that he has experienced delays from two to five minutes and up to two days, depending on the staffing situation at the detachment and what other responsibilities they have at any given time. He felt that staff shortages were not uncommon.
- [803] Garry Bogdan stated that since 1985, Environment Canada has seen a constant decrease in the RCMP involvement in other than *Criminal Code* law enforcement activities.
- [804] Garry Bogdan further testified that, while his officers must often work alone, the work alone policy at Environment Canada encourages wildlife enforcement officers to engage officers from other agencies as backup where possible. He stated that unarmed park wardens might be called on to provide assistance, but they would not be considered as backup. He opined that an unarmed officer is a liability. Given his considerable experience as a wildlife enforcement officer, I found his testimony to be persuasive in this regard.
- [805] Robert Prosper agreed in testimony that the jurisdictional police's response to emergencies is an important element in the risk mitigation strategy for park wardens. In the absence of any meaningful prescription for minimum response time for police backup in *Law Enforcement Management Directive 2.1.9*, in the local law plans reviewed or in the MOUs between Parks Canada and jurisdictional police services and of any meaningful agreement with jurisdictional police services to provide timely backup by an armed law enforcement officer, it is my opinion that Parks Canada's back-up mitigation measure in Directive 2.1.9 is woefully inadequate.

[806] With regard to this issue and the circumstances that existed at the time of HSO Grundie's investigation of Park Warden Douglas Martin's complaint, I would also note that this was one of the criteria that led

HSO Grundie to decide that a danger existed for park wardens conducting law enforcement.

Whether Or Not the Issuance of a Sidearm Is Necessary and Appropriate in the Circumstances

[807] Given the above noted shortcomings of mitigation measures related to communication equipment, the CPIC and the provision of reliable and timely backup, which applied equally at the time of HSO Grundie's investigation, it is necessary to look at the third issue, which is whether or not the issuance of a sidearm to park wardens as a standard piece of personal protective equipment is necessary and appropriate to mitigate their exposure to the risks associated with law enforcement.

[808] The questions raised by HSO Grundie and the parties in connection with this issue were:

- comparability of park wardens to police officers;
- comparability of park wardens to law enforcement officers employed by other similarly mandated federal and provincial resource protection agencies who issue sidearms to their officers as standard equipment;
- comparability of park wardens to law enforcement officers employed by other federal and provincial resource protection agencies who do not issue sidearms to their officers;
- statistics suggest that the park wardens' risk of grievous bodily harm or death is remote and the risk of being injured or assaulted is even less;
- the sidearm does not address grievous bodily harm or death;
- the IMIM does not require a sidearm nor considers it an industry standard of personal protective equipment for officers engaged in law enforcement;
- park wardens can use verbal skill and tactically reposition if matters escalate and, if they end up in a situation of grievous bodily harm or death, they can use their baton, long arm or weapons of opportunity to deliver lethal force;
- issuing sidearms to park wardens as standard equipment would increase the risk to park wardens and to the public;
- no law enforcement agency issues equipment to meet all conceivable risks; and
- national scope of the issue.

Comparability of Park Wardens to Police Officers

[809] HSO Grundie held that the mandate of park wardens is similar to that of police forces and of other resource protection agencies who equip their officers with sidearms as standard protective equipment.

- [810] Mr. Lambrecht held that conferring peace officer status on park wardens provides them with the authority to enforce the *Criminal Code* within the scope of Parks Canada's jurisdiction. He argued that the appointment does not make the park warden a police officer, nor mean that park wardens have a police mandate. Mr. Lambrecht also maintained that the core mandate of Parks Canada and its employees, including park wardens, is the preservation and protection of natural resources in parks. He noted that park wardens only spend approximately 15 to 20 percent of their time conducting law enforcement work in parks.
- [811] Professor Stenning stated that over the last ten to fifteen years, recognition has grown that policing is now provided by a wide variety of public and private organizations and that the development of policing policy needs to focus on more than traditional police forces. For example, policing at a major airport may require peace officers from public or private agencies, with specialized anti-terrorist equipment, training and expertise, whereas policing at an old age home may only require someone to be able to generally protect residents. He concluded that to distinguish the police officer status, it is necessary to look at the nature of responsibilities, practice and work environments.
- [812] The respondents submitted a report from the Justice Institute of British Columbia entitled *Review of Force Options Requirements of Greater Vancouver Transportation Authority Police Service (GVTAPS) Designated Constables*, dated December 14, 2004, in connection with Inspector Browning's expert opinion report, which I found helpful for differentiating the police from park wardens.
- [813] The purpose of the Justice Institute Report was to determine whether or not GVTAPS designated constables required a sidearm to carry out their expanded role of protecting Vancouver Translink clients from grievous bodily harm or death. The study looked into the term "police officer" as to the nature of responsibilities, usage and specific work environments.
- [814] According to the report, the proposed evolution of GVTAPS designated constables into an armed police-like agency was discussed with the BC Association of Chiefs of Police and the BC Association of Municipal Chiefs of Police. Neither of these groups opposed arming GVTAPS designated constables, because they would look like police; be trained to a BC police standard; be subject to the provision of the *Police Act*, including its complaint process; be governed by a board; perform a police function; and be equipped with all the tools of a police officer, including a sidearm.
- [815] The report stated that similar transit agencies in the provinces were examined regarding the philosophical approach to arming its officers. It concluded that the decision to arm officers with a sidearm or not is predicated on whether the role of the officer is primarily focused on protecting transit users and transit assets or on policing based law enforcement. If it is policing based law enforcement, then the officers should be armed, provided that they are screened, trained, supervised and directed by policy and procedures to the same standard as a local jurisdictional police service.

- [816] The Justice Institute Report suggested the following continuum with regard to articulating the role of police and police-like agencies:
- private security guards; transit security officers with no enforcement authority;
 - special provincial constables, with security function and some enforcement duties;
 - special provincial constables such as conservation officers with a **high degree of law enforcement function**; and
 - municipal police.
- [817] According to the Justice Institute Report, the first two groups focus on security, they perform their responsibility through a number of proactive high visibility functions and their role is largely to **observe and report**. The report states that as the continuum proceeds down toward law enforcement, the focus shifts progressively to aggressive and active enforcement tactics. Moreover, the tools to gain compliance shift from mere presence and dialogue to restraints and application of pain through pressure points, up to and including lethal force.
- [818] I would agree that park wardens are not police officers. They are not appointed as police officers pursuant to any Police Act, subject to a statutory complaint process or governed by a police board. However, the evidence in this case demonstrates that park wardens perform a high degree of law enforcement intervention, as evidenced by the nature of their duties as peace officers. These law enforcement duties, in respect of resource protection enforcement, public peace enforcement and administration enforcement, encompasses warnings, investigations under the *Criminal Code*, the CNPA and other resource protection statutes, charges, arrest, seizure and prosecution. Park wardens are also required to transport individuals where police services are not available to respond or require the assistance of park wardens.
- [819] In carrying out their duties, park wardens are authorized to use aggressive enforcement tactics through the full continuum of use-of-force response, up to and including lethal force; they are trained to a police standard; they are uniformed in police-like uniform; and they are equipped with tools to gain compliance. In addition, this work is carried out at night and in locations that are remote and otherwise geographically inhospitable, with no reasonable expectation of viable back-up. Looking at the overall evidence regarding park warden authority, uniform, training and equipment, I find that, while not police officers, they perform a high degree of law enforcement.

Comparability of Park Wardens to Law Enforcement Officers in Similar Federal/Provincial Resource Protection Agencies Who Issue Sidearms as Standard Equipment

- [820] Mr. Lambrecht argued that park wardens cannot be compared with conservation officers or Canadian wildlife enforcement officers who are equipped with sidearms for their work. He held that these officers are responsible for enforcing hunting and fishing regulations and regularly come in contact with hunters who are armed with firearms and fishers who may have knives and other sharp edged tools. He pointed to the fact that hunting is not permitted in national parks and park wardens are not responsible for

checking recreational hunting licences. He held that conservation officers and Canadian wildlife enforcement officers are likely to deal with more armed persons in one year than any police force.

- [821] However, the 1991 Buker-Frey Study, the 1993 CEGEP Report entitled *A Study Pertaining to the Safety of the Duties of Park Wardens in Law Enforcement*, the 1977 Rescue 3 Risk Management Inc. Study entitled *Final Report Recommending a Level of Service for Alberta Regional National Parks*, the 1999 Victoria Committee and the 1999 Report by David Jivcoff entitled *An Officer Safety Issue Analysis Compilation Paper* all reported comparing park wardens to conservation officers in other jurisdictions who are armed with sidearm, and all recommended that park wardens be similarly issued with sidearms. Parks Canada did not offer any evidence that it rejected these comparisons at the time. Instead, the evidence is that Parks Canada just fundamentally disagreed with the notion of issuing sidearms as standard equipment to park wardens. The Victoria Committee Report noted that 10 out of 12 provinces and territories, along with 3 of 4 federal agencies involved in ecosystems protection, presently carried sidearms. The Report by David Jivcoff noted that the provinces of Saskatchewan, Manitoba, Newfoundland and Labrador and Prince Edward Island had just armed their conservation officers, Fisheries and Oceans had armed their enforcement officers and Alberta was in the process of arming its park rangers. He observed that Parks Canada Agency might soon be the only agency below the standard of care.
- [822] Moreover, in 1995, Parks Canada instituted a *Levels of Service* standard, that individual parks were to use to develop their individual law plans. The standard consisted of four law enforcement risk levels, where level four corresponded to the higher risk. The law plans for Banff National Park, Prince Edward Island National Park, Bruce Peninsula National Park/Fathom Five National Marine Park and Kouchibouguac National Park had all determined that the overall level of risk was level three, and that the level of risk for park wardens was level four. According to the *Levels of Service* standard, a level four risk, described as Advanced Law Enforcement Level of Service, called for the issuance of sidearms to all park wardens. As noted by HSO Grundie, the law plan for PEI National Park stated plainly that the absence of equipment to address a situation of grievous bodily harm or death could impair the ability of park wardens to protect themselves and park visitors. Despite the law plan recommendations, Parks Canada refused to follow its own policy and issue sidearms to park wardens in those parks.
- [823] The evidence of Dave Hanna was that his jurisdiction is adjacent to Banff National Park and that he has had frequent contact with federal park wardens in his work. He has worked jointly with park wardens on boundary patrols, shared intelligence, sits on a joint committee with park wardens on wildlife issues, has participated with local Parks Canada management in the development of their park law plan and has adopted park warden techniques. Dave Hanna added that his Agency uses the AACP use-of-force model, which is very similar to the IMIM model used and taught by the RCMP. He opined that the work of their armed conservation officers and of park wardens is very similar.
- [824] The evidence of Garry Bogdan was that he has worked with park wardens or adjacent to park wardens for twenty-five plus years. Before joining Environment Canada, he worked

as an Alberta conservation officer and worked closely with park wardens at Prince Albert National Park. His officers deal with the same big game species found in national parks and in the more recent past, his office has worked with park wardens on joint boundary patrols and on the illegal sale of bear parts. He held that the work of park wardens and wildlife enforcement officers armed with sidearms was similar, because they are both responsible for resource protection and do similar enforcement activities in connection with the work.

- [825] Edward Davis provided expert evidence that any law enforcement incident involves an interaction between the law enforcement officer, the subject and the circumstances that bring them together. He described this interaction as "the deadly mix". On that subject, Mr. Raven held that, while amended Directive 2.1.9 aims to address park wardens' behaviour, it does not address the circumstances giving rise to an encounter, nor does it address the subject's behaviour. In my opinion, Mr. Lambrecht's argument, focusing on the role of conservation and wildlife officers and on the frequency of dealing with armed hunters, does not adequately consider circumstances that give rise to an intervention by a park warden or the range of subject behaviour.
- [826] I am inclined to believe that the comparisons made by Messrs. Hanna and Bogdan and the authors of the aforementioned in-house and third party studies intuitively considered the officer, the subject and the intervention situations when they concluded that park wardens were comparable to wildlife enforcement officers and conservation officers, who are armed with a sidearm.
- [827] Mr. Raven put forth the credible argument that risks to which park wardens are exposed in connection with incidental public peace law enforcement is comparable to conservation officers and Canadian wildlife enforcement officers approaching an armed hunter. In particular, he stated that park wardens continue to investigate disturbances, conduct traffic stops, investigate resource protection offences, including poaching incidents, and continue to interact in a law enforcement context with individuals under the influence of alcohol and/or drugs. He added that they continue to do this work at night and in locations that are remote and geographically inhospitable, with no reasonable expectation of viable back-up. I am in agreement with his position that all of these have been characterized in evidence as dangerous, and that Parks Canada called no park wardens with a working experience of the new Directive 2.1.9 to counter this evidence.
- [828] I also give weight to the notation in the *Jasper National Park Law Plan 2003*, which reads: "[Park] wardens dealing with wildlife offenders or suspects are at a high risk since the location can be remote, or late at night and these persons are usually armed, liquor or drugs may be involved, and the penalties imposed can include: loss of hunting rights and property, significant fines and times in prison."
- [829] Garry Bogdan stated that it was his experience that, in ninety percent of the time, an armed hunter is someone who is law abiding; in five percent of the time, the hunter is someone who has committed a violation out stupidly or out of ignorance of the law; and in approximately five percent, a hunter is someone who may have violent tendencies, dislike authority, be mentally unstable, be under the influence of alcohol or drugs or have outstanding arrest warrants. All the experts' testimonies, including the job-experience

based opinion evidence by park wardens, agreed that the unpredictability of the subject's behaviour is what makes law enforcement inherently risky.

[830] In my opinion, it is necessary to consider the officer, the subject and the circumstances for assessing risk. On balance, I find the evidence to be more persuasive than not that the work of park wardens is comparable to other resource conservation law enforcement officers who are armed with a sidearm for their work.

[831] This essentially agrees with the finding made by HSO Grundie.

Comparability of Park Wardens to Law Enforcement Officers in Similar Federal/Provincial Resource Protection Agencies Who Do Not Issue Sidearms as Standard Equipment

[832] Mr. Lambrecht argued that park wardens are comparable to conservation officers who are not issued sidearms. Mr. Graham stated that his evidence established that most jurisdictions in Canada employ full time and seasonal park officers who are appointed as peace officers under the *Criminal Code* but are not armed with a sidearm. These officers have the power of search and of seizure. He held that the study conducted by John Good showed that all jurisdictions provided their park officers with uniforms and radios. It also established that many jurisdictions provide their park officers with pepper spray, handcuffs and a collapsible baton. Some jurisdictions also provide long arms for wildlife purposes, while the provinces of Manitoba and Alberta provide their park officers with a sidearm and a long arm for their law enforcement programs. Additionally, the study showed that conservation officers employed by the provinces of Alberta, Manitoba, Nova Scotia, Ontario, Saskatchewan and the Yukon Territories are equipped with sidearms for law enforcement purposes.

[833] I gave the survey results produced and submitted by John Good little weight, because terms used in the survey had not been defined or adequately defined, to ensure that John Good and the respondents had a common understanding of what information was applicable to the survey. My overall lack of confidence in the results of the study conducted by John Good was confirmed by the evidence of Bruce van Staalduinin, who provided important detailed information regarding the park wardens' situation in Ontario that is not reflected or evident in John Good's Report.

[834] According to Bruce van Staalduinin's evidence, there are significant differences between park wardens employed by Parks Canada and Ontario park wardens. For example, the majority of Ontario employees are seasonal. The training provided to federal park wardens is significantly broader than that provided to Ontario seasonal park wardens. Federal park wardens require: a 12-week course of mandatory training in Resource Conservation Activities; Law Enforcement Component of Recruit Training; 20 hours annually on Law Enforcement Proficiency Workshop Training, which includes recertification every five years and twenty hours annually to hone muscle memory; IMIM and PDT training with recertification every two years; and Compliance Training. Ontario park wardens need only complete a two week park warden course, which includes a segment on the use of force, on arrest, on conflict avoidance, on empty hand techniques, on handcuffing techniques and on the use of a baton. Unlike federal park wardens, Ontario park wardens do not wear soft body armour and are not issued with pepper spray.

Finally, Ontario park wardens have no responsibilities relative to resource management law enforcement and they do little or nothing that would qualify as solo backcountry law enforcement.

- [835] On the subject of police back-up, Bruce van Staalduinin stated that the parks with the highest level of visitation are located in southern Ontario and OPP is quite close nearby. For example, some detachments are either in the park, near the park boundary or close to the park boundary.
- [836] Inspector Browning provided documentation in his expert report regarding the RCMP Auxiliary Constables Program. According to the report, auxiliary constables have the power of arrest but cannot use it unless under the direct supervision (i.e. eye contact) of a regular RCMP member or indirect supervision where the Commander has decided that risk is low and there is no need for direct supervision. While auxiliary constables are provided with auxiliary/reserve constable training, use-of-force training other than firearms and the use of the ASP baton and pepper spray, they are not trained to the same level of RCMP members and cannot be involved as respondents in any incident requiring special skills and intervention practices, such as violent acts, domestic assaults, weapons, domestic violence, chemical, biological, radiological and nuclear incidents, or where grievous bodily harm may be suffered.
- [837] In my opinion, neither Ontario seasonal park wardens nor RCMP auxiliary constables compare with federal park wardens in that they do not perform a high degree of law enforcement, at night and in locations that are remote and geographically inhospitable, with no reasonable expectation of timely and reliable back-up from the jurisdictional police.
- [838] That being stated, Mr. Lambrecht referred to the testimony of Dave Hanna that his Agency also employs for the summer approximately 65 seasonal conservation officers who are usually students and second year seasonal conservation officers and who are appointed as special constables instead of peace officers. These seasonal conservation officers are provided with a duty belt and equipped with soft body armour, a baton, pepper spray, handcuffs but no side arm. They are appointed as special constables and have the power of arrest in connection with offences under the *Gaming and Liquor Act*, the *Highway Act*, the *Wildlife Act*, the *Fisheries Act* and the *Alberta Sport, Recreation, Parks and Wildlife Foundation Act*.
- [839] When I asked Dave Hanna for clarification on why full time conservation officers were armed and seasonal officers were not, he explained that seasonal park wardens are required to obtain authorization from a full time armed conservation officer before undertaking law enforcement activities and the full time armed conservation officer will try to accompany the student. However, it appeared to me from his testimony, that his agency's policy regarding its seasonal conservation officers was not consistent with his own thinking about the need for conservation officers to be armed.
- [840] Mr. Lambrecht, nonetheless, insisted that these unarmed conservation officers cannot be ignored when comparing Parks Canada park wardens with other Agencies.

- [841] However, it is stated in the management summary portion of the report entitled *British Columbia Auxiliary/Reserve Constable Review, 1998*, by Darrell Kean and Associates Consulting Limited, Criminal Justice Training and Research, a report that was contained in the expert opinion report submitted by Inspector Browning, that Ministry of the Attorney General executives, senior police executives throughout the province, as well as the BC Federation of Police Officers and the RCMP officers' association began to express concerns about the auxiliary/reserve constable program in British Columbia, including the activities of such members. It was stated that, historically, the auxiliary/reserve police programs never envisaged the role that these constables were currently playing in the delivery of policing services to the community. Another summary excerpt stated that local police authorities were often presented with unusual circumstances that required them to take chances. One such example involved inappropriately assigning law enforcement tasks to auxiliary/reserve constables.
- [842] On the issue of whether or not to arm auxiliary/reserve constables with sidearms, the Review states that some departments have tried to circumvent the possibility of auxiliary/reserve constables having to use deadly force by not arming the reservists. It notes, however, that few regular police officers would sit in the right side of a patrol car in a police uniform without a sidearm. It also states that experience has taught regular police officers that situations can quickly escalate to the point where their only option is the immediate use of deadly force. Consequently, the province, local governments and police agencies will have to decide whether they are willing to pay the price associated with placing volunteers with insufficient training and experience and in police uniforms in situations of high risk.
- [843] All this suggests to me that certain degree of "rolling the dice" has occurred, based on the notion that the frequency of exposure to grievous bodily harm or death to such officers is likely to be low or remote. In fact, this is one of the notions Parks Canada uses to argue that park wardens need not be armed with a sidearm when conducting law enforcement. As previously stated, I do not agree that this is the proper criteria in respect of hazards that have innate risk. Rather, the *Canada Labour Code* requires that in situations of high risk and low frequency involving an innate hazard, the employer takes all reasonable measures to eliminate and reduce the risk associated with the innate hazard necessary to ensure that the health and safety of its employees is protected.

Statistics suggest that the park wardens' risk of grievous bodily harm or death is remote and the risk of being injured or assaulted is even less

- [844] Mr. Lambrecht referred to the officer safety study conducted by Dr. Evans, entitled *National Assessment of Relative Risk in Warden Law Enforcement Occurrence Reports*. He argued that the officer safety study and three years of records from the new national occurrence tracking system shows that the probability of a park warden being threatened with grievous bodily harm or death is remote and the risk of injury related to law enforcement is rarer. He further pointed out that park wardens can use discretion on whether or not to intervene if risks are high and can refuse to work under the Code if there is a danger.

- [845] However, the objective of the above noted study was to identify relative risks, as opposed to absolute risks, of abuse, threat and assault, with or without injury. Moreover, Dr. Evans stated in his Report that it is the nature of the specific hazards and the circumstances surrounding exposure to hazards, along with consideration of risks, training, education and equipment, which largely determine appropriate and reasonable management and mitigation strategies. I could find nothing in this Report to substantiate Mr. Lambrecht's contention that the study data confirmed that the risk of a park warden being exposed to grievous bodily harm or death is rare and the risk of injury even rarer. Dr. Evans commented in his Report entitled *Review of Officer Safety Occurrences, Specific Study Concerns and Injuries Associated with Law Enforcement Activities of Parks Canada Wardens*, dated October 23, 2001, that occurrences involving threats/weapons or physically restraining or assaulting a park warden were infrequent and actual injuries less frequent. However, the Report confirmed a total of 825 officer safety concerns reported by park wardens. It also noted that specific safety factors were recorded in 645 of the occurrence reports reviewed and, in 33% of the cases, the most common safety factor was subjects with criminal or violent histories. These 645 occurrence reports with specific safety factors also confirmed that subjects who were verbally aggressive with park wardens (78) or subjects who threatened park wardens with weapons or assaulted them (6) accounted for approximately 12% of the officer safety occurrences.
- [846] Dr. Evans commented in his Report entitled *Review of Officer Safety Occurrences, Specific Study Concerns and Injuries Associated with Law Enforcement Activities of Parks Canada Wardens*, dated October 23, 2001, that occurrences involving threats/weapons or physically restraining or assaulting a park warden were infrequent and actual injuries less frequent. However, the Report confirmed a total of 825 officer safety concerns reported by park wardens. It also noted that specific safety factors were recorded in 645 of the occurrence reports reviewed and, in 33% of the cases, the most common safety factor was subjects with criminal or violent histories. These 645 occurrence reports with specific safety factors also confirmed that subjects who were verbally aggressive with park wardens (78) or subjects who threatened park wardens with weapons or assaulted them (6) accounted for approximately 12% of the officer safety occurrences.
- [847] Dr. Evans stated in his 2001 Report that the data had limitation because there was no standard definition for warden occurrences, some park wardens did not perform CPIC checks before becoming involved with park visitors and underreporting of some specific concerns occurred.
- [848] On the nature of the risk, the expert evidence of Sergeant Butler and Edward Davis was that law enforcement officers cannot know with any certainty how the subject might react. That is, the unpredictability of human behaviour constitutes an inherent danger that can be exacerbated when it comes to individuals who may have violent tendencies, dislike authority are mentally unstable, are under the influence of alcohol or drugs or have outstanding arrest warrants.

- [849] Sergeant Butler testified that any policy that determines the need for protective equipment should be premised on the "low frequency, high risk" principle. This principle is grounded in the belief that where the consequences of a particular event are dire or critical for an individual, prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of the event occurring. It also holds that, where the potential outcome of exposure to risk is dire or critical for a person, mitigating measures to prevent that dire outcome must be taken, regardless of the likelihood of the exposure occurring. I do not disagree with that principle.
- [850] In his testimony, Duane Martin listed known poachers in and around Riding Mountain National Park that were known to have lengthy criminal records, including individuals tagged on the CPIC with violence notices. He also pointed to the evidence of Garry Bogdan, who had conducted his own studies after those of Dr. Bell. Garry Bogdan found that approximately sixty percent of individuals they had charged during a two-year period had serious *Criminal Code* violations and thirty-five percent had violence notices. He was also involved with a study on night hunters done by the Province of Saskatchewan, which found that over eighty percent of those offenders had other *Criminal Code* violations. His evidence confirmed that individuals with criminal records and histories of violence, including those known to dislike authority, are known to frequent or travel through parks or to live in the vicinity.
- [851] It is also clear from the evidence regarding BOLFs, from intelligence information submitted by park warden Duane Martin and other park wardens who testified, from the law plans and from the anecdotal evidence submitted by park wardens, that persons with criminal histories of violence are known to frequent parks, travel on park transportation corridors and reside in the vicinity of parks.
- [852] The local law plans prepared with the involvement of park wardens provide compelling evidence that, however remote the likelihood that park wardens will be exposed to injuries, assaults or situations of grievous bodily harm or death, it is not nil. In almost every time, the law plans identified risk situations, leaving no doubt that they continue to exist. In fact, I found it surprising that the new revised park warden job description does not acknowledge that law enforcement is inherently risky.
- [853] Moreover, the following law plans identified specific risk situations: at Chilkoote Trail, persons in possession of firearms are known to use the trail for illegally entering Canada; at Riding Mountain National Park, there was an issue with open liquor and unsafe boating; at Gwaii Haanas, park wardens may encounter individuals involved in smuggling and others who are armed; and at Yoho, Kootenay and Lake Louise, there are safety concerns associated with the Trans Canada Highway and the transport of illegal drugs or other contraband. I did not regard such entries as hypothetical possibilities out of a brainstorming "what if" session. The caution simply reflects the collective wisdom, experience and concern of park superintendents and park wardens.
- [854] Additionally, the law enforcement occurrence reports by park warden Finland, reviewed by Robert Prosper during his testimony, confirmed that individuals with criminal records and histories of violence, including those known to dislike authority, are also known to

frequent or travel through parks or to live in the vicinity and park wardens can become involved with such individuals during law enforcement activities.

- [855] The more recent evidence of park wardens Deagle and Hawkins was that they have approached vehicles for public safety purposes and have been met by individuals extremely violent or known to be violent towards police. In one case, in 1998, park warden Deagle had stopped to assist a vehicle parked on the side of the road. He received a message from the CPIC that the individual connected with the vehicle registration had a lengthy criminal record and a caution for violence, and was known to hate police officers and to carry a defender short barrelled shot gun.
- [856] Robert Prosper agreed in testimony that park wardens do anything that police do in law enforcement, as long as the activity is incidental to their prime mandate, which is resource protection and enforcement of park legislation, as well as legislation consistent with park legislation, including activities related to *Criminal Code* offences, such as not providing identification or obstructing and assaulting a peace officer.
- [857] Parks Canada's documents in evidence confirm that there are inherent risks in performing law enforcement duties. For example, Appendix A of *Law Enforcement Management Directive 2.1.9* states: "There is an inherent element of risk associated with law enforcement activities." In this regard, I recall Garry Bogdan's statement that approximately ninety percent of people are law abiding, **five percent commit violations stupidly or out of ignorance of the law** and approximately five percent have the *mens rea* intention to break the law in order to capitalize for personal gain or reputation. Given all the evidence submitted in this case, I would interpret the term "stupidly" to include individuals acting under the influence of alcohol or drugs or suffering from mental illness, even though it is not necessarily the most accurate or appropriate term to use.
- [858] Moreover, Brett Moore, Manager for Resource Conservation, wrote to park warden McIntyre in May 2000 that there are inherent risks in performing law enforcement duties and that there are no guarantees.
- [859] The uncontested expert opinion of Edward Davis and Sergeant Butler was that information is crucial for an officer's best assessment of risk when undertaking a law enforcement activity. In situations where park wardens become involved in a law enforcement situation incidental to their other duties, they may have little or no preliminary information regarding the situation or the subjects.
- [860] The training provided to park wardens, which includes IMIM and PDT, and the personal protective defensive equipment issued to them is consistent with the reality of an ever present inherent risk.
- [861] In my view, the evidence neither supports Mr. Lambrecht's position nor his view that frequency is the appropriate criteria.
- [862] In addition, I find Mr. Lambrecht's suggestion that Park Canada's *Law Enforcement Management Directive 2.1.9* is adequate and that park wardens are protected because

they can always refuse to do work under the *Canada Labour Code* to be contradictory statements. The suggestion that reliance on the right to refuse provisions in the Code is a mitigating factor in the prevention program suggests in itself that there are problems concerning the prevention program.

[863] This essentially agrees with the finding made by HSO Grundie.

Sidearm does not address grievous bodily harm or death situations

[864] The evidence was consistent that there is an inherent risk associated with all law enforcement activities and that risk is the unpredictability of the behaviour of the individual, who can be influenced by stress, drugs, alcohol or any other factor.

[865] Inspector Browning testified that officer presence is viewed as a level of intervention and depends on the ability of a subject to identify that a peace officer is present by the officer's uniform, vehicle or other mark. He confirmed that officer presence can de-escalate or escalate a situation in seconds. Conversely, Inspector Browning agreed that the subject may also be assessing the situation to decide what response will be given to the police officer. He agreed that most assaults on officers occur from four to five feet. Therefore, it was reasonable to conclude that the assaults occur at the point where information is being exchanged between the subject and the officer or during the course of an arrest.

[866] Expert witnesses all agreed that officer presence is part of the IMIM and maintained that all witnesses who were expert on the subjects of use-of-force and violence against law enforcement personnel agreed that officer presence can have the effect of escalating or de-escalating a subject's behaviour. They also agreed that the very fact that a law enforcement officer is present as an agent of social control is sufficient to have this effect on a subject. The evidence was that a "weak" officer presence can also have the effect of escalating subject behaviour. Edward Davis' thesis was that several law enforcement officers confirmed in their evidence that an officer's diminished confidence can contribute to increase the subject's aggressiveness.

[867] Edward Davis testified that the uniform, duty belt equipment and enforcement vehicles and vessels give park wardens every appearance of a law enforcement officer. He testified that a subject may assume that the approaching law enforcement officer knows his/her criminal background and attack without warning. This is particularly true if the subject is under the influence of drugs or alcohol and/or is paranoid or otherwise inhibited.

[868] The Loree Study on assaults to RCMP members to which Sergeant Butler referred conclusively established that, in a significant portion of the time, the assault occurred spontaneously, before officers had time to call for backup. Parks Canada Agency did not provide evidence to contradict this view and I have no reason to doubt the legitimacy of this risk concern.

[869] Park wardens who testified confirmed that they had all been mistaken because of their uniform and duty belt with a police officer or another federal or conservation law

enforcement officer equipped with a sidearm, despite the fact that the park wardens were not wearing one. Moreover, at the hearing, park warden Deagle showed his own duty belt, which included a Parks Canada's issued banger pistol. This pistol, which has all the appearance of a sidearm, is used for animal control and only discharges sound producing ammunition. Despite the fact that this pistol is worn at the back of his duty belt, he confirmed that he had been queried by the public several times as to the calibre of his "sidearm".

[870] In my opinion, the evidence of Inspector Browning and other testimonies above noted support the respondents' contention that officer presence is part of the IMIM, it can de-escalate or escalate a situation and the subject may also be doing his own assessment of the situation to decide whether to attack the officer. A "weak" officer presence can have the effect of escalating subject behaviour to the level of grievous bodily harm or death.

[871] This essentially agrees with the finding made by HSO Grundie.

The IMIM does not require a sidearm nor considers it an industry standard of personal protective equipment for officers engaged in law enforcement

[872] The position of Parks Canada is that sidearms are not required by the IMIM and their only purpose is to deliver lethal force and kill someone. Hence Parks Canada's argument that a park warden could use the baton, long arm or any weapon of opportunity should a situation of grievous bodily harm or death arise.

[873] Inspector Browning confirmed that the IMIM does not mandate the issuing or use of a sidearm. It simply identifies that lethal force is an appropriate response to a threat of death or grievous bodily harm. Notwithstanding this, the IMIM presupposes that the officer will be trained in the use of a sidearm and all other intervention options.

[874] Inspector Browning also confirmed that RCMP members are not instructed that their sidearm must be used if it is drawn. I understood him to say that the purpose of drawing the sidearm in a situation of grievous bodily harm or death is first to regain control. He stated that RCMP officers are told to ask themselves the following three questions: *Am I or others in immediate danger? Am I in control? What can I do to lessen the danger?*

[875] Inspector Browning agreed that many circumstances requiring a police officer to use lethal force are beyond the officer's control so the officer must be prepared to react when a lethal force situation arises. He also agreed with the finding of the Stetzer Report that it is the activity and the suspect that significantly determines the outcome, not the law enforcement individual officer. Inspector Browning also agreed that one cannot predict human behaviour. He recognized that, while an officer will rarely be in a situation where it is appropriate to use lethal force, it is essential to the public's and the officer's safety that the officer be trained and equipped to respond.

[876] Sergeant Butler stated that the enforcement community considers the agency issued sidearm as the standard for close personal protection. Moreover, the sidearm is typically viewed by the public and law enforcement officers as a defensive tool necessary for the

safety of the public and the officer. The sidearm is typically worn in a holster, on the officer's duty belt, where it is ready in exigent circumstances.

- [877] Sergeant Butler testified that the weapon is only used if the subject does not respond in order to de-escalate his/her grievous bodily harm or death behaviour. He gave two poignant examples of how drawing his sidearm had the immediate effect of gaining the cooperative behaviour of subjects and instead of leaving someone dead, the matter was brought to a rapid non-violent end.
- [878] The respondents conceded that the IMIM does not mandate the tool or technique with which to accomplish a lethal force response, but asserted that the use-of-force model is premised on an officer's ability to transition from lesser force options to lethal force options and back to lesser force options, as appropriate. This can only be accomplished if the law enforcement officer is physically unencumbered in his ability to do so.
- [879] The consistent evidence in the case was that peace officers must transition with the subject. Inspector Browning and other witnesses agreed that the moment the grievous bodily harm situation de-escalates, IMIM training tells them to re-holster their sidearm and use the force appropriate to the subject's behaviour. At the same time, officers have to be able to escalate up again if the subject's behaviour goes back to grievous bodily harm or death. Frankly, the view that a sidearm is drawn to kill is simply one-dimensional, uninformed and unsupported by the facts.
- [880] The expert witnesses were unanimous that a law enforcement officer is not required to proceed sequentially through the use-of-force options set forth in the IMIM, but, rather, to respond to the level of force presented by a subject. They also agreed that risk assessment is not a static but a continual process. Hence, as the subject's behaviour changes, so too does the appropriate response by the law enforcement officer. In any case, the purpose of any intervention is public safety as well as officer safety, and officer safety is recognized as essential to public safety.
- [881] I conclude from this that a sidearm is a necessary and appropriate tool to deter an attack, regain control without having to discharge the sidearm if the subject's behaviour suddenly escalates to a situation of grievous bodily harm or death, transition down if and when the subject's behaviour de-escalates and survive a situation of grievous bodily harm or death where the only option for self preservation is the use of lethal force.
- [882] Finally, a long arm, a baton, a shovel, a stick or any other weapon of opportunity would not give the park wardens control or the ability to transition up and down in concert with the subject's behaviour. Every witness agreed that any weapon can be used to deliver force if there are no other options available, but that is not the point. The appropriate tool for a law enforcement officer is the one that allows the officer to transition in accordance with the IMIM training and control the situation so as to meet the objective of the IMIM which is: "The best intervention causes the least harm or damage." In my opinion, the sidearm is that tool.
- [883] This essentially agrees with the finding made by HSO Grundie.

Park wardens can use verbal skill and tactically reposition if matters escalate and, if they end up in a situation of grievous bodily harm or death, they can use their baton, long arm or weapons of opportunity to deliver lethal force

- [884] According to the IMIM, any intervention requires an officer to consider the option of tactical repositioning. Expert witnesses agreed that it is not always possible to tactically reposition when the officer is physically limited in his/her ability to do so because of physical barriers or the subject prevents the officer from doing so, as in the case of an assault.
- [885] Sergeant Butler emphasized the erroneous belief "that disengagement is always a possibility. This belief could (and has) resulted in officers entering into situations they should not have because they believed they could simply 'tactically reposition'. This unrealistic belief results directly to a complacent attitude and overconfidence; two of the prime reasons officers find themselves assaulted, injured and killed."
- [886] Expert witnesses agreed that, in situations of grievous bodily harm or death, it is crucial that officers have a tool or technique that will allow them to quickly stop the threat. They agreed that the purpose of training is to develop "muscle memory", to enable officers to react quickly and appropriately to subjects' behaviour without having to first formulate a plan. Sergeant Butler stated that it was unlikely that an untrained person would be able to apply lethal force because, under stress, a person is using cognitive thinking less. He added that, without lethal force training, park wardens have not developed the muscle memory essential to acquiring an instantaneous response to the threat of grievous bodily harm or death when a split-second may make the difference to their life.
- [887] Expert witnesses were in agreement that verbal intervention/negotiation skills are the most important of IMIM options. Evidence abounded that verbal intervention is ongoing during any law enforcement encounter and that it may indeed resolve the matter. However, expert witnesses also agreed that assaultive or deadly force confrontation often come at the officer seemingly from nowhere, without prior warning or indication that anything was amiss. In this regard, Brett Moore had written to park warden McIntyre, in May 2000, that "[w]e know that both management (verbal tactics) and anticipating subject behaviour can fail. We know there are no guarantees." It is clear that verbal intervention is an integral part of IMIM or other use-of-force models, but basing a policy of arming or not arming park wardens on their ability to resolve every law enforcement intervention through verbal tactics or to talk their way out of danger in front of an uncooperative or combative subject is simply not realistic.
- [888] Regarding the use of the baton as defensive weapon in situations of grievous bodily harm or death, Inspector Browning's evidence was that the closer to a threat the officer is, the greater the sense of fear becomes. He explained that a heightened sense of fear can lead to increased heart rate, auditory exclusion, tunnel vision, loss of fine and complex motor skills, memory loss about the incident, slow motion and reliance on gross motor skills. He stated that the greater the distance between officer and subject, the greater the reaction time with less vulnerability. That is, more time equates to better judgement and appropriate level of intervention. The reaction gap allows the officer to perceive, analyse, formulate and initiate and the officer may have more intervention options due to that

reaction time. He added that, when facing an edged weapon, the very minimum distance to maintain is 25 feet, whether the sidearm is holstered or not. If the officer has less than 25 feet with the assailant, he/she should use any available barrier.

- [889] Sergeant Butler stated that the *Criminal Code* authorizes the use of lethal force where there is a risk of death or grievous bodily injury. In that case, officers can use anything at their disposal. However, he stated, the reality is that, unless the officer is trained on all those different tools, it is very unlikely that, in such a stressful situation, they will be able to use anything. Sgt. Butler explained that, in a lethal force confrontation, the sympathetic nervous system takes over from the normal para-sympathetic nervous system and the sympathetic nervous system releases all sorts of hormones into the body. One process connected with the release of hormones is a shift from cognitive thinking to subconscious or mid-brain thinking. While the person can function through significant pain, the chances are very remote that they will be able to effectively use any use-of-force option unless they have received extensive scenario based training on that option.
- [890] The RCMP *Police Defensive Tactics Training Manual* stated, in the section entitled “On the subject of Target Zones, Closed Mode Strikes, Takedown from the Closed Mode”, that the defensive baton is not designed as a lethal weapon and is not an alternative lethal force. Instead, it is to be used to counter or stop an aggression. Sergeant Butler agreed that the baton can be used to deliver lethal blows to certain parts of the body, but the officers are trained that these deadly parts of the body are prohibited target areas. Also, they are not trained to use the baton to respond to a death or grievous bodily injury threat.
- [891] Park warden Deagle, who was a PDT trainer, testified that a critical component of the PDT training includes the improvement of any tool or technique taught. He held that muscle memory is critical, so that the park warden's reactions are automatic under high stress and the delivery of lethal force is appropriate. He emphasized that so-called weapons of opportunity go with no training or muscle memory, neither does the use of the baton to deliver lethal force. In fact, muscle memory training on the use of the baton will likely influence the park warden to direct blows to non-lethal body areas.
- [892] In his decision, HSO Grundie expressed concern that the park warden would have to be close to an assailant armed with an edged weapon to use the baton to deliver lethal force. The need for close proximity to use a baton to deliver lethal force adds unacceptable risk to the situation.
- [893] Witnesses agreed that a person will use anything to survive an attack in a situation of grievous bodily harm or death and that, in this context, the baton could be used. However, there is considerable evidence that it is irresponsible for Parks Canada to suggest that the baton or other weapon of opportunity is the prescribed mitigation tool for park wardens to deal should a situation of grievous bodily harm or death arise.
- [894] On the matter of substituting the long arm for the sidearm, Sergeant Butler stated that the sidearm is tactically superior over a shot gun or rifle for close quarter battle situations. This is because, in a close battle situation, an officer will use at least one free hand to attempt to control the offender's lethal attack. Since the pistol is designed to be accessed

and operated with one hand, it functions well in those situations. For its part, a long arm is designed to be aimed and fired using both hands. This, Sergeant Butler wrote, leaves the officer at a tactical disadvantage in close quarter situations. He added that the long arm requires significant distance between the officer and the offender to be deployed, but statistics and research prove that spontaneous attacks occur at close range. Moreover, it is easy at close range for an offender to defeat an officer's attempt to bring a long arm to bear and render the possession of the shoulder weapon useless.

[895] Dave Hanna testified that Alberta's full time conservation officers are provided with a long arm for wildlife use. However, he confirmed that they receive no training on its use as a defensive weapon. He opined that the long arm could be too easily taken away from the officer, it would interfere with the officer using other defensive tools on the duty belt and it would increase the potential for unintended collateral damage.

[896] In my opinion, the evidence is compelling that reliance on verbal skills or tactically repositioning may not be an option in all cases. The evidence also confirms that park wardens cannot be expected to deal with situations of grievous bodily harm or death by using their baton, long arm or weapons of opportunity to deliver lethal force.

[897] This essentially agrees with the finding made by HSO Grundie.

Issuing sidearms to park wardens as standard equipment would increase the risk to park wardens and to the public

[898] Following his review of the literature on the "weapon's effect" referred to by Dr. Stenning in his expert report and testimony, Sergeant Butler opined that there is insufficient solid research to confirm its validity. To the contrary, the research of operational policing tends to indicate that the weapon's effect is not supported.

[899] A 2002 study of Canadian police officers murdered between 1980 and 2002 by RCMP Corporal Brian established that changes to holster design and weapons retention training have coincided with a significant reduction in injury or murder by an officer's own weapon. In fact, there were no Canadian police officers slain, with their own gun, between 1991 and 2002.

[900] Dr. Stenning gave evidence that Canadian studies indicate that the suicide rate of police officers by their own gun is less than the rate of suicide for the general population of men between the ages of 19-64.

[901] With regard to the risk of a police officer being charged with manslaughter, Dr. Stenning established that findings of criminal responsibility on the part of police officers who have shot civilians are rare in both Canada and the USA.

[902] Dr. Stenning stated that a study of suicide by cop revealed that these individuals had a documented history of mental illness and/or suicidal tendencies and, in some cases, had high blood alcohol readings at the time of death.

[903] Taken altogether, I conclude that the safety concerns raised by Dr. Stenning are worthy of consideration by any law enforcement officer who is issued a sidearm. However, given

the design of holsters, the weapons retention training and the fact that a subject who is under the influence of drugs or alcohol or who is mentally incapacitated could mistake a uniformed park warden for a police officer or an officer in authority, I do not believe that these concerns are sufficiently persuasive to negate the option of issuing a sidearm to park wardens.

[904] In my opinion, the evidence in the present case is convincing enough that uniformed park wardens could be and have been mistaken for police officers or law enforcement officers in authority.

[905] The facts that park wardens conduct a high level of law enforcement, that they work in remote and difficult-to-access locations, that timely backup by the jurisdictional police is not assured and that communication equipment is not infallible support the reality that issuing them a sidearm is a necessary and appropriate mitigation measure, that largely addresses the challenges connected with the work of park wardens conducting law enforcement.

[906] This essentially agrees with the finding made by HSO Grundie.

Mr. Lambrecht's argument that no law enforcement agency of any kind issues equipment to meet all conceivable risks

[907] Section 124 of the *Canada Labour Code* requires an employer to ensure that the health and safety of employees at work is protected.

[908] In *Juan Verville, supra*, the Federal Court commented at paragraph 68 on the standard of proof to establish a contravention under section 124 of the Code. As indicated previously, the Court noted that an employer must take all reasonable steps to identify health and safety hazards in the workplace and, once a hazard has been identified, take reasonable steps to eliminate or minimize the hazard as much as is reasonably practical.

[909] Mr. Lambrecht's premise that no law enforcement agency of any kind issues equipment to meet all conceivable risks is therefore contrary to the Code. In fact, the only way that an employer can avoid taking action to eliminate or minimize a hazard is to demonstrate that it is not reasonable to take such action. Additionally, an employer cannot avoid contravening the Code by taking partial action on the reasonable measures identified to eliminate or minimize a hazard. Implementing only three, four or five of the six reasonable measures or actions identified in the workplace does not satisfy the requirements of the Code.

[910] Sergeant Butler testified that the decision of what constitutes proper equipment requires balancing between the statistical likelihood of the need for such a weapon and the consequences of the officer not having the weapon should the need arise. He held that a statistically low probability of lethal assault against the officer is practically irrelevant if the risk of harm to the officer is grievous bodily harm or death. In my opinion, this view is consistent with the *Canada Labour Code*, particularly where an inherent risk is connected to an activity.

National scope of the issue

[911] The evidence heard and the law plans submitted regarding eight different parks of different size and different geography, in three different provinces and with radically different visitation levels indicated that the law enforcement health and safety concerns raised by park warden Douglas Martin are not unique to one park, but span the country.

[912] I further note that Robert Prosper characterized Dr. Evans' study as a significant one, which findings were based on a data set of some 14,000 law enforcement occurrences recorded in parks throughout Canada. Notwithstanding this, Dr. Evans's study made no distinction between the various national parks and sites across the country suggesting that law enforcement in the various Parks Canada parks and sites be handled differently.

Conclusion

[913] A contravention of section 124 of the *Canada Labour Code* occurs where an employer has not taken all reasonable measures to ensure that the health and safety of every employee employed by the employer is protected. Where the consequences of a particular event are dire or critical for an individual, I interpret section 124 and the Purpose provisions of the Code, sections 122.1 and 122.2, to mean that prevention measures must be taken to prevent that dire outcome, regardless of the likelihood of the event occurring. In my opinion, Parks Canada's failure to provide its park wardens engaged in law enforcement with sidearms and to provide them with appropriate training constitutes a contravention of section 124 of the Code.

[914] Justice Gauthier in *Verville supra* stated that, for a finding of danger, it is necessary to determine the circumstances in which a potential hazard, condition or future activity could reasonably be expected to cause injury or illness before the hazard or condition can be corrected or future activity altered and determine that the circumstances will arise as a reasonable possibility.

[915] In this case, the evidence confirms the following circumstances:

- sections 18 and 19 of the *Canada National Parks Act* specify a dual mandate for park wardens, including the enforcement of the Act and other mandated regulatory resource protection statutes anywhere in Canada and, as a peace officer, the preservation and maintenance of the public peace in parks. Park wardens are authorized to carry out investigations under the *Criminal Code*, the CNPA and other resource protection statutes. Section 21 of the CNPA gives park wardens powers to arrest without a warrant for any offence committed under the Act or any other statute in a national park. The exercise of these powers is supported by the express granting of powers of search and seizure;
- for carrying out their duties, park wardens are: authorized to use aggressive enforcement tactics through the full continuum of use-of-force response, up to and including lethal force; trained to a police standard; dresses in police-like uniform; and equipped with tools to gain compliance. The work is often carried out at night and in locations that are remote and otherwise geographically inhospitable. The potential value of natural and cultural resources and considerable fines under the NCPA can only heighten the risk of attack;
- Parks Canada acknowledges in Appendix A of *Law Enforcement Management Directive 2.1.9* that there is an inherent risk associated with law enforcement

activities. Experts who testified agreed that this inherent risk is the unpredictability of human behaviour ;

- expert witnesses agreed that inherent risk associated with law enforcement is related to the nature of the work, which involves the unpredictability of human behaviour connected with individuals who may have violent tendencies, dislike authority, be mentally unstable and be under the influence of alcohol or drugs;
- individuals with criminal records and histories of violence, including those known to dislike authority, are known to frequent or travel through parks, or to habituate in the vicinity;
- expert witnesses agreed that a law enforcement activity can immediately escalate to grievous bodily harm or death without warning or provocation on the part of the park warden;
- Parks Canada acknowledged that there is an abundance of edged weapons and tools in and around campsites and the law plans confirmed that it is not uncommon to find armed individuals in a park;
- the park law plans, notices, law enforcement occurrence reports and anecdotal evidence of park wardens confirm that it is reasonable to expect that park wardens will encounter high risk individuals in national parks who pose a potential risk;
- the elimination of higher risk law enforcement activities and reduction of the frequency of others by Parks Canada through their revised *Law Enforcement Management Directive 2.1.9* did not alter the nature of the inherent risk associated with law enforcement;
- the risk mitigation measures related to communications and the CPIC are not infallible and, notwithstanding the best intentions and efforts, police services of jurisdiction are not able to ensure reliable and timely back-up to park wardens;
- the policies in the revised *Law Enforcement Management Directive 2.1.9* regarding two-park warden law enforcement responses and patrols, and the strategy of observe, record and report are unproven as risk mitigation measures and may, in fact, add risk to both unarmed park wardens;
- there is a disconnection between *Law Enforcement Management Directive 2.1.9* and actual practice in the field in some important areas which can adversely affect the health and safety of park wardens performing public peace law enforcement;
- park wardens must consider whether failing to intervene in enforcement could later be construed by Parks Canada and the Courts as not having acted within the scope of their duties and employment given the nature of the threat to the public and any other circumstances that might be in play. Park wardens must also consider whether failing to intervene could later be construed as a contravention of Part II of the Code. This uncertainty corresponds to the precise moment, according to the IMIM, park wardens must assess the risk to themselves and the public, and this adds risk to the whole process;
- a statistically low probability of lethal assault against the officer is practically irrelevant where the risk of harm to the park warden is death or grievous bodily harm. Parks Canada did not take this into full consideration and argued, instead, that there

is only a very remote possibility that a park warden might be threatened by grievous bodily harm or death;

- Parks Canada ignored the recommendations of in-house and third party studies it commissioned to the effect that sidearms be issued to park wardens conducting law enforcement;
- a sidearm is a necessary and appropriate tool for: deterring an attack; for regaining control without having to discharge the sidearm where the subject's behaviour suddenly escalates rapidly to a situation of grievous bodily harm or death; for transitioning down if and when the subject's behaviour de-escalates; and for surviving a situation of grievous bodily harm or death where the only option for self preservation is the use of lethal force;
- intermediary weapons are not always effective due to distance, weather conditions, or the physical and mental status of the subject who might also be under the influence of alcohol or drugs;
- weapons of opportunity such as a shovel or a stick do not give park wardens control or the ability to transition up and down in response to the subject's behaviour. Moreover, muscle memory is critical so that reactions are automatic when the park wardens are under high stress and the delivery of lethal force is appropriate. Weapons of opportunity for delivering lethal force go with no training or muscle memory and may not be available when needed;
- the use of long arms as a defensive weapon, in place of a sidearm, is unwise and unsafe. The long arm is not appropriate for transitioning and the appearance of a park warden with a rifle or shotgun could escalate a situation to the detriment of all; the long arm is an unsuitable defensive tool at close range. In addition, rifles are high velocity, high penetration weapons that could result in collateral injury;
- verbal skills or tactically repositioning may not be an option in all cases.

[916] In my opinion, it is reasonable to expect in the circumstances that park wardens engaged in law enforcement could be injured before the hazard or condition is modified or activity altered, because they are not armed with a sidearm and provided with appropriate training and because there is an inherent risk associated with law enforcement which is the unpredictability of human behaviour. Therefore, I confirm the finding of HSO Grundie that a danger existed for park wardens conducting law enforcement at the time of his investigation and I find that a danger continues to exist for park wardens conducting law enforcement without being issued sidearms as standard personal protective equipment. I also confirm the national scope of the direction that HSO Grundie issued to Parks Canada as there was no evidence to show that the nature of risk associated with law enforcement was different for the different Parks Canada locations.

[917] Having concluded that a sidearm is necessary and appropriate in the circumstances to mitigate against the danger, I am varying the directions that HSO Grundie issued to Parks Canada on February 1, 2002 to require Parks Canada to prohibit any park warden from conducting law enforcement unless and until park wardens have been: screened; trained; supervised; directed in accordance with a standard that Parks Canada determines to be appropriate taking into consideration the approach and direction of other federal agencies

who arm their law enforcement officials with a sidearm; and issued a sidearm. In this regard, I rely on a health and safety officers, as assigned by Human Resources and Social Development Canada, to ensure that Parks Canada has complied with the directions.

- [918] The direction issued to the Chief Executive Officer of Parks Canada, which applied to all park wardens engaged in law enforcement in Canada, is varied as follows:

The said Health and Safety Officer considers the following activity constitutes a danger to employees while at work:

Wardens who are expected to engage in law enforcement activities for resource management purposes and the maintenance of public peace and who may find themselves at risk of grievous bodily harm or death are not trained on or provided with the necessary personal protective equipment which includes a sidearm.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures immediately to:

- (a) correct the hazard or condition or alter the activity of park wardens, or
- (b) protect the park wardens from danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to discontinue the activity that constitutes a danger unless and until park wardens who conduct law enforcement have been: screened; trained; supervised; directed in accordance with a standard that Parks Canada determines to be appropriate taking into consideration the approach and direction of other federal agencies who arm their law enforcement officials with a sidearm; and issued a sidearm.

- [919] The direction issued to the Field Unit Superintendent of Banff National Park, which applied to park wardens conducting law enforcement in Banff National Park is varied as follows:

The said Health and Safety Officer considers the following activity constitutes a danger to employees while at work:

Wardens [in that Park] who are expected to engage in law enforcement activities for resource management purposes and the maintenance of public peace and who may find themselves at risk of grievous bodily harm or death are not provided with the necessary personal protective equipment which includes a sidearm.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures immediately to:

- (a) correct the hazard or condition or alter the activity of park wardens, or
- (b) protect the park wardens from danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to discontinue the activity that constitutes a danger unless and until park wardens who conduct law enforcement have been: screened; trained; supervised; directed in accordance with a standard that Parks Canada determines to be appropriate taking into consideration the approach and direction of other federal agencies who arm their law enforcement officials with a sidearm; and issued a sidearm.

Obiter Dictum

Having reached and formulated my conclusion, I wish to add the following comments in the form of “obiter dictum”.

Mr. Lambrecht argued that Parks Canada monitors its law enforcement program annually and makes whatever corrections are appropriate. However, there was no evidence that Parks Canada had taken action to address the fact that, contrary to Directive 2.1.9, dedicated two-person patrols were splitting up in order to accomplish the work and park wardens were responding to public peace incidents involving park staff as a first responder because the police service of jurisdiction could not respond immediately. Neither of these matters is insignificant in my opinion.

During his testimony, Robert Prosper stated that the Parks Canada policy health and safety committee had been consulted throughout the project to refocus the role of park wardens and to implement the new *Law Enforcement Management Directive 2.1.9*. However, the evidence presented indicated that consultation was reactive instead of proactive, whereby the committee was essentially provided text and asked either to provide comment or to approve it. This is less than the sense of partnership and participation that is envisaged in the Code. To my thinking, this could explain the seeming disconnect between the *Law Enforcement Management Directive 2.1.9* and actual practice in the field.

Mr. Lambrecht complained that HSO Grundie had not considered the words of a park warden who had been grievously assaulted along a highway when he stopped to render assistance and stated that he probably would have been shot if he had been armed. I was not persuaded by his argument with regard to this, given the expert testimony of witnesses that the image projected by a law enforcement officer can have the effect of escalating or deescalating a situation. Neither HSO Grundie nor anyone else could postulate as to what effect wearing a sidearm would have had on the assailants in that situation.

Appeals Officer
Douglas Malanka

Summary of Appeals Officer's Decision

Decision: CAO-07-015

Appellant: Parks Canada Agency

Respondent: Douglas Martin and Public Service Alliance of Canada

Provisions: *Canada Labour Code*, 122.1, 122.2, 124, 125, 126(1)(c), 129(7), 145(1), 145.1(2), 145(2) and (2.1), 146(1), 146.1(1), 146.2.
Criminal Code, 2, 25(1), 25(4), 34, 217.1, 231, 235.
Canada National Parks Act, 4, 8, 18, 19, 20(1), 21, 22, 26.

Keywords:

park warden, law enforcement, resource protection, public peace, refusal to work, sidearm, sidearm training, longarms, weapons of opportunity, unpredictability of human behaviour, absence of danger, Incident Management Intervention Model (IMIM), Canadian Police Information Centre (CPIC), Alberta Association of Chiefs of Police (AACP), Clients, Acquiring and Analysing Information, Partnerships, Response and Assessment (CAPRA), Law Enforcement Management Directive 2.1.9, Law Enforcement Administration and Operational Manual, elimination, reduction, mitigation measures, police services of jurisdiction, back-up, telecommunication devices, training, soft body armour, verbal intervention, tactical re-positioning, two-person patrols, dedicated patrols, incidental, observe, record and report, danger, national directions.

Summary:

On June 5, 2000, Douglas Martin, a park warden law enforcement specialist employed by Parks Canada Agency (Parks Canada) at Banff National Park, filed a complaint under Part II of the *Canada Labour Code* (the *Code*). He complained that Parks Canada did not provide park wardens with the defensive equipment defined by the standard of care applicable to peace officers in Canada performing similar work of resource conservation law enforcement, which includes a sidearm and training on its use.

A health and safety officer investigated into park warden Douglas Martin's complaint and, following his preliminary examination, launched a national investigation into the matter. Following his investigation, the health and safety officer decided that a danger existed for park wardens performing law enforcement activities because such park wardens may find themselves at risk of grievous bodily harm or death and are not provided with the necessary personal protection equipment.

Both Parks Canada as well as park warden Douglas Martin and the Public Service Alliance of Canada (PSAC) appealed the directions to an Appeals Officer, pursuant to subsection 146(1) of the *Code*. Parks Canada asked that the directions be rescinded, alleging that a danger did not exist for park wardens. Park warden Douglas Martin and PSAC asked that the directions be varied, to expressly require Parks Canada to issue sidearms to park wardens or to develop a procedure for the issuance of sidearms.

Appeals Officer Serge Cadieux inquired into the appeals pursuant to section 146.1 of the Code and, by written decision dated May 23, 2002, he found that a danger did not exist for park wardens and rescinded the directions that HSO Grundie had issued to Parks Canada.

Park warden Douglas Martin and PSAC sought judicial review of Appeals Officer Cadieux's decision at the Federal Court. The Federal Court dismissed their application by Order dated October 6, 2003.

Park warden Douglas Martin and PSAC appealed the Federal Court's decision to the Federal Court of Appeal. In a decision dated May 6, 2005, the Federal Court of Appeal allowed the appeal, set aside the decisions of the Federal Court and of Appeals Officer Serge Cadieux and remitted the matter to the Appeals Office for re-determination.

Another appeals officer conducted a *de novo* review of the case, and decided that a danger existed for park wardens who are engaged in law enforcement and who are not provided with a sidearm for the work or provided with training on the sidearm. The appeals officers confirmed the decision of the health and safety officer that a danger existed for park wardens but varied the directions that the health and safety had issued to Parks Canada. The appeals officers directed that park wardens are not be engaged in law enforcement unless and until park wardens have been screened, trained, supervised, directed in accordance with a standard that Parks Canada determines to be appropriate taking into consideration the approach and direction of other federal agencies who arm their law enforcement officials with a sidearm, and issued a sidearm for the work.