IN THE PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF MONCTON

Citation: R. v. The Royal Canadian Mounted Police, 2017 NBPC06
Date: 2017-09-29
Docket: 32605601

Between: **Her Majesty, The Queen,**

- and -

The Royal Canadian Mounted Police

DECISION

Before: **Judge R. Leslie Jackson**

Date(s) of Hearing: **April 24,25,26,27 & 28,**
May 1,2,3,4,8,9,10,15,16,17,19,23,
24,25 & 26,
June 13,14 & 15,
July 4, 2017

Appearances:

Paul Adams and Suhanya Edwards **for the Crown**

Mark Ertel, Ian Carter and Jon Doody **for the Defendant**

JACKSON, P.C.J.

Introduction:

[1] On June 4, 2014 an assailant armed with, among other weapons, an M305 semi-automatic .308 Winchester rifle and at least sixty round of ammunition murdered three general duty Royal Canadian Mounted Police (RCMP) members and wounded two others.

[2] In the aftermath of this tragedy the RCMP was charged with four offences pursuant to section 124 of the *Canada Labour Code R.S.C.1985 c. L-2* (the "CLC") alleging a failure to ensure the health and safety of every person employed by it by failing to provide appropriate use of force equipment, training and adequate supervision.

[3] Section 124 enacts what is commonly called a "general duty" to protect workers and is preventative legislation which imposes a duty on employers to **"ensure that the safety and health at work of every person employed […] is protected".**

[4] It is noteworthy that the RCMP has not been charged that by any act or omission it caused the death of or injury to its members. That is not an issue in this trial.

[5] It was conceded at the opening of the trial that all members who responded to the June 4th incident in Moncton were employees of the RCMP for the purposes of s. 2 of the CLC.

[6] The defence of "due diligence" is available to any person charged with an offence under s. 124 of the CLC (s. 148 of the CLC) and the RCMP asserts that it exercised due care and diligence to avoid any contravention of the CLC.

Positions of the Parties:

The Crown:

[7] The Crown alleges that following the institution of the *Immediate Action Rapid Deployment* (IARD) policy in 2006-2007 which required front line general duty members to immediately respond to and stop an "active threat", RCMP use of force experts knew that the current RCMP weaponry (service pistol and shotgun) required updating to ensure that responding members were equipped to safely and effectively respond to such incidents and advised RCMP management accordingly.

[8] In spite of this, some seven years later there were no carbines in Moncton on the night of June 4, 2014 and no personnel that were trained on their use by the RCMP. The Crown asserts that by this time the RCMP had known "for years" that the patrol carbine was

the appropriate weapon to respond to an armed suspect such as the one members were confronted with on June 4, 2014, had in fact approved the patrol carbine for use by general duty members in 2011 and had begun an incremental rollout. The delay in equipping and training members, says the Crown, is inexcusable.

[9] The Crown also asserts that the RCMP failed to provide both responding members and their supervisors with appropriate training in how to respond to an active shooter event in an outdoor or open environment, thus leaving members without appropriate tactical training to enable them to respond effectively and safely to the June 4, 2014 incident.

The Defence:

[10] With respect to Count one, the Defence suggests that the Crown has failed to prove the *actus reus* of the offence. Because there is no specific regulation alleged to have been breached (such as for example, failure to wear protective footwear), the Crown must prove not only the act or omission alleged but also that the act or omission constituted a reasonable precaution in the circumstances. The Defence posits that while an accident or an incident may, in some circumstances, provide evidence of a breach of duty, the mere fact of the accident or incident will not necessarily satisfy the burden on the Crown to prove beyond a

reasonable doubt that a *prima facie* breach of the duty of care occurred.

[11] Alternatively the Defence asserts that it has shown on a balance of probabilities that the RCMP took all reasonable steps in the circumstances to avoid the occurrence of the prohibited act. Their position is that the need for patrol carbines for general duty members did not become "fully apparent" until the results of the Firearms Capability Evaluation were presented to Community and Aboriginal Policing (CAP) in January 2011 and that the remaining time was required for the RCMP to exercise its due diligence in obtaining patrol carbines and commencing training of its members.

[12] The Defence position on Counts Two and Three is the same: that as the Crown has particularized the alleged failures, that is,

> **"failing to provide RCMP members with appropriate information, instruction and/or training to ensure their health and safety when responding to an active threat or active shooter event in an open environment"**

and,

> **"failing to provide RCMP supervisory personnel with appropriate information, instruction and/or training to ensure the health and safety of RCMP members when responding to an active threat or active shooter in an open environment".**

the onus rests on the Crown to prove those allegations beyond a reasonable doubt. This they allege has not been done and thus the Crown has failed to prove the *actus reus* of the offences because it failed to prove that the precautions outlined in the Counts were reasonable precautions to be taken in all the circumstances of the case.

Count Four:

[13] The Crown confirmed to Defence in advance of the trial that this Count contains no additional allegations beyond those set out in the first three Counts and therefore if a conviction is entered on any of them the principles enunciated in ***R. v. Kienapple*** would apply and this count would be judicially stayed.

Facts

[14] The April 20, 1999 shootings at Columbine High School in Colorado changed the way general duty officers and first on scene officers responded to ongoing life-threatening incidents. Prior to this, the prevailing policy for police forces was that the first responders should secure the scene and wait for specialized units such as Emergency Response Teams (ERT) to arrive to confront the shooter. At Columbine, while the responding officers waited for the Special Weapons and Tactics Team (SWAT) to arrive, the

perpetrators continued their murderous rampage for some forty minutes. (See Exhibit 66 at page 10).

[15] Police agencies across North America, including the RCMP, began to change their policies and procedures for responding to an "active threat". By late 2006 or early 2007 the RCMP had developed an IARD policy for such events. This policy applied to situations **"where on-duty members must stop an active threat causing death or grievous bodily harm"** (Ex.1, Tab 2, 1.1). An active threat is defined as **"one or more individuals who seek out an environment that offers multiple potential victims at risk of death or grievous bodily harm not easily able to escape the threat"** (Ex.1, Tab 2, 2.1). Police priority during an IARD is **"to stop the active threat in accordance with the principles of IMIM"** (Ex.1, Tab 2, 1.9). These policies were in force on June 4, 2014; however the policies and training were all geared towards responding to such an event in an indoor or confined setting, such as a school, shopping mall or similar structure; additionally IARD training, other than that received by Cadets at Depot during initial training, was not mandatory.

[16] Two events which occurred between the Columbine and Moncton shootings also had an impact on the question of the duty of the RCMP to protect its members. I refer to the murder of four members

in Mayerthorpe, Alberta in 2005 and the murder of two members in Spiritwood, Saskatchewan in 2006, all of them at the hands of an assailant armed with a long barreled weapon.

[17] In Mayerthorpe, RCMP members who were executing a search warrant were ambushed in a Quonset hut by an assailant who had surreptitiously entered the hut during the night. Following the incident, an Incident Management Review was conducted by the RCMP in 2008 and a Public Fatality Inquiry held in 2011 presided over by Assistant Chief Judge Pahl of the Provincial Court of Alberta.

[18] In his report dated March 3, 2011 at page 23 ACJ Pahl said:

> **"RCMP members should be appropriately armed. The evidence at this Inquiry was that the RCMP no longer offers long gun training to its recruits. This reflects the RCMP's assessment that rifles are not widely used, present a high risk of collateral damage and require individual adjustment. As well, proficiency in their use is a highly perishable skill. As a result of these and related issues, the potential for the implementation of an Active Shooter Response Program was recommended by an RCMP report and is being examined. This recommendation is designed to improve timely access to heavier, long barreled weapons, primarily for ERT, but is also addressing the availability of patrol carbines for use by general duty members. This would increase response capabilities above the current shotgun and pistol deployment […] Senior Deputy Commissioner Knecht testified that the rollover from shotguns to patrol carbines is underway and I can only suggest that this initiative be accorded high priority. I am not qualified to comment on these changes, but I am satisfied that Commissioner Knecht is and that he believes they are in the best interest of all members. I need not say more as I am satisfied that the RCMP continues to assess and enhance its ability to meet threats which are themselves constantly evolving."** (Ex.2, Tab 14, P. 23).

[19] In the Spiritwood incident, two RCMP members who were in pursuit of a suspect arrestable for uttering threats were killed by the suspect using a high powered rifle. He also fired at another member who was in a different vehicle but that member was not injured. The suspect then fled and eventually committed suicide. The report deals in large part with the extraction of injured/deceased members from the scene and the difficulties encountered. The reviewing officers noted in their report dated July 7, 2006:

> **"Lastly and most important[sic] the suspect was still at large and in possession of a high powered rifle which he had already demonstrated he was prepared to use against members."**

They concluded however:

> **"From the actions taken by members at the scene it would appear that they were applying the principles of the IMIM by continually assessing the situation as it changed or more information became available by considering the resources they had available and by developing a plan in line with these resources and the information they had.**
>
> **The result of taking these steps was a rescue effort with no further injury to anyone else involved."** (Ex.2, Tab 10, Pgs 68-69).

[20] An investigation pursuant to the CLC came to a slightly different conclusion and in a document entitled Assurance of Voluntary Compliance dated August 29, 2007 a Health and Safety Officer noted under item 1:

> **"As a result of the investigation and analysis into the shootings of the RCMP Officers in the Spiritwood Detachment area on July 7, 2006, it has been determined that the Incident Management Intervention Model (IM/IM), including the formal key risk assessment stages, was not followed as established during the Cadet Training Program. The employer has developed the IM/IM as an integral procedure for preventative measures. The employer shall ensure RCMP Officers continue to receive instruction and training in the IM/IM procedure as established during the Cadet Training Program."** (Ex.2, Tab 11, P. 1)

Under number eight of the same document the following entry appears:

> **"As a by-product of the investigation into the shootings of the RCMP Officers in the Spiritwood Detachment area on July 7, 2006, it has been determined that a hazard was present to the retrieval team regarding the suspect's firearm capability in relation to the firearm capability of the Officers entering the shooting area, the inability to detect the suspect and the lack of protective equipment available to Officers. The employer shall complete a hazard assessment of high risk retrieval activities for Officers when ERT response is not present in a timely manner, taking into account, but not limited to the following: types of firearms which may be used by suspects; types of firearms available to officers; bullet resistant equipment which may be required for protection; and acceptable response times for ERT throughout rural areas."** (Ex.2, Tab 11, P.5)

A compliance date of October 29, 2007 was given for all items and agreed to as evidenced by the signature of Assistant Commissioner Darrell McFadyen on August 30, 2007.

[21] By this time the Use of Force Section, which is part of Contract and Aboriginal Policing (CAP), (at the time known as Community, Contract and Aboriginal Police Services or CCAPS), had

begun work on the IARD policy and other issues relating to use of force by members. Sgt. (now Inspector) Bruce Stuart who had arrived in 2006 at the Use of Force Section, on March 3, 2007 wrote a briefing note to the Deputy Commissioner (Ex.1, Tab 3) the stated purpose of which was

> **"To brief the DCOI on evaluating appropriate long barrel weapon systems for the RCMP, in particular the adoption of a semi-auto carbine rifle versus shotgun."** (At Page 1)

The issue identified was:

> **"The current RCMP approved long barreled weapon systems require updating to ensure members are fully equipped to address incidents such as active shooters and other high risk situations involving heavily armed suspects."** (At Page 1)

The document notes that of the long guns currently available to RCMP general duty members, one is no longer manufactured (the Remington Model 70, .308 rifle adopted in 1960), and the other, the Remington Bushmaster 870, 12 gauge shotgun adopted in 1962 is the only long gun available to address active shooter situations. [22] The briefing note lists as benefits of the carbine that it had been identified as an appropriate long barrel weapon system for patrol officers by firearm experts, was the industry standard, the Ontario Provincial Police (OPP) already had a semi-automatic carbine, and that previous inquests had identified the requirement for a precise long barreled weapon for law enforcement.

[23] The recommendation given to the Deputy Commissioner was that CAP continue to research both the feasibility of the project and efforts to identify appropriate specifications for a detachment rifle. On May 28, 2007 approval was granted and Stuart commenced work on it along with the eleven other projects for which he was responsible, including a needs analysis for Hard Body Armor (HBA) for general duty use, which was another recommendation stemming from the Mayerthorpe Public Fatality Inquiry.

[24] On October 14, 2007 an unarmed civilian who had arrived at Vancouver International Airport died following the use of a Conducted Energy Weapon (CEW), also known by the brand name "Taser". The fallout from this incident was a great concern to RCMP management and so for the next two years no further work was done on the carbine project. Both Stuart and Superintendent (then Inspector) Lightfoot, who at that time made up the Use of Force section, testified that the Vancouver incident became the focus of all they did for the next two years as they revamped CEW training, made changes to IMIM and commenced a data bank for reception of statistics relating to use of force by members. D/Com Darrell Madill (Ret'd) who was the Officer in Charge of CAP from 2008 until he retired in 2011, testified that during his tenure the CEW was front and center of all they did and that he prioritized the CEW over the patrol carbine because he put the resources to, in his

opinion, the area of greatest need. In any event it is clear that until 2009 nothing concrete was done to move the carbine project forward.

[25] Following the Vancouver CEW incident the Federal Minister of Public Safety requested the Commission for Complaints Against the Royal Canadian Police to review RCMP protocols on the use of the CEW and their implementation. The Commission issued two reports an Interim Report on December 11, 2007 (Ex.7, Tab 4) and a Final Report on June 12, 2008 (Ex. 7, Tab 5). In neither report does the Commission call for a ban on the use of the CEW. In the Interim Report it says:

> "**The Commission for Public Complaints Against the RCMP (Commission) is not recommending an outright moratorium on CEW use by the RCMP, as the weapon has a role in certain situations. Rather the CEW needs to be appropriately classified in use of force models for very specific behaviours involving very specific situations.**" **(**Ex.7, Tab 4, P.1)

while in the Final Report it says:

> **"As stated in the Interim Report, the Commission is not calling for an immediate moratorium on CEW use. Having said that, if the RCMP fails to immediately implement all of the recommendations made by the Commission, then it is conceivable that the problems of CEW deployments currently being raised will continue.**" (Ex.7, Tab 5, P.15)

[26] The Reports did however criticize the RCMP for changing policy in relation to CEW use without reference to the realities of the use of the weapon by the RCMP. The Interim report said:

> **"Changes to policy appear to have appropriately considered the experiences of external sources, but failure to correlate this data to RCMP-specific experiences amounts to a significant oversight, which should be redressed at the earliest opportunity.**
>
> **Of particular concern is the fact that there are currently 2,840 CEWs within the RCMP and since introduction, 9,132 members have been trained to use the CEW, yet there exists no empirical data generated by the RCMP as to the benefits, or detriments of using the weapon. […]**
>
> **Failure to properly collect, collate or analyze its own data means that the RCMP is unable, by its own inaction, to relate any external research to RCMP use of the CEW […] In effect, CEW use was liberalized without a complete thoughtful analysis or strategic plan, which amounts to a critical shortfall in the management and oversight of the CEW."** (Ex.7, Tab 4, P.2)

[27] RCMP management took this to mean that any use of force decision required a rigorous and independent analysis of both external and internal experiences. Madill says he feared that RCMP members would lose the CEW as a use of force option, although neither report suggested that. He also said that he learned from the CEW incident that it was impossible to rely on the experiences of others as justification for a change in use of force strategy. Stuart testified that his view was that the RCMP was being criticized for not having done sufficient research before purchasing CEWs. Lightfoot testified that he was told by senior management that because of the Commission report, independent and "better" research was needed to justify changes. He opined that there needed to be a focus on independent and Canadian research to

satisfy what he termed ”special interest groups” who had expressed concerns following the CEW incidents. When asked who the “special interest groups” were he said they included an academic who did a paper on the Vancouver Airport incident, the media, the Commission for Public Complaints against the RCMP and The Standing House Committee on Public Safety.

[28] In early 2008 Lightfoot, who was at the time the OIC of the Use of Force Section “floated” the idea of having the Canadian Police Research Centre (CPRC) do some research on the carbine project, however he says he was told by senior management that they were not seen as independent enough as they had done work on the CEW policy.

[29] By March 2009 as the work on the CEW was nearing completion, Lightfoot began to seek out someone to do research on the carbine project and was eventually put in touch with Professor Darryl Davies, an Instructor in the Department of Sociology and Anthropology at Carleton University. It is clear from a review of his Curriculum Vitae (Ex. 12) that he is a social scientist and academic who had worked in the past for Correctional Service of Canada, the Ombudsman’s Office of the Department of National Defence, and the Department of the Solicitor General (Federal).

[30] Lightfoot and Davies eventually met and Lightfoot outlined what he was looking for and prepared a "Statement of Work for Patrol Carbine Project" (Ex.1, Tab 6) a four-page document which outlined work objectives and a timetable of four months for completion. In Item 1(k) of the Statement of Work which appears under the heading "Work Objectives/Initiatives to be accomplished" the following appears:

> "**The completion of the needs analysis which would include the recommendation of the most appropriate tools such as; weapons platform specifications, caliber/munitions specifications, optics specifications, storage options (vehicle/office) and specifications, which are most likely to meet the RCMP's needs as well as address the public's safety, and the recommendation of appropriate training/qualifications, policies and procedures.**" (Ex.1, Tab 6, P.3)

[31] Lightfoot says he gave this to Davies who said he could do the work, while Davies says that he told Lightfoot that he had no knowledge of guns, didn't own one but would be happy to do a research project, that is, a literature review and a survey.

[32] In any event, Lightfoot had no further contact with Davies after this as he left the unit, returning in April 2010. Davies was eventually contracted to do a report, entitled "Aiming for Safety: A Needs Analysis to Determine the Feasibility of Adopting the Patrol Carbine in the RCMP" (Ex. 1, Tab 7), which he delivered in March 2010. It appears that during the work on the contract, Davies essentially worked alone with the exception of some work

done on the questionnaire which was sent out to both RCMP members and other agencies that had patrol carbines. Davies proposed a roundtable with RCMP members to obtain their views on a patrol carbine however this was rejected by RCMP management for budgetary reasons.

[33] There is also substantial disagreement between Davies and RCMP management as to whether or not the report he delivered was a final or draft report which was subject to revision. Davies maintains that he delivered a draft report and that it was his expectation that there would be a meeting between the parties in which any deficiencies/changes/additions could be addressed. Nothing in either the report or the e-mails which accompanied and followed its delivery indicated that this was other than a final report and the RCMP, quite reasonably in my view, considered it as a finished project. This, along with the disagreement as to the scope of work, clearly points out the inadequacy of the process of engaging Davies which was recognized by Madill in a December 13, 2010 letter to Davies saying:

> **"Our expectation was that you would provide as analysis of the review and survey results and how they would relate to the needs analysis regarding possible adoption of a patrol carbine for the RCMP.**
>
> **It may have been beneficial to clarify those expectations, and others related to a draft or finished report, when the statement of work was prepared. We have learned from this experience and will certainly keep it in mind when developing**

> **future contracts within our directorate."** (Ex.1, Tab 9, Pgs 1-2).

[34] Davies did recommend that the RCMP:

> **"immediately adopt and phase in a national patrol carbine program for all of its uniformed patrol officers […]**
>
> **plan and execute a comprehensive and effective training program for all of its members […]**
>
> [prepare] **guidelines on the storage, maintenance, training and re-qualification requirements for the carbine […]**
>
> [and] **undertake consultations with the Department of National Defence and other police agencies in order to determine the best model/type of platform and munitions to be acquired".** (Ex.1, Tab 7, Pgs 38-39)

[35] The Davies Report did not meet the needs of RCMP management and by letter of June 21, 2010 Assistant Commissioner (at the time of the trial, Commissioner) Paulson advised Davies accordingly. Paulson wrote:

> **"The results of your needs analysis were expected to answer the question as to the direction the RCMP should take in regards to equipping general duty members with a patrol carbine. The expectation of the reviewers was that the report would provide an evidence-based rationale for or against the implementation of a patrol carbine for the RCMP, based on the Canadian experience.**
>
> **Although the report did conduct an overall review of print material and survey results, the report lacks the detailed analysis required to bring any firm recommendations to the RCMP senior management for their consideration. The report did not probe the information available on the topic with sufficient scrutiny […]**
>
> **The conclusions reached were not supported by the material reviewed. […] The report does not contain appropriate consultation and detailed information required to assist us**

> **with making an informed decision regarding the advancement of the Patrol Carbine Project.”** (Ex.1, Tab 8, Pgs 1-2).

[36} The above may be viewed as a fair comment and an expression of the RCMP’s view of the report, however it was the gratuitous comment contained in the last paragraph of the letter which ignited a flurry of angry e-mails and threats of lawsuits which continued until January 2011 when then Deputy Commissioner Knecht convened a meeting of the parties and defused the matter.

[37] By March 2010, CAP had decided that the Davies report was insufficient to meet their needs and were assessing other options to obtain a needs analysis including having made contact with CPRC, the agency they had rejected two years earlier. (Ex. 7, Tab 12). Lightfoot had several meetings with Dr. Kate Kaminska of CPRC in the spring and summer of 2010 to establish roles and responsibilities before CPRC undertook the project.

[38] Dr. Kaminska, who was declared an expert in scientific research and analytic methodology, including project design and implementation, holds a Bachelor of Science degree in Engineering Physics and a Ph.D. in Physics, both from Queen’s University, Kingston, Ontario, and is Adviser to Chief of Staff (Science and Technology) at Defence Research and Development Canada in Ottawa. From April 2010 until November 2015 she was part of an operational

research team which worked on specific projects, one of which was the firearms capability project for the RCMP.

[39] Dr. Kaminska testified that in any project one must firstly decide what the project involves, what the Centre can do and in what time frame, which involves a bit of negotiation. She explained that part of that exercise is to understand what exactly the client wants, noting that often clients are "not terribly articulate" as to what they want. She put together a project charter (Ex.8, Tab 14) outlining roles and responsibilities and worked with a team which included both outside researchers and academics, Lightfoot and Stuart as well as Cpl. Kirk Chiasson from the RCMP and Dr. Simona Verga from her agency.

[40] The initial stage of the project was to determine whether a capability gap in respect of firearms existed. This work was completed by early 2011 and the report entitled "Firearms Capability Evaluation" (Ex.3, Tab 15) was delivered to the RCMP in May 2011. At page 11-12 of the report under the heading "Conclusions and Recommendations" the authors state:

> **"The objective of the research presented in this report was to evaluate the current firearm capability available to front-line officers of RCMP, and to establish whether the current capability is sufficient to enable the officers to respond safely and effectively to the array of operational situations involving the threat of grievous bodily harm**

> **and/or death which may require the use of firearms, or whether a capability gap exists. […]**
>
> **The two RCMP standard-issue long-guns have become the *de facto* secondary weapons for front-line RCMP members regardless of any original intent for deployment and they have remained virtually unchanged for the past four decades. […]**
>
> **Collectively, the findings and conclusions of these three components indicate that front-line RCMP members are not adequately equipped to be able to safely and appropriately deal with some of the threats they face during their daily operations. The findings provide evidence to indicate the existence of a firearm capability gap for front-line RCMP members."**

In fact, however, the results were known to RCMP management on January 17, 2011 (Ex. 8, Tab 15, P. 2) and the team had started working on what was known as the "solutions phase" before May 2011.

[41] On January 28, 2011 Lightfoot along with the Director General of CAP (now D/Commissioner) Kevin Brosseau, was summonsed to Senior Deputy Commissioner (now Chief of Police of Edmonton Police Service) Knecht's office to discuss progress on the patrol carbine project. The Senior Deputy had been subpoenaed to testify at the Mayerthorpe Inquiry and requested Lightfoot to bring him up to speed on the project and was "taken aback" by the lack of progress on the project. In the past Knecht had been frustrated by the length of time it took to make decisions in Ottawa and says that in transferring to Ottawa he thought he might contribute to speeding up the process. He says that Lightfoot told him that he

was ninety nine per cent sure of what he was going to recommend and so he told Lightfoot and Brosseau that we are going to roll out the carbine project as he wanted to ensure that the project would move ahead.

[42] Lightfoot says that Knecht told him to identify an "off the shelf" solution while Knecht says he doesn't recall using those words, although he allows that it is wording he may have used. In his mind it meant that you don't have to a carbine with all the "bells and whistles" just a basic model that meets the needs. Paraphrasing what he said at trial, "you don't need a Cadillac nor a Volkswagen, but why not a Chevrolet".

[43] Knecht testified that it was an easy decision to make but not one that could be easily done, it would take time. Top of mind was the need to liaise with the contract partners, provinces and municipalities, and get them on board. He knew there would not be carbines on the street the next day but believed eighteen months was a realistic goal to strive for. However Knecht left the RCMP in June 2011 to assume his current position with the Edmonton Police Service.

[44] By that time the solutions phase of the carbine project was underway. As Dr. Kaminska was on maternity leave this phase was

headed by her colleague Dr. Simona Verga who was also declared an expert in scientific research and analytic methodology, including project design and implementation. Dr. Verga holds a Bachelor's degree in Physics from the Institute of Microtechnology in Bucharest, Romania and a Ph.D. in Physics from the University of Alberta. It was she who principally authored the report entitled "Firearms Capability Evaluation-Solution Phase" (Ex.3, Tab 16) again with contributions from Stuart, Chiasson and Lightfoot from the RCMP, four other researchers from her own agency, and the RCMP Chief Armourer.

[42] All work on the solutions phase report was finished in June 2012 although drafts had been circulated to the RCMP in April/May of that year and the final report was dated December 2012. At page 16 of the report the authors noted:

> **"To conclude, the greatest part of this report addressed the first recommendation derived from the phase 1 report-that the RCMP undertake research to determine an appropriate solution option for addressing the capability gap. Although the research team was unable to assess other possible options, research findings have established that the patrol carbine does indeed constitute an appropriate solution to address the capability gap, given the operating environment that front-line RCMP officers face. […]**
>
> **If the carbine is introduced to the RCMP arsenal, there are implications for the RCMP in terms of training, governance, and policy. Initial and ongoing training are critical factors in the successful adoption of new firearm systems. Thus the development, execution and periodic evaluation of training programs are required."**

[43] While work on the solutions phase was ongoing, Lightfoot began the process of having the patrol carbine approved for use by the RCMP. This involved appearing before the Senior Executive Committee (SEC), the body that must approve any change of armament for the Force. He prepared a PowerPoint presentation (referred to as a "deck") seeking approval of the Colt C8 patrol carbine which he presented to the SEC meeting of April 20, 2011 (Ex. 8, Tab 19A). SEC wanted further information which was prepared and at the September 6, 2011 SEC meeting a further deck was presented (Ex.8, Tab 20A) following which **"SEC approved the addition of a patrol carbine (based on the Colt C8 platform) to the inventory of firearms available to front-line members."** (Ex.8, Tab 20B).

[44] Approval of the patrol carbine for front-line members having been given, it then became necessary to determine how, when and in what manner the carbines would be distributed to front line members, and to establish how the project would be funded. Inspector Larry Brookson was OIC of the Use of Force Section from December 2011 until June 2013. He was tasked by Brosseau to manage the carbine project. He set up various templates to track progress on the various parts of the project. Two Boards were established; the Carbine Project Board, made up of the OIC and other senior officers in CAP as well as representatives from other directorates

(such as Learning and Development (L&D), Finance, and Uniforms and Equipment) which would be impacted by the project, and the Project Investment Board, comprised of the D/Commissioners and other top ranking officers. The first Board looked after details of the carbines (what sort of trigger, optics and storage options should be used) and the other dealt with financing issues or changes in direction of the project. Both Boards met regularly and produced briefing notes and minutes of decisions all with a view to keeping the carbine project on tract and eventually securing senior management approval. When Brookson left in June 2013 the carbine use policy had been completed, training prepared by L&D and the first batch of the 375 carbines approved had been delivered.

[45] The form the carbine rollout would take was an issue. Both Stuart and Lightfoot favoured a national implementation and proposed it as an option in the first deck presented to SEC in April 2011 (Ex 8, Tab 19A, P. 8), however SEC directed that a divisional implementation was the way to proceed. What was eventually sought and approved in September 2011 was

> **"an incremental implementation of a divisional deployment strategy. Divisions through the "Risk/Threat Deployment Assessment Matrix" identify the locations requiring firearms and complete divisional user training in Divisions"** (Ex. 8, Tab 22A, P.9).

[46] A draft of a "Detachment Threat/Risk Assessment Tool for Patrol Carbine Deployment" was prepared and sent out in December 2011 to the Divisions (that is the Provinces and Territories in which the RCMP provides policing services on a contractual basis) asking each Division to have the document completed by a named Detachment. In the case of J Division (New Brunswick) it was the Blackville Detachment. The document asked for information on subjects such as Member Involved Shootings (MIS), presence of firearms in the area, Subject Behaviour Officer Response Reporting (SBOR) statistics, size and access ability of detachment, ERT response times, patrol carbine availability in other police services, public support of carbines and whether or not there was "financial support" for the purchase of carbines. The last issue was a contentious one as the initial draft of the document contained no questions as to cost; however senior management insisted that it be part of the tool.

[47] The purpose of the assessment was to assist Divisions in determining where they needed patrol carbines and in what number, the stated rationale being that it was the Divisions who were in the best position to decide those questions, not Headquarters. The document itself sets out its purpose in the Preamble in these words:

> **"The purpose of this threat/risk assessment matrix is to provide decision makers a general guide to assist with identifying areas within their divisions which should be considered for initial deployment of patrol carbines. The policing environment has inherent risk, for this reason predicting where and when a lethal threat may transpire is not possible. Baring** [sic] **this in mind Divisional Commanders must weigh the local uniqueness of each of its detachment areas and risks associated to policing when making deployment decisions. The matrix does not and can not offer an exclusive list of factors which should be examined when completing a risk assessment."** (Ex. 8, Tab 26, 4th page)

[48] The final version of Risk Assessment Matrix was sent by C/Supt. Brenda Butterworth-Carr, then Acting Director General, National Criminal Operations of CAP, in March 2012 to all Divisions requesting that they have each detachment or unit complete the questionnaire. The completed questionnaires were then to be returned to the district who, using the provided scoring template, would apply the scoring values to the questionnaires.

> **"The district will then calculate the total score for each detachment's Questionnaire and enter it into the District Evaluation Chart within the appropriate risk level and ranked within that level from highest to lowest score. This will provide a picture of the highest to the lowest risk detachment/units.** (Exhibit 8, Tab 32, 4th page)

The revised questionnaire in addition to the information requested in the first draft, also gave details on the estimated costs of the weapon, ammunition, training and maintenance. The Preamble quoted at paragraph 47 does not appear in the final document.

[49] On May 17, 2012, J Division provided its completed carbine evaluation chart and a week later, presumably on the basis of that evaluation, placed an initial order of twenty-two carbines and necessary ancillary items as well as twelve more in each of the following four years. By July 4, 2012 Butterworth-Carr is again corresponding with the Divisions asking that they confirm that they have the funding for the purchase of the carbines they have ordered and J Division replies in the affirmative on July 11, 2012.

[49] Commissioner Paulsen granted approval for the initial rollout of 377 carbines on July 17, 2012, amended later that month to add an additional 125 carbines for E Division. (Ex. 9, Tab 47).

[50] Although approved, carbines did not immediately start to be rolled out. The following fall and early winter were consumed with contracting with Colt Canada and other suppliers for the carbine and ancillaries and developing the necessary training programs. Indeed it was not until March 21, 2013 that the first completed order for 527 carbines were received by the RCMP Armourer for fitting and final approval. In the same month the Carbine Operator Trainer Course pilot was held at Depot in Regina, Saskatchewan.

[51] Carbines began to be shipped out to divisions in August 2013 with all being shipped out by the end of the week of September 9,

2013. J Division received their order of 22 carbines on September 12, 2013 and commenced contact with CFB Gagetown, the only available firing range, as to available dates for a carbine operator course. The plan was to have fifty percent of officers trained within five years. Eventually the first courses were set for May 9 and June 6, 2014 (Train the Trainer) and June 2-6, 2014 for a carbine operator course. (Ex. 8, Tab 28).

[52] So it was that on June 4, 2014 there were twenty two patrol carbines available for RCMP general duty members in New Brunswick and all of them were at CFB Gagetown being used for training purposes. As of that date Hard Body Armor (HBA) had recently arrived at Codiac Detachment with members being advised of that fact by way of e-mail and being directed to familiarize themselves with the equipment.

Applicable Legal Principles

[53] Section 124 of the CLC reads as follows:

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

[54] Section 124 is found in Part II of the CLC which is subtitled "Occupational Health and Safety". The purpose of Part II is set out in section 122.1 as follows:

> **"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."**

[55] The CLC is clearly preventative legislation imposing a standard of care on employers to take all steps reasonably required to ensure employee health and safety against risks they may face in the course of their employment.

[56] The legislation creates regulatory or public welfare offences which are considered strict liability offences against which a defendant may raise the defence of due diligence. In ***R. v. Gemtec Limited, 2007 NBQB 199 (CanLII)*** McNally J said at paragraph 32:

> **"The due diligence defence relating to strict liability offences was also addressed by the Supreme Court of Canada in *R. v Sault Ste. Marie* when it defined the three categories of offences. In dealing with strict liability offences, Dickson, J. stated:**
>
> > **2. Strict liability offences in which there is no necessity for the prosecution to prove the existence of *mens rea;* the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."**

[57] Section 124 enacts what is known as a general duty clause. There is no allegation of breach of a specific regulation made under the CLC; however it is not incumbent on the Crown to

establish that fact in order to sustain a conviction. ***R. v. Saskatchewan Wheat Pool*** 2000 SKCA 73 at paragraphs 12-14.

[58] Where there is no specific rule or regulation alleged to have been breached, the Crown must prove that there was a *prima facie* breach of a standard of care. ***In R. v. Argentia Freezers and Terminals Ltd.*** [2003] N.J. No.14 at par 23, Orr, PCJ said:

> **"In situations where there is no underlying regulation it is more difficult to establish the commission of the offence as it is more difficult to establish the *actus reus* of the offence. Mere proof of an accident is not sufficient to prove the *actus reus* before shifting the burden of proof of due diligence to the defendant. Rather, the Crown must first prove beyond a reasonable doubt an apparent *prima facie* breach of a duty of care under section 124 to ensure the safety and health at work of an employee. If the Crown has done that and only if it does that will the onus shift to the accused to show on a balance of probabilities that it showed due diligence."**

[59] The determination of whether or not an accident or an incident provides evidence of a breach of a regulatory offence is one that can only be made following a consideration of all relevant circumstances and identification of the specific elements of the offence charged. This was the conclusion arrived at in ***R. v. St. John's (City)***, 2016 CanLII 28455 at paragraph 36.

[60] Once a breach of a regulatory offence has been established the defence of due diligence is available. In ***R. v. Rideout***, 2014

NLCA 29 at paragraphs 12-13, the Court of Appeal of Newfoundland and Labrador said:

> **"[12] The Supreme Court in *Sault Ste. Marie* described the "due diligence defence" as "taking all reasonable steps to avoid the offence" (page 1326). Shortly thereafter, the Court elaborated on the meaning of due diligence in *R. v. Chapin*, 1979 CanLII 33 (SCC), [1979] 2 S.C.R. 121. At page 134, the Court explained that "an accused may absolve himself on proof that he took all care which a reasonable man might have been expected to take in the circumstances, or in other words, that he was in no way negligent."**
>
> **[13] In *Alexander*, this Court considered the defence of due diligence in the context of an offence under the *Waste Material Disposal Act*, RSN 1990, c. W-4. Green J.A., as he then was, explained it at paragraph 18:**
>
> > **The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. In *R. v. Kurtzman* (1991), 1991 CanLII 7059 (ON CA), 50 O.A.C. 20; 4 O.R. (3d) 417 (C.A.), Tarnopolsky, J.A., observed at p. 429 that "The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably."**

[61] Due diligence however does not require superhuman effort. A defendant must take all reasonable steps to avoid harm, but this is not the same as all conceivable steps, only those steps that could be reasonably expected in the circumstances. ***R. v. Maple Lodge Farms***, 2013 ONCJ 535 (CanLII) at paragraphs 363-364.

Analysis and Decision

Count One

[62] This Count alleges that the RCMP:

> **"On or about June 4th, 2014, at or near Moncton, in the Province of New Brunswick, failed to ensure the health and safety at work of every person employed by it, namely: Royal Canadian Mounted Police (RCMP) members, was protected by failing to provide RCMP members with appropriate use of force equipment and related user training when responding to an active threat or active shooter event contrary to Section 124 of Part II of the Canada Labour Code, thereby committing an offence under Section 148(1) of Part II of the Canada Labour Code, R.S.C. 1985, c. L-2."**

[63] The Crown has chosen to particularize this Count by alleging a failure to provide appropriate use of force equipment, which would include the patrol carbine and (HBA), as well as appropriate training in their use and therefore must prove beyond a reasonable doubt that the provision of these items would constitute a reasonable precaution to be taken. As noted above there are no specific requirements in the CLC which would require the RCMP to provide either patrol carbines or HBA to its members.

***Prima Facie* Duty of Care**

[64] With respect to patrol carbines the first question may be when did the need for a patrol carbine become obvious? It is clear that as early as 2007 RCMP management was aware of the limitations in the existing armaments, the pistol and shotgun. Both Stuart and Lightfoot testified that instinctively they knew that front-line

members were outgunned when facing heavily armed adversaries but in their view they needed research to justify their position.

[65] It is also clear that following Stuart's Briefing Note to the Deputy Commissioner in March 2007 and the approval to start research on the issue all work on the carbine project was curtailed after the CEW incident in Vancouver for a period of two years. The delay was occasioned not only by the enormous amount of work done by Stuart and Lightfoot on CEW policies but also the lack of sufficient personnel at Use of Force section.

[66] It is clear to me that RCMP management were "smarting" after the criticism levelled at them following the decision regarding CEW use, particularly that coming from those groups providing some level of civilian oversight on their activities, and were determined not to be in that position again. This mindset manifested itself in the almost hypervigilant need for research before taking any action.

[67] Another delay was occasioned by the rejection of the Davies Report and the engagement of Defence Research and Development Canada (DRDC)-Centre for Security Science, formerly CPRC, to do a needs analysis. While it could be acknowledged that the Davies Report was inadequate for RCMP purposes this speaks more to the

inadequacy of the process of hiring Davies than either his abilities or the quality of his work. While Lightfoot in his testimony would not admit that it would be impossible for a single social scientist to prepare a report containing all the information requested in the Statement of Work (Ex. 1, Tab 6), saying only "He said he could do the work"; given that it took DRDC with a team of experts (including two who had Doctoral degrees in Physics), some eighteen months to prepare their analysis it would be clear to any reasonable and well informed observer that Davies could never have fulfilled that mandate.

[68] When D/Com Madill came to CAP in 2008 he created an "issues tracking matrix" in order to understand the issue which the Directorate was facing and track progress on those issues. Ex 7, Tab 9 is an example of this document. There are some twenty-one items on the matrix ranging from the CEW, HBA, a new IMIM model and patrol carbines to Detachment Clerk Review and Senior Leadership Selection Process Review, so obviously some prioritizing of issues would be necessary. A live issue in this analysis is whether or not the patrol carbine program, an officer safety issue and an obligation under the CLC, was accorded sufficient priority between 2007 and 2014.

[69] Both the Davies Report (Ex.1, Tab 7) and the Risk Assessment portion of the Firearm Capability Study (Ex.3, Tab 1, P. 29) made reference to the opinion of members that existing available weaponry was insufficient for safety reasons. Davies, through the RCMP, sent out some 120 questionnaires to members in 2009 and his analysis of the responses indicated that more than three quarters of the respondents believed that the pistol/shotgun combination was inadequate to meet their needs in the current policing reality. The October 2010 Threat Assessment Workshop lead by a retired RCMP officer, which Drs. Kaminska and Verga attended and then analyzed the results, revealed that the top three risks identified all dealt with the unavailability of appropriate firearms to meet member's needs. (Ex. 3, Tab 1, Pgs 29-33). Indeed the third risk identified was

> **"failure to comply with the Canadian Labour Code [sic] where police are confronted with incidents involving the threat of grievous bodily harm and or death".**

[70] In his Briefing Note to the Deputy Commissioner in 2007 (Ex. 1, Tab 3,) Stuart, an RCMP firearms Subject Matter Expert (SME), does not say that "maybe" there should be an update to available armaments, rather he says:

> **"The current RCMP approved long barreled weapon systems require updating to ensure members are fully equipped to address incidents such as active shooters and other high risk situations involving heavily armed suspects."** (Underlining added)

[71] It is clear that if RCMP management were not convinced in 2007 then by late 2010 or early 2011 they knew or should have known that there was a serious safety risk to front-line members when they faced heavily armed opponents and that this risk should be highly prioritized. The question then becomes what did RCMP management do to address this risk and does their conduct establish a breach of their duty of care to ensure the health and safety of employees while at work?

[72] Once the patrol carbine had finally been approved as an addition to inventory of firearms available to front-line members in September 2011 the RCMP decided on an incremental divisional rollout. The Divisions were provided with a tool by RCMP management in Ottawa designed to assist them in determining how many carbines they would need and in what areas they should be firstly deployed, the idea being that Detachments facing the highest risk should receive the carbines before Detachments where the risk was determined to be lower. As noted in paragraph 46 above, a portion of the tool dealt not with an assessment of risk, but questions relating to finances and budgetary approval.

[73] The RCMP knew that such a risk assessment was an inaccurate tool. In the preamble to the first risk assessment tool sent out

to a sampling of Detachments it was stated: "**The policing environment has inherent risk, for this reason predicting where and when a lethal threat may transpire is not possible.**" The evidence of Dr. J. Pete Blair, Professor Of Criminal Justice at Texas State University who was declared an expert in "training in police tactics, with an emphasis on police tactics in active shooter events" opined that it was "next to impossible" to predict where an active shooter event would occur by doing a broad based survey.

[74] Even allowing for the time required for updating IARD and IMIM policies and for developing and piloting a course of fire for carbine training, there was a significant time lapse before carbines became available for front-line members in New Brunswick. The rollout of the first 375 carbines was approved in July 2012 and yet nearly two years later none were available in Moncton. Even in January 2014 RCMP management personnel in J Division were greatly concerned with financial implications, particularly the cost of overtime in delivering carbine training. (Ex. 8, Tab 28). Consideration of officer safety does not appear to be included in discussions of the decision makers whether at Divisional or Headquarters level.

[75] While each individual step in the process may be justifiable at some level, when taken as a whole the length of time taken and the lack of urgency accorded the carbine project establishes, in my view, a *prima facie* case of breach of the duty of care required under section 124 of the CLC to ensure the health and safety of employees while at work.

Defence of Due Diligence

[75] Having found a breach of the duty of care the onus now shifts to the RCMP to demonstrate on a balance of probabilities that, in this case, it had taken all reasonable steps to ensure the safety of front-line members when responding to active shooter events. Several factors come into play in this determination including the particular activity involved including inherent risks, the likelihood of harm, industry standards, relevant legislation, the promptness of the response to the issue, and mitigation efforts undertaken.

[76] The activity involved in this analysis is policing, and particularly the requirement that front-line RCMP members engage potentially heavily armed suspects. As has been already noted, it is beyond controversy that policing is a perilous occupation and sadly, as we know all too well, one in which danger of significant injury and/or death is present and can never be entirely

eliminated. That does not mean that the risk should be ignored, nor does it mean that it must be accepted as being part of the job and therefore no efforts need to be made to reduce the frequency of risk or to mitigate the potential consequences of the risk or mitigate its occurrence.

[77] The RCMP suggests that the magnitude of the risk must be measured alongside its frequency. As I understand the submission, even though the risk is great because the likelihood of such an event is relatively remote, due diligence has been met. I am not attracted to that argument. If a risk of injury and death exists in the workplace, the fact that, happily, it does not occur frequently does not serve as mitigation of the risk. Due diligence cannot be reduced to a mathematical or statistical calculation where an employer can "take a chance" that because an event occurs infrequently, no, limited, or delayed action is an appropriate response. When the risk to the employee is great due diligence requires a robust and timely response.

[78] The "Industry Standard" in regard to the provision of patrol carbines to general duty members was evolving in the years leading up to 2014, at least in Canada. While one large police force, The Ontario Provincial Police (OPP) had front-line officers equipped with patrol carbines for many years, others were either in the

process of implementing a patrol carbine program of some sort, whether for all or just select front-line members, or were considering a carbine program. In the United States of America, it was more common for front-line officers to have patrol carbines. In a paper entitled "Active Shooter Events from 2000 to 2012" (Ex. 70, P. 10) written by Dr. Blair and others, under the heading "Training and Equipment Implications"" the following observation is made:

> "**Being prepared to use force also means having the equipment needed to act effectively. The data clearly support** [sic] **equipping officers with patrol rifles. […]**
>
> **Officers ought to have firepower at least equivalent to what they will face if they go in harm's way.**"

It could not be said that the industry standard required the provision of patrol carbines in 2014; however as was noted by Stuart, T.C.J. in ***R. v. Placer Developments***, 13 C.E.L.R. 42:

> "**No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring.**
>
> **The care warranted in in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required and the extent the accused could control the causal elements of the offence.**"

[79] In the case of general duty officers now required to initially engage heavily armed suspects there existed a grave potential of harm, although the likelihood of an incident in which death or grievous bodily harm actually occurred was statistically remote.

While the RCMP could not control the causal elements in the sense of predicting or allowing the event to occur, there can be no question that they were aware of the increasing prevalence of heavily armed opponents and the presence of long guns particularly in the north and in rural areas. The 2007 *Needs Analysis for Hard Body Armor* (Ex. 1, Tab 5) prepared by Bruce Stuart, notes at page 5 that **"there has been an increase in the possession of firearms by criminals within Canada, in particular 'high power' weapons."** and later "**anecdotally, RCMP members face rifle and shotgun threats regularly, especially in rural areas."** That same report at page 4 referenced a document prepared two years earlier which had recommended the provision of HBA as the appropriate required level of protection for general duty members and noted **"In fact, it is felt that the risk in this area has increased, rather than diminished".** Yet on June 4, 2014, HBA had only recently arrived at Codiac Detachment and most of the responding members were unfamiliar which its use.

[80] In my view the larger issue in determining whether or not the RCMP have established a defence of due diligence requires a consideration of the promptness of the RCMP response to the issue and the question of mitigation of risk in the interim period.

[81] The RCMP asserts that the time required for the rollout following the 2011 acceptance of the patrol carbine as an addition to the weaponry available to front-line members was necessary to allow for the governmental procurement processes they are required to adhere to, to allow their contract partners time to complete their own budgetary processes, and to prepare upgraded training and course of fire protocols.

[82] While patrol carbine approval occurred in 2011 it was not until almost a year later on August 23, 2012 that the Project Initiation Document (PID) (Ex. 9, Tab 42) was finalized. Two conclusions may be taken from this document which, according to the document description on page 2, was prepared with the aim of **"securing project approval and expenditure authority."** Firstly, it is clear that the RCMP were aware of their situation in respect of obligations imposed by section 124 of CLC. At page nine it reads:

> **"The CPRC Firearm Capability Evaluation concluded that general duty RCMP members are not adequately armed to be able to safely and appropriately deal with some of the threats they face during their daily operations. Under section 129 of the *Canada Labour Code*, the RCMP, as employer, has a duty to ensure that the health and safety at work of every person employed by the RCMP is protected. Continuation of the status quo is unacceptable."**

[83] Secondly, it is clear that even then the RCMP were aware that there could be criticism of the length of time taken to bring the project to conclusion. Annex J-Communications Plan of the PID notes

that in 2006 a national working group examining IARD policies identified the need for HBA and an improved long barrel weapon system as areas of concern, and then at page two states:

> **"The patrol carbine is the first new firearm added to the arsenal available to operational members since the rollover from revolvers to semi-automatic handguns. This significant upgrade in operational firearms capabilities may elicit negative reactions by internal and external partners and stakeholders; namely the length of time it took to bring about the deployment of a new firearm from some audiences. […] Highlighting the extensive research that went into selecting this specific firearm and its configuration can mitigate some of this criticism; however, focusing on the increased benefits to public and officer safety rather than dwelling on delays is likely a better approach."**

[84] One year after approval by SEC the first contract for 527 carbines (that is the 377 ordered by Divisions after completion of their threat assessment matrix and an additional 150 ordered by E division), was awarded to Colt Canada. It was however another year, that is, in September 2013, before any patrol carbines were shipped from the RCMP Armourer to the Divisions, and even then only 22 carbines were shipped to J division. By June 4, 2014 there were no carbines available to general duty RCMP members in Moncton. Indeed it was not until June 6, 2014 that the first 13 J Division members were trained as patrol carbine operators.

[85] That is not to say that nothing happened in those thirty three months. The procurement process mandated by Federal government regulations was time-consuming and there were delays in obtaining

some of the ancillaries because of problems with the manufacturer. There were training materials to be prepared, piloted and eventually rolled out. There were innumerable meetings of the Carbine Project Board and the Project Investment Board, minutes of meetings and reports drafted and circulated, apparently to satisfy the requirements of the bureaucracy at RCMP Headquarters in Ottawa.

[86] While individually each of these items may have been necessary, when one looks at the bigger picture there is nothing to suggest that RCMP management, either at National or Divisional level, felt a sense of urgency to move the project along. If, as RCMP internal documents state, the *status quo* was unacceptable in relation to the known duty to ensure the health and safety of general duty members, management's actions in response to that duty do not demonstrate a resolve to address the issue in a timely manner. The focus throughout the process was on other concerns, some of which, such as budgetary issues, dealing with contract partners, and training were legitimate; while others, such as shielding themselves from public criticism, should not have been part of the equation.

[87] The timeframe for the rollout of any meaningful number of patrol carbines for general duty member use was a far cry from the eighteen months envisioned by Knecht in January 2011. I was

impressed by Knecht who had some thirty four years of experience with the RCMP before assuming his current post. He struck me as a "straight shooter", someone who wanted to get things done, and who had been frustrated by the bureaucracy in Ottawa. Although not in favour of patrol carbines for general duty use at first, when he "became educated on this" (as he put it), he changed his mind and called it an easy decision to make, but allowed that implementing it would not be quite as easy. Unlike many of the RCMP witnesses, he testified to feeling "a fair sense of urgency" in moving the project forward. I am inclined to accept his timeline of eighteen months before patrol carbines were on the street as reasonable.

[88] Assistant Commissioner Alphonse MacNeil (ret'd) was engaged by the RCMP to perform an Independent Review Moncton Shooting (Ex. 5, Tab 35) and also testified at trial. MacNeil served with the RCMP for thirty-eight years in a variety of capacities until his retirement in 2014. He was, by consent, declared an expert in "tactical, operational and strategic policing including RCMP operations, tactics, equipment, management supervision and training." At page 170 of his Review, MacNeil stated **"A full examination of the research, procurement and subsequent national rollout of the patrol carbine is beyond the scope of this report"**, however because that weapon was not available to the initial

members who attended the scene his review did touch on some aspects of the patrol carbine project.

[89] In particular at page 172 the Review states:

> **"Mayerthorpe and Spiritwood occurred against a backdrop of increasingly common active shooter incidents in North America and Europe. The RCMP related incidents and the apparent trend towards more active shootings drew attention to the firearms capability gap that existed within the RCMP frontline and commenced a protracted process of studying, procuring and delivering the patrol carbine to members on the frontline."**

[90] However the Review recognized that the RCMP:

> **"must comply with Federal government procurement processes, conduct research, build business cases and determine funding models before moving to approve and deliver something as significant and costly as a carbine to the frontline"** (page 173)

MacNeil's conclusion as stated at trial (and also apparently as given in the Review although redacted from the copy entered as an exhibit) was **"to expedite the rollout, it's taken too long already. Let's get at it."**

[91] I agree with MacNeil's conclusion. The rollout took too long, even allowing for all the variables and challenges noted above.

[92] The lack of any meaningful interim strategy to mitigate the danger to front-line members responding to active shooter events before June 4, 2014 (whether one calculates the starting point as being Stuart's briefing note in 2007 or when the FCE established

that a "capability gap" existed in 2011) is also a relevant consideration in determining whether or not the defence of due diligence has been met. The only evidence of such a strategy might be the August 1, 2102 e-mail from Supt. Joanne Pratt, then Director-Operational Policy & Programs, National Criminal Operations, to the Officers in Charge of the Divisions (Ex. 9, Tab 48) where she says:

> **"As you are aware, we have been working toward the procurement and roll out of a Patrol Carbine for general duty deployment. While strides have been taken, the rollout of the Patrol Carbine will take some time. With this in mind, as a means to assist to mitigate high risk response to incidents, you may wish to consider the deployment of the ERT carbines to part time ERT members when working in their regular duty capacity."**

[93] The difficulty is that the "strategy" is no more than a suggestion and there is no evidence that it was either acted upon or implemented and certainly not by J Division. Indeed the evidence establishes that RCMP management in Ottawa took a "hands off" approach to the Divisional rollout. Deputy Commissioner Brenda Butterworth-Carr, who in August 2012 was the Director General of National Criminal Operations, testified that she was not in a position to direct how Divisions managed the Patrol Carbine rollout and was unaware of who would be in a position to order Divisions to undertake a mitigation strategy such as the one suggested in Pratt's e-mail. Commissioner Paulson allowed that he could have given such a directive, however none was ever given.

[94] In January 2014 the RCMP Policy Health and Safety Committee raised a concern with the Commissioner regarding compliance rates for mandatory training for members, specifically that they were low. (Ex. 59) Mr. MacNeil testified that he knew from experience that the RCMP was not ensuring that all members were recertifying annually. This would be, *inter alia*, pistol and IMIM recertification; however there was no requirement for mandatory recertification for shotgun, rifle or IARD. Of the twenty-two first-on-scene members on June 4, 2014, five were not requalified on their duty pistol and twelve not requalified on the shotgun. (Ex. 60)

[95] In my view the RCMP did not have, during what MacNeil referred to as the "protracted process of studying, procuring and delivering" the patrol carbine, a mitigation strategy in place to mitigate the risk to front-line members who were required to engage active shooters who may be armed with long barreled weapons. The risk was known to the RCMP and had been the subject of comment in both the Mayerthorpe and Spiritwood Inquiries (although neither specifically recommended the adoption of a patrol carbine) and was referred to in several RCMP Briefing Notes and reports previously noted.

[96] One argument advanced by the RCMP as justification for their cautious approach to the rollout of the carbine project is the need to be aware of

> **"the potential long-term impact on its policing model of arming its general duty members with carbines, in particular the issue of the militarization of the police force"** (Defence Final Submissions at par. 77).

In support of this proposition the Defence called Dr. Peter Kraska, a Professor in the Department of Criminal Justice and Police Studies at Eastern Kentucky University in Richmond, Kentucky. Dr. Kraska was declared an expert in "Police Militarization particularly in the furnishing of equipment to general duty members". His report entitled "Moving Down the Militarization Continuum: Consequences and Implications" (Ex. 52) concludes at page thirteen

> **"implementing policies and practices that render the C-8 military-grade machine gun standard issue to RCMP line-personnel along with military-grade body armor constitutes a significant movement down the militarization continuum".**

[97] What Dr. Kraska does not conclude is that the decision to so equip front-line members was either unnecessary or wrong. He describes it as a "cautionary tale" based on his statistics and research, all of which come from the U.S.A., which indicate the potential of unintended consequences to such decisions mainly relating to public perception of the police. He made frequent references to police shootings in Ferguson, Missouri and Dallas

Texas, and to the erosion of public trust and police legitimacy in those cities. He offered no Canadian statistics and admitted that he had not studied the Canadian experience nor was he in a position to opine on them. While interesting, the evidence presented is of marginal use in determining any of the questions before the Court. He allows that there exists a quandary between the cultivation of a paramilitary culture among line officers by equipping them with carbines and leaving them ill prepared to effectively handle an active shooter situation by not so equipping them, suggesting the need to be "cautious, prudent and thoughtful" when making the decision. Being thoughtful, cautious and prudent however does not take precedence over the duty imposed by s. 124 of the CLC.

[98] Commissioner Paulson also alluded to concerns about the militarization of police forces. In particular to evidence he gave while appearing before The Standing Senate Committee on National Security and Defence on February 6, 2017 (Ex. 72) in which he says in his opening statement:

> **"But I am also afraid of the trend in policing for escalating military-style tools being used by law enforcement to conduct police operations, the so-called militarization of policing."**

While this may in fact reflect the RCMP's concerns in February 2017, I can find no reference in any of the voluminous material

filed as exhibits, other than in Dr. Kraska's report, of a concern expressed over militarization of policing.

[99] D/Com. Brosseau talked about the line of questioning regarding political/public support for purchase of carbines which is found in the Divisional Threat/Risk Assessment at question 15 along with whether there was financial support for the purchase at question 16. In Brosseau's 2013 presentation to the SEC, the question of local political and public support is addressed in relation to the Threat/Risk assessment tool and not in any broad based concerns about militarization of policing. I can find nothing in the evidence which would lead me to conclude that concerns about militarization of policing was a factor in any of the RCMP actions in the rollout of the carbine up to June 4, 2017. It simply cannot be used as a *post facto* justification for the delay in making carbines available to front-line members. In my view, any concerns about public perception of or political support for the carbines project was borne out of a desire to insulate the force from the type of public criticism it had faced regarding its rollout of the CEW and not from a concern about police militarization.

[100] Due diligence required the RCMP to do what a reasonable person having a similar degree of knowledge and experience would do, in all the circumstances of the case. In this case the persons

who were tasked with informing and making decisions regarding the patrol carbine and its rollout were police officers having a vast range of experiences, who knew, or should have known, the risks front line members faced, and who knew intuitively that they were outgunned. Even accepting the proposition that it was not until receipt of the FCE in 2011 that it was evident that an upgrade to existing weaponry was required, would a reasonable person have allowed that state of affairs to continue, so that on June 4, 2014 no carbines were available to front-line members in Moncton responding to a gun call? Would a reasonable person accept that, of the some seven hundred front-line members in J Division, a plan whereby in the first year twenty-two (or three percent) would be provided equipment which a study indicated was an appropriate solution to an identified firearm capability gap was appropriate? Would a reasonable person conclude that five years after the start of the carbine rollout in J Division it would be appropriate to provide that equipment to only seventy (or ten percent) of the front-line members? I think not.

[101] Due diligence, while not requiring superhuman effort, does require a plan properly prioritized, resourced and executed to address known risks to the health and safety of members, and in this case specifically, the known risk of death and/or grievous bodily harm to members when responding to an active shooter event.

The plan to investigate the need for and thereafter the rollout of the carbines was under resourced from the beginning (despite repeated requests from Lightfoot and Madill for additional personnel at Use of Force Section), was badly managed (the Davies contract and the initial rejection of the CPRC as an appropriate research body), was not properly prioritized (firstly the CEW delay and then the decision to have a divisional rollout) and was lacking in any sense of urgency to have the plan completed.

[102] In my view the RCMP have failed to establish due diligence. Front-line officers were left exposed to potential grievous bodily harm and/or death while responding to active shooter events for years while the carbine rollout limped along, apparently on the assumption that as the likelihood of such an event was relatively rare, a timely implementation was not required. As Watson J. said in ***General Scrap Iron & Metals Ltd.*** 2002 ABQB 665 at paragraph 100:

> **"An approach which focused on likelihood of danger rather than on exclusion of danger where possible could encourage employers to engage in a chillingly brutal calculus of the odds of harm against the cost of its avoidance".**

While I do not suggest that the RCMP made such a calculation, it is clear that their approach to the rollout was focused on the odds of an event such as the Moncton murders ever happening, rather than on their duty to ensure the health and safety of its members

should it happen. It is also clear that no one, and no threat assessment, can predict when such an atrocity will occur.

[103] The RCMP position is that their officers who responded on June 4, 2014 had appropriate use of force equipment and training. I will deal with the training aspect later in these reasons; however it is clear to me that the use of force equipment available to those members on June 4, 2014 left them ill-prepared to engage an assailant armed with an automatic rifle. Those witnesses who were members of RCMP management were unanimous in their opinion that responding front-line members were adequately equipped to deal with the threat they faced. Indeed to borrow a term from the political arena, it appears that on this issue at least, they were all repeating "talking points" designed to be the justification for their position. Their opinion is based on their observations made from the comfort and security of their offices; however the view of the responding officers who were facing imminent danger that day is different. Cpl. MacLean, the on-site supervisor, some thirty minutes into the response says:

> "**Call ERT. We're going to need everything we've got.**" [And] **"Keep cover guys. He's got long guns. Ours are too short for him."** (Ex. 4, Tab 24, Session 16 & 17).

A couples of minutes later Cst. Nickerson, who has seen two of his colleagues murdered by the shooter and who obviously knows that

armed only with his service pistol he is outgunned, asks MacLean ***"Do we still keep moving because again, he's got the high power and he's probably got a scope."*** (Ex.4, Tab 24, Session 29) Cst. White, who while in the Canadian Armed Forces, had been qualified in carbine use, encountered the shooter on Bromfield Avenue and testified that if a carbine were available to him he could have effectively engaged him but he knew that the shooter was out of range of his pistol. Lastly Cst. Dubois, who was actually shot while rescuing Cst. Benoit and who had a visual on the shooter but at a distance beyond the range of his pistol, testified that, based on a lifetime of experience with firearms as a hunter and his RCMP training, he could have engaged the shooter if he had a carbine. I accept as accurate their observations as to the adequacy of the firearms at their disposal in responding to this active shooter event, and reject the proposition that they were adequately armed to respond to an assailant armed with a long gun.

[104] Almost all members of RCMP management who testified at trial said that safety of their members was a priority of theirs. While they paid lip service to that ideal their actions, or in this case inactions, belie that concern. A real concern for the health and safety of front line members responding to active shooter events would have seen a rollout of the patrol carbine prioritized and not left to the vagrancies of available funding. It would not

countenance a plan for J Division where after five years only ten percent of front line members had access to equipment which their own studies determined was an appropriate solution to a demonstrated need, that is, that RCMP members are not adequately equipped to be able to deal safely and appropriately with some of the threats they face during their daily operations.

[105] I therefore have concluded that the Defendant has not established that it acted with due diligence and find the Defendant guilty of Count One.

Counts Two and Three

[106] Count Two alleges that the RCMP

> **"…failed to ensure the health and safety at work of every person employed by it, namely: Royal Canadian Mounted Police (RCMP) members, was protected by failing to provide RCMP members with appropriate information, instruction and/or training to ensure the health and safety of RCMP members when responding to an active threat or active shooter event in an open environment, contrary to Section 124 of Part II of the Canada Labour Code…".**

[107] Count Three alleges that the RCMP

> **"failed to ensure the health and safety at work of every person employed by it, namely: Royal Canadian Mounted Police (RCMP) members, was protected by failing to provide RCMP supervisory personnel with appropriate information, instruction and/or training to ensure the health and safety of RCMP members when responding to an active threat or active shooter event in an open environment, contrary to Section 124 of Part II of the Canada Labour Code."**

[108] There is no provision of the CLC or its Regulations which would require the provision of information, instruction or training in regard to either the members response or the supervision of members when dealing with an active threat or active shooter event which occurs in an open environment. Therefore the onus rests on the Crown to prove beyond a reasonable doubt that the omissions in Counts Two and Three are reasonable precautions that a reasonable employer in similar circumstances ought to have implemented in order to protect the health and safety at work of its employees. (***R. v. Brampton Brick Ltd.*** [2004] O.J. No. 3025 at par. 28). The Crown cannot discharge this burden by proving that the precautions they allege were not taken were reasonable in some abstract sense, but rather that they were reasonable in all of the circumstances of the case. The hazard sought to be alleviated must have been either actually or reasonably foreseeable. ***(R. v. Petro Canada*** [2008] O.J. No. 4396 at pars 135-136).

[109] Defence Counsel suggests that there is no evidence that anyone in the RCMP anticipated outdoor active shooter events; however such an event occurred at Spiritwood in 2006. I reject the notion that it was not reasonably foreseeable that RCMP members could face an active shooter in an outdoor environment. In fact it was actually foreseeable. The RCMP position appears to be that as outdoor shooter incidents are relatively rare comprising,

according to the MacNeil report, approximately ten percent of all North American incidents, then they are not reasonably foreseeable. That is not the case. It was foreseeable that another outdoor shooter event would occur; however the likelihood of it happening was remote.

[110] Evidence presented at trial however establishes that the training which the Crown suggests was a reasonable precaution to be taken did not exist prior to June 4, 2014. The IARD course offered pre-2014 focused solely on responding to active shooter/threat in an enclosed area. The training offered in the U.S.A. was the same. Advanced Law Enforcement Rapid Response Training (ALERRT) is the equivalent of IARD and approved by the Federal Bureau of Investigations as the standard for active shooter training in the U.S.A. Dr. Blair, the Executive Director of ALERRT, testified that while his organization offered a course in outdoor shooter tactics it was considered a specialty course used to train mainly game wardens and border patrol officers. It certainly was not offered to general duty front-line officers. In his expert report "Active Shooter Training: a comparison of the RCMP and ALERRT" (Ex. 65) at Tab 1 he opined:

> **"The training offered by the RCMP prior to June 4, 2014 appears to have been consistent with the training offered to other North American police forces at the time and in line with other police forces' assessment of the threat. Following the Moncton, Dallas, and Baton Rouge attacks, this assessment**

> **has changed. Many departments are now rapidly moving to integrate exterior response skills into their departments' training, but at the time of the Moncton attack, they did not."**

[111] The evidence of Joanne Rigon and Christine Hudy convinces me that the RCMP have a first class training program both for the recruits at Depot and for ongoing training. That assessment is shared by Dr. Blair who noted that much of the IARD Outdoor Practical Course (Ex. 67) has been used in the revamped ALERRT course which deals with outdoor shooter scenarios. In his Report MacNeil says

> **"After the shooting began, several members involved responded tactically in a manner consistent with their IARD training; teaming up in threes, pursuing the threat in order to stop it, and working as an independent unit to accomplish this goal".** (Ex. 5, Tab 35, page 108)

The training provided (observing threat clues, using the seven stages of risk assessment, the seven tactical principles and the ten tactical errors), enabled responding officers to respond to the threat they faced. What they lacked however, was the appropriate equipment to deal safely and effectively with that particular threat.

[112] I agree with the findings of Kastner, J. in ***Petro Canada*** (Supra at par. 198) that an employer cannot be required to "provide" something that did not exist and that **"the plain meaning**

of the word 'provide'…does not include the concept of 'developing' or 'inventing'." My conclusion is that the precautions alleged in Count Two are not, in all the circumstances known prior to the tragic events of June 4, 2014, reasonable precautions which ought to have been taken.

[113] In regard to Count Three, the allegation of lack of supervisor training, there can be no question but that there was some degree of confusion during and immediately after the shootings. MacNeil, is his report, notes that any supervisory shortcomings were understandable given the **"emotional gravity"** of the situation and the **"lack of training and experience in dealing with this type of tragedy"** (Ex. 5, Tab 35, P. 55). It is important to note that the June 4th killings occurred within a relatively short time span. The time between the first two murders was approximately two minutes and within twenty minutes the third murder had occurred and two other members had been injured. With the benefit of hindsight one can point to areas where improvements could be made; however I do not consider it reasonably foreseeable that supervisors in a small city detachment would be faced with supervising the response to a killer who was actively seeking out and killing RCMP members and therefore the provision of such supervisory training is not a precaution which a reasonable employer ought to have implemented. Additionally it appears from

the MacNeil Report that such tactical training did not exist within the RCMP. (Ex. 5, Tab 35, P. 62)

[114] Defence Counsel in their final submission, and Paulson in his testimony referred to the MacNeil report as measuring the RCMP against a "standard of perfection", presumably in regard to his recommendations that the RCMP provide training to better prepare supervisors to manage and supervise throughout a critical incident and that they include outdoor shooter response tactics in the IARD course. That is incorrect. What MacNeil said in his testimony was that he was not looking at some sort of gold standard but rather at what he believed could be achieved in a reasonable period of time.

[115] I have therefore concluded that the Crown has not established a *prima facie* case in respect of Count Two as the precautions particularized did not exist prior to June 4, 2014 and are therefore not reasonable precautions. In respect of Count Three, the Crown has failed to prove that the precautions alleged in that Count were precautions which the RCMP as a reasonable employer ought to have implemented for the protection of its employees. I find the Defendant not guilty on Count Two and on Count Three.

Count Four

[116] Because of my decision on Count One I hereby enter a Judicial Stay of Proceedings in respect of Count Four.

Dated at Moncton this 29th day of September, 2017

R. Leslie Jackson, J.P.C.