

Part 4

The Regulatory Framework

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PART 4: THE REGULATORY FRAMEWORK

A. USE OF FORCE BY POLICE OFFICERS—THE LEGAL FRAMEWORK

1. Civilian governance of the police

Important principles form the basis of any discussion about a police officer's use of force. In his 1994 *Policing in British Columbia* report,¹⁶ then-Justice Wally Oppal stated:

Thus in a system of responsible government, the police are ultimately accountable to civilian authority. This fundamental tenet of a liberal democracy distinguishes Canada from totalitarian or dictatorial states in which the police are either accountable only to the executive branch or, in extreme cases, to no other authority at all.

This accountability has, in my view, two aspects. First, there is an after-the-fact accountability, through which police management must answer for how a police force is operated; and individual police officers must answer for their own conduct through internal disciplinary or court proceedings.

Second, there is a proactive accountability, through which the legislative and executive branches of government set standards of practice governing how police officers will carry out their duties. The mandate given to this Commission is an example of proactive accountability. My recommendations respecting the use of conducted energy weapons will, if accepted by the legislative and/or executive branches of government, impose new standards governing future police conduct.

While police officers have a legal duty to carry out their tasks in accordance with such standards, there is an equally onerous duty on civilian authority to set such standards in the first instance. Ignoring this responsibility, or delegating it to the police would be an abdication of a fundamental element of our liberal democratic system; we do so at our peril.

It is with this understanding that I have approached my work as Commissioner.

¹⁶ *Closing the Gap—Policing and the Community*, Volume 1, p. B-3.

2. A police officer's authority to use reasonable force

a. *The Criminal Code*

As a society, Canadians have entrusted their police officers with exceptional powers, including the power to search private property, the power to arrest (sometimes without a warrant), and the power to use force. These powers are all qualified, with elaborate checks and balances that Parliament and the courts have developed over the years to safeguard against abuses.

i. General rule

A police officer's authority to use reasonable force is dealt with in several sections of the *Criminal Code*.¹⁷ Section 25(1)(b) sets out the basic principle:

Every person who is required or authorized by law to do anything in the administration or enforcement of the law ... as a peace officer or public officer, ... 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.

If a police officer uses excessive force, then s. 26 applies. It states:

Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

The *Criminal Code* has three special provisions respecting the use of force that is intended or is likely to cause death or grievous bodily harm, which I will mention briefly.

ii. Protection from death or grievous bodily harm

Section 25(3) states that a person is not justified in using force that is intended or is likely to cause death or grievous bodily harm, unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of anyone under that person's protection from death or grievous bodily harm.

¹⁷ R.S. 1985, c. C-46, as amended. See <http://laws.justice.gc.ca/en/showtdm/cs/C-46?noCookie>.

iii. Taking flight to avoid arrest

Section 25(4) states that a police 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 five conditions are met:

1. The officer is proceeding lawfully to arrest the person, with or without warrant;
2. The offence for which the person is to be arrested is an offence for which that person may be arrested without warrant;
3. The person to be arrested takes flight to avoid arrest;
4. The police officer believes on reasonable grounds that force that is intended or is likely to cause death or grievous bodily harm is necessary for the purpose of protecting the officer or any other person from imminent or future death or grievous bodily harm; and
5. The flight cannot be prevented by reasonable means in a less violent manner.

iv. Escaping inmate

Section 25(5) states that a police officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary, if two conditions are met:

1. The officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the officer or any other person; and
2. The escape cannot be prevented by reasonable means in a less violent manner.

In 1981 the BC Court of Appeal was required to interpret the phrase “grievous bodily harm.”¹⁸ The case involved an RCMP officer who had been convicted by a jury of assault causing bodily harm for striking a detainee with a nightstick as the detainee was exiting a police cruiser and kicking the detainee after he fell to the ground.

Although there was a dispute about the actions of the officer and the detainee, the detainee suffered a laceration on his forehead, a large bruise to his left cheek, and a fracture of his left cheekbone.

¹⁸ *R. v. Canada (Royal Canadian Mounted Police)* (1981), 60 C.C.C. (2d) 211.

Relying on two earlier court authorities, the Court of Appeal ruled that “grievous bodily harm” does not mean *any* hurt or pain, but is limited to “serious hurt or pain.”¹⁹ Later in this Report I will discuss the implications of this interpretation. For now, it is enough to note that if one were to conclude that a conducted energy weapon is likely to cause “serious hurt or pain,” then s. 25(3) of the *Criminal Code* would justify a police officer’s use of the weapon only if the officer believes on reasonable grounds that it is necessary for the officer’s self-preservation or the preservation of anyone under the officer’s protection from death or serious hurt or pain.

b. Canada’s commitment to international treaties and conventions

During our public forums, Hilary Homes made a presentation on behalf of Amnesty International Canada, in which she suggested that police use of conducted energy weapons might violate Canada’s international commitments. She stated:²⁰

Increasingly, the Taser appears to have been deployed simply too often and too soon. Amnesty International believes that using powerful electroshock weapons against those already restrained; disturbed, intoxicated, but non-dangerous individuals; unruly children; and people who are non-compliant but who do not pose a probable threat of serious injury to themselves or others, is an excessive use of force which may in some circumstances also constitute torture or other cruel, inhuman or degrading treatment. [underlining added]

i. Torture

On June 24, 1987, Canada ratified the United Nations *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.²¹ Article 2(1) imposes a duty on each State party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The duty to prevent torture is absolute—Article 2(2) adds that “No exceptional circumstances whatsoever ... may be invoked as a justification for torture.”

19 *Ibid*, para. 18. The court authorities relied upon were *Director of Public Prosecutions v. Smith* (1960), 44 Cr. App. R. 261, and *The Queen v. Archibald* (1898), 4 C.C.C. 159.

20 Transcript, May 15, 2008, pp. 25-26.

21 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. p. 85 (entered into force 26 June 1987), available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

Under Article 11, Canada also has a duty to prevent torture by systematically reviewing its interrogation rules, instructions, methods, and practices, as well as arrangements for the custody and treatment of people subjected to arrest, detention, or imprisonment.

Article 1 of the Convention defines “torture” as meaning

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

From my reading of this definition, several elements must be established for an act to amount to torture:

- Severe physical or mental pain or suffering is intentionally inflicted on the subject;
- The pain or suffering is inflicted for any of the following purposes:
 - obtaining from the subject or a third person information or a confession;
 - punishing the subject for an act the subject or a third person has committed or is suspected of having committed;
 - intimidating or coercing the subject or a third person; or
 - for any reason based on discrimination of any kind;
- The pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity; and
- The pain or suffering does not arise only from, or is not inherent in or incidental to lawful sanctions.

On February 19, 2008, the United Nations Committee Against Torture, an expert panel established under Article 17 of the Convention, published a report²² that included the committee's concern about Portugal's use of conducted energy weapons:

Use of "Taser X26" weapons

The Committee is deeply concerned about the recent purchase by the State party of electric "Taser X26" weapons for distribution to the Lisbon Metropolitan Command, the Direct Action Corps, the Special Operations Group and the Personal Security Corps. The Committee is concerned that the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death, as recent developments have shown (Articles 1 and 16).

The State party should consider relinquishing the use of electric "Taser X26" weapons, the impact of which on the physical and mental state of targeted persons would appear to violate Articles 1 and 16 of the Convention.

From my examination of this issue, I have reached several conclusions. First, I am satisfied that conducted energy weapons inflict "severe pain or suffering, whether physical or mental," within the meaning of Article 1 of the Convention. While the Convention does not define "severe," I place considerable reliance on Mr. Reilly's laboratory experiment in which human subjects experienced intolerable pain at approximately one micro-coulomb of delivered charge, and on his evidence that the M26 and X26 weapons produce 100 micro-coulombs of delivered charge. Even if "intolerable" pain does not amount to "severe" pain, surely 100 times as much delivered charge must reach or exceed the "severe" pain threshold.

Second, for an act to constitute torture, it must be inflicted for one of the purposes specified in the definition, such as obtaining a confession, punishment, intimidation, or discrimination. Based on what I have been told about the use of conducted energy weapons in Canada, I am not satisfied that they are, in the normal course of events, used for any of these purposes. They are typically used to facilitate an arrest, to

22 U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Portugal, UNOHCHROR, 39th Sess., UN Doc. CAT/C/PRT/CO/4, p. 5, available at <http://www.unhcr.org/refworld/publisher,CAT,,PRT,4804a62e2,0.html>.

disarm a person, or to prevent a person from harming themselves, a police officer, or others. Having said that, it is conceivable that an officer could improperly use a conducted energy weapon for one of these specified purposes. In that case, careful consideration would have to be given to whether the officer's conduct violated the Convention.

Consequently, I am not satisfied that the normal use of conducted energy weapons constitutes torture within the meaning of the United Nations *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. While I recognize the possibility that such weapons could be used for such improper purposes, I do not consider it necessary to make recommendations against the use of conducted energy weapons for obtaining confessions or for punishment, as there is no evidence of such abuse in British Columbia, nor is any such abuse suspected in the future. In any event, torture constitutes an indictable offence under s. 269.1 of the *Criminal Code*, which tracks very closely the language of the United Nations Convention.

ii. Other cruel, inhuman, or degrading treatment or punishment

The same United Nations Convention imposes a comparable duty on State parties to prevent other cruel, inhuman, or degrading treatment. Article 16(1) states in part:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 11 is also made applicable, imposing a duty on all State parties to keep under systematic review their interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of people subjected to arrest, detention, or imprisonment, with a view to preventing other cruel, inhuman, or degrading treatment or punishment.

Although the Convention does not define "cruel, inhuman or degrading" treatment or punishment, several international courts or tribunals have done so. Such rulings are not binding on Canada, but may serve as evidence of customary international law:

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- The European Court of Human Rights ruled that a minimum level of severity is required for an action to constitute cruel, inhuman, or degrading treatment, which depends on the duration of treatment, the physical or mental effects of the treatment, and in some cases the sex, age, and state of health of the victim.²³
- The International Criminal Tribunal for the former Yugoslavia defined cruel and inhuman treatment as that which “causes serious mental or physical suffering and constitutes a serious attack on human dignity,” especially where it has been done deliberately.²⁴
- The European Court of Human Rights ruled that hooding, loud music, sleep deprivation, food and drink deprivation, and stress positions can constitute cruel, inhuman, or degrading treatment.²⁵

These rulings indicate that a certain severity of mental or physical pain or suffering is required, and that a variety of factors should be considered, including age, sex, state of health, the duration of the treatment, and its physical or mental effects on the person.

From my examination of this issue, I draw several conclusions. First, given the wide range of factors that must be taken into account in deciding whether specific treatment amounts to cruel, inhuman or degrading treatment, I am not prepared to say that the normal use of conducted energy weapons meets that threshold. Each case would have to be decided, based on the specific facts placed before the trier of fact.

Second, some international tribunals have identified particular groups in society (*e.g.*, children, the elderly, and those who are medically fragile) as being more vulnerable, which suggests to me that using conducted energy weapons against them increases the risk that such use may constitute cruel, inhuman, or degrading treatment or punishment.

Third, given the proliferation of conducted energy weapons around the world, and their increasing popularity among law enforcement bodies, it would be difficult to

²³ *Ireland v. U.K.*, European Court of Human Rights (1978).

²⁴ *Prosecutor v. Delalic*, International Criminal Tribunal for the former Yugoslavia IT-96-21-T (1998).

²⁵ *Ireland v. U.K.*, European Court of Human Rights (1978).

sustain an argument that the use of such weapons violates customary international law. To put it another way, the open use of conducted energy weapons by these States indicates their subjective belief that such use does not constitute cruel, inhuman, or degrading treatment.

3. British Columbia's approach to establishing use-of-force standards

Section 39(1) of the *Police Act*²⁶ states that the Director of Police Services is responsible for superintending policing and law enforcement functions in British Columbia. One of the director's statutory functions is to make recommendations to the minister on "the use of force by officers or classes of officers, including, without limitation, their training and retraining in the use of force" (s. 40(1)(e)(ii)).

In addition, s. 74(2)(t) of the Act authorizes the Lieutenant Governor in Council to make regulations:

- (t) respecting the use of force by a class of officers in the performance of their duties, including, without limitation,
 - (i) the training or retraining in the use of physical force
 - (A) in emergency response situations, pursuits or forcible entries, and
 - (B) as a means of restraining an individual, and
 - (ii) the training or retraining in the use of
 - (A) firearms, ammunition, batons, capsicum spray, physical restraint devices or other weapons and equipment,
 - (B) police dogs, horses and other animals, and
 - (C) motor vehicles when in pursuit or in emergency response situations.

Pursuant to that statutory authority, the Lieutenant Governor in Council passed the *Use of Force Regulation*.²⁷ There are three aspects of the Regulation on which I will comment.

²⁶ R.S.B.C. 1996, c. 367, as amended.

²⁷ B.C. Reg. 203/98. See http://www.qp.gov.bc.ca/statreg/reg/P/Police/203_98.htm.

a. Firearms

The Regulation has detailed rules about the types of firearms and ammunition that are authorized for use, maintenance and inspection of firearms, investigations to be conducted after the in-service discharge of a firearm, and the surrender of firearms (s. 3-8). Each member of a police force who is authorized to carry and use a firearm must complete a training course approved by the chief constable and qualify on the firearm, and must re-qualify on the firearm at least once annually (s. 10). With respect to use of a firearm, s. 5 states:

A member of a police force who is authorized to use a firearm under section 3, may discharge that firearm if it is reasonable and necessary to do so and in accordance with the protections and authorizations provided by section 25 of the *Criminal Code* (Canada).

b. Intermediate weapons

The Regulation defines an “intermediate weapon” as any weapon *other than*:

- a firearm; or
- a weapon that when used in its ordinary and intended manner is as likely to cause serious bodily harm or death to a person as a firearm.

It *does* include a firearm used with ammunition designed to be discharged at a muzzle velocity not exceeding 152.4 metres per second.

Section 9 then provides that a member of a police force may carry and use an intermediate weapon if two conditions are met:

- Use of the intermediate weapon has been approved by the director and a chief constable; and
- The member has completed a training course approved by the chief constable and has been qualified or re-qualified on its use as specified by the police force.

c. Use of force generally

Section 11 of the Regulation states:

Use-of-force policy

11. Each police force must develop or adopt a use of force model approved by the director and develop a written use of force policy that includes at least the following force options:
- (a) officer presence;
 - (b) communication;
 - (c) physical control;
 - (d) intermediate weapons;
 - (e) lethal force.

Section 10(3) of the Regulation requires that each member of a police force complete and qualify on a training course approved by the chief constable on the use-of-force model and techniques, and must thereafter re-qualify in the use-of-force techniques within a period specified by the police force.

The director is also required, under s. 2.1 of the Regulation:

- to appoint a use of force coordinator to coordinate development of use-of-force policy under section 11; and
- to chair a use-of-force advisory committee, including representatives from police forces, which must meet at least twice each year and may make recommendations respecting use-of-force policy.

From my examination of this issue, I have reached two conclusions. First, the Lieutenant Governor in Council has broad powers to establish province-wide policies respecting all aspects of use of force applicable to municipal police forces.²⁸

Second, Lieutenant Governor in Council has established a province-wide policy in relation to firearms and ammunition, but has not done so in relation to intermediate weapons or a general use-of-force policy.

28 In his presentation during our public forums, the Director of Police Services told me that, at least with respect to the use of conducted energy weapons, his authority under s. 40 of the Act is limited to making recommendations to police departments. He is currently seeking amendments “which will give us more definitive power to actually, rather than recommend, definitively set the standard”: Transcript, May 7, 2008, p. 57. While it is true that under s. 40 the director’s authority is limited to making recommendations to the minister on the use of force, that provision must be read in conjunction with s. 74, which authorizes the Lieutenant Governor in Council to make regulations respecting the use of force by a class of officers. In my view, the Lieutenant Governor in Council could, by regulation, set province-wide standards respecting all aspects of the use of force by police officers, including standards respecting the use of conducted energy weapons, relying, of course, on the director’s recommendations.

With respect to intermediate weapons, the Regulation does not specify the particular weapons that are approved, but leaves it up to the director and a chief constable to approve a weapon. This policy lacks transparency and leaves open the possibility of inconsistent application across the province.

With respect to the use-of-force policy generally, the Regulation delegates to each police force the development of a use-of-force model and written use-of-force policy. Although each police force's policy must include at least five specified force options, the Regulation gives no guidance respecting the substantive content for each option. While the Regulation requires that the director approve each police force's use-of-force model, it establishes no criteria to guide the police force and the director, and leaves open the possibility of wide variations in models among the police forces.

The use of force (of which the use of conducted energy weapons is a key aspect) is a fundamentally important element of policing. Of all police powers, it is the most extraordinary, and cries out for consistency across the province. More than that, civilian governance of policing means that use-of-force standards must be established by the legislative and/or executive branches of government, not the police departments themselves. While it would be appropriate to include the law enforcement community and other key stakeholders in discussions leading to the development of policy, the ultimate decisions must rest with civilian authority.

B. CURRENT REGULATION OF CONDUCTED ENERGY WEAPONS

1. Federal regulation

a. Under the Criminal Code

For those searching for cultural differences between Canada and the United States, nothing could be more striking than the two countries' extraordinarily different approaches to the regulation of conducted energy weapons.

In the United States, TASER International, Inc., produces a civilian model of its conducted energy weapon (the C2), which it advertises on its website and sells through retailers, such as outfitters, sporting goods and outdoor recreation stores, and a national chain of travel centres located along interstate highways.

In Canada, however, a conducted energy weapon is a prohibited weapon under the *Criminal Code*. It may also be a prohibited firearm. I will briefly discuss both.

i. Prohibited weapon

Under s. 84(1) of the *Criminal Code*, a “prohibited weapon” is defined as meaning (in addition to switchblade knives) “any weapon, other than a firearm, that is prescribed to be a prohibited weapon.” On December 1, 1998, a regulation was passed²⁹ stating in s. 4 that weapons listed in Part 3 of the schedule were prohibited weapons. Part 3 of the schedule included “Former Prohibited Weapons Order, No. 3,” which in turn listed as a prohibited weapon:

6. Any device that is designed to be capable of injuring, immobilizing or incapacitating a person or an animal by discharging an electrical charge produced by means of the amplification or accumulation of the electrical current generated by a battery, where the device is designed or altered so that the electrical charge may be discharged when the device is of a length of less than 480 mm, and any similar device.

In my view, that definition quite accurately described the M26 and X26 conducted energy weapons, and I am satisfied that both are “prohibited weapons” within the *Criminal Code*.

ii. Prohibited firearm

The same 1998 Regulation also stated in s. 2 that “the firearms listed in Part 1 of the schedule are prohibited firearms....” Part 1 of the schedule included reference to the same “Former Prohibited Weapons Order, No. 3,” which listed as a prohibited firearm:

²⁹ See Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted, SOR/98-462.

Any firearm capable of discharging a dart or other object carrying an electrical current or substance, including the firearm of the design commonly known as the Taser Public Defender and any variant or modified version of it.

It appears that the TASER Public Defender was manufactured in the 1970s, and used gunpowder rather than compressed nitrogen as the propellant. It was probably of a different design than the two current models, because the Department of Justice's Regulatory Impact Statement that accompanied the 1998 Regulation stated that although it had been in the prohibited *weapons* category, it "has been moved to the prohibited *firearms* class because it is a barreled weapon and thus comes within the 'firearm' definition in the Code." I question whether either the M26 or the X26 could be classed as a "barrelled weapon," which is an essential element of the definition of a firearm.³⁰

I am not persuaded that either the M26 or the X26 are "prohibited firearms" within the *Criminal Code*. For the purposes of this analysis, it is enough that they are "prohibited weapons."

b. As an electrical device

There are two aspects to product safety. The first focuses on whether a conducted energy weapon, when functioning properly and used as intended, is safe. The second focuses on whether the device meets quality standards in the sense that it functions properly and regularly within the manufacturer's specifications.

i. Certification of conducted energy weapons as safe

Several people who made presentations during our public forums noted the absence of standards for conducted energy weapons. Dr. John Webster, a biomedical engineer from Wisconsin, observed that there are international standards for electric fences,

30 However, it may be that TASER International, Inc.'s new XREP model, which is a wireless projectile fired from a shotgun, may fit the *Criminal Code* definition of a firearm, which states: "'[F]irearm' means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person..."

but not for conducted energy weapons.³¹ Walter Kosteckyj, legal counsel for Mr. Dziekanski's mother, stated:³²

In short, there are no standards in existence. In almost every other type of electrical device, there are standards which are set. In Canada those standards are generally set by the Canadian Standards Association. That at the very least is an independent body which employs multiple stakeholders and it might be, in my submission, an appropriate place to conduct the oversight that might be needed to test and approve these conducted energy weapons.... [H]ere is a totally unregulated weapon which has never been reviewed or standardized in any way.

A similar concern has been voiced at a national level. In August 2004 the Canadian Association of Chiefs of Police commissioned the Canadian Police Research Centre to conduct a comprehensive review of the existing scientific research and data and provide a national perspective on the safety and use of conducted energy weapons. On the issue of product safety, the authors stated:³³

It has become apparent to the CPRC team that there are no known, scientifically tested, independently verified, and globally accepted CED [conducted energy device] safety parameters. This is problematic for a couple of reasons.

- Police services and authorizing agencies are completely reliant on manufacturer claims regarding the safety of their products. By comparison there are many policing tools and equipment that have an accepted range of safety parameters such as body armour, OC spray concentrations, and police vehicle specifications. In terms of CEDs, what is known is limited to testing of the TASER M26 and X26. If a new CED were to be introduced, police services and authorizing agencies could only rely on manufacturer claims.
- Because of this lack of known safety parameters relating to CED, authorizing agencies are ill-equipped to respond quickly to advances in technology that may be immediately beneficial to police and, eventually, community safety. At least in the context of a few Canadian examples, some authorizing jurisdictions have little independent information to form decisions and policy—with the end result being an unnecessary bureaucratic process,

31 Transcript, May 5, 2008, p. 77.

32 Transcript, May 15, 2008, p. 7.

33 Technical Report TR-01-2006, *Review of Conducted Energy Devices*, p. 34. The report is available at <http://www.css.drddc.gc.ca/cprc/tr/tr-2006-01.pdf>.

devoid of leadership, that serves few stakeholders. This is a tangible “gap” in the complete understanding of CEDs that needs to be filled.

There are several regulatory approaches that could be employed, if it was felt necessary to certify conducted energy weapons as “safe” before they could be used by law enforcement agencies:

- ***Hazardous Products Act***³⁴—this federal legislation is used to regulate a wide range of consumer products.
 - Under s. 6, the Governor in Council may add to the schedule of restricted products any product, material, or substance that is or contains a poisonous, toxic, flammable, explosive, corrosive, infectious, oxidizing, or reactive product, material or substance or other product, material or substance of a similar nature that the Governor in Council is satisfied is or is likely to be a danger to the health or safety of the public.
 - Under s. 5, the Governor in Council may make regulations prescribing the circumstances and conditions under which specified restricted products may be imported into, and sold in, Canada. By adding conducted energy weapons to the list of restricted products, the federal government could require that they undergo safety testing or product standards certification before being imported or sold.
- ***Canadian Standards Association***—the association is a non-profit, private organization, accredited by the Standards Council of Canada, that tests products for compliance to national and international standards, and issues certification marks for qualified products. Certification marks tell potential customers and users that a product has been evaluated by a formal process—involving examination, testing, and follow-up inspection—and that it complies with applicable standards for safety and performance.

ii. Testing of individual conducted energy weapons

Apart from the issue of pre-deployment certification, to what extent can individual conducted energy weapons, once deployed, be tested to ensure that they are operating to the manufacturer’s specifications? The test commonly used by law enforcement personnel to assess functionality of an individual conducted energy weapon is the “spark” test. When a cartridge is not attached, pulling the trigger causes an electric spark to jump between the two electrodes at the nose of the

34 R.S.C. 1985, c. H-3.

weapon, which verifies that the device is working and that the batteries are adequately charged. However, it does not indicate the level of energy output produced.³⁵ When Cst. Mike Massine, the officer in charge of the conducted energy weapon program for the Victoria Police Department, testified at our public forums, he confirmed that the spark test (which is done at the start of each officer's shift) does not confirm that the weapon is operating to the manufacturer's specifications.³⁶

The RCMP's Conducted Energy Weapon Operational Manual³⁷ deals specifically with independent testing of conducted energy weapons. Until recently it stated that:

9. 1. The Canadian Police Research Center (CPRC) will conduct independent testing of a CEW when:
 - 9.1.1. someone is seriously injured or dies when a member resorts to lethal force because a CEW was ineffective or malfunctioned;
 - 9.1.2. a member is seriously injured or dies as a direct or indirect result of a CEW malfunction; or
 - 9.1.3. any incident in which it is in the public interest or the member's interest to determine the working state of a CEW.

It is noteworthy that testing was normally required only when there was evidence that the conducted energy weapon had malfunctioned. Testing was not required when a subject's serious injury or death was proximate to use of a weapon (when there was no evidence of malfunction), unless testing was ordered in the "public interest" under paragraph 9.1.3.

35 See TASER International, Inc.'s Operating Manual for X26C (the civilian model based on the X26 law enforcement model): <http://www.taser.com/products/consumers/Pages/TASERX26C.aspx> (see downloads).

36 Transcript, May 6, 2008, p. 29. See also, to the same effect, United States Government Accountability Office, "Taser Weapons: Use of Tasers by Selected Law Enforcement Agencies" GAO-05-464, 2005, p. 13.

37 RCMP Operational Manual, Chapter 17.7—Conducted Energy Weapon. Section 9, "Independent CEW Testing."

In February 2009, the RCMP's policy was amended. It now states:

9. Independent CEW Testing
 - 9.1. Independent testing of a CEW at a designated testing facility will be completed when:
 - 9.1.1. an incident involves injury requiring medical treatment or death proximal to the use of a CEW;
 - 9.1.2. a CEW was ineffective or malfunctioned; or
 - 9.1.3. a supervisor of an incident, a Divisional Use of Force Coordinator, a Criminal Operations Officer, the National Use of Force Officer, or National Criminal Operations Branch is of the opinion that testing is warranted in the circumstances, including in order to address any concerns about the performance of a CEW or the circumstances or impacts of its use.
 - 9.2. Testing of the CEW will determine the working state of the CEW and if the weapon is functioning as per the manufacturer's specifications.
...
 - 9.4.2 Divisional CROPS are to contact the DG NCROPS for the designated testing facility.³⁸

The Canadian Police Research Centre performs the tests based on TASER International, Inc.'s "Open Circuit Voltage Measurement Procedure" and "Load Voltage and Current Measurement Procedure." The results obtained using these protocols include:

- The open circuit voltage (*i.e.*, whether the voltage produced is the specified 50,000 volts);
- The maximum load voltage and current experienced with 250 ohms of resistance (*i.e.*, the voltage and current experienced by a subject, assuming 250 ohms of resistance is present); and
- The electrical frequency of the device (*i.e.*, whether the frequency of pulses is the specified 19 cycles per second).

Additional information, such as the energy produced in joules, could be recorded but is not done as part of the protocol currently used.³⁹

³⁸ See <http://www.RCMP-grc.gc.ca:80/ccaps-spcca/cew-ai/operations-17-7-eng.htm>.

Several municipal police forces in British Columbia⁴⁰ have policies requiring that a conducted energy weapon be submitted either to a supervisor or the investigating field officer, and retained as an exhibit, when the weapon has been discharged and death or grievous bodily harm or injury results. The policies do not specify that the weapon be tested for electrical output.

In 2008 the Canadian Broadcasting Corporation retained National Technical Systems to test 44 TASER X26 weapons (apparently taken from active service), and those tests were reviewed by three researchers, including Dr. Pierre Savard, one of the presenters at our public forums.⁴¹ The researchers determined that three units could not generate any current, even with charged battery packs. The study found that five of the remaining 41 weapons had grossly abnormal electrical characteristics:

- One unit could not generate current in a sustained manner when first loaded, but after a dozen attempts it worked properly and testing could be completed; and
- Four units generated currents above the ± 15 percent limits when connected to a 250 ohm load, as set out in Table 2.

Table 2: Abnormal electrical characteristics of tested X26 weapons

	Peak current	Average current	Peak voltage	Energy/pulse (mJ)
Mfgr. Spec.	3.3 ampere	2.1 milliampere	1200 volt	70 millijoule
Weapon ID				
A03	5.212	3.40	1115	97.9
A09	4.857	3.15	1090	99.1
A18	5.138	3.36	1170	96.8
B03	4.840	2.96	1059	106.0

The four weapons with peak currents that were 47–58 percent higher than the values specified by the manufacturer were among a group of six tested weapons that had

39 Information provided by Steve Palmer, Executive Director, Canadian Police Research Centre, on July 7, 2008. Mr. Palmer also advised the Commission that the centre is currently working with the United Kingdom's Home Office, the National Institute of Justice, and Pennsylvania State University to develop an independent, uniform conducted energy weapon testing methodology.

40 Oak Bay, Saanich, Central Saanich, Vancouver, New Westminster, Port Moody, and Nelson.

41 Savard, Pierre et al., "Analysis of the Quality and Safety of the Taser X26 devices tested for Radio-Canada/Canadian Broadcasting Corporation by National Technical Systems, Test Report 41196-08.SRC," available at <http://www.cbc.ca/news/pdf/taser-analysis-v1.5.pdf>.

been bought before 2005 which, according to the Savard review, “raises concerns about quality control during manufacturing, possible change of design and component aging” (p. 8). The reviewers also expressed concern that such abnormally high current pulses could possibly trigger extrasystoles (premature contractions of the heart), which could possibly reduce the threshold for ventricular fibrillation, especially if the barbs were discharged into the chest area, spanning the heart. They recommended:

- a moratorium on X26 weapons manufactured before 2005;
- further study of the electrical characteristics of X26 weapons in use in Canada and the U.S.A. (*i.e.*, output and irregular or variable discharges) using a standardized testing protocol such as that used in this study; and
- that the testing protocol include continuous, high-resolution recordings lasting at least two seconds, in order to measure possible changes in a series of 36 or more individual current pulses, and also include an evaluation of the effects of “spark testing.”⁴²

Within days of release of the Savard analysis, BC’s Minister of Public Safety and Solicitor General announced⁴³ that all municipal chiefs of police and other provincially regulated law enforcement agencies had agreed to withdraw from service all weapons acquired before January 2006 for independent testing, to ensure that they generate electrical currents consistent with the manufacturer’s specifications. He also announced: “Municipal police have also agreed to research and establish a standard for regular calibration of all [conducted energy weapons] used in the province, and RCMP in BC have also been asked to comply.”

From my examination of this issue, I have reached four conclusions. First, based on information the Commission received from the Canadian Police Research Centre, it is possible to test conducted energy weapons to determine whether they are functioning in accordance with the manufacturer’s specifications.

42 On December 2, 2008, TASER International, Inc., Vice-President Magne Nerheim wrote a detailed rebuttal to the CBC, challenging the testing protocol followed by National Technology Systems, and recommending that NTS repeat the test, first spark testing every unit as officers are trained to do, and discharging the weapons into a 600 ohm load, the average resistance of human subjects.

43 Information Bulletin, December 9, 2008, available at http://www2.news.gov.bc.ca/news_releases_2005-2009/2008PSSG0067-001862.htm.

Second, the policy applicable to municipal police departments in British Columbia does not require that a conducted energy weapon be tested following an incident in which a person died or was seriously injured.

Third, since February 2009, the RCMP policy requires that a conducted energy weapon be tested following an incident involving injury requiring medical treatment or death proximal to the use of a conducted energy weapon, or in other cases when specified senior officers are of the opinion that testing is warranted in the circumstances.

Fourth, the weapon test commissioned by the CBC raises concerns about quality control and about the capacity of some models to emit a current exceeding the manufacturer's specifications. It is gratifying that at least some models will be subjected to rigorous independent testing, and that BC's law enforcement agencies will work together in establishing a standard for regular calibration of all conducted energy weapons used in the province. As I will discuss in more detail in Part 10, I believe that the parameters that should be measured in the proposed testing protocol should include, but not necessarily be limited to:

- pulse rate or frequency (*i.e.*, number of pulses per second);
- pulse duration (in microseconds);
- peak output current during a pulse (in amperes); and
- delivered charge (in micro-coulombs).

2. Provincial regulation

As I discussed earlier, there is in British Columbia neither legislation nor regulations dealing specifically with conducted energy weapons. Such weapons are likely "firearms" within the meaning of the provincial *Firearm Act*, which defines "firearm" to include "any gun using, as a propellant, compressed air, explosives or gas." However, there would be little utility in regulating conducted energy weapons under this legislation, since the federal *Criminal Code* makes them prohibited weapons.

Although a conducted energy weapon meets the definition of "intermediate weapon" in the *Use of Force Regulation* discussed earlier, the Regulation gives no indication

that the provincial government has designated conducted energy weapons as intermediate weapons. Rather, s. 9 of the Regulation leaves it up to a chief constable and the provincial Director of Police Services to approve a specific weapon as an intermediate weapon.

During our public forums, the provincial Director of Police Services told me⁴⁴ that in the early 1990s the predecessor BC Police Commission developed, in consultation with police departments, approximately 400 minimum standards of policing. For the most part, they did not specify what the standards should be. Rather, they stated that each police department must have a standard on specified matters. These minimum standards have been used during the director's audits of police departments to determine whether they have policies in place. According to the director, these minimum standards are under review, the goal being to establish a new set of high-level policing standards that will be sanctioned by regulation.

Some of these minimum standards deal with use of force. The ones that apply to conducted energy weapons require, for example, written policies on:

- the carrying of weapons while off duty;
- the use and control of weapons issued by the police department;
- procedures for weapons inspections;
- written reports whenever an officer applies force through the use of a weapon, or takes action that results in injury or death;
- procedures for reviewing incidents in which an officer applies force by means of a weapon; and
- the criteria to be applied respecting assignment of an officer whose use of force results in a death or grievous bodily harm.

In the course of reviewing each police department's use-of-force policies, one of the Commission's researchers prepared a matrix showing the extent to which each department's policies address the issues specified in the ministry's minimum standards. The matrix is included as Appendix D.

44 Transcript, May 7, 2008, pp. 48-51.

3. Regulation in the United States

Early models of conducted energy weapons, such as the TASER Public Defender, used a gunpowder explosion to propel the darts, and were consequently classified as a firearm under Title 26 of the *United States Code*.⁴⁵ This resulted in such weapons being regulated by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives. In 1985 the U.S. Consumer Product Safety Commission announced that conducted energy weapons, because they were firearms, were outside its jurisdiction.

In 1994 conducted energy weapons were modified to use compressed air and later compressed nitrogen, instead of gunpowder, as the propellant. The Bureau consequently decided that such weapons no longer fit the United States *Code*'s definition of a firearm, and were thus not within its regulatory jurisdiction. However, the Consumer Product Safety Commission has not revisited its 1985 ruling, and still considers conducted energy weapons to be firearms.

The result is that in the United States, conducted energy weapons are not regulated federally, and there are no industry standards.⁴⁶

C. COURT DECISIONS ON CONDUCTED ENERGY WEAPON USE

The use of conducted energy weapons has been an issue in several Canadian court decisions during the past decade, some of which I will summarize below.

1. Criminal charges against police officers

There have been five cases in which a police officer was charged with assault with a weapon under s. 267(a) of the *Criminal Code*. In all cases, the officer argued that

45 26 U.S.C. 5801-5872 (also known as the *National Firearms Act*).

46 The Potomac Institute, a non-profit public policy research institute specializing in scientific and technological issues, stated, "There are no federal restrictions or guidelines for stun device use—nor for importation from foreign suppliers for that matter. Moreover, there is no regulatory body (private or public) and there are no industry standards." *Efficacy and Safety of Electrical Stun Devices*, March 29, 2005, p. 4, available at http://www.potomacinstitute.org/research/Stun%20Devices%20Report_FINAL.pdf.

using the conducted energy weapon was, in the circumstances, a use of reasonable force and consequently s. 25 protected the officer from criminal liability.

In three of the cases, the court accepted that the force used was not excessive, and acquitted the accused police officer. In two cases, the court ruled that the officer did not have reasonable grounds to arrest the person, and consequently the officer could not claim the protection of s. 25.

a. Officer did not use excessive force

In *R. v. Hannibal*,⁴⁷ Mr. Thompson, who suffered from bipolar disorder and post-traumatic stress disorder, was resisting arrest but was not violent. Five RCMP officers attended the scene. Three officers had pinned Mr. Thompson down and were in the process of handcuffing him when the accused, without any warning, used the conducted energy weapon in the touch-stun mode twice on Mr. Thompson.

The court acquitted the officer, finding a reasonable doubt as to whether the officer's use of the weapon amounted to excessive force. The officer had received a radio transmission that Mr. Thompson might be combative, and he observed that Mr. Thompson was verbally abusive and he was becoming more agitated. The officer's conduct fell within the range of appropriate use of force taught in his training; in particular, RCMP training materials allowed conducted energy weapons to be used in touch-stun mode when a subject was resisting arrest. The Court did express a general concern that, although a conducted energy weapon is a potentially effective tool, it should not be used as a "panacea for any form of non-cooperative or resistant behaviour" (para. 158).

In *R. v. St. Amand*,⁴⁸ five RCMP officers, executing a valid drug warrant, entered a residence where a party was in progress. The scene was described as chaotic—the room was filled with smoke and loud music was playing. Another officer forcibly took a 120-pound woman to the ground. The accused officer saw the woman act abusively

47 [2003] B.C.J. No. 3119 (BC Provincial Court).

48 [2006] B.C.J. No. 3059 (BC Provincial Court).

(both verbally and physically) toward the other officer, and perceived her movements in attempting to get up as “threat cues.” The accused also observed a dog attack another officer. The accused used the conducted energy weapon in touch-stun mode twice on the woman’s lower back.

The court acquitted the officer, concluding that he had discharged the weapon for as short a period of time as would be humanly possible. In the circumstances, use of the weapon did not constitute excessive force.

In *R. v. Galloway*,⁴⁹ a woman was forcibly arrested for uttering a death threat. She was handcuffed at her residence and brought to the police station, where she resisted when two female officers attempted to remove the handcuffs. The accused intervened, using the conducted energy weapon three times in order to gain compliance. The trial judge acquitted the officer, finding that his actions were reasonable in order to aid his fellow officers. On appeal, the court affirmed the trial judge’s conclusion.

b. Officer did not have reasonable grounds to make the arrest

In *R. v. Shott*,⁵⁰ the accused RCMP officer attended Mr. Brown’s residence to investigate an alleged fraud, for failing to pay a taxi fare. Mr. Brown admitted the accused into the residence and, after a short conversation, the accused attempted to arrest Mr. Brown, placing his arm on Mr. Brown’s elbow to bring him outside. When Mr. Brown jerked away, the accused used the conducted energy weapon in probe mode, having concluded that “verbalization” and “soft hand contact” had not worked, it would be inappropriate to use pepper spray in an enclosed space, and using a baton would be excessive. Mr. Brown was immediately incapacitated and fell to the floor, where the accused handcuffed him. The accused subsequently realized that Mr. Brown was not the taxi passenger, and released him.

49 [2007] N.S.J. No. 92 (Nova Scotia Supreme Court).

50 [2006] A.J. No. 1337 (Alberta Provincial Court).

The court convicted the accused. He did not have reasonable grounds to arrest Mr. Brown, and consequently could not claim the protection of s. 25.

In *R. v. Cameron*,⁵¹ the accused RCMP officer arrived outside a pub after a call for assistance from a fellow officer. The accused saw the complainant (Mr. Campbell) approaching another officer in what he perceived to be a threatening way. Mr. Campbell then climbed into a passenger seat of a car, in which there were three other occupants, including two women who seemed distraught. The accused did not know that the other officer had instructed the group to leave the scene, so he stopped the car, removed Mr. Campbell from the vehicle and arrested him for causing a disturbance by fighting, even though there had in fact been no fight. After walking Mr. Campbell to the police vehicle, he used the conducted energy weapon on Mr. Campbell's back in push-stun mode, for one second or less, in order to get him to climb inside the vehicle. The trial judge found that the accused acted within RCMP policy when applying the weapon and, citing *R. v. Hannibal* as authority, determined this was a relevant factor in deciding whether Constable Cameron's actions were reasonable. However, a reasonable person in the accused's position would have made more enquiries prior to arresting Mr. Campbell, and he did not have reasonable and probable grounds for the arrest. The accused was found guilty of assault with a weapon because he was not acting in execution of his duty when applying the conducted energy weapon.

2. Police officer's use of excessive force

In some cases, a court will exclude evidence or judicially stay criminal proceedings, if satisfied that an officer's use of a conducted energy weapon breached the accused's rights under s. 7 (security of the person) or s. 12 (cruel and unusual treatment or punishment) of the *Charter of Rights and Freedoms*.

51 [2008] B.C.P.C. 0231 (BC Provincial Court).

In *R. v. Merrick*,⁵² the accused protested verbally when told he was being arrested for a drinking-driving offence, and may have held onto a handrail. One of the three officers used a conducted energy weapon on the accused and, when the accused fell to the ground, the officer used the weapon a second time, claiming that by telling the officers to get out, the accused was actively resisting. The court found that both weapon deployments were unreasonable, and that telling the officers to get out could not constitute active resistance. Cumulatively, the unlawful entry into the accused's home, the unlawful arrest, and the excessive use of force warranted a judicial stay of proceedings.

In *R. v. Walcott*,⁵³ the court found that the first officer's use of a conducted energy weapon twice was reasonable, but that the second officer's use of another weapon three times was not, because the latter uses must have occurred after the accused had been subdued and handcuffed. The second officer's conduct violated Toronto Police Service policy, which allows use of a conducted energy weapon only when the accused demonstrates assaultive behaviour. The officer's egregious act of misconduct warranted a stay of proceedings.

In *R. v. J.W.*,⁵⁴ a 15-year-old youth was arrested for breaking and entering. The youth denied carrying a weapon but one was found during a pat-down search, which led to a strip search. After the youth put his clothes back on, the officer used a conducted energy weapon in stun mode on the youth's hip, but did not record the incident in his notes or complete the required use-of-force form. The court ruled that the strip search was justifiable, but that use of the weapon was unnecessary, outside policy, and constituted a shocking abuse of police powers, necessitating a judicial stay of proceedings.

52 [2007] O.J. No. 2266 (Ontario Court of Justice).

53 (2008), 57 C.R. (6th) 223 (Ontario Superior Court), and Article at p. 263 *ff.*

54 [2006] A.J. No. 1097 (Alberta Provincial Court).

3. Conclusions

From my examination of these and other court decisions, I have reached four conclusions. **First**, it would be unwise to generalize from these decisions, since in each case so much depended on the trial judge's findings of fact.

Second, one of the relevant factors (but not necessarily the determining one) is the extent to which the police officer acted in accordance with his or her training and with the police department's policy respecting when a conducted energy weapon may be deployed.

Third, the varying policies among police forces about when a conducted energy weapon may be deployed creates the risk of inconsistent verdicts across Canada. For example, using a conducted energy weapon when a person is actively resistant may protect an officer from an accusation of using excessive force in one jurisdiction, but may not in another jurisdiction that authorizes the weapon's use only in the case of assaultive behaviour.

Fourth, officer safety is a relevant factor in these court decisions. In all cases where an officer was at risk of injury or held a reasonable belief that he or she was at risk, the courts found that the use of a conducted energy weapon did not constitute excessive force. The converse, however, is not true, as there are cases where there appeared to be no danger to an officer or a civilian, yet the court still found that the force used was reasonable.